

## **“A LONG STEP DOWN THE TOTALITARIAN PATH”: JUSTICE DOUGLAS’S GREAT DISSENT IN *TERRY V. OHIO***

*Paul Butler*<sup>\*</sup>

### INTRODUCTION

The police are on a routine patrol in Washington, D.C., in an all-black housing project. Imagine that at midnight they see a car carrying three white teenagers ride slowly around the block three times. The teens see a group of young black men hanging out on a street corner. They park their car near the young men and look over at them. The men ignore the kids. After five minutes, the kids start driving slowly around the block again. What should the police do?

The police are on foot patrol at a busy mall in suburban Memphis. It is lunch time on a crowded Saturday. Three Middle-Eastern-looking men have entered the food court separately, and they sit at three different tables. The men are wearing traditional Islamic clothing. The mall does not get a lot of men dressed like that. One of the men has a suitcase with him that has a decal with Arabic writing. The other two have knapsacks. Each sits at a different table, takes out a copy of the Koran, and starts reading it. What should the police do?

These hypotheticals present the essential issue in *Terry v. Ohio*.<sup>1</sup> Justice Douglas answers, in dissent, that the police should not do anything official. They should not bring the formal power of the state to bear—at least not yet. They can do anything that private citizens could do, like walk up to the white teenagers or the Muslim men and start chatting, but if the teens or the men want to take off, the cops have to let them go. In Douglas’s view of the Constitution, the police must have

---

<sup>\*</sup> Carville Dickinson Benson Research Professor of Law, George Washington University Law School. The author would like to thank Aaron J. Sussman and Krystle Cadogan for their helpful research assistance.

<sup>1</sup> 392 U.S. 1 (1968).

probable cause before they detain any person. My thesis is that Justice Douglas's radical and "lonely"<sup>2</sup> dissent was right.

Perhaps, however, the Douglas dissent is not where the radical part started. Whenever the point is made that a Supreme Court decision is extreme, one has to ask whether it is the interpretation that is extreme or the Constitution itself. It is clear, for example, that the Fifth Amendment privilege against self-incrimination—a prohibition against the government requiring you to answer questions that could send you to prison—is one of those extreme rights. While no reasonable person would argue that the police should be able to torture to obtain information, many civilized societies would allow the government to put a murder suspect on the stand and have the prosecution ask, "Did you do it?" In the radical construct of freedom embodied in the Fifth Amendment, however, the state cannot force you to be an agent of your own destruction.

The text of the Fourth Amendment is less suggestive: one clause requires that government searches and seizures be reasonable, and the other requires that warrants be based on probable cause. The Warrant and Reasonableness Clauses operate in tandem.<sup>3</sup> There is debate among legal scholars about which one predominates.<sup>4</sup> The Supreme Court's reading has been that

---

<sup>2</sup> Akhil Reed Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1115 (1998).

<sup>3</sup> Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 394-95 (1994) ("[t]o determine the standards for a constitutional search, the Justices have engaged in a long-standing debate over the relationship of the amendment's two conjunctive clauses: the Reasonableness Clause and the Warrant Clause.").

<sup>4</sup> Compare Shenequa L. Grey, *Revisiting the Application of the Exclusionary Rule to the Good Faith Exceptions in Light of Hudson v. Michigan*, 42 U.S.F. L. REV. 621, 628 (2008) ("whether it is by a warrant or an exception to the warrant requirement, the search or seizure is constitutional if the conduct is reasonable.") and Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL OF RTS. J. 241, n.24 (1998) ("The Court . . . often has stated that there exists a presumption that a search or seizure is unreasonable unless the actor obtains a warrant.") with Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 401 (1988) ("[i]n *Terry*, however, the Court spurned the warrant clause and traditional yardstick of probable cause, turning instead to the reasonableness clause and the balancing test appropriated from *Camara*.") and Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) ("[w]hat is not needed at this juncture is another effort to explain

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 11

“the Warrant Clause’s requirement of probable cause [was] the substantive justification for a constitutional search.”<sup>5</sup> From this perspective, “the Warrant Clause . . . domina[ted] . . . [because] although the Reasonableness Clause could excuse the absence of a warrant in certain situations, the Reasonableness Clause could not authorize a search in the absence of probable cause.”<sup>6</sup> Another commentator notes that the “traditional” dominance of the Warrant Clause over the Reasonableness Clause stemmed from “the Court[‘s] . . . emphasi[s] [on] the Warrant Clause as the [Fourth] Amendment’s ‘cardinal principle . . . subject only to a few specifically established and well-delineated exceptions’ and had used the Reasonableness Clause as a means of justifying those exceptions based on overriding necessities such as exigent circumstances.”<sup>7</sup> The Warrant Clause predominates when the Court casts the Reasonableness Clause in a supporting role to probable cause.

That is where the radical part comes in. Under this reading of the Fourth Amendment, which was standard when *Terry* was decided, searches and seizures without probable cause are presumptively unconstitutional. The Douglas dissent was more consistent with this “law” than the majority opinion—even when it compelled the police to leave a suspect alone when it might be “reasonable” for them to detain him.

*Terry v. Ohio* governs more non-consensual police interactions with citizens than any other decision of the Supreme Court. Many more people are detained than are arrested. Law enforcement exploitation of the *Terry* doctrine, as seen in “zero tolerance” and “broken windows” police strategies, have occa-

---

why the Court is being untrue to the Fourth Amendment of a past time when the Warrant Clause *was* king.”) (emphasis added). The Supreme Court’s jurisprudence provides examples which indicate that the warrant clause predominates over the reasonableness clause. See Parr, *infra* note 4 (citing “Payton v. New York, 445 U.S. 573 (1980) (holding that a warrant is required to enter a home for the purpose of making an arrest) [and] Mincey v. Arizona, 437 U.S. 385 (1978) (holding that there is no ‘murder scene exception’ to the warrant requirement.)”).

<sup>5</sup> Bacigal, *supra* note 3, at 394.

<sup>6</sup> *Id.* at 395.

