Hydraulic Pressures and Slight Deviations

*Erik Luna**

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*
>
> —*Boyd v. United States*[1]

> To give the police greater power than a magistrate [could authorize] is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. . . . There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be

* Professor of Law, Washington and Lee University School of Law. Many thanks to Tim Lynch and Ilya Shapiro for their comments, and to Daniel Goldman and Thomas J. Moran for their research assistance.

[1] 116 U.S. 616, 635 (1886).

> sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime.
>
> —Justice William O. Douglas[2]

> It is, perhaps, a fact provocative of sour mirth that the Bill of Rights was designed trustfully to prohibit forever . . . the invasion of the citizen's liberty without justifiable cause and due process of law. It is a fact provocative of mirth yet more sour that the execution of these prohibitions was put into the hands of courts, which is to say, into the hands of lawyers, which is to say, into the hands of men specifically educated to discover legal excuses for dishonest, dishonorable and anti-social acts. The actual history of the Constitution, as everyone knows, has been a history of the gradual abandonment of all such impediments to government tyranny. Today we live frankly under a government of men, not of laws.
>
> —H.L. Mencken[3]

I. Introduction

The U.S. Supreme Court's most recent term included several Fourth Amendment decisions of varying levels of popular and academic interest and jurisprudential import. The opinion that may receive the most scholarly attention, *Herring v. United States*, further curtailed the exclusionary rule as a remedy for search and seizure violations.[4] In that case, the defendant was taken into custody after a sheriff's agent was informed about an outstanding warrant for his arrest, and a subsequent search revealed illegal drugs and a weapon. As it turns out, however, the warrant had been recalled five months earlier, but law enforcement employees had failed to update their computer database. Relying upon a series of earlier decisions, especially those that created a ''good faith'' exception to the exclusionary rule,[5] the Court held that suppression of incriminating evidence is justified only when the deterrence of unconstitutional conduct substantially outweighs the societal cost of a guilty person going free. Where the Fourth Amendment violation results from police

[2] Terry v. Ohio, 392 U.S. 1, 38–39 (1968) (Douglas, J., dissenting).

[3] H.L. Mencken, Prejudices: A Selection 181–82 (James T. Farrell ed., 1958).

[4] See Herring v. United States, 555 U.S. ____, 129 S. Ct. 695 (2009).

[5] See *infra* notes 8–10 and accompanying text.

negligence, as was the case here, the exclusionary rule need not apply.

There are lots of reasons someone might dislike the *Herring* opinion. It continues the Court's movement toward constitutional rights without remedies, allowing law enforcement to infringe upon an individual's Fourth Amendment rights and then present the fruits of that violation against him at trial.[6] Drawing upon the lessons of tort law, it can be argued that placing a cost on law enforcement for negligent behavior does, in fact, create an important incentive for the state and its employees to act with greater care.[7] One might also criticize *Herring* for analyzing what would seem to be an empirical question, the level of deterrence from applying the exclusionary rule, without any reference to data or research. This deficiency is particularly striking when compared to the decision the *Herring* Court relied heavily upon, *United States v. Leon*, a case where both majority and dissenting opinions grounded their arguments in empirical evidence.[8]

But the Supreme Court's use of *Leon* and its progeny is jurisprudentially interesting irrespective of one's position on the exclusionary rule or the ultimate judgment in *Herring*. The *Leon* exception applied first in situations where law enforcement relied in ''good faith'' upon a judicial warrant later declared to be invalid.[9] The rule was then extended to warrantless searches based on information contained in a court database and maintained by judicial employees, as well as to searches executed in reliance upon a statute later declared to be unconstitutional.[10] To a large degree, *Leon* was premised on the idea that evidentiary suppression for mistakes made by actors outside of the executive branch cannot meaningfully deter law enforcement. A quarter-century later, however, the *Herring* Court would dismiss—via footnote—any distinction between errors of the judiciary and those of the police.[11] At this juncture, it is hard to tell

[6] See, e.g., Hudson v. Michigan, 547 U.S. 586 (2006).

[7] See Herring, 129 S. Ct. at 708–10 (Ginsburg, J., dissenting).

[8] Compare United States v. Leon, 468 U.S. 897, 907 n.6 (1984), with *id.* at 950–51 (Brennan, J., dissenting).

[9] See *id.* See also Massachusetts v. Sheppard, 468 U.S. 981 (1984).

[10] Arizona v. Evans, 514 U.S. 1 (1995); Illinois v. Krull, 480 U.S. 340 (1987).

[11] Herring, 129 S. Ct. at 701 n.3. But see *id.* at 710–11 (Breyer, J., dissenting).

how far the Supreme Court will extend the concept of ''good faith'' and abstract deterrence balancing, but we surely have not seen the last iteration.

Another case from this past term, *Arizona v. Gant*,[12] confronted a different Fourth Amendment doctrine that had been stretched beyond its original theoretical justification: the power to search incident to lawful arrests. Four decades ago in *Chimel v. California*, the Court held that law enforcement may search the area within the arrestee's immediate control—that is, where he ''might reach in order to grab a weapon or evidentiary items''—with the goal of ensuring officer safety and preventing the destruction of evidence.[13] A few years after *Chimel*, the justices created a per se rule allowing a full search of an arrestee's person without any suspicion that weapons or evidence of crime might be uncovered.[14] In its 1981 decision in *New York v. Belton*, the Court fashioned an even broader rule for automobile searches incident to arrest.[15] In order to assist law enforcement and the lower courts, *Belton* propounded a ''generalization'' that the passenger compartment of a vehicle is within an arrestee's control, thereby drawing a bright-line rule permitting law enforcement to search the entire area incident to an arrest.[16]

In the years that followed, *Belton* generated considerable scholarly criticism.[17] More importantly, the case had been invoked in scenarios where it would have been silly to reference the original justifications for a search incident to arrest—protecting officers and preventing evidence destruction. Such cases were ''legion'' in the lower courts,[18] with searches upheld despite the fact that an arrestee had already been removed from his vehicle, handcuffed, and placed in the back of a patrol car.[19] A search might occur even though the handcuffed arrestee had been in the squad car for more than half an hour, or

[12] Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710 (2009).

[13] Chimel v. California, 395 U.S. 752, 763 (1969).

[14] United States v. Robinson, 414 U.S. 218 (1973).

[15] New York v. Belton, 453 U.S. 454 (1981).

[16] See *id.* at 460.

[17] See, e.g., Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing ''Bright Lines'' and ''Good Faith,'' 43 U. Pitt. L. Rev. 307 (1982).

[18] Thornton v. United States, 541 U.S. 615, 625–29 (2004) (Scalia, J., concurring in the judgment).

[19] See 4 Wayne R. LaFave, Search and Seizure § 7.1(c) (4th ed. 2004).

worse yet, he was already being transported to jail.[20] The Supreme Court only exacerbated the problem with its 2004 decision in *Thornton v. United States*,[21] which extended the *Belton* rule to ''recent occupants'' of an automobile. It was of no consequence that law enforcement first confronted the driver after he had parked and exited his car. According to the Court, the police need for a clear, unvarying rule in this situation justified ''the sort of generalization which *Belton* enunciated.''[22] But *Thornton* offered little guidance as to the meaning of *recent occupant*, portending further extensions by later cases—or so it seemed.

This past April in *Arizona v. Gant*, the Supreme Court considered a fact pattern that was materially indistinguishable from *Thornton*: After a driver had exited his vehicle, law enforcement arrested and handcuffed the man, placed him in the back of a patrol car, and then searched his vehicle.[23] In ruling the search unconstitutional, the *Gant* Court began by reciting the fundamental rule of Fourth Amendment law—''searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions''[24]—without mentioning that today this principle is more honored in the breach than in the observance. The majority opinion then described the limited nature of *Chimel*, emphasizing that the so-called ''grabbing area'' of an arrestee had been defined consistent with the justifications for a post-arrest search, protecting officers and safeguarding evidence. Turning to the context of vehicle occupants, however, the *Gant* Court struggled mightily to recast the rule propounded in *Belton*, which had been extended in *Thornton* only five years earlier. Among other things, the majority highlighted the fact that none of the party and amici briefs in *Belton* had advocated a mechanical approach. It even suggested that Justice William Brennan's *dissenting* opinion in *Belton*

[20] See United States v. McLaughlin, 170 F.3d 889, 894–95 (9th Cir. 1999) (Trott, J., concurring).

[21] 541 U.S. 615 (2004).

[22] *Id.* at 623–24.

[23] Arizona v. Gant, 129 S. Ct. 1710 (2009).

[24] *Id.* at 1716 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

was to blame for subsequent cases that understood the decision as adopting a bright-line rule.[25]

Ultimately, the *Gant* Court rejected this rule, claiming that the nearly three decades ''since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded.''[26] Instead, the doctrine should be read as allowing a car search incident to a recent occupant's arrest only if he is within reaching distance of the passenger compartment at the time of the search or if there is reason to believe that the automobile contains evidence of crime. Four dissenting justices took the *Gant* majority to task for ignoring principles of *stare decisis.*[27] Although one may disagree with the dissenters about the pros and cons of ditching the *Belton* rule, it is hard to quarrel with their interpretation of the Court's precedents and their conclusion that *Gant* overruled both *Belton* and *Thornton.* The majority attempted to distinguish the present case on the facts: *Belton* involved a single officer, for instance, and the arrestees had not been handcuffed or placed in a patrol car, while *Thornton* concerned an arrest for a drug offense. Such distinctions are less than convincing, however, given the language of the precedents themselves.[28] Even concurring Justice Antonin Scalia recognized that *Belton* and *Thornton* stood for a bright-line rule and that the narrowing of those decisions was ''artificial.''[29]

Both *Gant* and *Herring* are important opinions that deserve, and will receive, detailed scholarly attention in their own right. What I would like to suggest here, however, is that these cases have elements of a broader phenomenon—a sort of doctrinal creep-and-crawl—seen in constitutional criminal procedure and, in particular, Fourth Amendment law. The demands placed on police are unrelenting, as is the widely held belief that the Constitution inordinately hinders the efforts of officers to prevent, detect, and solve crimes. Law

[25] See *id.* at 1716–19.

[26] *Id.* at 1723.

[27] See *id.* at 1725–26 (Breyer, J., dissenting); *id.* at 1726–32 (Alito, J., dissenting, joined by Roberts, C.J., and Kennedy, J.).

[28] See Belton, 453 U.S. at 460; Thornton, 541 U.S. at 620. See also Thornton, 541 U.S. at 625 (Scalia, J., concurring in judgment).

[29] Gant, 129 S. Ct. at 1725 (Scalia, J., concurring).

enforcement presses the judiciary for change, which is understandable in light of the difficult duties of police officers and the adversarial nature of their profession. The courts may accede to such demands by recognizing limited exceptions to the exclusionary rule or the Fourth Amendment's command of warrants and probable cause. The original decisions might be tolerable, allowing small constitutional variations delimited by their alleged justifications. Over time, however, the courts can be pushed to extend an exception—sometimes in small increments, each case founded upon the last—until the point that the rationale for the original decision can no longer justify the doctrine.

One might argue that *Leon* and *Belton* were well-intentioned, the former premised on the futility (if not unfairness) of punishing law enforcement for judicial errors, and the latter concerned about the safety of officers who have just conducted an arrest as well as the preservation of incriminating evidence. But the cases that followed *Belton* allowed searches where the arrestee could be dangerous or destroy evidence only if he were ''possessed of the skill of Houdini and the strength of Hercules.''[30] The *Gant* Court may have ended such tomfoolery, but only through some disingenuous recasting of precedents. In turn, *Leon* now stands as a forerunner of the Court's new exception to the exclusionary rule, where law enforcement cannot be held responsible for the constitutional violations of *law enforcement.* The case spinoffs from *Herring* are limited only by the legal imagination. During this past term, however, the most enlightening example of doctrinal deviations under enforcement pressure was not *Herring*'s new exception or *Gant*'s erasure of a bright-line rule. Instead, it was the Court's decision in *Arizona v. Johnson*[31] concerning a seemingly minor and arguably preordained extension of the so-called ''stop and frisk'' doctrine.

