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COMMENT

ILLINOIS V. WARDLOW: THE SUPREME COURT DODGES THE RACE BULLET IN FOURTH AMENDMENT *TERRY* STOPS

INTRODUCTION

This comment analyzes the Supreme Court case *Illinois v. Wardlow*,[1] which applies the reasonable suspicion standard for investigative stops initially established in *Terry v. Ohio*.[2] Although the decisions are separated by more than thirty years, during which the Court has had the benefit of jurisprudential discourse[3] and social science research[4]

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1. 120 S. Ct. 673 (2000).

2. 392 U.S. 1 (1968).

3. *See, e.g.*, Honorable Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 617-18 (1999) ("Whether the impact of racial profiling is real or perceived, damaging or benign, underreported or overblown, it remains a public policy concern that must be confronted, both in the federal and state courts ... state courts must recognize that resolution of the problem in the context of equal protection may only be theoretical. Furthermore, even if the matter can be addressed under the Equal Protection Clause, a resolution may be neither swift nor effective."); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can The Police Go?*, 72-APR N.Y. ST. B. J. 42, 44 (2000) ("courts should take a very hard look at the government's justification for its actions. There is no place in constitutional law or criminal justice for a theory of "reasonable" racial discrimination."); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 325 (1999) ("we must strive to avoid police practices that impose high costs on law abiding citizens, and that skew those costs heavily on the basis of race"); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 1023 (1998) ("Courts must consider the facts in each case, not simple assertions that any time a person is suspected of crime X, they are always likely to be armed. Using categorical judgments robs *Terry* of its legitimacy. Without such a correction, *Terry* will continue to become what the Supreme Court still says it is not--pure and simple, a device for stopping people about whom officers have a hunch, perhaps with a racial cast, and searching them for evidence. And at that point, we will be right back where we started--in 1960, before *Mapp*, in the time of 'giving 'em a toss.'").

4. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 984 (1999) (discussing that the "five essential goals of human organization" will often lead to biased or discriminatory opinions about race). In notes 152, 160, and 167, Thompson cites additional social science approaches to this issue. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 99 (1993) ("recounting story of black man stopped by police while strolling in white neighborhood because he was 'incongruous in [his] surroundings' and thus suspicious"); SHELLEY E. TAYLOR, A CATEGORIZATION APPROACH TO STEREOTYPING, IN COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR, 83, 84-86 (David L. Hamilton ed., 1981); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping*

concerning the impact of race on investigative stops, the Court has refused to change how it analyzes such stops justified by reasonable suspicion. Simply stated, the majority of the Court has not reflected on how race can undermine the reasonable suspicion standard in *Terry* stops despite evidence that it can be a substantial, albeit an often hidden, reason for the stop. Race can affect *Terry* stops by both influencing how a detainee reacts to the police and contributing to the reason why the police decide to make the stop.[5]

Because of the Court's reticence to discuss how race could factor into an officer's judgment when observing a suspect, it is not surprising that the outcomes of *Wardlow* and *Terry* are similar. In fact, the Court has effectively precluded Fourth Amendment relief for police action influenced by race. *Whren v. United States*[6] held that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[7] A remedy sought under the Equal Protection Clause, however, presents practically insurmountable obstacles to a minority who has been improperly detained. For an equal protection claim, a suspect must show that "the law enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose."[8] As one commentator stated, "short of an admission by the police officer or similarly incriminating physical evidence, a [detainee cannot] prove that race served as the only reason or the primary reason for the stop."[9]

While the Court has practically foreclosed minorities from alleging racial bias in *Terry* stops, distrust of the police by inner city, minority populations has only seemed to increase. A training model developed for social workers illustrates this point well.[10] In the model, individuals are audibly presented four scenarios and asked to arrange them in the order in which they occurred.[11] The first scenario depicts a man climbing out of a window.[12] The second picture includes the same man running down

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of Blacks, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595-97 (1976) ("discussing psychological research revealing common stereotype that blacks are prone to violence").

5. The *Wardlow* dissent recognizes the first of these propositions. As Justice Stevens stated, the "accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion'" is inaccurate in light of current tensions between the police and minorities who reside in high crime areas. *Wardlow*, 120 S. Ct. at 680 (Stevens, J., dissenting).

6. 517 U.S. 806 (1996).

7. *Whren*, 517 U.S. at 813.

8. Davis, *supra* note 3, at 437.

9. *Id.*

10. *See* LARRY WRIGHT & CHARMAINE R. BRITTAIN, SPECIALIZED INTERVIEWING SKILLS FOR CHILD WELFARE WORKERS, U. DENV. CHILD WELFARE TRAINING AND RESEARCH PROJECT, 13 (2000).

11. *See id.*

12. *See id.*

a street.[13] The third picture depicts the man before a judge, and in the fourth picture, he is in jail.[14] Results have shown that a white respondent will often order the sequences as they are presented, one through four.[15] The rationale behind this sequential ordering is that the man was doing something wrong when he climbed out of the window and likely ran to avoid police officers who were legitimately in pursuit.[16] The man was then arrested, convicted, and incarcerated for the crime he committed.[17]

At the same time, results have also shown that a person of color would often sequence the scenarios differently.[18] A common response was to start with the man in jail.[19] He was in jail because the police pursued him and took him to court.[20] The police chased him because he was running down the street, and to justify the stop, the police later said the man was breaking into a house.[21] This training tool starkly illustrates the strained relations between minorities and law enforcement, arguably created in large part by improper racial considerations in *Terry* stops.[22] Although these studies tend to show that race is a factor that can contribute to both the reaction of the detainee to a police officer and to a police officer's suspicion in making a stop, the Court refuses to consider it in this context. Admittedly, including race in a Fourth Amendment analysis would be difficult for a court. This difficulty should not, however, preclude race from being included in a reasonable suspicion determination under the Fourth Amendment.

