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INEFFABLE INTUITION AND UNREASONABLE SUSPICION: OUR RULE OF LAW FAILURE

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I. INTRODUCTION

“*THE wholesale harassment by certain sectors 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.*”¹

It has become something of a meme to use the rule of law to mystify the terms of legal and political discourse and to bludgeon opponents by referencing our system’s most revered principles.² We use it as a sling to cast stones against human and civil rights abuses worldwide, yet we are not equally vigilant about our failings at home.³ Some argue that we can, in part, judge the quality of the rule of law in our nation by assessing the amount of counter-majoritarian, rights-protective decisions that our courts produce.⁴ Kairys notes that despite some hallowed Supreme Court decisions, *Brown* for example, our courts are a barrier to the advancement of the rule of law as often as they are a vessel for its realization.⁵ One area in particular where our courts have been unduly disrespectful of the rule of law is in the realm of searches, seizures, and reasonable suspicion under the Fourth Amendment.⁶

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1. *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968).
2. David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 316 (2003) (discussing the rule of law as a shortcut for legitimizing an argument).
3. *See id.* at 325–27.
4. *Id.* at 323.
5. *Id.*; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
6. *See* Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 609 (2012).

Our infinitely malleable standard of reasonable suspicion and the seemingly illimitable discretion that it affords police, coupled with a lack of police accountability and a degradation of the exclusionary rule, present serious domestic rule of law concerns.⁷ These concerns are more than hypothetical and are more than spurious slippery slope arguments.⁸ Indeed, in this area of law, our nation already lies at the bottom of a slippery slope. For example, the language of *Terry* (cited above and discussed in greater detail below) reassures us that the exclusionary rule does nothing to ameliorate the harassment of minorities by the police.⁹ Be that as it may, the Warren Court Justices' concerns about the future application of *Terry* were remarkably prescient. History has indeed borne out that granting police the ability to exercise tremendous amounts of discretion under the pretext of reasonable suspicion has not just allowed the harassment of minorities to continue—it has provided legal cover for institutional programs of harassment.¹⁰

Between 2004 and 2012, the New York City Police Department (NYPD) made 4.4 million stops under the program commonly known as “stop and frisk.”¹¹ Over 80% of those stopped were black or Hispanic.¹² In response, black and Hispanic citizens of New York City brought suit challenging both the constitutionality of their individual stops and the entire stop and frisk program under both the Fourth and Fourteenth Amendments.¹³ In discussing the Fourth Amendment claim, Judge Scheindlin noted both the difficulty of assessing the individual constitutionality of 4.4 million stops and the issue that the vast majority of factual proof relied on by plaintiffs for these claims was the police reports created by officers following a stop.¹⁴ Scheindlin noted that even this imperfect source of information reveals that officers made at least 200,000 stops without reasonable suspicion.¹⁵ In finding liability, Scheindlin wrote that, at a minimum, the NYPD acted with deliberate indifference towards the unconstitutional actions of its employees.¹⁶ And yet this was a modest victory. As we will see below, the slow march towards the complete degradation of any meaningful standard of reasonable suspicion continues. *Floyd* was not just a perfect storm of a malleable doctrine and a lack of police accountability, and it is certainly not just a one-off. Rather, it is a perfect manifestation of the tendencies and realistic possibilities in a system that has cast aside a meaningful, democratically-oriented rule of law.

7. *See id.* at 616.

8. *See id.* at 614.

9. *Terry v. Ohio*, 392 U.S. 1, 13–15 (1968).

10. *See* Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 *Miss. L.J.* 423, 486, 489, 493 (2004).

11. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

12. *Id.*

13. *Id.* at 557.

14. *Id.* at 559.

15. *Id.* She does not doubt that more than 200,000 stops were conducted without reasonable suspicion, but due to the NYPD's faulty recording keeping, we will never know. *Id.*

16. *Id.* at 561.

How did we get here, and where do we go? In the following sections, this essay lays out the development of the reasonable suspicion standard under the Fourth Amendment and argues that it is fundamentally incompatible with a meaningful, democratically-oriented rule of law. Finally, we offer a brief conclusion with suggestions of how to restore the rule of law in this area.

II. SEARCHES, SEIZURES, AND REASONABLE SUSPICION

*“Whether you stand still, move, drive above, below, or at the speed limit, you may be described by the police as acting suspiciously should they wish to stop or arrest you. Such subject, promiscuous appeals to an ineffable intuition should not be credited.”*¹⁷

The Fourth Amendment guarantees that the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.”¹⁸ The rights it provides “belong in the catalog of indispensable freedoms,”¹⁹ and in order to protect those rights, “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”²⁰

