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The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"

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THE AGE OF UNREASON: THE IMPACT OF REASONABLENESS, INCREASED POLICE FORCE, AND COLORBLINDNESS ON TERRY: "STOP AND FRISK"

Omar Saleem*

Introduction

Current general public-police encounters are reminiscent of a dialogue in J.R.R. Tolkien's classic fantasy novel The Hobbit, in which a hobbit named Bilbo Baggins, who lived under the ground, was visited by the wizard Gandalf. It was a sunny and pleasantly peaceful day with plush green grass when Bilbo said, "Good Morning" to the wizard Gandalf, and he meant it. Tolkien describes how the wizard looked at Bilbo from under long bushy eyebrows that stuck out further than the brim of his shady hat [and asked], "What do you mean?" . . . Do you wish me a good morning, or that it is a good morning whether I want it or not; or that you feel good this morning, or that it is a morning to be good on? "All of them at once", said Bilbo.¹

Similar to the dialogue between the hobbit and the wizard, the rules governing general-public police encounters are misleading, confusing, and susceptible to numerous interpretations. The Supreme Court has stated that its confession law is "murky and difficult," and that its search and seizure law is "intolerably confusing."²

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This position was echoed by Judge Harold Rothwax, a notable critic of the criminal justice process, who contends that the rules governing general public-police encounters are ambiguous and that both society and the police are reduced to "a guessing game on the street and in the courtroom."\(^3\)

Current general public-police encounter laws are of three types and are basically governed by two seminal cases decided during the Warren Court era. The types of encounters are voluntary, \textit{Terry} stop and frisk, and arrest.\(^4\) The two seminal cases, \textit{Terry v. Ohio}\(^5\) and \textit{Miranda v. Arizona},\(^6\) supposedly provide distinct and parallel analyses in which \textit{Terry} governs brief and minimally intrusive seizures and \textit{Miranda} governs custodial arrests. Through the years \textit{Terry} stop and frisk practices have shifted from a paradigmatic to a multifaceted stop and frisk resulting in an overlap with the traditional \textit{Miranda} analysis. The \textit{Miranda} and \textit{Terry} decisions, read conjunctively, result in confusion and the line between a formal arrest and a \textit{Terry} stop and frisk becomes blurred.\(^7\) This blur is the result of the lower courts expansion of the \textit{Terry} decision and the Supreme Court's reliance on an artificial reasonableness standard and colorblind constitutionalism.

The expansion of individual rights during the criminal pretrial process was the benchmark of the Warren Court.\(^8\) The \textit{Miranda} custodial interrogation and \textit{Terry} stop

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\(^3\) \textit{JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE} 237 (1996). He especially criticizes how the criminal justice process has lost respect for the search for truth. \textit{See id.} at 64.

\(^4\) \textit{See United States v. Cooper}, 733 F.2d 1360, 1363 (10th Cir. 1984). The voluntary encounter is communication without coercion or detention.

\(^5\) 392 U.S. 1 (1968).


\(^7\) \textit{See generally United States v. Glenna}, 878 F.2d 967 (7th Cir. 1989) (describing the difficulty in applying \textit{Terry}).


Ironically, the Warren Court itself created the overlap and confusion. In \textit{Chimel v. California}, 395 U.S. 752, 767 (1969) and \textit{Katz v. United States}, 389 U.S. 347 (1967), the Warren Court said all searches and seizures require warrants and probable cause. \textit{See Chimel}, 395 U.S. at 767; \textit{Katz}, 389 U.S. at 357-59. However, in \textit{Terry v. Ohio}, 392 U.S. 1 (1966), the Warren Court stated that, although a frisk is a search, the officer does not need probable cause. \textit{See id.} at 20; \textit{see also} Akhil Reed Amar, \textit{The Future of Constitutional Criminal Procedure}, 33 AM. CRIM. L. REV. 1123, 1126 (1996) ("The Warren court told
and frisk standards form the vortex of the controversial debates related to the constitutional rights of the individual. In this article, I attempt to address the debate as it relates to the inadequacy of the Terry stop and frisk standard. In part I, I trace the history of the Fourth Amendment, and suggest that a societal fear of crime has prompted the Supreme Court to dilute the probable cause standard for a reasonable suspicion standard for stop and frisk, i.e., search and seizures. I then provide an overview of the Terry trilogy to demonstrate how the Supreme Court narrowly defined the perimeters of a stop and frisk allowing for limited intrusion into an individual's rights of privacy and dignity based upon reasonable suspicion. In part II, I discuss the touchstone of the Fourth Amendment — reasonableness. I propose that the reasonableness standard fails in several respects: it presupposes the existence of a quintessential reasonable person; it is enforced in a biased manner primarily to protect police without regard to individual rights; and, it fails to consider the expansion of Terry stops to include greater police force. In part III, I discuss how the reasonable person standard for Fourth Amendment searches and seizures is particularly inappropriate for Black Americans. I suggest that the reasonable person standard is insufficient due to selective race-based Terry stops which place Blacks in custody during most police encounters. I provide several scenarios to illustrate this point. My contention is that the Supreme Court has been amiss in remedying the inadequacies of the search and seizure laws and has merely referred to an equal protection remedy — which the Court has consistently refused to provide. I conclude that the future of search and seizure laws are destined to become more confusing and arbitrary unless the Court establishes rules and guidelines for the courts, police and the general public in the spirit of the Fourth Amendment.

I. Background

A. Fourth Amendment Past and Present

The historical underpinnings of the Fourth Amendment are rooted in the American Colonists' complaints against England in the late 1700s. The English Parliament issued writs of assistance which allowed customs officers to search for smuggled goods without judicial authorization and specified search limits. Customs officers were empowered to conduct warrantless searches and seizures for illegal rum, slaves, religious deviance, poaching, vagrancy, and evidence of tax evasion. The searches
and seizures were pursuant to general warrants and writs of assistance, each of which
gave the officers unbridled discretion to search and seize.\textsuperscript{13}

Unbridled discretion fostered abuse on the part of the officers, and prompted
attorney James Otis to represent numerous Boston merchants in 1761 who were
subjected to arbitrary government searches and seizures. Otis argued that a man's
home is his castle and that the writs improperly lacked both accountability to a
neutral person and a particularity requirement which described the person, place or
thing searched or seized.\textsuperscript{14} John Adams later claimed that Otis' remarks precipitated
the American Revolution.\textsuperscript{15} Perhaps both Otis and Adams were correct because the
framers of the Fourth Amendment heeded Otis' warnings and feared an arbitrary,
capricious and overreaching government.\textsuperscript{16} The framers sought protection against
unreasonable searches and seizures and required that judicial officers issue warrants
based upon probable cause, supported by oath or affirmation and particularly describe
the place, person, or thing to be searched or seized.\textsuperscript{17} Their worthy aspirations to
guarantee these protections produced two clauses in the Fourth Amendment.\textsuperscript{18}

The first clause of the Fourth Amendment prohibits unreasonable searches and
seizures,\textsuperscript{19} while the second clause requires probable cause and particularity for

\textit{Fourth Amendment to the United States Constitution, 37 WM. & MARY Q. 371, 390 nn.84-85, 391
(1980).}

\textsuperscript{13} The Navigation Act of 1662 directed officers to "go into any House, Shop, Cellar, Warehouse
or Room . . . and in case of resistance, to break open Doors, Chests, Trunks, and other Packages, there
to seize and from thence to bring any Kind of Goods or Merchandise whatsoever, prohibited and
uncustomed." The Navigation Act of 1662, 13 and 14 Car.II, ch.11 § 5 (1662), cited in ROBERT M.
BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE EXAMPLES AND EXPLANATIONS 13 n.1 (2d ed.
1996).

\textsuperscript{14} See William W. Greenhalgh & Mark J. Yost, In Defense of the "Per Se" Rule: Justice Stewart's
Struggle to Preserve the Fourth Amendment's Warrant Clause, 31 AM. CRIM. L. REV. 1013, 1033
(1994).

\textsuperscript{15} See DARIEN A. McWHIRTER, SEARCH, SEIZURE AND PRIVACY 2 (1994).

\textsuperscript{16} The detrimental impact on the human psyche from an arbitrary, capricious and overreaching
government was described by Justice Jackson 138 years after the adoption of the Fourth Amendment in
an opinion in which he wrote:

\begin{quotation}
[The rights in the Fourth Amendment are not] mere second class rights but belong in the
catalog of indispensable freedoms. Among deprivations of rights, none is so effective in
cowing a population, crushing the spirit of the individual and putting terror in every heart.
Uncontrolled search and seizure is one of the first and most effective weapons in the
arsenal of every arbitrary government. And one need only briefly to have dwelt and
worked among a people possessed of many admirable qualities but deprived of these
rights to know that the human personality deteriorates and dignity and self-reliance
disappear where homes, persons and possessions are subject at any hour to unheralded
search and seizure by the police.
\end{quotation}


\textsuperscript{17} See Greenhalgh & Yost, supra note 14, at 1017-18.

\textsuperscript{18} The Fourth Amendment provides:

\begin{itemize}
  \item The right of the people to be secure in their persons, houses, papers, and effects, against
  unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but
  upon probable cause, supported by Oath or affirmation, and particularly describing the
  place to be searched, and the persons or things to be seized.
\end{itemize}

\textit{U.S. CONST. amend. IV.}

\textsuperscript{19} This clause safeguards the privacy and security of individuals against arbitrary government
warrants. Judicial interpretations of the Fourth Amendment vary and have established two diametrically opposed models concerning the relationship between the "reasonableness clause" and the "warrant clause" of the Fourth Amendment. Proponents of the exclusive model construe the clauses as independent of each other and hold that the probable cause requirement of the Fourth Amendment is limited to searches with warrants. The opposing position, the inclusive model, asserts that the warrant clause modifies the reasonableness clause, and therefore every search must satisfy the particularity and probable cause requirements of the Fourth Amendment. This construction of the Fourth Amendment mandates that every search and seizure is conducted pursuant to a valid search warrant, a warrant exception, or probable cause. Both models reflect a perceived role of the criminal justice system. The inclusive model is interconnected with the due process theory of criminal justice, which focuses on the possibility of human error and the need to protect individuals from state coercion and abuse. The focus is on human dignity and autonomy. The exclusive model is interconnected with a crime control theory, which places emphasis on the efficiency of the criminal justice process to investigate crimes, apprehend suspects, adjudicate cases, and sentence after adjudication. Law and order become the mechanisms to avoid societal breakdown from a loss of public confidence in the criminal justice system.

The Supreme Court has embraced the exclusive model, embedded in a crime control theory, which has gained momentum from a societal fear of crime and illegal drugs. The result is a transmutation of the framers' intent to protect the individual from government intrusions to an emphasis on law and order, the drug war, and the protection of one member of society from another. The Court, in its efforts to
champion effective crime control, expanded the reasonableness clause of the Fourth Amendment to allow government intrusions of an individual's privacy interests without a warrant or probable cause. The contortion of the reasonableness clause has its genesis, in part, in the Supreme Court's formulation in *Terry v. Ohio* of a stop and frisk based upon reasonable suspicion.

B. Trilogy: *Terry, Sibron, Peters*

The stop and frisk procedure dates back to 1942 when several state legislatures adopted the Uniform Arrest Act. The Act allowed police officers to stop and frisk a person in public for weapons if there was reasonable ground to suspect that the person was involved in a crime and posed a danger to the public. In 1967, the police stop and frisk procedure was proposed by the American Law Institute, a seizure of juveniles pursuant to curfew statutes. Are such juvenile curfew statutes primarily enacted to protect juveniles or to protect society from juveniles? For a discussion on this debate and the numerous states with juvenile curfews, see William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major Cities, 41 Crime & Delinqu. 347* (July 1995); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime,* 107 U. Pa. L. Rev. 66 (1958).

28. Professor Dressler has suggested that the Fourth Amendment was once considered a monolith, and the monolith was cracked with *Camara v. Municipal Court,* 387 U.S. 523 (1967), and broken with *Terry v. Ohio,* 392 U.S. 1 (1968). See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 185 (1991). Both cases emphasized reasonableness rather than probable cause for searches and seizures. In *Camara,* the Court decided that probable cause was based upon a reasonableness standard which weighs the government intrusion against the individual's privacy interests. See *Camara,* 387 U.S. at 534-35. This was a revolutionary approach which appears at odds with the framers' intent and attorney Otis' eloquent speech to protect the rights of the individual. See supra notes 14-15 and accompanying text for a discussion about the framers' intent.


31. See id.

32. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tentative Draft No. 1, 1966).
presidential commission, and numerous states. The prerogative of the police to deploy stop and frisk based upon reasonable suspicion was reviewed by the Supreme Court for the first time in the 1968 case of Terry v. Ohio.