<sup>7</sup> Sundby, *supra* note 4, at 1756-57 (noting that “almost all Fourth Amendment analysis was channeled through the Warrant Clause’s requirements of a warrant based upon probable cause of misconduct.”) (quoting United States v. Ross, 456 U.S. 798, 825 (1982) (citation omitted)).

sioned enormous distrust of the police in low-income and minority communities. *Terry* is one important reason why some people from those communities hate the cops. The first tragedy is that the case that has occasioned so much bad will was wrongly decided. As we shall see, Justice Douglas essentially predicted all of this. The second tragedy is that even now, more than forty years after *Terry* was decided, we still do not seem disposed to listen to Douglas's cry in the wilderness.

I write this article to try to change that. The article proceeds as follows: in the next section I give a brief account of William Douglas's life, emphasizing the parts of his biography that relate in some way to the issues in *Terry*. The next section provides a short account of the Great Dissenter's dissents in other cases. Then the *Terry* analysis begins, first with summary of the opinions and then an account of why the majority got it wrong and the dissent got it right. The article concludes with a reckoning of the high costs of not listening to Justice Douglas.

#### I. WILLIAM O. DOUGLAS: A SHORT BIOGRAPHY

William O. Douglas was born in Maine, Minnesota, on October 16, 1898.<sup>8</sup> He once told associates that “[a]ll I remember of my childhood is pain and poverty.”<sup>9</sup> After high school, Douglas attended Whitman College in Walla Walla, Washington, but the two-hundred dollar scholarship did not pay for books and room and board; he worked his way through college working as a janitor, a waiter, a fruit picker, and even as a firefighter.<sup>10</sup> Douglas also joined Whitman's debate team, where, foreshadowing his many memorable Supreme Court dissents, he made a name for himself by shredding his opponent's arguments.<sup>11</sup> In the much-attended debate against University of Washington in 1919, Douglas won for the underdog Whitman team with an innovative rebuttal; instead of addressing every one of the myriad arguments addressed by Washington's team, Douglas ignored

---

<sup>8</sup> Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* 8-11 (2003).

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 30-31.

<sup>11</sup> *Id.* at 35.

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 13

the issues that he believed to be irrelevant and targeted the single biggest weakness in Washington's argument.<sup>12</sup> Douglas then sat down with almost all of his speaking time remaining; the crowd was stunned, but the judges were impressed, and they rewarded Douglas with a Whitman victory.<sup>13</sup>

At Columbia Law School, Douglas found himself drawn to the teaching and legal theory of Professor Underhill Moore, an eccentric professor who used social-science research techniques to discover the real-world implications of legal doctrine.<sup>14</sup> Professor Moore became Douglas's mentor, hiring Douglas to revise his casebook for Bills and Notes, even though Douglas had not yet taken the class.<sup>15</sup> Douglas was chosen for the Columbia Law Review,<sup>16</sup> and, after graduating, his hard work was further rewarded; the school faculty offered Douglas an exclusive lecturer-in-law position, which he promptly accepted.<sup>17</sup>

Douglas was an energetic and innovative professor. One student described him as “a cowboy on a horse . . . He was all over the room, cracking out his precedents and questions as fast as we could write, driving, driving, driving, driving us as he drove himself.”<sup>18</sup> He was particularly energized by Columbia's efforts, driven by Professor Herman Oliphant, in the “legal realist” movement. Oliphant hoped to alter the school's curriculum into a laboratory for the new jurisprudence.<sup>19</sup> However, when university president Nicholas Murray Butler elevated Professor Young B. Smith, a member of the old guard, rather than legal realist Professor Oliphant to become the new dean of the law school, Douglas resigned in protest and accepted an offer to teach at Yale Law School.<sup>20</sup> There Douglas fully embraced legal realism, including by reorganizing the corporate-law offerings along legal realist lines, creating an entire curriculum organized

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 48.

<sup>15</sup> *Id.* at 48.

<sup>16</sup> *Id.* at 49.

<sup>17</sup> *Id.* at 52.

<sup>18</sup> *Id.* at 72.

<sup>19</sup> *Id.* at 73.

<sup>20</sup> *Id.* at 74-80.

on the “life cycle” of corporations, and teaming up with Harvard Business School professor George Bates to launch a joint degree program between the schools.<sup>21</sup> Douglas reinvented the study of corporate law, wrote five major corporate law casebooks in five years and conducted empirical social-science research into the effect of bankruptcy law. Meanwhile, the Great Depression and local financial scandals brought issues of corporate law issues into a harsh limelight.<sup>22</sup> Douglas’s research received national attention, and he was promoted to Sterling Professor of Law at Yale.<sup>23</sup>

William Douglas’s ambition, however, extended outside of the academy. He became an expert on the Securities Act of 1933, which requires registration of securities sales to inform investors of the nature and potential risks of investments, and he published an article entitled “Protective Committees in Railroad Reorganization.”<sup>24</sup> Due to this experience, Douglas was appointed to direct a study, headed by the Securities and Exchange Commission and mandated under the Securities Act of 1934 Act, which would investigate corruption in bankruptcy proceedings.<sup>25</sup> Hiring his former Yale student Abe Fortas to be his right-hand man, Douglas took an aggressive stance; he summed up his philosophy towards corrupt corporations in three words: “Piss 'on 'Em.”<sup>26</sup>

Corruption was everywhere. Douglas uncovered so many illegal practices that *Barron’s, the National Financial Weekly* described his effort as “obviously a complete victory for the commission.”<sup>27</sup> His work caught the attention of Robert Kintner, the *New York Herald Tribune’s* financial columnist, who found Douglas's analysis so cogent that Douglas was soon featured in at least one article each week on the first page of the financial section.<sup>28</sup> After Douglas led several other successful investiga-

---

<sup>21</sup> *Id.* at 87-88.

<sup>22</sup> *Id.* at 89-91.

<sup>23</sup> *Id.* at 104.

<sup>24</sup> *Id.* at 106-07.

<sup>25</sup> *Id.* at 107.

<sup>26</sup> *Id.* at 108-09.

<sup>27</sup> *Id.* at 110.

