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THE *TERRY* SCORE

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Nineteen years ago, the Supreme Court issued its landmark decision *Terry v. Ohio.*[1] In *Terry,* the Court expanded a police officer's power to seize persons suspected of committing an offense, holding that an officer can stop and frisk persons who act suspiciously, provided that the officer can point to "specific and articulable facts" justifying the stop.[2]

Although the Court required that the officer be able to point to "specific and articulable facts," it gave little guidance as to what facts, either by themselves or in combination, would be sufficient to justify an investigative stop.[3] To a large extent, then, the decision whether to stop and frisk is a discretionary one, left to the officer in the field.[4] Indeed, shortly after *Terry,* the District of Columbia Court of Appeals held that each case must be decided on its own facts,[5] and soon noted that the determination of whether the officer had sufficient justification is "not subject to mathematical formula."[6]

Because nineteen years have passed since the *Terry* decision, and statistical modeling processes have been used successfully in other fields,[7] we un-

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

2. *Id.* at 21.

3. *Id.* at 30 (each case decided on its own facts).

4. *See* District of Columbia Metropolitan Police Order No. 304.10 (1982) (giving factors for officers to use in determining whether to stop).

5. Stephenson v. United States, 296 A.2d 606, 609 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973).

6. Kenion v. United States, 302 A.2d 723, 724 (D.C. 1973).

7. Six years ago, Dr. Howard Champion of the Washington Hospital Center, and one of the authors of this article, William Sacco, published an article which quantified physiological

dertook an inquiry to see if we could develop, based on the District of Columbia Court of Appeals' case law, the mathematical formula it eschewed thirteen years ago. If such a formula, or score, could be developed, we hypothesized, that score could be used to assist officers in determining when they have enough facts to warrant making an investigative stop. Although the data base is statistically small, we were able to develop a score which expands upon the guidance that the court has previously provided.

The most explicit guidance the District of Columbia Court of Appeals has provided was set forth in *Stephenson v. United States.*[8] In that case, the court held that the officer can take into account (1) "the particular activity of the person stopped for questioning which the investigating officer has observed," (2) "that officer's knowledge about (a) the activity and the person observed and/or (b) the area in which the activity is taking place," and (3) "the immediate reaction or response of the person when approached and questioned by the officer."[9]

We were able to expand upon the criteria set out in *Stephenson*. We found seven factors (plus an additional catchall "other" factor), at least one of which was present in virtually every case where the court upheld the stop. Using the statistical processes discussed later in this article, we calculated how much each factor was "worth" in terms of its contribution to a sustainable stop.

This Article is divided into three sections. Part I outlines the methods used to identify pertinent cases, and to calculate the *Terry* score. Part II discusses the factors and the *Terry* score, and how the factors combine to establish a "good" or "bad" stop. Finally, Part III presents comments on our research and findings by prosecutors, defense attorneys, police officers, and academicians.

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factors which, in combination, assessed the severity of injury a trauma victim had sustained, and predicted the probability of patient survival. Champion, Sacco, Carnazzo, Copes & Fouty, *The Trauma Score,* 9 CRITICAL CARE MED., Sept. 1981, at 672 [hereinafter Champion]. Although predicting patient outcome is considerably different than predicting case outcome, we reasoned that if one could quantify physiologic severity and probability of death, one may also be able to quantify those factors which underpin *Terry*'s requirement of "specific and articulable facts," and develop a model with which to predict which factors, in combination, would lead to a sustainable stop.

8. 296 A.2d 606 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973).

9. *Id.* at 609; *see also* Lawrence v. United States, 509 A.2d 614, 616 (D.C. 1986) (citing *Stephenson,* 296 A.2d 606 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973)).

I. METHODOLOGY

A. Identifying Cases

The first task was to identify those District of Columbia cases in which the court discussed whether the officer who stopped and frisked an individual had the requisite "specific and articulable suspicion." We ran a search on one of the computerized legal data bases, identifying all District of Columbia cases in which the phrases "specific and articulable" or "reasonable and articulable," and the *Terry v. Ohio* decision were mentioned. Our search identified a total of 108 cases. Those cases formed our data base.

B. Identifying the Factors

An attorney read each case, recording the facts exactly as recited by the court, and noting whether the stop was upheld. Although the *Terry v. Ohio* decision was mentioned in all of these decisions, in forty-five cases, the court did not analyze whether the officer had "specific and articulable" suspicion to justify the stop.[10] Thus, the sixty-three cases in which the court discussed whether the stop was justified formed our principal data base.[11]

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10. For instance, in Tuck v. United States, 477 A.2d 1115 (D.C. 1984), the question presented was whether a warrantless entry to save animals in a pet shop was justified. *Id.* at 1118; see id. at 1119 (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968), for the objective standard of reasonableness and referencing "specific, articulable" facts justifying entry to render emergency medical assistance to animals). Similarly, in Lucas v. United States, 411 A.2d 360 (D.C. 1980), the question presented was whether a sensing device used by a department store violated the defendant's fourth amendment rights. *Id.* at 361; see id. at 363 (citing *Terry* for the proposition that the scope of a search must be strictly tied to circumstances which rendered its initiation permissible).

11. In some cases, the court differentiated between a *Terry* stop implicating fourth amendment protections, and a consensual encounter, in which no fourth amendment protections are triggered. For instance, in United States v. Burrell, 286 A.2d 845 (D.C. 1972), the officer noticed that Burrell watched him as he walked by a bus stop where Burrell was waiting. *Id.* at 846. Burrell left the bus stop as the officer approached. *Id.* The officer then caught up with Burrell, placed his hand on Burrell's arm, and said "Hold it, sir. Could I speak with you a second." *Id.* Burrell blurted out, "It's registered, it's registered." *Id.* The officer frisked Burrell, and found a gun (subsequently found to be unregistered). *Id.*

The court held that, rather than stopping Burrell pursuant to *Terry,* the officer had initiated a consensual encounter, during which a reasonable person would have felt free to leave. *Id.* at 846. The court apparently held that once Burrell blurted out that he was, in essence, carrying a concealed weapon, the officer had probable cause to arrest. *See id.* at 847. The court never reached the question of whether the officer had specific and articulable suspicion to justify an investigative stop. Indeed, according to the score we developed, it is questionable whether he had enough specific and articulable suspicion prior to touching Burrell for, by our count, he had only two points: defendant acted nervous (one point) and officer was experienced (other—one point).

Because in these "consensual encounter" cases the court did not reach the question whether the officer had reasonable and articulable suspicion justifying a *Terry* stop, we did not include these cases in our principal data set.

When the court indicated which particular facts provided the specific and articulable suspicion, we made special note of the court's holding in order to include the court's calculus into our scoring system. If the court did not specifically indicate which facts were dispositive, we simply recorded the facts. Additionally, whenever the court cited a case in support of the proposition that there was sufficient justification for the stop, we checked the cited case to make sure that it was on our list of *Terry* cases; if the case was not on the list, we added it.[12]

The facts were "groupable" into seven key categories, or factors, which were present, alone or in combination, in virtually every *Terry* stop case. These factors were: (1) the suspect matched the description of a person wanted in a reported crime;[13] (2) the officer saw a bulge which led him to believe that the person was carrying a concealed weapon;[14] (3) the suspect acted suspiciously;[15] (4) flight;[16] (5) the character of the neighborhood, de-

12. In some cases, probable cause cases were cited for support of a proposition discussed in a *Terry* context. See, e.g., Lawrence v. United States, 509 A.2d 614, 616 (D.C. 1986) (a *Terry* case) (citing Tobias v. United States, 375 A.2d 491 (D.C. 1977) (a probable cause case)) for the proposition that flight can be taken into account in determining whether a stop is justified. We did not include the probable cause cases in our data set, even though they have been used to justify *Terry* cases.