As will be discussed in greater detail below, the Supreme Court's 1968 decision in *Terry v. Ohio* authorized police to respond to suspicious behavior with brief detentions and limited patdowns in the absence of a warrant or even probable cause.[32] Few doubt that the

[30] United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part).

[31] See Arizona v. Johnson, 555 U.S. ____, 129 S. Ct. 781 (2009).

[32] Terry v. Ohio, 392 U.S. 1 (1968).

Terry Court had good intentions, trying to balance the interests of law enforcement and the public through an opinion containing restrictive language on the permissible scope of police practice. But Justice William O. Douglas, the sole dissenter in *Terry*, spoke of the longstanding ''hydraulic pressures'' to dilute individual rights in favor of law enforcement prerogatives. The Court's decision, he believed, would usher in a new regime where police could search and seize at will.[33] Several years later, Justice Thurgood Marshall admitted that Douglas had been prescient, ''that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the 'hydraulic pressures of the day,''' portending a future where innocent people may be detained and their bodies searched without any suspicion of wrongdoing.[34] Despite such admonitions, the succeeding years would witness the Court deferring to government claims under the *Terry* rubric, expanding police authority with each decision and moving further and further away from the original justification.

To be sure, the Supreme Court has found constitutional violations in *Terry* cases, and one could point to any number of lower court decisions in favor of the defense.[35] But the overall trend is unmistakable, toward a general police power to search and seize. This was not the intent of *Terry*, which might be characterized as a mild reworking of existing jurisprudence. But to use the words of Fourth Amendment law's great chestnut, ''illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.''[36] Some forty years after the stop and frisk doctrine was first announced, the *Johnson* Court held that police may pat down an individual without any suspicion of criminal activity, a now-predictable decision but one that only Justice Douglas foresaw in 1968.[37] The potential consequences are manifest and disquieting. Soon enough, we may see whether the Court will assent to further extensions or instead try to correct a doctrine cut loose from its theoretical moorings.

[33] *Id.* at 38–39 (Douglas, J., dissenting).

[34] Adams v. Williams, 407 U.S. 143, 162 (1972) (Marshall, J., dissenting).

[35] See, e.g., Florida v. J.L., 529 U.S. 266 (2000). See generally 4 LaFave, *supra* note 19.

[36] Boyd v. United States, 116 U.S. 616, 635 (1886).

[37] See, e.g., Terry, 392 U.S. at 35–39 (Douglas, J., dissenting).

II. *Arizona v. Johnson*

On the night of April 19, 2002, members of Arizona's gang task force were on patrol in an unmarked vehicle west of Sugar Hill, a Tucson neighborhood associated with the Crips street gang. At around 9 p.m., the officers pulled over an automobile on a major thoroughfare after a license plate check revealed that the vehicle's registration was suspended for an insurance violation, a civil infraction under state law without criminal repercussions. One of the task force members, Police Officer Maria Trevizo, testified that there was no reason to believe that anyone in the vehicle was involved in criminal activity. No crimes had been reported nearby, and the agents had no idea where the car had been or where it was going.[38] Trevizo also claimed that the vehicle had not been targeted or stopped with the purpose of investigating gang activity. She and her colleagues, Detectives Jack Machado and Dave Gittings, exited their unmarked police cruiser and approached the stopped vehicle, which contained three people—the driver, one passenger in the front seat, and another in the back seat. The occupants were told to keep their hands visible, and when asked whether there were any weapons in the vehicle, they all responded ''no.'' Machado then told the driver to get out of the car—ostensibly to get his driver's license and information about vehicle registration and insurance—while Gittings focused on the front-seat passenger who remained in the car throughout the process.

For her part, Trevizo concentrated on the back-seat passenger, a young black man named Lemon Johnson. Supposedly, Johnson had stared at the law enforcement agents while they approached the car, which Trevizo deemed unusual. She also noted Johnson's all-blue clothing—an indicator of possible gang membership—as well as a radio scanner in his jacket. Nonetheless, the officer said she had no reason to believe that Johnson was involved in criminal activity and described him as cooperative in response to her questions. Although he did not have identification, Johnson provided his correct name and date of birth and even admitted serving time for burglary.

[38] See State v. Johnson, 170 P.3d 667, 668–69 (Ariz. App. 2007); Joint Appendix at 26, 30, Arizona v. Johnson, 129 S. Ct. 781 (2009) (No. 07-1122) (testimony of Officer Trevizo).

Johnson also mentioned that he was from Eloy, Arizona, a place Trevizo recognized as the home of a Crips-affiliated gang.

Believing that Johnson could be a gangster, Trevizo asked him to exit the vehicle so that she could talk to the young man away from the other occupants and ''gather intelligence about the gang he might be in.''[39] The officer acknowledged that her goal was unrelated to the justification for the traffic stop, that Johnson could have refused to get out of the vehicle, and that she did not intend to detain him. After he exited the vehicle in an ordinary manner, without sudden or furtive movements, Trevizo directed Johnson to turn around and proceeded to pat him down. The officer had ''not observe[d] anything that appeared to be criminal'' at that time—Trevizo even claimed that Johnson could have refused to turn around and put his arms up to be frisked—but she still believed that Johnson might be armed based on ''the totality of what happened that evening.''[40] During the patdown, Trevizo found a gun near Johnson's waist and a subsequent search uncovered marijuana.

The trial court denied Johnson's suppression motion, and a jury found him guilty of unlawful possession of a weapon and possession of marijuana, netting a presumptive eight-year term of imprisonment. By a divided vote, the Arizona Court of Appeals reversed, holding that the patdown of Johnson violated the Fourth Amendment and thus required the suppression of evidence derived from the search. Pursuant to the U.S. Supreme Court's stop and frisk doctrine, first articulated in *Terry v. Ohio,* law enforcement may briefly detain an individual for investigatory purposes (i.e., a stop) if it has reasonable suspicion that he is committing or has committed a crime. If law enforcement then has a reasonable suspicion that the detainee is armed and dangerous, it may conduct a limited search of his outer clothing for weapons (i.e., a patdown or frisk). But according to a majority of the Arizona court, the former suspicion that crime is afoot serves as a necessary predicate for the latter search: ''An officer may not . . . conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to believe

[39] Johnson, 170 P.3d at 669; Joint Appendix, *supra* note 38, at 19.

[40] Johnson, 170 P.3d at 669; Joint Appendix, *supra* note 38, at 19–20.

a suspect may be armed and dangerous.''[41] The court reached this conclusion based on, inter alia, its reading of the original opinions in *Terry*.[42]

In this case, the constitutional issue boiled down to whether Johnson was seized immediately prior to being frisked or instead had been engaged in a consensual encounter. If he was not seized at that point, the appellate court reasoned, Officer Trevizo had no right to frisk Johnson. In a decision earlier that year, the U.S. Supreme Court had ruled that an automobile passenger is seized for Fourth Amendment purposes during a traffic stop.[43] The opinion gave no indication as to when the seizure ended, however, and the Arizona court was unable to locate a relevant precedent. But ''common sense suggests that at some point during the encounter the passengers in the vehicle must be free to leave—their fate is not entirely tied to that of the driver.''[44] An innocent passenger cannot be taken into custody or otherwise forced to convoy because his driver was arrested during a traffic stop. Given the facts and circumstances in this case, the appellate court determined that Johnson's initial seizure, incident to the stop of the driver, evolved into a separate consensual encounter where the officer was engaged in an unrelated investigation about potential gang affiliation. And without reasonable suspicion that Johnson was involved in criminal activity, Trevizo could not frisk the young man even if she had reason to believe he was armed and dangerous.

After the Arizona Supreme Court denied review, the U.S. Supreme Court granted certiorari; and on January 26, 2009, it reversed the lower court ruling in a relatively short, unanimous opinion. Writing for the Court, Justice Ruth Bader Ginsburg began by recapping *Terry*'s implications for street encounters: Law enforcement may stop an individual when it has a reasonable suspicion that he is involved in criminal activity. To proceed to a frisk, however, law enforcement must have a reasonable suspicion that the detainee is armed and dangerous.[45] Applying this doctrine to traffic stops,

[41] Johnson, 170 P.3d at 670 (citing In re Ilono H., 113 P.3d 696, 690 (Ariz. App. 2005)).

[42] See *id.* at 670–71.

[43] See Brendlin v. California, 551 U.S. 249, 262 (2007).

[44] Johnson, 170 P.3d at 671.

[45] See Arizona v. Johnson, 129 S. Ct. 781, 784 (2009).

> the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.[46]

Justice Ginsburg attempted to rationalize the doctrinal link between pedestrian and vehicular stops, as well as the differences, based on several propositions and a trio of precedents. To begin with, the Court had previously noted that traffic stops bear a resemblance to the brief detentions sanctioned by *Terry,* at least in terms of their duration and atmosphere. Prior cases also emphasized that traffic stops are ''especially fraught with danger to police officers,'' a risk that is minimized when ''officers routinely exercise unquestioned command of the situation.''[47] After making these points, Justice Ginsburg offered three applications of the *Terry* doctrine to traffic stops. Law enforcement has the automatic power to order a driver out of his vehicle during a traffic stop without any suspicion that crime is afoot, and an officer may frisk the driver if there is a reasonable suspicion he might be armed and dangerous. Secondly, police may roust other occupants from their seats during a traffic stop, even though a passenger is innocent of the traffic violation and not suspected of any criminal activity. Finally, a passenger, like the driver, is considered seized from the moment the car comes to a halt on the side of the road until the end of the traffic stop. Justice Ginsburg then tied together the three applications of *Terry*: During routine traffic stops, an officer may pat down any passengers if he reasonably believes they may be armed and dangerous.

The *Johnson* opinion also offered a few parting shots about the notion of consent. The Arizona appellate court's portrayal of Officer Trevizo's dealings with Johnson as consensual was factually inaccurate and, to some extent, legally irrelevant. At trial, the officer all

[46] *Id.*

[47] *Id.* (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997)).

but conceded that she was not seeking Johnson's consent that night. Indeed, Justice Ginsburg wondered why the prosecutor had even tried to depict the encounter as consensual. This was ''an 'unrealistic' characterization of the Trevizo-Johnson interaction,'' Ginsburg noted. ''[B]eyond genuine debate, the point at which Johnson could have felt free to leave had not yet occurred.''[48] As a matter of law, drivers and passengers remain seized throughout a traffic stop, which normally ends when a police officer says they are free to leave. Moreover, it was immaterial that Trevizo decided to conduct a separate investigation into Johnson's possible gang affiliation. So long as it did not measurably prolong the stop, ''[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure.''[49] Trevizo had done nothing wrong, the opinion concluded, as the officer need not allow Johnson to exit the car and leave the scene without making sure that a ''dangerous person'' was not behind her.[50]

Certainly, Justice Ginsburg (and the dissenting judge below) had good reason to reject the notion that any dealings between Officer Trevizo and defendant Johnson were consensual—at least if the word implies a voluntary interaction where an individual's will to refuse was not overborne by law enforcement. Here, the traffic stop was conducted by three agents who exited an unmarked vehicle wearing external tactical vests embossed with ''Police'' and ''Street Gang Task Force'' in large letters.[51] The occupants were first told to keep their hands visible. Then, one agent ordered the driver out of the car while the other agents trained their attention on the passengers, with Johnson being questioned about, among other things, whether he had spent time in prison. Officer Trevizo then asked Johnson to exit the car and immediately frisked him. Some of these details indicate that this was no ordinary traffic stop, such as the agents' tactical uniforms; other aspects are more banal but undermine the notion of consent, like the fact that the encounter unfolded rapidly and Trevizo never told Johnson that he could refuse to

[48] *Id.* at 787–88 (internal quotation omitted).

[49] *Id.* at 788.