Despite its supposedly revered status, the Fourth Amendment’s ability to protect our rights continues to be incrementally weakened at every turn through a multitude of special circumstances.²¹ At the heart of the discussion (and the problem) surrounding the protections provided by the Fourth Amendment are two societal values in diametric opposition: law enforcement’s need for flexible powers and responses to the myriad situations that arise when investigating criminal activity and the hallowed right of citizens to be free from arbitrary governmental intrusion into their lives.²² Writing for the majority in one of the most contentious opinions in the Court’s twentieth century history, Chief Justice Earl Warren’s opinion in *Terry v. Ohio* came down on the side of law enforcement needs and forever changed the nature of interactions between citizens and police officers.²³

The *Terry* opinion itself was not a broad acceptance of police authority to accost citizens at will, but it certainly became the seed of the poisonous tree. In the years since *Terry*, jurisprudence on the issue has consisted of a one-way march of police power expansion that has increasingly deviated from the language in the *Terry* opinion and has weakened our nation’s rule of law.²⁴

17. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

18. U.S. CONST. amend. IV.

19. *Michigan v. Long*, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Burton, J., dissenting)).

20. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

21. See *Katz*, *supra* note 10, at 461–62.

22. See *id.* at 429.

23. See *id.* at 443, 447–49.

24. See *id.* at 487.

A. THE TERRY STANDARD

Prior to 1968, officers effectuating a search or seizure were required to have probable cause to support a belief that the suspect in question was engaged in criminal activity.²⁵ For Fourth Amendment purposes, constitutionally valid police-citizen interactions occurred only when pursuant to voluntary citizen cooperation or when supported by probable cause.²⁶ *Terry* identified a third type of police-citizen interaction—an “investigative stop” or “*Terry* stop”—that is neither based on voluntary citizen interaction, nor supported by probable cause.²⁷ The more limited *Terry* stops, the Court reasoned, are governed by the Fourth Amendment’s general requirement of reasonableness rather than the Warrant Clause.²⁸ To lawfully detain a person for a brief investigative stop, an officer need only have a reasonable and articulable suspicion that criminal activity may be afoot.²⁹ An officer justified in conducting a *Terry* stop may also subject the person stopped to a pat-down in search of weapons if the officer reasonably suspects the person is “armed and presently dangerous.”³⁰

The facts of *Terry* are critical to understanding how and why the Court developed the reasonable suspicion standard. On October 31, 1963, Cleveland Police Detective Martin McFadden, a 39-year veteran of the police force, was patrolling downtown Cleveland in plain clothes.³¹ McFadden witnessed Terry and another man, Chilton, repeatedly walking up and down a block and decided to watch them further.³² The men would confer on one end of the block before one would leave, pause in front of a store window, peer inside, and then proceed to the end of the block.³³ The other man would undertake the same process, and the two would again link up on the corner.³⁴ At one point, the two spoke briefly to a third man, Katz, before continuing their routine.³⁵ Officer McFadden observed this behavior over the course of ten to twelve minutes, at which point Terry and Chilton walked off in the direction that Katz had gone.³⁶ The activities of Terry and Chilton aroused the suspicion of Officer McFadden, who believed the men were performing reconnaissance for an armed robbery.³⁷ He followed them a short distance before approaching

25. See *Terry v. Ohio*, 392 U.S. 1, 20, 26–27 (1968). In reality, this was the standard only in theory, and police use of warrantless searches and seizures occurred regularly, particularly in minority communities. See PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183–84 (1967).

26. *Terry*, 392 U.S. at 1.

27. *Id.*

28. *Id.* at 19–20.

29. *Id.* at 30–31.

30. *Id.*

31. *Id.* at 5.

32. *Id.* at 5–6.

33. *Id.*

34. *Id.*

35. *Id.* at 6.

36. *Id.*

37. *Id.*

the group, identified himself as a police officer, and asked for their names.³⁸ When the men mumbled something in response, Officer McFadden, fearful that the men might be armed, grabbed Terry, spun him around, and patted down the outside of his clothing, where he found a pistol in Terry's left breast pocket.³⁹ Officer McFadden proceeded to perform the same pat-down to the outer clothing of Chilton and Katz, yielding an additional pistol from the pocket of Chilton's overcoat.⁴⁰ Notably, Officer McFadden testified that he only patted the trio down to determine whether they had weapons and never reached inside their outer clothing until he felt the firearms.⁴¹ Terry and Chilton were subsequently arrested, charged with carrying concealed weapons, and convicted at trial.⁴²

The Court affirmed the conviction but recognized that for Fourth Amendment purposes, a person detained by an officer for an investigative stop is undoubtedly "seized," and any subsequent frisk is a "search."⁴³ An investigative stop is justified only by an objective reasonable suspicion that the person stopped is engaging in or is about to engage in criminal activity and must be limited in scope to the circumstances which justified the initial stop.⁴⁴ A "seizure" occurs whenever a police officer accosts an individual and prevents him from walking away.⁴⁵ The officer must be able to point to "specific and articulable facts," available at the time of the seizure, which, taken together with rational inferences, would "warrant a man of reasonable caution in the belief that the action taken was appropriate."⁴⁶

A frisk pursuant to a valid stop is justified only if the officer reasonably believes the person to be armed and presently dangerous.⁴⁷ The Court recognized the substantial privacy intrusions inherent in the procedure and placed strict restrictions on the situations that qualify its use.⁴⁸ An investigatory stop is often "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised," and it represents a "serious intrusion upon the person, which may inflict great indignity and arouse strong resentment."⁴⁹ The frisk is performed solely to allow the officer to determine whether the person is carrying a weapon that might threaten his safety.⁵⁰

38. *Id.* at 6–7.

