

# Terry, Timeless and Time-Bound

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## I. INTRODUCTION

Writing an introduction to a symposium marking the fiftieth anniversary of *Terry v. Ohio*<sup>1</sup> is a bit like the sad and perplexing task of delivering remarks at the memorial service of a troubled or otherwise notorious friend. One feels that the occasion calls for focusing on some bright spots, even if one should “keep it real” and acknowledge the complexity—at best—of the friend’s life. To be sure, *Terry*, and its grant of constitutional license for police to stop and search civilians on a quantum of suspicion less than probable cause—what has come to be denominated “reasonable suspicion”—has some admirers.<sup>2</sup> But, especially in the legal academy, the decision is infamously reviled. It is typically depicted at best as a pragmatic reconciliation of civilian and law enforcement interests that naively believed that police discretion could be meaningful cabined in ex-post determinations of whether a quantum of suspicion was “reasonable.” At worst, it stands as the Warren Court’s abandonment of its rights-protective and racial justice commitments in the face of increasing crime rates and adverse public response to *Mapp* and *Miranda*.<sup>3</sup> And so, how to eulogize this figure with such a checkered life?

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

<sup>2</sup> See, e.g., Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 301 (2010) (defending *Terry*); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1694 (1998) (criticizing *Terry*’s progeny but arguing that *Terry* itself “contains a sophisticated analysis that could have led, and might yet lead, to a less limited (and less deferential) substantive reasonableness balancing approach across the board”); Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 974 (1998) (“*Terry*’s stop and frisk rule as developed over the past 30 years has evolved to a practically ideal approach for governing law enforcement efforts to deal with a range of potentially criminal conduct without unnecessarily interfering with the liberty of ordinary people.”).

<sup>3</sup> For a sampling of such views, see, e.g., I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1261–63 (2017) (criticizing *Terry* for “weighing the needs of the police on one side and the privacy interests of racial minorities and goal of race-blind policing on the other,” for its malleable standard of reasonableness, and for its failure to anticipate programmatic stop-and-frisk); Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43, 56 (2016) (discussing *Terry*’s (two) original sins); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 66 (2014) (making the case that *Terry*, in authorizing stops and frisks, authorized racially subordinating policing, and in turn authorized torture); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271,

The portrait I will advance in this brief essay is of a decision with transcendent aspirations that quickly found itself ill-suited to the times—*Terry* as a deceptively timeless but ultimately time-bound decision. Chief Justice Warren’s opinion in *Terry* takes on some of the most vexing challenges for policing in a democratic society: the pathologies of street-level discretion, the challenges of ex-post judicial oversight, the imperative of legitimacy, and the prevalence of racial disparity. It self-consciously confronted many of the very dynamics that give rise to chief criticisms of it today. Given this deliberateness and seeming foresight, all the more reason (perhaps) to lay responsibility at its feet for what, fifty years on, it appears to have wrought: stop-and-frisk strategies in New York City, Baltimore, Ferguson, and beyond that have disproportionately burdened poor and black individuals with intrusive police contacts (with little if any documented effect on crime);<sup>4</sup> seemingly slippery slopes from reasonable-suspicion-justified traffic stops to fatal encounters;<sup>5</sup> justifiable fear among immigrants that a police stop will be the first stop on a route to deportation.<sup>6</sup> The *Terry* that purportedly aimed to find a “reasonable” accommodation between police priorities and individual and community well-being seems a truly culpable failure.

I am sympathetic to the inclination to conclude that, in *Terry*, the justices stared down the implications of expanded police discretion and the consequences of their decision . . . and flinched badly. And yet, it is well to take stock of the degree to which the criminal justice landscape has shifted under *Terry*’s feet over its five decades of existence. To name just a few key transitions, substantive and

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1277 (1998) (“*Terry* deserves critical attention because it authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide. The better view of *Terry* is that the ruling reveals the Warren Court’s capitulation and retreat from its earlier efforts to secure the constitutional rights of persons suspected of crime.”). Cf. William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1227 (1998) (assigning blame to law professors who ask *Terry* to do more than judicially enforced doctrine could ever do to regulate street-level policing).

<sup>4</sup> See Fagan, *supra* note 3, at 67–84; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <http://www.justice.gov/opa/file/883366/download> [<https://perma.cc/7G9P-Z3DT>] [hereinafter BALTIMORE DOJ REPORT]; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/B6PL-FGTT>] [hereinafter FERGUSON DOJ REPORT]. See also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 465 (2000) (reviewing empirical support for Broken Windows policing strategies and finding little).

<sup>5</sup> See Alex Kotlowitz, *Before Laquan McDonald, a Chicago Police Shooting with No Video*, NEW YORKER (Dec. 1, 2015), <http://www.newyorker.com/news/news-desk/before-laquan-mcdonald-a-chicago-police-shooting-with-no-video> [<https://perma.cc/G3MA-7BQL>] (telling the story of the shooting of Calvin Cross after being stopped on sidewalk by Chicago police).

<sup>6</sup> See Priscilla Alvarez, *Will Texas’s Crackdown on Sanctuary Cities Hurt Law Enforcement?*, ATLANTIC (June 6, 2017), <https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/> [<https://perma.cc/KRJ3-YFE4>] (detailing Texas law passed in 2017 criminalizing police chiefs who prevent police from inquiring about immigration status during encounters with civilians).

remedial Fourth Amendment protections have been largely hollowed out, stop-and-frisk has been transformed from a tool in the police arsenal to a programmatic policing strategy systematic to policing, and the volume of the criminal justice system and the consequences it imposes on individuals for even brief encounters with it have vastly increased. Each transformation by itself has significantly increased the magnitude and consequences of police discretion that was first blessed in *Terry*; in combination, the impact has been enormous. Absent these other shifts, disagreement with *Terry*'s outcome would no doubt perdure. But I suspect that *Terry*'s near-villain status among its detractors would not. And I am confident that the *Terry* Court cannot be blamed for misapprehending what was at stake in its decision. Assigning fault to *Terry* for the full impact of its legacy risks falling into the all-too-common legal academic trap of centering the importance of judicial decision-making at the expense of grappling with the far messier and more contingent political, sociological, and institutional forces that enter the mix once the judicial ink is dry.