<sup>28</sup> *Id.*

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 15

tions, President Franklin Delano Roosevelt called Douglas to appoint him SEC Commissioner.<sup>29</sup> In this position, Douglas delivered “two fisted addresses” that railed against the excesses and corruption in the financial community.<sup>30</sup> When Charles R. Gay, president of the New York Stock Exchange, accused the SEC of over regulating the market, FDR responded by appointing Douglas, the SEC Commissioner whom Wall Street feared most, to be SEC Chairman.<sup>31</sup>

Soon after, President Roosevelt selected Douglas to replace retiring Justice Louis Brandeis on the United States Supreme Court.<sup>32</sup> He was confirmed by a vote of sixty-two to four.<sup>33</sup>

On the Court, Justice Douglas was unique; he wrote short opinions in “one burst of creative energy” and developed the reputation of being “the quickest opinion writer since Holmes.”<sup>34</sup> Recent scholarship suggests that his early votes and decisions, which reflected a pro-government conservatism,<sup>35</sup> may have been influenced by his continuing political aspirations; thanks to the help of various political operatives, Douglas was almost chosen to displace Henry Wallace as President Roosevelt's vice president in 1944,<sup>36</sup> to replace Presidential Harry Truman as the Democrat's presidential nominee in 1948,<sup>37</sup> and to run alongside potential Presidential candidate Lyndon B. Johnson in 1960.<sup>38</sup> In time, perhaps due to a changing political landscape or internal disputes with conservative Justices Felix Frankfurter and Robert H. Jackson, Douglas began to shift away from deference to government authority and towards expansion of civil rights.<sup>39</sup> When liberal Justices Frank Murphy and Wiley Rutledge died within two months of each other, Justice Douglas and Justice Hugo Black, eventually joined by Chief Justice Earl Warren and

---

<sup>29</sup> *Id.* at 110-17.

<sup>30</sup> *Id.* at 124-30.

<sup>31</sup> *Id.* at 131-33.

<sup>32</sup> *Id.* at 174.

<sup>33</sup> *Id.* at 175.

<sup>34</sup> *Id.* at 182.

<sup>35</sup> *Id.* at 246-47.

<sup>36</sup> *Id.* at 212-32.

<sup>37</sup> *Id.* at 251-65.

<sup>38</sup> *Id.* at 346-51.

<sup>39</sup> *Id.* at 267-68.

Associate Justice William Brennan, carried the liberal mantle, leading the Court towards the largest expansion of individual rights ever seen in United States jurisprudence.<sup>40</sup> Justice Douglas resigned in 1975, after having served on the Supreme Court for thirty-six years, longer than any other Supreme Court Justice in history.<sup>41</sup> Douglas wrote 1,164 full opinions, including 486 dissents.<sup>42</sup>

## II. THE GREAT DISSENTER

Justice Douglas was an influential Supreme Court dissenter.<sup>43</sup> He has been characterized as a “maverick”<sup>44</sup> and as one of

---

<sup>40</sup> *Id.* at 302-03.

<sup>41</sup> *Id.* at 495.

<sup>42</sup> *Id.* at 495.

<sup>43</sup> At least thirty-eight articles refer to one of Justice Douglas's dissents using terms such as strong, powerful, forceful, notable or otherwise note the significance of the dissent. Using rough categories, Justice Douglas's dissents spanned Fourth Amendment jurisprudence, equal protection jurisprudence, privacy jurisprudence, takings jurisprudence, environmental jurisprudence and taxation. One example from each of these five categories is included below.

Yale Kamisar, *Symposium: Miranda after Dickerson: The Future of Confession Law: Foreword: From Miranda to Section 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 887 (2001) (noting that “[d]espite Justice Douglas's forceful dissent, the mischievous language in [*Michigan v.*] *Tucker*[, 417 U.S. 433, 446 (1974)] did not go away”).

Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 493-94 (1988) (asserting that “[i]n 1961, Justice Douglas's dissent in *Poe v. Ullman*, 367 U.S. 497, 515-16 (1961) (Douglas, J., dissenting) provided the jurisprudential foundation for expanding the meaning of ‘liberty’”).

Scott Alexander Nelson, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 166 (1994) (referring to Justice Douglas's dissent in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 693 (1974) as notable because it “recognized that the notion of guilty property is a fiction and depicted the case as ‘one of extreme hardship.’”). Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL'Y F. 63, 77-79 (2006) (discussing how Justice Douglas, in his famous *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) dissent, argued that environmental objects should be granted standing “to sue for their own preservation.”)

James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 319 n.277 (1995) (referring to Justice Douglas's dissent in *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) as notable).

<sup>44</sup> Jim Chen, *Defunis, Defunct*, 16 CONST. COMMENT. 91, 96-7 (1999) (“Like President Clinton after him, [in *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)] Justice Douglas ultimately decided to try mending affirmative action without ending it.”) (quoting Bernard Schwartz, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 33, 33 (New York U. Press, 1988)).

## 2009] A LONG STEP DOWN THE TOTALITARIAN PATH 17

the “Warren Court’s leading liberals. . . .”<sup>45</sup> In *DeFunis v. Odegaard*,<sup>46</sup> Justice Douglas was the only member of the Court to “address[] the merits of DeFunis’[s] constitutional claim.”<sup>47</sup> Douglas demonstrated his nuanced understanding of racial justice in his statement that “[t]he melting pot is not designed to homogenize people, making them uniform in consistency.”<sup>48</sup> He asserted that courts should consider whether to replace the LSAT with another test to ensure “that racial factors do not militate *against an applicant or on his behalf*.”<sup>49</sup> Justice Douglas’s *DeFunis* dissent “foreshadowed the ‘plus factor’ approach that would prevail in *Bakke*[,] . . . [and] [h]is proposals to abolish the LSAT and to administer direct tests of an applicant’s propensity to work in underserved communities resonate[s] with many contemporary proposals for reform.”<sup>50</sup> Similarly, Justice Douglas’s dissent in *Wright v. Rockefeller*<sup>51</sup> “anticipated and . . . rejected the ‘benign intent’ argument invoked in later affirmative action cases.”<sup>52</sup> “[T]hree decades later [Justice Douglas’s reasoning] in *Wright* [influenced a chain of] . . . voting-rights decisions beginning with *Shaw v. Reno*.”<sup>53</sup>

Another example of Justice Douglas’s ability to see into the future is found in his dissent in *Sierra Club v. Morton*.<sup>54</sup> In 1972, it seemed radical for Justice Douglas to argue that trees should be given standing in court.<sup>55</sup> Today, lawsuits challenging harms committed against the environment are filed regularly.<sup>56</sup>

---

<sup>45</sup> *Id.* at 98.

