TERRY UNBOUND

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This past summer, on June 17, 2012, thousands of people marched in New York City to protest the "stop-and-frisk" policies of the New York Police Department (NYPD). Organizers of the protest contended that the NYPD's practices "single[d] out minority groups and create[d] an atmosphere of martial law for the city's black and Latino residents."[1] Marchers carried signs that read, among other things, "Skin Color Is Not Reasonable Suspicion" and "Stop & Frisk: The New Jim Crow."[2] The previous month, the New York Civil Liberties Union (NYCLU) issued a report on the NYPD's stop-and-frisk program, based on information from the NYPD's own computerized database of its program, which the NYCLU had successfully sued the department to obtain.[3] The NYCLU's report closely analyzed the nearly 700,000 stop-and-frisks performed during the previous year (2011) and published findings that formed the basis of the protest organizers' call to action.[4] Those findings included the following

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[1] John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, N.Y. TIMES, June 18, 2012, at A15.

[2] *Id.* (internal quotation marks omitted).

[3] *See Stop-and-Frisk 2011: NYCLU Briefing*, NYCLU (May 9, 2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

[4] *See id.*

troubling facts and figures: Frisk rates varied enormously by precinct, with the highest rates in the least white parts of the city; blacks and Latinos were substantially more likely than whites to be stopped (and if stopped, frisked) but, among those frisked, were less likely than whites to be found with a weapon; the number of stops of young black men exceeded the entire city population of young black men; and ninety percent of the young black and Latino men who were stopped were innocent.[5]

Such disparities in street police encounters are not new; rather, they have long been the subject of complaints against the NYPD. In 1999, the Center for Constitutional Rights (CCR) filed a class action against the City of New York alleging unconstitutional racial profiling in the Department's stop-and-frisk program.[6] This complaint eventually yielded a consent decree in 2003, under which the City and the Department agreed to implement a number of remedial measures intended to reduce racial disparities in stops and frisks.[7] After the consent decree expired, the CCR filed a new class action against the City in 2008, alleging that the Department had failed to reform adequately its policies and practices. The CCR has retained an expert—Jeffrey Fagan, a criminologist and Columbia Law School professor—who produced a lengthy study of the 2.8 million written stop-and-frisk police reports entered into the NYPD's database between 2004 and 2009. His analysis of disparate treatment on the basis of race and ethnicity, which the court has recently deemed admissible over the City's objections,[8] yielded the following findings, which offer methodologically sophisticated support for the findings of the NYCLU's report: The racial composition of a local area within the City is a significant predictor of stop-and-frisk patterns, even after controlling for crime, social conditions, and police resources;

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[5] *See Stop-and-Frisk 2011*, *supra* note 3.

[6] *Daniels, et al. v. the City of New York*—Our Cases, CENTER CONST. RTS., http://ccrjustice.org/ourcases/past-cases/daniels%2C-et-al.-v.-city-new-york#files (last visited Jan. 10, 2013).

[7] *See* Stipulation of Settlement at 5-11, Daniels v. City of New York, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 24, 2003), *available at* http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

[8] *See* Floyd v. City of New York, 861 F. Supp. 2d 274, 288-90 (S.D.N.Y. 2012) (finding Fagan's disparate treatment analysis admissible and his reasonable suspicion analysis and classification system largely admissible).

blacks and Latinos are more likely to be stopped by NYPD officers, even in low-crime and racially heterogeneous neighborhoods and even when controlling for neighborhood crime rates and police patrol strength; and blacks and Latinos are treated more harshly during stop-and-frisk encounters with NYPD officers than whites who are stopped on suspicion of the same or similar crimes.[9] In addition to ruling Fagan's testimony admissible, the court has recently granted class certification in the case, and the litigation remains ongoing.[10]

Lest one think that the NYPD's aggressive stop-and-frisk program is yet another aberration peculiar to New York City and of interest only to its denizens,[11] it is worth noting that the recent march protesting the program was reported not only by the *New York Times*, the *New York Post*, and the *Wall Street Journal*, but also by the *L.A. Times*, the *Boston Globe*, the *Guardian*, and *Al Jazeera*. Media outlets from across the political spectrum—including Fox News and OccupyWallSt.org—covered the march in detail, and hundreds of videos of the protest were posted on YouTube. National experts have publicly debated the role of the stop-and-frisk program in either producing or threatening New York City's vaunted crime drop of the past two decades.[12] Moreover, other cities have faced similar issues regarding their own stop-and-frisk programs. For example, Philadelphia faced a similar class-action lawsuit and recently entered into a consent decree regarding its own stop-and-frisk policies,[13] while San Francisco's mayor recently drew fire by floating the possibility of

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[9] *Id.* at 281-82, 282 n.29 (quoting Declaration of Jeffrey Fagan in Support of Plaintiffs' Opposition to Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan ¶ 4(a)-(d)).

[10] *See* Floyd v. City of New York, 283 F.R.D. 153, 178 (2012) (granting class certification). For recent developments in related litigation see *infra* n. 122.

[11] *See* Matt Stopera, *48 Things You'll Only See in New York City*, BUZZFEED, http://www.buzzfeed.com/mjs538/things-youll-only-see-in-new-york.

[12] *See* Heather Mac Donald et al., *Does 'Stop and Frisk' Reduce Crime?*, N.Y. TIMES ROOM FOR DEBATE (July 17, 2012), http://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/.

[13] *See* Erica Goode, *Philadelphia Defends Policy on Frisking, with Limits*, N.Y. TIMES, July 12, 2012, at A11.

adopting a policy similar to those used by New York and Philadelphia.[14]

What, you may be wondering, does all this recent hot contention about the appropriateness and legality of stop-and-frisk policies have to do with William H. Rehnquist, as Justice and Chief Justice? After all, the landmark case—*Terry v. Ohio*[15]—that gave the Supreme Court's constitutional imprimatur to the practice of police stop-and-frisks was a decision handed down before Rehnquist even joined the Court, and authored by liberal icon Chief Justice Earl Warren, the leading contender for the role of "anti-Rehnquist" in the Court's history. Indeed, *Terry*'s break with previous Fourth Amendment law to authorize searches and seizures on less than probable cause has led many commentators to question Earl Warren and the Warren Court's "liberal" bona fides in criminal procedure.[16]

My contention in this symposium on Rehnquist's legacy on the Court is that a comparison of Warren's opinion for the Court in *Terry* with Rehnquist's opinions on later *Terry* issues reveals some crucial differences in emphasis. In particular, Warren and Rehnquist part ways in their evaluation of the seriousness of the intrusion entailed by stop-and-frisks, their consideration of potentially perverse police incentives created by Fourth Amendment standards, and their concern about racial disparities in law enforcement on the ground. These divergences, taken together, are profound, and they suggest that the Burger and Rehnquist Courts' later constructions and extensions of *Terry* have yielded a doctrine—and a law-enforcement license—far

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[14] *See* Terry Collins, *Outcry After SF Mayor Considers Stop-and-Frisk*, HUFFINGTON POST (July 18, 2012), http://www.huffingtonpost.com/huff-wires/20120718/us-sf-stop-and-frisk-/.

