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'Just Take Away Their Guns': The Hidden Racism of Terry v. Ohio

Cover Page Footnote
CUNY Law and Society Study Group, New York Group of the Society for Philosophy and Public Affairs, the 46th Annual Meeting of the American Society of Criminology, John Jay College's conference on International Perspectives on Crime, Drugs and Public Order.
"JUST TAKE AWAY THEIR GUNS": THE HIDDEN RACISM OF TERRY v. OHIO

Adina Schwartz*

I. Introduction

Noted social scientist James Q. Wilson recently argued that the best way to deal with illegal gun-carrying in the United States is to increase police use of stops and frisks, i.e. detaining individuals forcibly and patting down the outer surfaces of their clothing for weapons. Wilson conceded that if his proposal were instituted, "[i]nnocent people will be stopped. Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race." These expected consequences, however, did not give Wilson any pause. Instead of deploring the expected racially disparate impact, analyzing its normative implications, or considering its causes or likely effects on race relations, Wilson simply concluded that the use of stops and frisks must be escalated "if we are serious about reducing drive-by shootings, fatal gang wars and lethal quarrels in public places."

Wilson's proposal is not merely an abstract possibility. During the second half of 1992, prominent criminologist Lawrence Sherman collaborated with the Kansas City (Missouri) Police Department in conducting the "Kansas City Gun Experiment." In a

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2. Just Take Away Their Guns, supra note 1, at 47.
3. Id.
4. For the fullest account of the Kansas City Gun Experiment, see LAWRENCE W. SHERMAN, ET AL., THE KANSAS CITY GUN EXPERIMENT (National Institute of Justice Research in Brief, January 1995) [hereinafter KANSAS CITY GUN EXPERIMENT,
target area with an almost entirely non-white population and a homicide rate about 20 times higher than the national average, selected officers were assigned to patrol exclusively for illegal guns, using stops and frisks as a principal means for effecting gun seizures.\(^5\) Sherman and his colleagues recently published a favorable evaluation of their own experiment, based on a comparison between the target area and a "control" area where police practices remained unchanged during the experiment and where the number of drive-by shootings in 1991 was almost the same as in the target area.\(^6\) Sherman found that during the Kansas City Gun Experiment, 65 percent more guns were seized in the target area than in the preceding six months, gun crimes decreased by 49 percent, drive-by shootings dropped from 7 to 1, and homicides were significantly reduced.\(^7\) By contrast, drive-by shootings rose from six to twelve and there were no significant changes in numbers of homicides, guns seized or gun crimes between the same two time periods in the control area.\(^8\) In favorably assessing the Kansas City Gun Experiment, Sherman did not consider whether or to what extent the value of the decrease in gun crime was offset by increased police intrusions on the privacy of innocent people in general, or innocent members of minority groups in particular. Thus, Sherman reported that "[t]raffic stops were the most productive method of finding guns, with an average of one gun found in every 28 traffic stops,"\(^9\) but he failed to consider the normative implications of this fact: for every gun seized during the Kansas City experiment, at least twenty-seven stops intruded on the privacy of

\(^{5}\) Kansas City Gun Experiment, supra note 4, at 1, 3-6.

\(^{6}\) Id. at 1-3.

\(^{7}\) Id. at 1-2, 6-7.

\(^{8}\) Id. at 1-2, 7-.

\(^{9}\) Id. at 2, 6.
innocent stoppees. These innocent stoppees were overwhelmingly black.10

Sherman did caution that “[i]ntensified gun patrols . . . could conceivably have negative effects on police-community relations . . . . . . [and] could even provoke more crime by making youths subjected to traffic stops more defiant of conventional society.”11

10. Sherman's figures do not enable one to determine precisely how many people were subject to traffic stops during the Kansas City Gun Experiment. Nor do the figures enable one to determine how many of those stopped were found to be illegally carrying guns or to be otherwise engaged in criminal activity. Sherman fails to indicate how many people were in the stopped cars, how many guns were recovered from each traffic stop that resulted in a gun recovery, and how many of the people stopped were found to be engaged in illegal activity, other than gun carrying. In addition, although Sherman reports that “[n]ot all of the guns [seized] were carried illegally,” his statement that “about one-fifth (14) of the total 76 guns seized in the target area . . . were [legally carried but] confiscated by police for ‘safekeeping’ ” leaves open the possibility that during the experiment, additional numbers of legal guns were seized but not confiscated. KANSAS CITY GUN EXPERIMENT, supra note 4, at 6. For a discussion of the importance of precise comparisons of the numbers of people whose stops do and do not yield incriminating evidence, see infra Section V.

11. KANSAS CITY GUN EXPERIMENT, supra note 4, at 9 (footnote omitted)(downplaying the importance of these and other cautions by concluding that “[a]ll of these hazards are possible but unknown. The tradeoff is the well-known risk of gun violence, which is extremely high in many inner cities and still rising.”). Concern about the impact of Kansas City-type gun experiments on police-community relations is the avowed motivation for a separate manuscript, Community Policing Against Guns, supra note 4, by James W. Shaw, one of Sherman’s co-authors on KANSAS CITY GUN EXPERIMENT. Shaw writes:

Regardless of the strategy's promise for reducing gun crime, it will have limited value if the price of success is community hostility towards the police. Such hostility adversely affects police work in many respects, e.g., by making citizens unwilling to assist the police or even report crimes to the police when victimized, by making the police reluctant to act when they should or by tending to [make police] over-react when they do act, by making police work more dangerous, and by contributing to major riots and disturbances. Thus one critically important question about the . . . results [in reduction of gun crime of the Kansas City experiment] is whether the method was acceptable to the community.

Community Policing Against Guns, supra note 4, at 3 (citation omitted). See also id. at 20 (“Citizens' perceptions of police patrols, proactive or otherwise, are likely to be fairly subjective. Nonetheless, knowledge of their perceptions is important for determining the acceptability of police strategies and tactics.”).

Notwithstanding this avowed motivation, Shaw’s manuscript provides scant information about the effects of the Kansas City Experiment on attitudes towards the police. First, the basis for Shaw’s favorable assessment of the effects of the Kansas City Experiment is a survey in which residents of the Kansas City target and control areas were asked how they felt about their neighborhoods and their safety before and after the Gun Experiment. However, the survey did not include any questions about residents' feelings towards the police. Id. at 22-29. See also KANSAS CITY GUN EXPERIMENT, supra note 4, at 2, 8 (describing the survey). Moreover, as Shaw himself recognizes, his survey of community residents' feelings is totally uninformative in regard to “what the arrestees and people who were stopped thought of the method [of
These cautions avoid the issue, however, of whether the value of Kansas City-type gun experiments might be offset by resulting invasions of individual privacy or racial injustices, even in the absence of community opposition or defiance. An unvoiced assumption in Sherman's favorable evaluation is that even where, as in Kansas City, the people stopped and frisked during gun experiments are overwhelmingly black, an evaluation of such experiments does not depend on the causes of the racial disparity. Although he called for some further research,12 Sherman did not call for an inquiry into the extent to which racial disparity in the incidence of stops and frisks was likely to result from police racial bias or greater black criminality and correlated police expertise in apprehending those most likely to be involved in crime.13

Many police departments are expected to emulate Sherman's Kansas City Gun Experiment.14 Sherman has already directed an enhanced use of stops and frisks that the Kansas City Experiment employed." Id. at 29. In an attempt to minimize the significance of this gap in his data, Shaw notes that "no one filed a complaint against the police or filed a lawsuit" as a result of the Kansas City Experiment. Id. This absence of legal action on the part of those arrested or stopped is compatible, however, with both resentment of police and cynicism or despair about the possibility of obtaining legal redress. In other words, Shaw fails to rule out the possibility, noted by Sherman, that Kansas City-type experiments "could even provoke more crime by making youths subjected to traffic stops more defiant of conventional society." Id. at 9.

12. Id.
13. In a separate manuscript, Sherman's collaborator, James W. Shaw, argues that concern with the racial impact of police efforts to drive guns off the street is obviated by the fact that blacks are disproportionately victimized by violent crime. According to Shaw:

A note of concern . . . is that the impact of such a [police] focus [on firearms] may not be shared equally by all in the society. However, it is clear that violent crime is also not shared equally by all in society, but is concentrated among the poor, the young, and racial minorities. The unfortunate reality then is that anything less than a focus on guns and violent crime by the police may itself be unequal treatment of those same populations, the poor, the young, and racial minorities.

Detecting Guns, supra note 4, at 2 (citations omitted).

This assumes away a problem that, in accord with many other social scientists, Sherman himself recognized as recently as 1992. Namely, instead of using the powers granted to them by proactive gun patrol programs to target those most likely to be involved in crime, police may instead target blacks for intrusion because of racial animus and/or an unjustified assumption that all blacks are dangerous. See infra notes 204-211, 222-223 and accompanying text. If, however, police thus use their discretion under proactive programs to express racial bias, Shaw cannot assume, without argument, that these programs serve to protect blacks from violent crime.

14. Lawrence W. Sherman, In Remembrance: James Wilford Shaw, Criminologist, 20 THE CRIMINOLOGIST 23 (Sept./Oct. 1995) ("A conservative estimate is that over 100 other police agencies adopted a similar program [to the Kansas City Gun Experiment]"); Cf. Gerry Lanosga & Kathleen M. Johnston, Police Dispute Gun Data,
experiment in Indianapolis from October 1994 to April 1995, and the United States Attorney for the Washington D.C. has announced that Sherman will be advising an experiment in Washington D.C. as well. Using the racially neutral criterion of amount of gun crime per square mile, three Indianapolis areas—one with a predominantly white population and two with predominantly black populations—were targeted for escalated stops and frisks. As the race of the people stopped in each area was expected largely to mirror the race of the area’s population, the selection of both black and white target areas provided an opportunity for testing two hypotheses: (i) independent of behavioral indications of criminality, the race of those driving through each area and thus available for stopping would affect officers’ readiness to stop and/or frisk, the types of circumstances that officers perceived as indicating a need to stop and/or frisk, and/or would impact on the relative intrusiveness of the stops and frisks effected; and (ii) independent of behavioral indications of criminality, decisions to stop and/or frisk and/or the relative intrusiveness of stops and frisks would be affected by whether people driving through each area were racially out of place (i.e., whether whites were in a predominantly black target area or blacks were in the predominantly white target area).
Sherman did not collect the necessary data for testing these hypotheses, however.

Wilson and Sherman have both explicitly recognized that the legality of their proposals for escalated use of stops and frisks rests on the relaxed standards that the United States Supreme Court established in 1968 in Terry v. Ohio. This Article addresses an unnoted kinship between Terry and Wilson's and Sherman's proposals. In his opinion for the Terry majority, Chief Justice Earl Warren deplored the facts that police used stops and frisks as a means of racial harassment and that this was a major cause of explosive tension between the police and minority communities. Nevertheless, the Terry majority held that these facts provided no reason to establish strict standards for the exercise of the stop and frisk power. This argument has received scant critical attention.

20. Some courts have held that a stop may be justified by the fact that a person is racially out of place. See, e.g., United States v. Anderson, 923 F.2d 450, 456 (6th Cir. 1991), cert. denied, 500 U.S. 936 (1991); State v. Dean, 543 P.2d 425, 427 (1975) ("That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer's initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical aspects of law enforcement."). For discussion and criticism of this line of cases and consideration of some courts' refusal to allow stops to be justified by racial incongruity, see Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1502, 1519 (1988)[hereinafter Developments in the Law]; Sherilynn Johnson, Race and the Decision to Detain a Suspect, 93 Yale L. J. 214, 225-30, 240-41 (1983).


22. 392 U.S. 1 (1968); Just Take Away Their Guns, supra note 4, at 47; What to Do about Crime, supra note 1, at 28; Kansas City Gun Experiment, supra note 4, at 5, 6. See also Detecting Guns, supra note 4, at 5; Butterfield, supra note 4 (commenting on Sherman's gun experiments, Butterfield noted: "Phillip Heyman, a professor at Harvard Law School and former Deputy Attorney General in the Clinton Administration, said he believed the local police have more power than they realized to go after illegal guns, authority that grows out of a 1968 United States Supreme Court decision, Terry v. Ohio.").

23. 392 U.S. at 14, 14 n.11, 15, 17 n.14.


25. This argument is totally ignored in two of the most important law review articles on the racial basis of decisions to stop and arrest. See Developments in the Law, supra note 20, at 1494-1520; Johnson, supra note 20. Similarly, only ignorance of this
However, the assumption underlying the *Terry* holding—that facts about racial impact are irrelevant to delineating the proper scope of the stop and frisk power—provided the legal sanction for the lack of concern with race that Wilson’s and Sherman’s current proposals evince. Moreover, *Terry* contributed to the bedrock assumption that this Article seeks to discredit: that lack of concern with racial issues is simply part of realism about fighting crime.

This Article argues that in formulating standards for stops and frisks, courts, police departments and other policy makers should consider: (i) whether and to what extent blacks are more frequently stopped and frisked than whites; (ii) whether and to what extent this disparity reflects police racial bias; and (iii) the nature and extent of the resulting negative effects.


For mistaken interpretations and assessments of the validity of this argument, see infra notes 131, 134, 180 and accompanying text.

26. As discussed infra notes 140-141, 222-223 and accompanying text, before conducting his gun experiments, Sherman devoted substantial scholarly attention to assessing the extent and causes of the racially disparate impact of proactive police policies and police exercise of deadly force. It is therefore both ironic and unfortunate that in conducting and evaluating the gun experiments, he left such concerns behind.

For criticism and discussion of attempts by Sherman and his colleagues to dismiss concerns about the racial impact of the Gun Experiments, see supra note 14 and infra notes 224-225 and accompanying text.

27. Legal commentary in this area has been largely limited to the issue of the extent to which courts do and should allow officers to use race to justify individual decisions to stop, arrest, or otherwise detain citizens. See, e.g., *Developments in the Law*, supra note 20, at 1494-1520 (1988); Johnson, *supra* note 20; Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of *Terry* v. *Ohio**, 34 *How. L.J.* 567, 576-77, 582-87 (1991). The concern here is not with judicial scrutiny of the racial basis of individual decisions to detain, but rather with whether facts about the racial impact of stops and frisks should be taken into account in the formulation of general, racially neutral standards. While this Article advocates taking account of racial impact in the formulation of racially neutral standards for police action, some scholars have claimed that the proper response to racial impact is legal standards that vary with the race of those subject to the police action. See, e.g., Greene, *supra* note 25, at 2024-43, 2045-48, 2061-62; Tracey Maclin, *Black and Blue Encounters*, 26 *Val. U. L. Rev.* 243, 268-79 (1991). For further discussion, see also infra note 110.
These issues are of practical import because no police department or influential policy maker today is likely explicitly to direct officers to target blacks for stops and frisks;\(^{28}\) however, Wilson and Sherman have shown that some of this Nation's most important policy makers are ready to institute racially neutral guidelines for enhanced use of stops and frisks and to acknowledge that this will intrude more on blacks than on whites.\(^ {29}\) At the same time, these policy makers are not prepared even to consider whether and to what extent the expected racial disparity is likely to stem from police racial bias or good police work consisting of stopping and frisking those in fact most likely to be involved in crime. Though Sherman does call for future inquiry into the possible negative consequences of the racially disparate impact,\(^ {30}\) Wilson is totally unconcerned with such consequences. Under \textit{Terry}, this lack of concern with racial impact is legal. The question posed by this Article is whether the law's lack of concern is justifiable and, if it is, whether police departments and policy makers should nonetheless attend to racial impact. To answer this question, it is necessary to examine critically the largely forgotten argument, in \textit{Terry}, that facts about racial impact have no bearing on the law's delimitation of the racially neutral extent of the stop and frisk power.

Part II of this Article provides an overview of the decision in \textit{Terry} and its impact on subsequent case law. It shows that by excepting stops and frisks from the Fourth Amendment's traditional probable cause requirement, \textit{Terry} created powerful tools for the legal expansion of law enforcement powers. Part III discusses the \textit{Terry} opinion, focussing, in subparts B through D, on \textit{Terry}'s ambivalent position on race relations. Subparts B and D establish that the empirical contention that legal restrictions are powerless to deter racist abuses of the stop and frisk power is the basis for \textit{Terry}'s refusal to impose a heightened standard. That contention also underlies \textit{Terry}'s more fundamental position that no matter how much we care about racial justice, our concern is irrelevant to delineating the proper legal standard for stops and frisks.