13. *See, e.g.*, Davis v. United States, 498 A.2d 242, 244 (D.C. 1985) (suspect wearing description given in anonymous tip); Moore v. United States, 468 A.2d 1342, 1344 (D.C. 1983) (suspect wearing clothing of person described in radio run); *In re* J.G.J., 388 A.2d 472, 473-74 (D.C. 1978) (suspect wearing on age, physical description and clothing); McMillan v. United States, 373 A.2d 912, 913 (D.C. 1977) (car matched description as to color, license tag, and number of passengers).

14. *Moore*, 468 A.2d at 1344; Lewis v. United States, 399 A.2d 559, 560 (D.C. 1979); Mitchell v. United States, 368 A.2d 514, 515-16 (D.C. 1977); Anderson v. United States, 326 A.2d 807, 808-09 (D.C. 1974), *cert. denied*, 420 U.S. 978 (1975); Lyons v. United States, 315 A.2d 561, 562 (D.C. 1974); Terrell v. United States, 294 A.2d 860, 863 (D.C. 1972), *cert. denied*, 410 U.S. 938 (1973).

15. *See, e.g., Lawrence*, 509 A.2d at 615 (suspect waits on corner while companion goes into liquor store, exits and confers with suspect; the two then walk in front of store two or three times); United States v. Barnes, 496 A.2d 1040, 1041 (D.C. 1985) (same); Nixon v. United States, 402 A.2d 816, 818 (D.C. 1979) (suspect looks intently into cars); United States v. Childs, 379 A.2d 1188, 1189 (D.C. 1977) (suspects carry a television set in high crime area); Thompson v. United States, 368 A.2d 1148, 1149-50 (D.C. 1977) (suspect holds small manila envelope and a small piece of paper, appearing to roll a marijuana cigarette).

16. *Lawrence*, 509 A.2d at 615 (suspect fled from scene once officer turned on his emergency equipment); Robinson v. United States, 355 A.2d 567, 568 (D.C. 1976) (suspect fled from scene upon seeing officer); Smith v. United States, 295 A.2d 64, 66 (D.C. 1972) (defendants split up and fled upon seeing officer), *cert. denied*, 411 U.S. 951 (1973). Included in this category are those cases in which the officer relied on the flight of a companion. *See, e.g.*, United States v. Johnson, 496 A.2d 592, 594 (D.C. 1985) (driver fled once officers approached). Franklin v. United States, 382 A.2d 20 (D.C. 1978) (flight of companions justified investigative stop), *aff'd in part, rev'd on other grounds*, 392 A.2d 516 (D.C. 1978), *cert. denied*, 440 U.S. 948 (1979).

scribed either as a "high crime area,"[17] or an area in which the officer is aware of crimes;[18] (6) the suspect acted nervously or made a furtive gesture;[19] and (7) the suspect is seen in the vicinity of a recently reported crime,[20] (including being seen a short time after a crime has been reported).[21] Because court often mentioned other facts, we created an "other" category, into which we grouped these miscellaneous facts.[22]

C. The Statistical Process

Having identified the factors, we then subjected them to statistical analysis specifically designed to accommodate our small data base. We assigned each factor a numerical weight (on a scale from one to ten, the weights increasing with the statistical strength of the factor), and then derived a score for each case by totalling the weights for the factors appearing in the case.[23]

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17. *Barnes,* 496 A.2d at 1041; *Johnson,* 496 A.2d at 594; *Moore,* 468 A.2d at 1344 (D.C. 1983); *Childs,* 379 A.2d at 1190; Crowder v. United States, 379 A.2d 1183, 1184 (D.C. 1977); Curtis v. United States, 349 A.2d 469, 470-71 (D.C. 1975); Gray v. United States, 292 A.2d 153, 154 (D.C. 1972); Williams v. United States, 287 A.2d 814, 815 (D.C. 1972).

18. *Nixon,* 402 A.2d at 818; Jones v. United States, 391 A.2d 1188, 1189 (D.C. 1978); Dockery v. United States, 385 A.2d 767, 769 (D.C. 1978); Johnson v. United States, 367 A.2d 1316, 1317 (D.C. 1977); *Robinson,* 355 A.2d at 568; Coleman v. United States, 337 A.2d 767, 768 (D.C. 1975); Stephenson v. United States, 296 A.2d 606, 607 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973).

19. Lewis v. United States, 399 A.2d at 559, 561 (D.C. 1979) (nervous); *Jones,* 391 A.2d at 1189 (furtive gesture); *Crowder,* 379 A.2d at 1185 (nervous); *Johnson,* 367 A.2d at 1318 (nervous); Lawson v. United States, 360 A.2d 38, 39 (D.C. 1976) (furtive gesture); *Curtis,* 349 A.2d at 470 (furtive gesture); Tyler v. United States, 302 A.2d 748, 749 (D.C. 1973) (furtive gesture); United States v. Page, 298 A.2d 233, 234 (D.C. 1972) (furtive gesture); Watts v. United States, 297 A.2d 790, 791 (D.C. 1972) (furtive gesture); Terrell v. United States, 294 A.2d 860, 862 (D.C. 1972)(nervous), *cert. denied,* 410 U.S. 938 (1973).

20. United States v. Lewis, 486 A.2d 729, 731 (D.C. 1985); *In re* E.G., 482 A.2d 1243, 1245 (D.C. 1984); Wilkerson v. United States, 427 A.2d 923, 924 (D.C.), *cert. denied,* 454 U.S. 852 (1981); District of Columbia v. M.M., 407 A.2d 698, 700 (D.C. 1979); Bridges v. United States, 392 A.2d 1053, 1055 (D.C. 1978), *cert. denied,* 440 U.S. 938 (1979); *In re* J.G.J., 388 A.2d 472, 473 (D.C. 1978).

21. *Wilkerson,* 427 A.2d at 924; District of Columbia v. M.M., 407 A.2d at 70; Irby v. United States, 342 A.2d 33, 35 (D.C. 1975); *Williams,* 287 A.2d at 815.

22. *See, e.g.,* United States v. Barnes, 496 A.2d 1040, 1041 (D.C. 1985) (defendant told officer he had previously been involved in armed robbery); Franklin v. United States, 382 A.2d 20, 21 (D.C. 1978) (companion flees, officers experienced), *rev'd on other grounds,* 392 A.2d 516 (D.C. 1978), *cert. denied,* 440 U.S. 948 (1979); *Crowder,* 379 A.2d at 1185 (defendant present at illegal crap game); United States v. Childs, 379 A.2d 1188, 1191 (D.C. 1977) (officers experienced); Ford v. United States, 376 A.2d 439, 441 (D.C. 1977) (defendant showed officer narcotics paraphernalia).

23. The problem was modeled as a two-class multiple binary factor discriminant problem. *See* N. NILSSON, LEARNING MACHINES (1965). The performance of each factor, and many factor combinations, for prediction of the likelihood of a stop being upheld was evaluated using misclassification rate and relative information gain, r. *See* Champion, *supra* note 7; *see also* W. SACCO, H. CHAMPION & M. STEGA, Trauma Care Evaluation (1984). For a given factor or

Stops with scores exceeding a certain threshold were predicted to be upheld. Those falling short were predicted to be not upheld. The threshold was chosen to minimize the number of classifications or to be the smallest value above which are scores only of upheld cases. Using statistical modeling techniques,[24] we were able to develop a first draft of the score.

After reviewing the initial model, we determined that some factors were inordinately weighted. We adjusted the score to take into account the court's decisions, e.g., downgrading those factors the court had held must be "linked" with others if the stop was to be sustained.[25]

The variability of the results was explored by the "statistical bootstrapping" technique.[26] The entire factor weighting computations were redone from scratch with each of fifty bootstrap samples. The factor-weight sums were calculated for the individual cases in each bootstrap sample, and statistical rates determined.[27]

D. Results

Our research resulted in the following weighting of factors:

The *Terry* Score

(1)	Suspect matches description of suspect wanted in a reported crime:	10 points
(2)	Officer sees a bulge that looks like a concealed weapon:	7 points
(3)	Suspect acts suspiciously:	3 points
(4)	Flight:	5 points
(5)	Character of the neighborhood:	2 points
(6)	Suspect acts nervous/makes a furtive gesture:	1 point
(7)	Suspect is seen in the vicinity of a reported crime:	3 points
(8)	Other:	1 point

factor combination, R is the ratio of the information gain for that factor (or combination) to the information gain for a perfect predictive factor. R varies from zero to one. The closer R is to one, the better the predictor. On these data, the *Terry* score had an R value of 0.77.