[15] 392 U.S. 1 (1968).

[16] *See, e.g.*, Earl C. Dudley, Jr., Terry v. Ohio*, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 898 (1998) ("The knee-jerk liberal, pro-defendant, anti-police image that the Court in general, and Chief Justice Warren and Justice Brennan in particular, have been saddled with over the years is quite plainly undeserved, at least as far as the Fourth Amendment is concerned."). *See generally* Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed.,1983) (countering the portrayal of the Warren Court as defense-oriented).

broader than anything Warren would have accepted, based on his foundational opinion for the Court. It is Rehnquist's views and innovations, in particular, that have shaped a constitutional doctrine that is flexible or pernicious enough (depending on one's point of view) to prompt law enforcement practices like the NYPD's current stop-and-frisk program.

In what follows, I try neither to argue for nor to hide my own view that Warren has the better position in his differences with Rehnquist's later opinions. Rather, I conclude that, regardless of whose perspective one shares, the progressively "unbound" *Terry* doctrine and the controversial law enforcement practices that are currently conducted under its aegis must be considered—for better or for worse—as Rehnquist's legacy far more than Warren's.

I. THE SERIOUSNESS OF *TERRY*-TYPE INTRUSIONS

A preliminary question in *Terry* was whether a stop-and-frisk is a search or seizure at all for the purposes of the Fourth Amendment. Chief Justice Warren quickly and resoundingly repudiated the suggestion that stop-and-frisks might lie entirely outside the realm of constitutional protection: "We emphatically reject this notion."[17] However, a more subtle dispute remained and intensified as the Warren Court gave way to the Burger and Rehnquist Courts. Just how serious an intrusion is a *Terry* stop-and-frisk? What kinds of interests do citizens have in avoiding such interactions with law enforcement? What is the social cost of false positives in this context? The answers to these questions are not susceptible of simple "yes" or "no" responses and thus are inevitably a matter of degree and nuance. Nonetheless, answers to these questions necessarily inform decisions both about the scope of the doctrine and about its application in particular cases. Chief Justice Warren in *Terry* and Justice/Chief Justice Rehnquist in later cases demonstrated profoundly different intuitions about the seriousness of *Terry*-type intrusions. Rehnquist's opinions illustrate his generally far more dismissive view—a view that emerges from an in-depth consideration of Rehnquist's treatment of the issue of "intrusiveness," both in the abstract and in the

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[17] *Terry*, 392 U.S. at 16.

context of his attempts to weigh and measure it in concrete fact situations.

Let us turn first to Chief Justice Warren in *Terry* itself. Warren's evaluation of the intrusiveness of the police conduct at issue is revealed both in the language that he used to describe it and in his attempt to cabin the scope of the holding in the case. In rejecting the claim that a stop-and-frisk is not a Fourth Amendment search or seizure, Warren took issue with the characterization of such an event as a "mere minor inconvenience and petty indignity."[18] Warren scoffed:

> [I]t 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 inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[19]

He later underscored the point: "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[20] Moreover, Warren recognized that the indignity of the stop-and-frisk might sometimes be the point of the encounter, rather than an unfortunate side effect that can be minimized or mitigated. Warren quoted then-recent scholarship on policing to the effect that some police use of stop-and-frisks is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[21]

Warren's recognition of the seriousness of the intrusion imposed by police stop-and-frisks led him to attempt to confine the holding in *Terry* to narrow bounds. In particular, Warren maintained that the case posed only the question of the legality of the "frisk" conducted by Officer McFadden—but not the question of the legality of any prior "stop" of the suspects. With some

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[18] *Id.* at 10 (internal quotation marks omitted).
[19] *Id.* at 16-17 (footnote omitted).
[20] *Id.* at 24-25.
[21] *Id.* at 14 n.11 (internal quotation marks omitted).

straining of plausibility, Warren asserted that the record in the case was unclear about whether Officer McFadden's exchange with Terry and his companions prior to frisking them constituted a restraint on their liberty amounting to a constitutional seizure.[22] This reading of the factual record allowed Warren to conclude, "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."[23] Warren wrote for an eight-to-one majority over a solo dissent by Justice Douglas, but Justices Harlan and White each wrote separate, solo concurrences urging that the power to frisk must entail the power to make a prior forcible stop to investigate certain serious crimes, such as the attempted burglary that Officer McFadden suspected in *Terry*.

Although Harlan and White's concurrences in *Terry* suggested which way the wind was already blowing with regard to the constitutionality of "stops" in addition to "frisks," it was Justice Rehnquist who wrote the first opinion for the Court explicitly making the leap. In *Adams v. Williams*,[24] the first Supreme Court decision post-*Terry* to revisit the issue of stop-and-frisks, Rehnquist wrote, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."[25] Interestingly, Rehnquist did not claim to be breaking any new ground, despite Warren's explicit reservation of exactly that question in *Terry*. Rather, Rehnquist selectively quoted and paraphrased from *Terry* to make it seem as if his assertion about investigative stops was supported by the case, sandwiching the above quote with citations from Warren's opinion.[26] He then followed the above quote with the claim that "[t]he Court recognized in *Terry* that the policeman making *a reasonable investigatory stop* should not be denied the opportunity to protect

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[22] *Id.* at 19 n.16.
[23] *Id.*
[24] 407 U.S. 143 (1972).
[25] *Id.* at 146.
[26] *See id.*

himself,"[27] when the *Terry* Court had specifically declined to decide whether investigatory stops were ever reasonable.

The ease with which Rehnquist read and extended *Terry* to authorize investigative stops as well as frisks reflected his greater comfort with *Terry*-type intrusions. To Rehnquist, police stop-and-frisks were a far cry from full-blown searches and seizures. In one of his most important post-*Terry* opinions, *Illinois v. Wardlow*,[28] then–Chief Justice Rehnquist found sufficient reasonable suspicion for a lawful *Terry* stop in an individual's "unprovoked flight" from the police in a "high crime area."[29] Rehnquist reasoned that "[t]he *Terry* stop is a far more minimal intrusion [than an arrest]"[30] and emphasized its brevity, rather than its potential for humiliation: It "simply allow[s] the officer to briefly investigate further."[31] Justice Stevens, writing for four dissenters in *Wardlow*, quoted Warren in *Terry* on the resentment that *Terry* stops are likely to provoke, noting that such a reaction is even more likely in a *Wardlow* flight scenario:

> The resentment engendered by that intrusion is aggravated, not mitigated, if the officer's entire justification for the stop is the belief that the individual is simply trying to avoid contact with the police or move from one place to another—as he or she has a right to do (and do rapidly).[32]

