Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion

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TERRY V. OHIO'S FOURTH AMENDMENT LEGACY: BLACK MEN AND POLICE DISCRETION

Tracey Maclin*

It's harder to work in these neighborhoods now than it used to be because we send the kids to school and teach them about rights and then put them back in the neighborhood. I think we ought to either get rid of these neighborhoods or stop teaching these kids about their rights.

—Police officer's response to blacks who resist patrol tactics utilized by the police in the 1960's

It's like when you're a parent, you just know your children aren't doing what they're supposed to be doing.

—St. Petersburg Police Chief Goliath Davis, III, explaining how persons are selected in 1997 by police for field interview reports.

I. INTRODUCTION

When one examines the history and modern exercise of po-

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2 Tim Roche & Constance Humburg, Stops Far Too Routine for Many Blacks: One Year Later: St. Petersburg Violence, ST. PETERSBURG TIMES, Oct. 19, 1997, at 1A, available in 1997 WL 14072253. Police intelligence files reveal that “[b]lack residents are three times as likely as whites to be stopped and questioned by St. Petersburg police. And one in five young black people is considered suspicious enough by officers to be detained, subjected to a computer background check and asked about his comings and goings.” Id. One officer explained that he stopped a black man because the shopping cart he was pushing was “partially filled with aluminum cans.” Id. Officers often stop several black men to determine whether the bicycles they are riding are registered with the police department. See id.
lice "stop and frisk" practices, the old adage "the more things change, the more they stay the same," aptly describes the experience of many black men when confronted by police officers. Before the "due process revolution" of the 1960s, a retired, white Detroit police officer told the United States Civil Rights Commission the following:

I would estimate—and this I have heard in the station also—that if you stop and search 50 Negroes and you get one good arrest out of it that's a good percentage; it's a good day's work. So, in my opinion, there are 49 Negroes whose rights have been misused, and that goes on every day.  

Despite the passage of thirty years and a landmark Supreme Court ruling aimed at checking the discretion of officers, things have not changed much; black men continue to be subjected to

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3 Professor LaFave, in the seminal article on the subject, describes "stop and frisk" as "a time-honored police procedure [where] officers . . . stop suspicious persons for questioning and, occasionally, . . . search these persons for dangerous weapons." Wayne R. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 42 (1968). According to LaFave, stop and frisk "is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way." Id.; see also LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 10-17 (1967) (distinguishing stop and frisk practices, like "field interrogation" and "aggressive patrol," from traditional police procedures involving arrest or search incident to arrest). Professor John Q. Barrett has written a comprehensive and outstanding article on the background and development of the stop and frisk cases in the Supreme Court. See John Q. Barrett, Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference, 72 ST. JOHN'S L. REV. 749 (1998). For the lawyer or scholar who wants to understand how the Court approached and ultimately decided the stop and frisk cases, Barrett's article is essential reading.

4 Hearings Before the U.S. Commission on Civil Rights 375 (1961) [hereinafter Civil Rights Hearing] (testimony of Jesse Ray, retired officer, Detroit Police Department); see also ED CRAY, THE BIG BLUE LINE: POLICE POWER VS. HUMAN RIGHTS 185 (1967). When asked about discriminatory frisking by the police, the response of the Detroit Police Commissioner, Herbert W. Hart, is also noteworthy:

I would like to have you go over to police headquarters with me and take a look at the plaque in the lobby which has the names of 100 officers who have been killed in the line of duty. Many of these officers were killed because they did not pat down the citizens prior to interrogating them. I do not understand why a good law-abiding citizen would object to being patted down and questioned. It doesn't make sense to me if they're good law-abiding citizens.

Civil Rights Hearing, supra, at 399 (testimony of Herbert W. Hart, Police Commissioner, City of Detroit).
arbitrary searches and "frisks" by police.\footnote{See David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 677-78 (1994) (noting that African-Americans reside and work in areas associated with criminal activity thereby increasing the likelihood of stops and searches by police); David A. Harris, Frisking Every Suspect: The Withering of Terry, 28 U.C. DAVIS L. REV. 1, 44 (1994) (arguing that Fourth Amendment cases have produced a reality that "[minority group members can be not only stopped, but subjected to a frisk without any evidence that they are armed or dangerous, just because [of the] neighborhoods in which they work or live.") (italics omitted); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 251 (1991) (providing examples of incidents involving black males and their encounters with public officers on the streets of Boston); Omar Saleem, The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk," 50 OKLA. L. REV. 451 (1997) (arguing that Terry and its progeny have encouraged discriminatory police practices against blacks).}

Consider a few examples taken from recent press reports:

It was 72 degrees and sunny in Homestead, a town just south of Pittsburgh whose better days saw steel mills ablaze, and streets busy with people on their way to well-paying jobs. . . .

At 3:10 in the afternoon, the police and the young black men standing on Amity are playing the usual cat-and-mouse game. Two officers in a cruiser drive slowly past the men and stare, silently sending the word: don't hang too long. The men shrug the police off, walking casually away, but only until the car is out of sight. Then they regroup.

The game continues for the rest of the day and into the night. Police drive quietly by three more times. On the fourth pass, they order the men to move on or "someone's going to jail."

Finally, two of the men give it up and leave for home. On the way, police stop and search them. An officer notices a marijuana cigarette on the sidewalk and asks where it came from. The men say they don't know. The police let them go.

A half hour later, officers stop three more of the original group on Amity Street and pat them down.

No arrest is made. But the message has been sent.\footnote{Ann Belser, Suspect Black Men Are Subject To Closer Scrutiny from Patrolling Police, and the Result Is Often More Fear, Antagonism Between Them, PIT. POST-GAZETTE, May 5, 1996, at A15, available in 1996 WL 7656058.}
Friday night in the ghetto of southeast New Orleans, the city's highest crime area, as four young black men standing on a quiet, darkened corner are about to spend some time getting to know the hood of Officer Kevin Hunt's police car....

Dressed in dark blue police fatigues, heavy boots, and wearing a pistol, Officer Hunt leans the boy's hands against the patrol car as his partner, rookie Lawrence Jones, reaches for the handcuffs.

Hunt: “Put your hands behind your back, bro.”

Officer Jones runs a computer check for any outstanding warrants while Hunt uses his flashlight [for] a zero-tolerance search for crack cocaine.

Hunt: “Open your mouth! Lift up your tongue.”...

No drugs are found and this 14-year-old and his buddies are sent on their way.

The [New Orleans Police Department] calls these “proactive drug patrols.” Officers in this task force don’t ride around waiting to respond to 911 calls. Instead, they make frequent—on this night anyway—seemingly random searches of just about anybody hanging around suspected drug areas. Throughout an eight-hour evening shift, the officers, both of whom are black, roam this low-income black neighborhood and stop, cuff, and search more than 20 men, sometimes with guns drawn. ...

For sure, many of those stopped this night weren't choir boys. Computer checks showed many had past run-ins with the law. But this evening, not one had any drugs, and all but one was let go. He had an outstanding warrant.

Back in the patrol car, Officer Hunt says the stops are necessary to fight an entrenched drug trade which fuels crime.

Hunt: “They look at the type of work that we do as police harassment. No one’s blind to the fact that there’s a lot of narcotics here.”

Asked about the Fourth Amendment’s prohibition of unwarranted searches, Hunt says he’s merely responding to citizen complaints.

Hunt: “If we get citizen complaints about a specific cor-
Reading his newspaper and sipping his orange juice on the 6:42 train from Chappaqua, [New York], Earl G. Graves Jr. looked and felt like the briefcase-toting businessman he is. But when the train arrived at Grand Central Terminal at 7:35 and he stepped onto the platform, he was transformed.

In the eyes of two Metro-North police officers, he became, at least for the moment, a suspect. The two grabbed his elbows, showed their badges and escorted him to a nearby wall. “They lifted my arms in the air, relieved me of my briefcase and frisked me from top to bottom,” said Mr. Graves, senior vice president for advertising and marketing at Black Enterprise Magazine. . . .

As Mr. Graves tells it, the officers, who were soon joined by two others, asked him whether he was carrying a weapon and whether he was “on the job,” police talk for, “Are you a cop, too?”

Mr. Graves answered no to both questions and continued to stand there “with my arms in the air like a common criminal” as other commuters, many from the same train, streamed by. He asked the officers what kind of man they were looking for and was told a black man with short hair.

“Well, that narrows it down to about six million people,” Mr. Graves replied, his anger beginning to overcome his embarrassment. The officers, he recalled yesterday, were not amused. But they let him go on his way.8

The irony, of course, is that the police power to “frisk” suspicious persons is the product of a Supreme Court that did more to promote the legal rights of black Americans than any other court. The Warren Court, led by Chief Justice Earl Warren,

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8 David Stout, A Black Businessman’s Ordeal as a Suspect, N.Y. TIMES, May 9, 1995, at B1.
played an instrumental role in ending racial segregation and discrimination in the United States.\(^9\) The Warren Court also began what its critics and admirers have described as a revolution in constitutional criminal law,\(^10\) which paralleled the Court's rulings outlawing racial discrimination in civic affairs, helped to protect, and in some cases strengthen, the rights of black suspects and defendants enmeshed in the criminal justice system.\(^11\)

Thus, it seems paradoxical to criticize the Warren Court as insensitive to the experience of blacks, particularly blacks targeted by police officials. Yet, the Court's ruling in *Terry v. Ohio*,\(^12\) which upheld the power of police to "frisk" persons they suspect are dangerous, merits criticism. Although, *Terry* has been described as a compromise which "held out the commitment and promise to minority communities around the nation that the Supreme Court was seriously concerned about police practices which rode roughshod over individual rights,"\(^13\) and applauded for "a pragmatism that was uncharacteristic of the Court's ear-

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\(^11\) See Horwitz, supra note 9, at 98 (arguing that "[t]he Court's criminal [procedure] cases provide further evidence that the Warren Court viewed the protection of the rights of unpopular minorities as integral to democracy itself."); Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153-1154 (1998) (acknowledging that the Court's 1960's criminal procedure cases were designed to eradicate an "American apartheid" regime, but asserting that this doctrine has "outlived [its] utility" and urging the implementation of a new doctrine that recognizes the legitimate function of discretionary policing techniques and the competence of inner-city communities to protect themselves from abusive police power); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights."); Carol Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 843-44 (1994) (same).

\(^12\) 392 U.S. 1 (1968).

\(^13\) Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 576 (1991). Williams reads *Terry* as clearly condemning racial harassment and police abuse. See id. at 574. He views the source of unfettered police discretion in stop and frisk encounters to be subsequent cases, where the Court failed to consider the racial implications of its rulings. See id. 576-583.
lier [constitutional criminal procedure] rulings,"¹⁴ both of these assessments miss the real significance of the ruling. *Terry* deserves critical attention because it authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide. The better view of *Terry* is that the ruling reveals the Warren Court's capitulation and retreat from its earlier efforts to secure the constitutional rights of persons suspected of crime.¹⁵

When the criminal procedure revolution began in the early 1960s, the Court boldly and confidentially inserted itself as the guardian of the Fourth Amendment and recognized that the rule barring the admission of evidence obtained from an illegal search and seizure was an essential part of the amendment's guarantee of freedom from unreasonable police intrusions. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."¹⁶ The upshot of the Court's action was that police officers and state judges, who, after all, are the officials who ultimately decide on a daily basis whether the Fourth Amendment will be enforced at the state and local levels of government, would have to start paying attention to Fourth Amendment rules.