39. *Id.* at 7.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 16.

44. *Id.* at 29–31.

45. *Id.* at 16.

46. *Id.* at 21–22.

47. *Id.*

48. *Id.* at 16–17.

49. *Id.* at 17.

50. *Id.* at 24.

Applying these standards, the *Terry* Court found that Officer McFadden was pursuing the general interest of crime prevention and detection when he approached Terry, Chilton, and Katz, and his suspicions were reasonable based on the men's activities.⁵¹ The Court specifically noted that although their sidewalk activities viewed independently and out of context may not seem suspicious, viewing the activities together left little doubt that Officer McFadden's suspicion was reasonable.⁵²

The Court looked more searchingly upon Officer McFadden's decision to search Terry. In addition to the governmental interest in investigating crime, the Court also noted that the immediate safety of the officer and his need to assure himself that Terry was not armed with a weapon that could be used against him was a strong interest.⁵³ Officer McFadden was justified in suspecting Terry of plotting an armed robbery, which would presumably involve a weapon, and nothing about their interaction had given him reason to change his hypothesis.⁵⁴ Thus, Officer McFadden's belief that the men were armed was justified.⁵⁵

A protective frisk conducted during a legitimate investigative stop must not only be justified at its inception, but it must also be reasonably related to the justification for its initiation in scope.⁵⁶ It must be confined in scope to an instruction reasonably designed to discover the type of weapons that could be hidden on the person and used to assault the officer.⁵⁷ Officer McFadden's search of the men clearly fell within these limits.⁵⁸ His pat-down was confined to what was minimally necessary to determine whether the men were armed and was limited only to the outer clothing.⁵⁹ McFadden's only intrusion into pockets or inside surfaces of their clothes occurred after he had discovered the weapons on Terry and Chilton and, even then, was limited to an immediate retrieval.⁶⁰

B. SEARCH AND SEIZURE AFTER TERRY

On its face, the *Terry* decision seemed to strike a relatively reasonable balance between the competing interests of the needs of law enforcement and the right of citizens to be free from unreasonable government intrusion. Perhaps it did, but even several members of the *Terry* Court could see the potential for abuse from the doctrine's inception.⁶¹ Justice Harlan noted in his concurrence that any right to frisk is dependent upon the reasonableness of the forcible stop to investigate a crime since, ordinarily,

51. *Id.* at 23.

52. *Id.* at 22–23.

53. *Id.*

54. *Id.* at 28.

55. *Id.*

56. *Id.* at 28–29.

57. *Id.* at 29.

58. *Id.*

59. *Id.* at 29–30.

60. *Id.*

61. *See id.* at 33–34 (Harlan, J., concurring); *id.* at 34 (White, J., concurring); *id.* at 36, 38 (Douglas, J., dissenting).

all persons addressed have a right “to ignore their interrogator and walk away.”⁶² Justice White’s concurrence makes it clear that officers are without restriction to approach persons and engage them with questions, but that person is equally free to refuse cooperation and go on his way.⁶³ Further, even when an officer may properly briefly detain persons against their will for questioning, “the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.”⁶⁴ Justice Douglas’s dissent highlights the danger associated with affording police the power to search in circumstances where a detached magistrate could not similarly issue a warrant, and it cautions against the “powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”⁶⁵ Even Justice Brennan, whose insistence had convinced the Chief Justice to condition investigative stops on reasonable suspicion, expressed his discomfort with the opinion.⁶⁶ In a private letter to the Chief Justice, Brennan explained that he was “truly worried” over the “risk that police will conjure up ‘suspicious circumstances’ and courts will credit their versions.”⁶⁷

The justices’ concerns expressed over the *Terry* doctrine have largely come to fruition over the last fifty years. The *Terry* standard has been expanded, manipulated, and used to justify police actions that clearly do not fall within the parameters of the doctrine as it was originally envisioned; underlying Fourth Amendment rights have slowly lost their judicial protection.⁶⁸

In particular, *Terry* did little to assist lower courts in determining the types of facts that could meet the reasonable suspicion standard.⁶⁹ An early attempt to further define the standard led only to the holding that any inquiry should look at the “totality of the particular circumstances” to determine whether a particularized reasonable suspicion of criminal activity was present.⁷⁰ By 1989, the *Terry* standard was held to require only “some minimal level of objective justification” for making the stop.⁷¹

62. *Id.* at 32–33 (Harlan, J., concurring).

