Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio

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In Terry v. Ohio, the Supreme Court dramatically changed existing law. Contrary to all of the Court's prior criminal cases, Terry allowed the police to subject individual criminal suspects to Fourth Amendment intrusions without probable cause. Henceforth, police could perform stops and frisks when they had "articulable suspicion, founded upon reason"—something more than a hunch—that crime was afoot and that the suspect might be armed and dangerous.

The Court used three concepts to underpin Terry doctrinally and limit its reach. First, it restricted the searches and seizures that Terry would support. Stops could include only brief, temporary detentions to allow the officer to investigate his or her suspicions. Frisks, which police could do only if the crime suspected was violent or if there was some outward indication that the suspect was armed, could go no further than a patdown of the suspect's outer clothing sufficient to discover weapons. Second, police could not base either a stop or a frisk on the officer's instinct, no matter how well honed. Rather, the officer had to have reasonable suspicion, based on articulable facts, that an individual suspect could be involved in a crime and might be armed and dangerous. Third, the officer's suspicion had to be particularized. Police judgment had to be focused on the individual suspect, and not general observations concerning crimi-

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1 392 U.S. 1 (1968).
2 See id. at 19.
3 See id. at 29. "A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." Id. at 25-26.
4 See id. at 27.
nals or certain types of crimes. In cases since Terry, the Court has repeatedly re-emphasized this third idea, stating that police must base their reasonable suspicion on specific facts involving the particular person under observation.

A look at cases applying Terry in the lower courts reveals something surprising. Even though the Court’s rhetoric concerning the requirement of particularized suspicion stands, almost unchanged, since 1968, lower courts have gradually but unmistakably eroded the force of these words. First, courts have allowed stops when individuals fit into one or perhaps two categories of entirely innocent activity: simply being in a “high crime area,” for example, or exhibiting a desire to avoid the police, or both. The result is that, contrary to the Court’s own repeated statements requiring particularized suspicion, police can stop based on categorical judgments, regardless of the actual individual circumstances. Second, lower courts have slowly and steadily created whole categories of cases which allow police to frisk after a stop, whatever the specific facts are. They have done this by making general declarations that crimes that need not involve weapons are, nevertheless, always dangerous enough that police can always frisk a person they suspect of involvement in such crimes.

Similar cases have done the same thing with broad categories of situations that, lower courts say, always present dangers to police. Whether the particular facts indicate potential danger from weapons in an individual case, the supposed raison d’etre of the Terry frisk, becomes irrelevant. Under these cases, a frisk is automatic upon any legitimate stop, as long as the case falls into one of the “always frisk” categories.

The problem is not that these cases allow police to stop and frisk based on whether individual behavior falls into one of these categories. Rather, it is that these categories are so broad that they are far too likely to result in innocent people being stopped and frisked, and too unlikely to include the guilty. In essence, the categories that lower courts have developed since Terry are very inaccurate as predictors of possible criminal behavior. The

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5 See id. at 21 n.18; Sibron v. New York, 392 U.S. 40, 62-64 (1968) (noting the fact that the defendant was a drug addict did not give rise to reasonable suspicion that the defendant had committed a crime).

6 See infra notes 44-57 and accompanying text.

7 See infra notes 70-102 and accompanying text.

8 See infra notes 108-21 and accompanying text.

9 See infra notes 122-34 and accompanying text.
conduct these lower court categories include may seem suspicious, but it is far from clear that it is suspicious enough to actually indicate that crime is afoot. Soon, given the direction of the law, this system of categorical rules will allow police to stop and frisk almost anyone they want, with minimal interference from the courts. Worse yet, the burden of these lower court cases falls disproportionately on African Americans and other minority groups. A better system would move us away from overbroad categorical judgments. Instead, it would mandate that in order for stops to be considered reasonable, there must be facts that point to identifiable criminal activity. Similarly, frisks should only take place when there is suspicion of a crime that includes weapons, or facts that indicate weapons are present, regardless of the crime suspected. Anything less allows just the type of wide-open police discretion that *Terry* was designed to limit. Unless the Supreme Court corrects this problem, *Terry* will lose its legitimacy, and become, in practical terms, a decision which legally permits a stop and a frisk of almost anyone, for almost any reason. And whatever the Court meant in *Terry* by "reasonable suspicion," surely it did not mean that.

I will begin in Part I with a discussion of the social and legal context from which *Terry* arose, and will locate *Terry* on a continuum of Fourth Amendment actions. In Part II, I will explain briefly what the Supreme Court said in *Terry*, and what it has said about stops and frisks since. Part III will discuss the categorical rules allowing stops and frisks, and Part IV will explain why categorical rules in the *Terry* context represent a poor direction for the law to take. I will then make a suggestion in Part V designed to put particularity back into reasonable suspicion.

I. THE LEGAL AND SOCIAL CONTEXT

Any discussion of *Terry* must begin seven years earlier, with *Mapp v. Ohio*. In *Mapp*, the Court decided that the exclusionary rule should apply to the states via incorporation into the Fourteenth Amendment’s Due Process Clause. *Mapp* brought huge changes to police work on the state level. Before *Mapp*, the police might gather evidence and make arrests in compliance with the Fourth Amendment, or they might not; in terms of the

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11 See id. at 655.
outcomes of cases in most states, however, it made little difference. The prosecution could still use the evidence against the accused at trial, regardless of the nature or the egregiousness of any constitutional violation. The bottom line for officers on the street was that the way they gathered evidence did not matter. For example, look at the world before *Mapp* through the eyes of Remo Franceschini, a New York City police officer who got his gold detective's shield just a year or so before the Supreme Court decided *Mapp*.

We used to go into what we called the Valley, down on Eighth Avenue in Harlem, and raid the pool rooms. We didn’t have search warrants, we just went in the place and started something. Of course the place would be dirty. We’d line them up, search them, and lock them up for “discon,” disorderly conduct. Some for possession . . . . [T]hey knew we were detectives, and they didn’t give us a hard time. That’s the kind of fear and respect we commanded; they knew we controlled the streets and they knew we controlled that room.12

The same philosophy applied to on-the-street encounters between officers and citizens. Probable cause may not have been an unknown concept before 1961, but it certainly was an unnecessary one. Detective Franceschini had a simple approach to stops and frisks. If he saw someone on the street that looked “dirty,” he stopped his car and jumped out, threw the suspect up against the handiest wall or vehicle, and gave him “a toss”—a thorough search through his clothing and belongings.13 Any evidence or contraband that turned up became the basis for arrest and conviction, no (legal) questions asked. The detective’s own words describe best the effect *Mapp* had on this traditional way of doing business.

That all stopped with *Mapp v. Ohio* . . . . All of a sudden you couldn’t stop a guy on the street and give him a toss. You had to have probable cause. You couldn’t bring somebody in because you knew he was dirty, you had to see him being dirty. The exclusionary rule essentially shut down police procedure that had been going on for a hundred years . . . . [Eventually] the lawyers got wise and by

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13 Id. at 36.
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early 1962 what used to be good arrests were being
thrown out of court. 14

In short, Mapp changed the rules in any case in which
Fourth Amendment issues arose. Mere gut instinct or bare
hunches could no longer justify searches and seizures, at least if
police wanted to use the evidence recovered to prosecute the sus-
pects. Instead, officers had to have probable cause to believe
that the suspect was committing a crime before they could take
actions that crossed the Fourth Amendment line. To paraphrase
the detective's words, simply "knowing" the suspect was up to no
good was not enough; the officer had to have some facts. For the
first time, police in the states needed to concern themselves with
the niceties of the Fourth Amendment. Suddenly, the constitu-
tional guarantees against unreasonable searches and seizures
had teeth.

Notwithstanding the imposition of the probable cause stan-
dard, the use of techniques like stops and frisks, long a standard
part of street-level policing, did not end with Mapp. On the con-
trary, these practices continued 15 In the years immediately pre-
ceding Terry, the first empirical research on these "low visibil-
ity" practices showed that police were still using stops and
frisks after Mapp. 16

Against this legal background, American society went
through enormous changes in the years between Mapp and
Terry, and sometimes seemed to be coming apart at the seams.
Unrest occurred on many campuses across the country, often
centering on opposition to American military efforts in Indochina. 18 President John F. Kennedy, presidential candidate Rob-

14 Id.
15 See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH
16 Herman Schwartz, Stop and Frisk (A Case Study in Judicial Control of the
17 See, e.g., PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE,
FIELD SURVEYS IV: THE POLICE AND THE COMMUNITY (1966); PRESIDENT'S COMM'N
ON LAW ENFORCEMENT & ADMIN OF JUSTICE, FIELD SURVEYS V: (1967); LAWRENCE
P. TIFFANY, ET AL., DETECTION OF CRIME 5-94 (1967); Wayland Pilcher, The Law
and Practice of Field Interrogation, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 465
(1967); Albert J. Reiss & Donald J. Black, Interrogation and the Criminal Process,
374 ANNALS AM. ACAD. POL. & SOC. SCI. 47 (1967); John D. O'Connell & C.D. Lar-
sen, Note, Detention, Arrest, and Salt Lake City Police Practices, 9 UTAH L. REV. 593
(1965).
18 See, e.g., Banners of Dissent; Demonstration at the Pentagon, TIME, Oct. 27,
1967, at 23 (describing large demonstration by antiwar protesters at the Pentagon);
The specter of violence seemed to haunt America, even at the highest levels. Beyond these general forces buffeting the country, many communities experienced sporadic upheaval and destruction caused by issues of race. In the years just before Terry, public demonstrations and other actions of the civil rights movement were in full swing. Opposition to the demands of civil rights activists was often angry and bigoted, and sometimes violent. A host of American cities saw rioting, especially after the murder of Dr. King. The supreme irony of Dr. King's death—that the main advocate and symbol of nonviolent resistance to racial injustice had himself met a violent death at the hands of an avowed segregationist—put a sharp point on the entire debate over the treatment of racial minorities. It also highlighted the fact that one of the central concerns of those struggling for racial equality was the mistreatment of African Americans by overwhelmingly white police departments. In African-American communities, police did not so much follow the law as embody it; residents simply had to put up with whatever version of justice...


19 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 (stating that the Terry decision reflected tensions in society at large).

20 See, e.g., Donald Janson, Dr. King and 500 Jeered in 5-Mile Chicago March, N.Y. TIMES, Aug. 22, 1966, at 1 (reporting that during a fair housing march through white neighborhoods, Dr. King was met by 2000 whites, many of whom hurled objects and insults); Gene Roberts, Rock Hits Dr. King As Whites Attack March in Chicago, N.Y. TIMES, Aug. 6, 1966, at 1 (reporting on injuries to Dr. King and others in Chicago march as crowd of whites raged out of control and battled policemen in white residential area).

21 See, e.g., Widespread Disorders, N.Y. TIMES, Apr. 5, 1968, at A1 (recounting nationwide outbreaks of violence that occurred in wake of King's murder); see also Looting . . . Arson . . . Death . . . As Riots Swept U.S. Cities, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8, 12 (summarizing reports of riots in New York, Memphis, Nashville, Detroit, Minneapolis, Chicago, and other cities); Mobs Run Wild in the Nation's Capital, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8 (reporting rioting in Washington, D.C., where "Negro mobs terrorized the nation's capital, burning, looting, beating whites, attacking police and firemen and threatening wholesale slaughter").
officers on the street chose to impose, no matter how brutal or unfair. By 1967, the abuse of blacks by police using stops and frisks—the very technique at issue in Terry—had become such a pervasive experience in inner city neighborhoods that the President’s Commission on Law Enforcement and the Administration of Justice addressed the subject directly. “Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt ‘aggressive patrol’ in which officers are encouraged routinely to stop and question persons on the street . . . .”

This undercurrent of disruption and fear of crime did not go unnoticed. As 1968—a presidential election year—began, candidate Richard Nixon made political points by promising that he would restore respect for the law by correcting the mistakes of the Warren Court’s liberal jurisprudence. Thus law and order and the struggle of “the peace forces . . . against the criminal forces” became one of the major issues in the presidential campaign in 1968.

It was against this backdrop—changes in the legal environment embodied by Mapp, violent unrest in cities and on campuses, racial confrontations, and political assassinations—that Terry was decided. We can only speculate on whether any or all of these events played a role in bringing about the result in Terry, but all we know for certain is that the Court made an effort to come to some kind of accommodation between the interests of police in law enforcement and crime prevention, on the one hand, and the interests of citizens in remaining free from unwarranted police interference, on the other.