In Terry, Officer McFadden was patrolling downtown Cleveland, Ohio, at 2:30 p.m. in plain clothes and noticed two men standing on a street corner. McFadden
testified that the men behaved suspiciously: they did not make eye contact with him; they walked past a store and looked into the window approximately twenty times and returned to the corner to confer with each other; and, after they were joined by a third man the pacing, observing and conferring continued. McFadden suspected that the men were planning a robbery, and approached to ask their names. He believed the men were armed, and after they mumbled something in response to his inquiries he spun Terry around and patted down the outside of his clothing. He felt a gun, ordered the three men into the store, reached inside Terry's coat and removed a pistol. Terry was convicted of carrying a concealed weapon.

The Court held that the stop and frisk was reasonable and did not violate the Fourth Amendment although Officer McFadden lacked both a warrant and probable cause. Chief Justice Warren conceded that a search and seizure of Terry had occurred but indicated that a narrowly drawn police authority permitted a search and seizure without probable cause. An officer is not required to be absolutely certain that the individual is armed. The stop is justified when the officer has reasonable suspicion, based upon articulable facts, that criminal activity is afoot. Furthermore, a frisk is allowed if the officer reasonably believes that the person is armed and dangerous.

The Court decided Terry with the companion cases of Sibron v. New York and Peters v. New York. The three cases formed the Terry trilogy. The appellants in both the Sibron and Peters cases challenged a New York statute which permitted the police to conduct stop and frisks. Appellant Sibron was observed continuously from 4 p.m. to midnight by a New York City uniformed police officer. Sibron had several conversations with numerous persons who were known by the police as participants in an illegal drug trade. The officer was unable to hear the conversations and did not notice an exchange of money or drugs. Sibron went into a restaurant where he ordered pie and coffee, and while he was eating the officer approached him, told him to accompany him outside and stated, "You know what I am after." Sibron mumbled something in return and reached into his pocket while the officer simultaneously reached into Sibron's same pocket. Sibron was convicted of the unlawful possession of heroin found in his pocket.

The Court held that the stop and frisk was unreasonable due to insufficient evidence that the officer reasonably feared for his safety. His statement, "You

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36. See id. at 28-30.
37. See id.
38. Justice Douglas in his dissent, agreed that Terry was seized and that a frisk is a search within the meaning of the Fourth Amendment. See id. at 35-38 (Douglas, J., dissenting). Therefore, he added, a stop and frisk is constitutional only if there is probable cause that a suspect has committed or is about to commit a crime. See id. (Douglas, J., dissenting).
41. See supra note 34.
42. See id. at 44; LaFave, supra note 40, at 48-49.
know what I am after," suggested he was searching for drugs rather than conducting a protective frisk for weapons. Sibron's discussions with participants in an illegal drug trade over an eight-hour period failed to justify an officer's reasonable fear of life or limb to justify a stop and frisk because there was no indication that criminal activity was about to occur or had occurred. The Court insightfully stated, "So far as he [the officer] knew, they might indeed have been talking about the World Series."

The final part of the trilogy was the Peters case, in which a New York police officer was in his sixth floor apartment at 1 p.m. when he heard a noise and looked through his peephole and saw two men tiptoeing toward the stairs. He thought they were attempting to burglarize an apartment and when he opened and then slammed his door, the two men ran. The officer pursued them and caught Peters on the stairs. Peters said he was visiting a girlfriend, but refused to disclose her name because she was married. The officer frisked Peters and detected an object which felt like a knife in his pocket. It was an envelope containing burglar's tools. Peters was convicted of possessing burglary tools with intent to use them in the commission of a crime. The Court was undeterred by the fact that there was probable cause to arrest, and that the burglar tools would have been discovered in a search incident to a lawful arrest. It upheld the search and seizure of Peters as a lawful stop and frisk based on reasonable suspicion. Peters was in a public place, the officer had reasonable suspicion based upon articulable facts that criminal activity was afoot, and he reasonably feared for his safety. His suspicion was based upon loud noises which suggested a forced entry into an apartment, and strangers who tiptoed through the hallway and fled when their presence was discovered.

The Terry trilogy expanded the perimeter of the Fourth Amendment to allow a stop and frisk, i.e., a search and seizure, based upon reasonable suspicion rather than probable cause. The purpose of a stop and frisk is to allow an officer to pursue an investigation without fear of violence, rather than a ruse to discover evidence of a crime. The justification for the stop is based on a reasonable suspicion and is justified by an objective manifestation of articulable facts suggesting that the person stopped has committed, or is about to commit, a crime. The frisk is strictly limited

44. See id. at 64.
45. See id. at 64.
46. Id. at 47.
47. See Peters v. New York, 392 U.S. 40, 49 (1968). A quarter of a century after the Terry trilogy, the Court extended Terry stop and frisk procedure to allow an officer to reach into an individual's clothing and seize anything reasonably believed to be contraband. See Minnesota v. Dickerson, 508 U.S. 366, 373 (1993).
49. See id. at 66-68.
50. See id.
51. See Adams v. Williams, 407 U.S. 143, 146 (1972). The Adams Court expanded Terry when it found that the officer had reasonable suspicion although he was informed of criminal activity by an informant's hearsay information about another person in a high crime neighborhood. See id. at 147. In Terry, the officer's basis for reasonable suspicion was based on his own observation. See Terry v. Ohio, 392 U.S. 1, 5-8 (1968).
52. See Brown v. Texas, 443 U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 661 (1979);
to what is reasonably necessary for the discovery of weapons, and the officer must have an immediate safety concern. Each case in the Terry trilogy involved a minor intrusion. However, since the trilogy in 1968, both the streets and the description of a Terry stop have changed. The federal courts have shifted Terry stop and frisk from the weaponless grab and spin in Terry, and the chase and apprehend in Peters, to longer detentions and increased police force. This shift results from a piecemeal case-by-case development of Fourth Amendment jurisprudence with insufficient guidance from the Supreme Court which has repeatedly referred to a reasonableness standard.

II. Reasonableness and the Fourth Amendment

Whether a person is seized for Fourth Amendment purposes is based upon whether a reasonable person would feel free to leave a police encounter rather than a per se rule which focuses on the particular individual or a rule which prohibits guns and handcuffs during a Terry stop and frisk. Furthermore, the time frame for a Terry stop and the force used must be reasonable. The officer must act reasonably in the manner and scope of the detention. In effect, the touchstone of the Fourth Amendment is reasonableness.

Reasonableness is measured by the totality of the circumstances which emphasizes a fact-specific inquiry rather than a bright-line rule. The Supreme Court has
indicated that bright-line rules for Fourth Amendment jurisprudence are contrary to the Court's traditional contextual approach, and that common sense and ordinary human experience govern over rigid criteria. The rationale is that the police encounter a multitude of situations which makes bright-line tests impractical. The reluctance to adopt bright-line rules reflects the premise that law is something more than a compilation of rules; laws govern life and the essence of life is change. In Fourth Amendment analysis, the Supreme Court has rejected a bright-line test and used a common-sense or reasonableness approach. Because the term "reason" has its roots in Sir Edward Coke's assertion in the seventeenth century that reason is the soul of the law, his position has reinforced the legal profession's reliance on such terms as reasonable time, reasonable price, reasonable mistake, reasonable care, reasonable good faith, beyond a reasonable doubt, and the reasonable person standard.

One is seized, for purposes of the Fourth Amendment, if a reasonable person believes he or she is not free to leave. The reasonable person is the hypothetical individual who implements "those qualities of attention, knowledge, intelligence and judgment which society requires of its members . . . ". The reasonable person standard is used to determine whether an individual's conduct comports with the beliefs and actions of the reasonable person. The reasonable person test has its limitations.

A. Limits of Reason

Reasonableness is considered as either an objective or subjective standard. The objective standard focuses on the hypothetical reasonable and prudent person, and the

frisk" and for probable cause to make a warrantless arrest are both subject to de novo review. See Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996).


62. This view was expressed by Roscoe Pound in his discussion of the difficulties in establishing rules for the criminal justice system. See Roscoe Pound, Criminal Justice in America 36 (1945).


64. See id.


67. Restatement (Second) of Torts § 283(b) (1965).

68. The reasonable person standard impacts both criminal law and Fourth Amendment jurisprudence. In criminal law, the mental state of the actor is significant because crimes generally require both an act and mental state. See Morissette v. United States, 342 U.S. 246, 251 (1952); United States v. Fox, 95 U.S. 670, 680 (1878). The law of criminal self-defense is not focused on whether a person's belief is correct, but rather whether the belief that force was necessary was reasonable. See Model Penal Code § 3.04 cmt. at 15 & § 3.09 cmt. at 77-79 (Tentative Draft No. 8, 1958).
particular traits of the individual are irrelevant. The opposing position is the subjective standard which focuses on the mental state of the particular person. The subjective standard analysis shifts from the reasonable and prudent person towards an examination of the particular individual's state of mind. The subjective standard places the fact-finder in the shoes of the individual, and the individual's beliefs are examined from the mental and physical perspective of the individual.

The above objective and subjective standards are polar opposites, but tort law has remedied the analytical shortcomings of adopting either view to the exclusion of the other with an objective test for reasonableness which is partially subjective because it includes a consideration of the qualities of the particular person. This approach is also adopted in the Model Penal Code for manslaughter. The Code provides two elements to mitigate murder to manslaughter: (1) extreme mental or emotional disturbance and (2) an objective/subjective test to determine the reasonableness of the disturbance. The Model Penal Code "objective" test for reasonableness has an element of subjectivity which allows the fact-finder to look both at the reasonable person and at the perspective of the particular individual. Therefore, while the extreme emotional disturbance to mitigate murder from manslaughter must be reasonable, the reasonableness is determined from the individual's viewpoint.

Fourth Amendment jurisprudence, unlike tort law and the Model Penal Code, establishes an objective test for seizure and solely examines whether a reasonable person would feel free to leave a police encounter. Such an objective test is impractical for two reasons. First, the Supreme Court's reliance on reasonableness as the standard for the Fourth Amendment and its reluctance to adopt a bright line test for Fourth Amendment searches and seizures is unworkable. It is unworkable because the standard is enforced with bias, and reasonableness becomes difficult to ascertain when lower courts have allowed greater force and longer detentions during Terry stops. Second, the reasonable person is nonexistent because the general public does not feel free to walk away from the police. The fear of the consequences of walking away is particularly acute among Blacks who suffer a history of oppression.
B. Limits of Reason — Bias

The Supreme Court could develop a per se rule that if guns and handcuffs are used for a would-be Terry stop and frisk that both probable cause and a unique warning are needed. The American Law Institute has offered a bright-line rule that an officer provide any person stopped with the first two Miranda warnings before any "sustained questioning." Justice Marshall, in a concurring opinion, argued for a rule that any detention longer than a few minutes, as mandated by Terry's brevity requirement, is presumptively a de facto arrest. He stated, "[i]n my view, the length of the stop in and of itself may make the stop sufficiently intrusive to be unjustifiable in the absence of probable cause to arrest." Justice Marshall's position heeds the framers warnings of an arbitrary, capricious, and overreaching government because his position places probable cause as the rule, rather than the exception, for a valid search and seizure.

Despite the logical appeal of the above bright-line rules, it is unlikely that the Supreme Court will adopt such bright-line rules because the Court has consistently stated that bright-line tests are inimical to Fourth Amendment jurisprudence. Ironically, the Court's position has been inconsistent because it has adopted a significant number of bright-line rules for the Fourth Amendment to ensure police safety while providing minimal consideration of the framer's intent to protect the individual against an arbitrary and capricious government.

In United States v. Robinson, an officer, based on his prior contact with the defendant, believed that the defendant was operating a vehicle without a valid driver's license. The officer stopped the defendant's car and ordered him and all of the occupants out of the car. The officer then informed the defendant that he was under arrest, and then searched him incident to that arrest. Inside the defendant's coat pocket was a cigarette package which contained heroin. The Court held that a cigarette package found on the defendant's person could be searched because no other justification than an arrest is needed for a search. The officer did not need probable cause, evidence of a weapon, or any other justification to conduct the search incident to the lawful arrest. The Court established the bright-line rule that the arrest itself justifies the search.

The Court later expanded the search incident to an arrest bright-line rule enunciated in Robinson to justify a search beyond the area in control of the person lawfully arrested. In New York v. Belton, when an officer stopped the defendant's car for speeding, he smelled burnt marijuana and noticed an envelope on the floor

75. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(5) (1975).
77. Id. at 692 (Marshall, J., concurring). He also stated that "Terry 'stops' are justified, in part, because they are stops, rather than prolonged seizures." Id. (Marshall, J., concurring).
79. See id. at 235.
80. See id.
81. See id. at 236.
marked "supergold". The four occupants of the car, none of whom owned the car, were told to get out of the car and were arrested for marijuana possession. The officer separated the men into four different areas and searched them. After he searched them, and while they were some distance from the car, he searched the car's interior. The Court held that *Chimel v. California* applied and adopted a bright-line rule which allows a search of an automobile's interior if the search is incident to a lawful arrest. A search of the car did not require probable cause, reasonable suspicion, or risk of harm to the officer or the general public. Instead, as a bright-line rule, the Court held that the officer merely needed a lawful arrest for the subsequent search of the car's interior, even though the officer had separated the men and moved them away from the car.