63. *Id.* at 34 (White, J., concurring).

64. *Id.*

65. *Id.* at 37–39 (Douglas, J., dissenting).

66. See Debra Livingston, *Police Patrol, Judicial Integrity, and the Limits of Judicial Control*, 72 ST. JOHN’S L. REV. 1353, 1357 (1998).

67. *Id.*

68. See McAfee, *supra* note 6, at 614, 616.

69. See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 982 (1998).

70. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 n.10 (1975); *United States v. Cortez*, 449 U.S. 411, 417 (1981) (“Terms like ‘articulable reasons’ and ‘founded suspicion’ are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.”).

71. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (rejecting an attempt by the Ninth Circuit to create a test by which to assess the reasonable suspicion standard).

With this softened standard, it is of little wonder that just about anything can become a valid, articulable fact in support a reasonable suspicion of criminality. Examples of these “valid” and “objective” facts supporting a reasonable suspicion of criminality: avoiding eye contact,⁷² too much eye contact,⁷³ being nervous,⁷⁴ being calm,⁷⁵ walking away,⁷⁶ running away,⁷⁷ waving at police,⁷⁸ not waving at police,⁷⁹ and a host of other innocuous activities, a complete list of which could surely fill out the remainder of this brief essay. In a recent opinion, the Tenth Circuit astonishingly upheld a stop where the officer testified that the suspect’s acne and placement of hands on the steering wheel at the “10 and 2” positions were factors in his suspicion.⁸⁰ One early post-*Terry* court may have reasoned correctly when it held that mere presence in a “high-crime area” alone could not satisfy the standard,⁸¹ but the reality of police-citizen interactions in such areas hardly reflects the Court’s ruling.⁸² It has simply become standard to tack on additional, equally ambiguous factors to justify the stop, and police officers have not had difficulty finding approval from the judiciary.⁸³

Anything more than an outright admission by an officer to relying solely on a subjective hunch, it would seem, can be an articulable fact that gives rise to a reasonable suspicion of criminal activity.⁸⁴ Of course, in practice, such admissions are few and far between.⁸⁵ Experienced officers who do in fact act upon nothing more than an inchoate hunch will simply cage their testimony using tried and true “objective” reasons for conducting the stop.⁸⁶ Because of the deference the Court has said must be afforded to officer testimony in any *Terry* stop case, lower courts are eager to grasp onto an officer’s version of the facts as the starting point for

72. See, e.g., *United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir. 1984); *Williams v. State*, 754 N.E.2d 584, 588 (Ind. App. 2001).

73. See, e.g., 739 F.2d at 1433; *State v. Halstead*, 414 A.2d 1138 (R.I. 1980).

74. See, e.g., *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998); *United States v. Zukas*, 843 F.2d 179, 182–83 (5th Cir. 1988).

75. See, e.g., *United States v. Cardona*, 955 F.2d 976, 979 (1992); *United States v. Mejia*, 720 F.2d 1378, 1380–82 (5th Cir. 1983); *United States v. Himmelwright*, 551 F.2d 991, 992–93 (1977).

76. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Wilson v. United States*, 802 A.2d 367 (D.C. 2002).

77. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

78. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

79. See, e.g., *id.* at 271.

80. *United States v. Westhoven*, 562 F. App’x 726, 727–28 (10th Cir. 2014).

81. *Brown v. Texas*, 443 U.S. 47, 52 (1979).

82. Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100 (1999).

83. See David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 33 (1994).

84. *Id.*

85. See Patrick S. Yatchak, *Breaching the Peace: The Trivialization of the Fourth Amendment Reasonableness Standard in the Wake of Atwater v. City of Lago Vista*, 25 HAMLINE L. REV. 329, 354–55 (2002).

86. See Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL’Y 25, 25–33 (2007).

their fact-finding analysis.⁸⁷ Officers testify using rote terms like “suspicious bulge” and “furtive movement,” which have previously been accepted by courts, making it a simple matter for the judge in question to approve of the stop based on precedent.⁸⁸

