University of Richmond Law Review

Volume 35 | Issue 1 Article 6

2001

Usual Suspects Beware: "Walk, Don't Run" Through Dangerous Neighborhoods

Margaret Anne Hoehl
University of Richmond

CASENOTES

USUAL SUSPECTS BEWARE: "WALK, DON'T RUN" THROUGH DANGEROUS NEIGHBORHOODS

I. INTRODUCTION

The Fourth Amendment to the United States Constitution[1] is "designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'"[2] The Amendment is currently interpreted as consisting of two separate clauses, the first generally prohibiting unreason-

---

1. The Fourth Amendment provides:

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

U.S. CONST. amend. IV. The Fourth Amendment was made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

2. INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)). The Fourth Amendment is primarily enforced through the exclusionary rule rather than through constitutional challenges to police practices. The exclusionary rule deems inadmissible evidence obtained in violation of the Fourth Amendment, so if a citizen arrested for possession of a concealed weapon successfully contends that it was discovered during an illegal search, the weapon will be suppressed as evidence. Since defendants apprehended in violation of the Fourth Amendment are frequently acquitted once the incriminating evidence has been suppressed, the exclusionary rule theoretically gives law enforcement officers an incentive to adhere to constitutional guidelines. For further discussion, see *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule is binding on state courts), *Weeks v. United States*, 232 U.S. 383, 394 (1914) (holding that the exclusionary rule is binding on federal courts), and Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 347-48 (1996).

able searches and seizures, and the second requiring the establishment of probable cause prior to the issuance of a warrant.[3] Hence, only those government searches and seizures requiring a warrant necessitate the establishment of probable cause, and all other searches and seizures simply need to be "reasonable."[4]

Despite this rather broad interpretation of the Amendment, the Supreme Court has nonetheless "imposed a presumptive warrant requirement for all searches and seizures and has required probable cause in order for a warrantless search or seizure to be reasonable."[5] Predictably, this blanket warrant requirement has become riddled with exceptions,[6] generally indicating that in situations calling for immediacy of action, a warrant is not required and probable cause alone will be sufficient to render the search or seizure "reasonable."

In the landmark decision of *Terry v. Ohio*,[7] the United States Supreme Court eliminated even the probable cause requirement for a "stop and frisk," stating that this type of police conduct must comply only with the "general proscription against unreasonable searches and seizures."[8] The *Terry* Court held that, in the absence of probable cause for arrest, where an officer reasonably suspects that criminal activity is imminent, he is justified in stopping ("seizing") the suspect; once the stop has been made, the officer, if he has reason to believe that he is dealing with an armed and dangerous individual, may conduct a limited search for weapons in order to ensure his own safety and that of others.[9]

---

3. William D. Anderson, Jr., *Investigation and Police Practice: Overview of the Fourth Amendment*, 82 GEO. L.J. 597, 597 (1994). Although there is a minority view which maintains that only those searches and seizures conducted pursuant to a warrant are reasonable, and thus constitutional, the view presently credited by a majority of the Court asserts that the two clauses should be considered independently of one another.

4. *See id.*

5. *Id.*

6. *See, e.g.*, Chimel v. California, 395 U.S. 752, 781 (1969) (White, J., dissenting) (noting that exigent circumstances provide exceptions to warrant requirement); United States v. Rabinowitz, 339 U.S. 56, 64 (1950) (holding that no warrant is required for search incident to arrest); Carroll v. United States, 267 U.S. 132, 161-62 (1925) (holding that no warrant is required for search of automobile based upon probable cause); *see also* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 388 n.14 (1988).

7. 392 U.S. 1 (1968).

8. *Id.* at 20.

9. *Id.* at 27.