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13. *See id.*
14. *See id.*
15. *See id.*
16. *See* WRIGHT, *supra* note 10.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See* Illinois v. Wardlow, 120 S. Ct. 673, 680 n.7 (2000) (Stevens, J., dissenting) (citing Johnson, *Americans' View on Crime and Law Enforcement: Survey Findings,* NATIONAL INSTITUTE OF JUSTICE JOURNAL 13 (Sept.1997) (reporting that "43% of African-Americans consider 'police brutality and harassment of African-Americans a serious problem' in their own community"); Casimir, *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, MAR. 26, 1999, p. 34 ("informal survey of 100 young black and Hispanic men living in New York City; 81 reported having been stopped and frisked by police at least once; none of the 81 stops resulted in arrests."); *see also Wardlow*, 120 S. Ct. at 680 n.8 (citing Alex Kotlowitz, *Hidden CasualtiesL Drug War's Emphasis on Law Enforcement Takes a Toll on Police*, Wall St. J., Jan. 11, 1991, at A2 ("'Black leaders complained that innocent people were picked up in the drug sweeps . . . .' Many stops never lead to an arrest, which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas.")); *Id.* at 681 n.9 ("the Chief of the Washington, D.C., Metropolitan Police department, for example, confirmed that 'sizeable percentages of Americans today – especially Americans of color – still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day-to-day application.").

Part I of this comment is a brief discussion of the Fourth Amendment, the historical *Terry* decision, and the more recent search and seizure case *Whren v. United States*.[23] The reader will note that prior to *Whren,* the topic of race is noticeably absent from this section, and for good reason: the Court does not address race in the context of the Fourth Amendment. Part II presents the reasoning of the Court in *Wardlow,* and discusses the part concurrence and part dissent by Justices Stevens, Souter, Ginsburg, and Breyer. Part III is a critical analysis of *Wardlow*, in which the Court adheres to the *Whren* holding and refuses to consider race in its Fourth Amendment analysis. This article maintains that by applying an analysis similar to the totality of the circumstances test as suggested by Justice Stevens in his dissent, courts can effectively consider race more explicitly. Finally, Part IV concludes that until courts consider race as a pertinent factor in Fourth Amendment analysis, the government will continue to prevail on the majority of the claims that contest frivolous stops based on the lenient *Terry* standard.[24]

I. BACKGROUND

A. *The Reasonableness Clause and the Fourth Amendment*

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[25]

Historically, momentum in support of the Fourth Amendment stemmed from the use of writs of assistance in the colonies before the American Revolution.[26] The writs were a prevailing legal practice in England that authorized the British "examination of suspected ships and vessels, vaults, cellars, warehouses or other places in which might be

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23. 517 U.S. 806, 808 (1996) (in which the Court considered "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.").

24. *See* George C. Thomas III, *Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 ST. JOHN'S L. REV. 1025, 1029 (1998) (addressing a random sample of criminal cases involving reasonable suspicion and determining that the government prevails 72% of these cases).

25. U.S. CONST. amend. IV.

26. *See* EDWARD C. FISHER, SEARCH AND SEIZURE 4 (1970).

found smuggled goods or those on which the required duties had not been paid."[27] These warrants, oftentimes exercised with discretion, significantly contributed to colonist dissatisfaction that culminated in the Revolutionary War.[28] In drafting the Bill of Rights, enacted in 1789, the republic's founders intended in part to ensure that private citizens would be free from this or any other kind of unwarranted governmental intrusion.[29]

No statutes exist to guide judges and juries through the process of deciding whether law enforcement officers obtained information in compliance with a suspect's Fourth Amendment rights.[30] Instead, the Fourth Amendment itself is the "ultimate yardstick," and judges must turn to the court's prior decisions that interpret it.[31] Like much of the language of the Constitution, the "unreasonable search and seizure" clause is a vague term that courts have interpreted differently, and "[t]here is no mathematical test for determining reasonableness other than balancing the need to arrest or search against the invasion that is entailed."[32]

To further complicate a court's analysis of Fourth Amendment violations, a judicially created doctrine known as the exclusionary rule prevents a court from considering evidence if the evidence was seized in violation of the Fourth Amendment.[33] Commentators have criticized the doctrine because it is not included in the language of the Amendment, and at one point the Supreme Court nearly repudiated it in *Adams v. New York*.[34] The rule was reaffirmed soon after the *Adams* decision, however,[35] and it continues to be a method to exclude evidence, regard-

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27. *Id.*

28. *See* LAWRENCE C. WADDINGTON, ARREST, SEARCH, AND SEIZURE 1 (1974).

29. *See* J. DAVID HIRSCHEL, FOURTH AMENDMENT RIGHTS 1 (1979).

30. *See* WADDINGTON, *supra* note 28, at 1.

31. *Id.*

32. *Id.* at 8.

33. *See* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 55 (2000 ed.).

34. 192 U.S. 585, 595 (1904).

35. *See* Weeks v. United States, 232 U.S. 383, 391-93 (1914) ("The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by

less of the evidence's relevance or materiality.[36] Chief Justice Warren explained the policy rationale of the exclusionary rule in *Terry*, stating that it "has been recognized as a principal mode of discouraging lawless police conduct."[37] Additionally, "without [the rule] the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'"[38] Thus, reinforced by the judicial acceptance of the exclusionary rule, the Fourth Amendment guarantees private citizens a right to privacy against unreasonable or unwarranted actions by government officers.[39]

B. *A Precursor to* Terry

Every state has its own constitutional provision relating to search and seizure that provides the same guarantee discussed above.[40] Nearly twenty years before deciding *Terry*, the Supreme Court determined that search and seizure provisions apply to actions of state law enforcement officials as well as federal officers.[41] In *Wolf v. Colorado*,[42] the Court held that although "the Fourth Amendment did not *per se* apply to state action, nevertheless search and seizure is a matter implicit in the modern concept of due process of law, guaranteed to every person by the Fourteenth Amendment . . . ."[43] The Court reasoned that

> The security of one's privacy against arbitrary intrusion by the police–which is at the core of the Fourth Amendment–is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prel-

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the sacrifice of those great principles established be [sic] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.").