It was far more natural for Rehnquist to aggregate the social costs of denying police the tool of the investigatory stop-and-frisk than to aggregate the social costs of the "false positives" that *Terry*'s lowered standard of suspicion necessarily entailed. In Rehnquist's view, to restrict stop-and-frisks was to require "a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."[33] The aggregate social costs of policemen shrugging at suspected crime were obvious to Rehnquist. But aggregating the social costs of the threats to the

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[27] *Id.* (emphasis added).
[28] 528 U.S. 119 (2000).
[29] *Id.* at 124.
[30] *Id.* at 126.
[31] *Id.*
[32] *Id.* at 127 n.1 (Stevens, J., concurring in part and dissenting in part).
[33] Adams v. Williams, 407 U.S. 143, 145 (1972).

innocent of broader stop and frisk power was not so obvious. For example, in *Ybarra v. Illinois*,[34] Rehnquist dissented from the Court's holding that police officers executing a narcotics search warrant for a bar and its bartender could not also lawfully frisk the dozen patrons present in the bar without further individualized suspicion to believe that they were armed and dangerous. In Rehnquist's view, the Court should have concluded that the presence of the patrons in the bar during the execution of the warrant posed enough of a threat to the safety of the police to render them subject to frisk. Rehnquist did not answer how many people merely present at the execution of a warrant should be subject to frisk without further suspicion, content to leave that determination to the amorphous calculus of "reasonableness."[35]

Almost two decades after *Ybarra*, Rehnquist won a majority on an analogous issue, holding in *Maryland v. Wilson*[36] that police conducting lawful traffic stops could order passengers to get out of the car pending completion of the stop, without any further individualized suspicion. Rehnquist reasoned that passengers might pose a danger to the police conducting the stop, and that once the car was stopped, "the additional intrusion on the passenger is minimal."[37] In dissent, Justice Stevens questioned Rehnquist's grounds for concluding that ordering passengers out of the car would make police officers safer and noted that the sheer ubiquity of traffic stops meant that the "minimal" intrusions authorized by the majority would quickly add up:

> [C]ountless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant. In all events, the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority.[38]

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[34] 444 U.S. 85 (1979).

[35] *Id.* at 109 (Rehnquist, J., dissenting).

[36] 519 U.S. 408 (1997).

[37] *Id.* at 415.

[38] *Id.* at 419 (Stevens, J., dissenting) (footnote omitted).

The facts of *United States v. Montoya de Hernandez*[39] present a more dramatic example of the same dispute (also between Rehnquist and Stevens). In *Montoya*, customs officials stopped the respondent as she disembarked from a flight from Bogota, Columbia, to Los Angeles because they suspected her of smuggling drugs in her alimentary canal (that is, by swallowing them in balloon packets to be passed through her digestive tract). Respondent refused to submit voluntarily to an X-ray, claiming to be pregnant. In the hopes that nature would take its course and that the respondent would begin passing drugs when she defecated, the officials detained her in a small room for a period that totaled almost twenty-four hours—almost sixteen hours until the officials sought a warrant and almost eight more hours until a magistrate finally authorized a pregnancy test, X-ray, and rectal exam (because the respondent managed to resist defecating during her lengthy detention). Rehnquist wrote for the Court in upholding the detention under the Fourth Amendment, quoting his own prior opinion in *Adams v. Williams* to the effect that a police officer with suspicion less than probable cause should not be required to "shrug his shoulders and allow . . . a criminal to escape."[40] While Rehnquist did acknowledge that the "[r]espondent's detention was long, uncomfortable, indeed, humiliating,"[41] he placed the blame for it squarely on the respondent herself: "[B]oth its length and its discomfort resulted solely from the method by which *she* chose to smuggle illicit drugs into this country."[42] This claim ignores the fact that the low threshold of suspicion required for such detentions necessarily means that many *blameless* people who are not smugglers at all will be subject to the same treatment. Stevens concurred in the result because respondent had been offered but had refused the option of a voluntary X-ray examination, but he noted the fallacy of Rehnquist's argument: "[W]e must assume that a significant number of innocent persons will be required to undergo similar procedures."[43]

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[39] 473 U.S. 531 (1985).

[40] *Id.* at 544.

[41] *Id.*

[42] *Id.* (emphasis added).

[43] *Id.* at 545 (Stevens, J., concurring in the judgment).

Another airport-stop case further illustrates Rehnquist's reluctance to aggregate the burdens imposed by detentions on mere suspicion rather than probable cause. In a rare limitation on airport stops, the Court in *Florida v. Royer*[44] held that the questioning and detention of a suspect who fit a "drug courier profile" exceeded the permissible bounds of an investigative stop. Two narcotics detectives approached Royer as he sought to board a flight from Miami to New York, asked for his airline ticket and identification, and—without returning those documents—asked him to come with them to small room off the airport concourse where they brought his checked luggage without his consent and then asked for his consent to open it. Royer permitted the detectives to search his bags, both of which were found to contain marijuana. The Court rejected the government's contention that the entire interaction was consensual and held instead that Royer's detention exceeded Fourth Amendment limits (and thus that his consent was the fruit of his unlawful seizure). The plurality opinion by Justice White suggested that investigative detentions on less than probable cause generally should be no more intrusive than necessary to achieve their ends. White noted that in this case, "the officers' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases"[45] because the officers could have made clear to Royer that he was free to go (thus converting the interaction into the "consensual" encounter that the government insisted it was), or the officers could have refrained from moving Royer to a separate police room unless particular circumstances suggested such a move was warranted, or the officers could have used drug-sniffing dogs for a more expeditious investigation of the contents of Royer's luggage.[46]

Rehnquist wrote a disdainful dissent that described the plurality opinion as "meandering" and betraying "a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the

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[44] 460 U.S. 491 (1983) (plurality opinion).

[45] *Id.* at 504.

[46] *See id.* at 504-05.

vindication of the innocent."[47] Rehnquist saved special scorn, however, for the plurality's suggestion that *Terry* stops should be governed by a "least restrictive means" test. To the plurality's list of less restrictive investigative options available to the detectives in *Royer*, Rehnquist responded with a mix of exasperation and derision:

> All of this to my mind adds up to little more than saying that if my aunt were a man, she would be my uncle. The officers might have taken different steps than they did to investigate Royer, but the same may be said of virtually every investigative encounter that has more than one step to it. The question we must decide is what was *unreasonable* about the steps which *these officers* took with respect to *this* suspect . . . .[48]

By focusing on the particular investigation of Royer—which after all did yield illegal contraband—Rehnquist narrowed the frame so as to necessarily exclude all of the *future* interventions, including false positives, that his analysis would authorize.