In the recent decision of *Illinois v. Wardlow*,[10] the Supreme Court considered the question of whether evasion of law enforcement officers in an area known for a high incidence of crime is, without more, sufficient to establish reasonable suspicion to justify a stop-and-frisk.[11] Although re-affirming the principle that presence in a high-crime neighborhood cannot be used as the sole basis to support a *Terry* stop,[12] the Court maintained that since flight is the "consummate act of evasion," when a person is observed fleeing from the police in an area with a high incidence of criminal activity, the two taken together are sufficient to create a reasonable inference of wrongdoing.[13]

The purpose of this note is to explore the evolution of Fourth Amendment jurisprudence since the decision in *Terry*, and to discuss how *Wardlow* reflects an ongoing trend in which courts are allowing reasonable suspicion to be based on generalized factors that have been divorced from the requirements of particularized suspicion and a likelihood of imminent criminal activity. Part II will discuss the evolution of the reasonable suspicion standard from a narrow exception to the Fourth Amendment into an expansive legal doctrine. Part III will discuss the recent decision in *Wardlow*, and demonstrate that, although decided consistently with developing legal trends, this case represents a further departure from the basic underlying principles of *Terry*. Part IV will discuss various factors which have historically been considered in determining reasonable suspicion, and will consider whether *Wardlow* will affect the manner in which they may be weighed and combined.

II. THE EVER-EXPANDING SCOPE OF THE *TERRY* STOP

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society . . . ."[14]

10. 528 U.S. 119 (2000).
11. *Id.* at 126.
12. *Id.* at 124; *see also* Brown v. Texas, 443 U.S. 47, 53 (1979).
13. *Wardlow*, 528 U.S. at 124.
14. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

A. Terry v. Ohio: *The Seed is Planted*

In *Terry*, the Supreme Court considered the question of whether a stop-and-frisk conducted in the absence of probable cause automatically violates the Fourth Amendment.[15] On the afternoon of October 31, 1963, an experienced police officer in downtown Cleveland observed three men alternately conferring with each other on the street and strolling over to stare in a storefront window.[16] His suspicions aroused, the officer confronted the men, identified himself as a police officer, and asked for their names.[17] When his request was refused, the officer frisked the men and discovered guns on two of them—defendants Terry and Chilton—who were subsequently convicted for carrying a concealed weapon.[18] The defendants appealed, contending that the guns were seized during the course of an unlawful search, and that the trial court therefore improperly denied their motion to suppress the evidence.[19] Because the officer did not have probable cause for arrest prior to patting the men down and discovering the weapons, the Supreme Court granted certiorari to resolve the issue of whether probable cause is always required before any search or seizure may be considered "reasonable."

The *Terry* Court recognized that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"[20] for purposes of the Fourth Amendment.[21] However, to justify this seizure, some reasonable suspicion of criminal activity is required, and that suspicion must amount to more than just an inarticulable hunch.[22] The Court noted that although the protection of the Fourth Amendment does extend to citizens on the street,[23] the interest of the govern-

15. Terry v. Ohio, 392 U.S. 1, 9 (1968).

16. *Id.* at 5-6.

17. *Id.* at 6-7.

18. *Id.* at 7-8.

19. *Id.* at 8. Terry and Chilton were tried and convicted at the same time, and petitioned for certiorari together. After the Supreme Court granted certiorari, however, Chilton died, leaving only Terry's conviction for review. *Id.* at 5 n.2.

20. *Id.* at 16.

21. "[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . a 'seizure' has occurred." *Id.* at 19 n.16.

22. "[A] simple 'good faith on the part of the arresting officer is not enough.'" *Id.* at 22 (internal quotations omitted) (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

23. *Id.* at 9 (citing *Beck*, 379 U.S. 89, Rios v. United States, 364 U.S. 253 (1960), Henry v. United States, 361 U.S. 98 (1959), United States v. Di Re, 332 U.S. 581 (1948),

ment in "effective crime prevention and detection" outweighs the privacy interest of the citizen where the officer has reason to suspect imminent wrongdoing.[24]

Once the decision to detain the suspect has been made, the *Terry* Court held that a limited search of the suspect's outer clothing would be allowed for the purposes of permitting the officer to ensure his own safety.[25] The Court also commented that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[26] Thus, the original rationale behind allowing this warrantless search was to ensure the safety of the officer, and not to uncover evidence of wrongdoing.[27]

The issue in *Terry* is not the propriety of the police conduct itself, but rather the admissibility of the evidence (a weapon) uncovered during the limited search of the defendant.[28] Therefore, the fundamental holding of *Terry* is that, as long as the scope of a search conducted pursuant to a stop-and-frisk is limited to that necessary to ensure the safety of the officer, the search does not violate the Fourth Amendment, and any weapons recovered will be admissible evidence.[29] Notably, the *Terry* Court emphasized the necessity of the narrowness of the search, stating that "even a limited search of the outer clothing . . . constitutes a severe, although brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[30]

---

and Carroll v. United States, 267 U.S. 132 (1925)). The Fourth Amendment is said to apply to any place or situation where the individual may harbor a reasonable "expectation of privacy." *Id.* (citing Katz v. United States, 389 U.S. 347, 351 (1967)). For a list of cases discussing this concept, see Anderson, *supra* note 3, at 599 nn.16-20.