II. Terry: Compromise and a Step Back Toward Mapp

In Terry, the Court decided to allow the police to do some-

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23 See, e.g., Robert B. Semple, Jr., Nixon Decries 'Lawless Society' and Urges Limited Wiretapping, N.Y. Times, May 9, 1968, at 1. Nixon's comments decrying Supreme Court decisions as "going too far in weakening the peace forces as against the criminal forces" received strong approval. Id.; see also Nixon Links Court to Rise in Crime, N.Y. Times, May 31, 1968, at 18 (reporting that presidential candidate Nixon accused Supreme Court of "giving the 'green light' to "the criminal elements" in this country").
24 Semple, supra note 23, at 1.
thing it had always prohibited before in criminal cases. Using a balancing test borrowed from *Camara v. Municipal Court*, the Court stated that, in certain situations, police could conduct limited types of searches and seizures—stops and frisks—on less than probable cause. Balancing the “limited” and “brief” nature of the intrusions that stops and frisks entailed against the need of law enforcement to attack crime and to protect officers and members of the public while they did this, the Court said that police could stop and frisk suspects whenever they had a “reasonable suspicion” that crime was afoot and that the suspect was armed. A reasonable suspicion, while less than probable cause, required more than an “unparticularized suspicion or ‘hunch,’” Rather, the officer would have to be able to articulate reasons—based on experience and observations—that gave rise to the suspicion. The issue, the Court said, was whether the officer could “point to specific and articulable facts which, taken together with rational inferences [drawn] from those facts,” would “‘warrant a [person] of reasonable caution in the belief that the action taken was appropriate.’”

The Court then sharpened the analysis by examining stops and frisks separately. First, the Court said, the stop must be reasonable at its inception. Unfortunately, the opinion supplied only the sparest guidance for future cases on when police may lawfully stop a suspect. Second, once the police have properly stopped a suspect, the issue shifts to when the officers may frisk the suspect. On this point, the Court was considerably more forthcoming. Police may perform a frisk, the Court said, if the

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26 See *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968) (stating that stops and frisks clearly qualify as searches and seizures for Fourth Amendment purposes, and arguments to the contrary are “fantastic” and amount to “sheer torture of the English language”).
27 Id. at 24-25.
28 See id. at 22-24.
29 Id. at 27.
30 See id.
31 Id. at 21-22.
32 See id. at 19-20.
33 See, e.g., id. at 19 n.16. The Court actually refused to pass upon “the constitutional propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.” Id. See also 4 LAFAVE, supra note 15, at § 9.1(a)-(e) (discussing whether the Court set out a stringent or variable probable cause test in *Terry*).
crime thought to be afoot is likely to involve weapons, or if the
officer observes other facts that lead to suspicion that the sus-
pect is armed and dangerous, regardless of whether the type of
crime suspected involves weapons. The police can only use a
frisk to discover whether the suspect was armed, not to search
for evidence. Given this purpose, the Court limited frisks to a
patdown of the suspect's outer clothing. The actions of the offi-
cer in Terry, the Court said, fit neatly into this framework; in-
deed, his actions represented exemplary police work.

Several times in the course of the opinion, the Justices
pointed out that police must base a Terry stop on specific and
particular information about the subject and the situation. In
deciding whether the officer acted reasonably, "due weight must
be given, not to his inchoate and unparticularized suspicion or
'hunch,' but to the specific reasonable inferences which he is en-
titled to draw from the facts in light of his experience." The
Court explained what it meant by discussing in detail what it
was in Terry that attracted the officer's attention and how this
demonstrated a strong possibility that the suspects were armed
robbers, why he frisked them, and exactly how he performed
the frisk. The reason for requiring that police base stops and
frisks only on specific, particular information concerning indi-
vidual suspects was not, the Justices said, simply a matter of
good policy or sound police work. Nor was it a preference for
specific reasoning over general propositions. It was something
more, something that went to the heart of the Court's task. Po-
lice must "point to specific and articulate facts . . . [and] ra-
tional inferences" because "[t]his demand for specificity . . . is the
central teaching of this Court's Fourth Amendment jurispru-

24 See Terry, 392 U.S. at 28.
25 See id. at 24, 27.
26 See id. at 29.
27 See id. at 29-30.
28 See id. at 28 ("[T]he record evidences the tempered act of a policeman who in
the course of an investigation had to make a quick decision as to how to protect
himself and others from possible danger, and took limited steps to do so.").
29 Id. at 27 (emphasis added).
30 See id. at 22-23, 27-28.
31 See id. at 28.
32 See id. at 29-30. As if to emphasize the point, the Court explicitly refused to
explain in any depth "the limitations which the Fourth Amendment places upon a
protective seizure and search for weapons" leaving the development of these limita-
tions to future cases. Id. at 29.
In other words, the requirement that police base stops and frisks on specific facts and particular circumstances is not an administrative convenience or a prophylactic rule. It is a constitutional command, one important enough to honor even as the Court moved away from probable cause. And it is worth noting that the Court has continued to demand particularized fact-based judgments in its decisions after Terry.43

Thus was the grand compromise of Terry forged. It was, the Court said, an effort to find a reasonable balance between the needs of law enforcement and the rights of individual citizens to go about their business without interference. And, to its credit, the Court's opinion explicitly acknowledged one of the most troublesome aspects of the larger context within which the police used frisks: The existence of "police-community tensions in the crowded centers of our Nation's cities"45 created, in no small part by the "wholesale harassment" of minority groups, especially African Americans, with stops and frisks.46 The Court attempted to accommodate these sometimes antagonistic interests by giving police the power to perform stops and frisks, but putting strict limits on the exercise of this power. An officer's "street sense," however well developed, would not be enough; instead, the Court

43 Id. at 21 & n.18.
44 For example, in United States v. Cortez, 449 U.S. 411 (1981), in which the court endeavored to explain "the elusive concept of what cause is sufficient to authorize police to stop a person," id. at 417, the Court explained that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity... [This] process... must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." Id. at 417-18 (emphasis added). Similarly, in Ybarra v. Illinois, 444 U.S. 85 (1979), police raided a bar pursuant to a warrant that allowed them to search the bar and the bartender. See id. at 88. One of the officers frisked each of the patrons present, including the defendant. See id. The Court said that neither the warrant nor the general circumstances provided a basis for a frisk. Even under the reasonable suspicion standard, the Court said:

[T]he initial frisk... was simply not supported by a reasonable belief that [the defendant] was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person... Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons. The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked....

Id. at 93-94 (emphasis supplied).
45 Terry, 392 U.S. at 12.
46 Id. at 14 & n.11.
required that stops and frisks be based on particularized, reason-able suspicion drawn from articulable facts observed and in-fferences legitimately drawn from them. The Court also limited the extent of the detention and the scope of the search to that necessary to investigate and derail the suspected crime and disarm the suspect; no searches for evidence were allowed. *Terry* seemed to promise the successful balancing of these disparate in-terests, all in the name of reasonableness. A person reading *Terry* might think that a way had been found to give the police the authority they needed to investigate and stop crime while simultaneously limiting their discretion in ways that might ad-dress some of the black community’s long-standing grievances.

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

In the years since *Terry*, the Supreme Court has revisited the question of stops and frisks. While the number of these cases is not very large, they have provided the Court with oppor-tunities to change the *Terry* rules. It never has. Instead, the Court has reaffirmed its original rhetoric and made it clear that it has no intention of varying the approach it first took in *Terry*.

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47 See, e.g., Stephen A. Saltzburg, *Criminal Procedure in the 1960’s: A Reality Check*, 42 DR AKE L. REV. 179, 192 (1993) (“*Terry* demonstrated the Court’s under-standing that law enforcement requires instantaneous decisions and that protection of the public would never be adequate if police could only act on probable cause. . . . Without *Terry*, it is doubtful law enforcement officers could deal with the myriad problems they encounter on a daily basis.”).

48 See supra text accompanying notes 12-14.

49 Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amend-ment on the Streets*, 75 CORNELL L. REV. 1258, 1335 (1990) (noting that *Terry* and similar cases have nearly extinguished the right to move about unmolested).
Two cases will serve as examples. In *Ybarra v. Illinois*, the Court rejected the argument that there was any exception to the *Terry* rules for a "cursory search for weapons" without individualized reasonable suspicion, or that *Terry* should be broadened to allow for searches for illegal narcotics. Instead, the Court used *Ybarra* as an occasion to reaffirm that, in order to frisk, police must have a reasonable belief that the suspect was armed and dangerous, "a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Terry*, the Court continued,

created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain." ... The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked ...

Twenty-five years after *Terry*, the Court was still articulating the stop and frisk rules in almost exactly the same form in which it propounded them in 1968. In *Minnesota v. Dickerson*, the Court faced the issue of whether or not it ought to recognize a tactile analog to the plain view rule. If, in the course of an otherwise proper frisk, the police officer felt an object and it was immediately apparent to the officer that the item was contraband, could the officer seize it? Yes, the Court answered, restating the *Terry* rule in terms nearly identical to *Terry* itself, in which "[t]hese principles were settled 25 years ago."

[Terry] held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . .," the officer may briefly stop the suspicious person ... [and] "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous" . . ., the officer may conduct a patdown search ... strictly "limited to that which is necessary for the discovery of weapons.

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51 Id. at 93-94.
52 See id. at 94-95.
53 Id. at 92-93.
54 Id. at 93-94.
56 Id. at 373.
which might be used to harm the officer or others nearby." If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.\(^{57}\)

*Ybarra* and *Dickerson* show that the Supreme Court's understanding of *Terry* has not fundamentally changed. Its rhetoric remained nearly the same in 1993 as it had been in 1968. Reasonable, articulable suspicion, particularized to the individual suspect, must underlie the stop; the officer may employ a limited search for weapons, but only with reasonable suspicion that the suspect may be armed and dangerous, based either on the type of crime suspected or observation of the suspect that indicates he is presently armed. Given that the makeup of the Court changed dramatically in the twenty-five years between 1968 and 1993, this constancy seems remarkable.

III. CATEGORICAL JUDGMENTS REPLACE PARTICULARIZED SUSPICION

Beyond this surface calm, things have in fact changed. Regardless of the Supreme Court's rhetorical reassurances, the law as applied by lower courts has moved away from the Court's insistence on individualized suspicion. Instead, lower courts have begun to rely on a categorical jurisprudence—that is, an ascertained of whether the suspect fits into one or more overly broad categories, instead of an examination of facts that would tell both the officer on the street and a court deciding a suppression motion whether or not there was reasonable suspicion to believe that a particular person was involved in crime and armed. On the question of stops, the lower courts have permitted them based not on an assessment of all of the facts that make up the "whole picture" as it relates to the particular individual involved,\(^{58}\) but simply on meeting one or two broad criteria that may have nothing to do with criminal conduct. As for frisks, the change is even more evident. Despite the Court's constant admonitions that a frisk requires reasonable suspicion that the suspect may be armed, either by virtue of the type of crime

\(^{57}\) *Id.* (third alteration in original) (citation omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 24, 26, 30 (1969)).

\(^{58}\) *U. S. v. Cortez*, 449 U.S. 411, 417 (1981) (emphasizing that stops must be assessed by viewing all of the facts and asking whether there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").
involved or the existence of external clues to the presence of a weapon, lower courts have, over time, set up categories of cases, persons, and situations that will always meet the “armed and dangerous” test, regardless of the individual facts. Thus, anyone who falls into these categories may be frisked automatically, regardless of whether the circumstances actually indicate a weapon may be present. Both of these developments threaten to change Terry—in fact, one could argue that at least as the law is applied outside the Supreme Court, they already have—from a device that allows brief temporary detention and limited searches for purposes of criminal investigation into a technique that allows the police to make forcible stops and do searches almost entirely at their discretion. And all the while the Supreme Court has remained oblivious, fiddling away while the lower courts burn the limits on police behavior set in Terry.

A. Permissible Grounds For Stops

If a case based on evidence gathered during a frisk is to stand up in court, Justice Harlan’s concurrence in Terry tells us that the correct starting point for the analysis is the stop, not the frisk itself. A legitimate frisk, Harlan said, presupposes a valid stop. Thus the reasons courts accept as legitimate bases for stops make a great deal of difference. Unfortunately, Terry and its companion cases do not deal directly with the issue of what constitutes sufficient grounds for a stop. In Terry, the Court said that the central issue was not the propriety of the stop but the frisk, and all but refused to discuss the stop; in Sibron v. New York, the Court proceeded directly to a discussion of the frisk without any consideration of the seizure of the defendant and his removal from the place where the officer found him. Despite Justice Harlan’s prodding, the Court did nothing more in Terry

59 See Terry, 392 U.S. at 32-33.
60 See id.
61 See, e.g., id. at 23 (“The crux of this case, however, is not the propriety of Officer McFadden’s taking steps to investigate petitioner’s suspicious behavior, but rather, whether there was justification for McFadden’s invasion of Terry’s personal security by searching him for weapons in the course of that investigation.”); id. at 19 n.16 (“We . . . decide nothing today concerning the constitutional propriety of an investigative ‘seizure’ upon less than probable cause . . . .”).
63 See id. at 62-63 (refusing to decide whether a seizure took the place of the frisk in the restaurant, moving instead to the propriety of the frisk).
64 See Terry, 392 U.S. at 32-33 (Harlan, J., concurring) (noting the importance of
and *Sibron* to define what it would accept as the legal basis for a stop, an issue "on which courts, lawyers and police deserve guidance." Thus the task was left to subsequent decisions.