As if the expanded *Terry* standard were not dangerous enough as applied to pedestrians, the Court’s application of the standard to traffic stops essentially converted the investigatory stop into an “open sesame for general searches”⁸⁹ any time a person leaves their home. It was not long before the Court would empower police officers with the ability to order drivers from their vehicles absent suspicion of any crime beyond a traffic violation, calling the trampling of liberty a “petty indignity.”⁹⁰ The ability to order passengers from a vehicle would follow despite the fact that persons riding in a vehicle subject to a traffic stop were not suspected of any type of wrongdoing.⁹¹ Further expansions would provide police with the authority to “frisk” a vehicle⁹² and subject a vehicle to a suspicionless search via a drug sniffing dog.⁹³ Perhaps the most startling decision relating to traffic stops occurred in *Whren v. United States*, where the Court held that the subjective motivations of officers making a stop are irrelevant for Fourth Amendment purposes, essentially opening the door for selective legal enforcement.⁹⁴ So long as the officer is justified in conducting the initial stop based on reasonable suspicion that the suspect has violated even a single minor violation, the officer’s subjective intent plays no part in the analysis.⁹⁵ Without the protections of the Fourth Amendment, persons subject to racially disparate enforcement through the *Terry* doctrine are forced to seek remedy under the Equal Protection Clause.⁹⁶ The effect of *Whren* is to deprive the defendants of the ability of to suppress the evidence gained against them through unconstitutional means.⁹⁷ Given the prevalence of incredibly robust traffic codes in our nation, the *Whren* opinion in essence signed off on exactly the type of general warrants that the Fourth Amendment was designed to combat.⁹⁸

Despite this immense power granted to police through the expanded *Terry* doctrine, a counter-balancing mechanism does exist. Since the earlier Warren Court opinion of *Mapp v. Ohio* provided the now-familiar

87. Harris, *supra* note 83, at 32–37 (arguing that “police justify questionable searches and seizures with creative hindsight or even perjury”).

88. *Id.*

89. Illinois v. Caballes, 543 U.S. 405, 415 (2005) (Souter, J., dissenting).

90. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam) (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)).

91. Maryland v. Wilson, 519 U.S. 408, 410 (1997).

92. Michigan v. Long, 463 U.S. 1032, 1045 (1983).

93. Caballes, 543 U.S. at 409 (upholding use of drug dog sniff of vehicle performed during traffic stop despite the fact that officer had suspicion only of traffic offense).

94. Whren v. United States, 517 U.S. 806, 813 (1996).

95. *Id.*

96. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1064 (2010).

97. *Id.*

98. See Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

exclusionary rule, evidence obtained by the government from a search or seizure in violation of a defendant's Fourth Amendment rights is suppressed.⁹⁹ The exclusionary rule has often been criticized as excessive and costly to society, and jurists dislike its use because the immediate effect of its invocation is often that a guilty defendant will walk free.¹⁰⁰ It may be an imperfect rule, but in light of the expanded *Terry* doctrine, its viability has never been more important.¹⁰¹ In addition to the usual judicial reluctance against its operation, two recent Supreme Court decisions have further hampered the exclusionary rule's ability to provide meaningful protection of Fourth Amendment rights. *Hudson v. Michigan* extensively discussed the exclusionary rule as an obsolete relic that imposes large costs on society and deserves to be jettisoned.¹⁰² Though that section of Scalia's opinion was only able to garner four votes,¹⁰³ a 2009 case later drew heavily from *Hudson*. In that case, *Herring*, the Court took another step towards abolishing the exclusionary rule, describing it as a disfavored "last resort".¹⁰⁴ The Court held that the rule should only apply when the police conduct is sufficiently deliberate and culpable, such that the exclusion would provide deterrence "worth the price paid by the justice system."¹⁰⁵

There is little doubt that Justice Scalia's scathing criticism in *Hudson* helped pave the way for disarming the exclusionary rule in *Herring*.¹⁰⁶ Amazingly, *Hudson* cites "increasing professionalism of police forces" and "evidence that police forces across the United States take the constitutional rights of citizens seriously."¹⁰⁷ Surely, our nation's founding fathers would agree that constitutional protections really are not necessary as long as the judiciary feels it is proper to "'assume' that all unlawful police behavior would be 'dealt with appropriately' by the authorities."¹⁰⁸

Over a decade of conduct by the NYPD before *Floyd* sheds light on the professionalism of police forces and the serious consideration they give to the rights of citizens. Under stop and frisk, a great deal of the 4.4 million searches conducted by the police are immune to findings of whether suspicion was reasonable or not because officers were not attentive to the required paperwork.¹⁰⁹ Officers were told to target "the right people."¹¹⁰

99. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

100. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (upholding the exclusionary rule only because Justice Kennedy, one of the five-vote majority, refused to join that section of the opinion.).

101. *See* Robert M. Bloom & David H. Fenton, "A More Majestic Conception": *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47 (2010).

102. 547 U.S. at 591.

103. *Id.* at 603, 604.

104. *Herring v. United States*, 555 U.S. 135 (2009).

105. *Id.* at 144.

106. Harris, *supra* note 72, at 32-37.

107. 547 U.S. at 598-99.

108. *Id.*

109. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2013).

110. *Id.* at 603.