<sup>46</sup> 416 U.S. 312 (1974) (Douglas, J., dissenting).

<sup>47</sup> Foy Meyer III, *The Rise and Fall of Affirmative Action*, 8 TEX. REV. L. & POL. 437, 511 (2004) (“Perhaps the most important aspect of *DeFunis* was Justice Douglas’[s] dissenting opinion, the only one addressing the merits of DeFunis’[s] constitutional claim.”).

<sup>48</sup> 416 U.S. at 334 (Douglas, J., dissenting).

<sup>49</sup> *Id.* at 336; see Chen, *supra* note 44, at 96-97.

<sup>50</sup> Chen, *supra* note 44, at 97.

<sup>51</sup> 376 U.S. 52 (1964).

<sup>52</sup> Chen, *supra* note 44, at 98.

<sup>53</sup> *Id.* (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)).

<sup>54</sup> 405 U.S. 727 (1972) (Douglas, J., dissenting).

<sup>55</sup> *Id.*

<sup>56</sup> Kimberly E. O’Leary, *Using “Difference and Analysis” to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 68-9 (1997) (“When the late Supreme Court Justice William O. Douglas posed his now-famous question ‘Should trees have standing?,’ [in *Sierra Club v. Morton*] he was widely believed to be far outside the mainstream of American law.

The landmark Supreme Court case *Griswold v. Connecticut*<sup>57</sup> is a cornerstone of privacy jurisprudence. The source of *Griswold*'s reasoning? Justice Douglas's *Poe v. Ullman*<sup>58</sup> dissent.<sup>59</sup> Justice Douglas's *Poe* dissent "[laid] the jurisprudential foundation for expanding the meaning of 'liberty.'"<sup>60</sup> In *Adler v. Board of Education*,<sup>61</sup> Justice Douglas was the first Supreme Court Justice to "conceive a theory of academic freedom" and, more importantly, the first to "identif[y] [it] as a subset of the First Amendment."<sup>62</sup> Again, Justice Douglas's theory was later adopted by the Supreme Court.<sup>63</sup> Justice Douglas's dissent in *Packard Motor Co. v. National Labor Relations Board*<sup>64</sup> became the "intellectual underpinning for the Court's adherence to the management-labor dichotomy."<sup>65</sup> State legislatures were influenced by Justice Douglas's dissent in *Broadrick v. Oklahoma*<sup>66</sup> to "affirm[] the rights of employees to participate in politics while not on the job."<sup>67</sup> One scholar asserts that Justice Douglas's dissent in

---

However, citizens now routinely bring lawsuits that challenge harms to the environment.").

<sup>57</sup> 381 U.S. 479 (1965).

<sup>58</sup> 367 U.S. 497 (1961).

<sup>59</sup> Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? – On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices be Considered Unconstitutional?*, 9 AM. U.J. GENDER SOC. POL'Y & L. 395, 402 (2001) ("Five years after the Court refused to address a Connecticut statute criminalizing the use of contraceptives by married couples, the Court adopted the reasoning of Justice Douglas'[s] dissent in *Poe v. Ullman* in *Griswold v. Connecticut* [, 381 U.S. 479, 485-86 (1965)] and held the same Connecticut statute unconstitutional.").

<sup>60</sup> Kappelhoff, *supra* note 43, at 493-94 ("In 1961, Justice Douglas' dissent in *Poe v. Ullman* provided the jurisprudential foundation for expanding the meaning of 'liberty.'").

<sup>61</sup> 342 U.S. 485 (1952) (Douglas, J., dissenting).

<sup>62</sup> Rachel E. Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U.L. REV. 187, 192 (1998) ("What is most notable about Justice Douglas'[s] dissent [in *Adler*] is not that academic freedom is mentioned for the first time but, rather, that it is identified as a subset of the First Amendment.").

<sup>63</sup> *Id.* at 192.

<sup>64</sup> 330 U.S. 485 (1947) (Douglas, J., dissenting).

<sup>65</sup> Jonathon B. Goldin, Comment, *Labor-Management Cooperation: Bath Iron Works's Bold New Approach*, 47 ME. L. REV. 415, 453-54 n.158 (1995) ("It was Justice Douglas's dissent in the Court's 1947 decision in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, n.158 (1947), that became the intellectual underpinning for the Court's adherence to the management-labor dichotomy.").

<sup>66</sup> 413 U.S. 601 (1973) (Douglas, J., dissenting).

<sup>67</sup> *Developments in the Law – Public Employment [Part 1 of 2]*, 97 HARV. L. REV. 1611, 1659 (1984) ("More significantly, in light of the relaxation of federal restrictions on

## 2009] A LONG STEP DOWN THE TOTALITARIAN PATH 19

*Cardona v. Power*<sup>68</sup> is one of “[t]he two most important Supreme Court opinions relating to the question of non-English speaking voters.”<sup>69</sup> As demonstrated by the examples presented above, Justice Douglas’s positions were not those of an irresponsible maverick. Rather, his dissenting opinions provided foundations for future legal developments.

Justice Douglas also had a capacity for empathetic decision-making. For example, one scholar notes that Justice Douglas’s “central concern” in *Wisconsin v. Yoder*<sup>70</sup> “was not the dispute between the parents and the state . . . but [rather] the possibility of a dispute between the children and the state.”<sup>71</sup> In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>72</sup> Justice Douglas noted that the case was “one of extreme hardship.”<sup>73</sup> As reflected in *Sierra Club v. Morton*,<sup>74</sup> Justice Douglas’s empathy extended even to nature.<sup>75</sup>

## III. 1967: STREET LAW

In 1967, the year *Terry* was decided, the streets seemed buck wild. Not only was crime increasing, there were also urban riots and campus uprisings. The police responded aggressively, by detaining people, not because they had probable cause to arrest, but rather because their suspicion was aroused, and they wanted to investigate further. In the hypothetical at the

---

nonfederal employees, many state legislatures have taken a cue from Justice Douglas’s dissent in *Broadrick* and affirmed the rights of public employees to participate in politics while not on the job.”)

<sup>68</sup> 384 U.S. 672 (1966) (Douglas, J., dissenting).