When police directly observe the commission of a crime, the propriety of a forcible stop needs no further support. Indeed, in such a situation, officers can stop and arrest, too. But observation of suspicious activity which is not, in itself, criminal is another matter. It may not be enough to justify an arrest, but can serve as the basis for a stop. For example, observation of a suspect carrying a new television at midnight in an area of appliance stores prone to burglaries would surely support a reasonable suspicion that would permit a stop. Given these hypothetical factors, there is clearly at least a significant possibility that the suspect is involved in an ongoing crime, and the chances of any innocent explanation for this conduct are slim. Since we need only look for reasonable suspicion, which is something less than a probability that the defendant is involved in criminal behavior, this type of conduct should qualify.

But in other instances, courts have gone further. They have allowed a single facet of conduct, sometimes alone and sometimes in conjunction with another, to serve as a basis for a stop, even when the action observed is not only consistent with innocence but presents only a remote possibility for interpretation by officers as an indication that crime is afoot. As such, these

making "clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime").

4 *LaFave*, supra note 15 at 144.

See 4 *LaFave*, supra note 15, at § 9.4(d) (discussing police observations of suspicious conduct regarding property, premises, and persons).

65 See, e.g., *Alabama v. White*, 496 U.S. 325, 330-31 (1990) (finding that reasonable suspicion requires less evidence than probable cause, both in quantitative and qualitative terms); *Derricott v. State*, 578 A.2d 791, 800 (Md. Ct. Spec. App. 1990) (reasoning that because the impact of a *Terry* stop on liberty is not great, "the required justification is significantly less than probable cause"), rev'd, 611 A.2d 592 (Md. 1992) (holding that matching a drug courier profile is insufficient to meet the reasonable suspicion test).

66 Of course, under the Court's current cases, the mere fact that an action is consistent with innocence would not be enough to support the conclusion that the police activity was unreasonable. *See United States v. Sokolov*, 490 U.S. 1, 9-10 (1989) (finding that a group of acts, each of which may be innocent, may call for investigation when viewed together).

67 One court characterized conduct meeting the *Terry* standards as that which police would find "anything but innocuous." *United States v. Torres-Urena*, 513 F.2d 540, 542 (9th Cir. 1975). Professor LaFave does a better job than the court in *Torres-Urena* of articulating the standard for stops when he explains that a stop is unjusti-
cases allow for stops based simply on whether the suspect falls into one or perhaps two broad categories, instead of a reasonable judgment based on particularized suspicion.

1) Reactions to the Presence of Police—One category of behavior often mentioned as a basis for suspicion is the reaction of the suspect to the presence of the police. For example, when a suspect notices police, the suspect may flee or behave in some way that shows a desire to avoid the police. This attracts police attention;\(^\text{70}\) officers stop suspects based on this type of conduct.\(^\text{71}\)

It seems reasonable to allow officers to consider this behavior as one factor among others clearly indicative of crime that may serve as the basis for a stop. In fact, many courts have done so, holding that police may stop persons already under suspicion when, for example, suspects watch the police carefully,\(^\text{72}\) attempt to hide something\(^\text{73}\) or themselves\(^\text{74}\) from the police, change direction if "there does not even exist a significant possibility that the person observed is engaged in criminal conduct."\(^\text{75}\) LAFAVE, supra note 15, at 149. This is preferable to the "anything but innocuous" standard because it points out that the possibility of criminal conduct must be significant. There is always some possibility, however remote, that conduct that catches a police officer's eye will be criminal, but using such a low standard effectively allows officers to operate based on hunches, which Terry clearly says cannot be done.

\[^{70}\]See TIFFANY, supra note 17, at 40 (noting that police are trained to observe "persons who show undue interest in the activities of the police; persons who make an apparent effort to avoid meeting an officer; persons who, at the sight of an officer, attempt to conceal or dispose of some article").

\[^{71}\]See 4 LAFAVE, supra note 15, at 176.

\[^{72}\]See United States v. Holland, 510 F.2d 453, 454-55 (9th Cir. 1975) (discussing the suspiciousness of occupants of a slow-moving car in a rural area late at night watching police serve a warrant to seize drugs at a nearby residence); State v. Halstead, 414 A.2d 1138, 1148 (R.I. 1980) (discussing suspiciousness of the fact that both occupants of a slow-moving rental truck "gawked" at police at 4:30 a.m., in an area where a rental vehicles were not common).

\[^{73}\]See United States v. Watson, 953 F.2d 895, 897 (5th Cir. 1992) (finding a police search proper where, as the officer approached, the defendant sitting in a car "move[d] about in his seat as if to conceal or retrieve some item"); United States v. Stanley, 915 F.2d 54, 56 (1st Cir. 1990) (finding the search of the vehicle proper after the defendant "moved as though he were hiding something under the seat"); United States v. Orozco, 590 F.2d 789, 791-92 (9th Cir. 1979) (finding police suspicions proper where, after seeing police, the suspect tossed an object over a wall); United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976) (finding police suspicions proper when a man exchanged something with another in a known drug trafficking area, then rapidly turned away when he saw a police officer); Jeffreys v. United States, 312 A.2d 308, 310 (D.C. 1973) (finding police suspicions proper of such action by a man who then entered a parked car in the early morning hours with the lights off, motor running, and the driver slouched down); State v. Anderson, 591 So. 2d 611, 612-13 (Fla. 1992) (finding behavior suspicious when upon seeing a police cruiser, the defendant threw an object into a nearby planter and then, after the
rection in an effort to evade officers,\textsuperscript{74} or drive,\textsuperscript{75} run\textsuperscript{77} or walk.

cruiser passed, retrieved the object and put it in his shoe); State v. Husband, 437 So. 2d 269, 271 (La. 1983) (finding that although cabdrivers often carry guns, and it is legal for them to do so, the stop was justified when the driver tried to conceal a gun in the cab after arrest of the passenger).

\textsuperscript{74} See United States v. Tate, 648 F.2d 939, 941-42 (4th Cir. 1981) (finding that the "[defendant] and his companion appeared to be hiding their faces from the gaze of the detectives" was relevant to the justification for the stop); Brown v. United States, 546 A.2d 390, 393 (D.C. 1988) (finding the fact that "as the car drove away, one person lay or crouched in the back seat, peeking up and looking back several times" relevant to stop); Muehleman v. State, 503 So. 2d 310, 313 (Fla. 1987) (finding that reasonable suspicion existed when the defendant covered his face with his arm when he saw police); State v. Cyr, 501 A.2d 1303, 1306 (Me. 1985) (finding a stop justified where a man in a truck with the lights off in a parking lot of a furniture store at midnight ducked down in seat); Commonwealth v. Moses, 557 N.E.2d 14, 15 (Mass. 1990) (finding suspicion and stop justified where the occupant of an auto "immediately ducked below the dashboard" upon making eye contact with a uniformed officer); State v. Bobo, 524 N.E.2d 489, 492 (Ohio 1988) (finding relevant the fact that the suspect ducked down in car as if hiding something).

\textsuperscript{75} See State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992) (stating that when the defendant emerged from an apartment building characterized as a crack house and walked toward the street but turned abruptly and walked around the building and away from police after seeing them, such "evasive conduct after eye contact with police, combined with his departure from a building with a history of drug activity," constituted reasonable suspicion), affd on other grounds sub nom. Minnesota v. Dickerson, 508 U.S. 366 (1993).

\textsuperscript{77} See United States v. Paleo, 967 F.2d 7, 9 (1st Cir. 1992) (emphasizing that "the car's flight from the police" in "suspected drug trade ... area" amounted to reasonable suspicion); United States v. Moreno, 891 F.2d 247, 248 (9th Cir. 1989) (finding that there was reasonable suspicion when the defendant drove up to a house where police had just served a search warrant and found cocaine and $17,000, but then drove away upon observing police cars and a police officer); Cooper v. State, 763 S.W.2d 645, 645 (Ark. 1989) (finding that paper tags on an old car, and "the obviously evasive actions of the driver" in making a sudden turn when police car pulled up, constituted reasonable suspicion that the car was stolen); People v. Wells, 676 F.2d 698, 700 (Colo. 1984) (holding that an investigatory stop was warranted when the defendant attempted to drive away when an officer approached); McDaniel v. State, 489 S.E.2d 112, 114 (Ga. Ct. App. 1997) (holding that police had reasonable suspicion to stop the defendant when the defendant saw an officer and immediately drove rapidly away in an erratic manner); Brown, 546 A.2d at 393 (holding that reasonable suspicion existed when a car drove off at a high speed at a late hour, moving from a dimly lit area with a high incidence of street robberies); Platt v. State, 589 N.E.2d 222, 226 (Ind. 1992) (finding that reasonable suspicion existed where the defendant, parked "by the side of a country road in the dead of night, [and] immediately fled" when a police car pulled up); State v. Richardson, 501 N.W.2d 495, 497 (Iowa 1993) (per curiam) (holding an investigatory stop proper when a police car made a U-turn to investigate a car parked by a marina at 12:40 a.m. when all businesses were closed and a car suddenly pulled away); State v. Fitzgerald, 620 A.2d 874, 874 (Me. 1993) (stating reasonable suspicion existed where the defendant, seen outside his car after dark in a private turn-around where the owner had complained of people dumping trash and, upon approach of police cruiser, the defendant "immediately got into his car and tried to drive off").
away rapidly\textsuperscript{78} from the police. The real issue, however, is

\textsuperscript{77} See United States v. Wilson, 2 F.3d 226, 231 (7th Cir. 1993) (finding that the defendant's "rather precipitate exit from a moving car" and subsequent "flight . . . is clearly a relevant factor"); United States v. Thompkins, 998 F.2d 629, 633 (8th Cir. 1993) (stating that when a nervous bus passenger lied about an aspect of his travels, reasonable suspicion existed after his "sudden flight from the station"); United States v. Silva, 957 F.2d 157, 160 (6th Cir. 1992) (holding that flight by the companion of a person that was being served a felony arrest warrant constituted reasonable suspicion); United States v. Lane, 908 F.2d 895, 899 (6th Cir. 1990) (finding reasonable suspicion when "four males broke into a run when the uniformed officers entered the apartment building" where frequent drug trafficking occurred); United States v. Chamberlin, 644 F.2d 1262, 1265 (9th Cir. 1980) (stating there was reasonable suspicion when two men with extensive criminal records darted between houses and ran when an officer returned); Luker v. State, 358 So. 2d 504, 506 (Ala. Crim. App. 1978) (holding an investigatory stop justified when, upon seeing police car, the suspect ran and threw an object to ground); People v. Souza, 885 P.2d 982, 989 (Cal. 1994) (en banc) (finding that "fleeing at the first sight of a uniformed police officer" shows "not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified," and thus, given time of night and high crime area, constituted reasonable suspicion); Hovington v. State, 616 A.2d 829, 831 (Del. 1992) (holding that there was reasonable suspicion when the defendant associated with persons to be arrested for prior drug sales fled from an "open air drug market"); United States v. Bennett, 514 A.2d 441, 446 (D.C. 1986) (stating reasonable suspicion existed when the defendant exchanged money on the street in a drug area, and when police approached, the two men ran off separately); State v. Bell, 382 So. 2d 119, 119 (Fla. Dist. Ct. App. 1980) (finding reasonable suspicion when a man seen looking into an apartment at 4:30 a.m. fled from police); State v. Belton, 441 So. 2d 1195, 1199 (La. 1983) (stating there was grounds to stop the defendant who fled when police approached an area outside a bar where narcotics were sold); People v. Carter, 293 N.W.2d 681, 697-98 (Mich. Ct. App. 1980) (holding that there was reasonable suspicion where the defendant, at night in area where several rapes had occurred, suddenly turned and ran back toward a building upon seeing police); State v. Stinnett, 760 P.2d 124, 126-27 (Nev. 1988) (finding reasonable suspicion when the defendant, huddled with others in a high drug area, fled into an abandoned premises upon seeing police); People v. Leung, 497 N.E.2d 687, 688 (N.Y. 1986) (mem.) (holding there was reasonable suspicion where the defendant, who passed 3" x 5" envelope to companion, fled when police approached and identified themselves); Commonwealth v. Moore, 446 A.2d 960, 962 (Pa. Super. Ct. 1982) (finding there were grounds for a stop where two men emerged from an alley in a high crime area at night, looking at an object held in one of the defendant's hand and ran upon seeing police).