Interviews with officers and administrators are particularly illuminating.¹¹¹ Police Chief Esposito admitted to targeting young men of color in their late teens or early twenties.¹¹² Officer McCormack, when asked which groups were committing robberies, had no problem singling out young African-American males.¹¹³ The NYPD was aware as early as 1999 that the stop and frisk program disproportionately impacted minority citizens.¹¹⁴ Supervisors regularly voiced blatant contempt for local populations.¹¹⁵

This lack of internal record keeping, racial bias, and blatant contempt for citizens of the city the police force is sworn to protect and serve led to an institutionalization of a racist program by which African-Americans and Hispanics were stopped at disproportionately higher rates¹¹⁶ and were more likely to be subject to the use of force.¹¹⁷ Officers interviewed indicated that those challenging the use of racial indicators were ignoring reasonable suspicion,¹¹⁸ while Scheindlin terms the program one of “race-based suspicion.”¹¹⁹ NYPD officers’ poor training as to what constitutes “furtive movements,” a behavior justifying a stop, was so prevalent that it could be interpreted to mean nearly anything.¹²⁰ In the absence of concrete meaning, and perhaps on an unconscious level, being a minority became a furtive movement.

III. THE RULE OF LAW

*“The concept of reasonable suspicion, like probable cause, is not ‘readily or even usefully reduced to a neat set of legal rules.’”*¹²¹

Perhaps it is a cheap shot to use this language from *Sokolow* to make a glib point that our standard of reasonable suspicion is a somewhat inimical concept to the rule of law. But what, exactly, is the rule of law? It is surely an amorphous concept used to support political agendas as often as used to honestly assess the quality of governance. The rule of law has been defined in terms of procedure and in substance.¹²² Kairys described numerous characteristics associated with defining the rule of law:

First, certain relationships . . . should be governed by rules. This is perhaps the most elementary aspect of the rule of law . . . Second,

111. Chief Esposito, according to Scheindlin, is “the highest ranking uniformed member of the NYPD throughout the class period.” *Id.* Serrano was an officer during the class period. *Id.*

112. *Id.* at 604.

113. *Id.*

114. *Id.* at 590–91.

115. *Id.* at 597.

116. *Id.* at 562.

117. *Id.*

118. *Id.* at 603.

119. *Id.*

120. *Id.* at 561.

121. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing the Supreme Court’s decision in *Gates* to apply that court’s language on probable cause to reasonable suspicion); *see also Illinois v. Gates*, 462 U.S. 213, 232 (1983).

122. Kairys, *supra* note 2, at 308.

the rules should be accessible and available to everyone, so that everyone might know the rules upon which a society operates. Third, the rules should be applicable to everyone . . . Fourth, follow the rules laid down . . . Fifth, the legal process should be fair.¹²³

Kairys then notes a total of fourteen oft-mentioned characteristics of the rule of law, everything from considerations of justice to judicial review.¹²⁴ Finally, he notes that the rule of law is often discussed as a social or political system “in grandiose terms,” rather than as an element of democracy.¹²⁵ In this way, Kairys argues the “rule of law,” rather than democracy, is often offered as the highest ordering principle of our system.¹²⁶ He argues further that at present the rule of law is often used to politically delegitimize arguments on both sides of the spectrum.¹²⁷ Kairys himself endorses what he terms as a “minimalist” formulation of the rule of law.¹²⁸

In this minimalist sense (which is not without its own definitional and boundary problems), there are three essential requirements for the rule of law: certain relationships, events and transactions should be subject to rules; the rules laid down should be followed and should apply to everyone, including limits on government and on the powerful; and the rules should be enforced with some mechanism for seeking redress.¹²⁹

Accepting Kairys’s minimalist definition of the rule of law, his intuition that it flows from a democratic system rather than the other way around, and his argument that it requires the protection of a democratically-oriented judiciary,¹³⁰ any number of the circumstances mentioned previously as supporting an objective finding of reasonable suspicion, not to mention a decade of racially discriminatory stops-and-frisks, are clear failures of the rule of law. When the judiciary is a cavernous maw ready to accept any suspicion as reasonable and give any manner of deference to law enforcement, it is clear that police stops are not governed by rules in any meaningful sense.

Obviously, the rule of law cannot just mean that clear rules must always prevail over mushy standards. Without naming them, it is sufficient to say that there are various aspects of our own constitutional law in which governance by standards is at least arguably preferable. However,

123. *Id.* at 312.

124. *Id.*

125. *Id.* at 314.

126. *Id.*

127. *Id.* at 315–17.

128. Kairys’s main concern with the rule of law is that it is used as a blunt instrument to label countries, cultures, and religions as uncivilized and outside the community of nations. He is concerned about its imperialistic and grandiose overtones, and sees democracy, engagement, and democratically-oriented judges as necessary to the operation of rule of law. *Id.* at 326–29.

129. *Id.* at 318.