[50] *Id.*

[51] See Joint Appendix, *supra* note 38, at 13–14.

comply. Under these circumstances, it is almost laughable to argue that the defendant could have said ''no'' to the officer's requests.[52] Johnson's cooperation is best described as submission to authority, or acquiescence to the inevitable, rather than voluntary consent.[53]

But if anyone is to blame for the lower court's ''unrealistic'' finding of consent, it is the Supreme Court justices themselves. They are the authors of the Fourth Amendment's problematic ''consent doctrine,'' which claims to evaluate voluntariness under the totality of the circumstances,[54] yet in practice means utter deference to law enforcement.[55] For example, an individual need not be told of his right to refuse an officer's requests or that he is free to go after a traffic stop is complete.[56] Moreover, police deception does not necessarily vitiate consent.[57] Nor does it matter that consent to search someone's property was provided by another person who only *appeared* to have the authority to do so.[58] An individual's consent has even been judged voluntary despite the fact that it was obtained at police gunpoint.[59] In view of such decisions, leading scholars have surmised that the issue of voluntary consent does not depend on whether a suspect's will was actually overborne. Instead, it is a normative assessment of the governmental need to search versus concern about coercive police tactics—where law enforcement almost always prevails.[60] One might imagine that the Supreme Court would have found the Trevizo-Johnson interaction to be consensual if that were the only way the officer's search could be deemed lawful. But at least the seminal

[52] See, e.g., Arnold H. Loewy, Cops, Cars, and Citizens: Fixing the Broken Balance, 76 St. John's L. Rev. 535, 554 (2002).

[53] See Johnson, 170 P.3d at 675 (Espinosa, J., dissenting).

[54] See Schneckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973).

[55] See, e.g., Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153; Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211 (2002).

[56] See Schneckloth, 412 U.S. at 227; Ohio v. Robinette, 519 U.S. 33, 35 (1996); United States v. Drayton, 536 U.S. 194 (2002).

[57] See, e.g., Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure: Investigation 267–68 (4th ed. 2006); 4 LaFave, *supra* note 19, at § 8.2(m)–(n).

[58] See Illinois v. Rodriguez, 497 U.S. 177 (1990).

[59] See, e.g., United States v. Barnett, 989 F.2d 546, 555–56 (1st Cir. 1993); Strauss, *supra* note 55, at 226.

[60] See, e.g., Dressler & Michaels, *supra* note 57, at 266.

case on consent searches, the 1973 decision in *Schneckloth v. Bustamonte,* was relatively forthright about its real purpose and effect. In the words of the always pragmatic (but sometimes conceptually challenged) Justice Potter Stewart, consent searches ''may be the only means of obtaining important and reliable evidence.''[61]

In contrast, the doctrinal origin of the present case, *Terry v. Ohio,* did not allude to the subsequent deviations that would take place in its name. This is not to say that *Terry* wasn't controversial from the start; to the contrary, it was (and still is) a source of scholarly argument.[62] What is beyond debate, however, is that the *Terry* opinion itself cannot be read as empowering law enforcement to order a driver from his vehicle during a routine traffic stop, and it certainly did not license the automatic rousting of innocent passengers. Nor did *Terry* authorize the police conduct in *Johnson,* where law enforcement frisked a passenger without any belief that he was involved in criminal activity or even accountable for a civil violation. Similarly, it is a stretch to claim that the ''suspicious'' circumstances in this case—Lemon Johnson staring out the car window, the color of his clothes, his home town, etc.—would meet the *Terry* Court's description of the requisite level of proof. What is more, *Terry* seemed quite clear that the fact of a detention does not permit investigations wholly unrelated to the justification for the stop, let alone that an ancillary inquiry could serve as the occasion to frisk an otherwise innocent individual. To understand how this all became possible, we must turn back to the doctrine's source.

III. *Terry v. Ohio*

Chief Justice Earl Warren's majority opinion in *Terry v. Ohio* was motivated by admirable goals, including the pursuit of a remedy for the abusive policing of minority communities detailed in major

[61] Schneckloth, 412 U.S. at 227.

[62] See, e.g., Wayne R. LaFave, Street Encounters and the Constitution: *Terry, Sibron, Peters,* and Beyond, 67 Mich. L. Rev. 39, 39 n.4 (1968). See also Symposium on the 30th Anniversary of *Terry v. Ohio,* 72 St. John's L. Rev. 721 (1998); Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry,* 72 Minn. L. Rev. 383 (1988).

commission reports.[63] The Court sought to bring within the fold of constitutional law the otherwise unregulated contacts between police and citizen.[64] When law enforcement accosts an individual on the street, inhibits his freedom to walk away, and thoroughly explores the outer surface of his clothing, he has been subjected to a Fourth Amendment intrusion. A seizure occurs not only upon formal arrest but whenever an officer, ''by means of physical force or show of authority, has in some way restrained the liberty of a citizen.''[65] Moreover, the Court found it impossible to argue that ''a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'''[66] This is not a trifling interference but instead ''a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.''[67] The frisk represents a sharp infringement ''upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.''[68] Given that the street detention amounted to a seizure and the pat-down constituted a search, a stop and frisk might seem to require judicial preclearance, or at least probable cause.[69]

But according to the *Terry* Court, the police conduct at issue here, ''necessarily swift action predicated upon the on-the-spot observations on the beat,'' could not be governed by the warrant process.[70] And because the Warrant Clause of the Fourth Amendment is inapplicable, Chief Justice Warren proclaimed that probable cause is not a prerequisite. Instead, this police technique would be subject to

[63] See President's Comm'n on Law Enforcement & Admin. of Justice, Task Force Report: The Police (1967); Nat'l Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders (1968). See also Gregory H. Williams, The Supreme Court and Broken Promises: The Gradual but Continual Erosion of *Terry v. Ohio,* 34 How. L.J. 567, 571–72 (1991). For an excellent review of the Court discussions leading to *Terry,* see John Q. Barrett, Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference, 72 St. John's L. Rev. 749 (1998).

[64] See Terry, 392 U.S. at 28–31.

[65] *Id.* at 19 n.16.

[66] *Id.* at 16.

[67] *Id.* at 17.

[68] *Id.* at 25.

[69] See, e.g., Katz v. United States, 389 U.S. 347, 356–57 (1967).

[70] Terry, 392 U.S. at 20.

''the Fourth Amendment's general proscription against unreasonable searches and seizures.''[71] Relying upon a case decided a year earlier, the *Terry* Court evaluated the reasonableness of the stop and frisk by balancing the government interests at stake—crime prevention and detection, and officer safety—against the individual's interest in freedom of movement and bodily autonomy.[72] The balance the Court ultimately struck would allow an officer to conduct a brief detention based on a reasonable suspicion that ''criminal activity may be afoot'' and then a patdown if he has a reasonable suspicion that a suspect is ''armed and presently dangerous.''[73]

There were, and still are, many reasons to be dissatisfied with *Terry.* At the time, dissenting Justice Douglas thought it was a ''mystery'' how a search and seizure could be lawful without probable cause of criminal activity.[74] A neutral magistrate could not issue a warrant in such circumstances, given the constitutional standard of proof—but after the Court's decision, ''the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action.''[75] Probable cause is not only spelled out in the text of the Fourth Amendment and engrained in America's constitutional history, but it ''rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'''[76] Douglas saw *Terry* as a ''long step down the totalitarian path'' brought about by the ''hydraulic pressures'' of crime and justice, creating the type of ''new regime'' that could be legitimate only after popular deliberation and constitutional amendment.[77] Likewise, Professor Anthony

[71] *Id.*

[72] See Camara v. Municipal Court, 387 U.S. 523 (1967).

[73] Terry, 392 U.S. at 30–31. The *Terry* Court itself did not use the words ''reasonable suspicion,'' although it was used in Justice Douglas's *Terry* dissent, *id.* at 37 (Douglas, J., dissenting); as well as in a companion case to *Terry,* Sibron v. New York, 392 U.S. 40, 49, 60 (1968). Later cases would make clear that this was the term for the level of suspicion required for a *Terry* stop and frisk. See, e.g., Dressler & Michaels, *supra* note 57, at 285 n. 29.

[74] See Terry, 392 U.S. at 35 (Douglas, J., dissenting).

[75] *Id.* at 36.

[76] *Id.* at 37.

[77] *Id.* at 38–39.

Amsterdam cautioned against a graduated approach, which ''converts the Fourth Amendment into one immense Rorschach blot.''[78] *Terry* created a third category of street encounter between arrests based on probable cause and simple conversation that requires no justification. ''But why only three categories?,'' Amsterdam rhetorically asked. ''Why not six, or a dozen, or an even hundred?''[79] The Court's sliding scale approach to the Fourth Amendment would only provide ''more slide than scale,'' with the intended distinctions of the graduated model dissolving in the practical realities of street enforcement and trial adjudication.

But the *Terry* opinion did not foresee these problems, with its language attempting to cabin the new doctrine. As mentioned, the Court sought to expand constitutional protection by applying the Fourth Amendment to stops and frisks, and a primary impetus was the ''wholesale harassment'' of minorities, especially African Americans. The abuses had become a leading source of conflict between law enforcement and minority communities, ''as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.''[80] For this reason, *Terry* acknowledged that ''the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.''[81] The majority opinion also recognized that stops and frisks were serious invasions of liberty. Patdowns in particular inflicted a great indignity, ''performed in public while a citizen stands helpless, perhaps facing a wall with his hands raised,'' with the officer fingering the individual's entire body—''arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet.''[82]

[78] Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 393 (1974). See also *id.* at 374.

[79] *Id.* at 376.

[80] Terry, 392 U.S. at 15 n.11 (quoting the President's Comm'n, *supra* note 63, at 183).

[81] *Id.* at 17 n.14.

[82] *Id.* at 17, 17 n.13 (quoting L.L. Priar & T.F. Martin, Searching and Disarming Criminals, 45 J. Crim. L. Criminology & Police Sci. 481 (1954)).

Police should not undertake these procedures lightly, the Court admonished, and the judiciary must condemn such activity if it is overbearing or harassing, or lacks a sufficient evidentiary basis. Chief Justice Warren made plain that there were predicates and limits to the stop and frisk process. *Terry* mandated two separate inquiries: ''whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.''[83] Specifically, the preliminary question asked if there was adequate reason to believe that criminal activity was afoot and a particular individual was involved. If so, the second issue came into play—whether there was reason to believe that the suspect was presently armed and dangerous. Between these stages, an officer could identify himself as a policeman and ask reasonable questions. A subsequent patdown would be permissible only if ''nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety.''[84] The frisk was thereby predicated on a lawful stop based on reasonable suspicion of criminal activity.

The facts in *Terry* illustrated the dual inquiry: A police officer witnessed two men walking back and forth in front of a store, ''pausing to stare in the same store window roughly 24 times'' and conferencing on a street corner after each roundtrip. The pair ultimately met with a third man, whom they followed and then rejoined a few blocks away. The officer believed that they were ''casing a job,'' that is, checking out the store in preparation for an armed robbery. He stopped the three men and asked them questions; only after they ''mumbled something'' in response did the officer frisk the trio and uncover firearms.[85] The suspicion of crime thus preceded the frisk, the legal implications of which Justice John Marshall Harlan made ''perfectly clear'' in his concurrence: The authority to conduct a frisk ''depends upon the reasonableness of a forcible stop to investigate a suspected crime.''[86] Harlan noted that ''[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous.'' During a voluntary conversation with law enforcement, a citizen

[83] *Id.* at 20.

[84] *Id.* at 30.

[85] *Id.* at 7.

[86] *Id.* at 33 (Harlan, J., concurring).

''certainly need not submit to a frisk for the questioner's protection.'' Any power to search does not originate from an officer's ''right to disarm, to frisk for his own protection,'' but instead from his belief that criminal activity was afoot and his prerogative to prevent and investigate serious crime.[87]

Although stops and frisks required neither a warrant nor probable cause, *Terry* stated that ''the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context.''[88] Citing its core cases on probable cause and even using the language of these opinions, the Court held that an agent ''must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.''[89] The benchmark was a sensibly cautious individual—what ''a reasonably prudent man in the circumstances'' would have believed based on the objective facts, without reference to a given officer's unparticularized suspicions or hunches.[90] The requirement of specificity was nothing less than ''the central teaching of this Court's Fourth Amendment jurisprudence.''[91] By its words, then, *Terry* did not portray the standard of proof as insubstantial.