\textsuperscript{78} See United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) (stating that when officers approached the defendant, and "he attempted to evade them by turning his back and walking away," such "evasive conduct, although stopping short of headlong flight," may be considered); United States v. Willis, 967 F.2d 1220, 1222 (8th Cir. 1992) (finding that reasonable suspicion existed when police, responding to an unelaborated call for assistance from a cab driver, saw the defendant shift "from a slow run to an all-out sprint" upon seeing police car, and then apparently throw away a shopping bag); United States v. Espinosa, 827 F.2d 604, 608-09 (9th Cir. 1987) (finding reasonable suspicion where the defendant in a drug trafficking area was about to give handful of money to another person, but upon seeing police, pocketed the money and walked away rapidly); United States v. Hall, 525 F.2d 857, 860
whether behavior fitting into this category by itself should ever be considered a sufficient basis for a stop. On the one hand, perhaps "deliberately furtive actions and flight at the approach of strangers or law officers" may be read as indicative of consciousness of guilt. For example, some courts have held that any actions that manifest an intent to flee from the police or to avoid them through unusual means would be enough. But on the

(D.C. Cir. 1976) (stating that it was "conduct not usual for a passenger in an automobile stopped for a traffic violation" for the defendant to pass something in a secretive manner to the driver, and then get out of the car and begin to walk away); State v. Bailey, 410 So. 2d 1123 (La. 1982) (finding grounds for stop where the defendants were rolling a commercial-sized battery charger down a street during the early morning hours and "quickened their pace" at the appearance of police); Graham v. State, 601 A.2d 131, 135 (Md. 1992) (stating that there were grounds to stop men carrying a box of computer-type equipment when one "started to walk faster and away from" the other upon the approach of police); Commonwealth v. Moses, 557 N.E.2d 14, 17 (Mass. 1990) (holding the investigatory stop was warranted when four men conversing with occupants of car "quickly dispersed in two different directions" upon making eye contact with a uniformed officer); State v. Purnell, 621 S.W.2d 277, 284 (Mo. 1981) (finding reasonable suspicion where the defendant looking into a business at 2 a.m., "began to hurriedly walk... away" as a marked police car approached); People v. Sierra, 638 N.E.2d 955, 956 (N.Y. 1994) (mem.) (holding there were grounds for a stop where the defendant summoned another man in a "narcotics supermarket" and then walked away when police approached); People v. Matienzo, 609 N.E.2d 138, 138 (N.Y. 1993) (mem.) (holding that reasonable suspicion existed where the defendant was seen exchanging a small plastic bag for money, and "quickened his pace" on approach of police); State v. Butler, 415 S.E.2d 719, 722-23 (N.C. 1992) (finding there were grounds to stop the defendant, on a corner frequented by drug users, where "there was an additional circumstance—defendant's immediately leaving the corner and walking away from the officers after making eye contact with them"); Commonwealth v. Stratton, 331 A.2d 741, 742 (Pa. Super. Ct. 1974) (finding reasonable grounds for suspicion where a person concealed in doorway of a laundromat at night moved quickly away upon observing police approaching); Stinson v. State, 578 S.W.2d 667, 668 (Tenn. Crim. App. 1978) (stating that there were reasonable grounds for suspicion when the defendant, carrying bundle of clothes, looked surprised by police and immediately turned around and walked rapidly in the opposite direction); State v. Glover, 806 P.2d 760, 761 (Wash. 1991) (finding that grounds existed to stop a trespass suspect, especially given the suspect's "turning away from the officers, walking faster").


See People v. Martineau, 523 P.2d 126, 127-28 (Colo. 1974) (finding that reasonable suspicion existed to stop a man walking down a street at about 4 a.m. who ran off and hid when a police car shined spotlight on him); Commonwealth v. Sanchez, 531 N.E.2d 1256, 1259 (Mass. 1988) (stating that the defendant's action of fleeing after indicating he would consent to a search, "provide[d] a reasonable and articulable suspicion justifying an investigatory stop"); State v. Andrews, 565 N.E.2d 1271, 1274 (Ohio 1991) (holding there was reasonable suspicion where the suspect fled "away from a police cruiser" into dark area and "threw down what he was carrying in his hand"); State v. Jackson, 434 N.W.2d 366, 391 (Wis. 1989) (stating that "although the officer in this case did not directly observe the com-
other hand, many actions prompted by the mere presence of police may not indicate culpability at all. Passersby may simply be reacting to the authority of the police, or may just wish to avoid even the smallest misstep, so as to minimize their chances of police contact. A number of cases have held, for example, that neither hesitating to pass a squad car, glancing at the police by the passenger in a car, looking obviously surprised when recognizing the police car, appearing nervous when a police car passes, looking away from the police or pointing at them, driving away normally, nor speeding up, do not, alone, supply reasonable suspicion. These cases seem correct; Terry should not be read

mission of a crime, and the reported stabbing turned out to be false," to the knowledge of the officer before the seizure here in question, "it would defy common sense to conclude that fleeing an officer to the point of running through yards and jumping fences at 2:00 a.m. does not amount to suspicious circumstances affording reasonable grounds to justify a request for identification and an inquiry into the sudden flight").

See, e.g., State v. Hicks, 488 N.W. 2d 359, 364 (Neb. 1992) ("Nor is an intense desire to avoid contact with the police necessarily indicative of a guilty conscience. Fear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment, and fear of unjust arrest are all legitimate motivations for avoiding the police.").

See United States v. Peters, 10 F.3d 1517, 1522 (10th Cir. 1993) (stating that a passenger's "sideways glances" at a passing police car "are simply insufficient to support a reasonable suspicion"); United States v. Carter, 369 F. Supp. 26, 29 (E.D. Mo. 1974) (holding there was not sufficient justification for stopping the defendants where they appeared surprised and disturbed); Parker v. State, 363 So. 2d 383, 386 (Fla. Dist. Ct. App. 1978) (finding that the fact the defendant turned to look at police was not sufficient grounds for the stop); Thomas v. State, 297 So. 2d 850, 852 (Fla. Dist. Ct. App. 1974) (finding that a stop was not justified when the defendant merely looked at the police); State v. Kupihea, 581 P.2d 765, 766 (Haw. 1978) (holding that where two passengers in a vehicle looked back in the direction of the police and crouched down there were no grounds for a stop); State v. Epperson, 703 P.2d 761, 767 (Kan. 1985) (holding that the fact that the occupants of a car at night seemed startled when a patrol car appeared did not justify a stop); State v. Truss, 317 So. 2d 177, 178 (La. 1975) (finding that when the defendant looked startled at the sight of police, an investigatory stop was not justified); State v. Johnson, 444 N.W.2d 824, 827 (Minn. 1989) (stating that no grounds for a stop exist "if a driver merely appears startled at the sight of a police officer passing him and then slows down a bit"); Rodriguez v. State, 578 S.W.2d 419, 420 (Tex. Crim. App. 1979) (stating that the mere fact that the defendant was looking over his shoulder at police car was not grounds for a stop). See generally United States v. Fernandez, 18 F.3d 874, 879 (10th Cir. 1994) (finding that the "unusual nervousness" of suspects during a traffic stop does not itself constitute reasonable suspicion and that the lower court's "heavy reliance on nervousness" was improper "given the complete lack of evidence in the record that [the officer] had any prior knowledge of [the suspects] to make an evaluation of their behavior"); United States v. Halls, 40 F.3d 275, 276 (8th Cir. 1994) (stating that "avoiding eye contact with state troopers" when the police car pulled alongside was not grounds for a stop); United States v. Millan-
to cover actions which merely indicate that the suspect wishes "to avoid any confrontation with the police."\textsuperscript{83} After all, all citi-

Diaz, 975 F.2d 720, 722 (10th Cir. 1992) (stating that the emphasis on nervousness "must be treated with caution," as "[i]t is common knowledge that most citizens, and especially aliens, whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness"); United States v. Pavelski, 789 F.2d 485, 489 (7th Cir. 1986) (holding that the mere fact that none of the passengers in the car made eye contact with police in the patrol car was not a basis for a stop); State v. Washington, 623 So. 2d 392, 398 (Ala. Crim. App. 1993) (stating that the "majority view . . . [is] that, unless coupled with additional and objectively suspicious factors, nervousness in the presence of a police officer and/or failure to make eye contact do not establish reasonable suspicion"); State v. Master, 619 P.2d 482, 483 (Ariz. 1980) (stating that the mere fact the defendant abruptly turned and walked back to his car when the officer turned his vehicle around was not grounds for a stop); People v. Loewen, 672 P.2d 436, 441-42 (Cal. 1983) (finding that "[n]ervousness in the presence of a police officer does not furnish a reasonable basis for a detention, especially where, as here, it resulted from police questioning about a traffic violation, and there is nothing unreasonable about "drivers and passengers of vehicles who fail to fix their vision on a uniformed officer conducting what appears to be a routine traffic investigation alongside a local highway"); People v. Rahming, 795 P.2d 1338, 1340 (Colo. 1990) (stating that the fact that the defendant stood still looking at the officer drive by and then proceeded to his car "at a fast pace" was not reasonable suspicion); State v. Scully, 490 A.2d 984, 988 (Conn. 1985) (holding that the defendant's actions of photographing a police officer in an unmarked police car and making "nonobscene, undramatic hand gestures" in the direction of the officer's vehicle during an anti-Klan march did not raise a reasonable suspicion within the meaning of Terry); In re D.J., 532 A.2d 138, 141-42 (D.C. 1987) (finding that where the suspect "merely attempted to walk away, behavior indicative simply of a desire not to talk to the police," was not a basis for a stop, as "[i]t would permit such justification would be effectively to create a duty to respond to the police"); Wilson v. State, 433 So. 2d 1301, 1302 (Fla. Dist. Ct. App. 1983) (holding that the defendant's change of direction after seeing an officer was not alone grounds for a stop); McClain v. State, 408 So. 2d 721, 722 (Fla. Dist. Ct. App. 1982) (stating that where the defendant's behavior "indicated only that he wanted to avoid the police," that reason was insufficient for a stop); Kearse v. State, 384 So. 2d 272, 274 (Fla. Dist. Ct. App. 1980) (finding that the suspect walking briskly from a parked car after observing officer was not grounds for a stop); People v. Fox, 421 N.E.2d 1082, 1086 (Ill. Ct. App. 1981) (finding that police officers who observed a car stop in an area of reported "partying and littering" stopped the car based on a mere "suspicion or hunch that the vehicle contained someone who had committed or was about to commit a crime," and as such was not justified); State v. Scott, 412 So. 2d 988, 989 (La. 1982) ("Nervousness on the part of a black laborer when confronted by an armed uniformed police officer does not seem so unusual as to indicate guilt or criminal proclivity."); State v. Ellington, 495 N.W.2d 915, 920 (Neb. 1993) (holding that no reasonable suspicion existed where the defendant, on approach of a police officer, walked away from a vehicle where he had been talking with the occupant); Commonwealth v. DeWitt, 603 A.2d 1030, 1032 (Pa. 1992) (determining that police did not have a reasonable suspicion to stop a vehicle that was not violating any traffic law).

\textsuperscript{83} State v. Anderson, 454 N.W.2d 763, 769 (Wis. 1990) (Heffernan, J., concurring) (stating that a stop was not justified where the defendant made, and then broke, eye contact with a police officer); see also United States v. Davis, 94 F.3d
zents have a right to walk away from the police without answering questions, as long as the officers do not have reasonable suspicion or probable cause to detain them. And it is possible that some people, especially members of minority groups, may have perfectly legitimate reasons to wish to avoid police, as they may have been subjected to unjustified detentions and searches, harassment, or even physical abuse in the past. Thus, allowing stops based only on the fact that the individual observed falls into the category of having an unusual reaction to the police is likely to sweep in many people as suspects without any real suspicion of their involvement in criminal activity.

2) Incongruity—Those Who Do Not “Belong”—Suspects may attract police attention because they do not seem to fit in where they are observed. This “incongruity” may be based on the fact

1465, 1468 (10th Cir. 1996) (same). But see David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 661 (1994) (stating that numerous cases “allow[] . . . police to stop and frisk based on location in a high crime area plus evasion of the police,” even when legitimate reasons exist to avoid police).

84 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) (finding that a citizen who does not wish to answer police questions may disregard the officer’s questions and walk away)); see also Florida v. Bostick, 501 U.S. 429, 437 (1991) (stating that while police may question an individual about whom they have no suspicion, “an individual may decline an officer’s request without fearing prosecution”); Brown v. Texas, 443 U.S. 47, 49 (1979) (holding that 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 the officers had no right to stop him”); United States v. Wilson, 953 F.2d 116, 126 (4th Cir. 1991) (finding that 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”); Harris, supra note 83, at 674 (“[T]he Constitution allows a person to walk away when questioned by the police.”). Obviously, there is more to the point than just knowing the legal rule. 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. See Maclin, supra note 49, at 1306. “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. Id.