130. “Democratically-oriented” does not mean aligned with the Democratic Party. It means a judiciary that is predisposed to protect and advance the rights of ordinary citizens. *Id.* at 327.

in a democratic society, as strict of rules as practicable should govern the interaction between individuals and the inherently coercive arm of the state. Individuals should be able to conform their conduct to some type of rule to avoid reasonable suspicion, *even if they are guilty*. Drawing on Posner's point in *Bloomfield*, is there any question that being able to be found "reasonably suspicious" due to an officer's inchoate intuition whenever or wherever is compatible with a robust rule of law?¹³¹ Is there any question that an honest measure of accountability and healthy respect for the citizens of New York would have avoided the racially discriminatory program at issue in *Floyd*?¹³² The rule of law failure is systemic. This must be acknowledged if we are to reintroduce the rule of law into the reasonable suspicion standard.

IV. CONCLUSION

*"The goals of liberty and safety may be in tension, but they can coexist—indeed, the Constitution mandates it."*¹³³

As we have noted, Kairys points out that modern proponents of the rule of law see it as the grand ordering principle of our system and that it requires democracy in order to function.¹³⁴ He counters this view with one in which democracy is the grand ordering principle of our system because it is innately desirable.¹³⁵ Kairys intuits that the rule of law does not "self-execute,"¹³⁶ but rather it relies on individuals within the judiciary and throughout society. How are we to square this view of the rule of law as necessary to providing the reliable legal system required by democracy with the reality of our system that leads to decisions in cases like *Westhoven*,¹³⁷ *Brown v. Texas*,¹³⁸ *Wardlow*,¹³⁹ and the institutionalization of a racist program of policing in New York City?

Perhaps the problem with our reasonable suspicion doctrine is not necessarily with the form it has taken, but rather that it has been shaped by a judiciary that is not diligent enough in protecting civil rights and executed by police forces that are not accountable. Kairys writes of the failure of our rule of law in the context of our treatment of "unlawful combatants."¹⁴⁰ He calls our rule of law hypocritical and not protective enough of human rights.¹⁴¹ All of this may be true, but even if it were not, the degradation of the Fourth Amendment in the ways we have described is a

131. *United States v. Brownfield*, 417 F.3d 654, 655 (7th Cir. 2005).

132. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

133. *Id.* at 556.

134. Kairys, *supra* note 2, at 314.

135. "We need democracy because we need democracy, and we need freedom and equality because we need freedom and equality." *Id.* at 314.

136. *Id.* at 327.

137. *See United States v. Westhoven*, 562 Fed. App'x 726, 730 (10th Cir. 2014) (not selected for publication).

138. *See* 443 U.S. 47, 49 (1979).

139. *See Illinois v. Wardlow*, 528 U.S. 119, 121 (2000).

140. Kairys, *supra* note 2, at 326.

141. *Id.*

more subtle and pervasive deterioration of the rule of law within the United States.

Obviously, results like *Westhoven* create concern for arbitrary applications of discretion by frontline law enforcement.¹⁴² But we do not need to carry out a hypothetical thought experiment to draw this conclusion. Despite the Supreme Court's skepticism in *Terry* that the exclusion of evidence would help end harassment of minorities by police,¹⁴³ history under the broad and inclusive standard of reasonable suspicion has borne out otherwise. We have already discussed *Floyd*, yet our criminal justice system is filled with racial disparities too numerous to mention in great detail here.¹⁴⁴ For example, while African-Americans make up only 13% of the population, they constitute 28% of all arrests, 40% of the incarcerated population, and 42% of the population on death row.¹⁴⁵ Minorities remain over-represented in overall arrest rates and are more likely to be sentenced to prison, where they face longer sentences than whites.¹⁴⁶ A 2013 report created by the American Civil Liberties Union (ACLU) indicates that "extreme" racial disparities exist in marijuana possession arrests.¹⁴⁷ Indeed, African-Americans are 3.73 times more likely to be arrested for marijuana possession than whites.¹⁴⁸

Of course, a reasonable suspicion jurisprudence that situates a great deal of discretion in frontline law enforcement is not alone responsible for these racial disparities.¹⁴⁹ But is there any question that it contributes to them, or at least has the capacity to? Whatever the view of the Supreme Court when *Terry* was written, it is clear that the malleability of the reasonable suspicion standard has at least contributed to racial disparities within our criminal justice system.¹⁵⁰ It is plausible that what Kairys describes as unconscious racism contributes at the level of "reasonable" suspicion.¹⁵¹

But what is the solution? How can we still allow for effective law enforcement while better implementing the rule of law in this area of our system? We need a solution that lays out predictable rules as to what constitutes reasonable suspicion such that individuals can preemptively conform their conduct, and one that does not lend itself to the perpetua-

142. *Westhoven*, 562 Fed. App'x at 730.

143. *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968) ("The wholesale harassment by 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.").

144. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

145. NAT'L COUNCIL ON CRIME AND DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2* (Christopher Hartney & Linh Vuong eds., 2009).

146. *Id.* at 3.

147. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17 (2013).

148. *Id.*

149. *Floyd*, 959 F. Supp. 2d at 588–89.

150. See *id.*

151. See David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857 (2011).

tion of racial disparities. We need stronger governance of frontline police conduct.