The conceptual connection between reasonable suspicion and probable cause was critical, grounding the *Terry* standard in a constitutional philosophy that ''common rumor or report, suspicion, or even 'strong reason to suspect''' could not support a search and seizure.[92] The Supreme Court has never attempted to quantify probable cause, other than to say it is less than the amount of evidence necessary to convict at trial.[93] But the justices opined that ''the resolution of doubtful or marginal cases [of probable cause] should be largely determined by the preference to be accorded to warrants,'' where any inferences can be ''drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the

[87] *Id.* at 32–33.

[88] *Id.* at 20 (majority opinion).

[89] *Id.* at 21 (citing, inter alia, Beck v. Ohio, 379 U.S. 89 (1964), and Brinegar v. United States, 338 U.S. 160 (1949)).

[90] *Id.* at 21–22, 27.

[91] *Id.* at 22 n.18.

[92] Henry v. United States, 361 U.S. 98, 101 (1959).

[93] See Brinegar, 338 U.S. at 175.

often competitive enterprise of ferreting out crime.''[94] At perhaps the ''high water'' mark for probable cause determinations, the Court held that the smell of opium coming from a closed hotel room did not justify a warrantless search and seizure.[95] Although the opinions often appeared fact-bound, they occasionally provided rules for proof determinations under the Fourth Amendment—laying out a test to evaluate information supplied by informants,[96] for instance, and rejecting bald assertions about an individual's character or his mere propinquity to particular people or places.[97]

Against this background, one might wonder how the ostensibly reasonable and limited decision in *Terry* could be the precursor of cases like *Arizona v. Johnson.* Other than Justice Douglas's dissent, the opinions in *Terry* seemed oblivious to the potential consequences, that constant pressure to water down individual rights might lead the Court to adopt new deviations, which, over time, would remove any limitations outlined in the original decision. Once judges disregard the motto of *obsta principiis*—''resist the beginnings''—it becomes harder with each step to return to the constitutional principle that had been spurned at the outset.[98] To be clear, the expansion of law enforcement's power to stop and frisk was only one aspect of a more general, ''continuing evisceration of Fourth Amendment protections,''[99] with the Supreme Court adopting new exceptions to the warrant requirement, allowing the admission of evidence despite its being illegally obtained, concocting procedural barriers to judicial review, and holding that a variety of privacy invasions were of no constitutional moment.[100] When dissenting justices would draw

[94] United States v. Ventresca, 380 U.S. 102, 109 (1965); Johnson v. United States, 333 U.S. 10, 14 (1948).

[95] Henry, 361 U.S. at 101; Johnson, 333 U.S. at 12–14.

[96] See generally Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[97] See Ybarra v. Illinois, 444 U.S. 85, 91 (1979); Sibron v. New York, 392 U.S. 40, 63 (1969); Spinelli, 393 U.S. at 414.

[98] See, e.g., Boyd v. United States, 116 U.S. 616, 635 (1886). See also Wayne R. LaFave, The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence, 28 Ariz. L. Rev. 291 (1986).

[99] United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976) (Brennan, J., dissenting). See also Andresen v. Maryland, 427 U.S. 463, 485 n.1 (1976) (Brennan, J., dissenting).

[100] See, e.g., United States v. Leon, 468 U.S. 897 (1984) (establishing ''good faith'' exception to the exclusionary rule); Stone v. Powell, 428 U.S. 465 (1976) (concluding that Fourth Amendment violations are not cognizable on federal habeas corpus

attention to each deviation, their colleagues in the majority would reject any concerns as alarmist given the narrowness of their decision. But when a later case would take a further step, the dissenters were relegated to criticizing the Court for violating its promise.[101] Even where it was breaking from established doctrine, however, a majority opinion might repackage prior precedents as being more consistent with the new approach. Such was the case with the Fourth Amendment's standards of proof.

IV. Diluted Suspicion

In 1983, the Supreme Court abandoned the prevailing test for informant information, and with it, any hard rules that had been developed on probable cause.[102] That case, *Illinois v. Gates,* opted instead for the multifactor, all-things-considered ''totality of the circumstances'' test. In so doing, the Court argued that probable cause is ''a fluid concept'' that could not be ''reduced to a neat set of legal rules.''[103] The *Gates* majority said its approach was consonant with prior cases, boldly claiming that it was simply ''reaffirm[ing]'' the totality of the circumstances test that had ''traditionally'' been used in evaluations of probable cause. The dissenters rejected this revisionist history, as well as the Court's new standard, which provided no structure for probable cause inquiries and invited intrusions based on unreliable information, ultimately permitting an alleged

review); South Dakota v. Opperman, 428 U.S. 364 (1976) (upholding warrantless inventory searches). See also Erik Luna, The *Katz* Jury, 41 U.C. Davis L. Rev. 839, 840–45 (2008) (discussing Katz v. United States, 389 U.S. 347 (1967), and its progeny).

[101] See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579, 610 (1983) (Brennan, J., dissenting):

> In dissent in *Martinez-Fuerte,* I expressed my fear that the Court's decision was part of a ''continuing evisceration of Fourth Amendment protection against unreasonable searches and seizures.'' The majority chided me for my rhetoric and my ''unwarranted concern,'' pointing out that its holding was expressly and narrowly limited: ''Our holding today, approving routine stops for brief questioning . . . is confined to permanent checkpoints.'' Today the Court breaks that promise.

[102] Illinois v. Gates, 462 U.S. 213 (1983).

[103] *Id.* at 232.

''totality'' to exceed ''the sum of its circumstances.''[104] Even concurring Justice Byron White recognized that *Gates* ''may foretell an evisceration of the probable cause standard.''[105]

As it turns out, Justice White, his dissenting colleagues, and numerous cynical scholars were right: For all intents and purposes, the totality of the circumstances standard has transformed probable cause into no standard at all. As suggested by empirical studies and subsequent case law, the judiciary rarely impedes police investigations by denying or second guessing their searches and seizures.[106] The Court's most recent precedents permit a type of guilt by association, where probable cause that someone within a group committed a crime means that all can be searched.[107] None of this should have been a surprise with the recrudescence of the totality of the circumstances test, which has meant judicial deference in the context of consent searches and had only sown confusion in the area of custodial interrogation.[108]

The Court had adopted the totality of the circumstances test for reasonable suspicion before applying it to probable cause, and it was inevitable that the test would have an even greater impact on stops and frisks. Many of the post-*Terry* cases had downplayed the requisite amount of proof while amplifying the gap between probable cause and reasonable suspicion. A stop and frisk needed only ''some minimal level of objective justification,'' the Court noted, which ''is considerably less than proof of wrongdoing by a preponderance of the evidence'' and ''obviously less demanding'' than probable cause.[109] Moreover, reasonable suspicion can be established

[104] *Id.* at 286–91 (Brennan, J., dissenting); *id.* at 295 n.8 (Stevens, J., dissenting).

[105] *Id.* at 272 (White, J., concurring).

[106] See, e.g., Laurence A. Benner & Charles T. Samarkos, Preliminary Findings from the San Diego Search Warrant Project, 36 Cal. W. L. Rev. 221 (2000); George R. Nock, The Point of the Fourth Amendment and the Myth of Magisterial Discretion, 23 Conn. L. Rev. 1, 7 n.25 (1990) (discussing ACLU study in Washington state).

[107] See Maryland v. Pringle, 540 U.S. 366 (2003); Wyoming v. Houghton, 526 U.S. 295 (1999). See, e.g., Tracey Maclin, The *Pringle* Case's New Notion of Probable Cause: An Assault on *Di Re* and the Fourth Amendment, 2004 Cato Sup. Ct. Rev. 395 (2004).

[108] See *supra* notes 54–61 and accompany text (discussing consent doctrine); Yale Kamisar, *Gates,* ''Probable Cause,'' ''Good Faith,'' and Beyond, 69 Iowa L. Rev. 551, 570–71 (1984) (discussing pre-*Miranda* standard for custodial interrogation).

[109] United States v. Sokolow, 490 U.S. 1, 7–8 (1989) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)); United States v. Cortez, 449 U.S. 411, 417 (1981)).

by ''information that is less reliable than that required to show probable cause.''[110] Previously, police needed to provide some showing as to how an informant got his information, why it should be believed, or at least some details that officers independently verified. Now an anonymous tip that someone will depart for a particular place at a particular time offers reasonable suspicion to detain, despite the fact that many of the tipster's details are demonstrably erroneous.[111] Reasonable suspicion can even be provided by a series of innocuous facts, collectively amounting to lawful activity subject to innocent explanation, so long as law enforcement could infer criminal activity was afoot. It can be suspicious, for example, when a driver does not look over at a patrol car, based on that officer's ''experience'' that ''most persons look over'' and give him ''a friendly wave.''[112]

With this low threshold, entire categories of information might not only be relevant, but effectively dispositive by simple invocation of law enforcement. In 1979, the Court had held that being in a high-crime area, specifically, ''a neighborhood frequented by drug users,'' was not itself a reason to suspect an individual of criminal activity.[113] Since then, however, some lower courts have found reasonable suspicion by pointing to otherwise harmless conduct—twice crossing the street, for instance, or sitting in a parked vehicle—because it occurred in an allegedly high-crime neighborhood.[114] In 2000, the Supreme Court condoned this approach in *Illinois v. Wardlow,* where it found that an individual's ''unprovoked flight upon noticing the police'' in a high-crime area provided sufficient justification to conduct a *Terry* stop and frisk.[115] In a partial dissent, Justice John Paul Stevens recognized that there are innocent reasons why someone might leave when law enforcement arrives at the scene.[116] Minorities,

[110] Cortez, 449 U.S. at 417–18 (1981). See also United States v. Brignoni-Ponce, 422 U.S. 873, 885 n.10 (1975).

[111] See, e.g., Alabama v. White, 496 U.S. 325, 353 (1990) (Stevens, J., dissenting).

[112] See, e.g., United States v. Arvizu, 534 U.S. 266, 270 (2002).

[113] Brown v. Texas, 443 U.S. 47, 52 (1979).

[114] See Margaret Raymond, Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion, 60 Ohio St. L.J. 99, 115–19 (1999) (discussing cases).

[115] See Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

[116] See *id.* at 128–29 (Stevens, J., concurring and dissenting in part).

in particular, may have good reason to avoid encounters with police officers they perceive as aggressive, adversarial, and dangerous.[117] More generally, key concepts like ''high-crime area'' and ''unprovoked flight'' have never been defined by the Supreme Court, and some lower courts have been willing to give credence to less persuasive notions (e.g., ''a slow run'' or ''a walk that accelerates'').[118] In practice, the mere incantation of such terms at a suppression hearing may justify a stop.[119]

By comparison, the Supreme Court's jurisprudence on frisks is relatively thin. In a 1974 case, *Adams v. Williams*, an officer patrolling a ''high-crime area'' at around 2 a.m. was told by a known informant that someone sitting in a nearby car was carrying drugs and had a firearm at his waist. When the officer approached the individual and asked him to open the car door, the man rolled down the window instead—at which point, the officer reached into the vehicle and removed a gun from the man's waistband.[120] Given the tip, time of day and location, and the suspect's failure to open his car door, the *Adams* Court concluded that the officer justifiably believed that crime was afoot and had ''ample reason to fear for his safety.''[121] In dissent, Justice Douglas emphasized that state law permitted individuals to possess concealed weapons and that the only basis for arrest in this case was a tip about illegal drugs. ''Can it be said that a man in possession of narcotics will not have a permit for his gun?,'' Douglas rhetorically asked.[122]

Subsequent cases would confirm Douglas's misgivings about presumptions in *Terry* analysis. In *Minnesota v. Dickerson*, two officers

[117] See *id.* at 132–34. See also Lenese C. Herbert, Can't You See What I Am Saying? Making Expressive Conduct a Crime in High Crime Areas, 9 Geo. J. on Poverty L. & Pol'y 135 (2002).