By 1968, when *Terry* was decided, there was a discernible shift in the Court's attitude concerning its ability to enforce Fourth Amendment norms. When analyzing the constitutionality of street encounters, the court stressed that it was "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street."¹⁷ Furthermore, in 1968, the Court "was a good deal less exuberant about the exclusionary rule"¹⁸ and its ability to deter illegal police conduct. The *Terry* Court appeared repentant about its earlier views on the exclusionary rule,¹⁹ and opined that the rule "was powerless to deter invasions

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¹⁴ See GRAHAM, supra note 10, at 143.
¹⁵ Cf. Yale Kamisar, The Warren Court (Was it Really So Defense-Minded?), The Burger Court (Is it Really So Prosecution-Oriented?), and Police Investigatory Practices, in THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T 67 (Vincent Blasi, ed. 1983) ("In its final years, 'the Warren Court,' I think it may be argued, was not the same Court that had produced *Miranda* or *Mapp*.").
¹⁷ *Terry*, 392 U.S. at 12.
¹⁸ Kamisar, supra note 15, at 64.
¹⁹ See *Terry*, 392 U.S. at 13 ("The exclusionary rule has its limitations . . . as a
of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.\textsuperscript{20} After reading \textit{Terry}, one better understands Professor Kamisar's insight that on criminal procedure matters, "there were \textit{two} Warren Courts."\textsuperscript{21} Indeed, the view of the Fourth Amendment and the exclusionary rule announced by the second Warren Court in \textit{Terry} is hard to reconcile with the vision announced in \textit{Mapp v. Ohio}, where the first Warren Court asserted that it would "no longer permit [the Fourth Amendment] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."\textsuperscript{22}

Without saying so, \textit{Terry} fundamentally changed Fourth Amendment law. Garden-variety search and seizure cases, the types that patrol officers are most likely to undertake, would no longer be judged by whether government officials had obtained judicial warrants or possessed probable cause before invading the privacy and personal security of individuals. After \textit{Terry}, police intrusions would be controlled by a malleable "reasonableness" standard that gave enormous discretion to the police. When this reasonableness norm was applied to street encounters between the police and urban residents, the result was predictable - expanded police powers and diminished individual freedom. One of the flaws of \textit{Terry} was that this shift in constitutional doctrine was implemented without a full examination of the consequences for blacks and other disfavored persons most affected by police investigatory methods. Moreover, the result in \textit{Terry} provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions.\textsuperscript{23} Unsurprisingly, the Burger and Rehnquist Courts

\textsuperscript{20} \textit{Terry}, 392 U.S. at 14.
\textsuperscript{21} Kamisar, \textit{supra} note 15, at 67.
\textsuperscript{22} \textit{Mapp}, 367 U.S. at 660.
\textsuperscript{23} See generally Harris, \textit{Black and Poor}, \textit{supra} note 5; Harris, \textit{Frisking Every
have sanctioned several forms of investigatory police conduct by invoking the reasonableness rationale announced in *Terry*. For this reason alone, the result in *Terry* deserves censure.

Part II of this article discusses some of the stop and frisk tactics used in the 1960s, how those tactics affected the black community, and the Court’s response to the friction between blacks and the police. Part III examines the contrasting approaches adopted by the Court when faced with forceful evidence that police officers routinely abused constitutional rights. In 1966, when confronted with evidence that the Fifth Amendment privilege against compelled self-incrimination was often ignored by police interrogators, the Court took steps to mitigate the abuse. However, in 1968, when mounting evidence indicated that stop and frisk practices were making a mockery of the Fourth Amendment rights of urban blacks, the Court’s response was very different. Finally, Part IV discusses the political background of *Terry*, and considers how that environment might have affected the Court’s decision.

**II. POLICE FRISKS, BLACK MEN AND THE CONSTRUCTION OF *TERRY V. OHIO*.**

Responding to complaints about rising crime and violence, many urban police departments in the 1960s initiated policies intended to deter street crime. Utilizing a vague power that had never been sanctioned by the Court nor authorized by statute in many places, police departments turned to stop and frisk practices to fight crime in the streets.24 Some of these police measures were designed to prosecute and convict offenders, while others were devised as efforts to clear the streets of criminal activity. While various labels were applied to similar tech-

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24 It has been noted that:
In the late 1960’s, many police departments apparently were contented with the fact that their authority to employ the stop-and-frisk tactic was undefined. Few courts or legislatures had said that the police could stop and frisk; but neither had they said that the practice was improper, and the resulting uncertainty did not strike the police as disadvantageous: Why go looking for trouble?
LaFave, supra note 3, at 43; see also TIFFANY, supra note 3, at 6-7 (stating that stop and frisk was a “law enforcement practice [that] has been... ignored or treated ambiguously by courts and legislatures. The police themselves have not given adequate attention to the practice”).
niques, the consequence for blacks subjected to these tactics was the same: Diminished constitutional freedom. Civil rights leader Bayard Rustin echoed the experience of many urban blacks when he described how New York's stop and frisk law was implemented in the 1960s:

Whatever its provisions or its purposes, this law is a nefarious example of class legislation, for its effect is to permit harassment of the poor. No police are going to stop and frisk well-dressed bankers on Wall Street—but they don't hesitate to stop well-dressed Negro businessmen in Harlem and go through their attaché cases. That kind of brusque police action is reserved for the poor and minorities like Negroes and Puerto Ricans.\(^{25}\)

"Field interrogation," for example, was one type of police tactic utilized in the 1960's.\(^{26}\) "A field interrogation consists of stopping, questioning, and if warranted, searching an individual who presents himself in a suspicious situation."\(^{27}\) According to one influential study of urban police departments:

The major aim of a program of field interrogation is the apprehension of persons who have committed crimes. Field interrogation is thus an investigative device, a stage in the criminal justice system designed to separate innocent persons from those who should be subjected to the next stop in the process.\(^{28}\)

Police officials asserted that field interrogation programs were vital to effective law enforcement, and many departments frequently utilized the practice.\(^{29}\) Despite its alleged effectiveness, field interrogation methods were often impelled by race.\(^{30}\)


\(^{26}\) See TIFFANY, supra note 3, at 6.

\(^{27}\) NATIONAL SURVEY, supra note 25, at 328.

\(^{28}\) TIFFANY, supra note 3, at 10.

\(^{29}\) See id. at 7.

\(^{30}\) Race was not the only subjective factor influencing officers when deciding to stop and question people on the street. For example, officers were likely to stop and question people on the streets at night. Officers apparently feel that the risk of error is much greater during daylight hours, when, as one officer put it, there are many "legitimate" persons
The race of a person is a factor which influences the decision to stop and question in several ways. There is a de facto concentration on Negroes and other minority groups which results from the police decision to concentrate field interrogations in areas having high crime rates. This administrative decision to allocate enforcement resources in proportion to the crime rate of an area probably results in subjecting minority groups to closer scrutiny and thus more frequent direct contact with the police. In racially mixed areas, no racial group seems to attract a disproportionate amount of police attention.

A person of one race observed in an area which is largely inhabited by a different racial group may be stopped and questioned. A Negro in an area which is almost exclusively white is more suspect than a white in the same area, although a decision to stop for questioning may not be made on that basis alone. A white person in a Negro neighborhood late at night is very likely to be detained. But in the latter case the purpose of the detention is not usually to detect crime but to warn the person of the danger of being in that area, particularly if he is alone. . . .

In racially mixed areas or predominately white areas, a person who has an appearance of relative affluence may have a degree of "immunity" from detention in a situation in which a more shabbily dressed person in that area might be detained. But officers tend not to recognize such a distinction in Negro areas. The normal indicia of "respectability" are given less weight by the police. There is, in other words, an indication that the racial classification is given greater weight than other factors, such as social or economic status, which may be more difficult for the officer to assess.3

In the 1960s, police officials also employed "aggressive pa-

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3 See id. at 21 (footnote omitted). Also, persons found in "high crime" areas are more likely to be stopped than persons found in neighborhoods with a low crime rate; officers are more aggressive in their questioning of persons found in high crime locales. See id. at 22. Age and gender are also factors in determining who is likely to be stopped and questioned. See id. at 23; see also SKOLNICK, supra note 1, at 45 (discussing criteria officers use in selecting persons for field interrogation).

31 TIFFANY, supra note 3, at 20-21 (footnotes omitted).
trol” tactics, which were primarily designed to reduce the amount of crime in a particular locale, rather than prosecute individuals. Aggressive patrol tactics included “rendering aid of various types, settling relatively minor disputes, controlling the use of sidewalks, handling drunks, discovering and confiscating weapons, and other ‘aggressive preventive patrol’ practices,... which are not intended to result in prosecution.” As was the case in field interrogation operations, aggressive patrol operations also tended to ignore constitutional edicts and the victims of these extra-legal practices were often black men:

In some sections of large cities there is a high incidence of serious, assaultive behavior involving the use of guns, knives, or other dangerous weapons. One police response to this problem is a continuing effort to remove dangerous weapons from persons in those areas. Special squads of police allocate a substantial part of their time to stopping and searching males found on the street. ... In most instances, the officers have no grounds for suspicion other than the facts that it is night, that the “suspect” is male, and that he is in an area with a high crime rate. Such areas are predominately inhabited by minority racial groups. During one typical evening, two officers engaged in twenty such stops, during which they searched thirty-seven persons and eleven cars.

Whatever the label attached to street patrol techniques, observers of field interrogation, aggressive patrol, and other stop and frisk practices, found that these programs had one common denominator: They created resentment and hostility among blacks exposed to these police operations.

32 Id. at 10.
33 Id. at 13.
34 See id. at 8 (“Field interrogation is one on-the-street police practice which involves confrontation between the police and the minority groups who reside in high-crime areas, a highly sensitive problem in current practice.”).

Preventive patrol involves making street stops (which may or may not be field interrogations) and street searches usually designed to find dangerous weapons and to impress people with the presence and activity of the police. It is probable that an aggressive program of preventive patrol does reduce the amount of crime on the street, though it is a significant comment on police attitude toward policy-making responsibility that there has been no noticeable effort to measure the effectiveness of this technique. It is also apparent that aggressive preventive patrol contributes to the antagonism of minority groups whose members are subjected to it. A basic issue, never dealt with explicitly, is whether, even solely from a law enforcement point
In *Terry v. Ohio* the Supreme Court did not quarrel with these conclusions regarding the impact that stop and frisk policies had on blacks. *Terry* was a landmark ruling for many reasons, not the least of which was the fact that the Court, for the first time, openly acknowledged the tensions between urban blacks and the police caused by street investigations and stop and frisk techniques. The Court conceded that "[d]oubtless some police 'field interrogation' conduct violates the Fourth Amendment," and noted the finding of a Presidential report that "'[i]n many communities, field interrogations are a major source of friction between the police and minority groups.'

The Court also acknowledged that "the friction caused by 'misuse of field interrogations' increases 'as more police departments adopt “aggressive patrol” in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" In essence, the Court confirmed what Bayard Rustin and others were asserting, namely, that many blacks harbored a growing resentment toward the police due to stop and frisk procedures that were often used in black neighborhoods. Put simply, in *Terry*, the Court confronted a constitutional question that encompassed "deep racial implications."

To understand the problem that stop and frisk tactics were causing in black neighborhoods, consider the conclusions of the President's Commission on Law Enforcement and Administration of Justice, which, by the way, believed that there was "a definite need" to stop suspects and to search such suspects for dangerous weapons:

In many communities, field interrogations are a major source of friction between the police and minority groups.

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See also Williams, *supra* note 13 at 574.


*Id.* at 14 n.11 (quoting *PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE* 183 (1967) [hereinafter TASK FORCE REPORT]).

*Id.* (quoting TASK FORCE REPORT, *supra* note 37, at 184).

Many minority group leaders strongly contend that field interrogations are predominately conducted in slum communities, that they are used indiscriminately, and that they are conducted in an abusive and unfriendly manner.

The Commission has found that field interrogations, used sometimes in conjunction with aggressive, preventive patrol, are often conducted on a broad-scale basis by many police departments. First, field interrogations are often conducted with little or no basis for suspicion.

Second, field interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile. For example, the Michigan State survey found, on the basis of riding with patrol units in two cities, that members of minority groups were often stopped, particularly if found in groups, in the company of white people, or at night in white neighborhoods, and that this caused serious problems.

Finally, field interrogations are frequently conducted in a discourteous or otherwise offensive manner which is particularly irritating to the citizen.

The Court's response to this evidence was equivocal. In a cryptic footnote, Chief Justice Warren, both voiced doubts about the efficacy of the exclusionary rule, and signaled that racial impact was a factor to consider when determining the constitutional reasonableness of challenged police practices. The Chief Justice wrote:

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

TASK FORCE REPORT, supra note 37, at 183-85 (footnotes omitted).