The Rehnquist opinion that was most dismissive, by far, of the intrusiveness of police stops was Rehnquist's solo dissent in *Delaware v. Prouse*.[49] In an eight-to-one decision, the Court struck down discretionary suspicionless car stops for the purpose of performing license and registration checks. The Court, per Justice White, rested its decision on the intrusiveness of car stops and concerns about abuses of police discretion in allocating such intrusions. Car stops, observed the Court, not only "interfere with freedom of movement" and are "inconvenient" but also "may create substantial anxiety."[50] The Court noted that *non*-discretionary fixed checkpoints for such purposes do not pose the same constitutional problem, in large part because motorists will feel less singled out at checkpoints and thus find them less anxiety-producing. As the Court observed, at fixed checkpoints "the motorist can see that other vehicles are being stopped, he can see

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[47] *Id.* at 519-20 (Rehnquist, J., dissenting).
[48] *Id.* at 528-29.
[49] 440 U.S. 648 (1979).
[50] *Id.* at 657.

visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."[51]

Rehnquist's lone dissent in *Prouse* was frankly incredulous of the Court's description of a citizen's likely reaction to a police stop, putting scare quotes around the adjectives used by the majority opinion: "Because motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists."[52] Later in the opinion, Rehnquist repeated the observation with more scare quotes around the rest of the majority's descriptive adjectives: "To comply with the Fourth Amendment, the State need only subject *all* citizens to the same 'anxiety' and 'inconvenien[ce]' to which it now subjects only a few."[53] Rehnquist portrayed the Court's fairly mundane burden-sharing solution as a novel application of the adage "'misery loves company'" that Rehnquist found "'curiouser and curiouser' as one attempts to follow the Court's explanation for it."[54] Rehnquist was mystified by the idea that assuring the fair distribution of the burdens of intrusive police conduct might be part of Fourth Amendment "reasonableness." Rather, Rehnquist described the Court's concern about the distribution of police intrusions as "the most diaphanous of citizen interests."[55]

Prouse gives some sense of just how far Rehnquist would have extended police authority to stop citizens on the public streets. Further insight comes from Rehnquist's dissent from denial of certiorari in *Massachusetts v. Podgurski*.[56] In that case, the Massachusetts Supreme Judicial Court had suppressed hashish found in an occupied van because a police officer had stuck his head through the van's sliding door that was partially open (eighteen inches) based on a vague dispatcher's call to "check

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[51] *Id.*
[52] *Id.* at 664 (Rehnquist, J., dissenting).
[53] *Id.* at 666.
[54] *Id.* at 664.
[55] *Id.* at 666.
[56] 459 U.S. 1222 (1983).

[t]wo men inside a van acting suspicious."[57] The Massachusetts Court found that the officer's conduct constituted a search of the van on less than probable cause, beyond what was authorized by *Terry*. Rehnquist urged the Court to grant review to establish a sliding scale that would permit "minimal intrusions" like the one at issue *even in the absence* of the reasonable articulable suspicion called for by *Terry*.[58] In all of his Fourth Amendment opinions, Rehnquist made no secret of his preference for a general "reasonableness" inquiry rather than an inquiry restricted to consideration of the specific thresholds of "probable cause" and "reasonable suspicion." But his *Podgurski* dissent from denial is the clearest expression of both the sliding scale that Rehnquist would endorse and his generally dismissive attitude toward the "minimal" intrusiveness of much police investigatory conduct.

II. PREVENTING PERVERSE POLICE INCENTIVES

Warren's opinion in *Terry* not only underscored the seriousness of the police intrusion at issue, it also sought to limit as far as possible the license the Court's decision gave to law enforcement, most notably in Warren's ultimately failed attempt to forestall the Court's endorsement of investigatory stops on less than probable cause. Warren explicitly noted "the utility of limitations upon the *scope*, as well as the initiation, of police action as a means of constitutional regulation,"[59] and he sought to craft a doctrine that would produce "*rules* which are intelligible to the police and the public alike."[60] In contrast, in Rehnquist's post-*Terry* opinions and votes, he consistently sought to expand the discretionary license granted to law-enforcement officials, starting with investigatory stops and ultimately going much further. Moreover, Rehnquist's opinions in support of these expansions repeatedly ignored or discounted concerns about potentially perverse incentives that broader police license would create.

Most notably, in his opinion for the Court in *Adams v. Williams*, Rehnquist ignored powerful warnings about perverse

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[57] *Id.* at 1223 (Rehnquist, J., dissenting from denial of cert.) (internal quotation marks omitted).

[58] *Id.*

[59] Terry v. Ohio, 392 U.S. 1, 17 (1968) (emphasis added).

[60] *Id.* at 17 n.15 (emphasis added).

police incentives cited at length in Justice Brennan's dissent—warnings that originated from none other than Judge Henry Friendly. The case had come to the Supreme Court from the Second Circuit, and Friendly had dissented from the panel decision denying relief (and later managed to convince the en banc Second Circuit to reverse in a brief per curiam opinion).[61] Judge Friendly was one of the most respected federal judges of his era and not particularly left-leaning on criminal justice issues.[62] His dissent from the panel decision was strongly worded, expressing the "gravest hesitancy" about expanding *Terry* to allow for investigatory stops in narcotics cases.[63] Such an expansion would, in Friendly's view, allow the tail to wag the dog: "There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."[64] Moreover, Friendly was concerned about allowing an unnamed informant's tip to form the sole basis for a police officer's reasonable suspicion, rather than the direct observations of an experienced police officer, like Officer McFadden in *Terry* itself. Friendly was surprisingly frank in expressing his concerns about police perjury: It would be too easy, he observed, for an anonymous tip to be "manufactured by the officer after the event."[65] With regard to the particular facts of *Adams v. Williams*, Friendly said, "There is no . . . guarantee of a patrolling officer's veracity when he testifies to a 'tip' from an unnamed informer saying no more than that the officer will find a gun and narcotics on a man across the street, as he later does."[66] Although Brennan's dissent consisted of a brief paragraph followed by two

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[61] *See* Williams v. Adams, 436 F.2d 30 (2d Cir. 1970), *rev'd en banc*, 441 F.2d 394 (2d Cir. 1971) (per curiam).

[62] *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 181 (2012) ("Friendly did not hesitate to criticize Supreme Court decisions that he found unduly handcuffed law enforcement and imposed excessive burdens on attempts to convict the guilty.").

[63] *Williams*, 436 F.2d at 38 (Friendly, J., dissenting).

[64] *Id.*

[65] *Id.*

[66] *Id.* at 38-39 (footnote omitted). To be clear, Friendly was not accusing the officer in the case of perjury; rather, as he explained, "While the findings of the Connecticut courts and the district court preclude our holding that the unnamed informer did not exist in this case, we can take the danger of fabrication into account in framing a general rule." *Id.* at 38 n.8.

full pages of Friendly's warnings, Rehnquist did not address Friendly's concerns about police incentives at all in his opinion for the Court.