24. *See supra* note 23.

25. These factors were "high crime area," "nervous/furtive gesture," "flight," "vicinity of the reported crime," and "other." See *supra* notes 13-22 and accompanying text for a discussion of the factors.

26. Diaconis & Efron, *Computer-Intensive Methods in Statistics,* SCI. AM., May 1983, at 116.

27. For the 50 bootstrap samples, the median R value was 0.74, and the median minimum misclassification rate was seven. The median smallest threshold above which were upheld case scores was six.

POINTS	PERCENTAGE OF STOPS UPHELD
1-3	18
4-6	65
7-9	86[28]
9+	100

These point values are cumulative; for example, if an officer, patrolling a high crime area, were to see a person acting suspiciously, and that person were to run away from the officer when approached, the officer would have the equivalent of ten points (2+3+5) of "specific and articulable facts."

Our research showed that the court upheld 18% of the cases in which the officer had the equivalent of three or less points, 65% of the cases in which the officer had four to six points, 86% of the cases in which the officer had seven to nine points, and 100% of the cases in which the officer had the equivalent of more than nine points. Thus, if the officer has less than seven points worth of specific and articulable facts, he would do well to pause and consider whether a stop is justified. Alternatively, if he has nine or more points, he should feel confident that if he decides to stop the person, he is acting within the constitutional limits defined by *Terry*.

E. Post-Result Checking

Once we had completed the initial computations, we tested the score against all of the published decisions we were able to identify. Assuming that the officer needed at least eight points for the stop to be "good," the score predicted the result in 77% of the cases. Because the published cases formed the very data set from which the score was derived, we felt it necessary to check the score against other decisions. The only other decisions against which we could check the score were the court's unpublished Memorandum Opinions and Judgments. We checked the score against ten decisions pulled randomly from the court's files.[29] The score predicted the result in 90% of the cases.

II. THE *TERRY* SCORE

A. The Score and the Cases

In this section, we discuss our weighting of the seven factors and analyze the cases in which the court discussed the particular factor being reviewed.

28. All stops with more than eight points were upheld.

29. *See, e.g.*, Brown v. United States, No. 85-1182 (D.C. June 11, 1986); Young v. United States, 515 A.2d 1090 (D.C. 1986). The score also accurately predicted the result in two cases published subsequent to the writing of this article, United States v. Bennett, 514 A.2d 414 (D.C. 1986) and Groves v. United States, 504 A.2d 602 (D.C. 1986).

1. The "Match Description" Cases

According to the *Terry* Score, "match description" is worth ten points. Because the court has upheld all stops when the officer had nine or more points, if the officer sees a person he thinks is wanted in a reported crime (i.e., the suspect "matches the description"), the scoring system suggests that the court will probably uphold the stop.[30] The case law mirrors this high point value.

Of course, if the officer sees a person who matches the description of someone suspected in a crime, common sense suggests that the officer should be authorized to stop the person to investigate further.[31] And indeed, the "match description" cases reflect this common sense approach to the law. Even if the only information on which the officer based the investigative stop is that the person matched the description of an alleged perpetrator, the court has upheld the stop.[32]

The court has gone much further, however, in upholding stops when the suspect only minimally resembled the person sought by the police. For instance, in *United States v. Lewis,*[33] the police were looking for a suspect who had assaulted a woman in Rock Creek Park.[34] The suspect was reported to be six feet tall, thin (approximately 150 pounds), with no facial hair.[35] The officer stopped a person almost six feet five inches, 209 pounds, with a mous-

30. It is important to distinguish when "match description" will provide probable cause to arrest and when "match description" will simply provide a basis upon which to make an investigative stop. In some instances, the match will provide a sufficient predicate for the police to have probable cause to arrest, as when the description has sufficient indicia of reliability and the match is exact. In other situations, however, the match between the description and the person observed is not exact, so that probable cause is lacking. Yet, because the match is close enough, there is a sufficient basis for the police to investigate further. *See infra* note 32 and accompanying text.

31. The matches analyzed by the court have been reasonably contemporaneous with the reporting of a crime. An officer would probably be justified in stopping a person who matches the description of a suspect *and* who is also in the general vicinity of a recently reported crime. It is questionable whether a description match, particularly of clothing, would justify a stop in other parts of the city, or at a time remote from the time of the crime.

32. *See, e.g.,* Davis v. United States, 498 A.2d 242 (D.C. 1985) (defendant matched description given by anonymous informant); United States v. Mason, 450 A.2d 464, 465 (D.C. 1982) (description substantially matched that given in radio run); Lee v. United States, 402 A.2d 840 (D.C. 1979) (victim described defendant); McMillan v. United States, 373 A.2d 912, 913 (D.C. 1977) (car matched description given in lookout as to color, license and number of passengers); Lawson v. United States, 360 A.2d 38 (D.C. 1976) (defendant matched description of man identified by anonymous caller who reported that man of defendant's description had a pistol in his pocket).

33. 486 A.2d 729 (D.C. 1985).

34. *Id.* at 731.

35. *Id.* at 733 & n.4.

tache.[36] The court upheld the stop.[37] Upholding the stop in the face of the wide disparity between the description and the suspect was no fluke; the court had previously held in *In re J.G.J.*[38] that it had never required a precise correlation between the description that the police have of a suspect and the actual appearance of the person stopped.[39] Thus, if an officer were to testify that he thought the person stopped matched the description of the person wanted in a reported crime, and the court credits his testimony, there is a high probability that the court will sustain the stop, even if the defendant only barely resembles the actual suspect.

2. *The "Bulge" Cases*

"Bulge" is worth seven points. According to our calculation of this factor's value, there is a high probability that, if an officer testifies that he saw a bulge in the suspect's clothes and had other information which reasonably led him to believe that the suspect was carrying a concealed weapon, the court will sustain the stop.[40] For instance, in *Mitchell v. United States,*[41] the officer, who had "reliable" information that a suspect had a revolver in his pocket, saw a person who matched the description of the suspect, and whose pants' pocket "bulged."[42] The officer's partner stopped the suspect, reached into the suspect's pocket, and recovered a gun.[43] The court, after reviewing all of the facts, held that the officer was "clearly" entitled to make a *Terry* stop upon noticing the bulge.[44] Similarly, in other cases, when the officer

36. *Id.* The description provided also indicated that the suspect was wearing a raincoat and sweater; Lewis was wearing only a sweater when stopped. *Id.*

37. The court also noted that the officer saw that Lewis had mud and briars on his pants leg, was in the same general vicinity as the offense, that Lewis slowed down upon seeing the officer, and that Lewis was perspiring. *Id.* at 733. Still, the import of the court's discussion makes it clear that, because there was a sufficient match of description, an investigative stop was warranted. *See id.* ("[o]fficer . . . observed appellee who arguably fit the description broadcast in the lookout"). Moreover, the mud and briars, and being in the same general vicinity of the crime, could be innocently interpreted. *See infra* note 77 (discussing United States v. Barnes, 496 A.2d 1040 (D.C. 1985)).

38. 388 A.2d 472 (D.C. 1978).

39. *Id.* at 474.

40. We pause to note that the officer must have a reasonable basis to believe that the person is carrying a concealed weapon. In the cases discussed *infra* notes 41-62, the officer was told that the person was carrying a weapon and saw a bulging pocket, or had other reason to suspect that the bulge was a concealed weapon. It is also apparent that the police are authorized to stop a person if they see a bulge which, due to its shape, leads them to conclude that the person is carrying a concealed weapon. It is doubtful whether the court would sustain a stop of a person simply because the person's pocket was bulging.

41. 368 A.2d 514 (D.C. 1977).

42. *Id.* at 515.

43. *Id.* at 515-16.