Terry, 392 U.S. at 17 n.14; see also Williams, supra note 13, at 574 (stating that the Court sent "a clear message that the perceptions of black citizens, in whose communities police power is most vigorously exercised, is an important and relevant factor to consider in deciding the proper scope of police investigative power.")
Terry, therefore, seems to recognize that race matters to the Fourth Amendment. In adjudicating Fourth Amendment issues, where persuasive evidence exists that police procedures are impacting a minority community and causing adverse effects, evidence of racial impact is relevant. Regrettably, however, the Court's disquiet about the racial consequences of stop and frisk policies was buried under a lengthy discussion on the limits of the exclusionary rule, and clearly occupied a subordinate position to the Court's overriding concern about police safety and violent crime.

The Terry Court was correct to recognize that the degree of resentment in the black community provoked by stop and frisk policies was a pertinent element in deciding the reasonableness of this practice under the Fourth Amendment. Where convincing evidence shows that a particular practice adversely affects a segment of the community, that evidence merits judicial attention. The Court does not promote Fourth Amendment values by ignoring evidence of racial impact. Indeed, where such evidence exists, as it did in Terry, it would be irresponsible not to consider it as part of the "totality of the circumstances" when determining the reasonableness of an intrusion. If police safety is a legitimate factor to consider when determining the reasonableness of a search, why not consider the racial impact of the challenged search? At a minimum, where evidence of adverse racial impact exists, the burden should be on those advocating ignoring such evidence to explain why evidence of racial impact should not form part of the "reasonableness" or "totality" analysis endorsed in Terry.

Elsewhere, I have detailed why racial impact is an important, but ignored, factor when determining the reasonableness of

(footnote omitted). Interestingly, although the Terry Court declared that the degree of resentment within the black community caused by certain police practices was relevant when deciding the scope of Fourth Amendment protection, the Court: does not mention the race of any individual. A reader of the Court's opinion will not learn that Terry was a case where a white police officer saw two young black men on a public street, thought they looked suspicious, kept watching them, followed them, and ultimately questioned and frisked them. Barrett, supra note 3. Nor is there any evidence that "any Justice mentioned race at any point in the [Justices'] conference" discussing Terry. Id.

42 See Terry, 392 U.S. at 23-24 (stating that the need for police safety justifies a search even where officers lack probable cause, the traditional standard for searching a person).
a police practice that impacts the minority community. Here, I want to explore why Terry, while correctly acknowledging the racial harm caused by stop and frisk, ultimately subverts Fourth Amendment values. Terry's holding was flawed because the Court lost sight of the larger picture it confronted. That scenario indicated widespread use of a police practice that was causing perilous friction between the police and minority communities and making a mockery of the Fourth Amendment rights of minority citizens. Had the Court applied a dose of common sense and been willing to stay the course on its "due process revolution," a different outcome was possible in Terry.

My view that Terry was wrongly decided emanates from three propositions which bear emphasis. First, long before Terry came to the Court, the law was settled on the amount of evidence needed for a warrantless search. In a string of cases involving car searches, the Court left no doubt that the Fourth Amendment required probable cause of criminal conduct before officers could search the inside of a car. This axiom of Fourth Amendment law was uncontroversial. If probable cause was the constitutional minimum to justify a car search, then surely an equivalent degree of evidence is required before that officer can undertake "a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons." While reasonable minds might agree that a car is not entitled to the same degree of protection afforded a home under the Fourth Amendment, clear thinking recognizes that the respect and privacy associated with our bodies at least matches the privacy accorded automobiles.

43 See Tracey Maclin, Race and the Fourth Amendment, 51 VAND. L. REV. 333, 362-92 (1998) (discussing relevance of race in Fourth Amendment analysis). The modern Supreme Court, however, has recently declared that racial concerns are irrelevant to Fourth Amendment norms. See Whren v. United States, 116 S.Ct. 1769, 1774 (1996) (declaring that "the constitutional basis for objecting to [discriminatory police conduct] "is the Equal Protection Clause, not the Fourth Amendment"); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271, 317 (arguing that the Court's recent cases make explicit that race is irrelevant to the determination of reasonableness under the Fourth Amendment).

44 See Brinegar v. United States, 338 U.S. 160, 176-77 (1949) (noting that an individual who has engaged in behavior likely to involve the transportation of forbidden goods is not immune from searches while traveling on public highways); Carroll v. United States, 267 U.S. 132, 163-54 (1925) (noting that if probable cause exists, vehicles may be searched for contraband).

45 Terry, 392 U.S. at 16.
Second, presenting the issue in *Terry* as a conflict between "police safety" and individual freedom, misunderstands the reality of street encounters. No matter how the Court ruled in *Terry*, police officers would continue frisking people they viewed as a threat to their safety. Once this pragmatic fact was conceded, the crucial question in *Terry* was who would bear the burden when officers searched without probable cause: The government, which would suffer the suppression of evidence, or the individual, who was the target of a search forbidden by the Constitution?

Finally, the *Terry* Court succumbed to pressure to weaken constitutional principle when it was clear that many politicians, and a large segment of the public, had signaled their disapproval of the Court's effort to extend meaningful constitutional protection to those who needed it the most: Poor and minority persons suspected of criminal behavior. A more confident Court would have surveyed the legal landscape, recognized that stop and frisk practices could not be reconciled with a robust Fourth Amendment, and begun the fight to ensure that blacks, the poor, and other "undesirables," would enjoy the same constitutional privileges possessed by the elite of American society.

### III. *TERRY V. OHIO: NOT ANOTHER MIRANDA V. ARIZONA*

In *Terry*, the Court described "the crux of th[e] case" as whether there was justification for Officer McFadden's frisk of Terry and his companions when he believed that they were preparing a daylight armed robbery in downtown Cleveland. While the *Terry* Court was aware of the multiple purposes

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46 Id. at 23. The facts of *Terry* were as follows: Around 2:30 p.m., Officer Martin McFadden, a 39 year veteran on the force, saw two men standing on a street corner in downtown Cleveland. See *id.* at 5. McFadden watched as one of the men walked up the street and looked into a store window, walked a short distance, turned around and looked into the store window again, and rejoined his companion on the corner. See *id.* at 6. The second man repeated this routine. See *id.* The two men undertook this routine five or six times. See *id.* Soon, a third man joined the group. See *id.* The third man left, and the two men remaining talked some more and eventually left the scene after about ten minutes. See *id.* Officer McFadden suspected the men were "casing a job, a stick-up." *Id.* He approached the men, identified himself, and requested identification. See *id.* at 6-7. When the men "mumbled something," the officer grabbed Terry, spun him around, and patted down the outside of his clothing. *Id.* In Terry's coat pocket McFadden felt a pistol which he removed. See *id.* A frisk of the second man, Chilton, also revealed a pistol. See *id.* A frisk of the third man, Katz, disclosed no weapons. See *id.*
served by aggressive patrol practices, the Court chose to emphasize police safety as the crucial interest to be weighed against the individual's interest in freedom from unreasonable searches and seizures. In the words of Chief Justice Warren:

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.\textsuperscript{47}

For eight of the Justices, it was "unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."\textsuperscript{48} It was no surprise the Terry Court found police safety a compelling interest. Few would dispute this judgment. However, a recognition of the compelling nature of police safety did not dictate the result in Terry.\textsuperscript{49} Indeed, as Justice Stevens would later recognize in judging the deeply divisive conflicts surrounding state abortion law and the Constitution, "[t]he fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the [interest] in personal liberty."\textsuperscript{50}

Specifically, the Court failed to consider adequately the impact a "police safety" exception to the Fourth Amendment's probable cause requirement would have on a criminal process that

\textsuperscript{47} Id. at 23.

\textsuperscript{48} Id.

\textsuperscript{49} It is important to note that the Terry holding is not based on the need for police action to prevent the occurrence of an imminent crime. Under the facts, Officer McFadden approached the men only after they had abandoned their post at the intersection and had begun to walk...away from the store they were supposedly casing. Thus it seems unlikely that McFadden jumped in to prevent an imminent hold up. It seems more likely that he acted to prevent them from getting away, after they had given up on (or at least postponed) their plan.

William J. Mertens, \textit{The Fourth Amendment and the Control of Police Discretion}, 17 U. MICH. J.L. REFORM 551, 588 n.158 (1984) (citations omitted); \textit{see also} Stephen A. Saltzburg, Terry v. Ohio: A Practically Perfect Doctrine, 72 ST. JOHN'S L. REV. 911 (1998) (stating that the Terry holding was "adopted against a factual background in which the Court was not very concerned about the nature of the target or the actual likelihood of imminent criminal action").

\textsuperscript{50} Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part).
already contained both structural obstacles hindering defendants' constitutional claims and biases favoring law enforcement norms and police testimony. Interestingly, in a somewhat similar context, two years before the Terry ruling, a majority of the Warren Court adopted a very different stance toward constitutional liberties, and formulated a rule that sought to counterbalance the bias in favor of law enforcement interests inherent in the criminal justice process.

By 1966, the Warren Court had decided several state cases where defendants alleged that police officers had engaged in coercive conduct to extract confessions of guilt.\footnote{The cases are summarized in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS, 452-71 (8th ed. 1994); see also JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 92-109 (1993) (examining and critiquing the Court's confession cases.).} In the past, police interrogation of criminal suspects had rarely aroused public attention or concern. As Professor Yale Kamisar described things, society did not know or care about the incommunicado interrogation session that occurred in the "gatehouses" of the American criminal justice system. So long as a defendant was accorded all of his legal rights once he entered the "mansions" of the courtrooms, few persons paid attention to what took place inside the "gatehouses."\footnote{YALE KAMISAR, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 28-40 (1980); cf. Walter V. Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 5 (1956) ("The public rarely knows or cares about [constitutional criminal procedure rules]. If it does, it is because of the excitement generated by an individual case; and in that context rules of procedure are likely to be regarded as loopholes through which the criminal escapes.").} But even when a defendant arrived at the "mansion," there was no guarantee that his rights there would be adequately protected. The process was structured so that a legitimate claim of unlawful police coercion might remain without judicial remedy. Ironically, the main structural obstacle confronting the defendant was the hearing to determine the voluntariness of his confession. At the typical hearing, a defendant
might recite his account of the physical or psychological coercion inflicted by overbearing police officers, while the officers who had obtained his confession would convey a completely different version of the facts, claiming they used no undue coercion. In most cases, particularly those involving violent crimes, state trial judges would resolve the credibility contest in favor of the police, and the findings were typically affirmed by state appellate courts.

Because police interrogation sessions were rarely recorded or conducted in the presence of neutral observers, a defendant

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53 See Schaefer, supra note 52, at 11 (describing the “rather set pattern” in confession cases).


To a mind-staggering extent . . . the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds . . . and identify with the criminal suspect instead of the policeman or with the putative victim of the suspect’s theft, mugging, rape or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.

These trial judges and magistrates are the human beings that must find the “facts” when cases involving suspects’ rights go into court . . . Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect—usually a down-and-outer or a bad type, and often a man with a record. The result is about what one would expect.

Id.; cf. Schaefer, supra note 52, at 13 (commenting on the dilemma state judges confront when adjudicating the constitutional claims of criminal defendants).

Even though the procedural requirements with which we are here concerned are by no means upon the same level with the hypertechnicalities of the recent past, and even though those requirements come with the ultimate sanction of a constitutional command, I can testify that it is not always easy to focus upon the procedural requirement and shut out considerations of guilt or innocence.

Id.