The balance of this essay aims to make this case, and in so doing to situate the six excellent contributions to this symposium, each of which in its own way draws inspiration from a piece of the changed landscape this introduction describes. Part I recounts *Terry*'s deceptively (and perhaps disappointingly) timely attributes. Part II briefly takes stock of the tectonic shifts in the criminal justice system that have transformed the stakes for police stops since *Terry*. Part III closes by previewing the essays that follow.

## II. TIMELESS *TERRY*

When I tell people that I teach a seminar called “Policing the Police,” the typical reaction is an utterance of something like, “How timely!” To this reaction, I now have a fairly polished Policing Was Always Timely elevator pitch. The unfortunate, well-meaning interlocutor gets an ear-full about the eternal tensions between democratic society and police authority, the intertwined legacies of racial oppression and policing, and historical debates about police discretion and oversight that are eerily resonant with contemporary concerns.

*Terry v. Ohio*, in which the Court first ruled on the constitutionality of the police practice that was already familiarly known as “stop-and-frisk,” is one of my go-to exhibits in making the case that today's concerns about “policing the police” have long preoccupied our legal system.<sup>7</sup> The Court in *Terry* evinced clarity about

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<sup>7</sup> See, e.g., *Terry*, 392 U.S. at 10 (“Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to ‘stop and frisk’—as it is sometimes euphemistically termed—suspicious persons.”). See also RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 198–201* (2016) (discussing history of stop-and-frisk pre-*Terry*); Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 42 (1968) (“The practice of stop and frisk, of course, is by no means new. It is a time-honored police procedure for officers to stop suspicious persons for questioning and, occasionally, to search these

the stakes that the case raised, and did so in terms that could comfortably be copied and pasted into any number of recent reports on the state of policing today.

The Court first rejected the position taken by some lower courts that had blessed the stopping and frisking of suspects on less than probable cause, that such encounters were sufficiently insignificant intrusions to fall entirely below the radar of the Fourth Amendment. Chief Justice Warren wrote for eight justices:

[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.<sup>8</sup>

The Court understood, moreover, that the impact of permitting the police the freedom to detain, without probable cause to suspect a crime has been committed, was not just individualistic but collective, felt at the community level. Stop-and-frisk practices threatened to “exacerbate police-community tensions in the crowded centers of our Nation’s cities,” and the Court cited, at length, the findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice that “field interrogations are a major source of friction between the police and minority groups” that experience routine police stops for being “suspicious” or having a “purpose [that] is not readily evident,” and which appear motivated not by legitimate law enforcement goals but “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.”<sup>9</sup>

Today in academic and policing circles it is en vogue to speak of the imperative of legitimacy, built on a foundation of mutual trust between law enforcement and the communities in which they work, with the community’s trust earned or lost by the degree to which encounters with police are perceived as being even-handed and respectful—roughly, the procedural justice paradigm.<sup>10</sup> And

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persons for dangerous weapons. This is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way.”)

<sup>8</sup> *Terry*, 392 U.S. at 16–17.

<sup>9</sup> *Id.* at 12, 14–15 n.11 (citing PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)).

<sup>10</sup> See, e.g., Tracey L. Meares et. al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 308–11 (2015); PRESIDENT’S TASKFORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASKFORCE ON 21ST CENTURY POLICING 1 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/9CDX-79ES>] (“Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services. In light of recent events that have exposed rifts in the relationships between local police and the communities they protect and serve . . . . Building trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational

while the empirical research that girds these views post-dates *Terry*, the intuitions that procedural justice research now bears out have long circulated and are on ample display in the text of Chief Justice Warren’s opinion in *Terry*.<sup>11</sup>

Moreover, as Professor Risa Goluboff reveals in her history of anti-vagrancy laws, the Warren Court, at the time that *Terry* was decided, was steeped in concern with the civil liberties and racial justice implications of beat-level police discretion. Civil rights practitioners were active as amici in the case, and while the racial dynamics of *Terry* had been erased from the reported decisions for some time prior to the Supreme Court’s involvement—Terry was black, and his two companions as well as the officer who stopped the three were white—the NAACP amicus brief focused the Court’s attention on the degree to which police viewed black individuals, and even more so mixed-race groups of individuals, as inherently suspicious.<sup>12</sup> Professor Wayne LaFave, writing shortly after *Terry*, also viewed the Court as having heard in argument the central concerns of opponents of stop-and-frisk “that police often have utilized street encounters for improper purposes such as the wholesale harassment of certain elements of the community, usually minority groups and Negroes in particular.”<sup>13</sup>

And yet, the Court was ultimately persuaded that countervailing concerns militated against an abolitionist position toward stop-and-frisk. The interest of the government in “effective crime prevention and detection,” plus the interest of “the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him,” balanced against what the Court viewed as a lesser civilian interest in being free of a seizure consisting of questioning and pat-down rather than a full-blown arrest, led the Court to conclude that the traditional requirement of probable cause required for arrest was too exacting in such situations.<sup>14</sup> And reasonable suspicion was born. The Court took this conciliatory course in the face of

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principle underlying the nature of relations between law enforcement agencies and the communities they serve.”); POLICE EXEC. RESEARCH FORUM, LEGITIMACY AND PROCEDURAL JUSTICE: A NEW ELEMENT OF POLICE LEADERSHIP 2 (2014), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf) [https://perma.cc/C8AF-VMDE].