Other bright-line rules for Fourth Amendment jurisprudence arose out of the *Pennsylvania v. Mimms* and *Maryland v. Wilson* decisions. The two decisions establish a bright-line rule which enables an officer to order occupants out of a lawfully stopped car, regardless of whether the occupant of the car is a driver or passenger, even without probable cause or reasonable suspicion to believe that any passenger has committed or is about to commit a crime. The Court balanced the individual's liberty interest when the car is already legally stopped against the officer's safety and decided that a bright-line rule was appropriate to protect the police. In the same term that the Court decided *Wilson*, it also held in *Ohio v. Robinette* that the police can search a person's car without first telling the person that he or she is free to leave.

The Court has, in effect, established several bright-line rules for Fourth Amendment searches and seizure. The rules were designed to protect the police. This premise of protecting the police has also allowed the police to use greater force during a *Terry* stop.

### C. Limits of Reason — Increased Force

The description of a stop and frisk articulated in the *Terry* trilogy has expanded from a paradigmatic to a multifaceted stop and frisk. The multifaceted expansion is primarily due to the crimes, violence and death associated with illegal drug usage.

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83. 395 U.S. 752 (1969). The Court in *Chimel* overruled the case-by-case reasonableness standard from *United States v. Rabinowitz*, 339 U.S. 56 (1950), and established a "lunge" rule which confines a search incident to a lawful arrest to areas in which an arrestee could reach for weapons or destroy evidence. See *Chimel*, 395 U.S. at 762-63.

84. See *Belton*, 453 U.S. at 460.

85. See id.

86. 434 U.S. 106 (1977). In *Mims*, the driver was ordered out of the car. See id. at 884.

87. 117 S. Ct. 882 (1997). In *Wilson*, the passengers were ordered out of the car. See id. at 884.


89. See id. at 419.

90. The highest arrest rates in the United States for 1993 were for driving under the influence, larceny, simple assault and drug abuse (each exceeding one million). See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS (1993). In 1989, possessors and traffickers represented roughly 20% to 24% of the 395,553 inmates of the nation's county and municipal jails and an estimated 25% to 35% of the 710,054 convicts serving sentences in the state and federal
The war on drugs has influenced the federal courts to expand *Terry* from a brief and minimally intrusive search and seizure into detentions which involve greater police force, guns, lengthy detentions, and handcuffs. The federal courts' expansion of *Terry*, coupled with the Supreme Court's contraction of *Miranda*, has created an overlap of the rules governing the *Miranda* and *Terry* decisions.

In *United States v. Taylor*, defendants Taylor and Pressler were convicted of the conspiracy to manufacture and attempt to manufacture amphetamines. Defendant Taylor was involved in the operation of amphetamine laboratories for several years and his co-conspirator, Pressler, assisted in the purchase of precursor chemicals from chemical supply companies. Agents of the Drug Enforcement Agency (DEA) obtained a warrant to place a beeper inside a box of chemicals ordered by Pressler. The box was initially transported to Taylor's sister's house, and later to his house—a routine Taylor frequently followed. The DEA agents obtained warrants to search both houses, and in his sister's house they found receipts for various chemicals. A search of Taylor's house necessitated a closing off of his neighborhood to avoid the public's exposure to dangerous chemicals. The agents disguised themselves as fire fighters, informed the residents that a propane truck had overturned, and asked them to evacuate the area. Taylor and Pressler were in Taylor's truck and were imprisoned. Drug prohibition forced our penal institutions to warehouse somewhere between 260,000 and 343,000 people who otherwise would not have burdened the system. If we add those who were imprisoned not for drug crimes but for drug-related crimes (such as crimes to get money, or murders and assaults arising out of the drug business), we could include another 150,000 to the total. In sum, half of the penal population is there from drug related charges. See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2611 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993)). The nature of a *Terry* stop will undergo further challenges from the spread of drugs and the advancement of technology which will enable the police to scan citizens from yards away with electronic devices with electromagnetic emissions and ascertain whether the person has a concealed weapon. See Erik Milstone, *New Devices Let Frisks Go Undercover*, A.B.A. J., Aug. 1996, at 32.


92. In *New York v. Quarles*, 467 U.S. 649 (1984), the Court stated, "[i]n recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desired clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our *Miranda* holding." *Id.* at 658 (citing Minnesota v. Murphy, 465 U.S. 420 (1984)); see also *Fare v. Michael C.*, 442 U.S. 707 (1979) (refusing to extend rights to counsel under *Miranda* to request to see probation officer); *Beckwith v. United States*, 425 U.S. 341 (1976) (permitting no expansion of *Miranda* right to noncustodial interviews).

93. 716 F.2d 701 (9th Cir. 1983).

94. See *id.* at 704. Many of the precursor chemicals are obtainable over-the-counter from chemical supply companies. In fact, 33% to 50% of the revenues for chemical supply companies are generated from the sale of precursor drugs that companies know are illegally sold. See Omar Saleem, *Killing the Proverbial Two Birds with One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685, 698-99 (1996).

95. See *Taylor*, 716 F.2d at 705.

96. The chemicals used in clandestine drug laboratories pose a danger of toxicity, ignitability, corrosivity, and explosivity. See *id.* at 698.
stopped by the agents a few yards from Taylor's house. Taylor, who was known by
the police as armed and dangerous, approached the agents and asked why the fire
trucks were in the area. The officers drew their guns and arrested Taylor while
Pressler sat in the front passenger seat of the truck. The officers ordered Pressler
to raise his hands, but he moved surreptitiously and failed to comply after three such
demands. He was handcuffed, frisked, and forced to lie face down in a ditch for
approximately three to five minutes.99

Pressler's detention necessitates an inquiry into whether the force used by the
police to detain was a Terry stop and frisk or a custodial arrest.99 The Terry
decision involved a brief and minimally intrusive stop and frisk. Terry was simply
grabbed, spun around, and his outer garment was patted down. In Terry, Officer
McFadden did not draw his gun during the detention of Terry and his accomplices
who were suspected of planning to commit a robbery.100 Officer McFadden
handcuffed Terry after he arrested him. Paradoxically, Pressler's detention involved
drawn guns, handcuffs, and lying face-down in a ditch for approximately three to five
minutes.101 The Taylor Court held that neither handcuffs nor forcing a suspect to
lie face down at gun point transforms a Terry stop and frisk into an arrest.102 The
rationale was that the use of handcuffs and guns was reasonable because Pressler
failed to obey orders to raise his hands, made furtive movements inside the truck, and
because of the low ratio of police to suspects.103 The court found that the interests
in effective law enforcement outweighed the individual's liberty and privacy
interests,104 and that the stop and frisk of Pressler was reasonable at its inception
and in its scope.105

The enlargement of a Terry stop and frisk to include drawn guns and handcuffs
depicts the ambiguity of the permissible scope of a Terry stop and frisk and the
current insufficient framework to distinguish a stop and frisk from an arrest. There
is a lack of guidance about where a Terry stop and frisk ends and a full custodial
arrest begins. Clarity is important lest the police arrest individuals based on
reasonable suspicion rather than probable cause. The lack of clarity conflicts with the
constitutional protections of the Fifth and Fourth Amendments, and the police and
general public have difficulty in determining whether an encounter is a stop and frisk
or a custodial arrest.

97. See id. at 705.
98. See id. at 709.
99. See id. at 706-09.
100. See Terry v. Ohio, 392 U.S. 1, 6-7 (1968).
101. See Taylor, 716 F.2d at 709.
102. See id.
103. See id. In Taylor, there were two suspects and two or three police officers. See id. at 708.
104. An individual's assertion of the Fourth Amendment protection against unreasonable searches
and seizures requires a legitimate privacy interest. See Katz v. United States, 389 U.S. 347, 361 (1967)
(Harlan, J., concurring). Such interests exists when the person has an actual subjective expectation of
privacy, and society recognizes that expectation as reasonable. See id. (Harlan, J. concurring).
105. See Taylor, 716 F.2d at 707-09.
In *United States v. Griffin*, the defendant transported cocaine from Houston, Texas, to Oklahoma City, Oklahoma. The Oklahoma City Police received information which led them to believe that Ms. Griffin fit the "drug courier profile," because she and another woman frequently bought one-way tickets a few minutes before their flight departed and paid cash for their tickets. Ms. Griffin passed through the airport security gate and the security personnel discovered bullets in her purse. She was escorted to a briefing room where she consented to a search of her luggage which alerted a drug detection dog to the scent of a controlled substance. Ms. Griffin and her companion were told that they were free to leave, but the police requested time to count the cash inside the luggage which totaled $38,500. The police lacked probable cause to arrest, and again told the women they were free to leave. Another officer entered the briefing room and asked Ms. Griffin if he could speak with her. She agreed to speak with him, and they went into his private office where he repeatedly asked about the source of the money. She admitted the money was drug related, told him drugs were in her car, and consented to a search of her purse which contained six hundred dollars. The officer then drove Ms. Griffin to her car, where he obtained written consent to search, and found cocaine in the glove compartment of her car. She was convicted of numerous drug related charges and sentenced to four concurrent life sentences. On appeal, Ms. Griffin argued that she was in custody from her initial encounter with the police, and that all the evidence should be suppressed because she was not given *Miranda* warnings. The court agreed and held that a reasonable person in Ms. Griffin's situation would have understood herself to be in custody and not free to leave.

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106. 7 F.3d 1512 (10th Cir. 1993).

107. See id. at 1514-15. Four years earlier, the Supreme Court acknowledged the "drug Courier profile" as an articulable fact, which taken together with natural inferences from those facts, creates a reasonable suspicion that criminal activity is afoot to justify a stop and frisk. See *United States v. Sokolow*, 490 U.S. 10, 10 (1989). This case also extended *Terry* to allow for reasonable suspicion based upon the person's appearance. See id.

108. See *Griffin*, 7 F.3d at 1514.

109. See id.

110. See id. at 1514-15.

111. The presence of drug-tainted money is insufficient for probable cause. In *United States v. U.S. Currency*, 39 F.3d 1039 (9th Cir. 1994), the defendant had bills in denominations of $5, $10, $20, $50, and $100 for a total of $30,060. A narcotics detections dog indicated the bag of money carried the scent of a controlled substance. The court found probable cause was lacking and denied forfeiture of the money. See id. at 1041. It relied upon a study conducted by the defense which indicated 75% percent of all currency in the Los Angeles area was tainted with residue of cocaine or some other controlled substance. See id. at 1043. The percentage of money tainted with residue from a controlled substance ranged from 10% to 15% percent in Bozeman, Montana, to 75% in Los Angeles and Las Vegas. See id. at 1041-43; see also Mark Curriden, *Courts Reject Drug-Tainted Evidence*, A.B.A. J., Aug. 1993, at 22 ("The mere presence of trace amounts of cocaine on a common object . . . is insufficient to support a felony conviction for possession of cocaine.").

112. See *Griffin*, 7 F.3d at 1515.

113. See id.

114. See id. at 1516.

115. See id. at 1519.
Ms. Griffin's subjective belief was relevant because it is central to the inquiry and analysis used to categorize the nature of her encounter with the police. When the police and a member of the general public engage in a discussion, while the officer is engaging in an official duty, the "stop" of that person may be characterized as voluntary, a Terry stop and frisk, or an arrest. A voluntary general public-police encounter is a communication without coercion or detention. The person is free to ignore the officer and walk away. Unlike a stop and frisk or an arrest, a level of suspicion is not required. Both stop and frisk and arrests are seizures, but the former requires reasonable suspicion and the latter requires probable cause.

A seizure for purposes of the Fourth Amendment and custody for purposes of Miranda both involve restraint on a person's freedom to walk away from the police. The Supreme Court has attempted to distinguish the Fourth Amendment seizure from Miranda-type custody. A person is in custody for purposes of Miranda when there is a formal arrest or restraint of movement associated with formal arrest. The inquiry of whether a person is seized for purposes of the Fourth Amendment is based upon "whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter."

Theoretically, a Terry stop and frisk is a brief and minor inconvenience and a minor indignity, while a custodial arrest is a police-dominated atmosphere in which the person is removed from a familiar environment, surrounded by antagonistic forces, subjected to persuasion techniques, and entitled to Miranda protections. The current practice among federal courts of allowing greater police force has placed Terry stops into police-dominated atmospheres with antagonistic forces similar to custodial arrests. Although the Griffin court decided that Ms. Griffin's detention in the airport was a custodial arrest rather than a Terry stop, the standard for custody, for purposes of Miranda, yields inconsistent results. In Taylor, the defendant Pressler submitted to police authority when the police used guns, handcuffs, and ordered him to lie face-down in a ditch for three to five minutes. Pressler's detention met the standards for both the Fourth Amendment seizure and the Fifth Amendment custody requirements. A reasonable person in Pressler's situation would not feel free to leave, and his detention was more associated with a formal arrest because there were several officers, guns were drawn and Pressler was

116. See id. at 1516.
119. See Buffaloc, supra note 56, at 614.
123. See Buffaloc, supra note 56, at 614.
124. See United States v. Griffin, 7 F.3d 1512, 1519 (10th Cir. 1993).
125. See United States v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983).
126. See id.
handcuffed face-down in a ditch. The Court decided that Pressler's detention was more similar to a stop and frisk than to an arrest because the force used was reasonably necessary and reasonably limited and that the *Miranda* standard simply did not apply.