In a separate dissent in *Adams v. Williams*, Justice Marshall worried that the Court's expansion of *Terry*'s "delicate balance" would allow stops and frisks "at the whim of police officers who have only the slightest suspicion of improper conduct."[67] Marshall castigated himself for having failed earlier to see the wisdom of Justice Douglas's sole dissent in *Terry*, in which Douglas warned of "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees."[68] Marshall's grim dissent, however, was premature; in a corollary to the "false summit" that mountain climbers experience when they prematurely think they have reached the top of a mountain only to find that the peak lies further uphill, there can be experiences of "false nadir" as well. Marshall simply could not have foreseen in 1972 just how much further *Terry* would be expanded on Rehnquist's watch in ways that would create yet new incentives for police to use its license in questionable ways. Perhaps the biggest leaps that *Terr*y took with Rehnquist's approval (though he did not author the opinions) were first, its extension to authorize police "frisks" of car interiors during car stops when police have reasonable suspicion to believe that the suspect might pose a danger if permitted to reenter the vehicle,[69] and second, its extension to authorize police "frisks" of houses when police executing an arrest warrant reasonably fear the presence others in the house who might pose a danger to the police.[70] Each of these extensions posed the same tail-wagging-dog problem that Friendly flagged in *Adams v. Williams* – that car stops and warrant executions might be undertaken by police not for their own sake but in order to perform the extensive "frisks" that they permit.

In a series of Fourth Amendment decisions outside of the specific *Terry* context, Rehnquist remained impervious to the

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

[68] *Id.* at 161 (quoting Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) (internal quotation marks omitted)).

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

[70] *See* Maryland v. Buie, 494 U.S. 325 (1990).

general concern that expanded police license to search and seize would lead the police to use any such expansions beyond their intended scope. For example, in *United States v. Robinson*,[71] Rehnquist wrote for the Court authorizing police officers to conduct a full search of an arrestee's person during the course of a custodial arrest, whether or not the officers have any reason to think that they will find weapons or evidence. In *Robinson*, the arrest was for the offense of driving without a license, and the officer opened a crumpled cigarette packet found in Robinson's pocket to reveal heroin. Writing in dissent, Justice Marshall argued that custodial arrests should automatically grant the police license to conduct only a *Terry* pat-down, rather than a full search. Marshall noted that in Robinson's particular case, there were allegations in the record (unresolved by the lower court) that the officer had acted pretextually in arresting Robinson for a traffic offense. Marshall argued that such allegations raise a systemic concern: "[T]he powers granted the police in this case are strong ones, subject to potential abuse. . . . There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search."[72] In his opinion for the Court in *Robinson*, Rehnquist not only declined to address Robinson's specific allegations of pretext, but also ignored the general problem of expanded police *incentives* for pretextual action.

Similarly, a decade later in *Texas v. Brown*,[73] Rehnquist wrote for a plurality of the Court authorizing the police to seize an item in plain view upon probable cause to believe that it contained contraband, reversing the lower court's decision requiring police to "know" that an item in plain view is subject to seizure. The facts of the case involved a police officer conducting a license-and-registration check at a fixed checkpoint who saw an opaque, green party balloon knotted at the tip fall from the driver's hand to the seat beside him. Rehnquist concluded that the officer properly seized and inspected the item because the officer's expertise gave him probable cause to believe that the balloon contained narcotics. Justice Stevens, concurring in the judgment, criticized

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[71] 414 U.S. 218 (1973).

[72] *Id.* at 248 (Marshall, J., dissenting).

[73] 460 U.S. 730 (1983) (plurality).

Rehnquist's plurality opinion for failing to distinguish the issue of seizure of the balloon from the issue of its further inspection and the introduction of its contents into evidence, in light of the Court's precedents requiring judicial warrants for the opening of closed containers found in plain view.[74] Stevens worried about the incentives that a broad reading of Rehnquist's opinion would permit. He observed that in situations where "an officer who is executing a valid search for one item seizes a different item" the Court in the past had been "sensitive to the danger . . . that officers will enlarge a specific authorization . . . into the equivalent of a general warrant to rummage and seize at will."[75] Once again, Rehnquist did not feel the need to address this argument regarding police incentives in his plurality opinion.

Yet another decade later, Rehnquist dissented from an opinion for the Court in another plain view case that quoted approvingly Stevens's concerns in *Brown*. In *Minnesota v. Dickerson*,[76] the Court upheld a "plain feel" analog to the "plain view" exception to the warrant requirement, holding that the police may develop probable cause to seize an item during a *Terry* frisk if the item's feel is distinctive enough to the touch to generate a sufficient level of suspicion. However, the Court held that the facts of *Dickerson* indicated that the frisking officer had manipulated the contents of Dickerson's pocket more extensively than *Terry* permitted and affirmed the Minnesota Supreme Court's judgment that the drugs found during the search must be suppressed. In doing so, the Court quoted not only Stevens's concurrence in *Brown* but also Warren's opinion in *Terry* itself about the need to keep the legal bounds of a frisk "strictly circumscribed."[77] Rehnquist dissented on the ground that, in his view, the record was not sufficiently clear about whether the officer exceeded the lawful bounds of a *Terry* frisk, and therefore a remand for further fact-finding was more appropriate than an affirmance of the suppression order.[78] Once again, no comment

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[74] *Id.* at 747 (Stevens, J., concurring in the judgment).

[75] *Id.* at 748.

[76] 508 U.S. 366 (1993).

[77] *Id.* at 378 (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968) (internal quotation marks omitted)).

[78] *Id.* at 383 (Rehnquist, C.J., concurring in part and dissenting in part).

from Rehnquist about the need to address perverse police incentives.

Rehnquist's insouciance about expanded police discretion is most apparent in the traffic stop context. In *Prouse*, Rehnquist, alone on the Court, would have been willing to uphold discretionary license-and-registration checks of motorists without any individualized suspicion at all. In his *Prouse* dissent, Rehnquist finally did address directly the issue of potential police abuse of such broad discretion, as this concern was the focal point of the majority opinion. Rehnquist started with a burden-shifting argument to the effect that those raising concerns about police abuse of discretion should bear the burden of proving the validity of such concerns because "state acts are accompanied by a presumption of validity until shown otherwise."[79] Applying this presumption to the discretionary license-and-registration checks at issue in *Prouse* itself, Rehnquist observed: "Although a system of discretionary stops could conceivably be abused, the record before us contains no showing that such abuse is probable or even likely."[80] However, less than two decades later, when the petitioners in *Whren v. United States*[81] attempted to show that their stop for a civil traffic violation was in fact a pretextual, race-based stop to look for drugs, Rehnquist joined the Court in holding such concerns outside of the scope of the Fourth Amendment.[82] The very next Term after *Whren*, Rehnquist wrote for the Court in *Maryland v. Wilson*[83] and extended police authority during traffic stops to order passengers, as well as drivers, out of cars. Justice Kennedy noted in dissent that *Whren* had removed any constraint on police abuse of the new power granted in *Wilson*, concluding that the two decisions together "put[] tens of millions of passengers at risk of arbitrary control by the police."[84]

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[79] Delaware v. Prouse, 440 U.S. 648, 667 (1979) (Rehnquist, J., dissenting).