44. *Id.* at 517.

saw a bulge, and had other reason to believe that the suspect had been involved in criminal activity, the court has upheld the stop.[45]

However, it is *not* important that the officer's suspicions turn out to be correct. In *Terrell v. United States,*[46] the officer saw the defendant slumped over the wheel of a car, with the motor running.[47] The officer approached the car, and asked the defendant if he was all right.[48] The defendant said nervously "I'm fine," and moved his hand.[49] The officer saw that the pockets of the defendant's windbreaker looked heavy, and thought there was a gun inside the pocket.[50] Upon seeing what he thought was a gun, the officer told Terrell that he was going to frisk him.[51] Terrell pushed the officer and fled.[52] Upon apprehending Terrell, the officer discovered not a pistol, but rather ammunition (and a key case) in his pocket.[53] The officer found a gun elsewhere.[54] The court held that the officer's conduct up to the point when Terrell pushed him was "fully justified under the *Terry v. Ohio* requirement of articulable circumstances."[55]

Similarly, in *United States v. Dowling,*[56] the officers were told that a man wearing a long black raincoat, who had gone down an alley, had a gun in his pocket.[57] The officers went down the alley, and saw a man (Dowling) who matched the description given.[58] Upon stopping Dowling, the officers observed a large bulge in his pocket.[59] When Dowling was frisked, the officers did not find a gun, but rather found gambling slips.[60] On the description given, and the bulge in the pocket, the court sustained the stop.[61]

One could conclude from *Mitchell, Terrell,* and *Dowling* that whenever an

45. *See, e.g.,* Moore v. United States, 468 A.2d 1342 (D.C. 1983) (suspect matched description of person wanted in lookout; officer notices that suspect's coat pocket was bulging; stop upheld); Anderson v. United States, 326 A.2d 807 (D.C. 1974) (officer responds to radio run for a man with gun; defendant approaches officer holding something in his jacket; officer sees that what defendant is concealing makes jacket bulge; stop upheld), *cert. denied,* 420 U.S. 978 (1975).

46. 294 A.2d 860 (D.C. 1972), *cert. denied,* 460 U.S. 938 (1973).

47. *Id.* at 862.

48. *Id.*

49. *Id.*

50. *Id.* at 862-63.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* The gun was in the car in which the defendant was riding.

55. *Id.*

56. 271 A.2d 406 (D.C. 1970).

57. *Id.* at 407.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 408.

officer reasonably believes that the bulge he sees is a concealed weapon, he can make an investigative stop. According to our score, however, the "bulge" factor will not always be enough to justify an investigative stop (only 86% of the cases with seven to nine points are upheld). Is the score realistic? If an officer sees a bulge which leads him to think that the person is carrying a concealed weapon, one would think that the officer should be authorized to make an investigative stop. Yet, the statistical weighting may be more accurate than it seems at face value. Assume that the officer who sees the bulge is experienced; when a court reviews the stop, the court would examine a total of eight points of "specific and articulable" suspicion (seven for the bulge, one for the officer's experience). Microanalysis of the score shows that the court is more likely to uphold an eight-point case than a seven-point case.[62] If, however, the officer is inexperienced, a court may pause before sustaining the stop, particularly if the officer had no basis for believing that the bulge was a concealed weapon other than seeing the bulge.

3. *The "Suspicious Behavior" Cases*

According to our score, suspicious behavior is worth three points. Such behavior alone, then, is not enough to justify an investigative stop. Can this scoring be accurate? We feel that it is, provided that the "suspicious behavior" factor is divided into two sub-sets: one in which it is apparent that the person is preparing to commit a crime, and one in which the suspicious behavior can be innocently interpreted.

Truly suspicious behavior, where it is apparent that the person is preparing to commit a crime, will, by itself, justify a stop. For instance, in *United States v. Thomas,*[63] the police officers watched the defendant as he and his companions stalked two women on a dark street late at night.[64] The court noted that the defendant's behavior was sufficient to justify an investigative stop.[65]

Similarly, in *Smith v. United States,*[66] the officer watched the defendant and his companion peer into cars for an hour and a half.[67] The officer thought that the defendant was trying to break into the cars.[68] Subsequent events proved the officer correct; the defendant entered the National Zoo

62. *See supra* note 28.
63. 314 A.2d 464 (D.C. 1974).
64. *Id.* at 466.
65. *Id.* at 467.
66. 295 A.2d 64 (D.C. 1972).
67. *Id.* at 65.
68. *See id.* (officer on routine patrol looking for people breaking into automobiles).

empty-handed, and later was seen leaving the zoo carrying a bag.[69] As soon as the defendant and his companion saw the officer, they split up,[70] a tactic used by criminals to foil pursuing police.[71] The defendant's behavior, even prior to his entering the zoo, was so clearly suspicious that it would have been sufficient to justify an investigative stop.[72]

The court, however, has taken a different approach when the defendant's behavior hints at criminal activity, but can be interpreted innocently. In such cases, the court has established a high barrier to the officer's initiating an investigative stop. For instance, in *United States v. Barnes,*[73] the defendant was standing in front of a store near its closing time.[74] He looked up and down the street while a companion came out of the store two or three times, each time conferring with the defendant.[75] Despite the similarity to the defendant's behavior in *Terry v. Ohio,*[76] the court explicitly held that standing on a street corner in a high crime area, and conferring with a companion going in and out of a store, is insufficient to justify a *Terry* stop. The court wrote:

> Appellee's standing in front of a store just before it closed, looking up and down the street while a companion went in and out a few times and conferred with appellee on each occasion, is not sufficiently suspicious—even in a "high crime area"—to warrant an investigative seizure of the person. Such behavior, while somewhat suspicious, is capable of too many innocent explanations to justify such an intrusion; for example, the two men could have been waiting impatiently for an employee friend to get off work, or they may have been manifesting a frustrated ambivalence about whether to make a particular purchase. Accordingly, if the officer's approach and questioning constituted a seizure, it was unconstitutional, and the pistol and ammunition recovered from the ensuing frisk would have to be suppressed.[77]

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69. *Id.* at 66. The officer discovered a car stereo in the bag. *Id.*

70. *Id.*

71. Lawrence v. United States, 509 A.2d 614, 616 (D.C. 1986).

72. *Smith,* 295 A.2d at 66 ("record discloses a prolonged course of suspicious conduct which a trained police officer could reasonably expect to culminate in a theft"); *cf.* United States v. Thomas, 314 A.2d 464 (D.C. 1974).

73. 496 A.2d 1040 (D.C. 1985).

74. *Id.* at 1041.

75. *Id.*

76. In *Terry,* the defendant and his companions walked back and forth in front of a store numerous times. Terry v. Ohio, 392 U.S. 1, 6 (1968). The distinguishing factors between *Terry* and *Barnes* seem to be that in *Terry,* the defendant walked in front of the store at least five or six times, *id.,* while in *Barnes,* the defendant's companion only went in and out of the store two or three times. *Barnes,* 496 A.2d at 1041.

77. *Barnes,* 496 A.2d at 1043 (citations omitted). *Barnes* was cited with approval in Law-

The court has also held that passing money in a high narcotics area by itself does not justify an investigative stop.[78]

When ambiguous behavior is "linked" with other factors, which by themselves cannot justify an investigative stop, the combination may be enough to justify a stop. Factors upon which the court has frequently mentioned include flight, character of the neighborhood, nervousness, furtive gesture, and presence in the vicinity of a reported crime.

4. "Flight"

"Flight" is worth five points, an extraordinarily high value for a "linked" factor. Still, this high value is reflected in the case law.

The suspect's reaction upon being approached and questioned by an officer is one of the elements of the three-pronged *Stephenson* test.[79] Flight from authority, under certain circumstances, implies consciousness of guilt.[80]

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rence v. United States, 509 A.2d 614 (D.C. 1986), where the court was faced with similar facts. In both *Barnes* and *Lawrence,* however, subsequent events provided the police with sufficient justification for stopping the defendant. *Barnes,* 496 A.2d at 1045 (initial encounter was a consensual inquiry; when defendant said that he had no business at the store and had previously been involved in an armed robbery, officer had sufficient justification to make *Terry* stop); *Lawrence,* 509 A.2d at 616 (defendant's flight upon seeing police, combined with suspicious activities in front of liquor store, provided adequate justification for investigative stop).