Part IV provides a critical analysis of \textit{Terry}'s holding. It demonstrates that \textit{Terry}'s empirical contention about the law's inevitable

\(^{28}\) See \textsc{Jerome H. Skolnick}, \textsc{Justice Without Trial} 80 (1966) ("In principle, ...[p]olice [d]epartments ... in America ... are racially unbiased. That is, one would not find in a training manual the idea that Blacks should be treated differently in the criminal process than whites, nor even that Blacks are apt to exhibit greater criminality than whites. The explicit principle is racial equality.").

\(^{29}\) See \textsc{Just Take Away Their Guns, supra} note 2, at 47.

\(^{30}\) \textsc{Kansas City Gun Experiment, supra} note 4, at 12.
inefficacy against racist abuse of the stop and frisk power is grounded in an unrealistic and overly simple model of police motivation. Additionally, the contention is belied by studies of the effects of police department policies on the exercise of deadly force and of the process by which the exclusionary rule deters abuses. Part IV concludes that the Warren Court's world-weary realism in holding against the application of a heightened standard for stops and frisks was, in fact, highly unrealistic.

The contemporary implications of this critique are developed in Part V, starting from the fact that now, as at the time of the Terry decision in 1968, blacks are more likely to be stopped and frisked than whites. Now, as then, there is seething resentment of police practices—including stops and frisks—in some minority communities.  

The analysis and critique of Terry's argument in Parts II-IV demonstrates that contrary to the lack of concern evinced in Wilson's and Sherman's recent proposals, racial impact should be taken into account in both the legal and administrative delimitation of the stop and frisk power. Part V argues, however, that a major gap in our empirical knowledge must be remedied before racial impact can properly be taken into account. In particular, we lack any well-grounded estimate of the extent to which the racially disparate incidence of stops and frisks is caused by police bias against blacks or greater black criminality and corresponding police expertise in apprehending those most likely to be involved in crime. The paucity of existing empirical knowledge of the causes of the racially disparate incidence of stops and frisks makes it impossible to determine whether the disparate impact in fact justifies any change in the scope of the stop and frisk power. Much less does the requisite empirical basis exist for deciding what types of heightened, racially neutral limits the law or police department guidelines should impose. Through criticizing existing studies, Part V suggests the sorts of studies that are needed. This empirical work is not only necessary if the law, police department guidelines and social policy are to respond to the demands of racial justice and civil liberties, but even if paramount importance is accorded to the fight against crime. Accordingly, this Article concludes that neither Wilson's

31. See, e.g., Peter S. Canellos, Police Face a Confidence Gap Many Blacks Worried Officers Cover for Own, BOSTON GLOBE, Oct. 17, 1995 at M21 (explaining that "the ongoing mistrust of police in the black community . . . suggests that Boston, like most urban areas, still has a racial gap when it comes to faith in law enforcement.").
nor Sherman's lack of concern with racial impact can rightly be considered part of a realistic approach to crime.

II. An Overview of Terry v. Ohio and Its Legal Legacy

Coming in 1968, the Supreme Court's opinion in Terry was the product of a time of racial turbulence and rising fear of crime. During the 1960s, cities burned in race riots and crime rates rose. In 1964, "law and order" became an issue for the first time in a Presidential campaign.

Terry was the product of a social and legal climate that was avowedly liberal. Representing this climate, President Lyndon Johnson responded to the rise in crime and to the race riots with the appointments of the President's Commission on Law Enforcement and Administration of Justice (the President's Commission) and the National Advisory Commission on Civil Disorders (the Kerner Commission). The President's Commission issued its report in 1967. The report, as well as taskforce reports and field studies executed for the Commission, were referred to in both the litigants' briefs and the Supreme Court's opinion in Terry.


33. See, e.g., FRIEDMAN, supra note 32, at 274; see generally Francis A. Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. ILL. L. FOR. 518, 539 ("That period [the late 1960's] was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were [sic] politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were presented as a war between the 'peace forces' and the 'criminal forces.'"). For the suggestion that starting in the 1960's, racial and 'law and order' concerns have been intertwined, see, e.g., John A. Powell & Eileen B. Hershe

34. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967) [hereinafter PRESIDENT'S COMMISSION REPORT].

35. See id., referred to in Brief of Americans for Effective Law Enforcement, as Amicus Curiae [hereinafter Americans for Effective Law Enforcement Brief], reprinted in LANDMARK BRIEFS, supra note 20, at 515-16; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-185 (1967)[hereinafter POLICE TASK FORCE REPORT], referred to in Terry v. Ohio, 392 U.S. at 14 n.11; in N.A.A.C.P. Brief, reprinted in LANDMARK BRIEFS, supra note 20, at 577, 578 n.2, 579 n.3, 581 n.7, 612, 612 n.61, 621 n.78, 637 n.99, 643 nn.108-109, 644; and in Americans for Effective Law Enforcement Brief, reprinted in LANDMARK BRIEFS, supra note 20, at 516; POLICE TASK FORCE REPORT at 146-49, referred to in N.A.A.C.P. Brief, reprinted in LANDMARK BRIEFS at 639; DONALD BLACK & ALBERT J. REISS, JR. 2 STUDIES IN CRIME AND LAW ENFORCEMENT
report of the Kerner Commission was issued in March 1968, after the briefing and oral argument in Terry were completed, but three months before the Terry decision came down. Both Commissions stressed that social and economic disadvantages were the primary, if not sole, cause of disproportionate minority involvement in crime and of riots in the ghettos. The Commissions dwelt, moreover, on the need to attend to police practices—including the aggressive use of stops and frisks—that were a major cause of tension between the police and minority communities and thereby themselves a cause of riots and crime.

36. See supra note 20.

37. See, e.g., the President's Commission: "The Commission is of the view that if conditions of equal opportunity prevailed, the large differences now found between the Negro and white arrest rates would disappear." President's Commission Report, supra note 35, at 45. Similarly, "[M]uch of American crime, delinquency, and disorder is associated with . . .: Poverty, racial antagonism, family breakdown or the restlessness of young people. During the last 20 years these conditions have been aggravated by such profound social changes as the technological and civil rights revolutions, and the rapid decay of inner cities into densely packed, turbulent slums and ghettos.

"It is in the cities that the conditions of life are the worst, that social tensions are the most acute, that riots occur, that crime rates are the highest . . ." Id. at 91.

Similar statements by the Kerner Commission include: "The background of disorder is often as complex and difficult to analyze as the disorder itself. But we find that certain general conclusions can be drawn: Social and economic conditions in the riot cities constituted a clear pattern of severe disadvantage for Negroes compared with whites . . ." Kerner Commission Report, supra note 20, at 8. "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II. Among the ingredients of this mixture are: . . . The black ghettos, where segregation and poverty converge on the young to destroy opportunity and enforce failure. Crime, drug addiction, dependency on welfare, and bitterness and resentment against society in general and white society in particular are the result." Id. at 10.

38. The President's Commission urged that "[p]olice agencies cannot preserve the public peace and control crime unless the public participates more fully than it now does in law enforcement. Bad community feeling does more than create tensions and engender actions against the police that in turn may embitter policemen and trigger irrational responses from them. It stimulates crime." President's Commission Report, supra note 35, at 100. See also id. at 92. Similarly, the Police Task Force Report noted, "[b]etween January 1964 and June 1966, 32 disturbances or riots occurred . . . Poor police-community relations, together with poor housing, unemployment and op-
Framed by this background, the decision in *Terry* was a product of the Warren Court, itself a primary symbol of 1960s liberalism. Written by Chief Justice Earl Warren himself, the majority opinion in *Terry* was joined by, among others, noted liberal justices Marshall, Brennan and Fortas. Justice Douglas was the sole dissenter. This liberal parentage notwithstanding, *Terry* limited the Warren Court's previous expansion of the rights of criminal suspects. The subject of *Terry* was street crime. Specifically, a plainclothes police officer had observed Terry and another man pacing back and forth. Whether the court would strike its own prior expansion of the rights of criminal suspects in *Terry* (as it did) would have some bearing on the ultimate composition of the Court. The Warren Court was more liberal on issues of civil rights and liberties than its predecessors. The *Terry* majority was met with skepticism by the more conservative Warren Court, which would have to strike down *Terry* in the future.

The decision in *Terry* was a product of the Warren Court, itself a primary symbol of 1960s liberalism. Written by Chief Justice Earl Warren himself, the majority opinion in *Terry* was joined by, among others, noted liberal justices Marshall, Brennan and Fortas. Justice Douglas was the sole dissenter. This liberal parentage notwithstanding, *Terry* limited the Warren Court's previous expansion of the rights of criminal suspects. The subject of *Terry* was street crime. Specifically, a plainclothes police officer had observed Terry and another man pacing back and forth.

...
forth in front of a store in downtown Cleveland in the middle of the afternoon. Suspecting that the men were planning a robbery and also fearing that they might have a gun, the officer approached, identified himself as a policeman, and requested their names. When they mumbled in reply, the officer grabbed Terry, patted down the outside of his clothing, and felt a pistol in the breast pocket of his overcoat. The officer then removed the coat and recovered the gun from the pocket. Terry was charged and convicted of carrying a concealed weapon.40

At issue before the United States Supreme Court were (i) whether the stop and frisk of Terry violated the prohibitions on illegal searches and seizures of the Fourth Amendment to the United States Constitution41 and (ii) whether, as the “fruit” of a Fourth Amendment violation, the gun therefore could not be used as evidence for convicting Terry.42 A broader issue of principle was also involved. Before the Supreme Court’s decision in Terry, a fundamental tenet of Fourth Amendment law was that government officials can subject an individual or his or her property to a search or seizure only if they have probable cause to believe that he or she has committed or is committing a crime.43 Terry held that the Fourth Amendment had not been violated even though stops and frisks are properly classified as searches and seizures under the Fourth Amendment and even though the officer’s decision to stop and frisk Terry was not based on probable cause.44 The Supreme Court reached this holding by creating an exception to the probable cause requirement. Instead of requiring probable cause, stops and frisks are justified if they conform to a less stringent reason-

in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.” Id.

40. 392 U.S. at 4-7.
41. The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV.
42. 392 U.S. at 8, 12.
43. See, e.g., Beck v. Ohio, 379 U.S. 89, 96 (1964), and Wong Sun v. United States, 371 U.S. 471, 479 (1963), both citing Brinegar v. United States, 338 U.S. 160, 176 (1949) (“Requiring more [than probable cause] would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.”).
44. 392 U.S. at 16, 20.
able suspicion standard.\footnote{392 U.S. at 20, 27.} Under \textit{Terry}'s reasonable suspicion standard, an officer must have reason to believe that "criminal activity is afoot" in order to stop the suspect, and reason to believe that the suspect is "armed and presently dangerous" in order to frisk him.\footnote{392 U.S. at 24, 27-28, 30.}

The immediate consequence of the Supreme Court's reasoning was that \textit{Terry}'s conviction was affirmed on the ground that his stop and frisk had not violated the Fourth Amendment and that the gun recovered from the frisk had therefore properly been used

\footnote{45. 392 U.S. at 20, 27.} \footnote{46. 392 U.S. at 24, 27-28, 30. The \textit{Terry} majority explicitly declined to decide whether \textit{Terry} had been "seized" within the meaning of the Fourth Amendment before he was frisked. Accordingly, the majority only decided what the requisite justification was for a stop and frisk and did not reach the question of what justification the Fourth Amendment required for a stop alone. \textit{Id.} at 19 & 19 n.16. \textit{See also id.} at 32 (Harlan, J., concurring) (criticizing the \textit{Terry} majority for failing to recognize that "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.") (emphasis added).

By contrast, later cases have relied on the \textit{Terry} majority's suggestion that while a stop is justified by "reasonable suspicion" that "criminal activity may be afoot," a frisk is justified only by "reasonable suspicion" that the suspect "may be armed and presently dangerous." \textit{392 U.S. at 30. See, e.g., United States v. Cortez, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," citing \textit{Terry}, 392 U.S. at 16-19 (footnote and other citations omitted)); Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979) (a frisk of an individual must be "supported by a reasonable belief that he [is] armed and presently dangerous," citing \textit{Terry}, 392 U.S. at 21-24 (other citation omitted)); Adams v. Williams, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose," citing \textit{Terry}, 392 U.S. at 30 (footnote omitted)).

The distinction between the requisite justifications for stops and frisks notwithstanding, a frisk is virtually certain to be found necessary for protection and, hence, justifiable whenever a stop is upheld. As Justice Harlan stated in his \textit{Terry} concurrence:

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. . . . There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet. \textit{Id.} at 33. \textit{See also Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev.} 349, 436 (1974) ("[H]ow can even the most enlightened and conscientious courts ever fail to detect the presence of the necessary, indefinable less-than-probable-cause probability of a weapon or, having thus justified the frisk, refuse to allow the police to remove anything harder than a damp sponge which they will testify 'felt like' a weapon?" (footnotes omitted)); N.A.A.C.P. Brief, \textit{reprinted in Landmark Briefs, supra} note 20, at 593 ("Undoubtedly, a legislature might give the power to 'stop' without accompanying power to 'frisk,' but all of the significant pieces of legislation so far proposed or enacted couple 'stop' with 'frisk,' and the proponents of stop and frisk seem unanimous that 'frisk' is necessary if 'stop' is to be effective." (footnote omitted)).
to convict him. More broadly, *Terry* weakened the rights of all criminal defendants by broadening the admissibility of evidence that could be used against them. As a result of *Terry*, a defendant was no longer absolutely shielded, by the absence of probable cause, from being convicted on the basis of evidence obtained from a search and seizure. The evidence could be used so long as the search and seizure was properly classified as a stop and frisk and so long as the less stringent requirement of reasonable suspicion was met.

*Terry* did more than weaken the rights of criminal defendants, however. Because *Terry* established that stops and frisks were exempt from the traditional probable cause requirement and an official's evidence of criminality would henceforth have to rise only to the level of reasonable suspicion, *Terry* increased the likelihood that innocent people would be stopped and frisked.

In the years since 1968, the *Terry* exception has virtually swallowed up the rule that probable cause is required for searches and seizures. The Fourth Amendment's protection of the privacy of both innocent people and those who commit crimes has thereby been drastically reduced. Although *Terry* reasoned that stops and frisks are governed by a weaker reasonable suspicion requirement because they are less intrusive than the arrests and "full" searches to which probable cause properly applies, the *Terry* majority ex-

47. 392 U.S. at 30, 31.
49. For a similar argument, see N.A.A.C.P. Brief, reprinted in Landmark Briefs, supra note 20, at 580-83.

By granting police increased discretion under the Fourth Amendment, *Terry* also made it more difficult for suspects to prevail in the civil actions seeking damages for Fourth Amendment violations by federal and state agents that are respectively available under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and 42 U.S.C. § 1983.

50. See, e.g., Williams, supra note 27, at 576-82; William J. Mertens, The Fourth Amendment & the Control of Police Discretion, 17 U. Mich. J.L. Ref. 551, 617 (1984) ("The extension of *Terry* . . . threatens to hand the police new search and seizure powers with little protection against discretionary abuse. The root problem is the *Terry* Court's severance of the probable cause requirement from the Fourth Amendment's reasonableness clause, which would, if pushed to its logical limit, allow all searches and seizures not requiring a warrant to be judged under a balancing test rather than traditional probable cause." (footnote omitted)); Scott E. Sundby, A Return to Fourth Amendment Basics, 72 Minn. L. Rev. 383, 385 (1988) (*Terry" significantly undermined the role of probable cause and set the stage for the long-term expansion of the reasonableness balancing test without proper justification or limits").

51. 392 U.S. at 25-27.
plicitly declined to define how intrusive a search or seizure can be and yet count as a stop or frisk.\textsuperscript{52}

Moreover, \textit{Terry} left open the practical question of what amount and type of evidence would be necessary to justify a stop and frisk.\textsuperscript{53} The officer's decision to stop and frisk Terry was based on observation of arguably suspicious activity. Terry and his companion paced back and forth, looking into the same store window 24 times.\textsuperscript{54} By contrast, subsequent decisions have established that the reasonable suspicion requirement may be met even if a decision to stop or frisk is based in part on the suspect's personal characteristics, rather than on his or her suspicious activity. Thus, courts have held that race or ethnic appearance may be a factor.

\textsuperscript{52} Representative statements in Chief Justice Warren's opinion for the \textit{Terry} majority are: "[W]e turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him." 392 U.S. at 15-16; "We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." \textit{Id.} at 29 (citation omitted).