36. *See* WADDINGTON, *supra* note 28, at 3; *see also* Elkins v. United States, 364 U.S. 206, 210 (1960). "To the exclusionary rule of *Weeks v. United States* there has been unquestioning adherence for now almost half a century." *Id.* (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Gouled v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1921); Agnello v. United States, 269 U.S. 20 (1925); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Grau v. United States, 287 U.S. 124 (1932); McDonald v. United States, 335 U.S. 451 (1948); United States v. Jeffers, 342 U.S. 48 (1951)).

37. Terry v. Ohio, 392 U.S. 1, 12 (1968) (citing Weeks v. United States, 232 U.S. 383, 391-93 (1914)).

38. *Terry*, 392 U.S. at 13 (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

39. *See* FISHER, *supra* note 26, at 11.

40. *See id.* at 8.

41. *See id.* at 9.

42. 338 U.S. 25 (1949).

43. FISHER, *supra* note 26, at 9. The Fourteenth Amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

> ude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
>
> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.[44]

After extending the protection of constitutional provisions in cases involving state as well as federal action, the Court was confronted with issues of warrantless searches and seizures. In *Beck v. Ohio*,[45] the petitioner (Beck) was driving when he was stopped by police officers.[46] Without a search warrant or an arrest warrant, the officers arrested Beck and searched his car.[47] Finding nothing, the officers took him to the police station and searched him.[48] They found some clearing house slips in an envelope that Beck had tucked into his sock.[49] He was charged with possession of the slips in violation of a state criminal statute.[50]

Beck argued that the evidence should have been excluded because the police had obtained it through an unreasonable search and seizure that violated his constitutional rights.[51] The trial court overruled the motion to suppress, and both the Ohio Court of Appeals and the Ohio Supreme Court affirmed his conviction.[52] The Supreme Court granted certiorari to determine whether the arresting officers had probable cause to conduct the arrest, and whether a warrantless arrest was constitutionally valid.[53] Upon review, the Court concluded that Beck's arrest could not "be squared with the demands of the Fourth and Fourteenth Amendments."[54]

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44. *Wolf*, 338 U.S. at 27-28.
45. 379 U.S. 89 (1964).
46. *See Beck*, 379 U.S. at 89-90.
47. *See id.* at 90.
48. *See id.*
49. *See id.*
50. *See id.* (charging Beck for possession of "numbers game" ticket in violation of a statute that stated: "No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state." OHIO REV. CODE, § 2915.111 (Anderson 1972)).
51. *See Beck*, 379 U.S. at 90.
52. *See id.*
53. *See id.* at 90-91.
54. *Id.* at 93.

In its analysis, the Court noted that the trial court was informed of two facts: "the officers knew what the petitioner looked like and knew that he had a previous record of arrests . . . . [b]ut to hold knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will."[55] Furthermore, the Court warned of the dangers of a warrantless arrest, stating that "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[56]

Probable cause, the court noted, "is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests,"[57] because to require more of officers would "unduly hamper" their efforts.[58] At the same time, requiring less would "leave law-abiding citizens at the mercy of the officers' whim or caprice."[59] Pursuant to the probable cause standard, although the officers may well have acted on good faith in stopping and arresting the petitioner, "good faith on the part of the arresting officers is not enough."[60] If good faith was the applicable test, the Court concluded that "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[61] Accordingly, Beck prevailed on his claim that his rights had been violated because officers had unjustifiably intruded into his car and person.

C. *The Reasonable, Articulable-Suspicion Standard of* Terry

In *Terry v. Ohio* the Supreme Court established that reasonable suspicion, a standard short of probable cause, was enough to justify a police stop and investigation.[62] *Terry* addressed the Fourth Amendment's role in confrontations between law enforcement and private citizens.[63] In *Terry*, a plainclothes policeman with 39 years of experience observed two men on a street corner.[64] Though the officer was unable to articulate

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55. *Id.* at 96-97.
56. *Id.* at 96.
57. *Id.* at 91 (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).
58. *Id.*
59. *Id.*
60. *Id.* at 97 (citing Henry v. United States, 361 U.S. 98, 102 (1959)).
61. *Id.*
62. 392 U.S. 1 (1968).
63. *See Terry*, 392 U.S. at 4.
64. *See id.* at 5.

what exactly aroused his suspicion, he stated at trial that "when I looked over they didn't look right to me at the time."[65] He proceeded to observe one of the men walk past a store window and peer in, then walk back to the corner.[66] After a brief conference, the second man walked past the window, peered in, and returned.[67] They repeated these actions five or six times each and met up with a third man.[68] The officer suspected the men were "casing a job, a stick-up," and that "they may have a gun."[69]

After this surveillance, the officer approached them, identified himself as an officer, and when he did not recognize them he asked their names.[70] After a mumbled response, the officer grabbed Terry, spun him in the direction of his associates, and frisked the outside of Terry's clothing.[71] During the stop, the officer felt and removed handguns from two of the three men and arrested all three.[72] The police charged both Terry and his associate with carrying concealed weapons.[73] The officer later testified that he had not placed his hands beneath either defendant's clothing until he felt the contours of a gun.[74]

The Supreme Court granted certiorari to determine whether the admissibility of the guns violated Terry's Fourth Amendment rights.[75] Chief Justice Warren noted the importance of protecting personal liberties by citing *Union Pacific Railroad Company v. Botsford*[76] to state that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[77]

The Court first discussed the "stop and frisk" rule.[78] Under suspicion that an individual may be connected with criminal activity, the Court supported the principle that the police can stop that individual and detain him or her briefly to determine if that person might be armed.[79] The minor inconvenience or embarrassment to the suspect is outweighed

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65. *Id.*
66. *See id.* at 6.
67. *See id.*
68. *See id.*
69. *Terry*, 392 U.S. at 6.
70. *See id.* at 6-7.
71. *See id.* at 7.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See Terry*, 392 U.S. at 8.
76. 141 U.S. 250, 251 (1891).
77. *Terry*, 392 U.S. at 9.
78. *Id.* at 10.
79. *See id.*

by the competing societal interest to facilitate effective and safe law enforcement by officers who act on their suspicions.[80]

The Court introduced the argument that the stop and frisk rule is a "substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'"[81] The court noted petitioner's argument that such a rule would only intensify tense relations between the police and inner-city urban communities and perpetuate a sense of distrust and invasion when officers stop citizens to determine whether they should investigate further.[82]