<sup>11</sup> Stephen J. Schulhofer et al., *American Policing at A Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 341 (2011) (tracing enduring concern with police “legitimacy,” variously conceived, over second half of twentieth century); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 111 (2005) (“The social science of criminal justice system legitimacy dovetails nicely with the origins of the Supreme Court’s constitutional criminal procedure doctrine. A quick review of the early cases reveals the Court’s preoccupation with public perceptions of the fairness of judicial proceedings.”).

<sup>12</sup> See GOLUBOFF, *supra* note 7, at 201–20. See also Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae Supporting Petitioner at 43–44, *Sibron v. New York*, 392 U.S. 40 (1968).

<sup>13</sup> LaFave, *supra* note 7, at 59.

<sup>14</sup> *Terry*, 392 U.S. at 22–23, 30.

prescient warning from the NAACP, through the pen of Anthony Amsterdam, that the reasonable suspicion standard, “[h]owever intellectually reasonable . . . in the corridors of academe, . . . is a delusive and unworkable proposition on the streets of our cities, and particularly on the streets of our ghettos where stop-frisk logic does its daily work,” a “mere fine, scholastic pretext[] for oppression.”<sup>15</sup>

To be sure, there is historical evidence that the Court struggled with this resolution, and the majority opinion declaimed any intention to sanction a standard lower than probable cause to *detain* as opposed to frisking after a proper detention: The Chief Justice wrote, “We . . . decide nothing today concerning the constitutional propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.”<sup>16</sup> But the balance of the Court’s opinion might still be blamed for being ambiguous in this regard, an ambiguity that was quickly construed by law enforcement in its own favor, and which the Court papered over in *Adams v. Williams* when it declared that *Terry* had indeed stood for the proposition that brief detentions need only be reasonable.<sup>17</sup>

For those who share today the concerns aired fifty years ago in Anthony Amsterdam’s brief to the Court, the result in *Terry* is maddening—maddeningly dense, to use a contemporary term. And yet it is well to reflect on the degree of hindsight bias that might be coloring an overly dim view of *Terry*. I wish here not to enter a final verdict on whether the Court in *Terry* did the best, or the worst, that it could have done, but instead to posit this: Assume the justices in *Terry* knew they might get it wrong, and calculated the costs of doing so; how high would those costs have been? The next Part argues that in the fifty years since *Terry* those costs have skyrocketed in ways the Court almost certainly did not, and could not, have anticipated.

### III. TIME-BOUND *TERRY*

I want here to reflect briefly on just three ways in which the landscape of policing and criminal justice has shifted since 1968, in ways that bear directly on the implications of *Terry*’s license to stop-and-frisk: the erosion of substantive and remedial Fourth Amendment doctrine, the rise of programmatic stop-and-frisk, and the expanded volume of the criminal justice system and the consequences it

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<sup>15</sup> Brief for the NAACP Legal Defense and Education Fund, Inc., *supra* note 12, at 34.

<sup>16</sup> See *Terry*, 392 U.S. at 19 n.16; GOLUBOFF, *supra* note 7, at 209–12; 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, 896 (1998) (“The majority opinions in *Terry*, *Sibron*, and *Peters* carefully refrained from approving—indeed, they circumambulated Robin Hood’s barn to avoid approving—what have become known universally as ‘*Terry* stops.’ And nowhere in Chief Justice Warren’s opinion will you find the words ‘reasonable suspicion’ that have come to exemplify the *Terry* standard. Instead, the opinion carefully employs and adapts the language of *Brinegar v. United States*, the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information.”).

<sup>17</sup> See GOLUBOFF, *supra* note 7, at 214.

imposes on individuals for even brief police encounters. These shifts have been amply documented elsewhere, and indeed several essays in this symposium take up pieces of each. The point here is not to be novel or thorough in identifying contemporary trends in criminal justice, but rather to invite us to reflect on how very out-of-place *Terry* would feel in present times.

### A. Doctrinal Shift

First, consider the shape of current Fourth Amendment doctrine in contrast to what existed at the time of *Terry*, including the migration and arguable declawing of free-standing reasonableness, rather than probable cause, to a range of policing contexts. In 2017, the reasonableness standard has come to bless a range of now-regular police-civilian contacts that would have been far less frequent under a probable cause standard: (1) brief seizures based on a belief that a crime is currently being or had been committed in the past, (2) generalized patrols in the border area, (3) seizures of vehicles anywhere, (4) removal of drivers and passengers from seized vehicles, (5) the seizure of narcotics and other non-threatening contraband found during a *Terry* pat-down . . . the list of encounters goes on.<sup>18</sup> As Professor Craig Lerner has written, “the balancing approach sanctioned by the *Terry* Court . . . would quickly prove imperialistic, colonizing vast reaches of police activity.”<sup>19</sup>

In the course of this colonizing project, the list of permissible bases for forming reasonable suspicion consistently expanded, and the capacity for the Fourth Amendment to scrutinize ill-motivated policing contracted. Moreover, this occurred through decisions that lacked resonance with *Terry*’s concerns about racially disparate policing and call for courts to “retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.”<sup>20</sup> Thus, in *United States v. Martinez-Fuerte*, the Court blessed reliance on race in deciding whether to stop vehicles near the border, and in *Illinois v. Wardlow*, the Court blessed police

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<sup>18</sup> See *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (“The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity.” (internal quotation omitted) (citing *Terry*); *Maryland v. Wilson*, 519 U.S. 408 (1997) (removal of passengers without individualized suspicion); *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (seizure of non-threatening contraband found during proper frisk); *United States v. Hensley*, 469 U.S. 221, 229 (1985) (reasonableness rather than probable cause governs detention of individual on suspicion of prior completed felony); *Pennsylvania v. Mimms*, 434 U.S. 106, 109–10 (1977) (*Terry* balancing used to uphold police discretion to order drivers out of their cars in course of a legal stop); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (*Terry* balancing for random patrols in border region).