Subsequent cases, however, have pronounced increasingly invasive police actions to be mere "\textit{Terry} stops," and thus subject only to \textit{Terry}'s reasonableness requirement rather than probable cause. Thus, the \textit{Terry} majority repeatedly observed that the stop and frisk of Terry was less intrusive than an arrest or full search because of its brevity. 392 U.S. at 25, 26. However, in United States v. Sharpe, 470 U.S. 675 (1985), the U.S. Supreme Court held that there was no "hard-and-fast time limit for a permissible \textit{Terry} stop[,]" 470 U.S. at 686 (citing United States v. Place, 462 U.S. 696, 709 n.10 (1983)), and advised courts to defer to officers' assessments of law enforcement needs. \textit{Id.}

The \textit{Sharpe} Court acknowledged that too lengthy an intrusion might amount to a de facto arrest. "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." \textit{Id.} at 685. However, the Court emphasized "the need to consider the law enforcement purposes to be served by the stop," and warned that, in determining whether the permissible time had been exceeded, "the court should not indulge in unrealistic second-guessing " of police decisions. \textit{Id.} at 685-86.

Subsequent cases establish, moreover, that a \textit{Terry} stop may include a considerable display of physical force. Thus, although Terry was frisked by a single officer who apparently did not display a weapon, 392 U.S. at 7, 28, 29, courts commonly find that people surrounded by multiple officers with drawn guns are subject to \textit{Terry} stops, rather than arrests. See, e.g., United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1992); United States v. Jackson, 918 F.2d 236 (1st Cir. 1990); United States v. Jones, 759 F.2d 633 (8th Cir. 1985), \textit{cert. denied}, 474 U.S. 837 (1985).

\textsuperscript{53} "Each case of this sort will, of course, have to be decided on its own facts." 392 U.S. at 30.

\textsuperscript{54} \textit{Id.} at 22-23.
although not the sole factor, establishing reasonable suspicion.\textsuperscript{55} In 1989 in \textit{United States v. Sokolow}, the Supreme Court held, moreover, that drug profiles may be relied on to establish reasonable suspicion.\textsuperscript{56} These profiles, first developed by the federal Drug Enforcement Agency in the mid-1970s, are supposed to guide law enforcement officers in selecting people to suspect of being drug couriers and consequently to question or otherwise surveil at airport terminals. Among the personal characteristics included in drug profiles are whether a person is nervous or too calm, seated in the middle or back of an airplane, or travelling to or from a “source city” for drugs.\textsuperscript{57}

Through these expansive definitions of what counts as a \textit{Terry} stop and as reasonable suspicion, the courts’ post-\textit{Terry} decisions have massively relaxed Fourth Amendment protections. Within both the Supreme Court and the broader legal community, there has been impassioned debate about the extent to which this relaxation follows from the logic of \textit{Terry}.\textsuperscript{58} It is indisputable, however,

\textsuperscript{55} See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Kim, 25 F.3d 1426, 1431 n.3 (9th Cir. 1994); United States v. Lopez-Martinez, 25 F.3d 1481, 1487 (10th Cir. 1994); Anderson, 923 F.2d at 455; Dean, 543 P.2d at 427. For discussion and criticism of the cases establishing that race may be a factor in establishing reasonable suspicion, see, e.g., Johnson, \textit{Race and the Decision to Detain a Suspect, supra} note 20, passim; \textit{Developments in the Law, supra} note 20, at 1500-1518; Williams, \textit{supra} note 27, at 576-77, 582-87. I discuss these cases more fully infra note 90 and text accompanying notes 89-93.

\textsuperscript{56} United States v. Sokolow, 490 U.S. 1, 10 (1989).

\textsuperscript{57} See, e.g., id. at 13-14 (Marshall, J., dissenting) (describing factors in drug profiles and criticizing the profiles’ “chameleon-like way of adapting to any particular set of observations”); United States v. Ornelas-Ledesma, 16 F.3d 714, 716-17 (7th Cir. 1994) (describing factors in a drug profile and questioning their probativity in regard to crime): \textit{Developments in the Law, supra} note 20, at 1502-03.

\textsuperscript{58} For disagreement within the Supreme Court, see, e.g., \textit{Terry}, 392 U.S. at 38-39 (Douglas, J., dissenting) (“Only [probable cause] draws a meaningful distinction between an officer’s mere inkling and the presence of facts within the officer’s personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime… To give the police greater power… is to take a long step down the totalitarian path… [I]f the individual is no longer to be 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.”); Florida v. Royer, 460 U.S. 491, 509 (1983) (Brennan, J., concurring) (“The scope of a \textit{Terry}-type ‘investigative’ stop and any attendant search must be extremely limited or the \textit{Terry} exception would ‘swallow the general rule that Fourth Amendment seizures [and searches] are ‘reasonable’ only if based on probable cause’… [A]ny suggestion that the \textit{Terry} reasonable-suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the \textit{Terry} line of cases.”) (citation omitted); Adams v. Williams, 407 U.S. 143, 154 (1972) (Marshall, J., dissenting) (“In today’s decision the Court ignores the fact that \textit{Terry} begrudgingly accepted the necessity for creating an exception from the warrant re-
that *Terry* provided the framework for the relaxation. Before *Terry*, Fourth Amendment law included only a bipartite division between searches and seizures for which probable cause is required, and official actions which do not count as searches and seizures and hence are not protected.

Had this division continued, it would have been impossible to de-

quirement of the Fourth Amendment and treats this case as if warrantless searches were the rule rather than the ‘narrowly drawn’ exception. This decision betrays the careful balance that *Terry* sought to strike between a citizen’s right to privacy and his government’s responsibility for effective law enforcement . . . .”). *Compare* United States v. *Place*, 462 U.S. 696, 714 (1983) (Brennan, J., concurring) (“*Terry*, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion. They do not provide the police with a commission to employ whatever investigative techniques they deem appropriate.”) *with id.* at 720 (“Justice Douglas was the only dissenter in *Terry*. He stated that ‘[t]here 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.’ Today, the Court uses *Terry* as a justification for submitting to those pressures.” (citation omitted)).

For scholarly disagreement on whether subsequent “*Terry* stop” cases have been true to *Terry*’s intent, see, e.g., Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 *CORNELL L. REV.* 1258, 1328 (1990); Williams, *supra* note 27, at 576-82 (subsequent Supreme Court decisions broke *Terry*’s promises by not according due weight to individual privacy interests); Mertens, *supra* note 50, at 589, 591. For scholarly arguments that subsequent Supreme Court decisions broke *Terry*’s promises by not according due weight to individual privacy interests or requiring sufficiently vigorous judicial review, see, e.g., Williams, *supra* note 27, at 576-82; and Maclin, 75 *CORNELL L. REV.* at 1328. For the opposing contention that subsequent “*Terry* stop” cases have been true to *Terry*’s intent, see, e.g., Sunby, *supra* note 50, at 399 (“The Court in *Camera* and *Terry* embraced the reasonableness balancing test in a manner that conceptually weakened probable cause and failed to provide any long-term guidance or limits for the future role of reasonableness.”), and Mertens, *supra* note 50, at 589, 591.

59. See cases cited *supra* note 43. In its *amicus* brief in *Terry*, the N.A.A.C.P. distinguished between the traditional bipartite model and the tripartite model advocated by proponents of stop and frisk. N.A.A.C.P. Brief, reprinted in *LANDMARK BRIEFS*, *supra* note 20, at 588-96. In particular, the N.A.A.C.P. stated that:

The *Classical Arrest-Search Model* thus recognizes two categories of police investigative powers. Powers whose exercise does not significantly invade personal liberty and the right of privacy . . . are given the police to use at large, indiscriminately, at their discretion, and without judicial supervision. Powers whose exercise does invade these rights may be used by the police . . . only against persons whom there is probable cause, to believe are criminal actors . . . . The ‘probable cause’ determination made by a policeman as the precondition of the exercise of these powers is judicially reviewable . . . .

In theory, the *Stop-Frisk Model* differs from the *Classical Arrest-Search Model* in that it recognizes at least three, perhaps more, categories of police powers.

*Id.* at 590-91 (footnotes omitted). *See also* *Ybarra v. Illinois*, 444 U.S. 85, 105 (1979) (Rehnquist, J., dissenting) (“The petitioner in *Terry* had sought . . . a model allowing the police to search some individuals completely and other individuals not at all.”).
crease Fourth Amendment protections by broadening the class of searches and seizures not subject to probable cause. It would also have been impossible to weaken the Fourth Amendment by gradually reducing the stringency of an intermediate reasonableness requirement. In short, by dissolving the traditional bipartite scheme, *Terry* created powerful tools for the legal expansion of law enforcement powers.

III. The Ambivalent Argument of *Terry v. Ohio*

A. The Invasiveness of Stops and Frisks and Violent Crime.

The majority opinion in *Terry* is two-sided. It eloquently decries the threats that the stop and frisk power poses to individual dignity and race relations only to insist repeatedly that the probable cause standard must nonetheless be lowered. Thus, the opinion ridicules the view that a stop and frisk is “a mere ‘minor inconvenience and petty indignity’,” but insists that stops and frisks are nonetheless less invasive than the arrests and “full” searches to which probable cause properly applies. The opinion’s eloquence about the threat that stops and frisks pose to individual privacy pales beside its impassioned description of the threat that violent criminals pose to police officers. Citing figures on the numbers of police officers killed and wounded in the line of duty from 1960-1966, the opinion proclaims: “American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.” The opinion urges that because officers need to be able to protect themselves while investigating crime, they need not wait for probable cause before subjecting individuals to the “far from inconsiderable” intrusion of a frisk for weapons.


In particular, Warren cites a scholarly description of frisks as including “[a] thorough search of the prisoner’s arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.” 392 U.S. at 17 n.13 (quoting Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L.C. & P.S. 481 (1954).

61. Id. at 25-27.
62. Id. at 24 n.21.
63. Id. at 23.
64. Id. at 24, 26. In work in progress, I show that this argument for the need to grant police power to frisk on less than probable cause is based on major and empirically questionable transformations of the facts briefed and argued to the United States Supreme Court. See Adina Schwartz, Who’s the We?: Relations among the
B. The Acceptance of the N.A.A.C.P.'s Premisses and Rejection of Its Conclusion.

The *Terry* majority's rejection of an across-the-board probable cause requirement was based, in addition, on an ambivalent position on race relations. The N.A.A.C.P. Legal Defense and Education Fund had submitted an *amicus* brief to the United States Supreme Court purporting to represent the many innocent people whose cases do not come to court because nothing incriminating is found when they are stopped and frisked. The brief spoke of the innocent victims as "Everyman," but nonetheless emphasized that all innocent citizens were not equally likely to be stopped and frisked. Instead, the N.A.A.C.P. claimed that blacks were more likely to be stopped and frisked than whites, and that racial prejudice on the part of the police was a major, if not sole, cause of the disparate impact. In addition, the N.A.A.C.P. urged that the ra-

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65. The N.A.A.C.P. stated that it wished to represent "[t]he many thousands of our citizens who have been or may be stopped and frisked yearly, only to be released when the police find them innocent of any crime . . . ." N.A.A.C.P. Brief, supra note 20, reprinted in *LANDMARK BRIEFS* at 580-81.

66. For example, the N.A.A.C.P. stated that "the Court is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy of individuals who are undifferentiable from Everyman as the probable perpetrators of a crime." *Id.*, reprinted in *LANDMARK BRIEFS* 586-88. Similarly, "*amicus curiae* wishes to speak principally in behalf of their interests—which we conceive to be indistinguishable (but for the vagaries of a 'reasonable suspicion') from those of the citizenry generally." *Id.*, reprinted in *LANDMARK BRIEFS* at 583; see also *id*, reprinted in *LANDMARK BRIEFS* at 634.

67. For the N.A.A.C.P.'s tendency to slide between equating the innocents whom it purported to represent with "Everyman" and with black victims of racism, see, e.g., *id.*, reprinted in Landmark *BRIEFS* at 615-616 ("[A]s to what citizen is it not reasonably possible that he has committed some crime? As to what unknown citizen on the street (even a crowded street) near the scene of a known crime? As to what group of ill-dressed young men on a ghetto street corner? As to what Negro abroad on the streets in a 'white' neighborhood late in the day?").

68. Thus, the N.A.A.C.P. wrote, "A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and practices in our society that bear with discriminatory harshness upon Negroes and practices in our society that bear with discriminatory harshness upon Negroes and practices in our society that bear with discriminatory harshness upon Negroes. The stop and frisk procedure . . . is such a practice. The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged. This is no historical accident or passing circumstance. The essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers. History, and not in this country alone, has taught that such discretion comes inevitably to be used as an instrument of oppression of the unpopular. It was so in the case of the search and seizure practices which the Fourth Amendment was written to condemn. We believe that the Amendment protects the unpopular, the
cist misuse of stops and frisks was a major cause of the tension between police and minority communities.  

The N.A.A.C.P.'s empirical contentions were controversial. In their amicus brief, the Americans for Effective Law Enforcement (The Law Enforcement) explicitly argued that disproportionate minority involvement in crime, rather than police racial prejudice, might explain the disparate incidence of stops and frisks. The brief relied, in particular, on Black and Reiss's finding, in their field survey for the President's Commission, that “Personal searches on Negroes are over twice as productive of weapons as are those conducted on whites. In on-view situations one-in-five frisks of a Negro yielded a gun; for whites the proportion was one-in-ten.”

The Law Enforcement brief failed to indicate, however, that despite their finding of greater yields from frisks of blacks, Black and Reiss nonetheless concluded that blacks were more likely than whites to be illegally frisked. On the one hand, according to

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Negro, and all our citizens alike, from subjection to the oppressive police discretion which stop and frisk embodies.” N.A.A.C.P. Brief, supra note 20, reprinted in LANDMARK BRIEFS at 579-80. Similarly, “[T]he man likely to be stopped [is] the man on the street in a ‘bad’ neighborhood, the man in the ghetto. . . .” Id., reprinted in LANDMARK BRIEFS at 611; “This suspicious cast of mind is intensified in the ghetto. The policeman on patrol in the inner city has little understanding of the way of life of the people he observes, and he believes (with considerable justification) that they are hostile to him. The result is inevitable. The patrolman . . . has come to identify the black man with danger. Little wonder that field interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile.” Id., reprinted in LANDMARK BRIEFS at 620-21. See also id. at 64-66, reprinted in LANDMARK BRIEFS at 640-42.

69. Id., reprinted in LANDMARK BRIEFS at 638. See id., reprinted in LANDMARK BRIEFS at 636-45.

70. Americans for Effective Law Enforcement Brief, supra note 34, reprinted in LANDMARK BRIEFS at 515-17.

71. Id., reprinted in LANDMARK BRIEFS at 517, citing BLACK & REISS, supra note 35, at 86. Under Black and Reiss's definition, an “‘on-view’ mobilization” occurs “[w]hen an officer initiates contact and reports on an incident that occurs in his presence”. Id. at 4.

The N.A.A.C.P. Brief, supra note 20, reprinted in LANDMARK BRIEFS at 581 n.7, indicated that other studies in the 1960s reported much lower yields from stops and frisks than those Black and Reiss found. In comparing the Black and Reiss study with other studies discussed in this article, it is important to note that the Black and Reiss figure concerns the yield from only those stops that culminate in frisks. By contrast, the figures from Sherman's Kansas City gun experiment, supra notes 4, 9-10 and accompanying text, Bogomolny's 1976 study, infra text surrounding notes 198-205, Piliavin and Briar's 1964 study, infra text surrounding notes 207-212, and Smith's 1981 London study, infra note 219, concern the yield from stops that both did and did not lead to suspects being frisked.

72. See BLACK & REISS, supra note 35.
Black and Reiss, "[t]he legality of the personal search depends upon necessity for self-protection if it is not 'incident to' an arrest and if permission is not asked and received."\textsuperscript{73} On the other hand, "[o]bservers in on-view encounters judged frisks necessary for the officer's protection less often when Negroes than whites were searched."\textsuperscript{74} Moreover, "[i]n on-views, Negroes were asked [for permission to frisk] in 8 percent of the cases compared to 11 percent for whites."\textsuperscript{75}

Black and Reiss's racial comparisons were not mentioned in the reports of either the President's Commission, its Police Taskforce or the Kerner Commission. As the N.A.A.C.P., the Police Taskforce and the Kerner Commission both explicitly argued that blacks were subject to significant abuse of the stop and frisk power and that this was a major source of explosive tension in minority communities.\textsuperscript{76} In contrast to the N.A.A.C.P., however, the Kerner Commission did not consider whether such abuse was the result of racial prejudice or greater than in other communities. The Police Taskforce explicitly argued that it was difficult to determine the extent to which decisions to stop and frisk blacks were motivated by racial prejudice or greater black criminality.\textsuperscript{77}

\textsuperscript{73} Id. at 82.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 85. Black and Reiss concluded that the higher frequency of illegal frisks of blacks was a predictable result of the great discretion that officers enjoyed in on-view encounters, and that this exercise of police discretion might in turn be explained by either discrimination or by disproportionate black criminality. "Assuming that police discretion is greater in the on-view encounter, it could also be assumed that officers will exercise that discretion more often with Negroes than whites (whether on grounds of a higher crime rate for Negroes than whites in these cities or on grounds of discrimination, or some other basis)." Id.