The Court questioned whether the officer "seized" defendant Terry and whether the officer conducted a "search" within the meaning of the Fourth Amendment.[83] The Chief Justice rejected the argument that a stop and frisk was not the same as a search and seizure:

> [i]t 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."[84]

Thus, the Court determined that "the Fourth Amendment governs all intrusions by agents of the public upon personal security . . . ."[85]

The Court then turned to analyze whether the officer's search and seizure "was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[86] Justification, pursuant to the language of the Fourth Amendment, requires probable cause. Yet the Court pointed to a reasonableness standard and stated that an officer must be able to cite "specific and articulable facts" which "reasonably warrant [an] intrusion."[87] Justified by the governmental interest in safe neighborhoods and effective crime prevention, the Court concluded that a police officer was justified

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80. *See id.* at 10-11.
81. *Id.* at 12 (citing Johnson v. United States, 333 U.S. 10, 14 (1948)).
82. *See Terry*, 392 U.S. at 12.
83. *Id.* at 16.
84. *Id.*
85. *Id.* at 19 n.15.
86. *Id.* at 20.
87. *Id.* at 21.

to investigate possible criminal activity even though he or she lacks probable cause.[88]

In deference to the safety of law enforcement, the Court inserted a reasonable suspicion test in lieu of the probable cause standard of the Fourth Amendment:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.[89]

The Court concluded that the gun seized from Terry was admissible based on the arresting officer's experience.[90] The officer had reasonable grounds to believe that Terry was armed because of observable, unusual behavior.[91] It was necessary for the officer to protect himself and the community to take action to discover whether a crime was afoot.[92] Furthermore, the search was restricted to the items the officer expected to find.[93] Such a search was reasonable, and according to the Court, it fell within the guidelines of the Fourth Amendment.[94]

As Justice White explained in *Alabama v. White*,[95] over twenty years after the *Terry* decision, reasonable suspicion is a different standard than probable cause:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.[96]

Thus, when it embraced the reasonable suspicion standard instead of probable cause as stated in the Fourth Amendment, the *Terry* Court sub-

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88. *See Terry*, 392 U.S. at 22.
89. *Id.* at 27.
90. *See id.*
91. *See id.* at 28.
92. *See id.* at 30.
93. *See Terry*, 392 U.S. at 30.
94. *See id.* at 31.
95. 496 U.S. 325 (1990).
96. *White*, 496 U.S. at 330.

stantially lowered the degree of suspicion required for police officers to stop and search a citizen.[97]

The *Terry* decision also established a reticence by courts to present the facts of cases without any mention of race.[98] This was challenged by *Whren v. United States,*[99] in which police officers pulled over and arrested two men who aroused suspicion with a variety of factors: they were young, the car had temporary plates, the driver was looking into the passenger's lap, and after seeing the officers, they turned quickly and sped away.[100] When the officers approached the car, one officer observed what looked like bags of drugs through the window.[101] Though the Court omitted defendant's race from the statement of facts, initially describing them as "youthful,"[102] defendants were eventually revealed by the Court to be black, but only when the Court rejected the argument that race should be relevant to the Fourth Amendment analysis of the case at bar.[103]

The *Whren* Court determined that defendant's admission that he committed a traffic violation furnished the requisite probable cause.[104] The appeal under the Fourth Amendment was misguided because "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[105] In other words, the Court would not consider racial motivations as factors to challenge the legitimacy of the probable cause to necessitate a stop and frisk or a search and seizure.

Thus, the *Whren* decision essentially precluded illicit racial motivation from being relevant to Fourth Amendment analysis.[106] As discussed below, the *Terry* rule is still adhered to today, and pursuant to *Whren*, race continues to be a non-issue in a Fourth Amendment analysis of investigative stops based on reasonable suspicion.

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97. *See* Stephen A. Saltzburg, *Terry and the Fourth Amendment: Marvel or Mischief? Terry v. Ohio: A Practically Perfect Doctrine,* 72 ST. JOHN'S L. REV. 911, 926 (1998).

98. *See* Thompson, *supra* note 4, at 978 (discussing a challenge to the constitutionality of a spot check of motorists without probable cause in Delaware v. Prouse, 440 U.S. 648 (1979) and whether the Fourth Amendment prohibits using deadly force against an unarmed, fleeing citizen in Tennessee v. Garner, 471 U.S. 1 (1985)).

99. 517 U.S. 806 (1996).

100. *See Whren,* 517 U.S. at 808.

101. *See id.* at 808-09.

102. *Id.* at 808.

103. *See id.* at 810-13.

104. *See id.* at 810.

105. *Id.* at 813.

106. *See* Thompson, *supra* note 4, at 981.

II. *TERRY'S* LEGACY IN *ILLINOIS V. WARDLOW*[107]

On September 9, 1995, shortly after noon, a four-car caravan of police officers drove through an area well known for crime, including drug transactions.[108] While driving, uniformed officer Nolan observed Wardlow standing next to a building, holding a bag.[109] When Wardlow saw the officers drive toward him, he turned and ran.[110] Suspicious of Wardlow's flight, Officer Nolan and his partner pursued and eventually stopped Wardlow.[111] An experienced officer, Nolan knew from practice that weapons were frequently found in the presence of drug transactions, and accordingly, Nolan frisked Wardlow.[112] During the pat down, Nolan felt a heavy object in the shape of a gun in Wardlow's bag.[113] Nolan opened the bag, found a loaded handgun, and arrested Wardlow.[114]

Wardlow filed a motion to suppress evidence of the gun because Officer Nolan did not have a reasonable, articulable suspicion to stop him.[115] The Illinois trial court denied the motion and convicted Wardlow for unlawful use of a weapon by a felon.[116] The Illinois Appellate Court agreed with Wardlow that Officer Nolan did not have reasonable suspicion to justify the stop and frisk and overturned the conviction.[117] The Illinois Supreme Court affirmed the appellate court's decision.[118] The Supreme Court granted certiorari and reversed.[119]

The Court analyzed *Wardlow* based on a standard first applied in *Terry*.[120] The *Terry* rule requires "a reasonable, articulable suspicion that criminal activity is afoot . . . [and] [w]hile 'reasonable suspicion' is a less demanding standard than probable cause,"[121] the officer must rely on more than a vague, unjustified suspicion or simply a gut-feeling about criminal activity.[122] The *Wardlow* Court held that the officers' stop and protective frisk did not violate the Fourth Amendment.[123]

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107. 120 S. Ct. 673 (2000).
108. *See Wardlow*, 120 S. Ct. at 674.
109. *See id.* at 675.
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *See Wardlow*, 120 S. Ct. at 675.
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *See Wardlow*, 120 S. Ct. at 675.
121. *Id.*
122. *See id.* at 676.
123. *See id.* at 674.