<sup>19</sup> Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 999 (2003).

<sup>20</sup> *Terry*, 392 U.S. at 15. For more extended analysis making a similar point see generally Fagan, *supra* note 3; Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329 (2013).

reliance on presence in a “high crime area” to transform otherwise non-suspicious behaviors into a basis for a stop.<sup>21</sup> Unsurprisingly, litigation around contemporary stop-and-frisk practices has demonstrated that this is a primary basis for police justifying enormously high (and not enormously fruitful) numbers of stops in urban minority neighborhoods.<sup>22</sup> And *Whren v. United States* took courts out of the business of scrutinizing police motivation via the Fourth Amendment reasonableness standard, rejecting the claim of the black petitioners in the case that a vehicle stop would be “unreasonable” if purportedly based on violation of a rarely enforced traffic law but *actually* based on the race of the vehicle’s occupants. Such concerns, the Court held, are the concern only of the Equal Protection Clause, not the Fourth Amendment.<sup>23</sup>

Moreover, whatever work the Fourth Amendment might do to check police who run afoul of even a rule of reasonableness has been limited by Fourth Amendment remedial contraction over the last fifty years.<sup>24</sup> Just a year after *Terry*, Warren Burger would ascend to the position of Chief Justice, and would bring with him his announced agenda of rolling back the exclusionary rule, among other Warren Court criminal procedure rights.<sup>25</sup> The Court has untethered the remedy from the Constitution, fashioned a range of “good faith” and “attenuation” exceptions to it, and announced recently that only “gross” or “systemic” negligence could trigger exclusion.<sup>26</sup> Erosion of the exclusionary rule reached its apex most recently in *Utah v. Strieff*, in which the Court declined to suppress evidence where an individual was stopped without reasonable suspicion, but who was discovered by that stop to have an arrest warrant; the individual’s warrant “attenuated” the unconstitutional conduct that preceded its discovery.<sup>27</sup> Justice Sotomayor’s full-throated dissent, wielding data showing enormous numbers of outstanding warrants for low-level offenses and “how these astounding numbers of warrants can be used by police to stop people without cause” demonstrated how ineffective the contemporary exclusionary rule will be in checking the “harassment” with which *Terry* expressed concern.<sup>28</sup>

Of course, the *Terry* Court had squarely before it arguments that a reasonable suspicion standard would ultimately be toothless in the hands of police and lower

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<sup>21</sup> *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563–64 (1976).

<sup>22</sup> See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 68–88 (2015).

<sup>23</sup> 517 U.S. 806 (1996).

<sup>24</sup> See generally Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

<sup>25</sup> See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 690–94 (2011) (describing history).

<sup>26</sup> *Id.* at 691–710, 725–39 (tracing this path).

<sup>27</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

<sup>28</sup> *Id.* at 2068–69 (Sotomayor, J., dissenting).



courts, and perhaps the Court was naïve to suggest (and believe) the contrary.<sup>29</sup> So too did *Terry* expressly contemplate the limits of the exclusionary rule to police the deleterious consequences of police stops, since only the (likely) small percentage of them that might lead to criminal charges could even plausibly be the subject of a suppression motion.<sup>30</sup> But it would have been nigh impossible for the Court in 1968 to anticipate the degree to which mere reasonableness would come to “coloniz[e]” policing,<sup>31</sup> or to envision that what little work the exclusionary rule *might* have done in a reasonable suspicion regime would be significantly diminished under those regimes and the Roberts Court to follow.

### B. *Programmatic Stop-and-Frisk*

As the Supreme Court has done that deconstructive work, and undoubtedly because of it, policing professionals have transformed stop-and-frisk from a useful but serially deployed tactic to a wholesale strategy. Prior to *Terry*, law enforcement understood its relationship to crime prevention as mediated by two functions: deterrence, achieved by enforcement and walking the beat, and incapacitation, achieved by investigation and arrest. The 1960s and 1970s saw a shift in this view, prompted in part by introspection as law enforcement was swamped by increased crime rates of that era. Innovators in the field began to propose, experiment with, and document some success with new models of policing that shared commitments to command-level strategic goals achieved, at least in part, through mandated patrol-level contact with civilians; community policing, hot-spot policing, and Broken Windows policing are all examples that share these attributes.<sup>32</sup> These new approaches to policing also shared, to greater and lesser extents, reliance on the legal authority that *Terry* granted to detain individuals without probable cause to arrest.

But absorbing the *Terry* stop into a policing strategy was transformative. As Tracey Meares has observed, “stop-and-frisk under this approach is not simply a tool on the officer’s belt to be used when the situation is right, such as intervening in a crime in progress, which was the factual scenario presented in *Terry*,” but rather is a “program” whereby “good policing is articulated from the top down throughout the entire agency to include aggressive, systematic, ‘legalistic’ field interrogations designed to suppress crime.”<sup>33</sup> And as Meares and others have argued, it is the programmatic nature of contemporary stop-and-frisk that is most

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<sup>29</sup> *Terry*, 392 U.S. at 15. See also Dudley, *supra* note 16, at 897 (suggesting as much).

<sup>30</sup> See *Terry*, 392 U.S. at 13–14.

<sup>31</sup> Lerner, *supra* note 19, at 999.

<sup>32</sup> See Anthony A. Braga, *Crime and Policing Revisited*, NEW PERSPECTIVES IN POLICING BULLETIN 3–8 (2015), <https://www.ncjrs.gov/pdffiles1/nij/248888.pdf> [<https://perma.cc/8B2D-PA79>]; Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 422–40 (2000).