\textsuperscript{76} The Task Force wrote that, "Misuse of field interrogations, ... is causing serious friction with minority groups in many communities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not sufficiently evident." POLICE TASK FORCE REPORT, supra note 35, at 184.

Similar statements by the Kerner Commission include, "[M]any departments have adopted patrol practices which ... have 'replaced harassment by individual patrolmen with harassment by entire departments'." KERNER COMMISSION REPORT, supra note 20, at 303.

The Police Taskforce and Kerner Commission agreed that abusive stops and frisks were a cause of poor relations between the police and minority communities. Nonetheless, they both called for research into the precise impact of aggressive patrol techniques, including stops and frisks, on police-community relations, see supra note 37 and surrounding discussion.

\textsuperscript{77} "[M]embers of minority groups ... generally believe ... that discrimination is practiced against both middle class and poor persons from minority groups. ... It is extremely difficult to establish the extent to which such allegations are accurate since
This controversy notwithstanding, the Terry majority opinion adopts the N.A.A.C.P.’s view that stops and frisks are used as a means of racial harassment.78 The opinion speaks of “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”79 Leaving no doubt that they credit these complaints, the majority cites the Police Taskforce Report to the effect that “[m]isuse of field interrogations’ increases ‘as more police departments adopt ‘aggressive patrol’. . .’80 Moreover, the opinion asserts that this abuse of the stop and frisk power is “a major source of friction between the police and minority communities.”81

Terry incorporates these empirical contentions about racial impact, however, only to reject the N.A.A.C.P.’s legal conclusion. The N.A.A.C.P. had argued that because of the danger of racist misuse, stops and frisks are properly subject, as all other searches and seizures under the Fourth Amendment, to the probable cause standard. The Terry opinion, however, emphatically denies that any such conclusion follows from the fact that stops and frisks are used to harass members of minority groups. The opinion entones that across-the-board enforcement of the probable cause standard would be a mere “futile protest”82 against racial harassment, a practice which “it can never be used effectively to control.”83 Moreover, the opinion claims that this “futile protest” would be costly. Invoking the spectre of criminal violence, the majority warns that a “high toll in human injury and frustration of efforts to prevent crime” may result if police are not allowed to stop and frisk on less than probable cause.84

discrimination is likely to be only one of several factors which affect an officer’s decision in any particular situation. Negroes . . . are arrested and probably stopped in disproportion to their numbers. However, these groups frequently live in high-crime areas. Consequently, normal, completely fair police work would doubtless produce the arrest or stopping of larger numbers of these groups.” POLICE TASK FORCE REPORT, supra note 35, at 183.

78. See Terry, 392 U.S. at 14.
79. Id.
80. Id. at 14 n.11, quoting POLICE TASK FORCE REPORT, supra note 35, at 184.
81. Id.; see also id. at 17 n.14, referring to “the abusive practices which play a major, though by no means exclusive, role in creating this friction.”
82. Terry, 392 U.S. at 15.
83. Id.
84. Id.
C. The Marginalization of Racial Concerns.

Notwithstanding this rejection of the N.A.A.C.P.'s argument for a stringent legal standard, the Terry majority nonetheless insists that a court must find a Fourth Amendment violation if a particular defendant shows that a stop or frisk was used as a means of racial harassment.\textsuperscript{85} This limited legal role for facts about the racial incidence and motivation of stops and frisks is grounded in a distinction between deterring future violations and condemning past violations. On the one hand, the Terry majority argues that legal restrictions are powerless to deter racist abuses of the stop and frisk power, but can by contrast deter legitimate law enforcement efforts. Accordingly, neither the extent nor the causes of racial disparity in the incidence of stops and frisks is relevant to defining the proper, racially neutral extent of the stop and frisk power. In other words, racial impact has no bearing on the choice between probable cause and the more lenient reasonable suspicion standard that Terry propounds. On the other hand, the underlying racial motivation for a particular stop and frisk is relevant because courts are still responsible for condemning "identified" instances of racist abuse.\textsuperscript{86} While dismissing a heightened Fourth Amendment standard as a "futile protest" against police racism,\textsuperscript{87} the Terry majority nonetheless proclaims that "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing. . . . When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."\textsuperscript{88}

As stated above, subsequent cases established that race may be a factor, although not the sole factor, establishing reasonable suspicion for a stop or frisk.\textsuperscript{89} Moreover, once an officer advances a nonracial justification for a decision to stop or frisk, courts have tended not to ask whether race was in fact the sole basis for the decision.\textsuperscript{90} These legal developments are consonant with Terry's

\textsuperscript{85} See Terry, 392 U.S. at 15.
\textsuperscript{86} See generally, Terry, 392 U.S. at 15.
\textsuperscript{87} Terry, 392 U.S. at 15.
\textsuperscript{88} Id.
\textsuperscript{89} See cases and articles cited supra note 55.
\textsuperscript{90} See, e.g., Lopez-Martinez, 25 F.3d at 1493 (McKay, C.J., dissenting) ("the majority's undue reliance on Brignoni-Ponce will essentially allow any Hispanic in the southern half of New Mexico to be pulled over without restraint"); Anderson, 923 F.2d at 455; Dean, 543 P.2d at 427 (1975); see discussion supra at note 20.

For criticism of courts' tendency not to probe into the racial basis of officers' decisions, see Developments in the Law, supra note 20, at 1501-02 ("As a general proposition, courts resist scrutinizing the incremental decisions leading up to detentions,
position that courts are powerless to deter racist stops and frisks. Because it follows that even the most exacting judicial inquiry into the racial basis of particular decisions will not deter officers from future racist abuses, scrutiny cannot be justified by its likely effects on future police conduct.

Nor is a firm foundation for probing scrutiny provided by Terry’s insistence that despite their inability to deter, courts remain responsible for condemning racist abuses. If deterrence is impossible, one of the strongest reasons for requiring judicial condemnation is that an independent harm occurs when courts announce to the public that illegal conduct is acceptable. Courts are more likely to perpetrate this harm by approving of stops or frisks for which race is clearly the sole basis than by failing to scrutinize plausible nonracial pretexts. Given the consequent lesser importance of condemning officers’ surreptitious reliance on race, it is not surprising that, despite the appeal to a “judicial integrity” rationale for condemning racial abuses, the Terry majority fails to assign courts proactive responsibility for rooting out police racism. Instead, the opinion speaks of courts’ reactive responsibility to condemn racial abuses “[w]hen such conduct is identified.”

This reactive view is in turn consonant with later courts’ tendency to abstain from asking whether the nonracial justifications that officers present for stops and frisks are in fact pretextual. 

Insisting on a Gestalt-like fourth amendment analysis that looks to the totality of the circumstances . . . . This approach has allowed courts to validate the use of race so long as the totality of the circumstances includes nonracial factors.”), and more generally, at 1501-04.

But see Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1446 (9th Cir. 1994) (noting that because “[t]he other factors that [the officer] used to justify his decision to stop . . . had such a low probative value that no reasonable officer would have relied on them to determine whether there was reasonable suspicion to make an investigative stop,” suspect’s Hispanic appearance was illegally relied on as the sole basis for the stop); Ornelas-Ledesma, 16 F.3d at 716-17 (7th Cir. 1994) (because of strong correlation between being Hispanic and other “suspicious” factors in drug profile, reasonable suspicion was not established by suspect’s match to profile); Developments in the Law, supra note 20, at 1503 n.54 (citing cases in which courts have disapproved of the use of race as a factor in criminal profiles).

91. See Terry, 392 U.S. at 14.
92. 392 U.S. at 15.
93. This is compatible with Johnson’s contention, supra note 20, at 257-58, that if courts took the task of being models of integrity seriously, they would be committed to rooting out racism root and branch. My point here is that judicial integrity is much more obviously violated when courts condone flagrant abuses than when they fail to expose and condemn concealed abuses. Thus, if the commitment to judicial integrity is not precisely defined, but rather vaguely alluded to as in Terry, that very commitment can support a tendency not to consider whether purported nonracial justifications are in fact pretextual.
Moreover, *Terry*'s reasoning paved the way for subsequent case law establishing that even if race is the sole basis for an intrusion, the Fourth Amendment is not necessarily violated.\(^{94}\) The N.A.A.C.P. had argued, in effect, that facts about racial impact are relevant to determining what sort of justification the Fourth Amendment requires for particular types of intrusions.\(^{95}\) *Terry*'s rejection of this argument went hand in hand with the position that the Fourth Amendment standards for particular types of intrusions are to be arrived at by balancing relevant governmental interests against the privacy interests of individuals.\(^{96}\) This position underlies the Supreme Court's contrasting decisions in 1975 in *United States v. Brignoni-Ponce*\(^{97}\) and in 1976 in *United States v. Martinez-Fuerte*.\(^{98}\)

At issue in both cases was whether the Fourth Amendment was violated when, on the basis of ethnic appearance alone, agents of the United States Border Patrol stopped occupants of vehicles for questioning near the Mexican border. In *Brignoni-Ponce*, the stops were conducted by roving patrols.\(^{99}\) Relying on *Terry*, the Court

\(^{94}\) See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-564 (1976); *United States v. Ojebode*, 957 F.2d 1218, 1223 (5th Cir. 1992) (Given absence of reasonable suspicion requirement for border stops, Nigerian defendant's Fourth Amendment rights were not violated even if "his detention by the Customs' inspectors was motivated by his race and nationality"), cert. denied, 113 S. Ct. 1291 (1993). Although this line of cases is discussed and criticized in *Developments in the Law, supra* note 20, at 1504-05 & n.58, 1507, the authors fail to recognize that the line is rooted in *Terry*'s rejection of the N.A.A.C.P.'s position.

\(^{95}\) See LANDMARK BRIEFS, supra note 20, at 579-580.

\(^{96}\) 392 U.S. at 21-22, 24, 26, 27. A conflicting interpretation might seem to follow from the statement, in footnote 14 of the *Terry* majority opinion, 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." 392 U.S. at 17 n.14. The seeming implication is that as a particular police practice (such as stops and frisks) exacerbates racial tensions, the balance between governmental and privacy interests may alter so as to give rise to more stringent Fourth Amendment standards for the exercise of that practice.

The preceding sentence in footnote 14 precludes this implication, however, at least in regard to stops and frisks. Referring back to his argument for the futility of seeking to control racist abuse of the stop and frisk power by imposing a heightened Fourth Amendment standard, Chief Justice Warren states that:

> We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction [between the police and minority communities] are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations.

*Id.*

\(^{97}\) 422 U.S. 873 (1975).


\(^{99}\) 422 U.S. at 882.
reasoned that the governing Fourth Amendment standard was to be determined by balancing the governmental interests in preventing the entry of illegal aliens and placing conditions on the legal entry of aliens against the invasion of individual privacy occasioned by roving patrol stops. The Court went on to hold that the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" showed that individualized suspicion was required for roving patrol stops. In other words, roving patrol stops are justified under the Fourth Amendment only if there is reason to suspect that the particular people stopped are illegal aliens. On this basis, the Court held that the Fourth Amendment was violated when roving patrols stopped individuals on the basis of Mexican appearance alone. Although Mexican appearance was relevant to establishing reasonable suspicion of illegal alienage, it could not by itself provide the requisite reason to suspect that a particular person was an illegal alien.

By contrast, a year later the Supreme Court held, in Martinez-Fuente, that even if people were stopped at fixed checkpoints on the basis of Mexican appearance alone, the Fourth Amendment would not be violated. Again relying on Terry, the Court reasoned that the Fourth Amendment standard for fixed checkpoint stops depended on "weigh[ing] the public interest against the Fourth Amendment interest of the individual." The Court then distinguished Brignoni-Ponce away on the ground that roving patrol stops were more intrusive than stops at fixed checkpoints.

100. Id. at 878-84.
101. Id. at 878.
102. Id. at 881-84, 886-87.
103. Id. at 885-86.
104. The Court reasoned that:

In this case, the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.... [T]his factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

105. 428 U.S. at 563-64.
106. Id. at 555.
107. Id. at 558-560.
On this basis, the Court held that the balance between government and individual interests did not require "individualized suspicion" for stops at fixed checkpoints, as opposed to stops by roving patrols.108

Whether the Fourth Amendment requires that a particular type of intrusion be justified by individualized suspicion is a question of what the proper, racially neutral standard is. In Martinez-Fuerte, the Court applied the racially neutral standard that individualized suspicion is not required to hold that a proper stop could be made, even where Mexican appearance is the sole reason for a particular person's being stopped at a fixed checkpoint. On the reasoning of Brignoni-Ponce, the vice in exclusive reliance is that Mexican appearance cannot by itself provide the requisite individualized suspicion for a roving patrol stop.109 Since, according to Martinez-Fuerte, "no particularized reason need exist to justify [a fixed checkpoint stop]," the vice would not arise from fixed checkpoint stops based on Mexican appearance alone.110

108. Id. at 562.
109. See supra note 104 and accompanying text.
110. 428 U.S. 563-64. The Court's reasoning is worth quoting at length:

"It is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. Cf. United States v. Brignoni-Ponce, 422 U.S. at 885-87. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.

Id. (footnotes omitted).

By considering only whether "a reasonable person would feel free to decline the officers' requests and terminate the encounter", the Supreme Court more recently held, in Florida v. Bostick, 111 S. Ct. 2382, 2386-89 (1991), that an individual may be stopped and questioned aboard a bus as part of a drug interdiction program without being "seized" within the meaning of the Fourth Amendment. Since such intrusions may accordingly not be subject to Fourth Amendment requirements, no quantum of suspicion may be needed to justify them. Id. at 2386.

In dissent, Justice Marshall charged that race was the principal, if not sole, basis for drug interdiction agents' decisions to question particular people. Id. at 2390 n.1 ("[T]he basis of the decision to single out particular passengers during a suspicionless [drug interdiction] sweep is less likely to be inarticulable than unspeakable [reliance on race].") See also People v. Evans, 556 N.Y.S. 794, 799 (N.Y. Sup. Ct. 1990) (criticizing Port Authority Police Department drug interdiction program on the ground that "[m]inorities did not fight their way up from the back of the bus just to be routinely stopped and interrogated on their way through the terminal."). The legacy of Terry and Martinez-Fuente, however, is that neither the extent nor the cause(s) of racially disparate incidence has any bearing on what the Fourth Amendment standard for a particular type of intrusion is. Thus, once, as in Martinez-Fuente and Bos-
This reasoning would not have been possible had the N.A.A.C.P.'s position in Terry prevailed. The governing Fourth Amendment standards for particular types of intrusions (including roving patrol and fixed checkpoint stops) would not have depended solely on the balance between governmental and individual interests. In addition, it would have been necessary to consider likely racial disparities in the incidence of particular types of intrusions under particular standards. It would also have been necessary to consider whether and to what extent such disparities are likely to result from police racial bias or police expertise in apprehending those most likely to be involved in crime.\footnote{111}

tick, the balance of individual and government interests is determined not to require any justification for subjecting particular individuals to a particular type of intrusion, the racial motivation for such an intrusion is irrelevant, from the point of view of the Fourth Amendment.

In reaction to the Bostick Court's failure to take account of the racial ramifications of drug interdiction programs, several commentators have proposed that the Fourth Amendment standards for particular types of intrusions vary with the race of those subject to the intrusions. See, e.g., Greene, supra note 25; Maclin, supra note 27. This article's suggestion, to the contrary, is that the extent and causes of the racially disparate incidence of a particular type of intrusion is relevant to determining a single, racially neutral standard for that intrusion.