24. *Terry*, 392 U.S. at 22.

25. *Id.* at 23-24.

26. *Id.* at 27.

27. Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring) (The "purpose of limited weapons search was 'not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.'") (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)).

28. *Terry*, 392 U.S. at 12; *see also supra* note 2.

29. *Terry*, 392 U.S. at 12.

30. *Id.* at 24-25. Chief Justice Warren provided a very graphic definition of a pat-down:

> The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits,

When applied to the facts of the case, the *Terry* Court held that the acts of the defendant were such that they aroused a reasonable suspicion of wrongdoing, thus justifying the initial seizure.[31] Further, since the officer limited his search to a brief pat-down for weapons, the scope of the search was reasonably limited to that intended to discover weapons, and, therefore, did not violate the Fourth Amendment rights of the defendant.[32]

Ultimately, the analysis for unreasonableness that emerges from *Terry* involves two considerations. First, to justify an initial seizure, the officer must be able to identify specific facts which, when viewed in light of his own experience, give rise to a reasonable suspicion of impending criminal activity.[33] Second, to justify the search, the officer must have reason to believe that the suspect is armed and dangerous, and the search must be reasonably related in scope to the circumstances which justified the initial interference.[34]

B. *Post-*Terry *Developments: The Weed Begins to Grow*

1. Defining Reasonable Suspicion

"Reasonable suspicion" has eluded quantification, but has been generally defined as a "fair probability"[35] that is "considerably less than proof of wrongdoing by a preponderance of the evidence."[36] However, there must be a particularized and objective basis for suspecting the individual of criminal activity,[37] and that justification must be based upon "specific and articulable facts."[38]

> waistline, and back, the groin and area about the testicles, and the entire surface of the legs down to the feet.

Id. at 17 n.13 (quoting L. L. Priar & T. F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. C. & P. S. 481, 481 (1954)).

31. *Id.* at 28.

32. *Id.*

33. *Id.* at 20-21.

34. *Id.*; *see also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 662-63 (1994).

35. Illinois v. Gates, 462 U.S. 213, 238 (1983).

36. United States v. Sokolow, 490 U.S. 1, 7 (1989).

37. INS v. Delgado, 466 U.S. 210, 232 (1984) (Brennan, J., concurring in part and dissenting in part); United States v. Cortez, 449 U.S. 411, 418 (1981).

38. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968).

Hence, random stops are not considered reasonable; there must be some specific fact upon which reasonable suspicion could be based which makes the stopped individual more likely to be involved in criminal activity than an ordinary citizen.[39]

Additionally, reasonable suspicion is judged according to the totality of the circumstances as seen by the officer in light of his experience,[40] although the inference must be reasonable and amount to more than a mere hunch.[41] Courts have continually refused to establish bright-line standards, stating that the test is "necessarily imprecise" since each case is to be decided on the basis of its own facts.[42]

2. What Constitutes a Seizure?

Even the briefest of stops must satisfy the reasonableness requirement,[43] and whether or not a seizure has occurred is determined according to whether a reasonable person would have felt that he was free to leave and go about his business.[44] Thus, a seizure may occur on the basis of words alone; no physical restraint is necessary to invoke Fourth Amendment concerns.[45]

In addition, actions constituting a restraint on liberty sufficient to lead a person to conclude that he is not free to leave will vary "not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."[46] For example, merely asking an individual his identity or requesting to see identification has been held not to constitute a seizure because (theoretically) a reasonable person would recognize his right to refuse and

---

39. *Brignoni-Ponce*, 422 U.S. at 883.

40. Ohio v. Robinette, 519 U.S. 33, 39 (1996); *Cortez*, 449 U.S. at 418; United States v. Silva, 957 F.2d 157, 159 (5th Cir. 1992) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

41. *Brignoni-Ponce*, 422 U.S. at 885-86; *Terry*, 392 U.S. at 27; *see also* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 102-03 (1999).