<sup>69</sup> Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1421 (1988) (“The two most important Supreme Court opinions relating to the question of non-English speaking voters are the majority opinion in *Katzenbach v. Morgan* [384 U.S. 641 (1966)] and Justice Douglas’ [s] dissent in *Cardona v. Power*”).

<sup>70</sup> 406 U.S. 205 (1972) (Douglas, J., dissenting).

<sup>71</sup> Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 387 (1997) (“Even today, almost three decades after the Court decided *Yoder*, Justice Douglas’s understanding of children and of the parent-child relationship in that case contrasts markedly with almost all Supreme Court jurisprudence involving conflicts between parents and the state.”)

<sup>72</sup> 416 U.S. 663, 693 (1974) (Douglas, J., dissenting).

<sup>73</sup> Nelson, *supra* note 43, at 166.

<sup>74</sup> 405 U.S. 727 (1971) (Douglas, J., dissenting).

<sup>75</sup> *Id.* at 742.

beginning of this article, for example, the police might have put on their siren and flashing light, stopped the car containing the teens, and asked what they were doing in that part of town at that time of night. When the police stopped someone they thought might have a weapon, they frisked.

If one were to ask the cops about their legal authority for the stop and frisk, they would most likely offer one of two answers: 1) It was what they were taught on the street or in the police academy or 2) that the Fourth Amendment applied only to arrests and full searches, and not to investigative detentions and pat downs. A New York police officer might say that he had “reasonable suspicion.” State courts in New York were one of the few court systems that prior to 1967 had considered the constitutionality of stop and frisks, and that is the standard that they developed.<sup>76</sup>

#### IV. STOP AND FRISK

In *Terry v. Ohio*, the Supreme Court blessed the police practice of investigative detentions without probable cause. It ruled that the police can briefly detain someone when they have “reasonable suspicion” that a crime may be occurring, or is about to occur.<sup>77</sup> Cops can “pat down” the person whom they have stopped if they have reasonable suspicion that the suspect is armed.<sup>78</sup> The “sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope” to discover weapons.<sup>79</sup>

In the *Terry* case, an experienced detective’s attention was drawn to two African-American men who were standing on a street corner in downtown Cleveland.<sup>80</sup> The detective did not know why he had started watching them; he said he was “attracted” because “they didn’t look right to me at the time.”<sup>81</sup> The detective observed the men walk up and down the street looking

---

<sup>76</sup> *Terry*, 392 U.S. at 19 n.15.

<sup>77</sup> 392 U.S. at 27.

<sup>78</sup> *Id.* at 8.

<sup>79</sup> *Id.* at 29.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Id.*

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 21

in the same store window several times.<sup>82</sup> He suspected they were “casing” a store with the intention of robbing it.<sup>83</sup> Next, however, the two men walked away from the store and were joined by a white man.<sup>84</sup> At that point, the detective approached, asked the men to give their names, and when Mr. Terry “mumbled something” in response, he grabbed Mr. Terry and pushed him against a wall.<sup>85</sup> The detective then patted down Mr. Terry and felt something that might have been a gun in his coat pocket.<sup>86</sup> He ordered all three men inside a store, where he frisked them. Mr. Terry and one of the other men were carrying guns.<sup>87</sup>

The prosecutors argued that the Fourth Amendment, which regulates government searches and seizures, did not apply because Mr. Terry had not been searched and seized within the meaning of the Amendment. The Supreme Court

emphatically reject[ed] this notion. . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a “search.” Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may in-

---

<sup>82</sup> *Id.* at 6.

<sup>83</sup> *Id.*

<sup>84</sup> Upon first blush, it’s strange that the detective approached Mr. Terry while he was walking away from the store that the detective suspected he was casing but the fact that the two African-American men were joined by a white man probably would have further aroused the officer’s suspicion. During this time in Cleveland (although not just Cleveland), police lore was that the presence of black and white men together was a strong indicator of potential criminal activity. John Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, *Criminal Procedure Stories* 295 (Carol S. Steiker ed., Foundation Press 2006).

<sup>85</sup> *Terry*, 392 U.S. at 7.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 6-7.

flict great indignity and arouse strong resentment, and it is not to be undertaken lightly.<sup>88</sup>

Since the Court found that Mr. Terry had been seized and searched, Fourth Amendment precedent required that police have “probable cause.”<sup>89</sup> The Court, however, declined to apply this (relatively) high standard, stating that “we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which . . . as a practical matter could not be . . . subjected to the warrant procedure.”<sup>90</sup> It held that the Fourth Amendment simply required the police conduct to be reasonable, which could be determined by balancing the government interest (investigating crime and officer safety) against the individual interest (privacy).<sup>91</sup> The Court specifically noted that it was not abandoning the jurisprudence that a search is presumptively unconstitutional if there is no probable cause, but simply creating a limited exception.<sup>92</sup>

Justice Douglas was the lone dissenter.<sup>93</sup> He observed that the probable cause standard was deeply rooted in the country’s history and the Court’s precedent.<sup>94</sup> Justice Douglas did not think the reasonableness balancing test was constitutionally sound because he thought the Fourth Amendment itself already balanced the relevant interests.<sup>95</sup> Douglas observed that there was no probable cause to arrest Mr. Terry before the search, because his crime, carrying a concealed weapon, had been dis-

---

<sup>88</sup> *Id.* at 16-17.

<sup>89</sup> *Id.* at 25-26.

<sup>90</sup> *Id.* at 20.

<sup>91</sup> *Id.* at 21.

<sup>92</sup> *Id.* at 27.

<sup>93</sup> *Id.* at 35-39 (Douglas, J. dissenting). Justice Thurgood Marshall had only recently joined the court. There is some evidence that he later regretted his vote with the majority. See John Q. Barrett, “*Deciding the Stop and Frisk Cases: Look Inside the Supreme Court’s Conference*,” 72 ST. JOHN’S L. REV. 749, 843 (1998) (“Justice Marshall, who as a newcomer to the Court was relatively uninvolved in the Court’s internal arguments over the stop and frisk cases, all but stated in later cases that he had voted wrong in Terry.”).

<sup>94</sup> *Terry*, 392 U.S. at 37 (Douglas, J. dissenting).

<sup>95</sup> *Id.* at 38-39.