[80] *Id.*

[81] 517 U.S. 806 (1996).

[82] *Id.* at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

[83] 519 U.S. 408 (1997).

[84] *Id.* at 423 (Kennedy, J., dissenting).

Interestingly, it is in the traffic context that Rehnquist was *most* willing to extend police authority, even though it is exactly that context in which police discretion is *least* cabined. As Bill Stuntz bluntly observed, because traffic laws are defined to include "thoroughly ordinary behavior like driving a few miles per hour over the speed limit," the police have the power to "stop anyone, anytime, for any reason."[85] Despite this breadth of authority, Rehnquist remained decidedly hostile to all potential modes of controlling potential abuses of discretion. In his dissent in *Prouse*, Rehnquist seemed genuinely mystified by the Court's preference for fixed checkpoints to stop all motorists over discretionary stops by police patrols. Yet, fixed checkpoints bring to bear two powerful limits on unbridled discretion. First, burden sharing: If the whole community has to share the burden of law enforcement practices, there will be a *political* check on police abuses.[86] Second, scarcity: Stopping all motorists is expensive, and thus, abuse of fixed checkpoints is subject to *resource* constraints. Of course, one could always dispense with such oblique forms of regulation and allow direct litigation about police abuses in individual cases. Yet Rehnquist voted with the Court in *Whren* against making claims of pretextual, discriminatory law enforcement cognizable under the Fourth Amendment. It is fair to say that the need to curb perverse police incentives created by expansive Fourth Amendment license simply did not make it onto Rehnquist's radar screen—not even as part of the freewheeling "reasonableness" inquiry favored by Rehnquist in Fourth Amendment cases.

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[85] William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853-54 (2001). *See generally* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497 (2007) (arguing that the degree of discretion delegated to law enforcement through specific laws in the traffic context is as great as has ever been accomplished through vague laws, and specificity does not constrain discretion unless judicial limits are placed either on the scope of activities that may be criminalized or on police authority to enforce the laws).

[86] *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 209 (1998) (promoting "community burden sharing" as a check on police abuse).

III. ADDRESSING RACIAL DISPARITIES IN LAW ENFORCEMENT

Writing in *Terry* in the flashpoint year of 1968, Warren was exquisitely sensitive to the issue of racial discrimination in law enforcement. Warren acknowledged concerns about the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,"[87] though he expressed skepticism that the exclusionary rule could provide more than a "futile protest" against such practices.[88] Warren cited extensively from the *President's Commission on Law Enforcement and Administration of Justice Task Force Report* on the police, noting the "friction" caused by aggressive police field interrogations and acknowledging the role of frisks as "a severely exacerbating factor in police-community tensions."[89] Warren sought to fire a shot across the bow, at least rhetorically, with regard to the "wholesale harassment" of which minority communities complained:

> Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.[90]

Warren's rhetoric may well have been in response to Justice Brennan's urging. In his extensive correspondence with Warren over the drafting of *Terry*, Brennan worried about unleashing police tactics that would "aggravate the already white heat resentment of ghetto Negroes against the police."[91] Consequently,

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[87] Terry v. Ohio, 392 U.S. 1, 14 (1968).

[88] *Id.* at 15 (concluding that the exclusionary rule could never effectively control police harassment because many police encounters are initiated for purposes unrelated to the prosecution of crime).

[89] *Id.* at 14 n.11.

[90] *Id.* at 15.

[91] *See* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 826 (1998) (quoting Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren 2 (Mar. 14, 1968), *available in* William J. Brennan, Jr. Papers, cont. 171, Manuscript Division, Library of Congress).

Brennan exhorted Warren to pay close attention to the wording of the decision, because "the tone of our opinion may be even more important than what we say."[92]

Rehnquist's post-*Terry* opinions did not display the same rhetorical care with regard to questions of race or ethnicity. Rehnquist joined, though he did not author, the only two decisions of the Court allowing overt considerations of ethnicity under the Fourth Amendment, both of which involved border stops. In *United States v. Brignoni-Ponce*,[93] the Court allowed apparent Mexican ancestry to be a relevant—but not the only—factor for the purposes of establishing reasonable suspicion under *Terry* for motorist stops near the Mexican border by roving border patrol agents. In *United States v. Martinez-Fuerte*,[94] the Court went further, allowing officials to have discretion to refer some motorists stopped at fixed checkpoints near the Mexican border to a secondary inspection area, even if such referrals were made "largely on the basis of apparent Mexican ancestry."[95] Rehnquist was less than meticulous in his paraphrasing of the Court's *Martinez-Fuerte* holding almost a decade later. In *United States v. Montoya de Hernandez*,[96] upholding the almost twenty-four-hour detention of a suspected balloon-swallowing international drug smuggler, Rehnquist described the special latitude given to border security and described the holding of *Martinez-Fuerte* as follows: "Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity."[97] Actually, the opinion for the Court in *Martinez-Fuerte* stressed that the initial checkpoint stop was of *all* motorists and thus partook of the reassuring features that the Court had stressed, over Rehnquist's dissent, in *Prouse*.[98] Because the "*extra* element of intrusiveness" in being referred to a

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[92] *Id.*

[93] 422 U.S. 873 (1975).

[94] 428 U.S. 543 (1976).

[95] *Id.* at 563.

[96] 473 U.S. 531 (1985).

[97] *Id.* at 538.

[98] *Martinez-Fuerte*, 428 U.S. at 558 ("At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." (quoting United States v. Ortiz, 422 U.S. 891, 894-95 (1975) (internal quotation marks omitted)).

secondary inspection area was "minimal," the Court upheld the discretion of checkpoint officials to make such referrals, even on the basis of ethnicity.[99] This more careful holding is not exactly the same as Rehnquist's more expansive version, in which the initial checkpoint stop itself could turn on motorists' ethnicity.