[118] See, e.g., State v. Harbison, 141 N.M. 392 (2007); Wilson v. United States, 802 A.2d 367 (D.C. App. 2002).

[119] See Andrew Guthrie Ferguson & Damien Bernache, The ''High-Crime Area'' Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 Am. U. L. Rev. 1587 (2008). See also David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 677–78 (1994); Herbert, *supra* note 117; Raymond, *supra* note 114.

[120] Adams v. Williams, 407 U.S. 143, 144–45 (1972).

[121] *Id.* at 147–48.

[122] *Id.* at 149–50 (Douglas, J., dissenting).

observed a person leaving a notorious ''crack house,'' and when he spotted the patrol car, the individual turned and walked away in an apparent attempt to avoid contact with law enforcement. The officers stopped the man and frisked him, which uncovered a lump of crack cocaine but no weapons.[123] The Supreme Court did not question that there was reasonable suspicion in this case, and in fact, it made no mention of the purported grounds for the frisk: an officer's claim that other weapons had been seized from people at that location and his experience that drug traffickers often possess weapons.[124] Rather, the *Dickerson* opinion focused on the discovery of the drugs, which would have been perfectly permissible if the incriminating character of the item was immediately evident from an ordinary *Terry* frisk.[125]

The unmentioned basis for the patdown in *Dickerson* is hard to square with the Court's earlier decision in *Ybarra v. Illinois,* where it held that police could not conduct a ''generalized cursory search for weapons'' during a drug bust but instead must have an individualized reasonable suspicion that the person frisked is armed and dangerous.[126] Nor does the *Dickerson* patdown fit with the more recent decision in *J.L. v. Florida.* In that case, the Court found no reasonable suspicion for a police frisk based on an anonymous tip that a young black male, wearing a plaid shirt and standing at a bus stop, was armed. More generally, it refused to adopt a categorical ''firearm exception.''[127] Nonetheless, lower court decisions have created virtual per se rules permitting frisks when law enforcement is investigating particular classes of crime.[128] This may make eminent sense in a few offense categories—homicide, forcible rape, or the type of robbery suspected in *Terry*—which almost by definition

[123] See Minnesota v. Dickerson, 508 U.S. 366, 368–69 (1993).

[124] See State v. Dickerson, 469 N.W.2d 462, 464 (Minn. 1991).

[125] See Dickerson, 508 U.S. at 378–79 (holding that ''*Terry* entitled [the officer] to place his hands on respondent's jacket'' but ''the incriminating character of the object was not immediately apparent to him'' and required a further search not authorized by *Terry*).

[126] Ybarra, 444 U.S. at 92–96.

[127] See Florida v. J.L., 529 U.S. 266, 269–74 (2000).

[128] See 4 LaFave, Search and Seizure, *supra* note 19, at § 9.6(a); David A. Harris, Frisking Every Suspect: The Withering of *Terry,* 28 U.C. Davis L. Rev. 1, 22–32 (1994).

involve weapons and violence. But some cases have accepted automatic frisk rules for crimes without any obvious connection to armed belligerence, including burglary, car theft, fraud, gambling, and prostitution.[129] No empirical evidence is offered for such rules. Instead, courts simply assert a proposition, like burglary is ''a crime normally and reasonably expected to involve a weapon.''[130]

The most utilized instance of automatic suspicion to frisk is in the area of drug enforcement, where lower court cases have said, inter alia: ''weapons and violence are frequently associated with drug transactions''; ''drug dealers and weapons go hand in hand''; and ''firearms are as much 'tools of the trade' as are most commonly recognized articles of drug paraphernalia.''[131] The association between drugs, guns, and violence is the subject of ongoing empirical debate, and the actual likelihood that an individual involved in a drug transaction is armed and dangerous is unknown and likely unknowable.[132] In reality, though, the probabilistic question is almost beside the point when drug enforcement is at issue—judges generally defer to police. As argued elsewhere, acquiescence by the courts to the so-called ''War on Drugs'' has resulted in a de facto drug

[129] See, e.g., United States v. Bullock, 510 F.3d 342 (D.C. Cir. 2007) (citing cases on, inter alia, burglary, drug dealing, car theft, and fraud); United States v. Hanlon, 401 F.3d 926, 929–30 (8th Cir. 2005) (''when officers encounter suspected car thieves, they also may reasonably suspect the individuals might possess weapons''); United States v. Johnson, 364 F.3d 1185, 1195 (10th Cir. 2004) (prostitution among crimes ''typically associated with some sort of weapon''); State v. James, 795 So.2d 1146, 1150 (La. 2000) (''the frequent association of narcotics trafficking with firearms justified the officer's brief, self-protective frisk''); People v. Tsang, 173 A.D.2d 173, 173 (N.Y. App. Div. 1991) (''guns usually accompany illegal gambling house operations'').

[130] United States v. Barnett, 505 F.3d 637, 640 (7th Cir. 2007). This particular conclusion seems at odds with a Supreme Court opinion in another area of Fourth Amendment jurisprudence: the police use of deadly force. See Tennessee v. Garner, 471 U.S. 1, 21–22 (1985) (noting that ''the available statistics demonstrate that burglaries only rarely involve physical violence'').

[131] United States v. Bustos-Torres, 396 F.3d 935, 943 (8th Cir. 2005); United States v. Trullo, 809 F.2d 108, 114 (1st Cir. 1987); State v. Richardson, 456 N.W.2d 830, 836 (Wis. 1990).

[132] For instance, one comparative study suggested that higher levels of drug *enforcement* explain higher levels of violence. See, e.g., Jeffrey A. Miron, Violence, Guns, and Drugs: A Cross-Country Analysis, 44 J. L. & Econ. 615 (2001). See also, e.g., Bernard E. Harcourt, Judge Richard Posner on Civil Liberties: Pragmatic Authoritarian Libertarian, 74 U. Chi. L. Rev. 1723, 32–33 (2007) (critiquing judicial use of hit-rates in Fourth Amendment analysis).

exception to the Constitution.[133] Dissenting justices have criticized the judiciary for becoming ''a loyal foot soldier'' in the drug war, adopting ''constitutionally forbidden shortcuts'' in service of prohibition.[134]

In particular, the Fourth Amendment has been rendered *hors de combat,* as epitomized by the judiciary's tacit approval of the ''drug courier profile.'' Among others, Professor David Cole offered a devastating critique of the profile—a set of traits and behaviors supposedly associated with individuals trafficking in drugs—noting how, over time, law enforcement used opposing characteristics or cited the entire universe of alternatives (e.g., too nervous, too calm, one of the first to deplane, one of the last to deplane, deplaned in the middle, etc.).[135] By the 1990s, however, the drug courier profile had been effectively endorsed by the Supreme Court's jurisprudence.[136] Other profiles, like gang membership—which include broad criteria like wearing particular colors, having tattoos, and frequenting a gang-related area—would be unsurprising extensions for *Terry* analysis.[137] The elasticity of these sketches, as well as the aforementioned notion of high-crime areas, has permitted a different, far more troubling form of profiling: the use of race or ethnicity in determining those individuals to be investigated or otherwise placed under suspicion. This phenomenon, known as ''racial profiling,'' seemed to

[133] See Erik Luna, Drug Exceptionalism, 47 Vill. L. Rev. 753 (2002).

[134] California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting); Harmelin v. Michigan, 501 U.S. 957, 1024 (1991) (White, J., dissenting). See also Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 908 (1990) (Blackmun, J., dissenting) (suggesting that Court's free exercise decision was ''a product of overreaction to the serious problems the country's drug crisis has generated''); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 680–81 (1989) (Scalia, J., dissenting) (arguing that drug testing regime approved by Court was ''a kind of immolation of privacy and human dignity in symbolic opposition to drug use'').

[135] David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 47–48 (1999).

[136] See United States v. Sokolow, 490 U.S. 1 (1989); United States v. Sharpe, 470 U.S. 675 (1985); Florida v. Rodriguez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

[137] See, e.g., Suzin Kim, Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles, 5 B.U. Pub. Int. L.J. 265, 270–71 (1996) (detailing specific gang profiles). Cf. State v. Jones, 835 P.2d 863, 866 (N.M. App. 1992) (noting that ''an individual's membership in a gang is a factor which may properly be considered . . . in determining whether a stop and frisk is proper'').

receive the imprimatur of the Supreme Court in border patrol cases from the mid-1970s, where it held that ''Mexican appearance'' was relevant for immigration enforcement.[138] In turn, several lower court cases have found race to be an acceptable factor in ordinary stop-and-frisk analysis.[139] Racial stereotyping under *Terry* is rarely overt, however, and instead it typically occurs under the pretext of a traffic stop pursuant to all-encompassing vehicular codes.

V. *Terry* Behind the Wheel

Some of the Supreme Court's pre-*Terry* decisions had upheld warrantless automobile searches and seizures—the earliest of which, ironically enough, involved a different type of drug crime, bootlegging. In *Carroll v. United States*, the Court recognized that it may not be possible to obtain a warrant ''because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.''[140] But that did not justify a search and seizure in the absence of probable cause of criminal activity:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[141]

Subsequent decisions reiterated that automobile searches and seizures required probable cause of criminal activity.[142] In fact, the

[138] See United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 563 n.17 (1976).

[139] See, e.g., United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (noting as factor in detaining defendant ''that he was a roughly dressed young black male''); United States v. Malone, 886 F.2d 1162, 1164 (9th Cir. 1989) (noting that suspicion was based on fact that, inter alia, defendant was ''a young, black male'').

[140] Carroll v. United States, 267 U.S. 132, 153 (1924).

[141] *Id.* at 153–54.

[142] See, e.g., Chambers v. Maroney, 399 U.S. 42, 50–51 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221–22 (1968); Brinegar v. United States, 338 U.S. 160, 164 (1949).

Court affirmed this principle in the first post-*Terry* border patrol case, *Almeida-Sanchez v. United States*: ''[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search.''[143] In 1975, however, the Supreme Court's decision in *United States v. Brignoni-Ponce* held that law enforcement could stop a vehicle based on a reasonable suspicion that it contained illegal aliens. After describing the public interest in preventing illegal immigration and the limited intrusion by border patrol agents, the Court expressly relied upon *Terry* and its progeny to justify a brief automobile stop. ''These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime.''[144] But the Court claimed that the decision was narrow, as it had rejected random border patrol stops and held that probable cause was required for anything extending beyond a brief detention to ask questions about suspicious circumstances.

Justice Douglas, however, saw *Brignoni-Ponce* as exemplifying the persistent deterioration of Fourth Amendment protection foreseen in his *Terry* dissent. The stop and frisk doctrine had now been extended from violent crime to drug and immigration offenses, and from street stops to seizures of moving vehicles. *Terry* had ''come to be viewed as a legal construct for the regulation of a general investigatory police power,'' which was ''warmly embraced by law enforcement forces and vigorously employed in the cause of crime detection.''[145] Though the reasonable suspicion standard may capture evidence of crime, ''the nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude.''[146] If the erosion of the Fourth Amendment was to be limited, it would come from the Court's vigorous review of the doctrine's subsequent

[143] Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973). See also United States v. Ortiz, 422 U.S. 891 (1975).

[144] United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).

[145] *Id.* at 889 (Douglas, J., concurring in the judgment).