<sup>33</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69 (2015).

proximately responsible for the most pathological manifestations of the practice. In New York City, which until recently hewed to an aggressive stop-and-frisk policing strategy, stops effected by the New York City Police Department rose from fewer than 100,000 in 2003 to more than 685,000 in 2011—an increase that seems unthinkable without the coordinated, command-level commitment that in fact existed.<sup>34</sup> A perhaps more striking example can be seen in the City of Baltimore, where the Department of Justice found that from 2010 to 2014 police “likely make several hundred thousand pedestrian stops per year in a city with only 620,000 residents”—an outcome that the DOJ attributed directly to an aggressive order-maintenance policing strategy.<sup>35</sup>

Moreover, programmatic stop-and-frisk significantly enhances the risk that any individual encounter will lack the quantum of suspicion that *Terry* envisioned, and will disproportionately impact communities of color. As Professor Jeff Fagan and Amanda Geller demonstrate, the inherently vague reasonableness standard, refracted through institutionalized practices and productivity pressures, produce “scripts” of suspicion that in reality justify stops through post-hoc rationalization rather than ex-post formation of individualized suspicion.<sup>36</sup> And as the Department of Justice documented in its Baltimore investigation, black residents of Baltimore were disproportionately stopped and frisked, frequently without reasonable suspicion, as a direct result of the police department’s decision to target enforcement in predominately poor, black neighborhoods.<sup>37</sup>

To be sure, the costs to individuals and communities of programmatic stop-and-frisk are not different in kind than the pathologies about which the NAACP, and others, warned the *Terry* Court. But the magnitude is categorically different, and the capacity for retail assessment of officer compliance with the *Terry* standard to meaningfully check those pathologies is substantially lower.

### C. Criminal Justice Explosion

Finally, as the Fourth Amendment has permitted more police encounters on reasonable suspicion (or less, in the case of exceptions to the exclusionary rule), and as stop-and-frisk evolved into a programmatic, logic-unto-itself policing paradigm, the United States has become the world’s largest incarcerator by several orders of magnitude. Its prison population has grown seven-fold, and its state jail population has grown comparably; in 2011, thirteen million people entered state

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<sup>34</sup> See Fagan & Geller, *supra* note 22, at 62. Programmatic stop-and-frisk is not limited to New York City, or even to large urban jurisdictions. See, e.g., David Abrams, *The Law and Economics of Stop-and-Frisk*, 46 LOY. U. CHI. L.J. 369, 371–72 (2014) (documenting cities where stop-and-frisk practices are subject to litigation challenges); FERGUSON DOJ REPORT, *supra* note 4, at 15 (describing systemic pressures to conduct stops in the absence of reasonable suspicion).

<sup>35</sup> BALTIMORE DOJ REPORT, *supra* note 4, at 24–26.

<sup>36</sup> Fagan & Geller, *supra* note 22, at 86–87.

<sup>37</sup> BALTIMORE DOJ REPORT, *supra* note 4, at 47–62.

jails.<sup>38</sup> *Terry* has played a direct role in this churn by widening the mouth of the funnel by which individuals enter the criminal justice system. But the size of that funnel would have been unimaginable to the Court in 1968.

In 2017, most observers of policing understand “reasonable suspicion” stops and searches in the traffic context, and at the border to be a significant tool of the War on Drugs, a phenomenon still ten years in the making at the time of *Terry*.<sup>39</sup> As the National Research Council found in its report on drivers of mass incarceration in the United States, the arrest rate for drug use and possession increased by 89 percent between 1980 and 1989, and by 2009 was double the rate of 1980.<sup>40</sup> The shift to prioritization of drug arrests, greased by *Terry* stops, also had the effect of magnifying racially disparate enforcement. Again drawing on National Research Council findings, since the 1980s drug-related arrests for black individuals have ranged from three- to four-times higher than such arrests for white individuals—despite consistent data showing comparable use and sales habits among the two populations.<sup>41</sup> And beyond the confines of drug crimes, it is generally true today that arrests are more likely to lead to imprisonment,<sup>42</sup> and more likely to be converted to felonies rather than less serious charges—a finding that Professor John Pfaff has argued is key to understanding what has driven the increase in U.S. incarceration rates since the 1970s.<sup>43</sup>

So too are the “collateral” consequences of stops and arrests vaster by far than in 1968. Professor Issa Kohler-Hausman’s research has highlighted a critical and quite contemporary consequence of stops alone, at least in jurisdictions practicing programmatic stop-and-frisk in the style of New York City: the record. She emphasizes that stops were partly a pathway to arrest, but were more commonly part of a strategy “to increase overall collection of information about people encountered on the street,” and to ensure that prosecutors, courts, and other actors down the line “had access to information about the frequency and nature of an individual’s law enforcement contacts.”<sup>44</sup> Stopped individuals are “mark[ed],” identified for differential, perhaps harsher, treatment in future cases.<sup>45</sup>

The “mark” is even deeper for those whose stops culminate in arrest, and yet deeper for individuals who are convicted—even of minor infractions. Criminal

<sup>38</sup> NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 34–40 (Jeremy Travis et al., eds., 2014).

<sup>39</sup> See, e.g., Jack B. Weinstein & Mae C. Quinn, *Terry, Race, and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN’S L. REV. 1323, 1324 (1998).

<sup>40</sup> NAT’L RESEARCH COUNCIL, *supra* note 38, at 49–50.

<sup>41</sup> *Id.* at 60–61.

<sup>42</sup> *Id.* at 51.

<sup>43</sup> See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 71–74 (2017).

<sup>44</sup> Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639 (2014).