85 See infra notes 149-53 and accompanying text.

This term was used by Professor Johnson to describe the use of racial characteristic to decide when a suspect did not fit into the area, thus giving police reasonable suspicion to stop. See Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 226-30 (1983); cf. Kolender v. Lawson, 461 U.S. 352
that the suspect is a member of a racial group or economic class not normally seen in the area, or the individual's obvious unfamiliarity with the area as manifested by his actions.\textsuperscript{87} As in the cases involving reactions to the presence of the police, officers consider incongruity along with other factors in considering whether or not reasonable suspicion to warrant a stop exists.\textsuperscript{88}

But again, the more difficult issue is whether any of these factors that make a person stand out, especially race, should be enough \textit{alone} to supply the requisite reasonable suspicion for a stop. Simply being a stranger in an area based on whatever racial, economic or other criteria police use should not, alone, be sufficient.\textsuperscript{89} Incongruity based on race is especially troubling, given the turbulent history of the use of stops and frisks on members of minority groups.\textsuperscript{90} While most courts agree that race cannot serve as the sole basis for a stop,\textsuperscript{91} others have explicitly

\begin{itemize}
  \item See, e.g., 4 LAFAVE, supra note 15, at 182-83 ("If [an] individual is of a race or economic status not ordinarily to be found in that area or if the officer . . . knows the people on his beat sufficiently to identify the person as a stranger, this is properly considered in assessing the degree of suspicion which exists.").
  \item See generally J. KLOTTER & J. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE § 2.6 (3d ed. 1977) (discussing the stop of a black man walking in black neighborhood).
  \item See, e.g., supra notes 21-22 and accompanying text. Stopping citizens based on racial incongruity seems perilously close to the infamous South African "pass laws," under which non-whites could be stopped by police and required to present passes to justify their presence.
  \item See supra notes 21-22 and accompanying text. Stopping citizens based on racial incongruity seems perilously close to the infamous South African "pass laws," under which non-whites could be stopped by police and required to present passes to justify their presence.
  \item See Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1066-67, 1071 (7th Cir. 1976) (stating that INS agents may not stop and question persons in the Midwest concerning immigration status merely because they look Mexican or have Spanish surnames); Duckworth v. State, 612 So. 2d 1284, 1285-86 (Ala. Crim. App. 1992) (stating that a car containing three white males which police deemed "out of place" was insufficient grounds for a stop); State v. Banks, 479 S.E.2d 168, 169 (Ga. Ct. App. 1996) (noting that a black man standing outside an apartment building at reasonable hour was insufficient to support reasonable suspicion of criminal activity); Sams v. State, 459 S.E.2d 551, 551-52 (Ga. 1995) (holding that although an officer thought defendant "was a white male, in a predominantly black housing project," a "person's race by itself does not establish a reasonable basis to believe criminal activity is afoot"); Wheeler v. State, 437 S.E.2d 823, 824 (Ga. Ct. App. 1993) (stating that the "sole reason" that the defendant was black cannot justify a stop, even if suspect was same race as suspected burglar); Commonwealth v. Grinkley, 688 N.E.2d 458, 463 (Mass. App. Ct. 1997) ("Unparticularized racial descriptions, devoid of distinctive or individualized physical details—even were they of a certain person and not, as here, of an entire group—cannot by themselves provide police with ade-
said that police can take racial incongruity into consideration along with other factors.\textsuperscript{92} The danger, of course, is that race will become not just a factor, but the factor, whether this is acknowledged or not. Using incongruity alone comes close to putting virtually unlimited discretion in the hands of the police, and allows them to exercise it on the basis of appearance, racial and otherwise.\textsuperscript{93}

3) Location—Courts often consider the area where police observe the suspect “is itself a highly relevant consideration.”\textsuperscript{94} One of the most common locational criteria police use as the basis for stops is the fact that they observed the suspect in a “high crime” or “high drug-trafficking” area. Judges almost always seem ready to accept these assertions without question, whether or not police supply any facts to support them. This happens not just because judges are inclined to believe police, but because of the way the Supreme Court has told lower courts to evaluate infor-

\textsuperscript{92} See, e.g., United States v. Anderson, 923 F.2d 450, 455 (6th Cir. 1991) (noting that “suspicions based solely on the race of the person stopped cannot give rise to a reasonable suspicion justifying a Terry stop,” but broader-based suspicion is valid); United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982) (noting that while “race or color alone is not a sufficient basis for making an investigatory stop, . . . race can be a relevant factor”); State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (holding a stop by a police officer of a Mexican male in a predominantly white neighborhood lawful, stating “detention and investigation based on ethnic background alone would be arbitrary and capricious and therefore impermissible, [but] the fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer”); State v. Ruiz, 504 P.2d 425, 427 (Ariz. Ct. App. 1973) (holding that a person of Mexican descent was properly stopped where it was the officers’ experience that it was very unusual for non-blacks to frequent the area except for the purpose of purchasing narcotics); State v. Mallory, 337 N.W.2d 391, 392-93 (Minn. 1983) (holding that the defendant’s race may be taken into account, as he stopped in all white neighborhood where a burglary by a black man had recently occurred).

\textsuperscript{93} See infra notes 149-53 and accompanying text.

\textsuperscript{94} 4 LAFAVE, supra note 15, at 189.
mation in suppression hearings. In United States v. Cortez, the Supreme Court instructed lower courts quite directly—defer to the judgment of police. Consider the appropriateness of Terry stop "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement"—the police themselves.

Taken at face value, this statement seems to make sense. After all, we want trial courts to have the benefit of the police officer's experience and training, and judges should have due regard for the fact that the streets do not always permit the relaxed reflection possible in judicial chambers. But this should not be taken too far. To say that the evidence should be evaluated with police experience in mind still means it must in fact be evaluated—and not simply accepted, unquestioningly, as a set of unproven bald assertions. In other words, Cortez contemplates judgment informed by the police perspective, not abdicated in favor of police assertions. Judges must distinguish between unsupported allegations that an area has a "high crime" reputation, on the one hand, to which they should give little credence, and statements backed by arrest and crime statistics and by discussion of the testifying officer's own experience that a particular type of crime prevails in a particular location, which deserves at least some weight. But the location alone—just the suspect's presence in a broadly described high crime area—should not, in any event, be considered adequate legal support for a stop. As Professor LaFave has put it, "simply being about in a high-crime area should not of itself ever be viewed as a sufficient basis to make an investigative stop."

4) The Problem with Basing Stops on Evasion, Incongruity, and Location—To be sure, there are other categories of actions into which any particular suspect might fall which should not, standing alone, serve as a legitimate basis for reasonable suspicion. For example, the companion of an arrested person may be more likely than others to be involved in crime, and may by virtue of association with the arrestee be a legitimate target for a frisk. The lateness of the hour may make certain conduct look suspicious that would not seem out of the ordinary if it occurred during the day. And knowledge on the part of the officer that a

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96 Id. at 418.
97 4 LAFAVE, supra note 15, at 190-91.
particular suspect has a record of arrests and convictions might also make an officer suspicious. As with reactions to police, incongruity, and location, these factors alone should not serve as a legitimate basis for a stop without other supporting observations.

But stating that falling into one of these categories should not be enough for a stop by itself does not fully address the problem. In most cases, the suspect usually will not fall into a single category, but into two or perhaps three. If so, should this mean that police automatically would have a legitimate reason to make a stop? While this idea has some appeal on the surface, it also has very serious negative implications. First, if combinations of the three categories of stops examined above—reaction to police presence, incongruity, and a high crime location—give the police the power to stop, they would have almost unlimited authority to stop many groups of citizens at whim. Even worse, however, some citizens are much more likely than others to be subject to these stops. Those who live in high crime areas will likely be poor and members of minority groups, and these very same people may also have strong reasons to avoid the police, given their past experiences. Thus, if the law allows stops based on membership in just these two categories, it effectively allows police nearly complete discretion to stop African Americans who live in crime-prone urban neighborhoods. Yet it is far from clear that there is a "significant possibility" that those fitting these criteria may be involved in crime; indeed, they may simply be walking or driving through the neighborhoods where they work or live. Combining incongruity based on race (for example, an African-American person in a white neighborhood) with reaction to the police would likely produce the same out-

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98 See Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466, 2489 (1996) (noting that "the Court has limited the kinds of factors that may create the reasonable suspicion or probable cause that justifies many searches and seizures in the absence of a warrant," including factors like location and flight from police).

99 See id. at 2490 (stating that if such factors can be the basis for reasonable suspicion, police "would have the power to stop and search or frisk large segments of the population virtually at will").

100 See infra notes 149-55 and accompanying text.

101 See Harris, supra note 83, at 681 (explaining that "African Americans and Hispanics become caught in a vicious cycle" when "[p]olice use Terry stops aggressively in high crime neighborhoods," leading these residents to evade police more often, which then becomes grounds for more stops).
come: a world in which categorical judgments replace individualized suspicion, and skin color effectively becomes a substitute for actual suspicious conduct. 102

B. Categorical Judgments Governing Frisks

If lower court decisions have expanded police power by ratifying Terry stops based on categorical judgments instead of particularized suspicion, the trend has been even more noticeable in cases concerning frisks. Recall that in the Supreme Court's cases concerning frisks, from Terry itself through the most recent case, Dickerson,103 the Court has restated the acceptable legal basis for frisks repeatedly in the same terms Terry itself used.104 Police can frisk a suspect only when they have a reasonable suspicion that the suspect may be armed and dangerous.105 That suspicion may arise from the fact that the type of crime suspected involves violence (for example, armed robbery, as in Terry itself106 or when, regardless of the type of crime, there is some outward indication that the suspect is armed, such as a telltale bulge under the clothing. Thus, the Court seemed to want us to take its words in Dickerson literally when it said that "[t]hese principles were settled 25 years ago" with the decisions in Terry and its companion cases.107 This language seems to reflect the Court's feeling that it has remained true to Terry, holding fast to the rules it laid down in 1968 against the shifting tides of legal argument.

Despite this rhetoric, lower courts have changed the law regarding frisks. Instead of the particularized judgment the Supreme Court requires concerning whether individual suspects may have weapons, hundreds of lower court cases allow police who suspect particular crimes to perform frisks automatically, as a matter of course, every time police stop someone, even though the suspected offense does not involve violence and the suspect shows no outward sign that he or she might be armed and dan-

102 See infra notes 149-55 and accompanying text.
104 See supra notes 50-57 and accompanying text.
105 See, e.g., Dickerson, 508 U.S. at 373 (quoting Terry v. Ohio, 392 U.S. 1, 24 (1968)).
106 See, e.g., Terry, 392 U.S. at 33 (Harlan, J., concurring) (arguing that a "frisk can be immediate and automatic" where police have "an articulable suspicion of a crime of violence").
107 Dickerson, 508 U.S. at 373.
gerous. These cases break down into two broad categories: *types of offenses* always considered dangerous and *types of persons or situations* that always present a threat, regardless of the absence of any facts that actually indicate dangerousness. Since the Supreme Court itself has spoken about frisks less than half a dozen times, these lower court cases make up the great bulk of the law on the subject. It is these cases, much more than the Supreme Court's pronouncements, that govern the day-to-day reality of frisks.

1) "Dangerous Offenses"—Terry and the cases that followed it held unequivocally that police can always frisk when they suspect a crime that, by its nature, involves weapons and violence. Terry itself was such a case: The officer on patrol suspected a daylight armed robbery of a jewelry store, an offense that requires the use of force and weapons. Adams v. Williams, in which the informant told the officer that the defendant was carrying drugs in his parked car and had a gun in his waistband, made a closely related but slightly different point. The Court in Adams stated unequivocally that, when there is reasonable suspicion that the defendant is armed and dangerous, regardless of the type of offense, a frisk may follow a stop without more.

Many lower courts have concluded that frisks may automatically follow stops in cases involving crimes which *do not* always require weapons and violence. While perpetrators of these crimes may, of course, possess weapons, there is nothing inherent in the crimes themselves that requires them. Yet these courts have concluded that anyone suspected of these crimes can automatically be frisked, regardless of the lack of any individual indication that they may have weapons. Two such crimes stand out over the great run of cases: drug offenses and burglary.

i) Drug Offenses—Many of the early post-Terry cases involved frisks of wholesale-level drug-traffickers. Courts concluded, with little difficulty, that major traffickers are so likely to carry weapons that police could frisk them automatically, whenever police legitimately stopped them. Firearms and

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108 See Terry, 392 U.S. at 28.
110 See id. at 146-48.
111 See, e.g., United States v. Woodall, 938 F.2d 834, 836 (8th Cir. 1991) (ruling that police intelligence information identifying the defendant as an associate of a narcotics violator and as "suspected of manufacturing controlled substances" justified frisk); United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989) (justifying a
other weapons are "tools of the trade" for major drug dealers, said one oft-quoted opinion,\textsuperscript{112} and police should have the ability to protect themselves from these dangers by frisking suspects immediately after the stop, regardless of the lack of any actual evidence of the presence of weapons.

These cases may seem, on the whole, reasonable. After all, drugs are contraband, and large amounts will be quite valuable. Large-scale transactions will also involve a great deal of money. Given the commodity involved, anyone involved in trafficking must rely on self-help to protect the illegal goods and the cash, so the presence of weapons makes sense.

But the decisions allowing automatic frisks for drug offenses

\footnotetext{112}{Oates, 560 F.2d at 62.}
did not stop with major traffickers. Year by year, courts gradually widened the category of drug offenses for which police could automatically frisk by saying that any sellers of narcotics—i.e., not just major traffickers but small time street corner sellers—were likely to carry weapons. Like the cases involving narcotics wholesalers, these cases allowed frisks of “retailers” automatically, whether or not officers had any evidence that the particular suspect had a weapon. Courts simply found the fact that a person fitting into the category of “suspected drug seller” was sufficient to sustain a frisk.