With regard to race, as opposed to ethnicity, Rehnquist also declined to tread as carefully as Warren. In *United States v. Sokolow*,[100] Rehnquist wrote for the Court upholding the use of a "drug courier profile" to support reasonable suspicion for a *Terry* stop of an air traveler. The DEA agents who stopped Sokolow explained that their observations of him matched a DEA profile for drug couriers. Rehnquist held that the agents' observations did indeed generate sufficient reasonable suspicion to stop Sokolow, and that the fact that their observations matched a profile did not "detract from their evidentiary significance."[101] The agents testified to such relevant (if underwhelming) facts as Sokolow's purchase of his expensive tickets with cash, his travel to a city that served as a source for drugs, and his brief stay in that city. But the agents also testified, more oddly, to Sokolow's attire—namely, his black jumpsuit and gold jewelry. This piece of the "drug courier profile" had drawn fire from Judge Norris in the Ninth Circuit, who blasted as "offensive" the "sociological assumptions" embedded in such an inference.[102] Despite this vigorous challenge from the lower court, Rehnquist blandly recited, more than once, Sokolow's sartorial choices without further comment about whether (or why) they formed a legitimate part of the agents' reasonable suspicion. On this point, Justice Marshall's dissent echoed Judge Norris, lambasting Rehnquist's opinion for its "repeated and unexplained allusions to Sokolow's style of dress."[103] While *Sokolow* was not itself a race case—there is no indication that Sokolow was black, nor did Norris or Marshall speak explicitly about race—Sokolow's "style of dress" undoubtedly called to mind widely held stereotypes about drug

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[99] *Id.* at 560 (emphasis added).

[100] 490 U.S. 1 (1989).

[101] *Id.* at 10.

[102] United States v. Sokolow, 808 F.2d 1366, 1370 (9th Cir.), *amended by* 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989).

[103] *Sokolow*, 490 U.S. at 16 (Marshall, J., dissenting).

dealers in inner-city, black communities. Indeed, the year before *Sokolow* was decided in the Supreme Court, a film parodying the "blaxploitation" films of the 1970s played off of the stereotyped connection between (black) drug dealers and gold jewelry: The plot of *I'm Gonna Git You Sucka* revolved around the (black) protagonist seeking revenge on a (black) local crime lord for the death of his brother caused by an overdose of gold chains.[104]

Rehnquist's unwillingness to address the topic of race in his post-*Terry* opinions was most apparent and most important in his decision for the Court in *Wardlow*, holding that an individual's flight from the police in a high crime area sufficed to establish reasonable suspicion for a *Terry* stop.[105] Unlike *Sokolow*, there can be no denying that *Wardlow* was a race case. Both Wardlow and the state of Illinois directly addressed race in their briefs before the Court, and the NAACP Legal Defense Fund (LDF) filed an *amicus* brief explaining the racial significance of the issue before the Court: "The weakening of the *Terry* standard prayed for by Petitioners here would deal a serious blow to the efforts of the Legal Defense Fund and other civil rights organization to eradicate race-based police practices . . . ."[106]

The *Wardlow* case implicated race in two distinct ways. First, counsel for Wardlow, along with the LDF and the American Civil Liberties Union (ACLU), argued that the use of flight from the police to sustain reasonable suspicion is unwarranted because innocent members of minority groups are likely to flee the police to avoid police harassment, not because they are guilty of criminal wrongdoing.[107] Their briefs echoed and supplemented Warren's opinion for the Court in *Terry* in documenting the problem of

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[104] *See* I'M GONNA GIT YOU SUCKA (Front Films 1988) (written by, directed by, and starring Keenen Ivory Wayans). The initial DVD release was in 2001; MGM re-released it in 2010. *See* IMDB, I'M GONNA GIT YOU SUCKA (1998), Company Credits, http://www.imdb.com/title/tt0095348/companycredits (last visited Jan. 22, 2013).

[105] Illinois v. Wardlow, 528 U.S. 119 (2000).

[106] Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent at 2, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 606996 at *2.

[107] *See* Brief for Respondent at 9, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 607000 at *15 n.10; Brief for the NAACP Legal Defense & Educational Fund, Inc., *supra* note 106, at 8-21; Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondent at 24, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 590721 at *20-24.

police harassment of minorities on the street. Justice Stevens's dissent for four members of the Court extensively cited this documentation of police harassment, including Warren's opinion in *Terry*,[108] concluding that:

> [T]he evidence supporting the reasonableness of these beliefs [that contact with the police can be dangerous even to the innocent, especially for minorities and those residing in high crime areas] is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.[109]

Second, reliance on the fact that the stop in *Wardlow* took place in a "high crime area" raised the concern that the case would authorize especially aggressive policing in minority communities, which are often plagued by elevated crime rates. As counsel for Wardlow argued to the Court, reference to an area's "high" rate of crime can easily serve as a "façade[]" or "prox[y]" for race.[110] Moreover, as Justice Stevens noted in dissent, "because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so."[111]

To all of these concerns about the racial implications of the holding in *Wardlow*, Rehnquist responded with—utter silence. He acknowledged that "[r]espondent and *amici* also argue that there are innocent reasons for flight from police," but failed to engage on the key point regarding the prevalence of police harassment in "high crime" minority neighborhoods.[112] One can read the majority opinion from beginning to end without receiving any inkling that the issues it addressed were thought to have profound implications for police-citizen relations in minority communities,

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[108] Wardlow, 528 U.S. at 132 n.7 (Stevens, J., concurring in part and dissenting in part) (quoting the President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Police, on "abusive" police practices and "friction" between minorities and the police) (citing *Terry*).

[109] *Id.* at 133-34.

[110] Brief for Respondent, *supra* note 107, at 37.

[111] *Wardlow*, 528 U.S. at 139 (Stevens, J., concurring in part and dissenting in part).

[112] *Id.* at 125 (majority opinion).

both by the major civil rights organizations that wrote as *amici* and by the four dissenting Justices. While both Warren's opinion in *Terry* and Rehnquist's opinion in *Wardlow* broke significant new ground in terms of authorizing police conduct that had previously been prevalent but constitutionally questionable, their respective acknowledgment and concern about the potential racial implications of their holdings could not have been more different.

IV. REHNQUIST'S POST-*TERRY* LEGACY IN NEW YORK CITY TODAY

Comparing Rehnquist's post-*Terry* cases to Warren's opinion in *Terry* itself is more than an exercise in Supreme Court "inside baseball." Rather, such a comparison suggests that there have been numerous roads not taken in the aftermath of *Terry*—including paths that might have regulated much more strictly the stop-and-frisk power, especially with regard to preventing police abuses and discriminatory applications. The controversy over New York City's current stop-and-frisk practices illustrates how the trajectory *Terry* has followed since 1968 has mattered in shaping policy. In particular, each of the differences between the perspectives of Warren and Rehnquist elaborated above are implicated in the debate over the legality and wisdom of the NYPD's stop-and-frisk practices.