The Court initially noted that Wardlow's presence in a high crime area was not enough to support the requisite reasonable suspicion, for it was just one of the "relevant contextual considerations in a *Terry* analysis."[124] The Court also cited several cases that suggest nervous behavior can be an additional contributing factor to determine reasonable suspicion.[125] The Court characterized defendant's flight from police as nervous conduct,[126] but noted that citizens are free to conduct their business and ignore a police officer who approaches without reasonable suspicion.[127] A citizen's refusal to cooperate does not give an investigating officer the justification to stop and search.[128] Yet according to the Court's interpretation of the facts, Wardlow did not merely avoid the officers and continue about his business – instead, he fled.[129] While flight itself is not indicative of illegal behavior, it is, as the Court stated, "the consummate act of evasion . . . [and] certainly suggestive of [wrongdoing]."[130]

The Court also reasoned that it would be impossible to police effectively if "scientific certainty"[131] was required of law enforcement in order to stop someone. Simply stated, such certainty will never exist. Thus, the Court concluded, reasonable suspicion must be based on "commonsense judgments and inferences about human behavior."[132] In light of that standard, the Court held that Officer Nolan was justified in his suspicion that Wardlow was involved in illegal activity, and further investigation was legitimate.[133]

A. *Justice Stevens' Dissent: Per Se Rules, Race, and the "Totality-of-The-Circumstances Test"*

In his dissent, Justice Stevens began by commending the Court for rejecting requests by petitioner and respondent for "per se rules."[134] The State of Illinois requested a rule to authorize "the temporary detention of anyone who flees at the mere sight of a police officer."[135] Respondent

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124. *Id.* at 676.

125. *See id.* (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam); United States v. Sokolow, 490 U.S. 1, 8-9 (1989)).

126. *See Wardlow*, 120 S. Ct. at 675.

127. *See id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. *Id.*

132. *Id.* (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

133. *See Wardlow*, 120 S. Ct. at 675.

134. *Id.* at 677 (Stevens, J., dissenting).

135. *Id.*

asked for an opposite rule that a person who flees from law enforcement cannot on its face be enough to justify a *Terry* stop.[136] Justice Stevens raised the issue of what reasonable conclusions about a person's behavior could be drawn from one who flees.[137] There are a variety of reasons for flight, some evasive and criminally motivated, others legitimate and law abiding.[138] Because of these various reasons, a bright-line rule would be unworkable.[139]

Instead of a per se rule, Justice Stevens reasoned that inferences about motivation for flight could be drawn from several circumstances, including "the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person's behavior was otherwise unusual."[140] The dissent then turned to a factor not discussed by the majority: race.[141]

Justice Stevens recognized that there is sufficient evidence to indicate that some citizens, especially minorities who live in low-income areas, may have good reason to distrust the police.[142] When any contact with the police can be considered dangerous, "unprovoked flight is neither 'aberrant' nor 'abnormal.'"[143] Evidence explaining minority skepticism of police is "too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient."[144] In other words, statistics from social science studies of strained relations between police and minorities could contribute to a "commonsense conclusion . . . that unprovoked flight can occur for . . . innocent reasons."[145] Because Justice Stevens finds this type of evidence credible, his approach is inherently subjective since people will often respond to encounters with law enforcement differently. Accordingly, Justice Stevens seems to suggest that on a case-by-case basis, courts could consider the subjective, personal perceptions and responses of individuals whose seemingly suspicious behavior to police officers might be either practical and sensible or indicative of wrongdoing. Thus, because reasons for

136. *See id.*

137. *See id.* at 678.

138. *See id.* at 678-79 (listing with good humor a variety of circumstances in which a reasonable person would run, including "to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature – any of which might coincide with the arrival of an officer in the vicinity").

139. *See Wardlow*, 120 S. Ct. at 679.

140. *Id.*

141. *See id.* at 680.

142. *See id.*

143. *Id.*

144. *See id.* at 681.

145. *See Wardlow*, 120 S. Ct. at 682.

flight can be legitimate, only a consideration of the totality of the circumstances will determine the proper result.[146]

Applying the "totality-of-the-circumstances test"[147] to the facts, Justice Stevens concluded the State did not meet its burden of articulating facts to support reasonable suspicion.[148] He did so, however, without addressing race further. Instead, the dissent noted the absence of several facts from the record that could have contributed to the reasonable suspicion analysis.[149] Officer Nolan was not asked whether the other officers were in uniform, or how fast the police cars were driving.[150] Nor did the record indicate whether Wardlow noticed the other police cars or how much of the caravan had passed before he started to run.[151] The only factor that supported a finding of reasonable suspicion was the officer's statement that Wardlow "looked in our direction and began fleeing."[152] The simple fact that Wardlow was carrying a bag in a high crime area did not incriminate him.[153] Similar to unprovoked flight, "presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry."[154] Thus, the dissent concluded, the Court relied on an insufficient series of facts to conclude that Officer Nolan's stop was justified.[155]

III. ANALYSIS

Although the four-justice *Wardlow* dissent recognized that race could be considered subjectively in a reasonable suspicion *Terry* stop, this article suggests the analysis should go one step further. If there is already substantial support on the Court, represented by the four-justice dissent, to consider how a person's preconceived notions can contribute to an outwardly suspicious response to the police, why should courts not also consider the racial biases of police officers who make the stops? There is little difference between the former and the latter; simply because the race issue is politicized does not mean it should be avoided. Though Justice Stevens' dissent rightly noted that minorities often distrust police enough to modify behavior, he did not suggest that race can

146. *See id.* at 682.
147. *See id.*
148. *See id.* at 684.
149. *See id.* at 683-84.
150. *See id.*
151. *See Wardlow*, 120 S. Ct. at 684.
152. *Id.*
153. *See id.*
154. *Id.* (citing Brown v. Texas, 443 U.S. 47, 52 (1979)).
155. *See Wardlow*, 120 S. Ct. at 684.

and should be a factor separately discussed by courts to assess the legitimacy of reasonable suspicion. This article takes that position.