The court's position in *Taylor* that an arrest is more lengthy, intrusive, and police-dominated than a *Terry* stop and frisk is inaccurate because numerous federal courts have allowed handcuffs and drawn guns for a lawful stop and frisk. Police are allowed to use force increasingly different from a paradigmatic *Terry* stop and frisk when such force is deemed necessary and reasonable to maintain the status quo and to protect the officer and the general public. The force includes a display of weapons and the use of handcuffs when reasonably related to the circumstances, even though the police lack probable cause.

A contrary position was adopted by the Seventh and Tenth Circuit decisions of *United States v. Smith* and *United States v. Perdue*, which have held that the use of handcuffs and guns transforms a stop and frisk into a custodial arrest which requires *Miranda* warnings. In *Smith*, clerks at a hotel notified the police that they suspected drug activity in one of their hotel rooms and the police set up surveillance to observe the hotel. After Smith checked out of the hotel, the officers followed the taxi. The officers stopped the taxi, ordered the occupants out of the taxi, and one officer held his gun at his side. Smith, who was one of six occupants in the taxi, was removed from the taxi, handcuffed and seated on the grass on the roadside. He was questioned and drug paraphernalia was discovered in his possession.

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127. See id.
128. See id. at 708-09.
130. See Buffaloe, *supra* note 56, at 614.
131. See id.
132. 3 F.3d 1088 (7th Cir. 1993).
133. 8 F.3d 1455 (10th Cir. 1993).
134. Approximately a decade earlier, the Supreme Court indicated that an individual is in custody when surrounded by four police officers, handcuffed and questioned. See New York v. Quarles, 467 U.S. 649, 655 (1984).
135. See *Smith*, 3 F.3d at 1091.
136. See *id.* at 1092.
belongings. The appellate court held that the stop and frisk was justified, but that Smith should have been advised of his Miranda rights because the officers outnumbered the suspects and Smith was not free to leave when he was frisked, handcuffed, and told to sit in a specific place.\(^{137}\)

Similarly, in Perdue, the court held that Miranda rights are required when police detain a suspect with force more traditionally associated with an arrest.\(^{138}\) In Perdue, two helicopters and fifteen to twenty police officers searched a metal building in rural Kansas pursuant to a search warrant. They found 500 marijuana plants, drug paraphernalia and a loaded pistol.\(^{139}\) While the officers were conducting the search, they noticed a car approach the building, stop and reverse its direction. The officers immediately became suspicious, drew their guns and ordered defendant Perdue and his fiancée to get out of the car and lie face down on the ground.\(^{140}\) Perdue's fiancée was unable to comply because she was pregnant. Perdue was handcuffed, and while lying on the ground he was asked why he was on the property. He stated he was there to "check on his stuff." When asked, "What stuff?" he replied, "The marijuana that I know you guys found in the shed."\(^{141}\) He was directed to another police officer who informed him of his Miranda rights. A forty-minute interrogation followed, and while his pregnant fiancée was visibly upset, Perdue made incriminating statements. The court held that although the initial stop may have been a lawful Terry stop and frisk, Miranda warnings were necessary during both interrogations because the officer forced the suspects at gun point to stop the car and answer questions, thereby placing them in formal custody.\(^{142}\)

Griffin, Taylor, Smith, and Perdue demonstrate that the increased police force used in Terry stops has made it difficult to distinguish a custodial arrest from what is termed a Terry stop and frisk. The police and general public are unable to accurately determine the difference between a Terry stop and an arrest. The use of police guns and handcuffs is a Terry stop for one court and an arrest in another.

The difficulty in distinguishing a Terry stop from an arrest becomes more pronounced when the increased force is supplemented with other stops which involve an increase in the length of time for detentions. For example, in United States v. Sharpe,\(^{143}\) the Court allowed a twenty-minute detention of a motorist on a public highway, and declined to establish a bright-line test between an investigative stop and frisk and an arrest.\(^{144}\) The twenty-minute detention was permissible because it was held reasonable as to manner, method, and purpose.\(^{145}\) The Terry Court's emphasis

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137. See id. at 1091-93.
138. See Perdue, 8 F.3d at 1464.
139. See id. at 1458.
140. See id.
141. Id. at 1459.
142. See id. at 1459-60, 1463-65.
144. See id. at 687-88.
145. See id.; see also United States v. Place, 462 U.S. 696, 709 n.10 (1983) ("[W]e question the wisdom of a rigid time limit. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation."). But see MODEL CODE
on brevity and minor inconvenience — to protect the privacy and dignity of the individual — has succumbed to concerns of whether the officer acted diligently and reasonably — a standard courts decide on a case by case basis. The focus on reasonableness rather than personal autonomy and dignity has resulted in an expansion of Terry to allow a lengthy detention if the police act diligently and reasonably during a Terry stop and frisk. The amount of force and the length of a detention are more problematic when the drug and race issues are intertwined.

D. Limits of Reason — Race and Police Encounters

Along with the failures of the Supreme Court to adopt an objective bright-line test for searches and seizures — except for police safety — and in providing insufficient guidance to lower courts concerning the permissible amount of force for a Terry stop, the Court has also failed to acknowledge the significance of the drug war and racial discrimination when it distinguishes a stop and frisk from a custodial arrest. The American drug problem incites a social insensitivity to "those people" who are perceived as the source of the problem, particularly where the majority of

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147. See Twenty-third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1992-1993, 82 GEO. L.J. 597, 632-33 (1994). Detentions of 30 minutes, one hour, and two hours have been held to be reasonable. See id. at 633-34 n.137.

148. See Sharpe, 470 U.S. at 688; see also United States v. Hensley, 469 U.S. 221, 234-35 (1985) (finding that an arrest is valid if the arrest would have been made by an experienced law enforcement officer); Dunaway v. New York, 442 U.S. 200, 212-13 (1979) (finding that Fourth Amendment seizures are reasonable only if they derive from probably cause); United States v. Elsoffer, 671 F.2d 1294, 1295-96 (11th Cir. 1982) (describing an airport detention which became an arrest due to duration of detention).

149. An exception to this exception is an opinion by Justice Stevens where the Court held that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug cases necessitated by the violence and dangers of the illegal drug culture. See Richards v. Wisconsin, 117 S. Ct. 1416, 1421 (1997). Justice Stevens refused to establish a brightline rule which would allow a no-knock entry when drugs are involved. Instead, he maintained a case-by-case reasonableness standard and stated that "[i]n order to justify a 'no-knock entry', the police must have a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile . . . ." Id.

150. In its discussion of race, the Terry Court regulated the significance of race to a sentence and a footnote when it mentioned that it was argued that a stop and frisk may exacerbate the tension between the police and Black communities because Black communities have been traditionally harassed by the police. See Terry v. Ohio, 392 U.S. 1, 12, 14 n.11 (1968). The solution, according to the Court, is found in the various courts monitoring the police and enforcing the exclusionary rule. See id. at 15. Neither of these proposals serve as a solution because courts give more weight to police than to a suspect's testimony, and the exclusionary rule — with already more than twenty exceptions — applies after a person's rights are already invaded. See David A. Harris, Frisking Every Suspect: The Withering of Terry, 28 U.C. DAVIS L. REV. 1, 32-36 (1994); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 120[B], at 241 (1991) (explaining that the exclusionary rule has little effect on the behavior of law enforcement personnel).
the general public perceive the police as fair and the violation of a right as a necessary harm to win the war on drugs.

The possession, distribution and sale of illegal drugs have ushered in an era of violence and despair. The corollary of illegal drugs is a societal fear of crime. It also has led those involved in the illegal drug trade to commit crimes for retribution or money to purchase drugs. The increase of drug-related crimes has increased the number of criminal suspects who use guns, which in turn has justified the expansion of the Terry stop and frisk. Unfortunately, the willingness

151. In a 1995 survey structured to report the level of confidence in the police, participants were asked "[h]ow much confidence you, yourself, have in . . . the police?" The choice of answers was: a great deal, quite a lot, or very little. When organized along racial lines, the percentage of people who answered "a great deal" and "quite a lot" was as follows: White 63%; nonwhite 30%; Black 26%. See KATHLEEN MAguIRE & ANN L. PASTORE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1994, at 147 (1995).

152. The invocation of a right is perceived as a game in which the suspect wants to "beat the system," or a right is part of a cost-benefit analysis and the individual's right gives way to a so-called public good. See ROTHWAX, supra note 3, at 38-40 (arguing that criminals are simply going free on a mere technicality); Gerald M. Caplan, Questioning Miranda, 38 VAND. L. REV. 1417, 1441-42 (1985). See also Camara v. San Francisco Municipal Court, 387 U.S. 523 (1967), where the Court created a new "cost-benefit" standard for probable cause based on a balancing of the individual's right to privacy against the state's need for the intrusion. See id. at 534-35. If the state's interest is greater than the individual's, then probable cause pursuant to the Fourth Amendment exists. See id.


156. In 1993, an estimated 1.3 million Americans were victims of gun-related crimes, and guns were involved in 29% of the 4.4 million murders, rapes, robberies, and aggravated assaults. Use of Firearms in Violent Crime on Rise-Study, SUN-SENTINEL (Ft. Lauderdale, Fl.), July 10, 1995, at 1A, 4A. Additionally, youthful offenders — a major source of crimes — are often armed with revolvers, semi-automatic handguns, sawed-off shotguns, military-style automatic, or semi-automatic rifles. See id.

157. The Terry Court was concerned about the number of officers killed in the line of duty and allowed the stop and frisk based on reasonable suspicion rather than probable cause as a means to allow officers to protect themselves and other prospective victims. See Terry v. Ohio 392 U.S. 1, 24 (1968). In a footnote, the Court expressed its concern about increased violence to police officers:

Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policeman. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41
and inclination to commit violent crimes has become intertwined with race discrimination, and the drug and crime problems in America are identified with poor inner city Blacks who purportedly lack the moral fiber and family structure necessary to become productive members of society. The volatile and visceral mixture of a perceived major drug problem, race discrimination, and fear of crime has contributed to a deterioration of the Fourth Amendment rights of Blacks from freedom from governmental intrusions.

In Black communities across the United States, both the Miranda and Terry decisions have transcended theoretical discourse. The impossibility of distinguishing a Terry stop from an arrest has become an exposition of the reality for blacks. The Terry decision has expanded into multifaceted and discriminatorily imposed obscure standards where the reasonable person would feel in custody rather than briefly detained. A vivid example is demonstrated in a reported police practice in Miami, Florida.

Of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives.

_id. at 24 n.21.

158. Perhaps the most glaring example of this position is the political arena because, in politics, race has always been an American rallying cry for block voter participation. See Derrick Bell, Race, Racism and American Law 176-195 (1992). Recall the 1988 presidential campaign of George Bush when images of Willie Horton—a man of African descent who was convicted of a crime and released on furlough—were presented to the general public because Horton had victimized a White couple. Horton's release occurred during the democratic presidential candidacy of Michael Dukakis, who was then governor of Massachusetts. The Horton scenario was used by the Bush campaign to illustrate Dukakis' "softness" towards crime and criminals. See David C. Anderson, Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice 205-56 (1995). The cerebral and visceral connections between race and crime are extremely profound, and most American—regardless of race—if asked to imagine a criminal would conjure up images of a black man. See Joint Center for Political Studies, Black Crime: A Police View 31 (Herrington J. Bryce ed., 1977); see also Donald A. Dripps, Criminal Procedure, Footnote Four and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About The Right of the Accused?, 44 Syracuse L. Rev. 1079, 1088 (1993) (explaining that legislators responsible for writing criminal codes are prejudiced because they view themselves more likely to be potential crime victims than suspects).


160. See United States v. Sokolow, 490 U.S. 1, 11-12 (1989) (Marshall, J., dissenting). Gerry Spence has warned against the elimination of rights of "that other person" in the interests of fighting the war on drugs when he stated: "At last the new king was crowned when we forgot the lessons of history, that when the rights of our enemies have been wrested from them, our own rights have been lost as well, for the same rights serve both citizen and criminal." Gerry Spence, From Freedom to Slavery: The Rebirth of Tyranny in America 7 (1995). Recognition of the injustices that Blacks confront has generated a perspective that it is both morally and legally appropriate for Blacks to consider race in reaching jury verdicts in criminal cases. See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 700 (1995).