[146] *Id.*

applications rather than the ''qualifying language of today's opinion.''[147] But ''I am not optimistic,'' Douglas remarked, given case developments since *Terry.*[148]

Once again, his doubts were well-founded. The border patrol cases at least involved searches and seizures premised on suspicion of crime, the smuggling of illegal aliens. But ensuing decisions would dispense altogether with the justification of criminal law enforcement. In 1979, the Court held unconstitutional random suspicionless car stops, purportedly to check for a driver's license and vehicle registration.[149] The opinion in *Delaware v. Prouse* included strong language about the liberty interest in ''a basic, pervasive, and often necessary mode of transportation,'' with many drivers finding ''a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves'' as pedestrians.[150] Just as citizens are not deprived of Fourth Amendment protection by moving out of their homes and onto public sidewalks, ''nor are they shorn of those interests when they step from the sidewalks into their automobiles.''[151] Along the way, *Prouse* had made clear that the *Terry* framework applied to police detentions for civil traffic violations. This might be perfectly sensible and consistent with prior decisions; by denominating traffic stops as seizures for purposes of the Fourth Amendment, they would be subject to constitutional protection. The question, however, is what this would mean in terms of permissible police powers during ordinary traffic stops lacking suspicion that crime was afoot.

The first troubling indicator had been provided a little more than a year earlier in a relatively short per curiam summary disposition (i.e., without the benefit of full briefing and oral argument).[152] In that case, *Pennsylvania v. Mimms,* law enforcement pulled over an automobile with an expired license plate. The driver was ordered out of the car without suspecting that anyone was involved in criminal activity and posed a threat to police safety. Instead, the officer simply

[147] *Id.* at 890.

[148] *Id.*

[149] See Delaware v. Prouse, 440 U.S. 648 (1979).

[150] *Id.* at 662.

[151] *Id.* at 663.

[152] Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam).

claimed that it was his practice to remove all drivers from their vehicles whenever he makes a traffic stop. Outside of the car, the officer saw a large bulge in the driver's jacket, and a subsequent frisk uncovered a revolver. In analyzing the case, the Supreme Court drew upon the balancing approach in *Terry* and yet refused to distinguish stops for traffic violations from those premised on criminal activity. It described the interest in officer safety as ''both legitimate and weighty,'' citing a study supposedly showing that nearly a third of all police shootings happened when officers approached individuals seated in vehicles.[153] In contrast, the intrusion upon individual liberty was depicted as *de minimis,* with a driver suffering a ''petty indignity'' by having to exit his stopped vehicle. ''What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for officer safety,'' the *Mimms* Court concluded.[154]

In dissent, Justice Marshall argued that this new police power during traffic stops went well beyond any reasonable reading of *Terry.* The stop and frisk in that case had been related in scope to the circumstances justifying the officer's suspicion in the first place, namely, facts suggesting that an armed robbery was in the works. Here, however, the officer had no suspicion of crime and no reason to believe that the driver was armed, only routine information that would justify the issuance of a citation for an expired license plate. ''There is simply no relation at all between the circumstance and the order to step out of the car,'' Marshall wrote.[155] Justice Stevens went even further in his dissent, arguing that the *Mimms* Court had upheld a new class of seizure, the rousting of drivers, which required no suspicion at all. The factual premise for this categorical rule—officer safety necessitates the power to order a driver out of his vehicle—was based on the mischaracterization of a single, nonrandomized study of 110 police shootings.[156] The data offered little

[153] *Id.* at 110.

[154] *Id.* at 111.

[155] *Id.* at 114.

[156] See *id.* at 117–19 (discussing Allen P. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. Criminology & Police Sci. 93 (1963)). Of the 110 shootings studied, 35 involved suspects in automobiles in a wide range of circumstances, such as shootings from *moving* vehicles. A dozen of the cases identified the suspect as seated behind the wheel of a car, while nine others occurred outside of the car while the officer was talking to the suspect. See also *infra* note 176 (discussing inapplicability of this study in *Michigan v. Long*).

information about the risk associated with traffic stops and provided no support for the idea that ordering a suspect out of the car increases officer safety. The existing evidence, particularly in light of the infinite factual variety of cases, could not justify the majority's per se rule. Nor could it be said that a driver always had a minimal interest in remaining in the car. For example, ''a person in poor health may object to standing in the cold or rain,'' while ''another who left home in haste to drive children or spouse to school or to the train may not be fully dressed.''[157] The millions of traffic stops each year are ''not fungible,'' Stevens argued, and to dispense with individualized suspicion is tantamount to abandoning judicial review.

In the end, Justice Stevens predicted that some drivers would be ordered out of their seats because of the color of their skin. Furthermore, the logic of *Mimms* necessarily covered passengers, who would be rousted from cars without having committed any offense, not even a trivial traffic violation. And if the concern truly is officer safety, ''rather than a desire to permit pretextual searches,'' the Court's new rule would legitimate automatic frisks for weapons of those ordered out of their vehicles.[158] Without more, simply forcing people to stand on the road would have no protective value if, unbeknownst to law enforcement, an individual is actually armed and dangerous. To be sure, none of these corollaries had been specifically approved by the Supreme Court, and a few had been rejected or at least reserved in a majority opinion. For instance, one of the border patrol cases had noted that, ''upon a proper showing,'' the judiciary would be empowered to prevent abusive stops based on race.[159] Of course, the real test would not be an earlier opinion's minimization of its impact, but what the Court did in future decisions.

Two decades later, the Supreme Court addressed a critical issue concerning pretextual and potentially race-based policing—whether an officer's actual intentions were relevant in assessing the constitutionality of a vehicle stop. In the 1996 case, *Whren v. United States*, plainclothes vice agents were patrolling a ''high drug area'' in an unmarked car when they saw a truck containing two young black

[157] Mimms, 434 U.S. at 120–21.

[158] *Id.* at 123.

[159] Martinez-Fuerte, 428 U.S. at 566 n.19.

men.[160] The officers ostensibly stopped the truck for minor, highly subjective traffic violations: turning without ''an appropriate signal,'' driving away from a stop sign ''at a speed greater than is reasonable and prudent,'' and failing to ''give full time and attention to the operation of the vehicle.''[161] When the officers approached the truck, they saw what appeared to be bags of crack cocaine and arrested the two men. In upholding the subsequent convictions, a unanimous Supreme Court declined to inquire into the officers' motivations for the traffic stop. It was irrelevant that moving and equipment violations offered a ready-made pretext for arbitrary or discriminatory policing. As a matter of fact, modern traffic codes are so broad in coverage—touching upon virtually every detail about vehicles and their operation, and often employing ambiguous language—that it is almost impossible for drivers to comply fully.[162] Worse yet, in this case it was not only unusual but also against department policy for plainclothes officers in an unmarked vehicle to make an ordinary traffic stop. Nonetheless, the Court rejected a limiting principle for minor code violations or a standard of reasonable officer behavior under the circumstances. And unlike the balancing approach in *Terry* and its progeny, *Whren* declined to weigh the diminished state interest in having vice agents enforce the vehicle code against the greater anxiety caused to motorists from stops by undercover police.

In combination, the Court's refusal to inquire into an officer's motivations and its indifference to the all-encompassing nature of modern traffic codes effectively means that law enforcement can stop any car at any time without a reason—or for reasons that are less likely to be ''inarticulable than unspeakable,''[163] like the driver's

[160] Whren v. United States, 517 U.S. 806, 808 (1996).

[161] *Id.* at 810 (citing and quoting D.C. Traffic Code).

[162] See, e.g., David A. Harris, ''Driving While Black'' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 558 (1997). See also Maryland v. Wilson, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting) (''The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances.''); Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (''Because of the extensive regulation of motor vehicles and traffic . . . the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office.'').

[163] Florida v. Bostick, 501 U.S. 429, 442 n.1 (1991) (Marshall, J., dissenting).

race or ethnicity. The *Whren* Court did acknowledge that selective enforcement based on considerations such as race would be unconstitutional, but the basis for such a claim would be the Equal Protection Clause rather than the Fourth Amendment. As it turns out, however, this was less of a sop than a cruel joke given the standard for proving selective prosecution under equal protection jurisprudence. A month before *Whren,* the Supreme Court held that in order to obtain government discovery on the treatment of individuals of different races, a defendant must show that similarly situated individuals of a different race received disparate treatment—which is, of course, the precise information that the defendant seeks to discover.[164]

Aside from the troubling issue of race-based policing, subsequent cases have demonstrated the upshot of allowing minor traffic violations to be an unquestioned predicate for police action. In the 2005 case, *Illinois v. Caballes,* a state trooper pulled over a vehicle for driving 71 miles per hour in an area where the posted speed limit was 65 miles an hour. The officer asked the driver for the usual information—his license, vehicle registration, and proof of insurance. While the officer was still writing the speeding ticket, another state trooper arrived on the scene and walked his drug-detecting dog around the car. When the dog alerted at the car's trunk, the officers opened the trunk and found marijuana.[165] In a brief opinion, the Supreme Court found no Fourth Amendment violation. Although a traffic stop to issue a citation can become unlawful if it unreasonably prolongs the detention, the duration of the stop was justified by the traffic violation and concomitant inquiries. That a drug investigation was occurring simultaneously was of no significance.[166]

In dissent, Justice David Souter argued that the police intrusion must be confined to the initial rationale for the detention, noting that the *Terry* Court had been careful to keep a stop from ''automatically becoming a foot in the door for all investigatory purposes.''[167] To make sure that the *Terry* doctrine does not devolve into ''an open

[164] See United States v. Armstrong, 517 U.S. 456, 465 (1996).

[165] See Illinois v. Caballes, 543 U.S. 405, 406 (2005); *id.* at 417–18 (Ginsburg, J., dissenting).

[166] See *id.* at 407–10.

[167] *Id.* at 415 (Souter, J., dissenting).

sesame for general searches,'' the rule had been that police may not ''take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention.''[168] Justice Ginsburg agreed in her dissent, noting that the scope restriction in *Terry* concerned not just the duration of any detention but also ''the manner in which the seizure is conducted.''[169] Existing doctrine could in no way justify the expansion of an ordinary traffic stop into a drug investigation. Lacking any apparent limitation, the *Caballes* decision would sanction the indiscriminate use of drug sniffs and similar techniques during traffic stops.[170] The *Terry* doctrine was thus converted into an all-purpose investigatory tool. A traffic stop for a civil infraction could be the predicate to investigate drug crime or, for that matter, *any* crime.

VI. Beyond Drivers

The cases discussed so far have involved seizures of pedestrians or drivers and searches of their persons. The question is whether—and how far—the doctrine might expand beyond the frisk of someone suspected of a crime or traffic violation. In its 1983 decision in *Michigan v. Long*, the Supreme Court extended *Terry* to allow ''frisks'' of an automobile.[171] Police officers patrolling a rural area around midnight saw a speeding, erratically moving vehicle that eventually swerved into a shallow ditch. The officers stopped to investigate and were met by the driver at the rear of his car. When they asked for the vehicle registration, the officers followed the man toward the open car door and observed a closed hunting knife on the floorboard. One officer stopped and frisked the driver, keeping the man under control at the rear of the car, while the other officer picked up the knife and shined his flashlight into the vehicle, purportedly to search for other weapons. He observed ''something leather'' under the armrest, knelt into the vehicle, lifted the armrest, and saw a pouch containing a small plastic bag of marijuana.

The *Long* Court upheld the search, arguing that ''*Terry* need not be read as restricting the preventative search to the person of the

[168] *Id.*

[169] *Id.* at 420.

[170] See *id.* at 417 (Souter, J., dissenting); *id.* at 422 (Ginsburg, J., dissenting).

[171] See Michigan v. Long, 463 U.S. 1032 (1983).

detained suspect.''[172] Relying upon *Mimms* and *Adams,* as well as decisions on searches incident to arrest, the majority opinion described traffic stops as exceptionally dangerous for police officers, including the threat that an *unarmed* person may have access to weapons. A driver might break away from police control at the rear of the vehicle, for example, and retrieve a gun or knife from his car. Besides, at some point a driver may be allowed to reenter his vehicle, the *Long* Court surmised, and might then have access to a weapon, making him ''no less dangerous simply because he is not arrested.''[173] For this reason, if officers suspect that the driver is ''potentially dangerous,'' they may search the passenger compartment to uncover weapons.