Ironically, some courts already recognize that reasonable suspicion should be based on the totality of the circumstances. For example, *United States v. Cortez*[156] held that a flexible standard, including certain mental inferences and judgments by trained officers, could be used to substantiate reasonable suspicion.[157] Also surprisingly, courts have previously considered race as a factor to permit officers to detain suspects.[158] Thus, because courts are already allowing officers the discretion to consider race objectively in order to detain a suspect, there is little justifiable reason why an examination of an officer's subjective motivations concerning race should be disallowed in the context of the Fourth Amendment. In such analyses, though *Whren* holds otherwise, courts should explicitly consider race in the contexts of how the character of the neighborhood affects the reactions of a detainee to police as well as how it influences a police officer's judgment in stopping an individual.

A. *The Character of the Neighborhood and Subjective Views of Detainee*

As demonstrated by *Wardlow*, courts already consider character of the neighborhood evidence in a reasonable suspicion analysis; they do so, however, in a limited context that prejudices the detainee. Courts should make a shift from allowing officers to consider the character of a neighborhood as a pretext to a stop to considering how citizens in a neighborhood see and react to the police. The former is an objective determination based on the following question: is the area known for un-

156. 449 U.S. 411 (1981).

157. *See id.* at 418.

> We have recently held that stops by the Border Patrol may be justified under circumstances less than those constituting probable cause for arrest or search. Thus, the test is not whether Officers Gray and Evans had probable cause . . . Rather the question is whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity. On this record, they could so conclude.

Id. at 421-22 (internal citation omitted).

158. *See* Davis, *supra* note 3, at 429 nn.28-9 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976) (holding that border patrol agents detaining travelers based on Mexican ancestry was not a constitutional violation); United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975) (concluding that border patrol officers can consider the race of a suspect as a factor to justify a stop); United States v. Weaver, 966 F.2d 391, 394-96 (8th Cir. 1992) (justifying the detention of a black man in an airport and holding that race, when coupled with other factors, is a basis for reasonable suspicion); State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (concluding that the ethnicity of a suspect can be considered when that individual seems "out of place" in a neighborhood); State v. Ruiz, 504 P.2d 1307, 1307-09 (Ariz. Ct. App. 1967) (holding that the police were correct to consider race when they stopped a Mexican in a predominantly black area)).

lawful activity? This can be determined by data amassed by local governments and police stations. The latter is a subjective approach: why did this individual act suspiciously in the presence of the police? As stated in the *Wardlow* dissent, either legitimate or unlawful motivations might cause an individual to flee or act outwardly guilty. Moreover, according to Justices Stevens, Souter, Ginsburg, and Breyer, distrust of law enforcement based on personal experience can be considered in the totality-of-the-circumstances test.

Presently, the courts allow the character of the neighborhood to be considered as a contributing factor to intensify an officer's suspicion. While some courts have already considered the ramifications of suspicion based on a suspect deemed out of place in a particular neighborhood,[159] courts must devise a way to prevent the risk that everyone in a poor neighborhood is "stop-eligible."[160] One way to do so is to carefully limit the use of the character of a neighborhood in this particular context. The Supreme Court has already held that the neighborhood alone cannot constitute reasonable suspicion.[161] Beyond this standard, however, courts inconsistently address how a questionable neighborhood contributes to justifying an officer's reasonable suspicion. Some courts have concluded that "a single observation of ambiguous conduct is sufficient . . . when coupled with a claim that criminal activity is prevalent in the surrounding neighborhood,"[162] while others have not. Similar behaviors in high-crime neighborhoods will often lead to different results, even though jurisdictions apply the same standard.[163]

It is obvious, however, that character of a neighborhood should be a factor to a police officer's assessment of suspicion. Quantitatively, a person in a bad neighborhood is more likely to be engaged in criminal activity.[164] Yet a wrongdoer will never be accurately identified every time by even the most astute of law enforcement officers, because there will always be law-abiding citizens in the worst neighborhoods.[165] Consequently, the use of character of the neighborhood in this context should be carefully limited.

To more effectively assess the role of neighborhood character, courts and police should consider the surroundings only when an actor's be-

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159. *See* State v. Barber, 823 P.2d 1068, 1074-75 (holding that a person who appears racially out of place in a neighborhood can never constitute a finding of reasonable suspicion of criminal behavior).

160. Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 99-101 (1999).

161. *See id.* at 112 (citing Brown v. Texas, 443 U.S. 47 (1979)).

162. *Id.* at 116.

163. *See id.* at 122.

164. *See id.* at 125.

165. *See id.*

havior is not common among law-abiding citizens of that neighborhood at the time and location where the actor is observed.[166] If observable behavior does not distinguish the suspect from other community members, the investigating officer must not pursue the suspect. This approach would insulate law abiders in a community whose cultural distrust of law enforcement officers prevails. Manifestations of this distrust or fear could never result in a stop unless the behavior is unusual in light of law-abiding, albeit police-wary, citizens in the area. Only then can the officer consider the character of the neighborhood as part of the totality of the circumstances to determine whether reasonable suspicion is legitimate.[167]

B. *Thinking About Race and Subjective Views of Officers*

Just as courts should subjectively consider the character of a neighborhood as it reflects on the reaction of detainees, courts should look more carefully at how police officers intuitively approach suspects. One way to do so would be to address the influence of social science research and cognitive psychology, which some legal scholars have suggested can help courts understand how the human mind understands conduct and draws on cultural understandings to evaluate behavior.[168] According to current cognitive research, people group information into organizational categories or schemas that are easier to understand. A discussion of schema "tries to explain how we store our knowledge, how we learn and how we remember what we have learned."[169] In other words, an activation of mental files will assist an individual's comprehension of a familiar event. This connection of the new to the known may be either a conscious choice or without any awareness by the individual.