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 23

covered during the search.<sup>96</sup> Thus, if before Mr. Terry had been searched, the police had gone to a magistrate and sought a warrant to search him, a judge would have had to deny the warrant.<sup>97</sup> Douglas wrote:

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be 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. The decision to enter it should be made only after a full debate by the people of this country.<sup>98</sup>

V. THE *TERRY* COMPROMISE

In *Terry*, the Supreme Court did what it sometimes does when it is presented with an interpretation of the Constitution that seems both correct and politically untenable: it split the baby. The best known example in a criminal procedure case is the decision in *Miranda v. Arizona*.<sup>99</sup> The American Civil Liberties Union had argued that whenever a suspect was subject to police questioning, the Fifth Amendment’s privilege against self-incrimination required that a lawyer be present. The Court’s compromise, embodied in the “*Miranda* warnings,” was that the suspect did have a right to a lawyer, but, after she was advised of the right, she could waive it immediately and proceed to police questioning absent a lawyer.<sup>100</sup> In *Terry*, the Court held, against the wishes of the law enforcement community,

---

<sup>96</sup> *Id.* at 35-36.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 38-39.

<sup>99</sup> 384 U.S. 436 (1966).

<sup>100</sup> *Id.* at 478-79.

that stops and frisks were searches and seizures, and thus were governed by the Fourth Amendment. Then, however, against Mr. Terry's assertion, it ruled for the first time that stops and frisks could be subject to a lower standard than probable cause; in this one specific (but far from rare) occurrence, the new standard was "reasonableness."

Then and now, the *Terry* decision has been widely heralded. The *New York Times*, in an editorial the day after the case was decided, said "[T]he Supreme Court's 8-1 decision . . . will help persuade policemen that the Court does not lie awake nights dreaming up ways to increase the hazards of their jobs."<sup>101</sup> More recently, Professor Stephen Saltzburg described *Terry* as "a practically perfect doctrine."<sup>102</sup>

So what's the problem? Justice Douglas's dissent essentially identified two major problems with the Court's analysis. First, it was inconsistent with all of the Court's previous interpretations of the Fourth Amendment. Second, it gave too much power to the police.

## VI. STARE DECISIS

The majority opinion offered no settled jurisprudential reason for departing from the "warrant clause predominates" rule that had governed Fourth Amendment analysis. Rather, the Court's analysis was premised on its perception on the realities of police work in the mean months of 1967. The majority opinion claimed that, "as a practical matter," the probable cause clause could not govern stop and frisk law because the police had to act quickly to tame the streets.<sup>103</sup> If they were required to take the time to get a warrant, or even to wait for probable cause, bedlam might ensue.

Perhaps, Justice Douglas replied, but there is still the Constitution. He described the Court's legal rationale in support of searches and seizures without probable cause as "a mystery."<sup>104</sup>

---

<sup>101</sup> "Unreasonable" Still Stands, N.Y. Times, June 12, 1968, at 46.

<sup>102</sup> Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 St. John's L. Rev. 911 (1998).

<sup>103</sup> *Terry*, 392 U.S. at 20.

<sup>104</sup> *Id.* at 35 (Douglas, J., dissenting).

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 25

He noted that the Court had “always used the language of ‘probable cause’” to access the constitutionality of warrantless seizures of persons.<sup>105</sup> Douglas quoted Supreme Court precedent that described the probable cause requirement as having “roots that are deep in our history.”<sup>106</sup> In *United States v. Henry*, the Court stated, “as early American decisions both before and immediately after [the Fourth Amendment’s adoption] show, common rumor or report, suspicion or even ‘strong reason to suspect’ was not adequate to support a warrant for arrest. And that principle has survived to this day.”<sup>107</sup>

That the principle did not survive past the summer day in 1967 that *Terry* was decided troubled Douglas not only for its practical consequences, but also as a matter of jurisprudence. Douglas noted that there might be a perceived need to give the police more power to “cope with modern forms of lawlessness.”<sup>108</sup> The process of changing the requirements of the Fourth Amendment, however, was not up to the Supreme Court; rather “it should be the deliberate choice of the people through a constitutional amendment.”<sup>109</sup>

Sometimes liberal Supreme Court justices are described as being ends-justified or consequentialist in their analysis. The concern is that judicial activists (a term applied more frequently to progressive justices rather than conservative ones) ignore settled precedence, or even the Constitution, in order to achieve a particular result. The more compelling case, in *Terry*, is that the eight other justices did not accord the Constitution the respect that it was due. It is true that the Fourth Amendment makes it more, rather than less, difficult for the police to investigate crimes, and that if the Court had decided *Terry* the way that Justice Douglas wanted, there might be some diminution in the ability of the police to prevent crime. It is also true, however, that if the majority of the Court did not like that allocation between citizen’s rights and police power, they had no legal au-

---

<sup>105</sup> *Id.* at 36 n.3.

<sup>106</sup> *Id.* at 37 (Douglas, J., dissenting) (quoting *Henry v. United States*, 361 U.S. 98, 100).

<sup>107</sup> *Id.* at 37-38 (quoting *Henry*, 361 U.S. at 101).

<sup>108</sup> *Id.* at 38.

<sup>109</sup> *Id.*

thority to change it. The balance, as Justice Douglas pointed out, already had been struck in the Constitution.

#### VII. POLICE POWER

Mr. Terry was arrested for carrying a concealed weapon. The problem is that the police did not find out that he was carrying a concealed weapon until they had seized him, without probable cause, and searched him, without probable cause. The most salient fact for Douglas is that if, prior to the arrest, the police had gone to a magistrate and sought a warrant to search Mr. Terry for a concealed weapon, they wouldn't have gotten it because there was no probable cause. Now, however, as a result of the Court's decision, the police could search for a weapon without a warrant and without probable cause. To Douglas this meant that the *Terry* decision gave the police more power than a magistrate.<sup>110</sup>

Professor Ahkil Amar has characterized the majority's analysis of this issue as weak and noted that it never responded to this point of the Douglas dissent.<sup>111</sup> Perhaps the Court did not respond because Douglas was correct. The police, whom the Court described in another Fourth Amendment case as "engaged in the often competitive enterprise of ferreting out crime"<sup>112</sup> are allowed to use their own judgment about when they can detain a person who is, in the eyes of the law, innocent, and the standard that they use—reasonable suspicion—is lower than the magistrate's requirement of probable cause. It was not farfetched to imagine that the police would use *Terry* as a pretext to search in situations in which a magistrate—one might even say the Fourth Amendment—would not have allowed. And of course the police have enthusiastically engaged in such pretextual searches (and seizures), a practice the Supreme Court blessed in a later case.<sup>113</sup>

---

<sup>110</sup> *Id.* at 36.