In dissent, Justice Brennan argued that the *Long* Court was ''simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause.''[174] *Terry* itself was explicit that a frisk must be *a carefully limited search of the outer clothing* of a detainee who is reasonably believed to be *armed and presently dangerous.* As such, the Supreme Court's extension to a broad search of an unarmed man's automobile ''can only be described as disingenuous.''[175] After all, the searches in *Mimms* and *Adams* were limited to the driver's person, not his car. The other precedents relied upon in *Long* involved searches incident to arrests, which the Court's previous cases had been careful to distinguish from the limited patdown of a suspect pursuant to *Terry.* Now, however, reasonable suspicion that a detainee was dangerous would permit the precise type of search that required a full custodial arrest based on probable cause.

This was not the only perverse aspect of *Long,* as argued by both Justice Brennan and prominent legal scholars. The majority had said that officers need not adopt alternative means to protect their safety. So although law enforcement could minimize any danger by moving the driver away from his car—which was the justification for rousting a driver in *Mimms*—an officer need not take protective measures

[172] Long, 463 U.S. at 1047.

[173] *Id.* at 1050.

[174] *Id.* at 1054 (Brennan, J., dissenting).

[175] *Id.* at 1056.

but instead may use the unmitigated risk to broaden his authority to search without probable cause. What is more, the suspicion of danger in *Long* was itself suspect. As Professor Wayne LaFave noted, the unremarkable discovery of a hunting knife in a car in rural Michigan ''sheds little if any light on the questions of whether there is another weapon in the car or whether [the driver] was at all likely to make use of any weapon.''[176] In this case, it takes an imagination to believe that an apparently intoxicated driver, removed from his car and whatever objects it may contain, is presently dangerous. It also seems implausible that an officer would allow a driver he believes to be dangerous to reenter his car during an ongoing stop, or that someone who has been told he is free to leave would then go grab a weapon from his vehicle to assault the officer. But by presenting hypothetical dangers to officer safety—as well as crediting circumstances that were not particularly suspicious and offering no limitations on the factual predicates—the Supreme Court had effectively created a new automatic *Terry* search rule.

In the automobile context, once *Terry* stops and frisks moved beyond the offending driver, who can be ordered from his seat under *Mimms* and his car searched pursuant to *Long*, the only question that remained was the permissible police action toward passengers. In 1997, the Supreme Court considered whether the *Mimms* rule applies to any occupant of a vehicle.[177] In that case, *Maryland v. Wilson*, a state trooper activated his lights and sirens when he saw a car driving

[176] *Long* also cited the study of officer shootings relied upon in *Mimms* and *Adams.* See Long, 463 U.S. at 1048 n.13 (citing Bristow, *supra* note 156):

> But a closer examination of that study reveals that it does not give credence to the *Long* analysis. The study reports that of police officers shot in connection with vehicle stops, about half were shot by persons seated in or concealed in a car, about a third by persons standing outside the car talking to the police, and the rest by persons then exiting the car or fleeing the scene. Quite clearly, a power to search the car is neither adequate nor necessary to protect the police in any of those situations. No mention is made in the study of any instance in which a person outside the car returned to the vehicle and then shot the officer, and thus it is quite understandable why the author does not propose that police be allowed to search cars, but rather that they maintain better ''vehicle occupant control while issuing traffic tickets, interrogating, or [performing] other routine police business.''

4 LaFave, Search and Seizure, *supra* note 19, at § 9.6(a).

[177] See Maryland v. Wilson, 519 U.S. 408 (1997).

over the speed limit and with no regular license tag. The car failed to pull over for a mile and a half, and along the way two passengers repeatedly ducked below sight level and then reemerged. During the subsequent stop, the trooper noticed that the front-seat passenger was sweating profusely and appeared extremely nervous. While the driver was sitting in the car looking for vehicle documents, the trooper ordered the nervous passenger out of the car and a quantity of crack cocaine fell to the ground as he exited.

In all likelihood, the now-flaccid standard for reasonable suspicion would have justified ordering the passenger out of the car based on a belief that crime was afoot. But that issue was not properly before the Court.[178] Instead, the *Wilson* majority crafted a per se rule permitting law enforcement to order passengers from a stopped car. Employing a reasonableness balancing test, the majority concluded that the same interest in officer safety credited in *Mimms* was implicated here, citing the nearly 6,000 officer assaults and 11 officer deaths that occurred during traffic pursuits and stops. The Court admitted that a presumptively innocent passenger may have a stronger case for personal liberty than the driver, who is at least suspected of committing a vehicular offense. The threat of violence, however, ''stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.''[179] With this understanding of the relevant risk, the *Wilson* Court reasoned that a passenger may have the same motivation to use violence as his driver, namely, to avoid apprehension for criminal activity. Given the weighty interest in officer safety and the minimal intrusion on liberty, passengers may be ordered out of the vehicle pending completion of the traffic stop.

Justice Stevens's prediction in *Mimms* had thus come to fruition. As Stevens now noted in his *Wilson* dissent, passengers can be rousted from their seats during traffic stops ''without even a scintilla of evidence of potential risk to the police officer,'' thereby allowing ''routine and arbitrary seizures of obviously innocent citizens.''[180] The Court's rule received no support from the cited statistics, which

[178] See *id.* at 416 n.1 (Stevens, J., dissenting).

[179] *Id.* at 414.

[180] *Id.* at 416 (Stevens, J., dissenting).

did not reveal how many cases involved passengers, let alone whether the incidents occurred while passengers were in their seats or whether the attacks could have been prevented by ordering the passengers from the car. The majority's claim about officer safety was no more plausible than the hypothesis that ordering passengers out of a vehicle *increases* the risk of danger. Using available data and generous assumptions, the new rule might provide some possible advantage to Maryland police in only one out of every 20,000 traffic stops of cars with passengers.[181] This minimal benefit was far outweighed by the aggregate invasions upon ''countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands.''[182] These passengers were no more lawfully seized than if they were stuck in a traffic jam caused by state highway construction. Their misfortune of being seated in a vehicle whose driver has committed a minor traffic violation did not justify a suspicionless seizure, forcing the blameless to expose themselves to the elements and the gaze of onlookers.[183]

The *Wilson* majority did acknowledge the undifferentiated nature of the statistics on officer assaults, saying it was ''regrettable that the empirical data on a subject such as this are sparse.''[184] A subsequent study found that male police officers were not at greater risk of homicide than all other males of similar age, a finding that the authors saw as ''contradict[ing] the assumption in *Terry* and its progeny that police face greater risk than the general population.''[185] Most likely, however, the statistics in the Court's opinions served as mere window dressing for legal conclusions, including bright-line rules allowing police to order drivers and passengers from vehicles. Still, *Wilson* left several legal questions unanswered,[186] for instance, whether law enforcement may forcibly detain a passenger

[181] See *id.* at 416–18.

[182] *Id.* at 419.

[183] See *id.* at 420–21.

[184] *Id.* at 413 n.2 (majority opinion).

[185] Illya D.Lichtenberg et al., *Terry* and Beyond: Testing the Underlying Assumptions of Reasonable Suspicion, 17 Touro L. Rev. 439, 459 (2001).

[186] See, e.g., Wilson, 519 U.S. at 415 n.3 (majority opinion). See also *id.* at 423 (Kennedy, J., dissenting) (noting that the Court did not have before it the issue of whether police can order passengers to remain in the vehicle ''for a reasonable time while the police conduct their business'').

for the entire duration of the traffic stop, and whether a passenger may be subjected to a *Terry* frisk without suspicion of criminal activity. Two years later, in *Knowles v. Iowa*, a unanimous Court reached the perfectly unobjectionable (and obvious) conclusion that a search incident to arrest must, in fact, be preceded by an actual arrest rather than the mere possibility of an arrest.[187] In dictum, the *Knowles* opinion mentioned what police might lawfully do during a routine traffic stop, including ''a 'patdown' of a driver and any passengers upon suspicion that they may be armed and dangerous.''[188] But the passage was unclear whether such frisks must be based on the *Terry* predicate of a justifiable belief that crime was afoot.

Dictum or not, however, and regardless of any ambiguity, this language was now available for a subsequent decision to latch on to. All that was needed was one last case to ''complet[e] the picture,'' as Justice Ginsburg would later say.[189] The Court's 2007 decision in *Brendlin v. California* considered whether a passenger, like the driver, was seized during a traffic stop.[190] In that case, the state had conceded that law enforcement lacked reasonable suspicion to conduct the stop, during which one of the officers recognized the passenger as ''one of the Brendlin brothers.''[191] After returning to the cruiser, the officer called for backup, confirmed that the passenger had an outstanding arrest warrant, ordered the man from the car at gunpoint, and then arrested him. The lower court concluded that the passenger had not been seized, relying on, among other things, the Court's language in *Wilson* that there is no reason to detain passengers who are presumptively innocent and only impeded ''as a practical matter'' in an ordinary traffic stop.[192] The Supreme Court unanimously disagreed, describing the post-*Terry* definitional evolution of seizures for Fourth Amendment purposes and posing the relevant issue as ''whether a reasonable person in [the passenger's] position

[187] See Knowles v. Iowa, 525 U.S. 113 (1998).

[188] *Id.* at 118.

[189] Johnson, 129 S. Ct. at 787.

[190] See Brendlin v. California, 127 S. Ct. 2400 (2007).

[191] *Id.* at 2404.

[192] People v. Brendlin, 136 P.3d 845, 853 (Cal. 2006) (quoting Wilson, 519 U.S. at 413–14).

when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself.''[193]

In this case, no reasonable passenger would have believed that he could leave without police permission, or ''come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing.''[194] Even when the stop is for a mere traffic violation, a passenger would reasonably expect to undergo some scrutiny. Here, the passenger had signaled his submission to authority by staying inside the car, and to hold that he was not seized for Fourth Amendment purposes would only invite random car stops by officers, who could use evidence of crime found during the detention against passengers. As in *Knowles,* the Court's decision in *Brendlin* seems obviously correct. The passenger is physically stopped along with the driver, and only an amazingly brave (or Pollyannaish) passenger would think that he could get out of the car, wave goodbye to everyone at the scene, and walk away. The problem is not *Brendlin*'s conclusion but how it fits with the stop and frisk cases that preceded it, as described above and illustrated this past term.

VII. *Johnson,* Again

Let's now return to the 2009 passenger frisk case, *Arizona v. Johnson.* As detailed earlier, the reasonable suspicion test has become so vacuous—and so minimized in comparison to the higher standard of probable cause, which itself was gutted by *Gates*—that little more than a hunch is required. Under the totality of the circumstances, mundane details, lawful in themselves and consistent with innocent explanations, can now rationalize a stop and frisk. In *Johnson,* Officer Trevizo found it suspicious that Lemon Johnson had watched from the back seat as agents approached the vehicle. In all fairness, though, his gaze was both innocuous and totally understandable. He was not witnessing an ordinary stop by a single traffic officer in a conspicuous police cruiser. Rather, Johnson and his colleagues had been pulled over by an unmarked white Cadillac containing multiple agents wearing tactical vests. Indeed, it might have been deemed

[193] Brendlin, 127 S. Ct. at 2406 (quoting Bostick, 501 U.S. 429 at 436).