161. The term "communities" is used rather than "community" because people of African descent within the United States vary economically, socially, and culturally. It has been eloquently stated that the Black community is now more of an idea or ideal than a reality. See Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1817 (1992).
In Miami, the police have an unwritten pat-down policy which requires certain persons to remove their shoes during a routine traffic stop. The journalist who wrote in the newspaper about the unwritten policy wittily titled his article, "These Are The Times That Try Men's Soles." Members of the south Florida communities, Overtown and Liberty City — both of which are Black and low-income communities — allege that such stops and searches are done discriminatorily and routinely in their neighborhoods. One community member stated, "I've heard of them stopping people on the street in Overtown, and while they're searching them, they make them pull their pants down, turn their pockets inside out." The primary narrative in the newspaper article involved a twenty-year-old Liberty City resident who arrived home around 12:30 a.m. accompanied by a few of his friends. An officer believed a traffic violation had occurred and he activated his emergency lights, ordered the individuals out of the car and instructed them to wait for the arrival of a police backup unit. They complied with an order to put their hands on the car and they were searched and told to remove their shoes. The individuals perceived the encounter as "the black experience." They articulated a position of powerlessness when they remarked: "They be beating on people for nothing. . . . They say, 'We gonna search you, and you gonna like it.'" The residents believe a body search is something the police will do and to resist is futile and dangerous.

The police indicated that individuals pull down their pants and remove their shoes in the interests of police safety. A female officer involved in the encounter described the Liberty City procedure as a Terry stop when she stated: "I do [a pat-down] on everyone for my safety and for other officers' safety." She continued,

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162. Elise Ackerman, These Are The Times That Try Men's Soles: Does The City Of Miami Police Department Have A Foot Fetish?, NEW TIMES (Miami), Dec. 22-28, 1994 at 7.
163. Id.
164. See id. Conflicting stories about what occurred after the stop were also discussed in the article. There were conflicting contentions giving rise to claims of resisting arrest and police brutality. See id.
165. Id. This sense of powerlessness is the Black experience. The economic and political views shared by the slaveholders, legislators, judges, and other public officials during the American colonial and antebellum periods continue to plague American today. Judge Higginbotham suggests that both slavery and today's race relations are divisible into ten beliefs or precepts directed towards Blacks: inferiority, property, powerlessness, racial purity, manumission and free Blacks, family, education and culture, religion, liberty, resistance, and by any means possible. See A. Leon Higginbotham, Jr., The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense And Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority, 17 CARDOZO L. REV. 1695, 1697-1701 (1996). In his article, Judge Higginbotham uses the term "precepts" as a list of "basic premises" that "taken together, could explain the whole institution of colonial and antebellum slavery and the race relations law of that era," which, he asserts, "still continue to haunt America in 1996." Id. at 1696. He asserts that the precepts have not been deconstructed by the courts, but that the courts has done a great deal to perpetuate the first three precepts directed towards Blacks: inferiority, property, and powerless. See id.
166. See Ackerman, supra note 162, at 7.
167. See id.
168. Id.
"Everyone I pat down, their shoes come off. That's all there is to it." Another officer added: "Recently we found a gun in a person's shoe in the jail . . . . I wouldn't say it's a policy. It's highly recommended . . . ."

The perspective of the individuals vis-à-vis the police depicts the practical difficulty of expanding the scope of a Terry stop. The line between a stop and frisk and a custodial arrest is blurred when Terry stop and frisks are continually expanded via force and intimidation based on the catchall notion of concerns for police safety. A paradigmatic Terry stop and frisk is brief with a low ratio of police to detainees, and the person is not deprived of his freedom in a manner associated with formal arrest, i.e., in a significant manner. This is dissimilar from the reality for Black males in Liberty City or any other city in the United States. Frequently, Blacks are stopped solely because of the color of their skin and there are numerous police, in several cars, with a display of force.

The Liberty City detention is more analogous to the Florida v. Royer decision than to the Terry decision. The issues in Royer arose out of a general public-police encounter in the Miami International airport. Royer, who fit the drug courier profile, was approached by two plain-clothes detectives who requested his airline ticket and driver's license. The officers informed Royer that they suspected him of transporting narcotics and asked him to accompany them to a room after they failed to return Royer's ticket and license. They brought Royer's luggage into the room where they searched it and discovered marijuana. The Supreme Court held that there was reasonable suspicion based on articulable facts that criminal activity was afoot to justify the initial stop in the concourse. The Court added that the limits of the

169. Id.
170. Id. The police are allowed to search a person because "someone else" previously concealed a weapon in such a manner. This search method defies both probable cause and reasonable suspicion and police are allowed to search anywhere. The number of intrusions which could result from a "someone else" methodology are endless. A California court allowed a search of a car's engine compartment and admitted expert testimony that people typically conceal guns in the engine's compartment because police seldom search there. See United States v. Webb, 115 F.3d 711, 713 (9th Cir.), cert. denied, 118 S. Ct. 429 (1997).
171. See ABC News Prime Time Live: Driving While Black (ABC television broadcast, Nov. 27, 1996). The ABC network conducted a study to determine whether young black men were stopped by the police more frequently than other members of society for the same offense. The network had three Black men ride inside an expensive car owned by the father of one of the occupants and placed a camera inside the car. The driver made a turn at an intersection without using his signal light. Although hundreds of others, including police cars, also failed to signal before turning the black youths were singled-out for a traffic stop. The stop was pretextual and the car was thoroughly searched for drugs. One officer saw a box and stated it probably contained drugs. See id. The recent Whren decision allows pretextual stops and held that the officer's subjective intent is irrelevant if there is probable cause for the stop. See Whren v. United States, 116 S. Ct. 1769, 1774 (1996). Therefore, officers can legally stop Blacks because of the failure to signal, although only Blacks are stopped. The problem escapes a legal solution, and is reduced to a flippant statement that, if people want to avoid a stop, they should signal at an intersection. For further discussion on race and black motorists, see Greg Williams, Selective Targeting in Law Enforcement, NAT'L BAR ASS'N MAG., Mar./Apr. 1996, at 18.
173. See id. at 497-500.
Terry stop and frisk were exceeded and Royer was arrested when the officers kept his belongings and escorted him into the interrogation room. The Court opined that the officers' conduct was more intrusive than necessary to effectuate an investigative detention authorized by Terry and stated: "We cannot . . . agree that every nervous young man paying cash for a ticket to New York under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge." The Court complied with the principles upon which Terry rested, namely, a special category of seizures approved on less than probable cause because such seizures are substantially less intrusive than an arrest.

The police practice in Liberty City of removing a detainee's shoes is similar to Royer, and dissimilar to Terry, because in both Royer and in Liberty City the detention is tantamount to an arrest. In both scenarios, there is a show of authority such that a reasonable person would believe he or she is not free to leave, i.e., significantly deprived of freedom. There is a threatening police presence of several officers, a likelihood of weapons displayed, and a tone indicating compulsion. The Black Liberty City detainee is supposedly "Terry stopped" and the detention would only require reasonable suspicion rather than probable cause because Terry stops are brief and minor intrusions. The question becomes whether the detention is a seizure for purposes of the Fourth Amendment or custody for purpose of the Fifth Amendment? The history of abuse against Blacks during police encounters, and the humiliation of removing shoes, and possibly pants, would lead Black males to reasonably believe there is a police-dominated atmosphere in which the detainee is surrounded by antagonistic forces. Therefore, the detainees are arrested and entitled to Miranda warnings.

The Supreme Court, however, would likely deny Miranda warnings for the Liberty City detainees and decide that the controlling case, which also involved a traffic stop, is Berkemer v. McCarty. In Berkemer, the Court held that traffic stops, despite

174. See id. at 500.
175. Id. at 507. Justice Brennan, who dissented in part, adopted the viewpoint that Royer's conduct was innocent and the police lacked both probable cause and reasonable suspicion for the initial stop in the concord. See id. at 512 (Brennan, J., dissenting).
176. See United States v. Sharpe, 470 U.S. 675, 690 (1985) (Marshall, J., concurring). Justice Marshall stated, "Terry must be justified, not because it makes law enforcement easier, but because a Terry stop does not constitute the sort of arrest that the Constitution requires be made only upon probable cause. For this reason, in reviewing any Terry stop, the 'critical threshold issue is the intrusiveness of the seizure," id. at 691 (Marshall, J., concurring) (quoting United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring)).
177. In United States v. Mendenhall, 446 U.S. 544 (1980), the Court stated that: "Examples of circumstances that might indicate a seizure, even when the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id. at 554.
178. The number of police, along with guns, badges and uniforms is inherently coercive. See Illinois v. Perkins, 496 U.S. 292, 296 (1990); see also New York v. Quarles, 467 U.S. 649, 655 (1984) (noting that the lack of a Miranda warning does not raise a presumption that a person is compelled to speak to law enforcement officer).
the restrictions placed on the detainee's movements, are more akin to a Terry stop than to an arrest for purposes of Miranda. The Court specifically stated that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of Miranda." Ordinarily, traffic stops are presumptively temporary, brief, and in public with one or two police officers.

The Berkemer standard focuses on the "objective" circumstances rather than the subjective perspective harbored by the police or the person detained and interrogated. The "objective" standard ignores the reality of the streets and the relationship between the police and Black Americans. Often, during a Terry stop and frisk, a detainee is confronted by several police cars and the officers' words and actions leads the person to reasonably believe that there is a significant restraint on freedom of movement. The removal of a person's shoes exceeds the minimal intrusion of the spin and grab in Terry. This practice, without individual suspicion based on articulable facts, nurtures a sense of powerless and a level of intrusion the framers of the Fourth Amendment sought to disallow. Their intent was to establish a government that did not engage in arbitrary and capricious conduct. The intent behind the Fourth Amendment was the automatic authorization to stop and frisk a person because someone who looked like the person and was in the same community allegedly had a weapon in his shoe in the past. The officer must have reasonable suspicion based upon articulable facts that criminal activity is afoot and a reasonable belief that the particular person is armed and dangerous to conduct a stop and frisk. Considerations of race in routine traffic stops do not automatically meet this standard. In fact, for Blacks, the phrase "routine traffic stop" is a misnomer because every stop has the potential for discretion and abuse. The following

180. See id. at 439.
181. Id. at 440.
182. See id. at 437-38.
183. See Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, in CRITICAL RACE THEORY 322, 322-23 (Richard Delgado ed., 1995). Professor Chang describes how he was stopped for suspicion of a stolen vehicle and was detained by four police officers in a deserted parking lot who failed to apologize after they discovered their mistake. See id. Professor Chang stated, "I have to carry it with me because of the anger I feel, and because of the fear — fear of the power that certain people are able to exercise over me because of this (contingent) [Asian] feature that makes me different." Id. at 323.
184. The degree of force must be reasonably necessary to protect the officer, and the length of the detention cannot exceed the time necessary to confirm or dispel the officer's reasonable suspicion. See United States v. Sharpe, 470 U.S. 675, 686 (1985); Terry v. Ohio, 392 U.S. 1, 20 (1968). Furthermore, the communities' reaction demonstrates a reasonable belief that one is not free to leave. See United States v. Ocampo, 890 F.2d 1363, 1369 (7th Cir. 1989) (providing that the location, time and reaction of the detainee are relevant).
185. See Terry, 392 U.S. at 30.
186. Traffic stops are inherent with the probability of abuse when an officer can follow Black youths and wait for a traffic violation — which is not a seizure. See California v. Hodari, 499 U.S. 621, 645 (1991). The pursuit and stop are permissible regardless of the intent of the officer. See Whren v. United States, 116 S. Ct. 1769, 1774 (1996). In addition, the officer can search the car with the detainee's consent without informing the detainees that he can refuse consent for the search, see Schneckloth v.
traffic stops illustrate the point.

Dr. Mae Jemison graduated from high school with honors, received her undergraduate degree from Stanford University in 1977, and her medical degree from Cornell University in 1983. She left her medical practice to join NASA as a mission specialist to conduct scientific experiments in space. She became the first Black woman astronaut to travel into space when she traveled aboard the Space Shuttle Endeavor in 1992 from Kennedy Space Center.

Notwithstanding her educational and scientific accolades, Dr. Jemison's travels in Texas proved more perilous than her travels in space. She was stopped by a patrolman in Nassau Bay, Texas, at 8 a.m. on February 24, 1996 for a minor traffic violation. She had been a resident of the small community for approximately eight years. The officer told her that she had committed a minor traffic violation and obtained her license and insurance information which he carried back to his vehicle. He returned and ordered Dr. Jemison out of her car and indicated that there was a warrant for her arrest. She was slammed face-down onto the ground, painfully handcuffed and forced to remove her shoes and walk into the police station barefoot. She was denied an opportunity to release the car to her seventy-year-old father, and she was not allowed to gather her personal valuables on the seat of her car left by the roadside. She indicated that she felt both humiliated and abused. She expressed concern about whether others were also subjected to such abuse.

Dr. Jemison's interaction with the police undermines a popular view espoused after the O.J. Simpson verdict that Blacks lack any reasons to complain because of voting rights, representation in the House of Representatives, and a proliferation of the Black middle class and Blacks of stature and achievement. Dr. Jemison's education and achievements did not save her from physical abuse. Her accomplishments did not prevent her from feeling the powerless and dehumanization that most Blacks experience in police encounters. She experienced the pain, state-backed force, and abuse that Blacks instinctively anticipate, fear, or challenge when confronted by the police. While police may 'serve and protect' Whites, Blacks are policed. Encounters are often followed by a sigh of relief that more harm was not inflicted.