111. In his dissent in Martinez-Fuerte, Justice Brennan criticized the majority for failing to take account of racial impact. Brennan failed to acknowledge, however, that he and the other members of the Terry majority had explicitly concluded that such considerations are irrelevant to the choice of Fourth Amendment standards. Brennan's dissent states that:

[T]he Court, without explanation, . . . ignores one major source of vexation. In abandoning any requirement of a minimum of reasonable suspicion, or even articulable suspicion, the Court in every practical sense renders meaningless, as applied to checkpoint stops, the Brignoni-Ponce holding that "standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens." Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same "suspicious" physical and grooming characteristics of illegal Mexican aliens.

428 U.S. at 571-72 (citation and footnote omitted).

The authors of Developments in the Law similarly argue that racial impact, and not simply the balance between individual and governmental interests, is relevant to the delineation of Fourth Amendment standards. Developments in the Law, supra note 20, at 1507 ("Under modern fourth amendment theory, judicial scrutiny heightens in relation to the severity of the harm suffered by the subject where the harm is defined exclusively in terms of the citizen's interest in being free from intrusive state action . . . .This framework permits courts to diminish scrutiny where the intrusion is marginal, but where the racial discrimination might be significant."). Similar to Justice
D. Misunderstandings of the Legacy of *Terry v. Ohio*.

A complete analysis of the relationship between *Terry* and later decisions on the role of race in Fourth Amendment law is beyond the scope of this Article. The foregoing analysis shows, however, that the legacy of *Terry* has been widely misunderstood. In particular, it is at most a half-truth that by failing to consider "the racial implications of police conduct," subsequent Supreme Court decisions have "broken [the] promises" of *Terry*. As this Article explains, the *Terry* majority adopted the N.A.A.C.P.'s empirical contentions about the extent and causes of racial disparity in the incidence of stops and frisks only to conclude that such considerations are irrelevant to delineating the proper standard for stops and frisks. *Terry*’s reasoning for this conclusion arguably paved the way for later courts’ tendency not to probe into racial motivation so long as an officer cites some nonracial factor to justify a particular stop or frisk. The reasoning in *Terry* also laid the foundation for the Supreme Court subsequently to conclude that unless individualized suspicion is required by the balance of governmental and individual interests, the Fourth Amendment is not violated by intrusions based on race or ethnic appearance alone.113

It is a mistake, nonetheless, to conclude without argument that "*Terry v. Ohio* may have been incorrectly decided. Given who the police are and their lack of training to break down color-based stereotyping, *Terry* may grant the police too much power to discriminate."114 The irony is that *Terry*’s consideration of racial impact itself implies that no matter how much we care about racial justice, facts about racial impact provide no reason for legal limits on police discretion to stop or frisk.115 The *Terry* majority argued that legal restrictions can do nothing to curb racist abuses, but can by contrast deter legitimate law enforcement efforts.116 If this is correct, neither the extent nor the causes of racial disparity are relevant to the law’s racially neutral definition of the extent of the stop and frisk power.117 It is necessary, then, to examine *Terry*’s

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Brennan’s dissent in *Martinez-Fuerte*, these authors totally ignore the explicit argument in *Terry* for the irrelevance of such racial concerns.

112. Williams, supra note 27, at 576-77, 582-88.
114. Greene, supra note 25, at 2040 n.224.
115. See supra part III.C.
116. See supra notes 82-84 and accompanying text.
117. This argument is consistent with Johnson’s argument, supra note 20, at 257-58, that regardless of its effects on police behavior, courts should not countenance officers’ explicit reliance on race as a basis for decisions to stop or arrest. Her point is
argument for the conclusion that the law is distinctively powerless against racist abuses. Only a critical analysis of that argument will allow us rationally to evaluate the assumption that so long as particular racial groups are not explicitly targeted by guidelines for the enhanced use of stops and frisks, racial impact is irrelevant to the legality of those guidelines. That assumption is both a legacy of Terry and a crucial underpinning of Wilson’s and Sherman’s recent, influential proposals for enhanced use of stops and frisks.\textsuperscript{118} Moreover, the assumption is related to a more fundamental view that permeates those proposals: namely, that concerns about racial justice are properly divorced from a commitment to fighting crime.

IV. A Critique of Terry’s Argument that the Law Is Powerless Against Racism

_Terry_ derives its conclusion that heightened standards can do nothing to curb racist abuses of the stop and frisk power from a further, equivocal position pertaining to the exclusionary rule. One of the most distinctive features of this nation’s legal system is the exclusionary rule, which holds that evidence obtained through violations of the Fourth Amendment is inadmissible in a criminal prosecution. In other words, such evidence cannot be used to obtain a conviction. In 1914 in _Weeks v. United States_,\textsuperscript{119} the Supreme Court held that the exclusionary rule was binding on federal courts. In 1949 in _Wolf v. Colorado_,\textsuperscript{120} however, the Supreme Court held that the exclusionary rule was not binding on state courts, where the overwhelming majority of criminal trials, and especially trials of street crimes, were then held.\textsuperscript{121} One of the key starting points

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\textsuperscript{118} See _supra_ part I.

\textsuperscript{119} 232 U.S. 383 (1914).

\textsuperscript{120} 338 U.S. 25 (1949).

\textsuperscript{121} _Id._
of the Warren Court’s revolutionary expansion of the rights of criminal defendants was *Mapp v. Ohio.*\(^1\) In *Mapp*, the Warren Court explicitly overruled *Wolf*, holding that the exclusionary rule was binding on state, as well as federal, courts.\(^2\)

As a consequence of the extension of the exclusionary rule, any delineation of the scope of government power under the Fourth Amendment is at the same time a delineation of the scope of the evidence that can be used to obtain convictions. Thus, as the majority recognized in *Terry*, the issue in that case was not merely the “abstract propriety” of a police officer’s decision to stop and frisk in the absence of probable cause.\(^3\) At stake was whether evidence obtained as a result of a stop and frisk could be used to convict an individual only if the stop and frisk was justified by probable cause, or also if a more lenient, reasonable suspicion standard was met.\(^4\) In accord with the basic reasoning of *Mapp v. Ohio*, the opinion for the *Terry* majority states that the cost of excluding reliable evidence is justified if the exclusion deters future Fourth Amendment violations. Moreover, the *Terry* opinion asserts that the application of the exclusionary rule does, in general, have this deterrent effect. In the words of the opinion, “[E]xperience has taught that [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere ‘form of words’.\(^5\)

Nevertheless, the *Terry* majority concluded that the rule is totally ineffective against the particular type of Fourth Amendment violation that was the target of the N.A.A.C.P.’s proposal to limit the extent of the stop and frisk power.\(^6\) Recall that the N.A.A.C.P. had argued that in order to deter racist abuses of the stop and frisk power, the probable cause standard should be uniformly applied to all searches and seizures, including stops and frisks.\(^7\) The *Terry* majority’s reply was that, despite its general power to deter Fourth Amendment violations, the exclusionary rule could do nothing to prevent officers from stopping and frisking individuals because of their race, rather than because of evidence of criminal activity. The opinion sweepingly proclaims that “[t]he whole harassment by

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\(^1\) 367 U.S. 643 (1961).
\(^2\) Id. at 659-60.
\(^3\) 392 U.S. at 12.
\(^4\) Id. at 13-14.
\(^5\) See supra part II.B.
certain elements of the police community of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."

This empirical contention about the exclusionary rule's ineffectiveness against police racism is the sole basis for the court's conclusion that racist abuses cannot be curbed by legal restrictions on the scope of the stop and frisk power. An evaluation of the contention is therefore crucial to assessing the validity of a crucial assumption that Terry bequeathed to Fourth Amendment law: namely, that facts about racial impact have no bearing on the extent of the stop and frisk power.

Many scholars have failed to recognize that Terry argued explicitly for the irrelevance of facts about racial impact. Others have confused Terry's argument with an argument for the general ineffectiveness of the exclusionary rule. By contrast, noted Fourth Amendment scholar Wayne R. LaFave recognized that the Terry majority contended that the exclusionary rule is distinctly powerless against racist abuses of the stop and frisk power. LaFave correctly notes that this contention was the basis for the Terry majority's conclusion that, no matter how much we care about racial justice, facts about racial impact provide no argument for a stricter

129. Terry, 392 U.S. at 14-15 (footnote omitted).
130. See supra note 25 and accompanying text.
131. Mark Tushnet, The Warren Court in Historical and Political Perspective 23-24 (1993), confuses Terry's argument for the exclusionary rule's distinctive inability to deter racist abuses of the stop and frisk power with an argument that the rule is powerless to deter all abusive stops and frisks. In addition to failing to recognize that Terry explicitly considered whether facts about racial impact were relevant to delineating the legal standard for stops and frisks, Johnson, supra note 20, assumes that the underlying empirical issue is the exclusionary rule's general effectiveness, rather than its distinctive effectiveness against racial abuse. Thus, Johnson states, "[w]hether judicial pronouncements that race is irrelevant to suspicion will deter police officers from detaining persons on the basis of their race is more difficult. This is a tiny part of the larger argument about the exclusionary rule: Does the sanction of exclusion effectively inhibit police illegality or does it merely set free some factually guilty defendants?" Id. at 257.

An opposing misconception is implicit in Burkoff's reference, supra note 25, at 704, to "[t]he exclusionary rule, relied on in Terry to constrain the exercise of investigatory authority where there is no probable cause." This flies in the face of the fact that one of Terry's principal arguments for allowing investigatory authority to be exercised on less than probable cause was the exclusionary rule's presumed inability to constrain racist abuse.

standard for stops and frisks. Mistakenly, however, LaFave concludes that this contention is based on a recognition of "the hard realities." The opinion for the *Terry* majority purports to derive the contention from two premises. First, police officers sometimes initiate encounters with citizens for purposes that "are wholly unrelated to a desire to prosecute for crime." Second, the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." Each of these premises is plausible enough. By themselves, however, the two premises do not establish *Terry*'s empirical contention that the exclusionary rule is totally powerless against racist abuses. This contention follows only on the further, hidden premise that police officers' prosecutorial goals can virtually never override their racist motivations.

This hidden premise is true only if at least one of the following three conditions obtains: (i) virtually no racially motivated stop and frisk can ever uncover potentially incriminating evidence; or (ii) virtually no individual police officer can ever be both racially biased and committed to prosecutorial goals; or (iii) the exclusion of evidence obtained from racially motivated stops and frisks can virtually never motivate police to curb their racist impulses, no matter how important the evidence is.

Research on police behavior, as well as common sense, shows that none of these conditions obtains in real life. The fact that racial prejudice motivated a stop and frisk does not preclude that stop and frisk from leading to evidence of criminal activity. Nor need even extreme racial prejudice prevent an officer from also being motivated to obtain convictions and/or to avoid having evidence thrown out of court, if only for the purpose of avoiding disapproval or its consequences from prosecutors, judges or police administrators. Nor is it impossible for even the most conscien-

133. *Id.*
134. *Id.* at 154. For a vaguer grasp of Chief Justice Warren's argument, see Williams, *supra* note 27, at 575 & 575 n.35. For criticism of Williams's assessment of the argument, see *infra* note 180.
136. *Id.* at 14.
137. More generally, Black and Reiss recognize that even if police lack adequate legal justification for engaging in a search, the search may nonetheless result in the discovery of incriminating evidence. BLACK & REISS, *supra* note 35, at 86.
138. There is widespread scholarly agreement that interests in career advancement can—and do—significantly curb officers' tendencies to act on racial prejudice in deal-
tious officer to be motivated, perhaps unconsciously, to use racial stereotypes as a basis for deciding whom to stop and frisk.139

Terry's conclusion that the exclusionary rule is totally inefficacious against racism thus follows only if we accept an unrealistic and overly simple model of police motivation. Studies of the effects of police department policies on the exercise of deadly force additionally argue against Terry's conclusion. Ironically, one of these studies is by Sherman, in collaboration with Ellen G. Cohn.140 The other is by Samuel Walker, one of this country's foremost historians of criminal justice.141 Both studies note that throughout the 1960s and early 1970s, most police departments in this country left the exercise of deadly force virtually unregu-

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139. For the claim that officers tend to equate being a black male with being dangerous, see, e.g., Walker, infra note 148 and accompanying text; Bogomolny, infra notes 204, 205 and accompanying text; Piliavin & Briar, infra notes 211, 212, and accompanying text; Skolnick, supra note 28, at 217-18 (citations omitted) ("One of the unanticipated consequences of the policeman's standard of 'reasonableness' is that it adversely affects many honest citizens living in high-crime areas. To a degree, all persons residing in such areas are 'symbolic assailants'. A 'symbolic assailant' . . . need not in fact be a criminal, but needs merely to conform to the stereotype. By this standard, Negroes who live in black ghettoes are especially prone to being searched according to a 'reasonableness of the search' standard."); N.A.A.C.P. Brief, reprinted in Landmark Briefs, supra note 20, at 620-21; Maclin, supra note 27, at 259-60.


Basically, it was up to the individual officer to decide when to shoot to kill. The absence of regulation was paralleled by a lack of training or discipline. Police departments tended to provide extensive training in marksmanship but absolutely no instruction on when shooting was or was not justified. Even when police shootings resulted in civilian deaths, the usual police department response was a pro forma criminal investigation ending in a finding of justifiable homicide. Both Sherman and Cohn and Walker stress that under this unrestrictive regime, police shot and killed many more blacks than whites. In particular, Sherman and Cohn cite Mendez's unpublished 1983 finding that in 1971, police in fifty-seven of the cities with populations of over 250,000 shot and killed seven times as many blacks as whites. According to Walker, the racial disparity throughout the country was as high as eight to one, "lend[ing] support to the allegation that the police had two trigger fingers, one for whites and another for blacks." Walker emphasizes, moreover, that the racial disparity was very much higher among persons shot and killed who were neither armed nor in the process of assaulting a police officer.

Both studies contrast the unrestrictive regime of the 1960s and early 1970s with the severe limits that police departments began to set on officers' discretion during the 1970s and early 1980s. Departments themselves promulgated strict, racially neutral standards, basically decreeing that deadly force could be exercised only in defense of the life of the officer or another person. Both Walker and Sherman and Cohn stress that these strict standards were enforced through departmental disciplinary review of all shootings. Moreover, Sherman and Cohn emphasize that tightened departmental standards and disciplinary procedures were accompanied by departments' institution of elaborate training in the appropriate use of deadly force.

The institution of such restrictive policies in the large police departments in this country was accompanied by enormous reductions in both the numbers of civilians killed by police and the racial

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142. Id. at 148; Sherman & Cohn, supra note 147.
143. Sherman & Cohn, supra note 140, at 13; Walker, supra note 141, at 26.
144. Sherman & Cohn, supra note 140, at 7.
146. Id. at 32.
147. Walker, supra note 141, at 27-30; Sherman & Cohn, supra note 140, at 13.
148. Sherman & Cohn, supra note 140, at 13.
disparity among victims of deadly force.\textsuperscript{149} Sherman and Cohn state that their own survey showed that in fifty of the fifty-nine cities with populations of over 250,000, the numbers of civilians shot and killed by police declined 51% from 1971 to 1984, from a high of 353 in 1971 to a low of 172 in 1984.\textsuperscript{150} Using Sherman and Cohn's data, Walker more modestly estimates that the decline in the number of people shot and killed by police in these fifty large cities was about “30 per cent between 1970 and 1984, from an average of about 300 a year to about 200.”\textsuperscript{151} Both Walker and Sherman and Cohn argue that this reduction was driven by an over fifty per cent reduction in the ratio of blacks to whites shot and killed by police.\textsuperscript{152} Walker simply states that the disparity was “cut... from roughly six blacks for every white to three to one.”\textsuperscript{153} More precisely, Sherman and Cohn cite Mendez’s finding that in fifty-seven of the cities with populations of over 250,000, the ratio of blacks to whites shot and killed by police fell from 7:1 in 1971 to 2.5:1 in 1978 and 2.8:1 in 1979. The reason for this decline in racial disparity was that throughout the 1970s, the rate of whites shot and killed by police per 100,000 whites in those cities was virtually constant. By contrast, the rate of black citizens killed per 100,000 blacks in those cities dropped fifty percent, from 2.8 in 1971 to 1.0 in 1978 and 1.4 in 1979.\textsuperscript{154}

Sherman and Cohn and Walker agree that the changed police department policies were the major, if not sole, cause of both the overall reduction in police exercise of deadly force and the reduction in the racial disparity among victims.\textsuperscript{155} In addition, Walker advances a specific explanation of the fact that blacks disproportionately benefited from departments’ promulgation and enforcement of strict, racially neutral standards. According to Walker:

[[It is possible to argue that an unrestrictive shooting policy allows officers to act out their racial stereotypes: that the black man lurking in the shadows is inherently dangerous, whereas the

\textsuperscript{149} By contrast, Walker, \textit{supra} note 141, at 31, notes that “there was an ambiguous pattern [in numbers of civilians killed by police] for the country as a whole. The difference is probably due to the fact that restrictive shooting policies were more prevalent among the largest cities.”