Cases involving retail sellers did not end the trend toward increasing the power of police to frisk automatically in drug of-

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113 See, e.g., United States v. Brown, 913 F.2d 570, 572 (8th Cir. 1990) (“Since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous.”); United States v. Salas, 879 F.2d 530, 535 (9th Cir. 1989) (ruling that police may reasonably assume suspected narcotics dealers to be armed and dangerous regardless of size of their operations); United States v. Post, 607 F.2d 847, 851 (9th Cir. 1979) (declaring that “[i]t is not unreasonable to suspect that a dealer in narcotics might be armed,” without considering scope of suspect’s drug trafficking); Ceballos, 719 F. Supp. at 126 (finding that the nature of the narcotics trade “reasonably warrants the conclusion that a suspected dealer may be armed and dangerous”); People v. Lee, 240 Cal. Rptr. 32, 36 (Ct. App. 1987) (relying on police officer’s belief that defendant was engaging in street corner drug sales and defendant’s placing hand in pocket of jacket to justify frisk); People v. Hughes, 767 P.2d 1201, 1205 (Colo. 1979) (finding it reasonable to frisk anyone “involved in [the] drug trade” because they are likely to carry firearms); People v. Holder, 557 A.2d 553, 555 (Conn. App. Ct. 1989) (holding that police may frisk street-level narcotics sellers because “[i]t is by now common knowledge among police officers that sellers of narcotics are frequently armed”) (alteration in original) (quoting State v. Marino, 555 A.2d 455, 458 (Conn. App. Ct. 1989)); Williams, 354 S.E.2d at 87 (finding that reasonable suspicion was engaged in narcotics distribution justified frisk, notwithstanding total lack of information suggesting defendant might be armed or dangerous); State v. Richardson, 466 N.W.2d 830, 832, 836 (Wis. 1990) (condoning frisk because anonymous tip advised that defendant would have seven grams of cocaine in his possession for sale and “drug dealers and weapons go hand in hand, thus warranting a Terry frisk for weapons”); see also Reynolds v. State, 592, So. 2d 1082, 1085-86 (Fla. 1992) (finding it reasonable to frisk driver for person re-supplying street dealers with small amounts of cocaine). But see Caffee, 516 So. 2d at 828 (cautioning that police may not automatically frisk all low-level narcotics sellers just because those trafficking large quantities of drugs remain subject to automatic frisks); Kindell v. State, 562 So. 2d 422, 423 (Fla. Dist. Ct. App. 1990) (rejecting anonymous tip that “black males were selling drugs at a certain location” and officer’s testimony that during any “drug call, for my own safety I will always check the outer clothing for weapons” as sufficient basis to justify frisk); People v. Rivera, 650 N.E.2d 1084, 1088-90 (Ill. App. Ct. 1995) (concluding that a Terry frisk “requires more than a generalized belief or statement that narcotic dealers may carry weapons”).
fenses. In a third group of cases, more recent than those involving either wholesalers or retailers, courts have pursued the theme of the association of drugs with violence beyond trafficking. In these cases, courts have allowed police to frisk anyone involved with drugs—including persons merely in possession of small amounts—because of the violent nature of drug crime.\footnote{See, e.g., Brown, 913 F.2d at 572 (approving of automatic frisks in drug cases because “weapons and violence are frequently associated with drug transactions,” without any distinction between major trafficking, minor trafficking, and simple transactions); United States v. Gilliard, 847 F.2d 21, 25 (1st Cir. 1988) (reasoning that police justifiably frisked a suspected drug purchaser because the defendant “participated in a narcotics sale and... firearms are ‘tools of the trade’ ”) (quoting Oates, 560 F.2d at 62); Trullo, 809 F.2d at 113 (determining that defendant’s participation in single narcotics transaction justified automatic frisk because “concealed weapons were part and parcel for the drug trade”); Jackson v. State, 804 S.W.2d 735, 739 (Ark. Ct. App. 1991) (approving of automatic frisk because police observed defendant standing in area where police “reasonably suspected that the men in front of the abandoned building were engaging in drug use or traffic”); People v. Ratcliff, 778 P.2d 1371, 1379-80 (Colo. 1989) (justifying frisk of suspected drug purchaser because police “had previously encountered armed suspects under similar circumstances”); State v. Burns, 698 So. 2d 1282, 1284-85 (Fla. Dist. Ct. App. 1997) (warranting the frisk because of “the association of weapons and drugs,” without regard to trafficking); Dixon v. Commonwealth, 399 S.E.2d 831, 833 (Va. Ct. App. 1991) (reiterating that “the suspicion of narcotics possession and distribution gives rise to an inference of dangerousness”); State v. Williams, 554 N.E.2d 108, 112 (Ohio 1990) (allowing automatic frisk of person driving up to property where police spotted growing marijuana because “individuals involved in trafficking marijuana were likely to be armed and dangerous”). The Ohio Supreme Court has recognized that allowing frisks in narcotics cases without regard for the size of the transactions effectively renders frisks automatic. See State v. Evans, 618 N.E.2d 162, 169 (Ohio 1993) (noting that frisking “is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed”).} In other words, the dangerous nature of “narcotics crime” or “drug offenses” always calls for an automatic frisk, without regard to any trafficking or transactions at all.\footnote{See, e.g., United States v. Alexander, 907 F.2d 269, 273 (2d Cir. 1990) (announcing that the police may automatically frisk individuals suspected of purchasing narcotics because of “the dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose”); Anderson, 859 F.2d at 1177 (holding that police may automatically frisk defendant carrying what might be drug money because “persons involved with drugs often carry weapons”); Vasquez, 634 F.2d at 43 (ruling that “in view of the violent nature of narcotics crime” police officers justifiably subjected defendant to automatic frisk when defendant “bent down and reached under his seat”); State v. Dickerson, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991) (holding that a police officer justifiably frisked suspected drug purchaser because of several factors, including officer’s “experience that drug possessors often carry weapons”), rev’d sub nom. Minnesota v. Dickerson, 508 U.S. 366 (1993). But see State v. Thomas, 542 A.2d 912, 918 (N.J. 1988) (rejecting police suspicion that defendant possessed drugs as valid
make Justice Harlan's concurring opinion in Sibron seem pre-
scient. He warned against the dangers of allowing police to use
stops and frisks in cases of simple narcotics possession.116 While
"the right to frisk is automatic when an officer lawfully stops a
person suspected of a crime whose nature creates a substantial
likelihood that he is armed," Harlan said, "it is not clear that
suspected possession of narcotics falls into this category."117 It is
easy to understand Harlan's misgivings. First, stops and frisks
should be reserved for serious crimes. They are, after all, intru-
sions on personal security—no "'petty indignity,'" the Court said
in Terry118—and frisks are done without probable cause for the
purpose of making police safe. In order to reassure the public
that the intrusions are worthwhile, they should not be used
when there is no threat of serious crime. Second, the temptation
to turn frisks into devices with which to discover evidence in
narcotics cases could prove too strong to resist and might ulti-
mately overwhelm the safeguards the Court put on stops and
frisks in Terry. The power to frisk whenever police suspect any
level of drug involvement, combined with the ability to seize
nonweapons evidence under the "plain feel" exception,119 may
make stops and frisks in narcotics cases into an accepted police
technique for the discovery and seizure of contraband, despite
the Supreme Court's explicit protestations to the contrary.

ii) Burglary—Many courts have allowed automatic frisks
of any suspected burglar. Even though burglars need not carry
weapons to ply their trade, a number of courts have created an
automatic frisk rule for all burglary cases on the rationale that
burglars often carry screwdrivers and other tools that they could
use as weapons.120 According to these cases, this presumption of

117 Id.
118 Terry, 392 U.S. at 17.
119 Dickerson, 508 U.S. at 375-76 ("If a police officer lawfully pats down a sus-
pect's outer clothing and feels an object whose contour or mass makes its identity
[as contraband] immediately apparent... its warrantless seizure would be justified
by the same practical considerations that inhere in the plain-view context."). See in-
tra notes 158-60 and accompanying text.
120 See, e.g., United States v. Walker, 924 F.2d 1, 4 (1st Cir. 1991) (reasoning
that the officers justifiably frisked the defendant suspected of burglary because
"burglars often carry weapons or other dangerous objects"); United States v. Moore,
armed dangerousness applies to all types of burglaries, not just to those of residences or buildings.\footnote{See, e.g., People v. Tate, 657 P.2d 955, 959 (Colo. 1983) (permitting an automatic frisk of the defendant based on burglary of a vending machine); State v. Carter, 707 P.2d 656, 660 (Utah 1985) (holding the frisk of person suspected of burglary of a vehicle reasonable because suspected burglars may be armed with weapons or tools that could be used as weapons).}

2) Dangerous Persons or Situations—As with narcotics and burglary cases, many lower courts have found that police may...
always frisk certain people in particular situations, regardless of
the type of offense suspected or whether there is any reasonable
particularized suspicion to believe these suspects might be
armed.

i) **Companions of Arrestees**—A considerable number of
cases allow automatic frisks of any companion of an arrested
person, whether or not the companion poses any threat.\(^{122}\) Advo-
cates of this approach explain these cases by arguing that frisk-
ing anyone present when police make an arrest is necessary for
the safety of the officers,\(^ {123}\) though it is not clear that there is any

\(^{122}\) See, e.g., United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989) (justifying
the frisk of the defendant on the basis that she was seen walking with a “known
drug dealer,” who consorted with other drug dealers); United States v. Stevens, 509
F.2d 683, 688 (6th Cir. 1975) (upholding an automatic frisk of a companion in a car
initially stopped for a traffic violation when an officer began to suspect the car’s in-
volve in a burglary because “a police officer may, for his own protection, briefly
frisk a person reasonably suspected of having some nexus with a felony before
questioning him”); United States v. Poms, 484 F.2d 919, 922 (4th Cir. 1973) (holding
that police may automatically frisk all companions of arrestees within the immedi-
ate vicinity of arrest as a reasonably necessary safety precaution); United States v.
Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971) (“All companions of the arrestee
within the immediate vicinity, capable of accomplishing a harmful assault on the
officer, are constitutionally subjected to the cursory “pat-down” reasonably neces-
sary to give assurance that they are unarmed.”); People v. Samples, 56 Cal. Rptr. 2d
245, 254 (Ct. App. 1996) (holding the driver of car in which passengers were subjects
of a search warrant could be frisked); Allison v. State, 373 S.E.2d 273, 276 (Ga. Ct.
App. 1988) (holding that consensual search of suspect, which turns up a gun, justi-
ifies frisk of suspect’s companion); State v. Bechtold, 783 P.2d 1008, 1010 (Or. Ct.
App. 1989) (condoning automatic frisk of driver’s companion because police deter-
mined driver to be under influence of drugs and car’s owner, though not present,
was wanted on arrest warrant for drugs); Perry v. State, 927 P.2d 1158, 1163 (Wyo.
1996) (holding the risk of suspect “lawful under the ‘automatic companion’ rule”).
But see United States v. Flett, 806 F.2d 823, 827 (8th Cir. 1986) (rejecting the
“‘automatic companion’ rule” (quoting United States v. Bell, 762 F.2d 495, 498 (6th
Cir. 1985)); United States v. Bell, 762 F.2d 495, 498 (6th Cir. 1985) (same); United
States v. $37,590.00, 736 F. Supp. 1272, 1278 (S.D.N.Y. 1990) (“Simply because
someone is in the company of others who themselves are suspected or convicted of
criminal activity does not alone provide the basis for a Terry stop and frisk . . . .”);
dant was observed . . . walking down the street with the individual who [was
suspected] did not give rise to reasonable suspicion . . . .”); People v. Chinchillo, 509
N.Y.S.2d 153, 155 (App. Div. 1986) (holding that the mere presence of the defendant
with another individual who was wanted on an arrest warrant did not establish a
reasonable basis for suspecting a threat to the officer’s safety justifying a frisk);
that no constitutional basis for the frisk of a companion existed, even though police
observed drugs and paraphernalia in the room).

\(^{123}\) See, e.g., John J. O’Shea, Note, The Automatic Companion Rule: A Bright
Line Standard for the Terry Frisk of an Arrestee’s Companion, 62 NOTRE DAME L.
While frisking a companion of an arrestee can make sense in a factual context in which there is evidence of a connection between the arrestee and the companion that indicates a possibility of the companion's involvement, a categorical rule which does not take account of the facts of individual cases seems too broad.

ii) Persons Present When Police Execute a Search War-

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124 See 4 LAFAVE, supra note 15, at 184-86.