Bustamonte, 412 U.S. 218, 232 (1973), or that he is free to go. See Ohio v. Robinette, 117 S. Ct. 417, 421 (1996). Furthermore, the scope of the search is determined by the officer's reasonable belief. See Florida v. Jimeno, 500 U.S. 248, 251-52 (1991). If all else fails, the officer can continue to detain the driver for a reasonable time until a narcotics detection dog arrives without probable cause because a dog sniff is not a search. See United States v. Place, 462 U.S. 696, 707 (1983).


188. See id.


190. See ABC News Prime Time Live, supra note 171. A Black occupant of the car in the ABC experiment said that he did not mind the stop — it was nothing new — he was merely glad that the police released him unharmed. See id. Nikki Giovanni describes apprehension and surprise while stopped during a traffic stop by an officer at 3 a.m. who, instead of harassing her, provided assistance. See Nikki Giovanni, RACISM 101, at 46 (1994). She quipped: "A few years ago whether I was lost or not I would
a police demand is based on a unique line of historical realities different from the reasonable person and police-dominated standards articulated in Terry and Miranda.\(^9\) Her only recourse was to file a complaint with the officer's supervisor alleging the force used was excessive and racially motivated.

In yet another scenario involving a Black woman, a South Carolina State Trooper in an unmarked car sought to pull over a speeding car driven by a Florida resident, Sandra Antor. Ms. Antor refused to pull over immediately and the chase lasted seven minutes at speeds reaching eighty miles per hour. When she stopped, the officer approached and began shouting. He grabbed her, pulled her out of the car, and threw her against the car and the ground constantly shouting obscenities.\(^9\) The entire incident was videotaped. The officer was fired and Ms. Antor pled guilty to speeding. Appearances imply that the incident ended with the officer's termination and Ms. Antor's conviction.

A vignette offered by a local South Carolina attorney illustrates a pervasive acumen which depicted the sense of powerlessness in the Black communities. The attorney noted that it is often difficult to prove cases of brutality, false arrests and civil rights violations against law enforcement officials because jurors tend to respect police officers and discredit the testimony of the complainant.\(^3\) Blacks are aware

have been written up. But we were just two little ol' ladies. . . . He saw old women." Id. Her stop raises two questions. Why was she stopped simply for being out at 3 a.m.? And, what if she were a young Black man? An example of how the police serve and protect Whites and discredit Blacks is demonstrated in an incident which involved a Laotian child named Knoerak Sinhasomphone, age fourteen. He was dazed and had wandered onto a Milwaukee, Wisconsin, street corner. A white adult male explained to a police officer, who was also white, that the fourteen-year-old was his friend, and that the child was intoxicated. Despite the protest of Black onlookers, the police allowed the man to depart with the child. Thirty minutes later, the man killed the child. The child was, in fact, the man's thirteenth victim. The man's name was Jeffrey Dahmer. Estate of Sinhasomphone v. Milwaukee, 56 Crim. L. Rep. (BNA) 1549, 1565 (E.D. Wis. Feb. 2, 1990).

191. For a discussion on the Terry-seizure and the Miranda-custody standards, see supra notes 82-90 and accompanying text.

192. See Bad Cops, Good Cops: Videos of Police Brutality Spawn Public Distrust. They Should Inspire Police Reform, NEWSDAY, Apr. 10, 1996, at A38; see also Jesse J. Holland, Associated Press, Camera Catches State Trooper Physically Abusing Motorist, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 9, 1996. Within a month after the nation observed the abuse Ms. Antor suffered, the nation saw another video which involved police abuse in California. Enrique Funex and Liticia Gonzalez were among 18 Mexican citizens and undocumented immigrants in a pickup truck speeding from the police on a California highway at speeds reaching 100 miles per hour for 80 miles. Occupants threw items from the truck at the police and the truck sideswiped other vehicles during the chase. The chase and apprehension of the suspects were videotaped by helicopters equipped with television-news cameras. Television stations around the country showed the police shoving Liticia Gonzalez, face-first, into the truck and pulling her to the ground by her hair. The incident reeked with excessive force and typified the belief by Blacks that Blacks and other historically oppressed groups have about the latent, obverse, and ominous aspects of Terry stop and frisks. See Beating Case Shouldn't Enrich Illegal Immigrants, St. PETERSBURG TIMES, Apr. 12, 1996, at 15A; Both Sides Speak Out on the Beatings by Deputies: A View of the Beatings from Mexico City, PRESS-ENTERPRISE (Riverside, Cal.), Apr. 6, 1996, at B2; Sheriff Vows "No Cover-up" Probe in Beating of Illegal Immigrants, SAN DIEGO UNION-TRIB. Apr. 4, 1996, at A3; Kenneth B. Noble, Video of Beating by 2 Deputies Jolts Los Angeles, N.Y. TIMES, Apr. 3, 1996, at A1.

193. See South Carolina Taxpayers Pick Up Tab for Claims Against Troopers, HERALD (Rock Hill, S.C.), Apr. 8, 1996, at 8A. In South Carolina, 724 complaints have been filed against state troopers since
of the possibility of increased police violence, racism, dehumanization and deprivation of freedom in a significant manner.\textsuperscript{194}

The abuse of police power is not limited to traffic stops. Professor Derrick Bell summarized the history of Blacks in America when he stated that Black rights and progress exist to the extent that "whites perceive that their [whites'] interests will benefit or not suffer any harm."\textsuperscript{195} Bell's premise was depicted in the behavior of the state, police and Whites when Susan Smith lost her children and Charles Stuart's wife was killed.

Susan Smith, a White woman, appeared before America as a twenty-three-year-old deeply grieved and loving mother who had her two minor children kidnapped by a Black man when he carjacked her automobile.\textsuperscript{196} The nation and her Union, South Carolina community empathized with her and rallied their efforts to find the missing boys. The police began to suspect Susan Smith as the culprit, and she later confessed to killing her two sons by drowning them in a car that she drove into a lake. The events which occurred before her confession reflect Bell's position. Before her confession, Black communities were subjected to sweep searches and Black men were stopped in their front yards, in pizza shops, while walking, in their cars and on basketball courts. They were subjected to arbitrary and capricious searches. In numerous instances, they were strip-searched.\textsuperscript{197} The case is a double tragedy of murder and racism. A White psychologist from South Carolina stated that when Susan Smith incriminated a Black man, her accusations were plausible to White

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\textsuperscript{194} Approximately 66\% of Blacks believe that the criminal justice system is racist. See Paul Butler, \textit{Black Jurors: Right to Acquilt?}, in \textit{POSTMORTEM: THE O.J. SIMPSON CASE} 38, 42 (Jeffrey Abramsom ed., 1996). Black and Whites respond markedly different in a 1994 survey when asked the following question, "Are there any situations you can imagine in which you would approve of a policeman striking an adult male?" The answer was "yes" at a rate of 76\% for Whites and 48\% for Blacks. See \textit{KATHLEEN MAGUIRE \\& ANN L. PASTORE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1994} 152 (1995).

\textsuperscript{195} DERRICK BELL, RACE, RACISM AND AMERICAN LAW 50 (1992). Professor Bell indicates that history reflects three basic points about race and racism in America: (1) progress is cyclical; (2) Blacks progress when their goals coincide with the needs of Whites; and (3) differences between Blacks and Whites are resolved through compromises that sacrifice the rights of Blacks. See id. at 8. An ample illustration of Bell's position is the current trend on issues of racial inequality. For example, the Fifth Circuit Court of Appeals held, in \textit{Hopwood v. Texas}, 718 F.3d 932 (5th Cir. 1996), that the Constitution does not allow admission preferences for Blacks or Hispanics. See id. at 939. In California, one Black member of the Board of Regents for the University of California at Los Angeles stated: "It's obvious that the resegregation of higher education has begun." Amy Wallace, \textit{UC Law School Class May Have Only 1 Black}, L.A. TIMES, June 27, 1997, at A1. His statement was in response to California's decision to eliminate race and gender considerations in the school admission's process. See id. The school desegregation battle has been fought so long and with such fervor that the NAACP recently announced that it has begun to reconsider its position of advocacy of public school integration. See Steven A. Holmes, \textit{At N.A.A.C.P., Talk of a Shift on Integration: "Separate But Equal" Wins New Support}, N.Y. TIMES, June 23, 1997, at A1.

\textsuperscript{196} See Don Terry, \textit{A Woman's False Accusation Pains Many Blacks}, N.Y. TIMES, Nov. 6, 1994, at 32.

Americans. Black Americans felt that the hoax was another assault on the souls and honor of Blacks and fostered the stereotypical view that Black men are "other," dangerous, and society is safer if they are detained, powerless and incarcerated.198

Charles and Carol Stuart were expecting a child and were leaving a childbirth class going home to a Boston suburb.199 Charles Stuart was a thirty-year-old fur company executive. He told the police that he and his wife stopped at a traffic light and an armed Black man in a jogging suit forced his way into their car, robbed them, and shot both of them. Charles Stuart was seriously wounded from a gun shot in the stomach, while both Carol Stuart and the baby died despite a emergency caesarean delivery. America identified with the victimized Charles Stuart as his frantic call from his car to the police dispatcher proclaimed his fear and agony. An endearing letter written from his hospital bed was read at the his wife's and baby's funerals as a portrait of his sincere love.

The death of a pregnant White woman and unborn child shot by a Black man prompted swift public reaction: the police conducted mass sweeps of Black communities, the Mayor called for the assistance of every available detective, politicians called for a reinstatement of the death penalty in Massachusetts, and a business leader offered a substantial reward for the capture of the assailant.200 Numerous Black men were searched and seized, one of whom was thirty-nine-year-old William Bennett. The police charged Mr. Bennett for the crimes after Charles Stuart reviewed photographs of possible suspects. Eventually, Charles Stuart's story began to unravel. When he became the focus of the investigation, he committed suicide.201

In both the Susan Smith and Charles Stuart hoaxes, the press and public reactions revealed more about the general public than about the would-be suspects. Whites were angry that White women and children were killed, and sought a culprit to answer for the crime. The White majority adopted the utilitarian notion that the temporary suspension of the rights of Blacks was necessary, and in the common good, to apprehend and punish the guilty Black assailant. The culprits were Susan Smith, Charles Stuart, and a society which was willing to blame Black men solely because of their skin color. If society embraces the belief that Blacks are inherently guilty, and the police are members of society, then it is reasonable to believe that the encounters between Blacks and the police are plagued with problems.

The Smith and Stuart crimes involved a crisis in which society blamed Blackness. In Jefferson Parish, New Orleans, a crisis was not necessary, Blackness sufficed. The sheriff in that suburb gave an order that Blacks in White neighborhoods were "up to no good," and that his officers could seize and search any Black on the "wrong side of town."202 In support of his position, the sheriff, a Chinese American, said that

198. See Terry, supra note 196, at 32.
199. See Peter J. Howe, From Nightmare to Reality, A City is Reeling: The Stuart Murder Case, BOSTON GLOBE, Jan. 7, 1990, at 1; Canellos, supra note 197.
201. See id.
seventy-nine percent of all robberies were committed by Blacks and seventy-three percent of the victims were White.203

The sheriff rescinded the order the following day, but his statements reveal a societal prejudice towards Blacks. He ordered a Terry stop and frisk of all Blacks in White neighborhoods even though the police lacked reasonable suspicion or probable cause. The detentions and searches were based solely on race in violation of the Fourth Amendment prohibition against unreasonable search and seizures. Despite the 175 years that the Fourth Amendment has existed, he unilaterally determined that race was more determinative than probable cause or reasonable suspicion. His racial prejudice was issued as an order for an entire police department and enforceable by the full powers of the state. He dehumanized Black communities, perpetuated racial polarization, and fostered tension between the police and the Black communities. At a minimum, he espoused views shared by the general public.204

E. Shortcomings of Current Law

The above scenarios demonstrate that Blacks believe that the police fail to enforce the law, and merely enforce the social, economic and political interests of Whites.205 Professor Paul Butler provides a profound and revealing personal story about his first police encounter which typifies the Black experience. When he was ten years old he rode his bike in an all-White neighborhood and a white officer drove his car next to him and asked if the bike belonged to him. The youthful Butler replied that it did, and, as he sped away, he asked the officer if the police car belonged to the officer. When Butler got home he related the story to his mother who spanked him and asked, "Didn't [you] know what happened to black boys who talked to the police like that?"206

Butler appropriately notes that this experience is considerably different for the White person, who recalls how the police were nice when they came to get the cat out of the tree.207 This fear for the Black youth by a parent was echoed by a mother who demands that her son only drive a station wagon lest the police stop and possibly abuse him as a Black youth in a luxurious automobile.208

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203. See id.