\textsuperscript{150} \textsc{Sherman} \& \textsc{Cohn}, \textit{supra} note 140, at 2.

\textsuperscript{151} \textsc{Walker}, \textit{supra} note 141, at 31.

\textsuperscript{152} \textsc{Sherman} \& \textsc{Cohn}, \textit{supra} note 140, at 7; \textsc{Walker}, \textit{supra} note 141, at 26, 31.

\textsuperscript{153} \textsc{Walker}, \textit{supra} note 141, at 26, 31.

\textsuperscript{154} \textsc{Sherman} \& \textsc{Cohn}, \textit{supra} note 140, at 7. \textit{See also} \textsc{W.A. Geller} \& \textsc{M. Scott}, \textsc{Deadly Force: What We Know} 148 (1992).

\textsuperscript{155} \textsc{Sherman} \& \textsc{Cohn}, \textit{supra} note 140, at 9, 13-14; \textsc{Walker}, \textit{supra} note 141, at 25-26, 32-33.
white suspect is not. Restrictive shooting policies, although nominally addressed to race-neutral situations, curb the effect of racial stereotypes, with rather dramatic results.156

Ironically (and in contrast to the majority's rhetoric in Terry),157 both Sherman and Cohn and Walker note that as police exercise of deadly force declined and became less racially imbalanced, there was a substantial decline in the number of officers killed in the line of duty.158 In particular, Sherman and Cohn state that the total number of police killed in the line of duty (excluding automobile accidents) in the fifty large cities they studied averaged 29 officers per year from 1970 to 1975, but declined 48% to an average of 14 per year from 1976 to 1980. From 1981 to 1984, there was a slight increase to an average of 17 per year.159 Walker similarly notes that throughout the United States, the number of officers killed in the line of duty declined from 131 in 1972 to 65 in 1990.160

Studies of the institutional operation of the exclusionary rule demonstrate the relevance of the studies on deadly force to Terry's empirical contention about the exclusionary rule's ineffectiveness against racism. These studies show that it is a mistake to assume that the exclusionary rule deters only, or even primarily, by appealing to the individual police officer's commitment to prosecutorial goals. Rather, the exclusionary rule has worked by appealing to prosecutors' and police administrators' interests in career advancement and obtaining convictions. In turn, prosecutors and police administrators have given individual officers institutional incentives for conforming to the requirements of the Fourth Amendment.161

156. WALKER, supra note 141, at 32.
157. See supra notes 60-64 and accompanying text.
158. SHERMAN & COHN, supra note 140, at 2; WALKER, supra note 141, at 32.
159. SHERMAN & COHN, supra note 140, at 2.
160. WALKER, supra note 141, at 32.
161. In his dissent in United States v. Leon, 468 U.S. 897, 928 (1984), Justice Brennan recognized that the deterrent effect of the exclusionary rule depends on the creation of institutional, rather than purely individual, incentives to conform to the Fourth Amendment. Brennan wrote:

To be sure, the rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But... the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of 'punishment' of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.

468 U.S. at 953 (citations omitted).
This process is strikingly illustrated by changes in the conduct of New York City police officers. Before the Supreme Court's 1961 decision in *Mapp v. Ohio*, New York State courts did not exclude evidence on the ground that it was obtained in violation of the Fourth Amendment. In turn, the New York City Police Department provided its officers with absolutely no training in Fourth Amendment requirements, and New York City police officers never applied for search warrants. District attorneys in New

Similarly, after his retirement from the United States Supreme Court, Justice Stewart wrote:

> [T]he exclusionary rule is not designed to serve a 'specific deterrence' function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a 'systematic deterrence': the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system—bringing criminals to justice—can be achieved only when evidence of guilt may be used against defendants.


Former New York City Police Commissioner Michael Murphy wrote that as a result of the *Mapp* decision, "in Fourth Amendment law] had to be held [by the New York City Police Department for all officers] from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function. Hundreds of thousands of man-hours had to be devoted to retraining 27,000 men." Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966). According to Yale Kamisar, Commissioner Murphy's statement implies that before *Mapp*, the New York City Police Department "spent no time at all" in training police in Fourth Amendment requirements. The more general lesson drawn by Kamisar is that police would not be trained in the Fourth Amendment at all in the absence of the exclusionary rule. Kamisar, *Remembering the Old World of Criminal Procedure: A Reply To Professor Grano*, 23 U. MICH. J. L. REV. 537, 559 (1990). In his dissent in *Leon*, 468 U.S. at 954 n.13 (1984), Justice Brennan similarly cites Commissioner Murphy's statement for the proposition that "the testimony of those actually involved in law enforcement suggests that, at the very least, the *Mapp* decision had the effect of increasing police awareness of Fourth Amendment requirements and of prompting prosecutors and police commanders to work towards educating rank-and-file officers." *Id.*

At a training session in 1965 on Fourth Amendment law, New York City Deputy Police Commissioner Reisman explained:

> Before [*Mapp* required New York courts to exclude illegally seized evidence] nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?

*Leon*, 468 U.S. at 954 n.13 (Brennan, J., dissenting) (citing Deputy Police Commissioner Reisman's statement in support of the proposition that the exclusionary rule deters primarily by creating institutional incentives for compliance with the Fourth
York State were similarly unfamiliar with and uninterested in Fourth Amendment requirements. Once the *Mapp* decision was issued, however, New York City police administrators responded to the prospective loss of convictions and associated pressure from prosecutors and judges by instituting training in the Fourth Amendment. In response to this training and to the correlated disciplinary incentives of not being subject to disapproval by police administrators, prosecutors or judges and not being blocked in career advancement, New York City police officers began applying for search warrants.

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Amendment). According to Kamisar, this statement shows that police administrators themselves recognized that until *Mapp* made illegally obtained evidence inadmissible in New York State courts, individual officers had no incentive to obtain warrants. Kamisar, *supra* note 163, at 556-57 & n.65.

For the related claim that before *Mapp*, New York City police officers did not feel bound by Fourth Amendment requirements, see Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980). Discussing the New York City department, Loewenthal states that:

Prior to *Mapp v. Ohio*, the police were not aware that constitutional standards for search and seizure had been applied to them in *Wolf v. Colorado*; no sanctions had been imposed in *Wolf*, and the police continued to search with impunity. When the *Mapp* decision imposed the exclusionary rule on the states, the police were confused because they had never been made aware of the constitutional standards for searching. However, once the police realized what had happened, they assumed that the exclusionary rule was an absolute necessity. Indeed, most police officers interpret the *Wolf* case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained. Thus, to police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation.

Id. at 29.

165. H. Richard Uviller, who was then in the New York District Attorney's office, recalls the time of the *Mapp* decision:

Constitution was in plentiful supply. Our New York police obviously would have to relearn a lot of basic procedure, both sides of the criminal bar would have to read a passel of federal cases in a hurry, and our judges would need to find phrases to sound knowledgeable and to make supportable discriminations in a wholly unfamiliar area. I cranked out a crude summary of federal search and seizure and suppression law just before the State District Attorney's Association convened for its annual festival of anecdotes. I had an instant runaway best seller. It was as though we had made a belated discovery that the fourth amendment applied in the State of New York . . . .


167. See Loewenthal, *supra* note 164, at 35 n. 30 stating:

[W]here the police officer indicates to the prosecutor that the search took place in a manner which is clearly illegal, the prosecutor may have the case dismissed—or negotiate for a guilty plea to a much lesser charge—before the pretrial hearing takes place. Thus, a police officer may avoid [the disci-
Orfield's 1987 study of Chicago narcotics officers similarly argues that the exclusionary rule operates as a deterrent to Fourth Amendment violations by motivating prosecutors and police administrators to create institutional incentives for individual officers to conform to the Fourth Amendment.\textsuperscript{168} Orfield found that starting in the 1960s and 1970s, the Illinois State's Attorney's office began to screen all warrant applications by Chicago police officers, to provide training sessions for officers in problematic areas of Fourth Amendment law, and to offer officers advice in ongoing investigations.\textsuperscript{169} The Chicago Police Department also provided training for recruits and "in-service" training in Fourth Amendment requirements.\textsuperscript{170} This training was complemented by a rating system under which the police department transferred or demoted officers or, more rarely, deprived them of promotions if courts suppressed evidence in a number of their cases.\textsuperscript{171} Whenever evidence was suppressed, the department required officers to file written reports explaining why the evidence was suppressed and to offer explanations to supervising officers in internal review sessions.\textsuperscript{172}

Orfield found that when backed by these institutional incentives, the exclusionary rule significantly deterred Chicago narcotics officers from Fourth Amendment violations.\textsuperscript{173} His study implies, more specifically, that the exclusionary rule was particularly effec-

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\textsuperscript{169} Id. at 1026-27.

\textsuperscript{170} Id. at 1028.

\textsuperscript{171} Id. at 1027-28, 1046-49.

\textsuperscript{172} Id. at 1027-29, 1046-47.

\textsuperscript{173} Orfield, supra note 168, at 1017-18, 1054-55.
tive in deterring warrantless searches, including stops and frisks. On the basis of extensive interviews with the narcotics officers, Orfield concluded that "the exclusionary rule has caused the officers (1) to be especially careful in the context of warrantless searches and (2) to use warrants when at all possible..."174 In response to Orfield's questionnaire, the officers stated that the exclusionary rule was particularly likely to prevent them from performing "searches based on instinct."175

The process by which the exclusionary rule has been found to deter Fourth Amendment violations is similar to the process by which strict police department standards have been found to deter police exercise of deadly force.176 In both cases, individual officers are deterred from violations because police departments provide extensive training in the relevant legal standards, backed by accountability mechanisms and sanctions for violations. In the case of the exclusionary rule, prosecutors tend to provide officers with additional training and to threaten them with additional sanctions.177 We saw above that both Walker and Sherman and Cohn found that blacks disproportionately benefited from departments' promulgation and enforcement of strict, racially neutral standards for police exercise of deadly force. This arguably occurred because the severe limits that departments set and enforced on discretion discouraged officers from acting on an unthinking and stereotypical equation of being black with being dangerous. Both Orfield's study and the many studies of the changes that Mapp effected in New York City Police Department practices argue that if courts consistently enforced heightened Fourth Amendment standards through the exclusion of evidence, prosecutors and police departments would respond by training officers in the heightened standards and sanctioning them for violations. Orfield's study argues, more particularly, that this process would be as, if not more, likely to occur and deter individual officers from violations if the heightened standards pertained to stops and frisks than if they pertained to searches for which warrants were required. By finding that officers believed that the exclusionary rule was especially likely to discourage them from "searches based on instinct,"178 Orfield's study additionally implies that strict, racially neutral limits on stops

174. Id. at 1040. See also id. at 1017-18, 1038, 1043.
175. Id. at 1053.
176. See SHERMAN & COHN, supra note 140; see also WALKER, supra note 141.
177. See Orfield supra notes 168-75.
178. Id.
and frisks, enforced by judicial exclusion of evidence and correlated prosecutorial and police department training and discipline, can discourage officers from stopping and frisking individuals on the basis of racial or other stereotypes.

In sum, studies of the institutional operation of the exclusionary rule and of the racial impact of deadly force policies join with the empirical research discussed above on the relations between officers' prosecutorial goals and racist motivations\(^179\) to argue, against the Terry majority opinion, that the exclusionary rule can deter racist abuse of the stop and frisk power.\(^180\) It follows that there is no basis for Terry's conclusion that heightened standards for the exercise of the stop and frisk power can at best amount to a "futile protest" against racism.\(^181\) In other words, the Warren Court's world-weary realism in arguing against the N.A.A.C.P. Legal Defense and Education Fund's position in Terry was, in fact, highly unrealistic.\(^182\)

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179. See supra notes 140-156 and surrounding text.
180. The foregoing analysis of how the exclusionary rule deters argues against Williams' criticism of Warren's conclusion that heightened legal standards are powerless to deter racist stops and frisks. On the one hand, Williams contends that Earl Warren was right to claim that the exclusionary rule is powerless to deter racist abuses. On the other hand, Williams criticizes Warren for failing to recognize that "the Court could have taken any number of positions to limit the exercise of discretion in those situations, such as requiring police departments to develop enforceable guidelines for the officers to follow in making stops on the street..." Williams, supra note 27, at 575 n.35. In making these distinctions, Williams misses the point that the exclusionary rule is capable of deterring racist stops and frisks precisely because it is capable of motivating departments to promulgate and enforce strict, racially neutral standards. For further discussion, see supra note 176 and accompanying text.

For implicit agreement with the view that the exclusionary rule can deter racist abuses, see Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1, 23 (1962) (citations omitted) ("One of the primary reasons the Court finally imposed the exclusionary rule on the states was the realization that 'other remedies have been worthless and futile.' But this, in turn, was largely true because those who felt the brunt of police lawlessness were the vagrants, the migratories, the 'youthful imitation gangsters,' the slum dwellers, poverty-ridden Negroes, Mexicans, and other minority groups.").


182. Claims about the impossibility of effecting proposed reforms often turn out to be similarly unrealistic and, hence, ideological. See, e.g., Harry Braverman, Labor & Monopoly Capital (1974) (discrediting the supposedly realistic contention that in an industrial society, work must necessarily be routinized); Adina Schwartz, Meaningful Work, 92 Ethics 634, 639-42 (1982) (discussing implications of
V. Contemporary Implications of the Critique

This critical assessment is relevant because our situation in 1995 is very similar to the situation depicted in *Terry* in 1968. There exists a seething resentment of police practices—including stops and frisks—in minority communities.\(^{183}\) Blacks are more likely to be stopped and frisked than whites.\(^{184}\) The studies of deadly force policies,\(^{185}\) together with direct evidence of both racial animus on the part of police officers\(^{186}\) and a tendency to equate being black with being dangerous,\(^{187}\) argue that the racial disparity cannot simply be attributed to greater black criminality and consequent good police work consisting of stopping and frisking those in fact most likely to be involved in crime.\(^{188}\)

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\(^{183}\) Braverman's work for the possibility of reforming the workplace to foster individual autonomy); Peter Applebome, *Keeping Tabs on Jim Crow: John Hope Franklin*, N.Y. Times, Apr. 23, 1995, § 6 (Magazine), at 34 (noted historian of African-Americans states in interview that, "Because we made mistakes at the first stab at... desegregation. . . . doesn't mean we shouldn't keep trying to do it. . . ."); *What to Do about Crime*, supra note 2, at 28 (James Q. Wilson opines that "[a]s for rehabilitating juvenile offenders, it has some merit, but there are rather few success stories," and thereby fallaciously implies that past failures show that future attempts at rehabilitation must necessarily fail).

\(^{184}\) See, e.g., Maclin, supra note 27, at 243-45, 256-58, 261; Mann, supra note 21, at 139-40, 149, 163-64; Williams, supra note 28, at 584-88; Skolnick & Fyfe, supra note 33, at 15; see also *Causes of Police Behavior*, supra note 145, at 77 ("Proactive encounters . . . appear to differ substantially from reactive encounters. Citizens are generally more antagonistic to the police in proactive encounters and police are correspondingly harsher in their manner, but only toward suspects.").

\(^{185}\) See supra notes 140-154 and accompanying text.

\(^{186}\) See, e.g., Skolnick, supra note 20, at 80-82 ("When one observes police in the routine performance of their duties, one hears all the usual derisive terms referring to Blacks and a few others besides . . . . A negative attitude toward Blacks was a norm among the police studied, as recognized by the chief himself. . . . [H]ostile feelings toward the Black are characteristic of white policemen in general."); Maclin, supra note 27, at 271; Mann, supra note 20, at 146-47.

As indicated at note 138 supra, studies have found that racially prejudiced attitudes on the part of police are only weakly related to racially prejudiced behavior. However, this fails to establish that racially prejudiced attitudes have absolutely no impact on police behavior. For an argument that racially prejudiced attitudes do have a behavioral impact, see Mann, supra note 20, at 142-43.

\(^{187}\) See Greene supra note 27, at 2053 n.264 ("Where there is racial stereotyping, people tend to enforce the law more harshly against those groups perceived to be more violent or criminal."). See also supra note 139.