78. Gray v. United States, 292 A.2d 153 (D.C. 1972). The court has also held that an officer did not have sufficient justification to stop a defendant when: the defendant was not wearing his raincoat, despite the fact that it was raining, and was otherwise acting in a suspicious manner, Whitten v. United States, 396 A.2d 208 (D.C. 1978); the defendant was sitting in a car at night with the dome light on in a high crime area, and made a furtive gesture upon seeing the officer, Jones v. United States, 391 A.2d 1188 (D.C. 1978); the defendant was sitting in a car in an alley with the light off, acted nervously when the officer talked with him, and attempted to hide something, Tyler v. United States, 302 A.2d 748 (D.C. 1973); the defendant was driving his car unusually and tried to hide something when he saw the officer, Watts v. United States, 297 A.2d 790 (D.C. 1972); the defendant was walking down the street late at night and attempted to avoid the officer, Robinson v. United States, 278 A.2d 458 (D.C. 1971).

The court has upheld stops when the officer observed a defendant peering into parked cars, and the officer knew that there had been car "burglaries" in the area, Nixon v. United States, 402 A.2d 816 (D.C. 1979); where, in a high crime area, the officers saw defendants carrying television sets, United States v. Childs, 379 A.2d 1188 (D.C. 1977), Cooper v. United States, 368 A.2d 554 (D.C. 1977); and the officer saw the defendant holding a small manila envelope, appearing to roll a marijuana cigarette, Thompson v. United States, 368 A.2d 1148 (D.C. 1977); and where the police responded to a call for assistance and found an illegally parked car with its lights out and engine running, and the passengers acted nervous when the police approached, Johnson v. United States, 367 A.2d 1316 (D.C. 1977).

79. Stephenson v. United States, 296 A.2d 606, 609 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973).

80. United States v. Johnson, 496 A.2d 592, 597 (D.C. 1985). The court has not yet published a case involving so-called "innocent flight," i.e., where the defendant's flight does not imply consciousness of guilt. Such a situation might arise when the defendant runs from a

While flight alone cannot justify stopping the person,[81] it greatly influences the cases in which it is present. In *Lawrence v. United States,*[82] the court specifically noted that, because the defendant fled when he became aware of the officer, the stop was justified.[83] Even the flight of a defendant's companion, while not explicitly part of the *Stephenson* test, can tip the balance such that the court will uphold the stop.[84] The flight of a companion is only relevant, however, if consciousness of guilt can be imputed to the defendant.[85] As of this writing, there are no cases where the court has reversed a stop in which the element of flight was present.[86]

5. *The "Character of the Neighborhood"*

When the character of the neighborhood is relevant the court has held clearly that an officer can take into account the character of the area in which the suspicious activity occurs.[87]

The court has expressed the character of the area either as a "high crime area," or an area in which the "officer is aware of crimes." In both descriptions, the officer knows that crimes have been taking place; the difference is that some lower crime areas experience crime waves (in which the court may note that the officer was "aware of crimes in the area"),[88] while other areas are known for their high incidence of crime (high crime area).[89] This factor

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plainclothes officer before the defendant knows that the person calling for him to stop is a policeman. If such a case arises, the court may have to discount the flight factor.

81. United States v. Bennett, 514 A.2d 414, 420 (D.C. 1986) (Mack, J., dissenting).

82. 509 A.2d 614 (D.C. 1986).

83. *Id.* at 616. It is important to note that a stop occurs when a reasonable person would believe that he is not free to leave. *Id.* at 616 n.2. Thus, even if an officer has insufficient justification when he initiates a stop, if the person flees before a "reasonable person" would believe he is being detained, the stop may be nonetheless upheld when the suspect's flight is taken into account by a reviewing court.

We see this as being one of the dangers of presenting our research. Knowing that flight has such a high value, an officer might decide to try to induce flight, in order to justify what would otherwise be an unsupportable *Terry* stop. Police departments should take pains to stress that such bootstrapping is inappropriate, and a reviewing court should be sensitive to disregard situations where flight is deliberately induced.

84. *See, e.g., Johnson,* 496 A.2d at 594 (that driver of car fled upon approach of police was dispositive); Franklin v. United States, 382 A.2d 20, 22 (D.C. 1978) (flight of companions justified investigative stop).

85. *Johnson,* 496 A.2d at 597 & n.4 (citing with approval *In re* Appeal No. 113, 23 Md. App. 255, 326 A.2d 754 (1974) (no basis for *Terry* stop when flight of companion cannot be imputed)).

86. *See supra* note 80.

87. Stephenson v. United States, 296 A.2d 606, 609 (D.C. 1972), *cert. denied,* 411 U.S. 907 (1973).

88. *See supra* cases cited in note 18.

89. *See supra* cases cited in note 17.

is worth two points.

The court, however, explicitly "eschewed" placing a great deal of reliance on this factor, writing that the "familiar talismanic litany, ['high crime area'] without a *great deal more,* cannot support an inference that [the defendant] was engaged in criminal conduct."[90] Although the court's opinions have downplayed the siginificance of this factor, statistical analysis shows that this factor has some weight, as evidenced by its statistical value (two points). The statistical value suggests that the court places some weight on this factor, notwithstanding its protestations to the contrary.

6. "Nervous/Furtive Gesture"

This factor has the least probative weight of all of the factors; one point. The court has indicated that this factor must be linked to other indicia of criminal behavior before a stop can be upheld. In *United States v. Page,*[91] the officer saw the defendant, who was sitting in the rear of a car that was stopped for speeding, make a movement as if he was hiding something.[92] The court held that furtive movements can be part of the officer's "specific and articulable" facts arousing suspicion, but by themselves are insufficient to justify an investigative stop.[93]

Similarly, in *Watts v. United States,*[94] the officer thought that the defendant looked nervous and was trying to hide something.[95] The court held that the defendant's behavior was insufficient to justify an investigative stop.[96] The scoring system indicates that this factor has little value in determining whether the officer has enough specific and articulable facts to justify a stop.

7. "Vicinity of a Reported Crime"

"Vicinity of a reported crime" is worth three points. In some cases, the court noted that the suspect was seen a short time after a reported crime; we combined this type of fact into the "vicinity" factor because a suspect seen a short time after a reported crime is almost necessarily in the vicinity of the

90. Curtis v. United States, 349 A.2d 469, 472 (D.C. 1975) (emphasis added); *see also* Kenion v. United States, 302 A.2d 723, 725 (D.C. 1973). Thus, the fact that the person is acting suspiciously in a high crime area is not enough to sustain an investigative stop (the officer would have only five points). *See, e.g.,* United States v. Barnes, 496 A.2d 1040, 1041 (D.C. 1985).

91. 298 A.2d 233 (D.C. 1972).

92. *Id.* at 234.

93. *Id.* at 237.

94. 297 A.2d 790 (D.C. 1972).

95. *Id.* at 791.

96. *Id.* at 793; *see also* Tyler v. United States, 302 A.2d 748, 749 (D.C. 1973) (nervousness and fumbling insufficient to justify *Terry* stop).

reported crime. Although the court has yet to hold that this factor must be "linked" to other factors, we think it is apparent that this factor, standing alone, cannot justify a stop.[97]

The court has not written much regarding this factor although, when it is present, the court has usually upheld the stop. That the court upheld stops in which this factor was present is probably due more to the presence of the other factors, than to the mere fact that the suspect was in the vicinity of a reported crime.[98]

8. "Other"

Many cases include facts in addition to the seven factors outlined above. These "other" facts include situations in which the suspect tells the officer that he was previously involved in crimes,[99] the suspect is out on the street either in inclement weather[100] or late at night,[101] or among a group of people engaged in illegal activity.[102] An additional fact often mentioned by the court is the officer's experience.[103]

Because these facts generally arose in only a few cases, we were unable to assign specific point values to each fact; instead, we grouped all such facts into this "other" category and calculated a broad point value for the broad "other" factor. Statistical analysis shows that the "other" factor is worth one point.