204. In Philadelphia, when the police sought a stalker they stopped several hundred Black men and arrested 60 others. See Nat Hentoff, Forgetting the Fourth Amendment in Philadelphia, WASH. POST, Apr. 16, 1988, at A25. The detentions were allegedly without probable cause or reasonable suspicion. See id.

205. When Blacks were asked if they had a "great deal" of confidence in the police, the national average for positive responses was 58%, while 63% of Whites and 26% of Blacks responded positively. See MAGUIRE & PASTORE, supra note 151, at 147. Conversely, when asked if they had "very little" confidence in the police, the national average was 10%, while 8% of Whites and 32% of Blacks responded positively. See id.


207. See Butler, supra note 160, at 40.

208. See ABC News Prime Time Live, supra note 171.
The perception is that society and the police place a low value on the life of Blacks. Following the turmoil from the St. Petersburg, Florida riots in October 1996 and the acquittal of a White police officer in the death of a Black motorist in Brentwood, Pennsylvania, a Black woman who protested stated: "I love my country . . . but I don't think my country loves me. I respect authority, but authority doesn't respect me." Blacks particularly felt that their views had credibility due to remarks made during the O.J. Simpson trial when officer Mark Fuhrman stated, "anything out of a n----'s mouth is a f---ing lie." He added, "if you did the things that they teach you in the academy, you'd never get a f---ing thing done." Officer Fuhrman's statements were no surprise to Blacks who firmly believe that White officers hate Blacks and will violate civil rights and tamper with evidence if convinced it is necessary. With such a belief system about police, how can a Terry stop for Blacks possibly rely upon a reasonable person standard? Blacks have a unique and subjective set of experiences during police encounters which are beset in invasive conduct and invective words. There is an attempt to ignore this question by characterizing the issue as "playing the race-card." This term has awkward connotations because it suggests that, if race is injected into the dialogue, the advocate is playing a game and behaving underhandedly because the veritable issue is something else. The problem with this

209. Richard Wright expressed the anger and frustration of Blacks in 1945 when he stated that White America has reduced Black life to a level of crude and brutal quality. See Richard Wright, Introduction to St. Claire Drake & Horace R. Cayton, Black Metropolis: A Study of Negro Life in a Northern City at xxxiv (1945), cited in A. Leon Higginbotham, Jr., & William C. Smith, The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine, 76 MINN. L. REV. 1099, 1130 n.135 (1992). The devaluation of Black life was mocked in a skit conducted by police officers. In Fort Lauderdale, Florida, a white police officer attended a gathering in Tennessee called the "Good O' Boy Roundup" and performed a skit in which he beat a black baby doll with a police baton. See Scott Glover, Black Officers' Group Supports Detective's Dismissal Over Skit, SUN-SENTINEL (Ft. Lauderdale), June 21, 1996, at 2B.


212. Id.

213. Ironically, Fuhrman's remarks during the O.J. Simpson trial were perceived as an irregular occurrence with limited significance. This view is sharply criticized by critical race scholars who advocate there is no scholarly perch outside the social dynamics of race to discuss the American legal system. See Kimberle Crenshaw et al., Critical Race Theory: The Key Writing That Formed the Movement xiii (1995).
position is that it propounds an objective truth, and reduces the problem of racism to subjectivity and a game. The Supreme Court has fallen into this trap, perpetuating the race problem within the criminal justice system, through its rhetoric of framers intent and color-blindness.

The emphasis on color-blind constitutionalism was articulated in Plessy v. Ferguson, when the Court indicated that Jim Crow laws were neutral in the enforcement of racial separation and that "our Constitution is colorblind." The notion of color-blind constitutionalism advances the position that laws are drafted and the Constitution is interpreted without consideration of race because the law is neutral, objective and fair. For example, in Whren v. United States, the Court unequivocally stated that an officer's subjective intentions during a traffic stop, even if based on racist intent, are irrelevant for reasonable suspicion or probable cause Fourth Amendment analysis. Justice Scalia wrote the opinion and added the punctilio: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations of race." This statement by Justice Scalia provides form without substance because neither the Fourth Amendment nor the Equal Protection Clause provides an actual remedy for race-based Terry stop and frisk. Concerning the Fourth Amendment, Justice

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215. This so-called objective truth is itself "hidden in subjectivities and unexamined claims." See Patricia J. Williams, The Alchemy of Race and Right 11 (1991).
216. The term "framer's intent," among others, is often used to continue the disenfranchisement of certain groups. See Leslie Bender & Dan Braveman, Power, Privilege and Law: A Civil Rights Reader 138-41 (1995).
218. Plessy, 163 U.S. at 550. The Court stated:
Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal on cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. Id. at 551-52. The Rehnquist Court has decided several cases along the lines of color-blind constitutionalism. See Miller v. Johnson, 512 U.S. 900 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467, 490 (1992), cited in Panel Discussion, Conference on Race, Law, and Justice: The Rehnquist Court and The American Dilemma, 45 AM. U. L. REV. 567, 569-70 (1996); Board of Educ. v. Dowell, 498 U.S. 237 (1991).
221. See id. at 1774.
222. Id.
Scalia himself added: "But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." This statement disembodies the Fourth Amendment, particularly when the Supreme Court has indicated that race is relevant as a factor in the probable cause and reasonable suspicion analyses to detain a person.

Scalia also ignores the trend in lower courts to consider race as relevant in determining whether a stop is reasonable. In Arizona v. Dean, the police drove through residential neighborhoods in unmarked cars looking for "suspicious activity." It was afternoon when they noticed a person in a parked car who "looked Mexican" and appeared nervous. They asked the motorist for identification and for consent to search. Inside the trunk they saw a television and read the occupants their Miranda rights. The motorist was released, but arrested a couple of hours later when the police learned that an apartment in the area had been burglarized that afternoon. The television was taken from that apartment. A visceral reaction is "no-harm-no-foul" — the guilty were caught and the end justifies the means. The problem with this approach is that all Mexicans, and other vulnerable communities, are supposed to relinquish their rights against unreasonable searches and seizures for the common good. Scalia asserts that race or subjective intent plays no part in Fourth Amendment analysis. The officer's statement demonstrated something to the contrary when he stated: "He [the motorist] didn't look, I mean . . . he was a Mexican male in a predominantly white neighborhood of . . . oh, middle to upper-class people . . . ." Consequently, race itself becomes an articulable fact in the determination of whether reasonable suspicion exist.

Scalia's remark that subjective intent is inimical to Fourth Amendment analysis also ignores the politics of race in the criminal justice system. New York City experienced two events which demonstrate that considerations of race are alive and well in the criminal justice system. The first event involved district attorney, Robert T. Johnson, who refused to seek the death penalty against Angel Diaz, a twenty-eight-year-old Hispanic man accused of the shooting death of a New York City police officer. Governor George Pataki removed District Attorney Johnson from freedom is sought).

224. Whren, 116 S. Ct. at 1774.
225. See United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975). Suspicion to stop and frisk is often based on conduct resembling a crime or guilt, the environment in which the police observe the person, and the person's characteristics (which include race). See Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L. J. 214, 218 (1983).
226. See United States v. Harrington, 636 F.2d 1182, 1185 (9th Cir. 1980); United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977). In United States v. Weaver, 966 F.2d 391 (8th Cir. 1992), Chief Judge Arnold argued, in his dissenting opinion, that he was unprepared to state that race is never relevant. See id. at 397 (Arnold, C.J., dissenting).
228. See id. at 426-27.
229. See id. at 426.
230. Id. at 439.
231. See Rachel L. Swans, Grand Jury Indicts Man in Shooting Death of a Police Officer, N.Y.
the case and replaced him with Attorney General Dennis C. Vacco, who immediately indicated that there was strong evidence for seeking the death penalty. Any reference to Angel Diaz's race and the likelihood of discrimination is met with lofty cries of prosecutorial discretion and separation of powers.

The second event which occurred in New York City involved a ruling by Judge Harold Baer, Jr. of the Federal District Court of New York. The case involved a Black woman who, along with a few men, loaded her car with duffle bags at 5 a.m. in a high crime neighborhood. When confronted by the police, the men ran. Judge Baer found that there was neither probable cause nor reasonable suspicion for the detention and suppressed the eighty pounds of cocaine and heroin the police found in the woman's trunk. His view was that the stop was improper because Blacks loading a car at 5 a.m. in a high crime area is insufficient grounds to conclude that criminal activity is afoot. His critics sharply disagreed. The line of separation of powers and discretion, which was honored when it was time to prosecute Angel Diaz, was obliterated when the judge's decision was criticized by President Clinton, Sen. Bob Dole, New York Mayor Rudolph W. Giuliani, and United States Attorney Mary Jo White. Judge Baer eventually held another hearing and reversed his decision that the evidence should be suppressed.

Scalia's reference to the Equal Protection Clause as the constitutional basis for objecting to intentional discrimination is enfeebled by the Court's decisions in Washington v. Davis, McCleskey v. Kemp, and United States v. Armstrong. The three cases demonstrate the Court's position on an equal protection claim during the 1970s through the 1990s. In its interpretation of the Equal Protection Clause, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," the Burger Court in 1976 decided Davis and focused on the actor, rather than on the impact of discrimination on the victim. The Court

235. See id.
242. See Davis, 426 U.S. at 242-43. Following the Davis decision, the Court in Village of Arlington
held that it is insufficient to show that the impact of certain conduct by the actor is racially disproportionate. The claimant must also show discriminatory intent.

Approximately a decade after the Davis decision, the Court decided McClesky. In that case, the prosecutors sought the death penalty in seventy percent of the cases when the defendant was Black and the victim was White, yet the same prosecutors sought the death penalty in thirty-two percent of the cases when the killer was White and the victim was Black. Regardless of the statistical data, the Court found that there was insufficient evidence to establish racial discrimination for an equal protection claim. The Court reinforced the Davis and McClesky decisions with the 1996 Armstrong decision. In Armstrong, the Court considered whether a defendant who claims selective prosecution based on race is entitled to discovery. The Black defendants argued that they were prosecuted for crack cocaine related charges in federal court rather than state court, which mandated a lesser term of imprisonment. The Court replied that a presumption exists that a prosecutor has not violated equal protection. To overcome this presumption, the defendant must present clear evidence to the contrary that the federal prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. The defendant had to demonstrate — without the benefit of discovery — that the government failed to prosecute similarly situated suspects of other races.

Despite Scalia's reference to the Equal Protection Clause, excessive policing is virtually impossible to prove because a claimant must show that Blacks are disproportionately and unjustifiably subjected to "stop and frisk" and that such stops are racially motivated. The statistics would have to come from law enforcement officers, who collect statistics on the number of police officers assaulted but do not collect statistics on the number of people stopped or injured by the police. Moreover,

Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), held that disproportionate impact is not irrelevant, but is not solely determinative. See id. at 264-65. The Davis and Arlington Heights decisions reflect the Court's approach in addressing racism as an isolated incident by a few deviant individuals. This approach assumes we live in a colorblind society and ignores the possibility that non-purposeful conduct may foster an perpetuate racial discrimination. The other interpretative perspective is the antisubjugation one, which focuses on the impact on the victim rather than the conduct of the actor. See Omar Saleem, Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions, 19 COLUM. J. ENVTL. L. 211, 226 (1994) (relying heavily upon Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARv. L. REV. 1419 (1991)).