125 See id. at 262-63 (commenting on a case that asserted that all companions of arrestees capable of assaulting an officer can always be frisked: "[I]t is to be doubted whether such a broad rule is justified"). Compare this broad rule to Maryland v. Buie, 494 U.S. 325, 327 (1990), which allowed for limited use of a "protective sweep" of the area near an arrestee for officer's safety. The Court says that only certain areas can be "swept," and in some cases a standard akin to reasonable suspicion must be met. Id.
Another group of cases holds that police may automatically frisk anyone present when they execute a search warrant, despite Supreme Court and lower court holdings to the contrary. Searching a person or place is fraught with danger,

127 See, e.g., United States v. Jaramillo, 25 F.3d 1146 (2d Cir. 1994). The court acknowledged that police may not frisk bar patrons emerging from a rest room during police raid without particularized suspicion. See id. at 1153-54. The court, however, held that police may pat down persons present or arriving during raid of private home because “it is obviously reasonable to believe that individuals in a private home or vehicle have some connection with one another.” Id. at 1152; see also United States v. Reid, 997 F.2d 1576, 1579 (D.C. 1993) (holding that the police may automatically frisk persons arriving at or leaving an apartment because their “proximity to the premises” leads to reasonable suspicion); United States v. Harvey, 897 F.2d 1300, 1303-04 (5th Cir. 1990) (allowing for an automatic frisk of persons arriving at a residence in which police seized methamphetamine, syringes and firearms), overruled on other grounds, United States v. Lambert, 984 F.2d 658 (5th Cir. 1993); United States v. Patterson, 885 F.2d 483, 484-85 (8th Cir. 1989) (allowing police to frisk persons knocking on the door of a residence being searched by police because “the possible danger presented by an individual approaching and entering a structure housing a drug operation is obvious”); United States v. Vigo, 487 F.2d 295, 298 (2d Cir. 1978) (upholding a protective search of a purse of a passenger in a car of person being arrested); People v. Huerta, 267 Cal. Rptr. 243, 246 (Ct. App. 1990) (upholding a frisk on the basis that police may reasonably presume the person entering “residence of illicit drug activity” during a search to be armed); People v. Thurman, 257 Cal. Rptr. 517, 520 (Ct. App. 1989) (“[W]here police officers are called upon to execute a warranted search for narcotics within a private residence they have the lawful right to conduct a limited Terry pat-down search for weapons upon the occupants present while the search is in progress,” regardless of whether those occupants present any threat); People v. Martinez, 801 P.2d 542, 544-45 (Colo. 1990) (en banc) (determining the frisk of an unidentified person approaching a house being searched for drugs to be reasonably justified in light of the circumstances); State v. Harris, 384 S.E.2d 50, 53 (N.C. Ct. App. 1989) (condoning a frisk of the defendant and other motel room occupants suspected of dealing drugs and carrying weapons); State v. Davis, 380 S.E.2d 378, 379 (N.C. Ct. App. 1989) (upholding a frisk of all bar patrons because police had obtained a search warrant for the bar and its two proprietors, aff’d, 391 S.E.2d 187 (N.C. 1990) (per curiam); State v. Zearley, 444 N.W.2d 353, 357 (N.D. 1989) (holding a frisk valid because the defendant’s presence at a private residence being searched for drugs pursuant to warrant allowed police to infer a connection with the owners reasonably suspected to be dangerous); State v. Chambers, 198 N.W.2d 377, 382 (Wis. 1972) (holding that police may automatically frisk persons arriving at an apartment being searched for drugs).

128 See Ybarra v. Illinois, 444 U.S. 85, 92 n.4 (1979) (“A warrant to search a place cannot normally be construed to authorize a search of each individual in that place.”); see also Michigan v. Summers, 452 U.S. 692, 695 n.4 (1981). In Summers, the Court held that police may detain persons on the premises which they are about to search based on a warrant. See id. at 705-06. The Court distinguished Ybarra on grounds that Ybarra did not deal with detention, but with the legitimacy of a search:

In Ybarra . . . [n]o question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection
and the police need the ability to search at will in order to be safe as they perform this difficult job.\textsuperscript{130}

iii) Placing Persons in Squad Cars—Some cases hold that police may frisk any person placed in a squad car.\textsuperscript{131} Of course, police could frisk (indeed, even thoroughly search) anyone arrested and placed in a police vehicle.\textsuperscript{132} And the idea of frisking a

with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband.

\textit{Id.} at 695 n.4. \textit{See generally} Kindell v. State, 562 So. 2d 422, 423 (Fla. Dist. Ct. App. 1990) (holding a search unjustified because the officers did not have reasonable suspicion that the suspect was dangerous); Caffie v. State, 516 So. 2d 822, 828 (Ala. Crim. App. 1986) (same), aff'd sub nom. Ex Parte Caffie, 516 So. 2d 831 (Ala. 1987); People v. Galvin, 535 N.E.2d 837, 846 (Ill. 1989) (same); State v. Thomas, 542 A.2d 912, 918 (N.J. 1988) (same); \textit{John M. Burkoff, Search Warrant Law Deskbook} § 13.2 (1994) ("In short, the upshot of Summers and Ybarra is that the police may detain—but they may not search—the occupants of search premises based entirely on their presence at the scene pursuant to execution of a search warrant for contraband.") (emphasis omitted).

\textsuperscript{129} \textit{See} Thurman, 257 Cal. Rptr. at 519-20 (noting that officers executing warrants are "aware [that] they were engaged in undertaking fraught with the potential for sudden violence").

\textsuperscript{130} Supporters of automatic frisks during service of search warrants might seek solace in Summers. In Summers, the Court held that police may detain a person in the process of leaving her apartment when the officers arrived to execute a search warrant. The Court explained that the officers could detain the person involved simply to maintain the status quo. \textit{See Summers}, 452 U.S. at 701-02. The Summers Court, however, did not decide whether the search of Summers was justified as it occurred after the officers established probable cause to arrest. \textit{See id.} at 705. The question in the search warrant cases surveyed here is not whether the status quo may be maintained. Rather, it is whether everyone who shows up while a warrant is being executed can be searched automatically. This is an intrusion of a greater degree than was present in Summers.

\textsuperscript{131} \textit{See, e.g.}, United States v. Abokhai, 829 F.2d 666, 670-71 (8th Cir. 1987) (justifying a frisk of the defendant before placing him in a patrol car as "a reasonable precaution taken to protect the officers' safety" because there had been a recent armored robbery in the area and a possible third person was unaccounted for); Mashburn v. State, 367 S.E.2d 881, 881 (Ga. Ct. App. 1988) (upholding a frisk because the defendant became "real nervous" when asked to sit in a patrol car while an officer cited him for a violation of a local open container ordinance); \textit{cf. People v. Kinsella, 527 N.Y.S.2d 899, 901 (App. Div. 1988) ("Although a police officer may reasonably pat down a person before he places him in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing him in the police car in the first place.")}; People v. Howington, 443 N.Y.S.2d 519, 520 (App. Div. 1981) (holding that police department policy requiring "as a safety precaution all suspects about to enter a police vehicle must be subjected to a pat-down search . . . may not be employed as justification to search a person impermissibly seized").

\textsuperscript{132} \textit{See United States v. Robinson}, 414 U.S. 218, 236 (1973) (holding that search of an arrestee's person and area within control of the arrestee comports with the Fourth Amendment, despite the lack of any indicia of dangerousness); \textit{see also} Chimel v. California, 395 U.S. 752, 763 (1969) (announcing that search incident to
suspect before placing the person in a police car when an ongoing investigation requires that police move the suspect to another location seems reasonable. After all, if police must move the suspect, they would have a legitimate need for self-protection in the close quarters of the squad car. But simply putting suspects into police vehicles, alone, without any investigation-driven reason to do so, cannot serve as a basis to justify the frisk; any danger posed by the suspect in the car could be avoided simply by not placing him there. Nevertheless, under many of these cases, frisks are automatic.

IV. WHAT'S WRONG WITH CATEGORICAL JUDGMENTS?

What is wrong with making categorical judgments under Terry? Perhaps the categories that these cases set out are just another way of saying that every time a factually similar case comes along, a stop or frisk is justified. Is this really anything...
more than a series of bright line rules drawn around some small areas of the law? If so, isn't this something the Supreme Court has found perfectly acceptable in other Fourth Amendment cases?\textsuperscript{137}

The replacement of particularized suspicion with a system of categories as the standard for whether officers may stop or frisk poses at least two types of significant problems. The first are doctrinal difficulties—the damage these cases will do to the law concerning \textit{Terry} if not corrected. The second group of problems concerns the practical results of the use of categorical judgments.

A. \textit{Doctrinal Difficulties}

The increasing use of broad categorical judgments in place of particularized, individual suspicion represents a shift in the doctrinal underpinnings of \textit{Terry}. The Supreme Court itself explained the dangers in a recent opinion from an analogous area of law. \textit{Richards v. Wisconsin}\textsuperscript{138} was the Court's second knock and announce case in just two years. In the earlier case, the Court said that the requirement that police officers who have a search warrant must knock and announce before breaking down the door of a dwelling should be read in light of the Fourth Amendment's flexible reasonableness analysis, and left the ultimate decision in each case to lower courts.\textsuperscript{139} \textit{Richards} presented the Court with an opposing approach: The use of a broad, categorical rule, much like those discussed here, to decide when police must knock and announce. In \textit{Richards}, officers had gone to a hotel to serve a warrant on the defendant; when the defendant opened the door and saw the police, he slammed the door.\textsuperscript{140} The officers then kicked the door in and entered.\textsuperscript{141} The Supreme

\begin{footnotesize}
\begin{enumerate}
\item[(137)] See, e.g., \textit{New York v. Belton}, 453 U.S. 454 (1981) (noting a bright line rule allowing searches of the entire passenger compartment of any automobile in which a recent arrestee is found, regardless of whether any actual danger of weapons being obtained or evidence being accessed actually exists).
\item[(138)] 117 S. Ct. 1416 (1997).
\item[(139)] See \textit{Wilson v. Arkansas}, 514 U.S. 927, 934, 936 (1995) (holding that whether officers knock and announce their presence before entering is a factor to be considered in determining the reasonableness of the search).
\item[(140)] See \textit{Richards}, 117 S. Ct. at 1418-19 (holding officers' no-knock entry was not violative of the Fourth Amendment).
\item[(141)] See \textit{id.} at 1419.
\end{enumerate}
\end{footnotesize}
Court of Wisconsin upheld the police action, but not based on the facts. Instead, it relied on a blanket exception to the knock and announce requirement. In any felony drug case, the state court said, police need never knock and announce because of "the special circumstances of today's drug culture." In oral argument before the U.S. Supreme Court, counsel for Wisconsin asserted that this "exception was reasonable in 'felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs.'" Given the Terry cases from the lower courts, this reasoning should not have come as a surprise. It is exactly the type of categorical standard one could expect to see applied in a Terry case by a lower court.

The United States Supreme Court refused to go along with this reasoning, and expressed strong misgivings about "creating exceptions ... based on the 'culture' surrounding a general category of criminal behavior." First, the Court said, such rules are too broad to comport with a system based on reasonableness. They sweep in many more cases than is warranted. Substituting blanket, categorical rules for the individual judgments of officers on the scene means every case will be treated the same way, even when this would not be reasonable in many individual instances. Under Wisconsin's categorical rule, the failure to knock and announce in a felony drug case cannot be reviewed in any court even when officer safety and preservation of evidence are not at stake. As the Supreme Court put it:

[T]he exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. . . . [T]he asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon . . . . Wisconsin's blanket rule impermissi-

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142 Id. at 1417.
143 Id. at 1420 (citation omitted).
144 In fact, Wisconsin was not alone; several states had similar rules. See, e.g., People v. Lujan, 484 P.2d 1238, 1241 (Colo. 1971) (en banc); Henson v. State, 204 A.2d 516, 519 (Md. 1964); State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973); cf. People v. De Lago, 213 N.E.2d 659, 661 (N.Y. 1965) (noting similar rule for searches related to gambling operations).
145 Richards, 117 S. Ct. at 1420-21.
bly insulates these cases from judicial review.\textsuperscript{146}

In other words, lumping all felony drug cases together for purposes of deciding which cases present sufficient danger to allow police to bypass established Fourth Amendment safeguards is a mistake. Bright line rules are blunt instruments that eliminate the individual judgments necessary to maintain a balance based upon reasonableness.

The Court's reasoning in \textit{Richards} applies with equal force to the lower court \textit{Terry} cases discussed here. The problem with the lower court decisions on stops and frisks is not the use of categories per se. After all, thinking about individuals in terms of how their conduct compares to standards we use to judge behavior does not seem either unfair or unusual. We make judgments like this all the time, and police officers do, too. \textit{Terry} itself is such a case: Those who scan the windows of a jewelry store twenty-four times without entering, stopping briefly only to speak furtively with each other, are quite likely to fall into the category of potential armed robber. But the problem with the cases examined here is that the categories lower courts have used to allow stops and frisks are far too broad. They allow police to stop and frisk when there is, in fact, little or nothing to indicate that crime is afoot or that the person under observation may be armed and dangerous. These categories therefore give police discretion to stop and frisk many citizens about whom there is no real reason to suspect any involvement in crime. With stops, for example, these cases allow police to use location in a high crime area or evasive behavior or a combination of both to indicate reasonable suspicion. While pacing back and forth twenty-four times in front of a jewelry store without entering it does indeed seem very likely to indicate that crime—a daylight armed robbery of the store—is afoot, location in a high crime area itself reveals nothing about a person's intentions, and evading the police says only that the person observed prefers not to have an encounter with the police. Even when combined, these two criteria do not approach any clear indication that crime is afoot. With frisks, the problem is even more striking. It is simply not true that \textit{every} small time street corner drug seller, or \textit{every} person who possesses drugs, or \textit{every} person who is a companion of a person who is arrested may be armed and dan-

\textsuperscript{146} \textit{Id.} at 1421.
gerous. Yet, that is the obvious effect of the categorical rules on frisks. These cases simply do not square with the intentions of the Supreme Court in terms of allowing police some discretion to stop and frisk on less than probable cause, but only when there is a reasonable basis—"reasonable suspicion"—that crime is afoot and that the suspect may be armed and dangerous.