55 Even before the ruling in Miranda v. Arizona, 384 U.S. 436 (1966), commentators were bemoaning the absence of objective recording of interrogation sessions. See Bernard Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, in POLICE POWER AND INDIVIDUAL FREEDOM 153, 180 (Claude R. Sowle ed., 1962)

The absence of a record makes disputes inevitable about the conduct of the police and, sometimes, about what the prisoner has actually said. It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground

Id. For a modern assessment of the requirement of accurate recording of interrogation
who took his appeal to the Supreme Court found the Court was in no position to second-guess the state court's factual findings. The Court was not prepared to say that the police version of the facts lacked credibility. Moreover, the Court was undoubtedly distressed that some of the more disturbing allegations of coercion were raised by black defendants in death penalty cases whose claims had been rejected by white southern judges. Many of the cases preceding the *Miranda* decision involved black defendants who alleged unfair and coercive treatment at the hands of white police officers. This state of affairs posed a political and judicial dilemma because “obviously the Supreme

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*Miranda* was a child of the racially troubled 1960’s and our tragic legacy of slavery. . . . *Miranda* itself was decided not only in the shadow of the police practices exposed in *Brown v. Mississippi*, [297 U.S. 278 (1936)] and *Chambers v. Florida*, [309 U.S. 227 (1940)], but also in the more recent past of the third degree applied particularly to southern blacks.

Id.; Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2224 (1996):

[In the 1940’s and the 1950’s,] the Court continued to encounter cases where white police officials in the rural South were accused of torturing African-American men. However, . . . these officials denied that violence occurred, thereby requiring the Court to pass over claims of beating, burning, and nightly whippings in the woods because of the procedural bar to review of “disputed facts.” . . . In effect, the disputed fact rule forced the Court to focus its Due Process inquiry upon the undisputed tip of police activities, while an iceberg of coercion remained hidden from review, if not from view.

Id.; see also Marvin E. Frankel, *From Private Fights to Public Justice*, 51 N.Y.U. L. REV. 516, 527 (1976) (noting that “the *Miranda* decision was so strongly undergirded by the desire to achieve equal treatment for the poor and the rich, the ignorant and the sophisticated”).

Court could not talk about its distrust of state-court fact-finding in these cases. Both decorum and the necessity of encouraging better performance by state judges in the enforcement of federal rights forbade the Supreme Court Justices 'to put their brethren of the state judiciary on trial.'

Moreover, the voluntariness test that was used to assess a defendant's claim that his confession was the product of police coercion was difficult to apply on a case-by-case basis. Trial judges were given little guidance, and the vagueness and open-ended nature of the test left appellate courts without a neutral standard to apply when reviewing judgments of lower courts.

Three years before its landmark ruling in *Miranda v. Arizona*, the Court recognized, in *Haynes v. Washington*, that the due process voluntariness test was an awkward device for determining when police conduct had produced a coerced confession:

> The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.

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65 See Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997) ("Most lawyers have known for a long time that the term coercion cannot be defined, that judges place this label on results for many diverse reasons, and that the word coercion metamorphoses remarkably with the factual circumstances in which legal actors press it into service.").

66 Professor Schulhofer has noted that under the voluntariness test:

Not only were conscientious trial judges left without guidance for resolving confession claims but they were virtually invited to give weight to their subjective preference when performing the elusive task of balancing. . .

[T]he ambiguity of the due process test and its subtle mixture of factual and legal elements discouraged active review even by the most conscientious appellate judges. Moreover, when higher courts did attempt to address confession questions, they found themselves so wholly at sea that the appearance of principled judicial decision-making inevitably suffered, whether or not they chose to hold the confession inadmissible.


69 Id. at 515.
Frustrated with this state of affairs, the Court, in *Miranda* and its companion cases, adopted a bright-line rule to counteract some of the structural mechanisms hindering defendants who claimed that their confessions of guilt were the products of unlawful police coercion. *Miranda* held that unless a person was informed of his constitutional right to remain silent and to have counsel present during custodial interrogation, any statement obtained from the defendant would be inadmissible at the trial.\(^6\)

Although *Miranda* was a compromise decision,\(^6\) the ruling produced shock-waves and thunderous protests. From Congress to the local police station, objections were heard that *Miranda* would "handcuff" the police, increase crime-rates, and endanger the public's safety.\(^6\) But the result in *Miranda* did not surprise

\(^6\) See *Miranda*, 384 U.S. at 444.

\(^6\) Although the American Civil Liberties Union filed an amicus brief in *Miranda* urging the Court to rule that an arrestee has a right to consult with legal counsel before interrogation begins, the *Miranda* Court rejected that argument. See id. at 474 (explaining that "[t]his does not mean . . . that each police station must have a 'station house lawyer' present at all times to advise prisoners," after noting that the arrestee, if he so requests, must have opportunity to consult with counsel). *Miranda*'s rejection of the ACLU proposal and the Court's approval of the practice of police officers obtaining waivers from arrestees without counsel, is *Miranda*'s greatest failure or virtue, depending on one's point of view. See Louis Michael Seidman, Brown and *Miranda*, 80 CAL. L. REV. 673, 743-47 (1992) (characterizing *Miranda* "as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance"); see also Charles Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987) ("All suspects in custody should have a nonwaivable right to consult with a lawyer before being interrogated by the police."); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 454 (1987) (finding that the *Miranda* ruling was a boon to the police; the "warnings work to liberate the police" because they allow the continued questioning of an isolated suspect, a circumstance which *Miranda* found to be constitutionally unacceptable). Others have been critical of *Miranda* because of its emphasis on process at the expense of ignoring the substantive content of interrogation. See Ofshe & Leo, supra note 55, at 1116 ("For all its fanfare, *Miranda* is concerned only with the procedural fairness of the interrogation process—whether a suspect retains his rational and voluntary decision-making ability in the face of inherently compelling police pressures—not with the substantive truth of the interrogation outcome."); cf. H. Richard Uviller, TEMPERED ZEAL 196 (1988):

> [T]he resolution of the *Miranda* case seriously impugns the integrity of its premises: if a confession given in police custody is necessarily coerced, so is a waiver. I heartily appreciate the Court's reluctance to outlaw all confessions given by suspects in custody; the cost to law enforcement would be far too great. But if noncoercive custodial interrogation is to be permitted (as it is), the famous warning adds little to the suspect's protection.

Id.

\(^6\) For two excellent discussions on the political reactions to *Miranda*, see Liva Baker, *MIRANDA: CRIME, LAW AND POLITICS* (1983) and Graham, supra note 10, at
students of the Court because many had expected that the Court would devise a per se rule to replace the voluntariness test that had controlled the admissibility of confessions:

Given the Court’s inability to articulate a clear and predictable definition of “voluntariness,” the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of dubious constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek “some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.”

The fact that observers of the Court could anticipate the Miranda decision did nothing to mollify Miranda’s many opponents. Indeed, for some critics of Miranda, the Court added insult to injury when it conceded that in some of the cases prompting its ruling, the defendants’ confessions might not have been declared involuntary under pre-Miranda standards. The Court’s reply to this complaint is noteworthy. Chief Justice Warren declared: “Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.”

In other words, a majority of the Court believed that a stringent, prophylactic safeguard was necessary because interrogation, as it then existed, was overwhelming the Fifth Amendment’s privilege against compelled self-incrimination. The judgment rendered by the Court was clearly controversial. But the controversial nature of the ruling did not mean that the Court had misjudged what was occurring in police stations across the country or lacked the constitutional authority to change that process. Like other landmark constitutional cases, Miranda concerned both a textual interpretation of the Constitution and a judicial assessment about how society’s institutions and values interact with constitutional requirements. In particular, Miranda addressed a pervasive, yet secretive, police practice that, up until that time, had eluded the Court’s consti-
tutional supervision because of a variety of institutional and societal preferences. Previous efforts to sway state courts and the police community to alter their practices to conform with constitutional mandates had proved unavailing. Accordingly, the Court decided that a drastic adjustment was required. Put simply, the "institutional realities" of the day compelled the Miranda holding:

[The Miranda Court] realized that a case-by-case review of voluntariness was severely testing its capacities, and those of the lower courts. . . .

Miranda dealt with the police. Traditional constitutional theory calls for courts to admit that they are not very good at finding the facts that bear on large-scale social problems; Miranda made essentially that admission about facts of a certain category of particular cases. Of course, the Miranda Court then decided that these institutional realities warrant a doctrine more favorable to the suspect, and less favorable to the authorities, than the previous law had been. But there is no basis for saying that that judgment undermined the legitimacy of what the Court did.70

The Miranda ruling was a response to the abuses and structural obstacles of the criminal process that obstructed Fifth Amendment claims. Two years later, the Court would confront evidence that similar abuses impeded the enjoyment of Fourth Amendment freedoms.71 While many black defendants had complained about unlawful interrogation practices, the complaints of racial harassment due to stop and frisk practices were also substantial. Indeed, the number of blacks who experienced illegal and offensive searches and seizures far outpaced the number of blacks exposed to coercive interrogation methods. The significance and depth of police abuse experienced by blacks should not be underestimated. For example, in 1968, the Kerner Commission found that hostility and distrust between the police and the black community was a contributing factor, and in some places, the factor, precipitating community protest and riots in

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71 See Terry v. Ohio, 392 U.S. 1, 13-14 (1968) ("[S]ome police 'field interrogation' conduct violates the Fourth Amendment.").
several urban centers.\footnote{\textit{See} \textit{Report of the National Advisory Comm'n on Civil Disorders} 157 (1968).} Part of the resentment blacks felt toward the police was generated by stop and frisk tactics and other forms of street harassment:

We have cited deep hostility between police and ghetto communities as a primary cause of the disorders surveyed by the Commission. In Newark, Detroit, Watts, and Harlem—in practically every city that has experienced racial disruption since the summer of 1964, abrasive relationships between the police and Negroes and other minority groups have been a major source of grievance, tension and, ultimately, disorder.

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

Physical abuse is only one source of aggravation in the ghetto. In nearly every city surveyed, the Commission heard complaints of harassment of interracial couples, dispersal of social street gatherings and the stopping of Negroes on foot or in cars without objective basis. These, together with contemptuous and degrading verbal abuse, have great impact in the ghetto. As one Commission witness said, these strip the Negro of the one thing that he may have left—his dignity, “the question of being a man.”

Although police administrators may take steps to eliminate misconduct by individual police officers, many departments have adopted patrol practices which in the words of one commentator, have “replaced harassment by individual patrolmen with harassment by entire departments.”

These practices, sometimes known as “aggressive preventive patrol,” take a number of forms, but invariably they involve a large number of police-citizen contacts initiated by police rather than in response to a call for help or service. One such practice utilizes a roving task force which moves into high-crime districts without prior notice and conducts intensive, often indiscriminate, street stops and searches.

\footnote{\textit{See} \textit{Report of the National Advisory Comm'n on Civil Disorders} 157 (1968).}
In some cities, aggressive patrol is not limited to special task forces. The beat patrolman himself is expected to participate and to file a minimum number of "stop-and-frisk" or field interrogation reports for each tour of duty. This pressure to produce, or a lack of familiarity with the neighborhood and its people, may lead to widespread use of these techniques without adequate differentiation between genuinely suspicious behavior and behavior which is suspicious to a particular officer merely because it is unfamiliar.

Police administrators, pressed by public concern about crime, have instituted such patrol practices often without weighing their tension-creating effects and the resulting relationship to civil disorder.\(^{73}\)

While the "realities of the street" meant that the Fourth Amendment was ignored during encounters between police and black men, the realities of the judicial process did little to repair the harm that had occurred on the streets. The same procedural obstacles and biases that influenced state trial judges to favor law enforcement norms and police testimony when resolving the "swearing contest" surrounding the events of custodial interrogation were doubtless prevalent at suppression hearings to assess the reasonableness of police searches and seizures during street investigations. After all, who is a state trial judge more likely to believe: The police officer who says he saw a bulge in the suspect's pocket, or saw the suspect make a furtive gesture, and now has the gun to prove it; or is the judge more likely to credit the testimony of an obviously guilty defendant who testifies that he was simply standing on the corner minding his own business when the police grabbed him and began a frisk without cause? One need not believe that every police officer who takes the witness chair in a suppression hearing commits perjury in order to understand the obstacles for defendants embodied in the system. Although some participants in the criminal process have stated that police perjury was, and still is, common when officers testify about search and seizure incidents,\(^{74}\) that is not

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\(^{73}\) Id. at 157-60.