<sup>45</sup> *Id.* at 643–48.

records in the digital age create far greater barriers to opportunity—in employment, education, and other sectors—than in the paper era of 1968.<sup>46</sup> The array of additional collateral consequences that today accompany criminal convictions even for minor offenses, and that exacerbate the societal estrangement experienced by those with even low-level contact with the criminal justice system—payment of substantial court fees, loss of public benefits, deportation, and so forth—were also largely unknown to the criminal justice system of 1968.<sup>47</sup>

#### D. Conclusion

One can take the view that *Terry* possesses flaws of imagination and execution. But imagine *Terry* without each of these changes, to say nothing of all of them in combination, and its flaws are far less consequential. In laying too much blame at the feet of *Terry* itself, we risk missing important lessons in how difficult the consequences of legal decision-making are to predict, and how dependent those consequences are on legal, sociological, political, and institutional forces that are beyond the control, and frequently below the radar screen, of judicial actors.

### IV. THE WISDOM THAT FOLLOWS

*Terry*'s contemporary manifestations supply the inspiration for each of the six fine essays that comprise this symposium. The authors' voices are diverse in topic and methodology, but they share a sense that *Terry* both reshaped the law's terms of engagement with policing, and was itself altered by the new contexts in which the stops and frisks that it blessed were deployed.

Professor Seth Stoughton's contribution, *Terry v. Ohio and the (Un)Forgettable Frisk*,<sup>48</sup> fuses scholarly insight with personal history to ruminate on the phenomenon of the frisk. Drawing on his former life as a patrol officer with the Tallahassee Police Department, Stoughton recounts his memories, or lack thereof, of "the frisk." Curiously, despite clear and particularized recollections of stops, arrests, and other interactions with civilians, and despite the fact that *Terry* suggests that the decision to frisk should be deliberate and justifiable, not a specific single frisk registers in Stoughton's memory. The reason Stoughton offers for this

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<sup>46</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1113 (2015); Alfred Blumstein & Kiminori Nakamura, Opinion, *Paying a Price, Long After a Crime*, N.Y. TIMES (Jan. 9, 2012), <http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html> [<https://perma.cc/MZM8-Q28A>].

<sup>47</sup> See ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 23–25 (2016); Natapoff, *supra* note 46, at 1089–94 (2015); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010).

<sup>48</sup> Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19 (2017).

seeming irony is that, from his perspective as an officer, the frisk was so utterly routine that it triggered nary a cognitive blip. Nevertheless, Stoughton can, and does, recount how he was trained to frisk in police academy drills—drills that taught pat-down tactics and inculcated a healthy fear and respect for the canniness of criminals who attempt to secrete weapons. Stoughton’s detailed account of the frisk—or what the frisk must have been—illustrates that however unforgettable the process was for him, the target of the frisk would undoubtedly recall the experience.

In the course of his powerfully honest and reflective narrative, Stoughton points to three important truths about *Terry* and policing in its shadow. First, and as Professor Stoughton has developed elsewhere, police training, tactics, and culture largely traffics in a siege mentality, a hyper-vigilance toward potential threat—an attitude that renders the frisk an inevitable by-product of a stop.<sup>49</sup> Second, it follows that *Terry*’s direction that frisks should occur only where there exist particularized indicia that the suspect is armed is largely toothless; whatever friction the reasonable suspicion standard might create in the decision to stop a suspect, on Stoughton’s account the frisk flows almost unconsciously. Finally, Stoughton hones in on the gulf between the experiences of policing, on the one hand, and of being policed, on the other. However much *Terry* hoped to ameliorate a “major source of friction between the police and minority groups,”<sup>50</sup> the persistence (and perhaps widening) of that gulf confirms that judicial oversight of day-to-day beat policing is unlikely to accomplish the task.

Another symposium contributor offers a view from the *Terry* trenches—but from the bench, not the beat. Judge Shira Scheindlin’s essay, *A Chance to Reflect: Thoughts from the Author of Floyd v. City of New York*,<sup>51</sup> offers perspective on *Terry*’s legacy forged in the remarkable circumstances of adjudicating the constitutionality of the New York Police Department’s stop-and-frisk program, as well as the more quotidian judicial circumstances of deciding work-a-day suppression motions. Judge Scheindlin’s bird’s-eye view of the effectiveness and impact of programmatic stop-and-frisk, gained as the federal judge in the Southern District of New York who oversaw multiple rounds of constitutional litigation over the NYPD’s program,<sup>52</sup> is sobering: She recounts that data developed in the *Floyd* litigation revealed that from 2004 to 2012 the NYPD made four million stops, of which 80% of the stopped individuals were African American or Hispanic; 90% of NYPD stops from 2004 to 2012 resulted in no further law enforcement action, and

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<sup>49</sup> See generally Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. FORUM 225 (2015).

<sup>50</sup> *Terry*, 392 U.S. at 14 n.11.

<sup>51</sup> Shira A. Scheindlin, *A Chance to Reflect: Thoughts from the Author of Floyd v. City of New York*, 15 OHIO ST. J. CRIM. L. 35 (2017).

<sup>52</sup> See, e.g., *Floyd v. City of New York*, 283 F.R.D. 153, 158 (S.D.N.Y. 2012); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 483–84 (S.D.N.Y. 2013); *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

that of the 52% of stopped individuals who were frisked, only 1.5% had a weapon. Neither the volume of the program nor the constitutional risks it ran were accidental: Internal NYPD forms guided officers to vague and standardless bases for stops such as “furtive movements,” NYPD commanders dispatched officers to majority-minority neighborhoods and to stop “the right people at the right time,” precincts worked under stop quotas driven by a command philosophy that more stops would drive down crime, and data on the racial impacts of the program were not internally analyzed or acted upon. But equally sobering are Judge Scheindlin’s reflections on the inherent limits of the *Terry* reasonable suspicion standard—even in the absence of the systemic pressures of the NYPD. A standard of “reasonable suspicion” does little to guide officers in the moment, and even less to check conscious or implicit racial bias that can infect threat assessment. And judges assessing officers ex post are, Judge Scheindlin asserts, under tacit and sometimes explicit pressure to avoid second-guessing the judgment, or questioning the credibility, of officers on the street. Stop-and-frisk, whether programmatic or intermittent, is on Judge Scheindlin’s account, bereft of meaningful legal oversight.