Second, the Richards Court highlighted another potential danger of the categorical approach. There is no logical way to confine the rationale for a categorical exception, such as Wisconsin's no-knock rule for all felony drug cases, to any particular type of case. Reasoning that would support one categorical rule would also support others. The Court worried that if categorical exceptions proliferated in knock and announce cases—as they have in the Terry area—this would render the application of the reasonableness requirement a nullity. As the Court stated, "[i]f a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to others or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."147

This would mean that, sooner or later, all individual judgments concerning whether or not it was reasonable to enter without knocking or announcing would be swept away and replaced by categorical rules, a result the Court did not find consistent with the reasonableness requirement of the Fourth Amendment. The exceptions would quickly swallow the rule.

Third, the Court expressed misgivings about basing Fourth Amendment judgments "on the 'culture' surrounding a general category of criminal behavior."148 The problem, of course, is that culture can change over time. Today's crime and criminals may bear little resemblance to tomorrow's. The Fourth Amendment (or any part of the Constitution, for that matter) should not shift with the latest fashions in criminal conduct. Allowing constitutional interpretation and the contours of bedrock civil liberties to shift simply because of the way certain criminal subgroups behave gives away the legal protections of the many, perhaps in perpetuity, because of the misdeeds of the most deviant few, with no assurances that the changes made will continue to be

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147 Id.
148 Id. at 1420-21.
necessary. The Justices explained it this way:

It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness “is to preserve the degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable.’”

The three points the Court made in Richards—the overbreadth of categories, the lack of any logical limit to their use, and the danger that the judgments underlying categories will depend on the public's crime concerns du jour—could just as easily apply to the current state of Terry law in the lower courts. These categories sweep broadly, covering many people and situations which may not be appropriate for such judgments. And the number and variety of these categories in the Terry area is proof that the Court was correct in Richards to fear the spread of categories that could easily swallow the knock and announce rule. That is precisely what has happened to stop and frisk law.

**B. Practical Problems**

The use of categorical judgments also presents at least two practical problems. One is the distribution of the effects of these rules among citizens. Another is the conversion of Terry from a carefully crafted, limited tool to be used selectively to fight crime in “fast developing” situations into a standard technique police use to search for contraband—precisely what the court has always sworn—and still swears—it will never allow.

1) *Racially Disproportionate Distribution of the Effects of Current Terry Law*—Given the various categories the courts have set up in place of individual judgments of particularized suspicion, African Americans and members of other minority groups will find themselves subject to Terry stops and frisks considerably more often than whites. For example, police often use presence in a “high crime area” in combination with other factors to justify stops. By virtue of continuing racial segrega-

149 Id. at 1421 n.4 (quoting Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

150 See supra notes 94-97 and accompanying text.
tion in housing and their relative poverty. African Americans and Hispanics will undoubtedly find themselves living and working in high crime areas much more often than whites. Moreover, members of these same groups are more likely to wish to avoid police, exhibiting evasive behaviors that officers may find suspicious. Given the basic fact that members of minority groups are just that—minorities—they are also more likely to not “fit in” in any non-minority neighborhood. If courts permit police to stop based on one or a combination of any two of these factors, it is absolutely certain that African Americans and Hispanic Americans will be stopped in numbers well out of proportion to their presence in the population. If courts also allow the use of broad categorical judgments to support frisks, making them nearly automatic whenever a person is stopped, the overall effect is to distribute the effects of Terry largely according to race. Skin color becomes a proxy for greater propensity for

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151 See, e.g., George C. Galster, Polarization, Place, and Race, 71 N.C. L. REV. 1421, 1430-31, tbl. 9 (1993) (showing urban neighborhoods consisting of African Americans and Hispanics to be highly segregated); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 840-41 (1994) (stating that racial segregation in housing patterns allows police to use “more aggressive and intrusive policing” in minority communities).

152 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 433-34 (115th ed.) (noting that on average, blacks earned $371 weekly in 1994, compared with $484 for whites, with an even more dramatic difference when whole family income is compared); see also U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, summary tbl. A (Sept. 1996) (showing that from October 1995 through October 1996, black unemployment was more than twice that of whites in each month).

153 See Harris, supra note 83, at 678.

154 See id. at 679-81 (arguing that there are many reasons, other than guilt, for African Americans to avoid the police, such as wishing to avoid harassment, physical mistreatment, and the like); Gregory Howard Williams, The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio, 34 HOW. L.J. 567, 567-69 (1991) (recalling witnessing a police beating of his father when the author was a child).

155 There is a strong parallel here to the racially disproportionate use of pretextual traffic stops. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997) (“[P]olice will use [their] immense discretionary power... mostly to stop African Americans and Hispanics... in percentages wildly out of proportion to their numbers in the driving population.”); Tracey Maclin, Race and the Fourth Amendment, 51 VAND. L. REV. 333, 336 (1998) (“Today, police departments across the nation... continue to target blacks in a manner reminiscent of the slave patrols of colonial America.”).
criminal involvement. The upshot will be that African Americans and other people of color will be stopped and frisked far more often than anyone else, and the law increasingly gives police discretion to do this without much need to reference individual factors that indicate suspicion.

2) Terry Stops as Evidence Gathering Tools—In every case in which it has had occasion to pass upon the propriety of a frisk, the Supreme Court has restated one of the fundamentals of Terry. Police may use frisks only to search for weapons. Frisks cannot be used to search for contraband. In Dickerson, its most recent Terry case, the Court used unequivocal language to make this point. “The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .” If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry . . . .

How ironic that this reaffirmation of the limited purpose of the frisk should come in Dickerson. In Dickerson, the Court established the “plain feel” exception. The idea is that police may seize contraband during an otherwise valid frisk if it is “immediately apparent” to the officer’s sense of touch that the item felt is contraband. In other words, if the police frisk a suspect, anything the police touch is subject to seizure, as long as the officer knows what it is immediately, without further

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159 Id. at 375-77.
searching.160

The implications of Dickerson for Terry stops are enormous. If, under the categorical rules discussed here, large numbers of people can be stopped and frisked at the discretion of the police, officers also have the power to search them for contraband in very practical sense. This is a far cry from the original conception of Terry as a carefully limited tool to investigate crime and disarm suspects while doing so. Nevertheless, this is clearly where we are.

3) Back to the Historical Context—A Return to Pre-Mapp Law? All of this takes us back to the historical context from which Terry arose. As Detective Franceschini said in his book, the way that police had done things for a very long time changed with Mapp v. Ohio and its imposition of the exclusionary rule on the states.161 The years between Mapp and Terry were a new world. You could not just “give a guy a toss” because “you knew he was dirty; you had to see him being dirty.”162 Terry was clearly a step away from Mapp’s probable cause standard and back toward the law as it existed before Mapp. The lower court decisions discussed here, which have replaced individual, particularized suspicion with overbroad categorical judgments, have effectively moved the standard back even further toward pre-Mapp law than Terry did. This has not occurred in one big jump; rather, the change has been slow and incremental. But looked at over the thirty years since Terry, it is still quite noticeable. The law now allows stops and frisks not only on less than probable cause, but on suspicion that may have little to do with actual criminal behavior. Thus, one of the main theoretical and practical justifications for allowing searches and seizures on less than probable cause—that it would rest on reasoned, individual judgments of the officer—has been removed. This undermines Terry at its foundation, and significantly weakens the “reasonable suspicion” doctrine. It becomes hard to avoid the conclusion that stops and frisks have become something quite a bit different than limited intrusions based on careful assessments of particular, reasoned suspicions having to do with individual suspects. Whatever the Supreme Court’s rhetoric, we are back almost where we were before Mapp: Police have nearly complete dis-

160 See id. at 375-79.
161 See FRANCESCHINI, supra note 12, at 38.
162 Id.
cretion to stop and frisk, and need only the bare bones of a reason—the simple assertion that the suspect fit one or two categories of behavior that are always looked upon as suspicious or dangerous—to satisfy a reviewing court.

V. REVIVING TERRY: RESTORING THE BALANCE BETWEEN LAW ENFORCEMENT AND INDIVIDUAL INTERESTS

As things stand now, the Supreme Court of 1968 (and perhaps the Court of the present day) might not recognize Terry as lower courts apply it. If Terry is to remain vital—if it is to be used to support judgments based on the reasonable, informed, and well-founded suspicion of the officer at the scene—the Supreme Court must abandon its perch high above the lower courts and the streets where the law is applied. The Court must acknowledge what all of the cases reviewed here make clear: Terry has been changed from a limited crime-fighting technique based on careful, individual judgments to one based on categorical justifications that effectively widen police discretion to the point that police may stop most people almost any time, and can use frisks as tools to search for evidence, not just weapons.\(^{163}\)

The Court must accept for decision cases that will give it the opportunity to correct this problem, as it did with the knock-and-announce rule in Richards. That is, the Court must grant certiorari on cases in which the approach of assessing whether there is particularized, reasonable suspicion has given way to a simple set of over broad categorical judgments, and make clear that it expects lower courts to actually examine the individual circumstances in each case. This is what the Court did in Richards when it found that lower courts, like the Supreme Court of Wisconsin, were basing their knock-and-announce decisions on categorical judgments. An opinion like Richards would do nicely: A restating of the legal standard, and an explanation of why categorical assertions, do not provide the grounding in reasonableness that the Court seeks.\(^{164}\)

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\(^{163}\) See supra notes 3-9, 156-60 and accompanying text.

\(^{164}\) Daniel Richman may be correct in asserting that I am too optimistic if I think that an opinion by the Supreme Court could help correct the problems I have highlighted here. See Daniel Richman, The Process of Terry-Lawmaking, 72 St. John's L. Rev. 1043 (1998). In fact, I would welcome correction from other sources, such as legislation or internal police regulation. See, e.g., Wayne R. LaFave, Controlling Discretion by Administrative Regulation: The Use, Misuse and Nonuse of Police Rules and Policies in Fourth Amendment Adjudications, 89 Mich. L. Rev. 442, 446
An excellent place to start would be the cases that allow stops based on presence in a "high crime area," in combination with other factors such as reaction to the police. Surely Professor LaFave is correct when he decries "[u]nspecific assertions that there is a crime problem in a particular area" and says that "[i]n view of the readiness with which courts make [the 'high crime'] characterization, even as to better neighborhoods, it would seem that greater circumspection is called for here." Since basing stops on location and evasive behavior allows police to target minorities for stops (which may often be followed by automatic frisks) almost at will, this is among the more unpalatable results the lower court shifts in Terry law have caused. The Court could do much worse than to reassert the place of particularized, reasonable suspicion in this context; after all, it was in Terry itself that the Court acknowledged that stops and frisks were not only nontrivial intrusions on individual freedom, but also a main source of black/white tension, mistrust and resentment of the police in minority communities. A decision such as the one I propose could have the effect of restoring one of the main promises of Terry.

VI. CONCLUSION

Thirty years after Terry, the case stands out—for its attempt at crafting a reasonable balance between law enforcement and individual freedom, for its acknowledgment that police had used aggressive techniques to control minority communities, and for its attempt to assert some measure of judicial control over, and place practical limits on, what previously had been a nearly invisible police practice. As with any opinion so ambitious, we cannot be surprised if it did not achieve everything its authors hoped it would or even if it has fallen short in some significant ways. What is striking is the contrast between the Court's rhetoric, which has continued into the 1990's essentially unchanged from 1968, with the decisions of many courts all over the country. The Court asserts that Terry is a well-balanced,
carefully crafted decision which limits police power; at the same time, lower court cases expand that police power almost continually.

If the Court really means what it says when it discusses *Terry*, it is time for it to get involved in the debate. The Justices must make clear that in order to be reasonable, suspicion that forms the basis for stops and frisks must indeed be particularized. Courts must consider the facts in each case, not simple assertions that any time a person is suspected of crime $X$, they are always likely to be armed. Using categorical judgments robs *Terry* of its legitimacy. Without such a correction, *Terry* will continue to become what the Supreme Court still says it is not—pure and simple, a device for stopping people about whom officers have a hunch, perhaps with a racial cast, and searching them for evidence. And at that point, we will be right back where we started—in 1960, before *Mapp*, in the time of "giving 'em a toss."