Intrusiveness: One of the most common and passionate modes of critique of the NYPD's stop-and-frisk practices is the first-person narrative of the experience of humiliating intrusion. Of course, some of these narratives complain of abuses that clearly fall outside of the realm of authorized police conduct. But many such narratives simply flesh out what stop-and-frisks of the everyday type feel like, especially to residents of neighborhoods that are subject to a high volume of such police conduct. As one *New York Times* reporter describes the current practice, based on recent interviews with New York City residents, "Most of the time, the officers swoop in, hornetlike, with a command to stop: 'Yo! You, come here. Get against the wall.'"[113] Many of those stopped described aggressive or hostile attitudes by the police. "'They talk

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[113] Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. TIMES, June 27, 2012, at A1.

to you like you're ignorant, like you're an animal,'" said one young man in Brooklyn.[114] A teenager in Queens said, "'They curse at us. They treat us like we killed somebody.'"[115] Even when the police were more polite, those who were stopped described feeling harassed.[116] Moreover, many of those interviewed "believed that officers had stopped them because of race—and race alone."[117] These experiences have led some to explain that they would not willingly cooperate with law enforcement.[118] Such responses are consistent with a growing body of literature that suggests that not only cooperation with law enforcement, but also compliance with legal norms, is influenced by perceptions of the fairness of law enforcement.[119]

Taking seriously the intrusiveness of *Terry* stop-and-frisks and their potential impact both on cooperation with law enforcement and compliance with legal norms might well have led to much more stringent limitation on its use. In particular, Warren's hesitancy to extend *Terry* to authorize investigatory detentions, Judge Friendly's warnings against using such detentions in narcotics cases and permitting unnamed informants to provide the basis for reasonable suspicion, and the *Wardlow* dissenters' concerns about the use of flight in high crime areas to authorize stop-and-frisks might have been heeded had the post-*Terry* Court been operating with a different balance of intrusiveness vs. law enforcement necessity in mind.

Incentives: The debate about incentives in the *Terry* context has involved two primary concerns—the fear that law enforcement officials will push any license to (or past) the limits of its logic, and

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114 *Id.*

115 *Id.*

116 *Id. See also* Richard F., *On the Corner*, *in* 12 ANGRY MEN: TRUE STORIES OF BEING A BLACK MAN IN AMERICA TODAY 55, 55-60 (Gregory S. Parks & Matthew W. Hughey ed., 2010) (describing the experience of frequent stop-and-frisks in East Harlem in New York City).

117 Ruderman, *supra* note 111.

118 *See id.* (reporting that one interviewee said that he and other neighborhood teenagers had become so bitter that even if they had information about a crime, they would not share it with the police); Richard F., *supra* note 116, at 59 ("I really don't trust [the police] at all. If I got robbed walking down the street, I would never think to call the police.").

119 *See, e.g.*, Symposium, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123 (2008).

the fear that broad license to stop-and-frisk will be used pretextually and discriminatorily. Both of these concerns are validated by New York City's stop-and-frisk experience. Perhaps the most striking feature of the NYPD's recent stop-and-frisk practices is the sheer enormity of the increase in the use of stops in the recent past. From 2002 to 2011, the number of stops made by the NYPD grew from just under 100,000 per year to just under 700,000 per year—a seven-fold increase in less than a decade.[120] The apparent elasticity of the number of stop-and-frisks that are considered legal and appropriate by the NYPD underscores the concern that law enforcement officials will push their constitutional authorization to its outside bounds, and even beyond. Tellingly, in Jeffrey Fagan's recent study of five years of police reports filed in New York stop-and-frisks, officers checked the box corresponding to "high crime area" in approximately fifty-five percent of all stops, regardless of whether the stop took place in a precinct or census tract with average, high, or low crime.[121] This practice suggests that some members of the NYPD may be pushing the license granted in *Wardlow* to make more stops in high crime areas well beyond any appropriate bounds. As for incentives to use broad discretion pretextually and discriminatorily, those concerns lie at the heart of the pending class action against the city.[122]

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[120] *See Stop-and-Frisk 2011*, *supra* note 3, at 3.

[121] *See* Floyd v. City of New York, 861 F. Supp. 2d 274, 284 (S.D.N.Y. 2012) (citing Fagan's proposed expert testimony).

[122] The judge presiding over the pending *Floyd* class action recently decided a smaller, related class-action suit alleging constitutional violations by the NYPD in performing stops without the requisite reasonable suspicion pursuant to New York City's Trespass Affidavit Program (TAP), which authorizes police officers to patrol in thousands of private apartment complexes around the city (a program formerly known in the Bronx as Operation Clean Halls). *See* Ligon, et al. v. City of New York, 12 Civ. 2274 (SAS), at 7 (S.D. N.Y. Jan. 8, 2013), *available at* http://www.nyclu.org/files/releases/CleanHallsRuling_1.8.13.pdf. The court ruled in favor of the plaintiffs, finding that "while it may be difficult to say where, precisely, to draw the line between constitutional and unconstitutional police encounters, such a line exists, and the NYPD has systematically crossed it when making trespass stops outside TAP buildings in the Bronx." *Id.* at 10. The court held that its remedial ruling would be consolidated with the remedial portion of the larger *Floyd* class action litigation, which challenges the NYPD's entire stop-and-frisk program, after a determination on the merits of the liability question in *Floyd*. *Id.* at 144-45.

Race: The pending class action and the recent protest march with which this Article began were animated by the widespread perception—supported both by raw data and by the more sophisticated analysis of that data by Jeffrey Fagan—that the NYPD is targeting racial minorities in its use of the stop-and-frisk power. In *Terry*, Warren insisted that the remedy of evidentiary exclusion must remain available for "overbearing or harassing" police activity.[123] However, with Rehnquist's approval, *Whren* precluded a Fourth Amendment exclusion remedy for pretextual searches and seizures based on race, leaving a civil rights suit as the only constitutional remedy for such abuses. Although the pending class-action suit cannot change the nature and scope of the constitutional license granted by the Supreme Court, it can change the way in which that license is implemented by the NYPD—by the court's judgment in the case or by negotiated consent decree. The ongoing litigation thus may yield a verdict not only on the persuasiveness of the evidence of racial discrimination with regard to the NYPD's stop-and-frisk practices but also (if such evidence is found) on the efficacy of the structure of constitutional remedies fashioned by the post-*Terry* Court.

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Nothing in the foregoing is meant to suggest that the post-*Terry* expansions sanctioned by Rehnquist constitutionally authorize the current NYPD stop-and-frisk practices; that, after all, is exactly what the pending class action is meant to determine. Rather, the tension between Warren's perspective in *Terry* and Rehnquist's perspective in his post-*Terry* cases is reflected in the current debates about the legality and wisdom of the NYPD's practices. Moreover, that tension helps to illuminate the range of potential constitutional constraints on the stop-and-frisk power that have been largely neglected or abandoned as Rehnquist's perspective has triumphed over Warren's. Rehnquist's triumph has not been complete, as even he found himself in the dissent at times along the way. However, on the key issues canvassed above,

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[123] *See* Terry v. Ohio, 392 U.S. 1, 15 (1968) ("When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.").

the weight of the Court's authority swung much farther in Rehnquist's direction than Warren's. Thus, it is only fair to conclude that current stop-and-frisk practices are the legacy of Rehnquist's Promethean *Terry*, much more than Warren's "bounded" version.