<sup>111</sup> Amar, *supra* note 2, at 1115.

<sup>112</sup> Johnson v. United States, 333 U.S. 10, 14 (1948).

<sup>113</sup> Whren v. United States, 517 U.S. 806 (1996).

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 27

Justice Douglas noted “powerful hydraulic pressures . . . [that] water down constitutional guarantees and give the police the upper hand.”<sup>114</sup> Again acknowledging the mean streets of the late 1960’s, he added that the pressure had “never been greater than it is today.”<sup>115</sup> His concern, however, was that if the police could search and seize at their discretion, we enter a “new regime.”<sup>116</sup> Now, more than forty years after Douglas made that prediction, we are fully there.

VIII. WHY THE *TERRY* DISSENT IS GREAT

Professor Mark Tushnet has described three characteristics that “great dissents” share: 1) they accurately predict the future, 2) they use rich rhetoric because they want their analysis to be remembered by future generations (as opposed to swaying contemporary courts), and 3) they “set out an account of democracy . . . that cannot fail to move the reader.”<sup>117</sup> By all three of these measures, the Douglas dissent is great.

A. *The Douglas Dissent Predicts the Future*

Consider the inglorious progeny of *Terry*. It includes the blessing, by some federal courts, of racial profiling.<sup>118</sup> It includes *Illinois v. Wardlow*, in which the Supreme Court held that *Terry* allows the police to detain people who only arouse suspicion because they happen to be in a high-crime area and they want to evade the police.<sup>119</sup> It includes this list of factors that various federal courts have found constitute “reasonable suspicion” of drug couriers at airports:

Arrived late at night

Arrived early in the morning

---

<sup>114</sup> *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases 98-99 (Mark Tushnet ed., 2008).

<sup>118</sup> *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992). See generally David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002).

<sup>119</sup> 528 U.S. 119 (2000).

One of first to deplane

One of last to deplane

Deplaned in the middle

Used a one-way ticket

Used a round-trip ticket

Carried brand-new luggage

Carried a small gym bag

Traveled alone

Traveled with a companion

Acted too nervous

Acted too calm

Wore expensive clothing and gold jewelry

Dressed in black corduroys, white pullover shirt, loafers without socks

Dressed in dark slacks, work shirt, and hat

Dressed in brown leather aviator jacket, gold chain, hair down to shoulders

Dressed in loose-fitting sweatshirt and denim jacket

Walked rapidly through airport

Walked aimlessly through airport

Flew in to Washington National Airport on the LaGuardia Shuttle

Had a white handkerchief in his hand.<sup>120</sup>

---

<sup>120</sup> United States v. Hooper, 935 F.2d 484, 499-500 (2d Cir. 1991) (Pratt, J., dissenting) (citing United States v. Sokolow, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (internal citations omitted)).

## 2009] A LONG STEP DOWN THE TOTALITARIAN PATH 29

As troubling, the Supreme Court has extended its “reasonableness” analysis outside of the context of stop and frisk – despite its avowal in *Terry* that it was carving out a limited exception.<sup>121</sup> Since *Terry*, reasonableness analysis has prevailed in cases involving drug testing,<sup>122</sup> border searches,<sup>123</sup> police checkpoints,<sup>124</sup> and inventory searches,<sup>125</sup> among others. Indeed some scholars have interpreted the Court’s opinion in *United States v. Knights*, in which it declared “[t]he touchstone of the Fourth Amendment is reasonableness,”<sup>126</sup> as its effective abandonment of the “warrant clause predominates” jurisprudence.<sup>127</sup>

This is the “new regime” of which Douglas warned. It is not “totalitarianism” but it is a “long step” down that path. The *Terry* doctrine is a major contributor to the widespread antipathy toward the police that many people in minority and low-income communities demonstrate, because they know that, in the words of the Douglas dissent, “the police can pick [a person] up whenever they do not like the cut of his jib.”<sup>128</sup>

### B. Memorable Rhetoric

In his dissent in *Terry*, Justice Douglas dropped the “t” bomb. He wrote, “To give the police greater power than a magistrate is to take a long step down the totalitarian path.”<sup>129</sup> To use the word “totalitarian,” in the middle of the cold war, to describe a U.S. Supreme Court ruling was more than a rhetorical flourish; it was a prediction of a future in which the United

---

<sup>121</sup> *Terry*, 392 U.S. at 27.

<sup>122</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>123</sup> *United States v. Ramsey*, 431 U.S. 606 (1977).

<sup>124</sup> *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>125</sup> *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (the only case listed here in which Court used reasonableness analysis and found search unreasonable).

<sup>126</sup> 534 U.S. 112, 118 (2001).

<sup>127</sup> See Kimberly S. Keller, *Privacy Lost: Comparing the Attenuation of Texas's Article I, Section 9 and The Fourth Amendment*, 34 St. Mary's L. J. 429, 432 (2003) (“In *United States v. Knights*, the Court emphasized its trend to shift focus from the ‘warrant requirement’ to the requirement of ‘reasonableness’ . . . .”); Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in United States v. Knights*, 25 Harv. J.L. & Pub. Pol'y 1201, 1208-1212 (2002).

<sup>128</sup> *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

<sup>129</sup> *Id.* at 38.

States would use tactics more like those of its adversaries. If, as in Tushnet's account of great dissents, the writing is for future generations rather than present courts, the t-word rings, forty years later, loudly and clearly. The only thing that Justice Douglas appeared not to have anticipated, when he stated the "hydraulic" pressure to "water down constitutional guarantees"<sup>130</sup> during unsafe times is September 11, 2001.