Within this process of categorization comes stereotyping, which leads to prejudgments based on understandings of categorical behavior. Though a sudden identification of a person's characteristics based on

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166. *See id.* at 127.

167. *See id.* at 128. This approach does not, however, leave room for stopping individuals in neighborhoods simply because it is not common to find them in those neighborhoods. *See* St. Paul v. Uber, 450 N.W.2d 623 (Minn. Ct. App. 1990) (examining the constitutional validity of "profile stops"). This court addressed whether an officer was justified to stop a vehicle registered to a suburb approximately 20 miles from the scene, simply because it was late at night and it was unusual to find a car with the address in the area. *See id.* at 624. The driver committed no traffic violations. *See id.* The court concluded the driver's fourth amendment rights had been violated. *See id.* at 629. Behavior is at issue, not appearance; race alone is never enough to justify a stop. Accordingly, a white man driving in a black neighborhood cannot be stopped absent an officer's reasonable suspicion that extends beyond an observation that the individual looks out of place. Assuming the man drives in a manner consistent with other law-abiding citizens of the neighborhood, a stop is both unnecessary and unwarranted. As the Minnesota Court of Appeals concluded in *Uber*, "[t]here simply needs to be something more than driving your own car in a proper and legitimate manner on the public streets of a town 'other than the one you live in' before the authorities can stop citizens." *See id.* at 628.

168. *See* Thompson, *supra* note 4, at 983-84.

169. ELLIN OLIVER KEENE & SUSAN ZIMMERMANN, MOSAIC OF THOUGHT 50 (1997).

age, sex, race, nationality, or occupation is not always accurate, it is oftentimes on what individuals base their judgments.[170] For example, if a police officer has a disproportionate number of encounters with men of color, an interaction with a Hispanic man will activate an officer's schema that Hispanic men are more likely to commit crimes, and the man before him will appear more suspicious.

Not surprisingly, stereotyping can play an integral role in a police officer's work, because officers are expected to investigate unusual behavior.[171] Mental categorization helps define what an officer sees, and personal biases can dictate judgments and behavior. That is, although an officer may not have control over unconsciously concluding that a Hispanic man standing on a corner looks suspicious, it nevertheless can be the controlling factor when that officer decides the person is suspicious enough to warrant a stop.[172]

The courts and society in general may be legitimately uncomfortable with the concept that racial biases not only exist, but can be attributed to learned understandings that result from cognitive sorting. These biases may not be outwardly malicious, but they can have a profound impact. A police officer who has unconsciously, or perhaps consciously, learned to differentiate between whites and non-whites with respect to the probability of criminal activity might very well suspect a non-white actor on a street corner over a white on the same street corner, simply because of race.

Contrary to the holding of *Terry*, race is an undeniable factor in Fourth Amendment stop and frisks, and equal protection should not be the sole remedy for Fourteenth Amendment questions considering race. Accordingly, courts should determine how race influenced a police officer's judgment and analyze how the officer approached the suspect through a social science lens. Though this science is far from perfect, and many courts would be reluctant to confront an officer's racial biases, an exploration of that officer's stereotypes could reveal whether the suspect was stopped for legitimate or racially motivated reasons. Clearly, the impact of race needs to be considered in the *Terry* reasonable suspicion analysis that is supposedly based on "commonsense judgments and inferences about human behavior."[173]

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170. *See* Thompson, *supra* note 4, at 985.

171. *See id.* at 987.

172. *See id.*

173. Wardlow v. Illinois, 120 S. Ct. 673, 676 (1999) (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

C. *Considering Subjective Objective—A Psycholegal Approach*

As stated above, the legal system tends to view social science contributions to the courtroom with little confidence. This reticence by courts to embrace a "psycholegal"[174] approach is summarized by Justice Black, who questioned, "[h]ow long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses?"[175] In *Missouri v. Jenkins,*[176] Justice Thomas reasoned that evidence presented by studies of social behavior was "unnecessary and misleading."[177] Research findings are often determined "malleable and unreliable, not reflective of the reality and complexity of the real world."[178] Furthermore, there is a paradoxical relationship between research produced by social scientists and common sense employed by lawyers and courts. "When research refutes common-sense psychology, it is often dismissed as invalid. When the research supports common-sense psychology, it is often dismissed as unnecessary because it merely confirms common sense."[179]

Courts typically employ a common sense approach to analyze and explain conduct. As the majority reasoned in *Wardlow*, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."[180] The *Whren* Court also observed the objective method of analysis, determining that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[181]

Just as courts are wary of psychological methodology, psychologists have viewed the common sense approach with equal skepticism.[182] This objective, reasonable person test to examine an arresting officer's conduct, according to psychological interpretation, borrows from "such unreliable sources as 'the pages of human experience.'"[183] The problem

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174. Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107 (1998).

175. United States v. Wade, 388 U.S. 218, 248 (1967) (Black, J., dissenting).

176. 515 U.S. 70 (1995) (Thomas, J., concurring).

177. *Jenkins*, 515 U.S. at 121(Thomas, J., concurring).

178. Redding, *supra* note 174, at 113.

179. *Id.*

180. Illinois v. Wardlow, 120 S. Ct. 673, 676 (2000).

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

182. *See* Redding, *supra* note 174, at 113.

183. *Id.* at 118 (citing Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1594, 1596-97 (1992) (stating that to the Court, common sense is "often is far more persuasive than data gleaned from methodologically sound research . . . the relationship between law and social science is less than perfect. 'Like an insensitive scoundrel involved with an attractive but fundamentally irksome lover who too much wants to be courted, the judiciary shamelessly uses the social

with relying on common sense in a courtroom is that it "lulls us into the false security of believing that we already understand people,"[184] while psychology can "raise[] questions about what we really do understand and go[] beyond common-sense formulations."[185]

Writing for the majority in *Wardlow*, Justice Rehnquist concluded the Court did not have a precise method to assess the behavior of Officer Nolan. "[I]n reviewing the propriety of an officer's conduct," Justice Rehnquist resolved, "courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists."[186] Though the proposed "subjective objectives" approach cannot provide a court with absolute certainty of an officer's justification or wrongdoing, the benefits of psycholegal research and considerations of an officer's subjective intentions could assist courts in making legal conclusions with more precision.