\(^{188}\) Further, anecdotal evidence that racial bias contributes to the racial disparity is provided by many accounts of black men—including prominent citizens—being
We do not, however, have any precise idea of the extent to which the racially disparate incidence of stops and frisks reflects police bias against blacks or greater black criminality and corresponding police expertise in apprehending those most likely to be involved in crime. This gap in our knowledge would not impede the proper legal delimitation of the stop and frisk power if the Terry majority was right to conclude that heightened standards can do nothing to deter racist abuses. However, this Article has demonstrated that Terry's argument for that conclusion is fatally flawed. Thus, we cannot comfort ourselves by concluding, as the Warren Court did, that no matter how much we care about racial justice, our concern is irrelevant to delineating the proper legal standard for stops and frisks.

To the contrary, the foregoing critique of Terry's argument shows that there are strong grounds to believe that strict, racially neutrally guidelines can deter officers from intruding on citizens simply because they are black. Moreover, there is no conflict between the view that Fourth Amendment law should be changed to take account of racial impact and the view that internal police department rulemaking is a more sensitive and effective vehicle for regulating stops and frisks than the law itself. As studies on the exclusionary rule show, legal regulation has been a necessary and major impetus for internal rulemaking and correlated discipline and training by police departments. In particular, police enthusiasm about stopped by police even though they were innocent of all crime. See, e.g., M. Tonry, MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA 50-51 (1995); Williams, supra note 27, at 566-70; Greene, supra note 27, at 2022-23, 2039-40; Maclin, supra note 27, at 250-56; Kenneth B. Noble, A Showman in the Courtroom, for Whom Race Is a Defining Issue, N.Y. TIMES, Jan. 20, 1995, at A27 (discussing incident in which police with drawn guns stopped and searched Johnnie L. Cochran, Jr., a black man who was then the third highest official in the Los Angeles District Attorney's office and went on to become O.J. Simpson's lead defense lawyer).

189. See supra Part IV.

190. See Amsterdam, supra note 46, at 417-31, for the classic statement of the view that police rulemaking is a more effective instrument than the law for regulating warrantless searches, including stops and frisks.

191. According to Anthony Amsterdam, "The sanction [of the exclusionary rule] would also probably provide the only available incentive to the police to make the [internal police department] rules [regulating warrantless searches], make them clear and make them a part of recruit and in-service training." Supra note 46, at 429. See also id. at 431.

Samuel Walker similarly argues that changes in judicial interpretations of the Constitution and in internal police department rules have been intertwined:

"[The various Constitutional, state and federal law, and departmental rulemaking] sources of rules interact with one another in a complex manner, with changes in one area stimulating or forcing changes in other areas."
Sherman's Gun Experiments argues that a heightened legal standard—enforced through the exclusion of evidence—would be necessary to stimulate departments to make and enforce effective guidelines against racially motivated stops and frisks. Thus, this Article's critical consideration of Terry's argument implies that racial impact, as well as individual and government interests, should be taken into account in both the legal and administrative delimitation of the stop and frisk power.

This conclusion is not tantamount, however, to the advocacy of any particular change in the extent of the stop and frisk power. To the contrary, the paucity of empirical knowledge of the causes of the racially disparate incidence of stops and frisks makes it impossible to determine whether the disparate impact justifies any change in the scope of the stop and frisk power. Much less does the requisite empirical basis exist for deciding what types of heightened, racially neutral limits the law or police department guidelines should impose.

The following distinctions show why substantive proposals for changes in Fourth Amendment law or internal police department guidelines must wait on empirical researchers' developing some well-grounded estimate of the extent to which the racially disparate incidence of stops and frisks is caused by police bias against blacks or greater black criminality and corresponding police expertise in apprehending those most likely to be involved in crime. Restrictions on the stop and frisk power are called for to the extent that police racial bias is the cause of the racially disparate impact of stops and frisks. To the extent, however, that the racial disparity results from greater black criminality and correlated police expertise in apprehending those most likely to be involved in crime, the vice is not police practices, but rather the higher black crime rate. The proper response to this vice is not restrictions on officers' power to stop and frisk, but rather measures to decrease the racial disparity in crime. Decriminalization is appropriate if, as has been argued in regard to drug crimes, higher black crime rates reflect impact of the [Supreme] Court's rulings in Mapp and Miranda, for example, has been felt far beyond the precise holdings of those decisions. They stimulated a broad reform movement within policing that encompasses improvements in recruitment standards, training, and supervision—including measures designed to control discretion.

Supra note 141, at 19.

192. See supra note 14.

193. See supra notes 140-154 and accompanying text for studies showing that racially neutral limits are especially effective against police racist abuse.
the unwarranted attachment of criminal penalties to behavior in which blacks are disproportionately involved. Where, as in the case of gun crimes, criminalization is clearly appropriate, an incidence of stops and frisks that accurately mirrored higher black criminality would call primarily for addressing the social and economic causes of crime. Even if justified by higher black criminality, however, especially frequent stops and frisks of blacks could create perceptions of discrimination, thereby fuelling tension between minority communities and police. While changes in police practices might be called for by this situation, the changes would not be the same as those called for if the racially disparate incidence of stops and frisks was actually the product of police racial bias. Instead of aiming directly to limit police discretion, the changes would aim to correct community perceptions while not impeding officers from exercising their proven expertise in apprehending crime. Thus, the causes of the racially disparate incidence of stops and frisks must be understood if courts, police departments, legislators and policy makers are properly to respond to that disparity.

Surprisingly, the gap in our knowledge about the relative roles of police racial bias and black criminality in the racially disparate incidence of stops and frisks is not the result of scholarly controversy. Instead, it is the result of an absence of scholarly attention. An enormous scholarly literature considers whether and to what extent greater black involvement in crime or racial bias in the criminal justice system accounts for the facts that blacks are much more likely than whites to be arrested, indicted, convicted and imprisoned. By contrast, there have been no recent scholarly attempts

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194. Tonry, supra note 188, at 81-123; Powell & Hershonov, supra note 33, passim.

195. For arguments similar to those in the above paragraph, see Smith, supra note 184, at 1042-49 and passim, and Tonry, supra note 188, at 79-80. As indicated supra notes 12-14 and surrounding text, one of the problems with Sherman's evaluation of the Kansas City Gun Experiment is a failure to distinguish between community opposition to "justified" and "unjustified" stops and frisks.

196. "[A]t every criminal justice system stage from arrest through incarceration, blacks are present in numbers greatly out of proportion to their presence in the general population. In 1991, for example, blacks made up a bit under 13 percent of the general population but 44.8 percent of those arrested for violent felonies and nearly 50 percent of those in prison on an average day." Tonry, supra note 188, at 49; see also id. at 28-31, 56-62 and passim. For similar statistics, see, e.g., Norval Morris, Race and Crime: What Evidence Is There that Race Influences Results in the Criminal Justice System?, 72 Judicature 111, 112 (1988); Greene, supra note 27, at 2036; Joseph F. Sheley, Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination, 67 Tul. L. Rev. 2273, 2275-76 (1993). See also Ronald L. Akers, Criminological Theories: Introduction and Evaluation 26 (1994) ("Adoles-
to compare the roles of racial bias and black criminality in officers' decisions to stop, frisk, or otherwise subject blacks to actions which may or may not lead to arrests or formal charges.\(^{197}\)

Many scholars claim that greater black criminality is the principal explanation for black overrepresentation in the criminal justice system. See, e.g., Akers, \textit{supra}, at 26-29; \textit{William Wilbanks, The Myth of a Racist Criminal Justice System} (1987); Smith, \textit{supra} note 184, at 1045. However, some of the scholars who accept this claim argue that racism within the criminal justice system is nonetheless a significant factor in black overrepresentation. See, e.g., Tonry, \textit{supra} note 188, at 49 (“[F]or nearly a decade there has been a near consensus among scholars and policy analysts that most of the black punishment disproportions result not from racial bias or discrimination within the [criminal justice] system but from patterns of black offending and of blacks' criminal records. Drug law enforcement is the conspicuous exception. Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs.”); Morris, \textit{supra} at 112 (although studies by Blumstein and Petersilia show that “about eighty per cent of the black overrepresentation in prison can be explained by differential involvement in crime,” the remaining twenty percent is the result of “racially discriminatory processes” within the criminal justice system).

For disagreement with the view that black criminality is the principal cause of black overrepresentation in the criminal justice system, see, e.g., Greene, \textit{supra} note 27, at 2032-38; Mann, \textit{supra} note 20, \textit{passim}; \textit{Developments in the Law, supra} note 20, at 1507-09; Williams, \textit{supra} note 27, at 583, 585-86.

\(^{197}\) Akers, \textit{supra} note 196, at 27 n.4, states that:

This research [on the existence of racial bias within the criminal justice system] almost exclusively examines formal decision points — arrest, indictment, conviction and sentencing. It does not look closely at racial and neighborhood disparities in informal and unauthorized action taken on the street. It may be that racial and class biases are found in the patterns of police patrols, citizen harassment, stop and search, stop and interrogate, use of excessive force, and other actions taken by the police in the community that do not get recorded. It may also be that this ongoing pattern, and well-publicized cases such as the infamous beating of Rodney King by Los Angeles police, that [sic] continues to support the image of a criminal justice system that is racially and class biased.

Tonry, \textit{supra} note 188, at 51, similarly recognizes that the absence of racial bias at formal decision points in the criminal justice system does not settle the question of whether racially-based suspicions underlie police officers' decisions short of arrest. “[T]hat police and others too often for no reason other than skin color or style of dress are suspicious of blacks does not, according to the best available evidence, mean that blacks as defendants and convicted offenders are treated fundamentally differently than whites.”

For works examining the relative roles of black criminality and racial bias in formal criminal justice processes, but not in police-citizen encounters short of arrest, see, e.g., Tonry, \textit{supra} note 188; Wilbanks, \textit{supra} note 196.

Some scholars assume without argument that racial bias must be the principal, if not sole, cause of the racially disparate incidence of all actions by police and criminal justice system officials, including stops and frisks. This assumption is revealed in the claim, advanced without any consideration of the relative yield of incriminating evidence from stops of blacks and whites, that police racial bias, rather than greater black criminality and police expertise in apprehending those involved in crime, necessarily explains the especially frequent arrests of black motorists on New Jersey high-
The most recent scholarly consideration of this issue in the United States is Bogomolny’s 1976 study of a major city in which officers called police dispatchers whenever they stopped citizens and desired record checks. All calls were recorded, and Bogomolny and his colleagues analyzed the records for ten consecutive days in 1973, during which time recorded stops were made of 5,998 people, eighteen of whom were apprehended for prior offenses and sixty of whom received traffic citations. Bogomolny found that the proportion of black males among the remaining 5,920 “innocent” individuals who were subjected to no further police action was greater than the proportion of black males among those arrested in the jurisdiction during the preceding year. The proportion of black males in the “innocent” population of stopped individuals was also greater than their proportion in the population available for stopping, as measured by analyzing a control population of people randomly stopped at roadblocks set up in socioeconomically varied neighborhoods. In addition, Bogomolny found that there was “[n]o appreciable disparity” in arrest and conviction rates between the “innocent” population of the stopped individuals and the control, roadblock population. Thus, the greater proportion of blacks among the “innocent” population of stopped individuals could not be attributed to a police tendency to stop those involved in crime in the past.

Bogomolny concluded, on this basis, that the rates with which blacks were stopped could not be explained by police expertise in targeting those most likely to be involved in crime. Instead, police racial bias—whether consisting of animus against blacks or a cognitive overestimation of black dangerousness—was a major cause of blacks being stopped more frequently than would be expected.
pected, given their availability for stopping. In Bogomolny's words:

When stopping persons on the street, it appears that officers use as a measure of criminality past contact with the police without any clear sense of who is most likely to be criminally involved. If this is true, it raises serious questions concerning the quality of the 'police expertise' utilized in making the judgment to stop a person on the street. Further, because of the disproportionately high number of young black male persons stopped, serious questions appear concerning the perceptions of the officer in stopping a particular person. It is not clear that the officer is prejudiced or acting from inappropriate motivation. He may have an honest perception that the persons stopped represent a criminal class of people. Yet the relatively poor yield, given the number of persons stopped and the comparison with the control group, raises doubt concerning the utility of this type of behavior.205

Bogomolny's findings appear inconsistent with Black and Reiss's 1967 findings, discussed above, on the relative rates with which weapons were recovered from frisks of blacks and whites.206 His findings are consistent, however, with 1964 findings by Piliavin and Briar207 which, by contrast with the Black and Reiss findings, were relied on in the Police Task Force Report to the President's Commission.208 On the basis of nine months' observation of encounters between police officers from a single department and seventy-six juveniles, Piliavin and Briar reported that seven, or seventy percent, of the ten juveniles exonerated and released without suspicion were black.209 By contrast, less than one-third of the sixty-six remaining allegedly "guilty" juveniles were black.210 Piliavin and Briar concluded that black "youths were accosted more often than others by officers on patrol simply because their skin color identi-

205. Id. at 573. Notwithstanding their negative assessment of police decisions to stop, Bogomolny and his colleagues may have systematically underestimated the amount of police racial bias by considering only stops in which record checks were requested from dispatchers. It seems unlikely that officers effecting stops for the purpose of racial harassment would ask for record checks, especially if they knew that such requests would be recorded.

206. See supra note 71 and accompanying text.


208. POLICE TASK FORCE REPORT, supra note 35, at 184. The Piliavin and Briar study is cited by Sherman in Causes of Police Behavior, supra note 138, at 79.

209. Piliavin & Briar, supra note 207, at 212 n.22.

210. Id. at 212 n.22.
fied them as potential trouble makers." They further observed that police bias was illustrated by the following incident. "One officer, observing a youth walking along the street, commented that the youth "looks suspicious" and promptly stopped and questioned him. Asked later to explain what aroused his suspicion, the officer explained, "He was a Negro wearing dark glasses at midnight." Other studies that purport to bear on the issue are of little aid in assessing the extent to which the racially disparate impact of stops and frisks is explained by police racial bias or police expertise in apprehending those most likely to be involved in crime. A 1994 study by Browning, Cullen, Cao, Kopache and Stevenson is explicitly motivated by the recognition that "[t]o date, research . . . has examined primarily the overt discriminatory practices of the police: arrest, police brutality, and the use of deadly force. In contrast, there is less attention paid to those police efforts of surveillance or social control in which no offense was committed, no arrest made, and no violent exchange manifested." The study, however, reports differences in the frequencies with which whites and blacks perceive themselves and their personal acquaintances as being "hassled" by police, or, in other words, "stopped or watched closely . . . even when [they] had done nothing wrong." By contrast, to assess the relative roles of racial bias and black criminality in decisions to stop or frisk, it is necessary to compare the frequencies with which actual stops of blacks and whites yield or do not yield incriminating evidence.

This assessment cannot be made if only stops that yield incriminating evidence are considered. Thus, Wilson and Boland's 1978 finding of no significant correlation between the proportion of non-whites in a city's population and high rates of moving traffic viola-

211. Id. at 213.
212. Id. at 212 n.22.
214. Id. at 4. The study found that "there is a significant association between being African-American and experiences of being hassled by the police. As opposed to only 9.6 percent of the whites, 46.6 percent of the blacks sampled reported being 'personally hassled by the police' . . . . [R]ace explains approximately 18 percent of the variation between whites and African-Americans in their experiences of being hassled by the police . . . . Again, being an African-American significantly increased the likelihood of hearing about an incidence of being hassled by the police . . . . As opposed to 12.5 percent of whites, 66.0 percent of blacks reported knowing someone who was watched by the police when he or she had done nothing wrong. Race explains 31 percent of the variation in the vicariously hassled experiences by the police." Id. at 5-6.
tions says nothing as to the existence of racial differences in the proportion of traffic stops that do not lead to ticketing. Similarly, Boydstun's noted 1975 study of the San Diego Field Interrogation Experiment analyzes only those field interrogations that culminated either in an arrest or in a failure to remove the officer's suspicions. Because field interrogations that resulted in the removal of all suspicion were not considered, Boydstun's findings of an absence of racial discrimination leave open the possibility that field interrogations of blacks were especially likely to result in the removal of all suspicion.