Every lawyer who practices in the criminal courts knows that police per-
my point here. Rather, the concern here is to merely highlight the quandary trial judges confront when they are asked to resolve the inevitable "swearing contest" between police officer and criminal defendant regarding what occurred on the street.

Moreover, when police safety is injected into a structure that tends to favor law enforcement interests, even objective, fair-minded trial judges will be swayed to rule in favor of the police in contested cases where a suspect's guilt is manifest. When confronted with a police officer's testimony that he frisked a suspect because the officer feared for his safety, few judges are able or willing to second-guess the officer's actions. This assertion is not meant to impugn the integrity of trial judges, but merely recognizes the natural empathy that judges will experience when confronted with such testimony. Before the Warren Court's due process revolution altered the way some within the legal profession approach the "law," "[j]udges [were] trained to look at criminal cases in terms of guilt or innocence." This attitude remains the norm in many courtrooms, particularly when an officer's search reveals that a person was armed. When such evi-

jury is commonplace.

...The reason is not hard to find. Policemen see themselves as fighting a two-front war—against criminals in the street and against 'liberal' rules of law in court. All's fair in this war, including the use of perjury to subvert 'liberal' rules of law that might free those who 'ought' to be jailed.


See Gretchen White Oberman & Kalman Finkel, The Constitutional Arguments Against "Stop and Frisk," 3 CRIM. L. BULL. 441, 458 (1967) ("In the cases where the reasonable suspicion formula is employed, the courts again and again feel themselves compelled to accept the officer's assessment of the danger inherent in the [street encounter].").

Schaefer, supra note 52, at 13.

One defender of Terry argues that courts should not legitimize the constitutional claims of guilty or "dirty" defendants because such persons "have no right to complain about police impropriety." James J. Fyfe, Terry: A[n Ex-] Cop's View, 72
dence is disclosed, the Fourth Amendment claim of a defendant is no match for probative proof of guilt:

In the field of criminal procedure . . . a strong local interest competes only against an ideal. Local interest is concerned with the particular case and with the guilt or innocence of the particular individual. . . . The counterbalance is only a general ideal of fair procedure which, if it is to prevail, must transcend the circumstances of the particular case. 78

When police safety is weighed against the freedom guaranteed by the Fourth Amendment, even appellate judges will approve police testimony that would be considered too vague and partisan in other constitutional contexts. 79 As an example, con-

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St. JOHN'S L. REV. 1231 (1998). Professor Fyfe also suggests that the social impact of unsuccessful frisks is ambiguous. Fruitless frisks produce slight harm because “many police and their bosses regard people not found dirty not as innocent, but simply as not caught this time.” Id. Moreover, police officials see unsuccessful frisks as a “positive public relations device because they demonstrate to the innocent citizens stopped that police are vigorously doing their jobs.” Id.

Fyfe’s observations embody a rather crabbed vision of the Fourth Amendment. The right afforded by the text of the amendment makes no distinction between innocent parties and those “who were, in fact, ‘dirty.’” Compare id., with U.S. CONST. amend. IV. Moreover, I fail to see the constitutional significance in the fact that some police officers view the targets of police frisks as “dirty,” and contend that frisking practices promote better community relations. The attitude of the police toward frisks should be constitutionally irrelevant. On the other hand, the type of police perspective that Fyfe describes often exacerbates tension between the police and the black community. As Fyfe has noted elsewhere:

[Police officers on American streets too often rely on ambiguous cues and stereotypes in trying to identify the enemies in their war. When officers act upon such signals and round up people who turn out to be guilty of no more than being in what officers view as the wrong place at the wrong time—young black men on inner-city streets late at night, for example—the police may create enemies where none previously existed.]


78 Schaefer, supra note 52, at 5.

79 See, e.g., Kolender v. Lawson, 461 U.S. 352, 358 (1983) (invalidating a California loitering statute because, as written and construed by state courts, it “contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification” to a police officer); Papachristou v. Jacksonville, 405 U.S. 156, 170 (1972) (invalidating a city vagrancy ordinance on vagueness grounds, noting, “[w]here, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law”); Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding that an ordinance prohibiting persons on street from “annoying” any police officer or other passersby was impermissibly vague “because it subjects the exercise of the right of assembly to an unas-
Consider Judge Keating's explanation in *People v. Peters*, which became a companion case of *Terry*, of the type of conduct and police judgment that triggered New York's stop and frisk law: "By requiring the reasonable suspicion of a police officer, the [stop and frisk] statute incorporates the experienced officer's *intuitive* knowledge and appraisal of the appearances of criminal activity.... Where a person's activities are perfectly normal, he is fully protected from any detention or search."

Consider also the testimony of Detective Martin McFadden. McFadden stopped Terry and his companions because he believed they were "casing" a store in preparation for an armed robbery. At the suppression hearing and trial, the following exchanges took place between McFadden and the trial judge:

Q. In your thirty-nine years of experience as an officer... Have you ever had any experience in observing the activities of individuals in casing a place?

A. To be truthful with you, no.

Q. You never observed anybody casing a place?

A. No....

Q. During your tenure as a police officer, during your 39 years as a police officer, how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up?

A. To my recollection, I wouldn't know, I don't know if I had, I don't remember any.

Later, Detective McFadden was asked why the defendants' actions seemed unusual:

A. Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and

certainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct").


Id. at 599-600 (emphasis added).

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

stopped and looked in and came back again.

Q. You didn’t know either one of these men did you?
A. I did not.

Q. And no one had furnished you any information with regard to these two men, [had] they?
A. Absolutely no information regarding these two men at all.  

When McFadden was asked why he was watching the men he replied: “In the first place I didn’t like their actions on Huron Road, and I suspected them of casing a job, a stick-up. That’s the reason.” Later, McFadden said his reason for watching the defendants was that “they didn’t look right to me at the time.”

At the oral argument in Terry, Justice Marshall questioned counsel for the State of Ohio on this point:

Justice Marshall: So, where did he [McFadden] get his expertise about somebody about to commit a robbery?

Mr. Payne: I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years I am quite sure that, even if by osmosis, some knowledge would have to come to him of the various degrees of crimes---

Justice Marshall: Now we’re getting intuition by osmosis?

In my view, McFadden’s testimony was too vague and insubstantial to justify a search and seizure of Terry and his companions. But, his actions typified police conduct in the 1960s. Officers were trained to assume that every person encountered on the street might be armed, and many officers relied on this assumption even during their routine encounters on the street. Interestingly, despite the widespread assumption that every person encountered was potentially dangerous or armed, whether an officer frisked a person primarily depended upon the inclination of the individual officer; there was no uniformity. As noted

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84 Id. at 1456.
85 Id. at 1418 (emphasis added).
86 Id. at 1456 (emphasis added).
88 See TIFFANY, supra note 3, at 44-45; Schwartz, supra note 25, at 436.
by one influential study of the police in the mid-1960's:

While the decision whether to frisk is influenced by [several] factors, the most critical factor is the officer himself. Some officers on regular patrol routinely frisk while others routinely refrain from frisking. Frisking is primarily dependent on how aggressive the officer views his role to be vis-à-vis persons he stops to question on the street.ª9

This same study also noted that officers almost always frisk or search when a person refuses to cooperate with police, and officers often search a person found on the streets "to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."²

Of course, some would say that no judge should second-guess

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ª Tiffany, supra note 3, at 48.
² Id. at 47-48. Frisks and other searches frequently occurred where police safety was not an issue and objective grounds for an intrusion were lacking. Searches for weapon confiscation were one notorious example. See id. at 13; Schwartz, supra note 25, at 443.

Further, even minor traffic infractions were used to justify stopping and searching persons. See Tiffany, supra note 3, at 15. Tiffany also notes:

[O]bservation of [traffic stops] makes it clear that a violation of the traffic code is often used as a subterfuge by officers who desire to interrogate a person about a more serious offense. Because of this, traffic regulations which normally are unenforced are asserted as a justification for field interrogations. The discretion often administratively granted to officers not to enforce traffic regulations may be used by them to gain "consent" to field interrogation or to a thorough search of either the person or his car.

Id. at 30 n.16. A former police officer testified:

I have felt and still feel that the Negro is living in a police state. I mean by this rash statement that the white officers of the [Detroit Police] department concentrate their enforcement efforts in the Negro community as a whole and specifically against the Negro. This has been reflected in my seeing on several occasions Negro citizens being stopped by scout cars for minor traffic violations and given a complete search, both the automobile and the person.

Civil Rights Hearing, supra note 4, at 323 (quoting testimony of Joynal Muthleb, former officer, Detroit Police Department). Police use of traffic violations as a pretext to conduct arbitrary and discretionary searches, particularly against minority motorists, continues, and in some places is thriving, due to the Court's recent decisions. See Whren v. United States, 116 S.Ct. 1769 (1996); Ohio v. Robinette, 117 S.Ct. 417 (1996). Although the Court finds this practice unobjectionable under the Fourth Amendment, academic commentators are nearly unanimous in their opposition to this practice. See generally David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).
Officer McFadden’s conduct. After all, when officers are confronting suspicious persons, they must make split-second decisions which may affect their own safety and the lives of others nearby. Defenders of the police like to remind judges that officers have a “sixth sense” to discern danger that cannot always be articulated in objective legal terms. In other words, an officer’s street experience provides a degree of expertise, particularly with regard to violent crime, that judges should not question, or at least not overly scrutinize.9

There is a facet of Terry that appears to accept this view. Chief Justice Warren explains that an officer’s actions in this context must be judged by asking “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”92 This standard is taken from the Court’s cases discussing the meaning of probable cause. But Terry did not (and could not) hold that McFadden had probable cause to arrest or search Terry and his companions for an identified crime.93 However, when the Chief Justice ex-

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91 As one scholar has noted:

[The police would like to have greater freedom to make searches not “incident” to an arrest. That is, they would like to be able to search first and then arrest on the basis of incriminating evidence disclosed by the search. . . .

Understandably, the police oppose a “strict” interpretation of the Constitution. They claim to have special skills enabling them to detect criminal activity, or its potential, and thus the privilege of prior search would not be abused.

SKOLNICK, supra note 1, at 216-17. Without adopting the position that officers have a “sixth sense” to detect dangerous persons, Professor LaFave reads Terry to permit a frisk for officer self-protection on a lesser degree of suspicion than needed to justify a detention for committing the offense of carrying a concealed weapon. See WAYNE R. LAFAVE, SEARCH AND SEIZURE §9.5 (a) at 247-48 (1996):

[The fact remains that a frisk for self-protection cannot be undertaken when the officer has unnecessarily put himself in a position of danger by not avoiding the individual in question. This means that in the absence of some legitimate basis for the officer being in immediate proximity to the person, a degree of suspicion that the person is armed which would suffice to justify a frisk if there were that basis will not alone justify a search. For example, if a policeman sees a suspicious bulge which possibly could be a gun in the pocket of a pedestrian who is not engaged in any suspicious conduct, the officer may not approach him and conduct a frisk. And this is so even though the bulge would support a frisk had there been a prior lawful stop.

Id.


93 See Earl C. Dudley, Jr., Terry v. Ohio, The Warren Court, and the Fourth
plains why McFadden’s observations justified his frisk of Terry, that explanation relies on constitutional language taken from the concept of probable cause. Thus, he states that McFadden’s observations were sufficient for a judge to find that “a reasonably prudent man would have been warranted in believing [that Terry] was armed and thus presented a threat to the officer’s safety while he was investigating his suspicious behavior.” This explanation, of course, does not tell the reader what constitutional standard, if not the probable cause rule, justifies McFadden’s frisk of Terry and his companions.

Justice Harlan’s concurring opinion offers some insight on the matter. Justice Harlan stated: “Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery.” Put another way, Justice Harlan was prepared to accept this “experienced, prudent” officer’s assessment that the events unfolding before him were a prelude to a violent crime. Under such circumstances, an experienced officer’s actions are not to be judged by the Fourth Amendment’s traditional standard of probable cause, but by a lesser standard of “justifiable suspicion,” or “‘reasonable suspicion.’”