Judge Scheindlin lays blame for all of this at the feet of *Terry* itself. The failure of the Court in *Terry*, or its consolidated companion decisions, *Sibron v. New York* and *Peters v. New York*,<sup>53</sup> to put meat on the bones of the standard of “reasonableness” paved the way for that meat to be supplied by officers themselves, or by the police profession as it developed stop-and-frisk policing strategies. And yet, despite *Terry*’s weaknesses, Judge Scheindlin confesses to uncertainty about the alternatives: What, Judge Scheindlin asks, should replace it? Perhaps, she suggests, those who share her dim view of what *Terry* has wrought are better casting their lots not with reform of legal doctrine, but rather with policy solutions—body worn cameras, adoption of community policing, and other strategies and tactics that can both mitigate *Terry*’s weaknesses and reduce police leveraging of the broad discretion the decision handed to the profession.

Professor Rachel Harmon and Andrew Manns also take up *Terry*’s legacy in contemporary stop-and-frisk policing strategies, and their analysis is greatly informed by the experience of the *Floyd* litigation.<sup>54</sup> But their essay, *Proactive Policing and the Legacy of Terry*, scopes out from any particular manifestation of a stop-and-frisk program to assess the role that *Terry* and constitutional doctrine in general can, and cannot, play in oversight of the style of policing that *Terry* gave birth to. Harmon and Manns cast a historical net to tie *Terry* to the rise in the 1960s and 1970s of “proactive policing” strategies—a range of policing approaches that collectively embody a remaking of the police-officer-as-responder into the police-officer-as-entrepreneur, whose job is to actively prevent, rather than react to, criminal activity—whether for the end of crime prevention per se, or for

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<sup>53</sup> *Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968).

<sup>54</sup> Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of Terry*, 15 OHIO ST. J. CRIM. L. 49 (2017).

the end of controlling certain populations. The array of proactive policing strategies also share a reliance on police discretion to stop (and frisk) as a means of achieving those goals, and hence the rise of proactive policing also means the rise of “programmatically” stop-and-frisk. In likening that strategy to deployment of “a diffuse weapon, like a form of tear gas,”<sup>55</sup> Harmon and Manns show their normative hands.

And yet, Harmon and Manns urge, even those who view programmatic stop-and-frisk strategies as harmful or ineffective must face the fact that they are, at least in some manifestations, probably constitutional. They reach this provocative conclusion (parting company with a number of scholars<sup>56</sup>) largely because they view the constitutional bar as so unfortunately low: *Terry* permits so much, and for those concerned with the racially disparate effects of these policing strategies, the Equal Protection Clause forbids so little. Moreover, echoing Harmon’s prior work on the inherent limits of constitutional criminal procedure as an oversight tool, they argue that tweaking constitutional doctrine to change that analysis will still not solve the problem.<sup>57</sup> And yet, like Judge Scheindlin, Harmon and Manns ultimately find reason for hope that proactive policing’s deleterious effects might be reined in, and hope that legal doctrine might have some role, albeit only a partial one. Taking inspiration from *Floyd*, and pointing to politically driven reforms of the NYPD that were spurred in part by that litigation, they cautiously embrace the potential for constitutional litigation to work in tandem with political reform efforts to police proactive policing’s potential pathologies.

Professor L. Song Richardson is more skeptical of the prospect of taming or reforming what she views as a direct and insidious consequence of *Terry*—its provision of legal cover for racially disparate policing—in *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*.<sup>58</sup> Continuing the trajectory of her pioneering work applying lessons of social psychology to understand policing and the blind spots of Fourth Amendment doctrine,<sup>59</sup> Professor Richardson argues that the *Terry* Court’s project of healing rifts between police and communities of color was doomed at the start for reasons baked, subconsciously, into the psyches of officers and the civilians with whom they interact. Two aspects of these unconscious psychological processes that have been experimentally documented are of particular concern here to Richardson: one, the operation of implicit racial bias that, research has demonstrated, causes individuals to unconsciously link

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<sup>55</sup> *Id.* at 65.

<sup>56</sup> *See, e.g.*, Meares, *supra* note 33.

<sup>57</sup> *See, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012).

<sup>58</sup> L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73 (2017).

<sup>59</sup> *See, e.g.*, L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962 (2015); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040 (2011).

black individuals with criminality and white individuals with innocence; and two, the existence of racial anxiety, which causes white individuals to anticipate that they will be perceived as racist by black individuals, and black individuals to anticipate that they will be treated in a racially unjust manner by white individuals. The combination of these processes, Richardson argues, creates police-civilian interactions that often are initiated based on implicitly racially biased hunches, and spiral deeper into often misperceived and misdirected hostility because of the psychological and physical manifestations of racial anxiety that both officer and civilian exhibit—“a feedback loop,” as she dubs it, of suspicion and mistrust.<sup>60</sup>

Hence, on Richardson’s account, to the extent that the *Terry* Court aimed to balance two competing concerns—that police have an opportunity to prevent crime in street interactions, and that civilians not experience harassment and an erosion of trust in the police—the reasonable suspicion standard that emerged failed both aims. And in contrast to Harmon and Manns, Richardson suggests little hope for *reforming* the practice of stopping and frisking on reasonable suspicion. Rather, she concludes, the degree to which racial biases inevitably infect stops and frisks counsels no less than abolition of the practice.