In sum, by contrast to Black and Reiss's 1967 study, Bogomolny's 1976 study and Piliavin and Briar's 1964 study both argued that racial bias was a major cause of the racially disparate incidence of stops and frisks. However, no subsequent United States studies compare both the frequencies with which blacks and whites are stopped and frisked and the frequencies with which those stops and frisks yield incriminating evidence. In the ab-

216. Boydstun, San Diego Field Interrogation Final Report 3, 27, Figure 4-47 (1975). Boydstun acknowledged the significance of those unreported field interrogations that resulted in the total removal of suspicion. "Some time is also spent on contacts initiated by officer suspicion during which the officer's suspicions are allayed and no record is made. The exact proportion of these is not known, though the observers developed the impression that such contacts occur as frequently as those that lead to a report." Id. at 63.
217. Id. at 41, 48, 51.
218. In a 1980 study, Mark H. Moore argued explicitly, as I do here, that racial bias may fail to be detected if one considers only arrests resulting from proactive patrols against guns and does not also consider stops that fail to lead to arrests. According to Moore:

[While there is a tendency for proactive arrests to involve a more minority and youthful population, a shift in arrest practices toward proactive methods need not be accompanied by dramatic changes in the characteristics of those arrested. Obviously, recorded arrests for weapons offenses need not reflect the incidence of stops and searches, and we may be as concerned with the stops as with the arrests.

Mark H. Moore, The Police and Weapons Offenses, 452 Annals 22, 32 (1980). This concern notwithstanding, Moore's data included only stops that resulted in recorded arrests.
219. Neither subject searches in the NCJRS (National Criminal Justice Reference Service) database nor a search for citations of Bogomolny's work in the Social Science Citation Index uncovered any such studies in the United States. These results are consistent with Akers's claim, discussed supra note 196, that there has been extensive attention to the role of racial bias in formal criminal justice system decisions, but almost no consideration of whether and to what extent racial bias infects informal police-citizen encounters. The failure to uncover recent work is also consistent with the fact that, in a review of the literature in 1992, Lawrence Sherman concluded that
sence of these studies, there are nonetheless, as argued above, strong grounds to believe that racial bias continues to contribute to the racially disparate incidence of stops and frisks.\textsuperscript{220} We cannot, however, intelligently assess how important a factor racial bias is today.

This gap in our knowledge is rendered especially urgent by James Q. Wilson’s recent advocacy of increased use of stops and frisks and by the expected emulation of Lawrence Sherman’s Kansas City and Indianapolis Gun Experiments throughout this country.\textsuperscript{221} As recently as 1992, Sherman explicitly claimed that proactive police strategies, including stops and frisks, are especially subject to racist abuse.\textsuperscript{222} He also argued that racist abuse could be curbed through racially neutral limits on the exercise of police powers.\textsuperscript{223} Consistently with these claims, Sherman could have

\textsuperscript{220}See supra notes 183-188 and accompanying text.

\textsuperscript{221}See supra Part I.

\textsuperscript{222}See supra note 181, at 173, 189.

\textsuperscript{223}Sherman stated that the fact, revealed in Kolender v. Lawson, 461 U.S. 352 (1983), “that the San Diego Police had collectively and discriminatorily harassed a black man with a ‘dreadlock’ hair style who liked to walk around town suggests the potential difficulty with any proactive policy aimed at ‘suspicious’ persons as targets. But this is . . . a problem that might be solved with more specific guidelines, especially
been expected to investigate the relative roles of racial bias and greater black criminality in officers' decisions to stop and frisk during his gun experiments. He could also have been expected to consider how guidelines might be designed to curb any bias observed. Sherman did not pursue these inquiries, however.

Sherman appears to believe that his failure to pursue this research is justified by the fact that black communities have so far welcomed, rather than opposed, his gun experiments. If, however, the gun experiments provide an avenue for racially discriminatory police action, this counts as a cost, even in the absence of community disapproval. Moreover, as Boydstun cautioned in his noted study of the San Diego Field Interrogation Experiment, the fact that community antagonism is not incited by a given level of stops and frisks does not preclude its being incited by escalated use.

Moreover, Sherman appears to believe that it would be difficult, if not impossible, to measure the extent to which police racial bias or greater black criminality is the cause of the racially disparate incidence of stops and frisks. This measuring difficulty was significantly circumvented, however, by Sherman's own selection of targets for intensive stops in Indianapolis this past year. On the basis of the racially neutral criterion of amount of gun crime per square mile, three areas—one with a predominantly white population and two with predominantly black populations—were

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224. See Butterfield, supra note 4. Sherman's collaborator, J. Wilford Shaw, makes a related attempt to justify lack of concern with racial impact. For discussion and criticism of Shaw's attempted justification, see supra note 13.

225. Boydstun cautioned that "Although there was little evidence that FI [field interrogation] activities influenced police-community relations in San Diego, there were some indications that the community might consider any increase in the currently low level of FI activity as an inappropriate use of patrol time. Pending further investigation, the current levels of activity should not be increased." Boydstun, supra note 216, at 6, 64. Downplaying this caution, Sherman stated, in his 1992 review of the literature, that "[w]ith proper training and supervision in a community relations-conscious police culture, field interrogations need not provoke community hostility, as the San Diego Field Interrogation Experiment suggests." Attacking Crime, supra note 181, at 188 (citation omitted).

226. See Sherman Comments, supra note 5.
targeted for intensive stops in Indianapolis.\textsuperscript{227} Granted that the racially neutral criterion of amount of gun crime per square mile was used to select the areas and that, as Sherman assumed, the race of people stopped in each area would largely depend on the racial composition of each area's population,\textsuperscript{228} it was still possible that race would influence officers' decisions to stop or not stop particular people in each Indianapolis target area. More precisely, Bogomolny's and other studies suggest that independently of behavioral indications of criminality, the race of those driving through each area and thus available for stopping would affect officers' general readiness to stop and/or frisk during the Indianapolis experiment, the types of circumstances that officers perceived as indicative of a need to stop and/or frisk, and/or the relative intrusiveness of the stops and/or frisks effected (e.g., numbers of officers involved, whether officers drew or pointed guns, whether suspects were ordered to leave their cars, whether they were frisked and whether the frisk extended to intimate body parts).\textsuperscript{229} The case law and empirical studies similarly suggest that independently of behavioral indications of criminality, decisions to stop and/or frisk and/or the relative intrusiveness of stops and frisks would be affected by whether people driving through each of the Indianapolis target areas were racially out of place (i.e., whether whites were in the predominantly black target areas or blacks were in the predominantly white target area).\textsuperscript{230}

These hypotheses could have been tested if records had been made of all stops effected during the Indianapolis experiment and if the records had included the race (as perceived by the involved officer(s)) of the person(s) stopped and the target area in which the stop was made. The records would also have needed to indicate the yield of each stop, or, in other words, whether the stop resulted in the recovery of guns, other incriminating evidence (possibly broken down into knives, drugs and a residual category) or no incriminating evidence. If these records had been kept, the yields from stops of blacks in the black target areas could have been compared with those from stops of whites in the white target area. Comparisons could also have been made between the yields from stops, in both the black and white target areas, of racially out of place and racially in place people. If, among officers involved in the Indian-

\textsuperscript{227} See supra note 16.
\textsuperscript{228} See Sherman Comments, supra note 5.
\textsuperscript{229} See supra note 19.
\textsuperscript{230} See references and discussion supra note 20.
apartheid experiment, there was either significant animus against blacks or a significant tendency to overestimate the dangerousness of black males, the yield of guns and, possibly, other incriminating evidence could have been expected to be lower per stop of a black in a black target area than per stop of a white in the white target area. If there was similar animus or unjustified suspicion of either blacks or whites who were racially out of place, the yield of guns and, possibly, other incriminating evidence could have been expected to be lower per stop of a person racially out of place than racially in place in either a black or white target area.

If all stops during the Indianapolis experiment had been coded by race, target area and yield, police, prosecutorial and judicial records could also have been used to develop an understanding of police racial attitudes and beliefs.231 In particular, information about the levels of police fear of and hostility towards blacks, whites and racially out of place individuals could have been gained from descriptions of the intrusiveness of stops in police, prosecutorial and court records. Given the coding, further relevant information about police motivation might have been gained from statements in the records about both the grounds for officers’ decisions to stop and/or frisk and the grounds for any decisions not to arrest and/or charge individuals whose frisks yielded incriminating evidence.232 The coding would also have facilitated racial comparisons of the numbers and results of any suppression motions or civil rights actions brought as a result of the Indianapolis experiment.

Data was not collected, however, on the race of those stopped during the Indianapolis experiment and therefore racial comparisons of yield were not and cannot be made. Thus, an opportunity was lost to develop the requisite empirical basis for determining the role that racial bias now plays in decisions to stop and frisk. As

231. These official records would undoubtedly include formulaic and self-serving statements. However, as the phenomenon of the “smoking gun” shows, revealing statements would also be likely to be made.

232. Some of this information was included in the police records for the Kansas City Experiment. Sherman’s colleague, J. Wilford Shaw, recounts that:

[For] every carrying a concealed weapon arrest effected by patrol officers, the officer must obtain the signature of a supervisory detective, attesting to probable cause for making the arrest and search . . . . It was estimated . . . that approximately one-third of the defendants were charged with less than the maximum state firearms charge because the detectives were not certain about the probable cause. The exact number of times this occurred is, however, not available. The reason for a particular charge, e.g., weak probable cause, is not included in the report.

Detecting Guns, supra note 4, at 25.
argued above, even absent this knowledge, there remain strong
grounds to believe that police racial bias, and not greater black
criminality alone, contributes to the racially disparate incidence of
stops and frisks. The lack of any well-grounded estimate of the
relative roles of police racial bias and greater black criminality
makes it impossible to determine, however, what, if any, legal or
administrative limits on the stop and frisk power are needed to
curb racial bias. More broadly, the gap in our empirical knowledge
makes it impossible to determine how the law and social policy in
general, as well as Fourth Amendment law and police department
guidelines in particular, should respond to the racially disparate in-
cidence of stops and frisks.

This lack of knowledge is not only regrettable from the stand-
points of racial justice and civil liberties. Even if we are willing to
claim that the fight against crime supersedes all concern with racial
justice and individual privacy, facts about racial impact remain rel-
levant. A central insight of the Kerner Commission and President's
Commission on Law Enforcement and Administration of Justice
was that police practices do not only succeed or fail at combating
existing crime. As the 1960s riots showed and the Rodney King
riot reemphasized, police abuses may themselves create racial ten-
sions that erupt in riots and crime. Police practices may, addi-

233. See supra notes 183-188 and accompanying text.
234. See supra note 189-203 and accompanying text.
235. See supra note 38 and accompanying text for the views of the Kerner and
President's Commissions. Recently, in the aftermath of the Rodney King riots, scholars
have delineated similar relationships among police abuses and riots and crime. Thus,
Smith claims that the Rodney King riots illustrate the fact that “racial prejudice
and discriminatory actions at several points in the criminal justice process are the
immediate cause of an escalating criminal response among black people; also, hostility
to the police and courts among black people at each stage is an immediate cause of an
increasingly prejudiced and unfair response by the criminal justice system. It is rea-
sonable to say that unequal treatment of black people by the criminal justice system
was a cause of the Los Angeles riots, hence a cause of the high crime rate among
black people; and that the high black crime rate was a cause of unequal treatment of
black people (but no excuse).” Smith, supra note 184, at 1048-49; see also id. at 1110.

More generally, Skolnick and Fyfe reflect that “even when iron-handed law en-
forcement proves effective in general, it also invites retaliation by those who are not
intimidated by it. Abusive police must then raise the force ante, employing ever more
severe violence to continue to seem formidable . . . . Those who are being policed do
not distinguish among blue uniforms. All cops come to be defined as brutal, and thus
appropriate targets for retaliation.” SKOLNICK & FYFE, supra note 28, at 96.

As previously noted, both the Police Task Force Report and the Kerner Commiss-
ion called for research on the impact of aggressive patrol techniques, including stops
and frisks, on police relations with minority communities. See supra note 38.

A question, which I intend to pursue in a later work, is whether, by deferring to
police expertise and holding that heightened legal standards are powerless to combat
tionally, discourage members of minority communities from aiding in the solution of crimes and contribute to alienation that erupts in crime.\textsuperscript{236} This is relevant to the legal delimitation of the stop and frisk power because, \textit{Terry} to the contrary, there is no reason to believe that police racism is uniquely unresponsive to legal regulation. The arguments for the potential efficacy of legal regulation

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\textsuperscript{236} Thus, the President's Commission spoke of the difficulty in “[c]arrying out with proper efficiency and discretion the complicated law enforcement and community-service tasks the police are expected to perform. . . . In city slums and ghettos . . . [t]here is much distrust of the police, especially among boys and young men, among the people the police most often deal with. It is common in those neighborhoods for citizens to fail to report crimes or refuse to cooperate in investigations. Often policemen are sneered at or insulted on the street. Sometimes they are violently assaulted. Indeed, everyday police encounters in such neighborhoods can set off riots. . . .” \textsc{President's Commission Report}, \textit{supra} note 34, at 99.

The Commission further argued that “[p]olice agencies cannot preserve the public peace and control crime unless the public participates more fully than it now does in law enforcement. Bad community feeling does more than create tensions and engender actions against the police that in turn may embitter policemen and trigger irrational responses from them. It stimulates crime.” \textit{Id.} at 100.

The Kerner Commission similarly warned: “It is axiomatic that effective law enforcement requires the support of the community. Such support will not be present when a substantial segment of the community feels threatened by the police and regards the police as an occupying force.” \textsc{Kerner Commission Report}, \textit{supra} note 20, at 301.

Sherman himself has recently argued that unfair police practices may produce the “defiant” response of increased crime. \textit{Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction}, 30 \textsc{J. Rsch in Crime \\& Delinqu.} 444, 463-466 (1993). Although he cites this work in his evaluation of the Kansas City Gun Experiment, \textit{supra} note 4, at 9, he fails to recognize that it shows the need to consider whether an unintended side effect of his Gun Experiments may be the creation of an additional avenue for the expression of police racial bias.

The argument that police practices are to be judged not only by their success or failure at combatting existing crime but also by whether they encourage or discourage future crime is an instance of a more general argument that I have advanced elsewhere. Namely, social institutions and practices necessarily affect the formation of future interests and abilities at the same time as they prevent or fail to prevent particular actions at a particular time. Hence, social institutions and practices are to be evaluated not only from the standpoint of people's existing interests, but also by considering the types of interests and abilities that they influence people to form. \textit{See}, \textit{e.g.}, Schwartz, \textit{Towards a Jurisprudence of Labour Law: Methodological Preliminaries}, 19 \textsc{Val. L. Rev.} 71 (1984), and \textit{Against Universality}, LXXVIII \textit{J. Phil.} 127, 139-43 (1981). Once one recognizes this, one sees the wrongheadedness of Wilson's assumption that we can choose between combating crime by “rely[ing] on the criminal-justice system,” on the one hand, or, on the other hand, by “attack[ing] the root causes of crime.” \textit{See What to Do about Crime}, \textit{supra} note 2, at 32. In advancing this dichotomy, Wilson fails to recognize that the measures the criminal justice system employs to investigate particular people and sanction them for engaging in particular crimes will themselves affect the dispositions that they and their fellow citizens form in regard to future crimes.
additionally imply that legal regulation may be necessary to stimulate police departments to deter racism themselves by instituting their own strict, racially neutral guidelines. It follows that neither Wilson's nor Sherman's lack of concern with racial impact can rightly be considered part of a realistic approach to crime. Since there are strong reasons to believe that racist abuses can be curbed by racially neutral limits on the stop and frisk power, we need to know how significant a role racial bias plays in decisions to stop and frisk. Only then can courts, police departments, legislatures and policy makers properly respond to the racially disparate incidence of stops and frisks.

VI. Conclusion

Recently, two of America's foremost policy makers and criminologists—James Q. Wilson and Lawrence Sherman—have advocated increased use of stops and frisks as a means for fighting gun crime. While both Wilson and Sherman recognize that their proposals are likely to result in blacks being stopped and frisked more frequently than whites, both assume that this racially disparate impact is legally and normatively irrelevant. This Article criticizes this assumption by showing that it is grounded in a fallacious argument in the 1968 Supreme Court case of *Terry v. Ohio*.

This Article contends that evidence exists to conclude that the greater incidence of stops and frisks of blacks is attributable to racial animus and/or an unwarranted cognitive equation of being black with being dangerous. The extent to which this is the case, however, is unclear. If courts, police departments, legislatures and policy makers are properly to respond to the racially disparate incidence of stops and frisks, criminological researchers must remedy this gap in our knowledge. Well-grounded comparisons are needed of the extent to which the racially disparate incidence of stops and frisks is caused by police bias against blacks or greater black criminality and corresponding police expertise in apprehending those most likely to be involved in crime.