What, then, is the constitutional foundation which supports

Amendment: A Law Clerk’s Perspective, 72 St. John’s L. Rev. 891 (1998) (explaining the Court’s initial attempts to justify the result in Terry in terms of probable cause, but noting that “[t]hese efforts foundered on the rather obvious fact that no one really suggested that Officer McFadden in Terry had ‘probable cause’ to believe much of anything”).

Terry, 392 U.S. at 28.

Id. at 33 (Harlan, J., concurring).

Id.

Id. at 37 (Douglas, J., dissenting). There is an alternative way to read Justice Harlan’s concurring opinion in Terry. As Professor Yeager has explained, Justice Harlan “wrote separately in Terry to express his view that the right to frisk follows automatically from the right to stop.” Daniel Yeager, Searches, Seizures, Confessions, and Some Thoughts on Criminal Procedure: Regulation of Police Investigation—Legal, Historical, Empirical and Comparative Materials, 23 Fla. St. U.L. Rev. 1043, 1054 (1996) (footnote omitted). According to Yeager, police detention of suspicious persons and police frisks “are so intertwined that often, as it was in Terry, it is the frisk that alerts us to the fact that a stop has taken place.” See also Sherry F. Colb, The Qualitative Dimension of Fourth Amendment “Reasonableness,” 98 Colum. L. Rev. 1, 66 (1998) (forthcoming) (“Justice Harlan proposed that the stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect.”) (footnote omitted).
the Court’s conclusion that McFadden’s observation justified a frisk of Terry and his companions? Is it probable cause? Is it a lesser standard, for example, a reasonable suspicion or mere suspicion standard? Or, is the Court working without an identified standard and simply relying on the judgment of an experienced patrolman who suspected an armed robbery was about to occur because he “didn’t like the[] actions” of the men he observed on a downtown street in the middle of the afternoon?98

Professor Dudley informs us that Chief Justice Warren’s majority opinion never uses the terms “reasonable suspicion” or “justifiable suspicion.” Rather, “the opinion carefully employs and adapts the language of Brinegar v. United States, the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information.”99 There is, however, a significant problem with this explanation: McFadden did not have “‘probable cause’ to believe much of anything.”100 So a reader of Terry is left to ponder the question of what standard, if not a “reasonable suspicion” standard, the Terry majority had in mind when it determined that Officer McFadden’s actions satisfied Fourth Amendment requirements. The reader is also left wondering why the Court employs the language of probable cause, but fails to explain why that standard has not been satisfied under the facts. Perhaps the Court believed that the Fourth Amendment’s Reasonableness Clause embodied an intermediate standard somewhere between “probable cause” and an “inarticulate hunch[,]”101 but was not prepared to articulate the terms or scope of that standard in Terry. Or perhaps the Court had no particular standard in mind, when assessing McFadden’s actions, and was simply deferring to the expertise of a “street wise,” experienced officer who sensed that he was confronting dangerous persons, and thus, frisked to protect himself.102

98 Terry transcript, supra note 83, at 1418.
99 Dudley, supra note 93; cf. LaFave, supra note 91, § 9.5 (a) at 251 (noting the language of Terry “is precisely the language which the Court has used time and again to define the probable cause requirement for arrest”).
100 Dudley, supra note 93.
101 Terry, 392 U.S. at 22.
102 Professor Dudley also notes: From the outset, it was Chief Justice Warren’s instinct to uncouple the “frisk” from the “stop” and to give the Court’s explicit blessing only to the former. The Court’s unanimous vote [at the conference meeting to discuss
If these speculations are accurate, the Court’s resolution of the issue is troublesome. First, on the matter of police “expertise,” the Court offered no objective evidence affirming the accuracy, or ability, of Officer McFadden individually or patrol officers generally, to spot or “sense” persons about to commit violent crimes. The Court may have been willing to give the police the benefit of the doubt on this point. Such an approach would allow the Court to skirt a sensitive issue and avoid opening a Pandora’s Box that would surely arouse the public’s anger. Understandably, the Court had no desire to risk being tarred, again, as “handcuffing” the police, particularly in a case where an officer had disarmed two men who appeared to be “casing” a stick-up job.\textsuperscript{3} However, if the Court was constructing a Fourth

\textit{Terry}, after all, was almost certainly prompted by the Justices’ collective recognition of the need of police officers to protect themselves and bystanders from armed men whose encounters with authority could—and often did—escalate quickly into violence. A determination that it was “reasonable” for policemen confronted with actors they reasonably suspected of criminal activity to “seize” them and conduct a limited “search” for dangerous weapons did not necessarily involve approval of the much more amorphous and troublesome power to “detain” a person for purposes of investigation on less than probable cause to arrest. Such a power was not merely susceptible of significant abuse, it was very difficult either to define or to confine . . . And there was concern that, because the threshold of the power to “frisk” for safety reasons would necessarily be quite low, the power to “stop” or detain, if linked to the power to “frisk,” would be exercised on very little suspicion indeed.

Dudley, \textit{supra} note 93.

On a personal note, I must confess that after meeting Reuben Payne, counsel for the respondent in \textit{Terry v. Ohio}, at the conference celebrating the thirtieth anniversary of \textit{Terry}, I was quite impressed with Mr. Payne’s defense of Officer McFadden’s detective skills. See generally Reuben M. Payne, \textit{The Prosecutor’s Perspective on Terry: Detective McFadden Had a Right to Protect Himself}, 72 ST. JOHN’S L. REV. 733 (1998). Although Mr. Payne readily conceded that in the 1960’s some Cleveland police officers arbitrarily harassed minority citizens, Payne was confident and steadfast that McFadden did not fit that mold. See id. Mr. Payne was also convinced that McFadden had a unique ability to watch persons on the street and identify persons bent on criminal conduct. See \textit{id.} Perhaps, Mr. Payne’s confidence in McFadden’s skills managed to rub off on some of the Justices during oral argument.

\textsuperscript{103} See Dudley, \textit{supra} note 93. As Dudley notes:

Individually, the Justices of the Supreme Court may have felt differing degrees of sympathy with the arguments of the police, but collectively they were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on the streets.

\textit{Id.}; GRAHAM, \textit{supra} note 10, at 143-44 (describing the \textit{Terry} Court as “capitulating” to the practical arguments of the police, who contended that they would inevitably frisk suspicious persons, even if evidence were ruled inadmissible
Amendment rule based on unstated and unsupported assumptions regarding the expertise of officers engaged in street encounters, its conclusion rested on an awfully thin reed. Empirical evidence on this point suggested that the Court should have proceeded with greater caution. The American Bar Foundation study of the police, which the Court thrice cited, raised some important questions about “police expertise” and the role it plays during street investigative practices. That study noted:

An important and unresolved question is whether the good policeman becomes an expert at spotting persons who have committed or are intending to commit a crime. Police themselves say that they become “alley-wise” with experience. But this expertise, if it exists, usually is not communicated to the recruit police officer in even the most highly advanced training academies. Some police officers say that this knowledge cannot be taught but can be acquired only by experience.

Observation indicates that police do learn things about the beat they patrol which make them more likely than the inexperienced observer to spot a suspicious person.

But these sources of police knowledge are almost always subjective; they are seldom made explicit. Also, the validity of the knowledge from these sources is not tested systematically.

. . . Because such expertise as may exist is left to the individual officer, it is not subject to effective review or control. And it may be suspected that individual prejudices, racial and others, influence these assumptions about behavior as strongly as does objective experience.194

Second, regarding whether the Fourth Amendment's Reasonableness Clause contains an intermediate standard somewhere between probable cause and a hunch, the Terry Court should have accorded greater respect to its precedents and the safeguards contained in the Fourth Amendment. On at least two

194 TIFFANY, supra note 3, at 89-90.

at a subsequent trial); id. at 157 (contrasting Miranda with Terry, where the Court “avoided laying down objective procedures for the stop-and-frisk, with evident relief, citing ‘the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street’”) (quoting Terry, 392 U.S. at 12).
occasions prior to *Terry*, the Court was urged to adopt a rule that would permit detention where officers lacked probable cause for arrest. For good reasons, the Court resisted those urgings. Although the probable cause standard is hardly a perfect concept for officers to apply, giving police the authority to detain or search persons without probable cause eviscerates Fourth Amendment freedoms. Like it or not, the probable cause requirement was intended to control police power and discretion; when a lesser standard is permitted, the power of the police is expanded. There are undoubtedly many factual scenarios where there is a "troublesome line... between mere suspicion and probable cause." In such cases, there may be an understandable urge for police intervention, notwithstanding the ambiguity of the facts. The Fourth Amendment, however, was meant to prevent the police from undertaking searches without probable cause. A search based on police suspicion may be expedient, but it is an intrusion that, prior to *Terry*, the Court had declared the Constitution does not permit.

In sum, Chief Justice Warren's opinion in *Terry* is far from perfect. Important aspects of the ruling are left unexplained, including what degree of suspicion justified McFadden's stopping and frisking Terry and his companions. *Terry* also leaves unre-

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*Probable cause* is not a very apt term; it has little to do with probability and nothing whatever with causality. But it is the term chosen by the Framers to describe the degree of suspicion requisite for the government to move into the citizen's private spaces. It means "damn good reason to believe," that's all. Not certainly beyond a reasonable doubt, not even more likely than not. But more than a hunch or suspicion. That's the best we can do to define it.


108 See, e.g., *Henry v. United States*, 361 U.S. 98, 104 (1959) ("Under our system suspicion is not enough for an officer to lay hands on a citizen."); *Brinegar v. United States*, 338 U.S. at 176 ("To allow [a search or seizure on] less [than probable cause] would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.").
solved whether a person can be detained for investigation on less than probable cause where there is no apparent danger to the police. Although these and other important questions were left open, there was a very definitive aspect to Terry: It signaled the end of the Warren Court's due process revolution. Terry would not be another Miranda. Terry indicated that the Court was no longer prepared to force change, as it attempted to do in Miranda, on police departments and officers who ignored or resisted the application of constitutional commands. Indeed, instead of reaffirming that police-citizen street encounters would continue to be governed by the textual and traditional standard of probable cause, the Court announced a new, more flexible, non-textual standard that gave officers enormous discretion and diminished the constitutional freedom of the individual. Terry was a victory for the police and a defeat for the right of the people to be secure against unreasonable searches and seizures.

IV. THE END OF THE “DUE PROCESS” REVOLUTION: THE FOURTH AMENDMENT RIGHTS OF BLACK STREET SUSPECTS ARE NO MATCH AGAINST POLICE SAFETY

Terry fundamentally changed Fourth Amendment law. The change was a boon for police. The change, however, was implemented without a full airing of the consequences for blacks and other disfavored persons that were most affected. Although the majority would not acknowledge the matter, the politics of the late 1960's probably influenced the Court's shift on Fourth Amendment law as much as anything else.

First, Terry recast Fourth Amendment doctrine without defining the contours of its new “police suspicion” standard, and without pausing to consider whether a police suspicion test could (or would) be cabined in future cases. Apparently, the Court believed that a constitutional norm below probable cause would eventually be articulated and obeyed, and would permit officers to take steps to protect themselves without diminishing Fourth Amendment rights. The Court was wrong. When a police suspicion test is substituted for the probable cause standard, the judicial tendency to defer to police intuition and experience is exacerbated.\textsuperscript{109} The probable cause standard, while not perfect,
does "avoid[] the dangerous mysticism" of police intuition.110

Probable cause . . . directs the judge toward an exercise of
independent and autonomous judgment, properly re-
sponsive to the policeman's expert capacity for observa-
tion and induction, but freed from the controlling imposi-
tion of police value judgments or from necessary reliance
upon the policeman's inexplicable "hunches" which inevi-
tably embody those value judgments.111

The doctrinal change mandated in Terry also occurred with-
out the Court discussing how a police suspicion standard might
affect the Fourth Amendment rights of blacks and other disfa-
vored persons.