Skepticism that the courts will rein in the expanding discretion that *Terry*’s progeny afford police also animates Professor Tonja Jacobi’s contribution, *The Future of Terry in the Car Context*.<sup>61</sup> Jacobi trains her twin lenses of law and political science on one context in which the breadth of police discretion to seize on less than probable cause has expanded beyond what the *Terry* Court could likely have envisioned: traffic stops. In a close analysis of the Court’s most recent significant move in that direction, *Navarette v. California*, Jacobi makes the case that the trajectory of reasonable suspicion in the car context is and will continue to be—for the foreseeable future—toward greater police authority to act on a lower quantum of suspicion. In *Navarette* itself, this pull led a majority of five justices, including opinion author Justice Thomas, to permit a car stop based on an anonymous tip stating that a vehicle matching that driven by the petitioner had run another car off the road at a specified highway location. This result, Jacobi argues, was not compelled by the Court’s precedents. Yet judicial politics and ideology also provide unconvincing explanations: Justice Thomas, currently perhaps the Court’s most conservative justice, was joined in the majority by Justice Breyer, one of the Court’s most liberal; Justice Scalia, perhaps the reigning conservative before his death, dissented with liberals Ginsberg, Kagan, and Sotomayor.

Drawing on her prior empirical work on judicial decision-making,<sup>62</sup> Jacobi offers a different explanation: methodology. *Navarette*, she demonstrates, was a victory for the Court’s most reliable *pragmatist* justices, and a loss for the Court’s formalists. Moreover, Jacobi argues, cases concerning reasonable suspicion in the

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<sup>60</sup> Richardson, *supra* note 58, at 88.

<sup>61</sup> Tonja Jacobi, *The Future of Terry in the Car Context*, 15 OHIO ST. J. CRIM. L. 89 (2017).

<sup>62</sup> See Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016).



car context are uniquely likely to activate pragmatist concerns, and to unify those justices who are most inclined to decide cases based on practical concerns about hamstringing the police. The justices accurately perceive, she concedes, that police face special hurdles in developing probable cause when a suspect is in a vehicle. Their concerns were evidenced by the pragmatists' preoccupation during the *Navarette* oral argument with the hypothetical anonymous tip of an atomic bomb in a vehicle, speeding toward Los Angeles: Must the police wait until the car smokes to approach it? Formalism, Jacobi argues, cannot cut through these concerns: Scalia's zinger at oral argument, "Let the car go. Bye-bye, Los Angeles," did not bring pragmatists into his coalition.<sup>63</sup> And so, Jacobi offers two specific strategic prescriptions for litigants who hope in the future for a result different from *Navarette*: hope for the appointment of more formalist justices, or craft your arguments to attend to the pragmatist concerns that animate the Court's current majority.

Illumination and critique of analytical methodology is also the starting point for Professor Alexandra Natapoff's contribution, *A Stop is Just a Stop: Terry's Formalism*.<sup>64</sup> Natapoff's methodological insight is that while the *Terry* opinion is often held up by scholars as a paradigm of pragmatism, the Court's belief that it might meaningfully cabin police discretion by permitting stops and frisks upon—and only upon—a "reasonable" degree of suspicion actually reflects formalism at its deepest level: a belief that meaningful distinctions can be drawn between legally defined categories of "stops" and "arrests," or between "reasonable suspicion" and "probable cause." It is formalism in this sense that animates all criminal procedure scholars (myself included) whose work probes and tinkers at the edges of constitutional doctrine, with the belief that the shape of those edges matters to the criminal justice system. But Natapoff wants to push the Court, and even more so the rest of us, out of that formalist comfort zone by urging clear-eyed examination of how the bulk of work churns through our criminal justice system: misdemeanor processing. Natapoff, a leading scholar of misdemeanors,<sup>65</sup> takes us into the actual workings of misdemeanor justice where, she details, the lines between stop and arrest, between arrest and charge, and between charge and conviction are rarely demarcated through litigation and contestation over formal doctrines like *Terry*'s reasonable suspicion standard. Rather, taking a cue from the late Bill Stuntz,<sup>66</sup> Natapoff argues that the contestation is driven by the unique "pathological politics" of misdemeanors—a "messy" interplay between weak legal

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<sup>63</sup> Transcript of Oral Argument at 24, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490).

<sup>64</sup> Alexandra Natapoff, *A Stop is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113 (2017).

<sup>65</sup> See, e.g., Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015); Natapoff, *supra* note 46; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

<sup>66</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

constraints and hydraulic institutional forces driving police, prosecutors, defenders, and judges.

Natapoff's pragmatic call to examine the facts on the ground of the misdemeanor justice system does not suggest that *Terry* and the legal standard it enunciated is irrelevant. Rather more damning, Natapoff's conclusion is that *Terry* both failed to anticipate and substantially exacerbated the degree to which a mere police stop would have far-reaching and little scrutinized consequences for the civilians involved. Natapoff bemoans, to some extent, the Court's failure in *Terry* to be more prescient—a failure borne in part of its typical rejection of a more empirically grounded or functional jurisprudence. What if, Natapoff imagines, Justice Warren had paused to play out the process that *Terry* stops would put in motion in misdemeanor cases? Indeed, as Natapoff points out, it took only four years for Justice Marshall to regret his vote with the *Terry* majority, and to observe his dissent in *Adams v. Williams* that “the delicate balance that *Terry* struck was simply too delicate, too susceptible to the ‘hydraulic pressures’ of the day.”<sup>67</sup> But it is not the Court alone that draws methodological ire. Natapoff concludes with an anti-formalist call to scholars seeking better to understand and critique the criminal justice system, to break out of cabined fields of inquiry that pretend that stages and actors in the criminal justice system can be neatly boxed in their roles and effects. If we are to understand the workings of the misdemeanor justice system—and, indeed, if we are to properly understand *Terry*'s legacy—we as scholars must also de-center doctrinal line-drawing of the sort that *Terry* engaged in, and work in the “messy” muck of formal law and institutional dynamics that actually characterizes much of our criminal justice system.

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<sup>67</sup> 407 U.S. 143, 161–62 (1972) (Marshall, J., dissenting).