The "other" factors almost always occur in conjunction with one of the main seven factors. The only "other" factor which will by itself justify stopping a person is that the person is among a group of people involved in

97. If the factor could stand alone, officers would be authorized to stop persons who simply were in the area of a reported crime.

98. *See supra* cases cited in notes 20-21.

99. *See, e.g.,* United States v. Barnes, 496 A.2d 1040, 1044 (D.C. 1985).

100. *See, e.g.,* Kenion v. United States, 302 A.2d 723, 725 (D.C. 1973).

101. *See, e.g.,* Jeffreys v. United States, 312 A.2d 308, 310 (D.C. 1973).

102. *See, e.g.,* Dockery v. United States, 385 A.2d 767, 769-70 (D.C. 1978) (defendant among group of people smoking marijuana); Crowder v. United States, 379 A.2d 1183, 1184 (D.C. 1977) (suspect involved in craps game).

103. *See, e.g.,* Franklin v. United States, 382 A.2d 20 (D.C. 1978); United States v. Childs, 379 A.2d 1188 (D.C. 1977). Although the cases do not address how much experience an officer must have before a court will note his expertise, a judge once noted that an officer who had been on the force for three years was experienced. *Kenion,* 302 A.2d at 726 (Reilly, C.J., dissenting). Additionally, we did not include "officer's experience" as part of the seven principle factors because we did not want each officer to "bootstrap" a stop by giving himself one point for his experience before the stop took place. A point for the officer's experience, assuming other "other" factors are not present, should only be added by the trial or appellate court.

criminal activity.[104]

B. Contrasting Cases: The 1-3 and 9+ Cases

As reported earlier in this Article, the court upheld stops 18% of the time when, by the *Terry* score, there were one through three points; 65% of the time when there were four through six points; 86% of the time when there were seven through nine points; and 100% of the time when the officer, by the score, had more than nine points. For illustrative purposes, we will juxtapose a one-through-three point case with a nine-plus case. This juxtaposition illustrates what is clearly an insufficient basis for conducting a *Terry* stop, with a more than sufficient basis.[105]

In the one-through-three point cases, the officer seems to have relied more on his hunch than on articulable facts. For instance, in *Curtis v. United States,*[106] the officer saw the defendant, walking in a high crime area, move his hand from one side to another after someone had yelled "police officers!"[107] It was this "furtive movement" which triggered the officer's suspicions and led to the stop.[108] The court held that the officer relied on his suspicions, and not on reasonable and articulable facts.[109] By contrast, in *Robinson v. United States,*[110] the police received a radio report describing a

104. *See Crowder,* 379 A.2d at 1185 (presence at scene of crime constitutes sufficient basis for further inquiry).

Sometimes, there will be more than one "other" factor present. For example, the officer might be experienced and the suspect might admit involvement in prior crimes. If the score were perfect, we could accommodate additional facts in the "other" factor, giving it a weight greater than one point. Given the small sample size, however, and the great variety of these other facts, we thought it better to group all facts not included in the seven main factors into one "other" category, and give this "other" factor a single score.

105. Generally, only if the person stopped is at the scene of a crime, *see supra* notes 100-01 will a stop with three or less points be upheld. The one case we have been able to identify where a stop with three or less points has been upheld is Wray v. United States, 315 A.2d 843 (D.C. 1974). There, the defendant and his companion split up after seeing the officer. *Id.* at 844. We did not characterize this as "flight" because flight is considered evidence of consciousness of guilt, Lawrence v. United States, 509 A.2d 614, 616 (D.C. 1986), and the court specifically noted that the splitting up in *Wray* was innocuous. *Wray,* 315 A.2d at 844. The defendants rejoined, and the officer saw the defendant carrying an object (subsequently determined to be a tape recorder). *Id.* The court upheld the stop, noting that the officer should have investigated when he saw the defendant carrying the object. *Id.* We classified this case as a purely suspicious behavior case (three points).

106. 349 A.2d 469 (D.C. 1975).

107. *Id.* at 470.

108. *Id.* at 472.

109. *Id.* at 471-72. The court also wrote that the fact that the incident took place in a high crime area was not significant. *Id.* at 472. The court also apparently ignored the fact that the officer was experienced. *See id.*

110. 355 A.2d 567 (D.C. 1976).

Peeping Tom.[111] Upon arriving at the scene, the officer saw the defendant, who matched the description of the person reported in the lookout.[112] The defendant saw the officer and began to run.[113] Moreover, the officer knew about similar crimes in the area.[114] By our count, there were seventeen points involved in this stop (match description—ten points; flight—five points; officer knew about crimes in the area—two points). By our scale, the court should have upheld the stop. It did.

Robinson stands in stark contrast to *Curtis.* In *Robinson*, the specific and articulable suspicion was overwhelming.[115] Few cases, however, will present such clear illustrations of what is, and what is not, a sustainable stop. Because most cases fall in between these two extremes, it is vital for the court's decisions to reflect a consistent rationale that provides guidance to line officers. When one compares the court's policy on "match description" and "suspicious behavior," it is difficult to discern that overriding policy.[116]

C. Policy Inconsistencies

"Match description," by itself, will almost always sustain a *Terry* stop. This is true even when the match is almost nonexistent.[117] On the other hand, the court has not placed great weight on "suspicious behavior." This factor has a weight of only three points and the court will sustain a "suspicious behavior only" stop only when it is clear that the person is about to commit a crime.[118]

It is difficult to rationalize why an officer should be barred from stopping a person whose behavior reasonably arouses suspicion (as exemplified by *Barnes*),[119] yet is authorized to stop a person who barely resembles the suspect (*Lewis*).[120] The person who is acting suspiciously is, by definition, do-

111. *Id.* at 568.
112. *Id.*
113. *Id.*
114. *Id.*
115. *See id.* at 569.
116. Since the District of Columbia Court of Appeals works in panels of three judges, one could expect some minor differences between approaches taken by different panels, given the different approaches individual judges take to particular issues. The court, however, has a number of processes to ensure that a panel does not issue a decision with which a majority of the court disagrees; for instance, the court can go en banc to reverse a panel. Thus, regardless of its makeup, a panel speaks for more than itself; it speaks for the entire court.
117. *See* discussion of United States v. Lewis, 488 A.2d 729 (D.C. 1985), *supra* notes 33-37 and accompanying text.
118. *See* discussion of United States v. Thomas, 314 A.2d 464 (D.C. 1974), *supra* notes 63-65 and accompanying text.
119. *See* discussion of United States v. Barnes, 496 A.2d 1040 (D.C. 1985), *supra* notes 73-77 and accompanying text.
120. *See Lewis,* 486 A.2d at 29.

ing something that might arouse an officer's suspicions, while the person who barely resembles a suspect may be doing nothing to warrant being stopped. True, a witness may give a confused description (mixing up colors, clothing, physical characteristics), which justifies stopping a person who looks somewhat like the person the witness described. Yet, given the fourth amendment's protection against unreasonable seizures, it seems inconsistent to permit an officer to stop (and possibly frisk) a person acting innocently, who may only barely resemble the person the officers are seeking, while barring the officer from stopping a person whose actions are reasonably arousing the officer's suspicions. One approach to resolving this inconsistency would be to require a greater match between the suspect and the person stopped, rather than lower the standard for suspicious behavior. Alternatively, perhaps the policy should be reversed; i.e., the officer should be authorized to stop a person whose behavior reasonably arouses the officer's suspicions, yet should be permitted to stop only people who reasonably match the description of persons wanted in a lookout.

Having sketched out the factors and the role they play in the case law, we turn to a discussion of how the scale can be put to practical use. Can the scale be used to help officers decide when to stop a person? Would a prosecutor or defense attorney use the scale and if so, how? Would using the scale further, or retard, constitutional protections? Rather than attempt to answer these questions ourselves, we asked prosecutors, defense attorneys, police officers, and constitutional law scholars to comment on the score and its potential uses. Their comments and criticisms are contained in the following section.