Scheidlin's suggested remedies are admirable.¹⁵² In her opinion on remedies in *Floyd*, she appointed a monitor to oversee internal NYPD reforms, ordered the NYPD to revise its internal practices in accordance with her liability opinion, ordered improved record keeping, and even ordered a pilot program for the use of body cameras on police officers.¹⁵³

This idea of using police body cameras could be gaining traction. In fact, in a 2013 position paper, the ACLU suggested that such "body-cams" could be used as a method to provide documentary evidence of encounters between the police and the public and noted that such programs could be mutually beneficial.¹⁵⁴ In order to ensure that the cameras do not become a tool for the government to monitor the public, instead of the other way around, the ACLU makes suggestions that include limiting the ability of the police to edit footage "on the fly," limiting footage retention, limiting the use of recordings, and establishing good technological controls.¹⁵⁵

While not a doctrinal solution, officer body-cams offer a workaround that can have positive rule of law implications. Certainly, the body-cams would remove the analysis of whether suspicion is reasonable away from a secondhand account and help truly objectivize the standard. One can imagine this footage being played in the courtroom, providing a more objective view as to whether the officer's suspicion was reasonable and based on articulable fact.

Perhaps we need a broader move away from order-maintenance policing. Making changes in this area appears to be an intractable problem.¹⁵⁶ Beyond the rule of law, order-maintenance policing that institutes stop and frisk programs has numerous hidden costs.¹⁵⁷ These costs include the collateral consequences imposed on those stopped for even minor offenses,¹⁵⁸ great costs on the community,¹⁵⁹ the burden on procedural jus-

152. She appointed a monitor to oversee the internal NYPD reform process, ordered the NYPD to revise their internal practices in accordance with her findings of liability, ordered the NYPD to improve its record-keeping, and even ordered a pilot program of the use of body cameras. *See Floyd*, 959 F. Supp. 2d at 668.

153. The City naturally appealed her orders of August 2013, and the Second Circuit issued a stay of the injunction pending the appeal. Following the election of Bill de Blasio in late January 2014, the City moved for a limited remand to the district court, where the parties are seeking a resolution. *Id.* at 685.

154. JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (2013). Stanley argues that body-cams could simultaneously protect against police misconduct while protecting the police from false allegations of abuse.

155. *Id.* at 2-6.

156. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 325 (2009).

157. *See id.*

158. They include immigration, public housing, incarceration, driving, and employment consequences. *See id.* at 300-06.

159. Namely, the impacts on families. *Id.* at 306.

tice,¹⁶⁰ and most importantly, substantive justice.¹⁶¹

We could also restrict the reasonable suspicion standard by requiring a higher showing for a lesser offense. Some have already made similar suggestions,¹⁶² and two state supreme courts have distinguished non-criminal from criminal activity for the purpose of stop and frisks by restricting the use of stop and frisks for non-criminal purposes.¹⁶³ Keenan and Thomas suggest that a court reviewing a pedestrian stop would begin by identifying the suspected offense and if the offense is civil or noncriminal in determining whether to make a stop.¹⁶⁴ Their model would rely in part on legislatures, realizing Kairys's idea that a robust rule of law requires democratic engagement.¹⁶⁵ Legislatures could characterize offenses and dictate when stops are reasonable. However, much like a move away from order-maintenance policing, it does not appear that legislative, political incentives are well suited to making this type of change. The idea remains admirable nonetheless.

To conclude, we return to Kairys' point: the rule of law is not self-executing.¹⁶⁶ Established and well-known institutions, procedures, and processes do not ensure the presence of justice.¹⁶⁷ One can easily imagine a system where arbitrary factors inform reasonable suspicion on an unconscious level because that is the system we have. Instead, we must, hopefully not naively, rely on our judiciary and the public to execute the rule of law, and thereby protect everyone from the arbitrary policing that, mixed with the malleable reasonable suspicion doctrine, presents concerns. This is not entirely utopian: the recent Supreme Court decision in *Riley* was certainly a step in the right direction.¹⁶⁸ Body cameras and similar workarounds could hold promise and are within legislative competency. The degradation of the reasonable suspicion doctrine indicates that the rule of law is not just something that can be installed and left to operate—we must all shepherd its development and never forget to tend to our own system.

160. *Id.* at 308.

161. *Id.* at 313 (“As the system works now, the innocent do not have the chance to obtain public vindication, and the guilty can often evade trial and conviction.”).

162. David Keenan and Tina M. Thomas, *An Offense-Severity Model for Stop-and-Frisks*, 123 *YALE L.J.* 1448 (2014).

163. *Id.* at 1477–79.

164. *Id.* at 1468.

165. *Id.* at 1484–85.

166. Kairys, *supra* note 2, at 327.

167. *Id.* at 312–13.

168. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (holding that law enforcement officers cannot search the private contents of a cell phone incident to an arrest without a warrant).