Whether well received or not, a psychological approach is nothing new to the courts. Cognitive assessments are frequently made to determine whether defendants are mentally fit to stand trial.[187] The psycholegal approach sought by this article simply extends the consideration of race, as suggested in part by the *Wardlow* dissent, to help explain the reactions of the detainee to police as well as the impact that race may

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sciences.' Courts cite the results of psychological research when they believe it will enhance the elegance of their opinions, as in the most oft-cited example of *Brown v. Board of Education*, but empiricism is readily discarded when more traditional legally acceptable bases for decisionmaking is available.").

184. Redding, *supra* note 174, at 118. (citing HARVEY C. LINDGREN AND JOHN H. HARVEY, AN INTRODUCTION TO SOCIAL PSYCHOLOGY 7 (1981)).

185. *Id.*

186. Illinois v. Wardlow, 120 S. Ct. 673, 676 (2000).

187. *See generally* United States v. Lyons, 731 F.2d 243 (5th Cir. 1984) (holding that a person is not responsible for a crime if that person cannot appreciate the wrongfulness of it due to a mental disease or defect); State v. Green, 643 S.W.2d 902 (Tenn. Crim. App. 1982) (setting aside the defendant's conviction, concluding the State had not met its burden of rebutting the defendant's sanity defense); State v. Strasburg, 110 P. 1020 (Wash. 1910) (remanding to determine whether the defendant had the will to control his body and comprehend the nature and quality of his actions). The following articles discuss the insanity defense in detail. *See generally* Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271 (1982) (After the acquittal of John W. Hinkley, Jr., Congress considered several bills to abolish or reform the federal insanity defense. The article is Professor Aranella's testimony before the House of Representatives' Subcommittee on Criminal Justice.); Donald H.J. Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect of the Defense of Insanity*, 14 RUTGERS L.J. 241, 244 (1983) ("This article undertakes an examination of the principal changes in the rules governing the use and effect of the insanity defense."); Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 497 (1985) ("Redefining the insanity defense, carefully structuring the commitment process for insanity acquittees, and ensuring treatment for those found guilty or not guilty by reason of insanity would more directly and effectively, address the concerns underlying the current attraction toward the guilty but mentally ill verdict.").

have on the motivations of the police who made the stop. Though not a definitive answer to a complex task, a psycholegal approach could be a starting point to assist a defendant in demonstrating the stop was race-based. If courts were more willing to consider the work of psychologists, fact finders could determine how an officer schematically organizes mental files, past experiences, and stereotypes. When the officer detains, frisks, and/or arrests someone because of racial bias, lawyers and judges should have tools to assess the subjective motivations of the officer. With proper training, lawyers could develop skills to "identify and counteract biases and prejudices . . . that would otherwise interfere with their ability to reach reliable verdicts." [188] Furthermore, lawyer-psychologist collaboration could enable lawyers to "gather more reliable evidence before trial, more effectively identify and eliminate biased jurors during voir dire, reduce the biasing effect of evidence presented during trial, and present clearer and more understandable arguments."[189]

Courts should permit and encourage the consideration of subjective motivations of officers who search, seize, or stop and frisk suspects. The analysis should not only consist of what a reasonable person, or experienced officer, would do under the fact-specific circumstances. An analysis of the psychological, schematic nature of the officer's suspicion would include an exploration of the officer's background knowledge of and experience with the detainee's race. Collaboration with cognitive psychologists would be appropriate to develop a research-based line of questioning to effectively assess the officer's previous experiences that contribute to racially motivated action. This information could assist a detainee in undermining the reasonable, articulable suspicion for a Fourth Amendment claim.

The approach should not be entertained to deceive the officer with psychological jargon, or to manipulate or damage otherwise honorable and just police work. Nor would the examination be an overblown, inefficient psychoanalysis of a witness. Rather, a psycholegal approach would be a natural extension of the common sense, objective standard approach currently employed by courts under *Terry*. At the same time, if courts would permit it, lawyers might train with and learn from psychologists in order to develop more precise methods to evaluate an officer's behavior, as Justice Rehnquist suggested was lacking in *Wardlow*.

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188. J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 775 (1987).

189. *Id.*

CONCLUSION

Inner-city distrust of police is both ingrained and justified by repeated occasions of unjustified stops. *Terry* allows police officers to make these stops based on reasonable suspicion, a lower standard than probable cause. *Wardlow* is a modern application of the *Terry* doctrine, which permitted officers to stop and search an individual in a high-crime neighborhood because he made eye contact with an officer and fled. Fleeing from police when there is a deep-rooted distrust of law enforcement does not support the requisite reasonable suspicion required to stop and frisk a suspect.

Police will continue to make unjustified stops and courts will continue to permit them unless the issue of race is brought to the forefront. It is not surprising that the majority opinion of *Wardlow* made no reference to race as a factor to be considered in light of the officer's reasonable suspicion, because society-at-large is uncomfortable with confronting racial biases. The dissent suggested that race could be a component of the totality of the circumstances, yet stopped short of applying race explicitly to the facts. Courts should allow race to be a factor in Fourth Amendment analyses instead of reserving the discussion solely for equal protection claims. One approach would be to consider the character of the neighborhood in determining whether an individual's behavior is out of the ordinary among law-abiding citizens. Another would be to permit an examination of whether an officer stopped a suspect based on reasonable, articulable suspicion or racial bias. Until schematic categorizations become a part of a court's assessment of an officer's motivations, on occasion police will continue to intentionally or unintentionally act on suspicions of race based on personal experience. This will only exacerbate the distrust between inner-city residents and the police, because citizens will continue to be stopped in high-crime areas simply because they are minorities.

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