The passage that invokes the specter of totalitarianism is not cited much in opinions by lower courts—one understands that judges might be reluctant to characterize their fellow jurists' decisions with such a strong word. In the academic literature, however—especially criminal procedure casebooks and law review articles—the line about the "long step down the totalitarian path" appears in virtually every account of *Terry*. This is not to say that the words are always cited approvingly; as mentioned above, the *Terry* majority opinion has been heralded by many scholars as an appropriate compromise. In these discussions, however, the t-word is ever present, like an echo.

### *C. Douglas's Account of Democracy*

Justice Douglas's dissent is profoundly concerned with democracy. He believes that the Court's departure from probable cause would only be justified if it were "the deliberate choice of the people."<sup>131</sup> Likewise, the last words of his opinion suggest that the expansion of police power authorized by the majority require a "full debate by the people of this country."<sup>132</sup>

Though Douglas never seemed to restrain his rhetoric when writing from the bench, he wrote even more passionately away from the Court. In *Points of Rebellion*,<sup>133</sup> published two years after the *Terry* decision, Douglas praised America's promise of freedom in relation to totalitarian countries:

After an American has been in a totalitarian country for several months, he is greatly relieved when he reaches home. He

---

<sup>130</sup> *Id.* at 39.

<sup>131</sup> *Id.* at 38.

<sup>132</sup> *Id.* at 39.

<sup>133</sup> William O. Douglas, *Points of Rebellion* (RANDOM HOUSE 1970) (1969).

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 31

feels that bonds have been released and that he is free. He can speak above a whisper, and he walks relaxed and unguarded as though he were no longer being followed.<sup>134</sup>

In the same essay, Douglas noted that America's freedom was under attack; he decried the growing authority of the government, particularly its tendency to empower police to oppress minorities, dissenters, and the poor through constant surveillance, investigations without due process, and other invasions of privacy. "[A] vast bureaucracy now runs the country," Douglas wrote, "irrespective of what party is in power."<sup>135</sup> Citing FBI wiretaps,<sup>136</sup> government employment screening,<sup>137</sup> and electronic surveillance,<sup>138</sup> Douglas expressed his fear that "Big Brother in the form of an increasingly powerful government . . . will pile the records high with reasons why privacy should give way to . . . law and order."<sup>139</sup>

Douglas specifically noted race as a "source of dissent,"<sup>140</sup> pointing out that "[t]he constitutional battle of the Blacks has been won, but equality of opportunity has, in practice, not yet been achieved. There are many, many steps still necessary."<sup>141</sup> Douglas wrote that "[p]olice practices are anti-Negro."<sup>142</sup> He lamented the growing authority of police officers to make discretionary arrests in order to advance discriminatory agendas:

Many cities make being poor a crime. A man who wanders about looking for a job is suspect; and he and his kind are arrested by the thousands each year. The police, indeed, use "vagrancy" as the excuse for arresting people on suspicion—a wholly unconstitutional procedure in our country.<sup>143</sup>

---

<sup>134</sup> *Id.* at 3.

<sup>135</sup> *Id.* at 54.

<sup>136</sup> *Id.* at 29-30.

<sup>137</sup> *Id.* at 16-29.

<sup>138</sup> *Id.* at 30-31.

<sup>139</sup> *Id.* at 29.

<sup>140</sup> *Id.* at 44.

<sup>141</sup> *Id.* at 94.

<sup>142</sup> *Id.* at 45.

<sup>143</sup> *Id.* at 47.

The Justice further complained that gross violations of privacy are accepted even in the investigation of minor transgressions: “[A] person on welfare has no Fourth Amendment rights: the police are empowered to kick down the door of his home at midnight without any search warrant in order to investigate welfare violations.”<sup>144</sup> Douglas asked, “Does social and economic justice always serve a secondary role in our society?”<sup>145</sup> After proposing a series of modifications to social policies, he predicted an imminent social and political revolution, stating that “[t]here are only two choices: A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs.”<sup>146</sup> He predicted “an explosive political regeneration”<sup>147</sup> demanding “measurable change.”<sup>148</sup>

In Justice Douglas’s view, reflected in his dissent in *Terry*, when one comes to America he does have to be afraid of the police. In his subsequent account of democracy, if the United States ever got to the point where the police had too much power, the people would demand “change.” It is perhaps still too early to know whether Douglas was right on this score. His faith in the people, and their desire to be free, is unquestionably inspiring. Time will tell whether this faith was justified.

#### CONCLUSION

Two years before *Terry*, in *Miranda v. Arizona*,<sup>149</sup> the Supreme Court got radical, at least according to the way the police perceived its opinion. The Court required the police to give suspects a mini-lecture in criminal procedure: Before interrogating suspects, the police had to warn them that talking to the police was not in their best interests. There were the predictable concerns that law enforcement would be undermined, but now, more than forty years later, these concerns appear to have been misplaced. The police, resourceful and adaptable, still manage

---

<sup>144</sup> *Id.* at 71.

<sup>145</sup> *Id.* at 65.

<sup>146</sup> *Id.* at 92.

<sup>147</sup> *Id.* at 97.

<sup>148</sup> *Id.* at 95.

<sup>149</sup> 384 U.S. 436 (1966).

## 2009]A LONG STEP DOWN THE TOTALITARIAN PATH 33

to enforce the criminal law, including getting suspects to talk even after they have received the *Miranda* warnings. So one lesson of the aftermath of *Miranda* is that the police are capable of adapting to the requirements of the Bill of Rights, even when those requirements seem explicitly to hinder law enforcement's ability to investigate crime. If Justice Douglas had written the majority opinion in *Terry*, the police still could have watched Mr. Terry and his associates; they just would not have been able to forcibly detain them until they had probable cause that a crime was going to be committed. It is true that the ability to intervene earlier in the process might thwart some crimes, but that crime-prevention benefit has to be measured against the widespread animosity towards the police that the stop-and-frisk doctrine has caused. In some low-income and minority communities, many people strongly dislike the police, and one important reason for this is *Terry*. It makes these citizens less likely to cooperate with the police, which is ultimately as much a detriment for public safety as for democracy. As rhetorical wars—the “war” on drugs and the “war” on terrorism—seem to lead the United States further down the “long path” to totalitarianism, the full greatness of the Douglas dissent has yet to be appreciated. The only question is whether the ultimate appreciation will be as a cautionary tale that was heeded, better late than never, or as the prediction of a frightening future, which now has arrived.