By uncoupling the Warrant Clause from the Reasonableness
Clause under the circumstances presented in Terry, the Warren
Court significantly altered Fourth Amendment analysis.112
Henceforth, frisks and other investigatory intrusions would be
analyzed by a doctrine where "the strictures of the Warrant
Clause were simply inapplicable, and the definition of a
'reasonable' search [w]ould . . . be cut free from the standard of
'probable cause.'"113 In short, whether a frisk or other protective
search was "reasonable" depends upon the totality of the circum-

If we recognize the authority of the police to stop a person and inquire con-
cerning unusual street events we are required to recognize the hazards in-
volved in this kind of public duty. The answer to the question propounded
by the policeman may be a bullet; in any case, the exposure to danger could
be very great.

Id. (emphasis added).
110 Brief for the NAACP Legal Defense and Educational Fund, Inc. at 29, Terry
111 Id. at 29.
112 Terry, of course, was not the first case to uncouple the Fourth Amendment's
two clauses. That distinction belonged to Camara v. Municipal Court, 387 U.S. 523
(1967). Before Camara, As Professor Sundby has written:
A search or arrest was reasonable only when a warrant based on probable
cause issued. Camara, in contrast, reversed the roles of probable cause and
reasonableness. Instead of probable cause defining a reasonable search, af-
after Camara, reasonableness, in the form of a balancing test, defined prob-
able cause. Allowing reasonableness to define probable cause expanded the
range of acceptable government behavior beyond intrusions based on indi-
vidualized suspicion to include activities in which the government interest
outweighed the individual's privacy interests. Reasonableness, in the form
of a balancing test, had finally gained entrance into fourth amendment
analysis, albeit through the back door of the warrant clause.

Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of
Camara and Terry, 72 MINN. L. REV. 383, 394 (1988) (footnotes omitted).
113 Dudley, supra note 93.
stances. While a “totality” model had been urged in some quarters, the Terry Court’s commitment to such a model was incomplete. The Court clearly was unwilling, or not ready, to consider all elements that made street investigations and aggressive patrol tactics “a sensitive area of police activity.” One element the Court did not factor into its “reasonableness-totality” analysis was the legitimate concern about police prejudice toward blacks and other minorities. By the late 1960s, objective evidence of police bias against blacks had been well documented by scholars and observers of the police. For example, in 1966,

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114 See, e.g., Edward L. Barrett, Jr., Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. CT. REV. 46, 63 (arguing that the reasonableness of each investigative technique should be determined by a balancing formula).

115 Terry, 392 U.S. at 9.

116 See, e.g., TASK FORCE REPORT, supra note 37, at 183 (noting a 1951 survey in one midwestern city where police officers “believed that the only way to treat a certain group of people, including Negroes and the poor, is to treat them roughly”); There seems little doubt that interpersonal violence as well as violence directed against policemen is considered [by the police] more likely to take place in minority neighborhoods regardless of economic class. Anxiety levels among officers are likely to be higher, therefore, in minority areas than in any other parts of the city. DAVID H. BAYLEY & HAROLD MENDELSOHN, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 91 (1969); [Citizen complaints show that anyone who defies the police is likely to be arrested, but a Negro or a Puerto Rican is more likely to be clubbed in the process. The chief area of conflict between Negro citizens and the police does not center around violent force, however, so much as around the attitudes and words of the police. It often seems that it is insults and racial slurs, rather than arrest, that make ghetto people most antagonistic to the police. PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 132 (1969); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 113-15 (1997) (discussing police prejudice against blacks in first-half of the twentieth century); It is likely that [an officer] has absorbed some of the prejudices and hatreds toward minority groups that are so tragically widespread in our society. It would be absurd to presume that the mere act of donning a uniform and badge would remove ideas, opinions and prejudices instilled in him from his childhood. J.E. CURRY & GLEN D. KING, RACE TENSIONS AND THE POLICE 15 (1962); In principle, the Westville and Eastville Police Departments [pseudonyms for actual departments observed by the author], like most in America, are racially unbiased . . . . Yet from the point of view of the Negro, or the white who is generally sympathetic to the plight of the Negro in America, most policemen—Westville and Eastville alike—would be regarded as highly racially biased. SKOLNICK, supra note 1, at 80; id at 81 (“A negative attitude toward Negroes was a norm among the police studied, as recognized by the chief himself. If a policeman did not subscribe to it, unless Negro himself, he would be somewhat resented by his
Professors Bayley and Mendelsohn in their book, *Minorities and the Police: Confrontation in America*, surveyed the beliefs of Denver police officers. They found that:

There is no question that policemen are more anxious in minority neighborhoods than any place else. Asked to indicate in which locations they most expected to encounter antagonistic and hostile response to them, policemen put the minority areas at the top of the list. . . . Race is undoubtedly an important perceptual clue for policemen when they gauge the possibility of harm coming to themselves.\(^{117}\)

The authors also found that policemen approach minority group members cautiously—alert for danger.\(^{118}\) The factor of race is clearly a specific clue in the policeman's world.\(^{119}\) Policemen associate minority status with a high incidence of crime, especially crimes against the person, with bodily harm to police officers, and with a general lack of support for the police.\(^{120}\)

Were all police officers racial bigots in 1968? Absolutely not. But there was sufficient evidence that some, if not many, officers were prejudiced against blacks to justify the Court's attention and its consideration on whether police bias against blacks might influence how street investigations were handled. After realizing that many police officers dislike or distrust blacks, or that officers associate blacks with danger, one should not be surprised to learn that blacks are disproportionately frisked and searched by the police. In a December 1967 article previewing the *Terry* decision for the *New York Times Magazine*, Fred Graham aptly described what happens when a police suspicion standard is combined with the authority to stop and frisk without probable cause: "Negroes, particularly young Negro males, are the ones most likely to be stopped and frisked in these casual, prearrest encounters between police and passers-by—and Negroes resent the fact."\(^{121}\)

The realities of the street investigations in 1968 should have

\(^{117}\) Bayley & Mendelsohn, supra note 116, at 94-95 (footnote omitted).

\(^{118}\) See id.

\(^{119}\) See id.

\(^{120}\) See id.

\(^{121}\) Graham, supra note 39, at 44.
prompted the Court to issue a broad ruling against stop and frisk practices, particularly in light of the obvious abuse that was occurring. Granted, in some places, illegal searches could not be deterred where officers were uninterested in convicting persons found with weapons or contraband.\textsuperscript{122} To this end, the Terry Court emphasized the limits of the exclusionary rule, and noted that the rule was “powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”\textsuperscript{123} Professor LaFave, among others, has argued that the Terry Court properly recognized that it could do little to stop illegal police practices by excluding evidence in a case involving legitimate police investigative techniques. Professor LaFave’s defense of Terry on this point rests on the premise that “it would be harsh medicine indeed to declare [legitimate street investigations] unconstitutional in order to administer an indirect and ineffective slap at [illegal street investigations].”\textsuperscript{124}

Although Professor LaFave raises an important question about the effectiveness of the exclusionary rule in circumstances where the police are determined to violate constitutional precepts, Fourth Amendment norms cannot be constructed around the proclivities of the police to obey the law. The effectiveness of the exclusionary rule’s deterrent function should not control the substantive content of the Fourth Amendment. Otherwise, the Court is constructing a constitutional jurisprudence where “the (exclusionary rule) tail [is] wagging the [Fourth Amendment] dog.”\textsuperscript{125}

\textsuperscript{122} See TIFFANY, supra note 3, at 13, 183-91.
\textsuperscript{123} Terry, 392 U.S. at 14.
\textsuperscript{124} LaFave, supra note 3, at 62.
\textsuperscript{125} Laurence A. Benner, Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective, 67 WASH. U. L.Q. 59, 136-37 (1989). Professor Benner’s analysis regarding the exclusionary rule’s influence in shaping the substantive content of confession law applies equally to the Court’s efforts to regulate aggressive patrol tactics employed by the police:

By allowing the deterrence rationale for the exclusionary rule to control the nature of the [Fourth Amendment] inquiry, the Court thus permits the logic of deterrence to shape the actual content of [the Fourth Amendment] itself. Under this formula any concern for justice is excluded from the equation. Indeed, any attempt to develop a coherent theory of justice under the [Fourth Amendment] is precluded.

\textit{Id.}
Further, Professor LaFave’s second concern about judicial efforts to influence the extent of legitimate street investigations, with “indirect and ineffective slap[s]” at plainly unlawful police actions, should not be given much weight. Indeed, a similar concern was raised and correctly put aside in *Miranda*. Critics of the *Miranda* holding were quick to claim that the Court’s new ruling would not deter blatant police brutality because, as Justice Harlan noted in his dissent, officers “who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.”

Although the *Miranda* Court was powerless to prevent third-degree tactics and police perjury by officers determined to violate the Constitution, fortunately this inherent limitation on the Court’s authority did not preclude the *Miranda* majority from issuing a rule designed to secure the liberty guaranteed by the Fifth Amendment. Nor did it matter that some of the petitioners’ confessions in *Miranda* might not have been declared involuntary under pre-*Miranda* standards, or that the Court lacked empirical proof regarding whether police interrogators actually employed the interrogation techniques that the *Miranda* majority found inimical to the Fifth Amendment’s privilege against compelled self-incrimination. These complaints were

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126 See LaFave, supra note 3, at 62.
128 Id. at 505 (Harlan, J., dissenting).
129 Shortly after *Miranda* was decided, Thomas A. Shriver, the District Attorney of Nashville, sought to have “Miranda” cards prepared for officers. It took well over a year and a half, however, for officers to receive the cards, which forced officers to rely upon memory to deliver the required warnings. Despite the delay, only one confession was ruled inadmissible in the Nashville criminal courts in the two years after *Miranda*. “When the irked District Attorney was asked later how the police managed to persuade the judges in so many cases that the full warning had been properly remembered and given, Shriver snapped: ‘I think they just lied.’” *GRAHAM*, supra note 10, at 138.
130 Justice Harlan dissented in *Miranda*, noting that:

> [T]he tenor of *Miranda* is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. . . . Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward “voluntariness” in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

*See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting). Justice Clark also dissented, arguing that “[t]he materials it refer[red] to as ‘police manuals’ are . . . [n]ot . . . shown by the record here to be the official manual[s] of any police
small matters because *Miranda* was concerned with the "bigger picture."

The Warren Court sought a modulation on police interrogations and used *Miranda* as the vehicle to effectuate the change. *Miranda* was an "epochal case" for several reasons. Without erecting a constitutional bar against all police interrogations (as some hoped or feared), *Miranda* sought to adjust this process by requiring that suspects be informed of their rights and warned about the consequences of talking with the police. Although it is now known that the shift imposed by the Court did not fundamentally alter the way police interrogate suspects or have a detrimental impact on law enforcement when *Miranda* was de-

department, much less in universal use in crime detection. Id. at 499 (Clark, J., dissenting). Also in dissent in *Miranda*, Justice White noted that:

[The Court] has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

Id. at 533 (White, J., dissenting); see also Uviller, supra note 65, at 192 ("[E]ven if the [police manuals on interrogation] were circulated or used in training, as the Court claimed, no one—and certainly not the Court—could know whether the recommended techniques were generally, or even frequently, employed.").

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Repetition and familiarity with the [criminal justice] process soon place the professionals beyond the reach of a police interrogation. Yet more than two decades after ... *Miranda* . . ., the rest of the world remains strangely willing to place itself at risk. As a result, the same law enforcement community that once regarded [Miranda] as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself.