[194] *Id.* at 2407.

abnormal if a vehicle occupant had failed to look at the agents, as was the case in *United States v. Arvizu.*[195]

In addition, Officer Trevizo found suspicious a scanner in Johnson's jacket, but she had no idea whether the device was on or not and admitted that there was nothing illegal about it. ''I know there's plenty of people that like to listen to scanners,'' Trevizo testified, ''and I have an uncle who listens to a scanner all the time.'' She just thought it was unusual for Johnson to be possessing one. Equally revealing was her use of the gang member profile, demonstrating how this instrument, like the drug courier profile, provides cover for police hunches. Trevizo testified about seven indicia of gang affiliation, but only one applied to Lemon Johnson—his blue attire—which the officer associated with the Crips street gang. Yet even this lone criterion was of dubious value, given that the driver was wearing *red,* the color of the Crips' arch-enemy, the Bloods street gang.[196]

The foregoing analysis also described how reasonable suspicion can be based on categories of information. Law enforcement may be justified in believing that an individual is armed and dangerous because of his location in a ''high-crime area'' or because the crime at issue is burglary, drug dealing, car theft, and so on—all without definition or meaningful parameters for these supposedly lawless zones, and despite the lack of a logical or empirical connection between the crime and violence or weapons. The facts in *Johnson* actually take the categories a step further. During the traffic stop, law enforcement did not suspect that burglary was afoot; rather, Johnson simply admitted that he had been incarcerated for burglary in the past. What is more, Johnson had not been found in the neighborhood Officer Trevizo described as ''a gang-related area.'' Instead, he was stopped east of that neighborhood—an area where ''the boundaries are not clearly defined,'' Trevizo admitted—while Johnson's car was traveling north on a major roadway used by thousands of vehicles each day.[197] The officer even relied upon the fact that Johnson hailed from a city with a known gang, thus making residency a potential point of suspicion against some 12,000 inhabitants of Eloy, Arizona.

[195] See *supra* note 112 and accompanying text (discussing *Arvizu*).

[196] See Johnson, 170 P.3d at 669.

[197] See Joint Appendix, *supra* note 38, at 10, 18, 30, 32.

In reality, most Americans are unlikely to be stopped and frisked without good reason. The same cannot be said for others, particularly minority citizens.[198] After *Johnson,* reasonable suspicion that someone is armed and dangerous can arise when, inter alia: an individual stares at officers or, conversely, does not look at them at all; the person is wearing blue, the shade of the Crips, even if he is with someone wearing red à la the Bloods; he is found in a purportedly high-crime or gang-related area, or simply driving on a major thoroughfare somewhere near it; the crime under suspicion is one that might conceivably involve weapons or ordinary tools, like burglary, although a past connection to this type of offense will suffice; the individual possesses a police scanner or, presumably, any number of other devices, regardless of whether it happens to be in use at the time; and the person came from a place that has a gang, which includes almost every sizeable city in America.

Using today's limp standard for reasonable suspicion, there may be no limit to the commonplace details that can be given a suspicious gloss under the totality of the circumstances. Moreover, the predicate for the frisk, a *Terry* stop, does not require much at all. On the road, police need not suspect that crime is afoot; a civil traffic offense, no matter how trifling, will do. As a practical matter, law enforcement need only follow an automobile for a short distance in order to find some reason to pull the car over. In *Johnson,* the violation was insurance related; *Whren* involved highly subjective infractions like driving faster than ''reasonable and prudent''; other cases may entail a burnt-out bulb for a vehicle's rear tags or failure to use a turn signal as required. Law enforcement's true motivation for a traffic stop is immaterial, so long as an officer can cite some traffic violation.

The pretextual nature of the stop can even be blatant, as demonstrated in both *Johnson* and *Whren.* The cases involved specialized agents in unmarked vehicles assigned to investigate, respectively, gang activity and drug crime. In *Johnson,* the main focus of Officer Trevizo and her colleagues was gathering gang intelligence and

[198] See, e.g., Hon. Harold Baer Jr., Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches, 4 J.L. Econ. & Pol'y 91 (2007); Civil Rights Bureau, Office of the Att'y Gen. of the State of N.Y., The New York City Police Department's ''Stop and Frisk'' Practices: A Report to the People of the State of New York From The Office Of The Attorney General (Dec. 1999).

combating gang crime,[199] not serving as traffic cops and ticketing errant drivers. The plainclothes vice agents in *Whren* were actually breaking department rules by performing an ordinary traffic stop. In either case, it is hard to believe that the detentions were motivated by a desire to stamp out minor vehicle infractions. Police officers may evince the real motivation for the stop by their words and actions, pursuing an investigation that has nothing to do with the traffic violation. Officer Trevizo testified that during the stop she was trying ''to gather intelligence about the gang [Johnson] might be in,'' including ''how big the gang is, what the areas are, maybe what kind of crimes they're involved in [and] who the leaders are.''[200] But again, an officer's actual reasons for the traffic stop are irrelevant, and conducting an investigation wholly unrelated to the stop is of no constitutional moment.

In the course of the stop, law enforcement may roust both the driver and any passengers out of the vehicle. Although based on officer safety, the categorical rules of *Mimms* and *Wilson* do not require any inkling that the occupants might be dangerous. Pursuant to *Long*, officers can search the passenger compartment of a vehicle without a belief that an unarmed detainee outside of the car is presently dangerous. Law enforcement need not minimize the risk of danger at all; in fact, officers may create the potential danger, and thus a justification for a frisk that was otherwise absent, by ordering an occupant out of his vehicle. And as the *Johnson* opinion makes clear, an individual need not be suspected of any criminal activity or even a civil infraction in order to be frisked. In other words, *Johnson* stands for the proposition that an individual who had done nothing wrong and may have been completely cooperative can be searched without any suspicion that crime is afoot, based on innocuous facts like the color of his clothes and the place he calls home. If any evidence is found during the patdown, courts will not second-guess the general, omnipresent fear for law enforcement safety and will be hesitant to question an officer's hodgepodge of details that allegedly triggered the search, as was true after *Johnson* was remanded back to the lower courts.[201]

[199] See Joint Appendix, *supra* note 38, at 8, 19.

[200] *Id.* at 19–20.

[201] See State v. Johnson, 207 P.3d 804, 807–09 (Ariz. App. 2009) (holding that Officer Trevizo had reasonable suspicion that Johnson was armed and dangerous).

The Supreme Court's authorization to frisk in the absence of crime may be surprising to some, even the legally trained, but it would be no news for those who live in minority neighborhoods, especially young black and Hispanic men in urban America. Consider the following interview with an officer in the Los Angeles County Sheriff's Department:

> [Deputy Jeffrey] Coates spent one day giving me what might be called a master class in the art of the pretext stop—pulling over blacks and Hispanics, hoping to come up with dope, or guns, or information. ''There's a law against almost everything as it relates to a vehicle,'' Coates said. Coates knows the law, and uses it. For example, Coates spotted a type of car, a Monte Carlo, which is known to be favored by gangsters, moving along in traffic. He pulled in behind the car and studied it for a moment. ''No mud flaps,'' Coates said, turning on his lights. They pulled the car over, and asked the three teen-agers, shaven-headed Hispanics, to step outside. They patted them down and looked through the vehicle. The teenagers freely admitted to being members of the South Los gang. ''Now the reason we stopped you was that you have no mud flaps on your rear tires,'' Coates said. ''But the real reason we stopped you is because we saw that you're rolling out of your area. Why don't you turn it around and go home.'' I asked Coates if it's his policy to remove every male from any car he stops, no matter what the cause for the stop. ''Yes. Officer safety.'' Would you do that in a different part of the county? ''I wouldn't do it in Santa Clarita,''[202] he said, pausing—realizing, perhaps, what that sounded like. ''I mean, it all depends.''[203]

Stories like this should be disconcerting to anyone who cares about the limitations on arbitrary power enshrined in the Fourth Amendment. It is not that this deputy stopped and frisked a naive school girl or an elderly war veteran; he pulled over three tough-looking, young men. The same might be said of Officer Trevizo's actions. Johnson may well be a gang member, and Trevizo was certainly correct that he was armed. The true measure of a constitutional right, however, is not the security it provides the majority and

[202] Santa Clarita is a mostly white, affluent city in Los Angeles County.

[203] Jeffrey Goldberg, The Color of Suspicion, N.Y. Times Mag., June 20, 1999, at 64.

people of impeccable character, but its application to the minorities, those of lower socio-economic classes, and the men and women whose lifestyles some may find distasteful. Moreover, a search and seizure is not legitimated by the evidence it turns up. ''[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.''[204] The concept of individualized suspicion of wrongdoing is one of the key differences between a liberal constitutional democracy and a police state. Unless their words and deeds are strongly indicative of criminal activity, people should have the freedom to be left alone. This liberty comes by constitutional right, not at the discretion of any official.

As suggested in this article's introduction, the point here is not to condemn law enforcement for seeking greater powers, and none of the foregoing should be taken as impugning the integrity of Officer Trevizo or any other agent. Today's police have an enormously difficult job, preventing, detecting, and helping to prosecute many crimes of unquestionable gravity. The actions of Trevizo and her colleagues may be routine, and the result the Supreme Court reached in *Johnson* was supported by amicus curiae briefs filed by the federal government, more than three dozen states, and a litany of organizations representing law enforcement and state and local government. They embody the ''powerful hydraulic pressures'' placed on the Court to ''give the police the upper hand,''[205] and that pressure is even greater today than it was when Justice Douglas uttered those words.

In light of prior decisions, *Johnson* is far from a watershed decision breaking from established doctrine. On the contrary, it was a slight deviation from the cases immediately before it, each of which was a slight deviation from the preceding decisions. Oppressive practices often begin this way, or so the Court warned more than a century ago.[206] The *Terry* decision might be lauded for bringing stops and frisks within the fold of the Fourth Amendment, or it may be criticized as permitting ''the obnoxious thing in its mildest and least

[204] Arizona v. Hicks, 480 U.S. 321, 329 (1987).

[205] Terry, 392 U.S. at 39 (Douglas, J., dissenting).

[206] Boyd v. United States, 116 U.S. 616, 635 (1886).

repulsive form,''[207] a search and seizure without a warrant or probable cause. What is clear, however, is that the stop and frisk doctrine that exists today cannot be supported by *Terry* itself. While Chief Justice Warren's opinion drew upon the language of prior probable cause cases, requiring that law enforcement point to specific and articulable facts, not unparticularized suspicion, today's officers can rattle off generalities about locations of high-criminality and profiles of wrongdoers.

Although *Terry* required that any stop and frisk must be related in scope to the suspected criminal activity that justified the intrusion in the first place, police can now use the opportunity a detention provides to conduct investigations wholly unrelated to its initial suspicion. *Terry*'s predicate for a stop—individualized suspicion of crime—is not required on the road. A minor traffic violation is sufficient to stop a driver and his passengers, all of whom can be rousted from the vehicle as a matter of course. After *Johnson,* a passenger who is suspected of absolutely nothing, not even a civil violation, may be frisked because law enforcement perceives him to be dangerous. The conclusion can find no support in the majority opinion in *Terry* and is inconsistent with the concurrence by Justice Harlan, who argued that an individual does not have to submit to a patdown for the officer's wellbeing.[208] But that is exactly what happened to Lemon Johnson. In hindsight, however, the most ironic aspect of *Terry* is its original ambition: A decision that was prompted by ''aggressive patrols'' and ''wholesale harassment'' of minority communities has instead spawned a doctrine that effectively licenses the practice.

In itself, *Johnson* may have some disturbing consequences. The next step for the new crimeless frisk rule could be its application beyond vehicle stops, when officers pat down people on the streets not due to an individualized suspicion of criminal conduct but because they look ''dangerous,'' the kind of police activity that the Supreme Court has found unconstitutional in its vagrancy and loitering decisions.[209] Maybe the Court will find such an extension unreasonable, not unlike this past term's decision in *Gant,* with the justices

[207] *Id.*

[208] Terry, 392 U.S. at 33 (Harlan, J., concurring).

[209] See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). See also City of Chicago v. Morales, 572 U.S. 41 (1999).

trying to tether a doctrine that had traveled far from its theoretical mooring. But given the development of stop and frisk law, I am not particularly optimistic. When *Terry* was decided, only Justice Douglas foresaw the potential mischief. Later, he was joined by Justices Brennan and Marshall, who had voted in favor of a limited exception to the warrant and probable cause requirements but then recognized the pressures that were leading to the evisceration of the Fourth Amendment. At various times Justices Ginsburg, Kennedy, Souter, and Stevens have dissented from further extensions of law enforcement's power to stop and frisk. The initial critics are long gone, and those who remain on the Court seem to have made their peace with a *Terry* doctrine radically transformed over the years, as evidenced by the unanimous decision in *Johnson.* When the next case comes, there may be no one left to dissent.