III. COMMENTS[121]

A. Maurice Turner, Chief, Washington, D.C. Metropolitan Police Department

The Metropolitan Police Department is in the process of evaluating the *Terry* score material and its possible applications. The Department's Director of Training has indicated a strong interest in incorporating the data into his program, because it presents useful information on the state of the law and reduces a complex concept to a manageable instructional format.

The Department is also evaluating this material for possible use in reviewing the conduct of its officers. Existing policy requires an officer to file a detailed report on every *Terry* stop, including a recitation of all factors relied

121. Except where specifically indicated, the opinions stated by the commentators are not necessarily those of the organizations for whom they work.

upon by the officer in determining that the stop was justified. A supervisor reviews each report in order to evaluate the officer's actions. Assuming that the score is statistically sound, its application to the *Terry* factors identified by the officer could expedite the review process by providing supervisors with a quick and standardized method for evaluating all stops.

B. Douglas McBroom, former Legal Advisor to the Pittsburgh Bureau of Police, 1966-69; Assistant U.S. Attorney, 1969-72; Chief Deputy Prosecuting Attorney, Pierce County, Washington, 1972-74; presently in private practice Seattle, Washington

In constructing a statistical sample quantifying those "specific and articulable facts" which do or do not support the frisk of a person subjected to an investigative stop, the authors of this Article have made a valuable contribution to the effort to bring objectivity into an area heretofore characterized by almost purely subjective decisions of police officers and judges who rule on their actions.

When it was decided in 1968, *Terry v. Ohio* was read as standing primarily for the proposition that a police officer was entitled to act for his own self-protection when his work required him to investigate an individual's behavior in circumstances short of those which would create probable cause for arrest. However, the investigative stop procedure soon expanded past the point of merely providing a means of protection to the officer. It became a tool for discovery of concealed items (i.e., narcotics, betting slips) which did not pose a physical threat to the officer.

Terry by no means signalled the start of investigative stops *and* searches by police. The difference that *Terry* made was that, after the decision, individuals who had been concealing evidence, or a weapon, more often proceeded to court after an "investigative" stop and search rather than simply seeing their concealed item confiscated (or dumped on the street), and then going on their way.

Experienced police officers, both before and after *Terry,* frequently made the judgment of whether to stop a "suspicious" person on instinct alone, being able to articulate the reasons for their actions only after the fact. Thus, whether the bulge in a subject's clothing "looked like a weapon," or whether the subject took "furtive action," or "acted suspiciously," became a problem of characterization for both prosecutors and defense attorneys. What the prosecutor calls a "nervous gesture," the defense attorney may explain as his client's need to scratch an insect bite; the prosecutor's "bulge" can be, for the defense attorney, the subject's own bulk.

It is in the statistical comparison of the factors which are commonly offered to justify the investigative stop that this writer sees as the major contribution of this Article. Although properly trained police officers, as well as attorneys and judges, are very familiar with the terminology (i.e., "furtive," "suspicious," "bulge") applied in a "stop and frisk" situation by the appellate courts, they have heretofore lacked any basis for objective measurement of how each factor might withstand judicial review. By citing a broad range of appellate decisions and utilizing a cogent methodology in analyzing those decisions, this Article provides objective benchmarks. It will be most useful to have a statistically valid guide for help in determining the weight to be given to each factor in application of the case law to particular circumstances.

C. Jonathan Stern, E. Barrett Prettyman Fellow, 1983-1985, Staff Attorney, Public Defender Service for the District of Columbia, 1985-present

The *Terry* score is a comprehensive descriptive analysis of the court of appeals' reported *Terry* cases. The score seems to reflect accurately the significance for the court of the various "factors," or categories of facts, which arise in those cases. By extrapolating from those cases a synoptic view of the court's *Terry* jurisprudence, the authors have made a valuable contribution to the bench, the bar, and law enforcement agencies. The authors are to be commended for that contribution.

As an aid to defense counsel in the litigation of these cases, however, the point score approach has two primary drawbacks. The first of these lies in the nature of the factors themselves. The very classification of the factors entails subjective judgments about a broad array of evidentiary "facts," and the factors thus represent characterizations, by the authors and the court, of those facts.

The authors' description of the "suspicious behavior" factor provides an example; whether certain conduct qualifies as "suspicious behavior" for fourth amendment purposes is not a "fact" to which a witness can ordinarily testify. Indeed, a police officer's testimony that a defendant was acting "suspiciously" may well be objectionable as the inadmissible conclusion or opinion of a witness not qualified as an expert. Thus, the determination of whether particular conduct will trigger the operation of a given factor is often a legal one, reserved in the first instance for the trial court. Unfortunately, case law has often provided little guidance for the resolution of the threshold question of what evidentiary facts are sufficient to establish the

existence of any given factor. That question is often the crucial one at the trial level.

A related difficulty arises from the rigidity of the point assignments. As a practical matter, a given factor will have more or less weight on the *Terry* calculation depending on the facts which comprise that factor. To take the "match description" factor as an example, the extent to which a particular description matches a suspect will vary widely from case to case. Because of that variety, not all description matches have the same probative value. Thus, trial judges tend to require more corroboration of an officer's suspicions in the case of a weak match than they do in the case of a strong one. Where the scoring system does not reflect these gradations of probative value, the point assignments may be too generalized to be dispositive in assessing a particular set of facts.

The other significant problems with the *Terry* score stem from the presumptive nature of the scoring system. The method here does not account for facts outside of the categories represented by the seven factors, facts which undermine the probative value of the factors. Assume, for example, that officer Jones observes Smith acting suspiciously (3 points) on the front stoop of 100 Pittsfield Street, which is in a high crime area (2 points), and that an assault had recently been reported in the 1300 block of Pittsfield Street (3 points). According to the *Terry* score, Jones "has" eight points and a stop would be justified. Assume also, however, that Jones knows that Smith lives inside 100 Pittsfield Street. Does that fact affect the scores for "character of the neighborhood" and suspect is seen in the "vicinity of a reported crime?" One would think, and defense counsel should certainly argue, that those factors should be entitled to little or no weight under the circumstances. Because the point assignment scheme does not allow for such subtraction from a score, the point totals will often be improperly skewed in favor of justifying the stop.

In sum, the *Terry* score will no doubt aid practitioners in forming general conclusions about the relative significance of various categories of facts. The score will be particularly useful for law enforcement agents, as a general guide to the law in an area where such guidance is lacking for the "policemen on the beat." In individual cases, however, there can be no substitute for defense counsel's thorough knowledge of all of the facts, and of the controlling cases from the court of appeals. To the extent that counsel can liken his client's case to a favorable precedent, or distinguish it from an unfavorable one, he must do so based on all of the circumstances cognizable under the *Terry* score, and regardless of the result indicated by the score. Of course, to the extent that the score favors his client, counsel should so argue,

but that argument is best grounded not in the score itself, but rather in the cases from which the score derives. Conversely, where the score's indicated result is adverse to the client, counsel's task will not be to attack the score as such, but to persuade the trial court that the particular cases, from which the score's general conclusions derive, do not control the case at bar.

As the Supreme Court has observed,

> [t]erms like "articulable reasons" and "founded suspicions" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.[122]

For that reason, individual pieces of the picture have little meaning outside of their larger context—the totality of the circumstances. While the *Terry* score thus provides a helpful overview of the *Terry* jurisprudence of the court of appeals, the score, in its present form, cannot take the place of the "case-by-case" analysis which must guide counsel's efforts in litigating these issues.