Id. at 199; see also Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 263 (1996);

Even when a rare suspect raises the Miranda stop sign, detectives sometimes roar past it, continuing their questions. Cases in which the police violated a suspect's Miranda rights in this manner have been addressed by appellate courts in 38 states, with mixed results. . . . In California, many police departments, including Los Angeles's, seem to have sanctioned that practice. In bulletins, interrogation law seminars, and training videos, officers have been told that if they continue their interrogation even though a suspect has invoked Miranda, they have little to lose and much to gain.

decided, giving suspects this small advantage was considered a monumental change for the criminal process. But, *Miranda* was also "an attempt to fulfill our nation's commitment to the ideal that the poor and minorities should receive treatment [comparable] to that accorded the rich and white in our legal system."\(^{113}\) With *Miranda*, the Court sought to extend the Fifth Amendment's privilege against self-incrimination to those who needed its protection the most: Persons under arrest, ignorant of their rights, isolated in a police dominated environment and subjected to incommunicado interrogation. Police practices before *Miranda* were simply unacceptable. As the Chief Justice explained for the Court, "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."\(^{124}\)

Comparable circumstances existed regarding stop and frisk practices. By 1968, the custom of stop and frisk was at odds with another of the Nation's cherished principles—the right against unreasonable search and seizure. That a ruling against stop and frisk would not have impeded searches where the police had no interest in prosecution was beside the point. Most forms of stop and frisk, as they were then employed and as the Court well knew, could not be reconciled with the commands of the Fourth Amendment. Like the *Miranda* Court, the *Terry* Court was confronted with a pervasive practice that had been employed for years without neutral restraints or effective judicial supervision. It would have been unrealistic to have expected or required the Court to stop all forms of illegal street searches. A ruling prohibiting stop and frisk would have been a first step in returning Fourth Amendment protection to individuals subjected to street investigations and other aggressive patrol tactics.

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When viewed this way, a precedent declaring frisks unconstitutional under the Fourth Amendment would have paralleled the Warren's Court other landmark criminal procedure cases.\textsuperscript{135} In many ways, \textit{Miranda} and \textit{Gideon v. Wainwright}\textsuperscript{136} were the first steps in the Court's effort to give meaning to the rights guaranteed by the Fifth and Sixth Amendments. Both cases were properly decided, notwithstanding the fact that police coercion and ineffective assistance of counsel continued after the Court's decisions. In fact, another Warren Court decision, \textit{Brown v. Board of Education},\textsuperscript{137} did not immediately stop segregation in the public schools and other public forums, but few have criticized \textit{Brown} because of this fact.

Finally, there is the matter of police safety—which was the driving force behind the \textit{Terry} result. The sixties was an exciting, but turbulent decade. The nation had suffered the convulsions of several urban riots. While \textit{Terry} was pending before the Court, Dr. Martin Luther King, Jr. was assassinated. Four days before \textit{Terry} was announced by the Court, Bobby Kennedy was killed. Many in society felt the Court had gone too far in policing the police. Law enforcement personnel, their supporters, and a large segment of the public felt under attack and accused the Court of coddling criminals and "handcuffing" the police.\textsuperscript{138} Two of the three presidential candidates in the 1968 election were attacking the Court's constitutional criminal procedure cases and blaming the Supreme Court for much of the nation's misery.\textsuperscript{139}

\textsuperscript{135} Cf. \textit{GRAHAM}, supra note 10, at 219 ("The [\textit{Terry}] Court adopted an approach that was almost the opposite of \textit{Miranda}.")

\textsuperscript{136} 372 U.S. 335 (1963) (concluding that the guarantee of counsel under the Sixth Amendment is a fundamental right, requiring states to appoint counsel to indigent defendants).

\textsuperscript{137} 347 U.S. 483 (1954) (holding that segregation in public education is a deprivation of the equal protection of the laws under the Fourteenth Amendment).

\textsuperscript{138} See, e.g., \textit{GRAHAM}, supra note 10, at 8 (discussing findings of a 1968 Gallup Poll which found that 63% of the public believed that the courts were too lenient with criminal defendants). The poll also found that:

[T]wo persons out of three thought the Supreme Court had made a mistake in restricting the police in questioning suspects and obtaining confessions. The Supreme Court's trumpet call for justice had been heard as a call for permissiveness in dealing with criminals, and \textit{Miranda v. Arizona} became the cutting edge of a political thrust against the \textit{Warren Court}. See \textit{id.} at 8-9; see also \textit{BAKER}, supra note 66, at 176 (explaining the police reaction to \textit{Miranda}).

\textsuperscript{139} See \textit{GRAHAM}, supra note 10, at 15 (quoting candidate Richard Nixon as declaring "[a]nd I say, my friends, that some of our courts and their decisions . . . have gone too far in weakening the peace forces as against the criminal forces in this
More to the point, the Court had developed "a strong pro-Negro image" as a result of its "due process revolution," which did not sit too well with segments of the white population that associated blacks with crime.\footnote{140} To quote one narrator of the decade: "The public resentment at the nine men who had changed the relationship between the police and their prey was real enough, the[ir] fear of crime being second only to the[ir] fear of blacks."\footnote{141}

This political background created the "hydraulic pressure" that Justice Douglas spoke of when he noted the influences confronting the Court "to water down constitutional guarantees and [to] give the police the upper hand."\footnote{142} Into this volatile mix came the Terry facts. In retrospect, no one should be surprised that the Court chose the path of least resistance and ruled that police safety justified a reduction of Fourth Amendment freedom. From a constitutional perspective, however, this was the wrong choice. Police safety is a compelling interest, but as the guardian of the Bill of Rights, the Court must ensure that pressing public

country."); id. at 10 (quoting candidate George C. Wallace as saying "[i]f you walk out of this hotel tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday morning, they'll be trying the policeman instead of the criminal").

\footnote{140} It has been observed:

As if it were not unfortunate enough, from the Supreme Court's viewpoint, to have a revolution in defendants' rights coincide with a crime scare, both developments are complicated further by their subtle connection with the problem of the Negro. The Supreme Court was drawn into reforming the criminal law when it set out to give Negroes equal rights before the civil laws and was faced with the absurdity of leaving them with no effective constitutional rights before the criminal law. Having outlawed Jim Crow, the Court had to humble John Law. Many of its landmark decisions on behalf of criminal defendants involved Negroes, often after they had been caught up in that ultimate of racial trials, a prosecution for raping a white woman.

Thus it was apparent that a moving force behind the Supreme Court's efforts to safeguard criminal suspects was its commitment to protect the rights of Negroes . . . .

Whether it was intentional or not, the Supreme Court emerged from this process with a strong pro-Negro image . . . .

Neither of these factors—the rising violent crime or the Negro unrest—were visible when the Supreme Court began its criminal law revolution in 1961, although both were very much in view when the Court handed down \textit{Miranda v. Arizona} in 1966. By then it was clear that the public reaction to both was shaping into a powerful force, and that those who wished to lay responsibility for it at the Supreme Court's door were being heard.

\textit{See id.} at 12-14.

\footnote{141} \textbf{BAKER, supra} note 66, at 224.

\footnote{142} Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).
policy concerns do not override constitutional liberties. The Terry Court failed this task. At bottom, the conflict posed in Terry was not about “police safety” versus “individual rights.” Instead, the difficult decision concerned allocating the burden when an officer’s concern for his safety resulted in conduct that compromised the freedom enshrined in the Fourth Amendment. No matter what the Court did in Terry, one would expect that police officers would always take steps to protect themselves in situations they viewed as threatening to their safety. Thus, as a practical matter, declaring frisks unconstitutional would not have stopped officers from searching persons where they felt threatened. The only thing that would have been prohibited was the admission of evidence in a criminal trial where officers discover weapons or contraband as a result of an illegal search. Put simply, the Warren Court misjudged what was really at stake in Terry: Who would bear the burden of protecting police safety when officers frisk individuals without probable cause, the state or the individual.143

143 See Harris, Frisking Every Suspect, supra note 5, at 18 n.103 (citing cases where officers testified that they routinely frisk persons they came in contact with; describing the author’s experience as a prosecutor-intern and defense attorney where he observed similar testimony; and noting law enforcement manuals urging officers to frisk persons for their own safety); JONATHAN RUBINSTEIN, CITY POLICE 309 (1973). Rubinstein instructs:

At the police academy the distinctions between a frisk and a search are carefully explained to [a recruit], and the limitations of his authority are defined as clearly as the law allows, but his instructors stress that he should not hesitate to frisk anyone if he feels it is necessary. “Any judgment you make is gonna have to be backed up in court, but if you think you should, do it.”

Id. (footnote omitted); cf. Barrett, supra note 3 (quoting a letter from Justice Brennan to Chief Justice Warren concerning revisions to the Chief Justice’s draft opinion in Terry, where Justice Brennan acknowledges that there is little the Court can do to prevent improper frisks during police-citizen encounters even if the Court ruled that frisks without probable cause were unconstitutional: “I recognize that police will frisk anyway, & try to make a case that the frisk was incident to an arrest for public disturbances, vagrancy, loitering, breach of peace, etc. & etc. — but at times I think these abuses would be more tolerable than those I apprehend may follow our legitimating of frisks on the basis of suspicious circumstances[.]”).


The justification the Court provides for upsetting the equilibrium that has finally been achieved—that police cannot and should not balance considerations of public safety against the individual’s interest in avoiding compulsory testimonial self-incrimination—really misses the critical question to be decided. Miranda has never been read to prohibit the police from
Moreover, even if one puts to one side the empirical evidence suggesting that some officers used frisks to undertake searches in cases where there was no apparent threat to their safety, there is another dilemma posed by the "police suspicion" standard endorsed in *Terry*. History teaches us that when law enforcement personnel are given loosely supervised discretionary powers, police behavior will reflect the biases and prejudices of individual officers. The police suspicion standard announced in *Terry* facilitates police abuse. Prior to *Terry*, there was substantial and uncontradicted evidence that stop and frisk tactics were being used against blacks in a manner that made a mockery of the Fourth Amendment. By refusing to declare frisks unconstitutional, the Court undermined a central goal of the Fourth Amendment. The amendment obviously condemns past search and seizure practices that violate constitutional norms, but it also functions to discourage abuses of power in the future. The *Terry* Court was well positioned to recognize the appalling state of affairs regarding stop and frisk practices. The Court could have, and should have, taken the first step to address this situation by ruling that a stop and frisk without probable cause is unconstitutional. Police safety would be served by allowing officers to frisk suspicious individuals without probable cause, however, the creation of a police safety exception meant the loss of Fourth Amendment rights.

asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Id.* (citation omitted).

145 See KENNEDY, supra note 116, at 76-125 (noting that from the days of slavery to the present, blacks have been the victims of police misconduct); Maclin, supra note 43, at 373 n.176 (citing sources that illustrate how unrestricted police power leads to a greater showing of racist police officer behavior).

146 The issue of safety was raised in *Miranda*. The argument was heard that if the police were forced to read suspects their rights, suspects would refuse to talk with the police, and consequently, there would be fewer criminals prosecuted. Such a result would mean that an unidentifiable number of guilty and dangerous persons would return to society to commit more crimes. Justice White's dissent warned that the Court's new rule would "return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." *Miranda*, 384 U.S. at 542. Justice White stressed that "society's interest in the general security is of equal weight" to the Fifth Amendment's privilege against compelled self-incrimination. *Id.* at 537. Of course, these claims were rejected by a majority of the Court.
V. CONCLUSION

For some, the Terry Court made the right choice. The need for police safety justified the loss of Fourth Amendment freedom. But those that have been the most vocal defenders of Terry tend to come from socio-economic and racial backgrounds that are predominately free from police harassment. For many blacks and other disfavored groups, however, the Terry Court wrongly subordinated their Fourth Amendment rights to police safety. The Court's failure to treat as dispositive the clear correlation between stop and frisk and the violation of their Fourth Amendment rights only served to remind blacks and other minorities of their second-class status in America.

147 Cf. SKOLNICK, supra note 1, at 219 ("All too often writers on the subject [of criminal procedures rules] fail to give sufficient consideration to the simple notion that legal practices must have a differential impact in a stratified and racially constructed society."). Anthony Amsterdam has also observed:

The inhabitants of a black ghetto, unlike those of a white or middle-class neighborhood, are able to identify with the criminal suspect instead of with the police. They know that it is quite possible, at any time, that the police will treat any one of them as a suspect—a possibility that simply never occurs to most white or middle-class people. As a result, they are concerned with the way in which the police treat suspects.

Amsterdam, supra note 54, at 811; see also Brent Staples, Growing Up to Fear the Law, N.Y. TIMES, Mar. 28, 1991, at A1 (describing how in 1970, the Philadelphia police arbitrarily searched the author's car after the author and his friends asked for directions to Broad Street, providing an example why "with reason, African-Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way").