243. See Davis, 426 U.S. at 239.
244. See id.
245. See McClesky, 481 U.S. at 287.
246. See id. at 292-97; cf. Castaneda v. Partida, 430 U.S. 482, 494 n.13 (1977) ("If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.").
248. See id.
249. See id. at 1486-87.
250. See id. at 1486-88.
jurors generally want to acquit police in misconduct cases\textsuperscript{211} and the Supreme Court has generally presumed that police officers act in good faith.\textsuperscript{212}

While neither the Fourth Amendment nor the Equal Protection Clause provides protection against \textit{Terry} stop and frisk, the mistreatment of Black detainees continues.\textsuperscript{213} Professor Patricia Williams articulated the Black pain when she stated: "Blacks who are treated as 'suspect profiles' at best suffer a range of abuses in contacts with the justice system that go from negligence to outright brutality."\textsuperscript{214} Such abuses are part of a level of prejudice that the Supreme Court is willing to tolerate for fear of disrupting American "values" imbedded in the legal and political systems.\textsuperscript{215}

\textbf{III. Solutions: \textit{Terry} Expanded and Racial Conflict}

The \textit{Terry} trilogy involved grabs, spins, pursuits and frisks of outer garments. The intrusions were based on reasonable suspicion and involved reasonable police force and a reasonable length of time for the \textit{Terry} stop. This has changed as the federal courts have begun to expand police force during a \textit{Terry} stop to include guns, handcuffs and chained legs.\textsuperscript{216} During the expansion of \textit{Terry}, the Supreme Court has been reluctant to assume a leadership role to direct the lower federal courts. Instead, the Supreme Court has insisted upon a reasonableness case-by-case approach

\begin{itemize}
  \item 213. In addition to the Equal Protection Clause and the Fourth Amendment, reference has been made to the Due Process Clause as a remedy for selective race-based \textit{Terry} stops. In \textit{United States v. Taylor}, 956 F.2d 572 (6th Cir. 1992), the court determined that both the defendant's initial encounter with the police and the search of his luggage was consensual. \textit{See id.} at 578-59. Therefore, the court decided that it was unnecessary to consider whether the surveillance or drug courier profile was based on race. \textit{See id.} If race were considere, the court stated that there would have been violations of defendant's equal protection and due process rights. \textit{See id.}
  \item 214. Patricia J. Williams, \textit{America and The Simpson Trial}, \textit{Nation}, Mar. 13, 1995, at 337. The abuse and harassment is evident in the fact that Blacks and Hispanics are more likely than Whites to be released after a police detention due to the weak grounds for the detention. \textit{See} Ronald Weitzer, \textit{Racial Discrimination in the Criminal Justice System}, 24 J. CRIM. JUST. 309, 311 (1996).
  \item 215. \textit{See} Developments in the Law — Race and the Criminal Process, \textit{Harv. L. Rev.}, 1472, 1493 (1988); \textit{see also} John O. Calmore, \textit{The Case of the Speluncean Explorers: Contemporary Proceedings}, 61 \textit{Geo. Wash. L. Rev.} 1764, 1776 (1993) (stating that racism has "disappeared except as it [is] 'imagined' by its subordinated subjects, who [continue] to 'suffer' in an unbelievable world — a color blind world of white innocence"). The Supreme Court is embracing legal concepts and has applied them without sufficient consideration of their practical impact. Such a possibility was shunned by Justice Frankfurter when he noted that, although theoretical discourse has it place, "the Constitution is intended to preserve practical and substantial rights, not to maintain theories." \textit{Rochin v. California}, 342 U.S. 165, 174 (1952) (quoting Davis v. Mills, 194 U.S. 451, 457 (1904)). \textit{See also} Patricia J. Williams, \textit{The Alchemy of Race and Rights} 8-10 (1991) (indicating that legal understanding and social concerns should not be oxymoronic). In addition, recall \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819) in which Chief Justice Marshall cautioned the Court to remember it is expounding the Constitution. \textit{See id.} at 407.
  \item 216. Ironically, stop-and-frisk has expanded so widely that "those who would oppose wider police power must prove this should not be so." \textit{Harris, supra} note 54, at 36.
\end{itemize}
for search and seizures with the caveat that the appropriate remedies for Fourth Amendment violations are the exclusionary rule and the Equal Protection clause — each of which has proved inadequate. In effect, the law of search and seizure has failed to reach the framers' aspirations, and has been reduced to gilded soliloquies espousing notions of law and order and police safety at the expense of individual rights. Issues of racism are ignored and the Court has fostered a tyranny of labels such as "reasonable person," "reasonableness," and "color blind constitutionalism." The Supreme Court should take a more affirmative role to protect individual rather than state rights.257

Excellent suggestions have been offered to address the increased force and racism which plagues current Terry stop and frisk. Professor Tracey Maclin has proposed that the Court consider the race of the person in the police encounter to determine whether the encounter is a seizure.258 Maclin concedes that the thesis would raise objections about race consciousness in a society focused on colorblindness of the law.259 Maclin responds with Justice Blackmun's remark that "[i]n order to get beyond racism, we must first take account of race. There is no other way."260 Maclin then addresses the claim that a race conscious proposal would create affirmative action for Black males with the truism that Black males would simply receive what the Fourth Amendment already guarantees.261 Finally, Maclin confronts the strongest criticism of a race-conscious proposal, which is that it relies too heavily on the subjective perceptions of Blacks. This focus, Maclin contends, is appropriate because "it makes no sense to devise Fourth Amendment rules as if we lived in a nation where there are no differences among us."262 Maclin suggests that police could be trained to keep abreast of minority groups' perceptions of police behavior and tactics.263

Maclin's thesis, while appealing, appears unworkable. The police would determine the nature and scope of a detention based upon the racial background of the detainee. Along with the existence of a familiar ring, such a position raises the concern about a police error. Would mistaken ethnicity become another exception to the

257. The Court's emphasis on state rights rather than individual rights was apparent from the cases it decided at its session on June 23, 1997. See Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (striking down congressional legislation on gun control as violative of state sovereignty); Reno v. ACLU, 117 S. Ct. 2329, 2350 (1997) (striking down a federal statute on the grounds that Congress exceeded its powers); Texas v. Flores, 117 S. Ct. 2157, 2172 (1997) (holding that Congress overreached in enacting the 1993 Religious Freedom Restoration Act because the Act contradicts vital principles necessary to maintain separation of powers and federal balance); Washington v. Glucksberg, 117 S. Ct. 2258, 2261 (1997) (allowing a state prohibition against causing or aiding suicide); Kansas v. Hendricks, 117 S. Ct. 2072, 2076 (1997) (allowing a state to detain people who are unable to control their behavior and thereby pose a danger to the public health and safety).

258. See Maclin, supra note 74, at 268-69.

259. See id. at 270-72.

260. Id. at 270 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting)).

261. See id. at 272.

262. Id. at 274 (Blackmun, J., dissenting).

263. See id. (Blackmun, J., dissenting).
exclusionary rule? Furthermore, America's color line has become more diverse and complex than Black and White, with twenty-five percent of the population identified as "of color." The State of California has a population of thirty-three percent Hispanic, and forty percent Asian. The officer would become authorized to determine the race, socio-economic, and political background of each detainee, a task some detainee's themselves grapple with daily. Maclin acknowledges the problem in the thesis with the statement: "Asking a police officer to decide or guess whether a person feels free to leave would require predictive skills that neither the police nor anyone else possesses." Maclin's thesis would also clash with the current color-blind constitutional Supreme Court, which itself offers an unworkable solution based on the exclusionary rule, Equal Protection Clause and due process. Attorney Johnnie Cochran expressed the sentiment of the Court when he stated: "If you go to the Supreme Court now, you're told that race can never be used to benefit anyone. It can only be used to punish." Maclin's position that Blacks perceive and experience police encounters differently from Whites was also addressed by Professor David Harris, who states that police have the power and discretion to stop and frisk and this power is often exercised disproportionately toward Blacks. Harris offered three proposals to resolve the problem. First, Harris proposes a return to the pre-Terry or probable cause standard. Harris states: "If stops and frisks based only on location and avoidance of police seem questionable under the reasonable suspicion standard, they would be even more so under the probable cause standard and therefore likely found unconstitutional." Harris perceives the return to pre-Terry as rather unlikely under the current Supreme Court Justices. Second, Harris suggests a recalibration of Terry which would force courts to require greater evidence before finding reasonable suspicion. Harris perceives this solution as unworkable because subtle changes would prove ineffective and the balancing process would remain intact. Harris' third proposal, advanced as his strongest, is to make the combination of innocent and necessary behavior a constitutionally protected activity insufficient to establish reasonable suspicion.

265. See id.
266. Maclin, supra note 74, at 273.
269. Id. at 682.
270. See id. at 684. He mentions that the only Justice who might consider a pre-Terry standard is Justice Scalia. See id. This is based on Scalia's emphasis in Minnesota v. Dickerson, 508 U.S. 366 (1992) (Scalia, J., concurring), that pre-Terry law supports a stop, but there is no support for a frisk unless the person is arrested. See id. at 380-82 (Scalia, J., concurring).
271. See Harris, supra note 268, at 684.
272. See id.
273. See id. at 685.
This third proposal comports with the framer's intent, and attorney Otis' legal argument, to protect the general public against unreasonable searches and seizures. The third proposal, however, appears indistinguishable from the first in both substance and its likelihood of success. The protection of innocent and necessary activity as constitutionally protected activity is a pre-"Terry" position if we presume that "protection" means certain police interference with the activity would require probable cause. In addition, the third proposal, similar to the first, runs counter to the current trend of cases decided by the Supreme Court. Harris is aware of this point in his mention of United States v. Sokolow. In Sokolow, the Defendant was in an airport and wore gold, appeared nervous, travelled under an alias, paid for his ticket with cash, and went to a "drug source" city, Miami, for only forty-eight hours. The Court acknowledged that the defendant's conduct in an airport was legal, but the Court held that the conduct established reasonable suspicion. Harris provides that his third proposal would not require the Court to overrule Sokolow because "no activity in Sokolow is both innocent and necessary, in the sense that being at one's home or place of work is necessary." The shortcomings of determining innocent and necessary activity is that the determination is reached after the invasion. The police would have to stop and frisk to determine whether the conduct is innocent.

Along with the Sokolow decision, the innocent and necessary standard also conflicts with the Terry decision, which allowed Officer McFadden to stop and frisk Terry to determine if his conduct was innocent and reasonable. Finally, the standard is at odds with recent Supreme Court decisions such as Maryland v. Wilson, which allowed the police to order passengers out of stopped cars, and Ohio v. Robinette, which allowed the police to search a person's car without first informing him that he was free to leave. In both cases, the person was engaged in innocent and necessary conduct and the police lacked both reasonable suspicion and probable cause.

Both Maclin and Harris provide useful insight into a major problem: racism and the police practices during a stop and frisk. Their scholarship is vital because race and the problems inherent in Fourth Amendment jurisprudence are seldom discussed in the same genre. The current stop and frisk standards are plagued with problems concerning reasonableness, increased police force and racial discrimination. Each of

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274. For a discussion about the framers' intent and attorney Otis' legal position, see supra notes 13-17 and accompanying text.
275. See Harris, supra note 268, at 667.
277. See id. at 4.
278. See id. at 9.
279. Harris, supra note 268, at 687.
282. See id. at 884.
284. See id. at 419.
the concerns is inextricably linked to the other. A viable solution of the problems is for the Court to limit the expansion of a *Terry* stop. This would curtail the expansion of the reasonableness standard and protect the rights of the general public.

The expansion of *Terry* stops to include guns and handcuffs has created an overlap with *Miranda* because it is difficult to know when a seizure ends and a custodial arrest begins. Professor Mark Godsey argues that options such as *Miranda* warnings, while inapplicable to all *Terry* stop encounters, are applicable to *Terry* stops that become custodial, thereby returning *Terry* to its intended contours. The possibility of extending *Miranda* warnings to *Terry* stops has precipitated debate. Opponents claim that *Miranda* applies to custodial interrogation and extending *Miranda* warnings to *Terry* stops would adversely impact *Miranda*'s bright-line rule. They add their fear that the terms "custody" and "interrogation" would become ambiguous and an involuntary standard for interrogations would resurface. It is further argued that the cost of *Miranda* warnings for *Terry* stops would encumber the police, yield fewer confessions, discourage individuals from cooperating with the police, endanger an investigation and lessen the deterrent impact of *Terry*.

*United States v. Smith* and *United States v. Perdue* are often cited as examples of the ills of applying *Miranda* warnings to *Terry* stops. In both cases, the Seventh and Tenth Circuits held that the detention of the persons was so intrusive that the individuals were in custody rather than seized. The holdings in *Smith* and *Perdue* have been criticized as an improper application of *Miranda*. The criticism is that the *Perdue* case, for example, failed to discuss how custody applies to *Terry* stops, specific elements to examine to know when an intrusion has gone beyond brevity and a limited intrusion, and future guidance.

This criticism of *Perdue* is misplaced. There is no need to apply custody to *Terry* stops. The *Perdue* court simply followed *Terry*, which itself involved a limited intrusion. The future guidance for *Terry* stop and frisk is in the *Terry* decision itself. A discussion about the woes of applying *Miranda* to a *Terry* stop fails to acknowledge that current police encounters are not *Terry* stops because of the increased use of police force. Once the police use guns and handcuffs, their encounter is considerably different than the conduct between the suspects and Officer McFadden in *Terry*.


287. See id. Although *Miranda* changed the law of custodial interrogations from a voluntariness standard to a bright-line test, the former standard is operative for a due process inquiry. See Colorado v. Connelly, 479 U.S. 157, 159 (1986).

288. See Note, supra note 286, at 678.

289. 3 F.3d 1088 (7th Cir. 1993).

290. 8 F.3d 1455 (10th Cir. 1993).

291. For a discussion of *Smith* and *Perdue*, see supra notes 133-42 and accompanying text.

292. See *Perdue*, 8 F.3d at 1465; *Smith*, 3 F.3d at 1098.

The Supreme Court can effectively remedy the reasonableness, race and increased police force issues in the encounters which lower courts have characterized as *Terry* stops if the Court takes the initiative and provides clear guidance to distinguish a *Terry* stop from and arrest. This could be accomplished in a "colorblind" fashion if the Court restricts the expansion of *Terry*. A limitation on the force used in a *Terry* stop would comport with the framers' intent that individuals remain free from unreasonable searches and seizures and indirectly address the reasonableness and race concerns inherent in *Terry* stops. The Court would move from the mythical world of Bilbo and the wizard, where racism does not exist and everyone is reasonable, into the proper role of expounding the constitutional rights of all Americans.