D. Professor William Greenhalgh, Professor at Georgetown University Law Center, and Director of the Criminal Justice Clinic

Rather than using a mechanical system of point allocation for a determination of either probable cause or reasonable articulable suspicion, in my submission, the authors would have made a more valuable contribution to the adversary process in the administration of criminal justice in the District of Columbia, if they had pursued the appendix route. Justice Frankfurter, in his dissent in 1947 in *Harris v. United States,*[123] pulled together all fourth amendment cases decided since *Weeks v. United States*[124] in table form "setting forth precise facts in prior decisions regarding unreasonable search and seizure and their holdings."[125] It was effectuated in succinct columnar form. Justice Stewart, in 1960 in *Elkins v. United States,*[126] likewise caused to be published as an appendix in table form, admissibility, in state courts, of evidence illegally seized by state officers as well as representative cases state by state. Both appendices have been a gold mine in tracing the history and development of fourth amendment exclusionary law.

The statistical model technique presented by the authors has significant drawbacks. In all the drug courier profile cases that the Supreme Court has

122. United States v. Cortez, 449 U.S. 411, 417 (1981).
123. 331 U.S. 145 (1947).
124. 232 U.S. 383 (1914).
125. *Harris,* 331 U.S. at 155.
126. 364 U.S. 206 (1960).

decided thus far (*United States v. Mendenhall,*[127] *Reid v. Georgia,*[128] *Florida v. Royer,*[129] *United States v. Place,*[130] *Florida v. Rodriguez,*[131] *United States v. de Hernandez*[132]), an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs was only helpful in approaching the defendant. I suggest that law enforcement officers can do this anyway in light of their experience. Thus, I am not quite sure that assigning each of seven key factors a numerical weight on a scale from one to ten is all that helpful. If the street officer, who must utilize all his senses (sight, hearing, and smell), devotes his full time and attention as to how many factors he is developing so that a proper *Terry* stop can be effectuated, he may lose something in the process. As he approaches a score of eight for a stop to be "good," he may be tempted to play black-jack and ask for another hit and, if unsuccessful, he's busted, not the suspect.

Additionally, it seems to me that by the use of systemic analysis, we lose something along the way, such as an increase of subjectivity, rather than objectivity, by the officers. A computer cannot be substituted for an objective standard. It requires that officers have a reasonable knowledge of what the law prohibits. We may be straying into the minefield of subjective good faith of the individual officer, something that the Supreme Court has fortunately yet to adopt.

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As a trial level prosecutor, I find statistical scoring of *Terry* encounters to be of great practical appeal. A standard, objective test for the admissibility of evidence seized under the presently elusive *Terry* proscriptions would be a valuable tool for the initial evaluation of cases, a critical stage for the prosecutor who seeks to apply a trial-proof standard for the filing of charges. Further, a scoring standard would provide a consistent format upon which to integrate the charging decision, motion responses, and lines of inquiry and argument at the eventual suppression hearing. I have adopted a somewhat similar tool in my practice to date for both evaluative and organizational purposes. In my practice, I use a list of factors relied upon by the Supreme Court in its probable cause and stop and frisk decisions. If a scoring standard were to be adopted by the courts, the urban prosecutor with a massive

127. 446 U.S. 544 (1980).
128. 448 U.S. 438 (1980).
129. 460 U.S. 491 (1983).
130. 462 U.S. 696 (1983).
131. 469 U.S. 1 (1984).
132. 473 U.S. 531 (1985).

caseload would enthusiastically forego the research-intensive case comparison method of analysis in favor of a simple accounting of factor scores.

Of course, practicality is not the only consideration. On the trial level, where the parameters of constitutional issues are defined in the fact finding process, accurate fact development must be the primary focus. As any trial attorney must acknowledge, the facts of a given case are not stable or fixed, but rather are a kinetic composition derived from the quality of the witnesses' perceptions, memories, abilities to articulate, and credibility. These components are certainly not susceptible to accurate statistical analysis. Moreover, the artifice of the courtroom, law of evidence, rules of procedure, and a myriad of other influences, necessarily distort the representation of a street encounter presented in court. To impose the further artifice of translating the facts into a numerical score would unnecessarily increase this distortion. Thus, statistical scoring of street encounters would be insensitive to the process by which constitutional issues are actually developed at the trial level.

Not incidently, an inflexible pass-fail test for the propriety of police action would increase the risk of abuse. Although I cannot speak from experience for the officer actually engaged in a *Terry* stop, my experience in interviewing hundreds of police officers fresh from such encounters makes me doubt very seriously whether even the most intelligent and disciplined officer often has the opportunity or motive for reflection required for the contemporaneous on-the-scene application of a scoring model. Like it or not, the good judgment we demand and expect from those who routinely face the protean variety of street confrontations is a product of instinct and experience and is unlikely to be affected by abstract models. In the vast majority of cases, a scoring standard would merely provide a convenient context in which to second-guess split second action. In the worst case, the scoring standard would be an effective road map for the witness who is willing to fabricate. This same risk of abuse obviously attends the result-oriented finder of fact.

Beyond risks to the accuracy and integrity of the fact finding process, statistical scoring of fourth amendment values would seem to trivialize the ultimate goal of our litigation, justice. However one defines "justice," it clearly cannot signify merely a statistically greater percentage of fair results over unfair results. In the *Terry* opinion, the Court explicitly went beyond strict consideration of Officer McFadden's encounter with Mr. Terry to discuss police-community relations, the treatment of minorities and police casualties, as well as judicial integrity and legal precedent. Statistical scoring might well, if applied fully, remove issues of the admissibility of evidence from the contemplation of justice by reducing the subtle interplay of social

and individual interests to a matter of seemingly simple addition. Such a reduction would be an impediment both to the perception of justice and to the accomplishment of justice.

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The authors, in developing a score to help officers determine when they have enough "specific and articulable suspicion" to warrant making a *Terry* stop, have advanced the state of the art regarding what is a sustainable stop. Were I still a prosecutor, I might use the score to help me determine when to paper a case, and to help me focus my arguments, both at the trial and appellate level.

The score, however, does not take into account such subjective factors as the individual prosecutor's knowledge of the veracity of the testifying officer or the prosecutor's own "gut instincts" regarding whether the arrest should be prosecuted. To that end, then, the score, to be properly used, should serve only as a guide to help prosecutors decide when to bring a case to court, rather than as a talismanic formula for prosecution.

It is likely that the authors could develop a similar score to assist officers in determining when they have probable cause to arrest and/or search. In fact, it seems possible to develop a score for most areas of the law that depend on a "totality of the circumstances" test. But more interesting than these scores themselves is the question of how far can the authors extend the methodology they used to develop their scoring system. For instance, could the authors develop a score to help prosecutors decide whether to ask a grand jury to indict? And could the authors develop a score that might predict the monetary outcome of cases?

To the extent that the law prefers clear cut answers to problems, the authors have provided a guide to an answer in an area that heretofore has been shrouded in clouds of judicial ambiguity. While that is an advance, it is also a danger. Some areas of the law might best be left to be colored in grays, rather than blacks and whites. If this score *assists* officers in determining whether to stop, and prosecutors in determining whether to prosecute, then the authors have indeed contributed to a more effective criminal law system. If the score is used as a substitute for the officer's and the prosecutor's good judgment, then the authors have opened a Pandora's Box perhaps better left untouched.

IV. The Authors' Response to the Commentaries and Conclusion

We set out to see if we could discern patterns in the District of Columbia Court of Appeals' decisions such that we could develop a scoring system that would help officers decide when they have enough specific and articulable facts to warrant seizing a person. We think our score can be such an aid. The score is not meant to be a definitive guide as to when an officer should stop someone; rather, it is meant to be one more tool that the officer can use to help him determine whether he can make a stop within the bounds set by *Terry*. Nor is it envisioned that the prosecutor would sit with calculator in hand totalling up the points in all *Terry* cases that come before him. The score, however, can be an additional tool for the prosecutor to use in deciding whether to take the case to court.

We read the comments as generally endorsing the use of the score as a tool to assist police and prosecutors. Whether use of the score becomes a panacea or a Pandora's Box only time will tell. Given the myriad of circumstances that confront an officer each day, even with the *Terry* score, the public must depend on an officer's good judgment in determining when a situation rises to the level such that he must intrude upon a person's activities and demand that the person account for his behavior, and the prosecutor's good judgment in knowing when the public interest warrants prosecution, or dismissal.