42. Michigan v. Chesternut, 486 U.S. 567, 573 (1988); *Terry*, 392 U.S. at 30.

43. Florida v. Royer, 460 U.S. 491, 497-98 (1983).

44. INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting *Mendenhall*, 446 U.S. at 544); *Royer*, 460 U.S. at 514 (Blackmun, J., dissenting) (quoting *Mendenhall*, 446 U.S. at 554); *Chesternut*, 486 U.S. at 573 (citing *Mendenhall*, 446 U.S. at 554).

45. *See Mendenhall*, 446 U.S. at 554.

46. *Chesternut*, 486 U.S. at 573.

continue on his way.[47] In practice, however, the problems with this theory are obvious. A reasonable person, when asked for identification, would not assume that he has a right to refuse and continue on his way, but would instead feel compelled to remain and abide by the officer's requests.[48] Moreover, considering the recent holding in *Wardlow*, a refusal to cooperate with a law enforcement officer, when combined with continuing on one's way, could easily be construed as an evasion of the police, which might then amount to a basis for reasonable suspicion if that individual is in a high-crime neighborhood or otherwise suspicious in appearance.[49]

3. Limiting the Search: How Far Can You Go?

Wherever a citizen may be said to harbor a reasonable expectation of privacy, the Fourth Amendment guarantees freedom from unreasonable government intrusion.[50] Hence, government officials are required to obtain a warrant prior to initiating a search.[51] However, as in all other areas of Fourth Amendment jurisprudence, a few exceptions to the general warrant requirement have arisen.[52] For example, although historically a warrant was required before law enforcement officers were permitted to open

47. *Delgado*, 466 U.S. at 216.

48. For an interesting decision illustrating the misconceptions police officers themselves may harbor concerning an individual's right to refuse to provide identification, see *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000). In this case, an inexperienced police officer attempted to detain and ultimately arrested a criminal defense attorney who exercised his right to refuse to provide identification. Despite quoting the relevant Utah statute to the officer several times, the attorney was forcibly removed from his vehicle and shoved to his knees. *Id.* at 1182-83.

49. *Cf.* United States v. Gray, 213 F.3d 998, 1000-01 (8th Cir. 2000) (holding presence in a high-crime area and a willingness to answer questions insufficient to establish reasonable suspicion). *Contra* United States v. Burton, 228 F.3d 524, 529 (4th Cir. 2000) (holding that a refusal to comply with request for identification is not enough to establish reasonable suspicion); State v. Warfield, No. 23932-9-II, 2000 Wash. App. LEXIS 1299, at *11-12 (Wash. Ct. App. July 21, 2000) (holding that presence in a high-crime neighborhood, refusal to answer verbal summons issued without reasonable suspicion, and walking away from the police are insufficient to establish reasonable suspicion to justify a *Terry* stop).

50. Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

51. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42-43 (1976) (authorizing exception to warrant requirement for entry into a residence while in "hot pursuit" and under exigent circumstances).

52. *Id.*

any closed container, courts have gradually eliminated this requirement for moveable containers in extraordinary circumstances as long as there is probable cause supporting the initial search.[53] An interesting question to ask here is whether courts might now extend this premise to a closed container discovered during a *Terry* stop, allowing it to be opened on the basis of reasonable suspicion rather than probable cause, in an attempt to discover if the suspect is armed and dangerous.[54]

The constitutionality of a search is not judged according to its success; a search unconstitutional at its inception cannot be later justified by any incriminating evidence it may uncover.[55] On the other hand, "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."[56] Consequently, the scope of a search should be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"[57] and in searches conducted pursuant to a *Terry* stop, the scope of the intrusion is intended to be a central element in the determination of its reasonableness.[58]

4. Judicial Expansions of the *Terry* Doctrine

In the years following the *Terry* decision, the Court continued to recognize that any seizure not subject to the Warrant Clause of the Fourth Amendment must be based on a balancing of government and private interests.[59] However, in a progression of cases,

---

53. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 574 (1991) (holding that the warrantless search of a paper bag found in the trunk of a car is constitutional where there was probable cause to search the bag even though no probable cause to search the vehicle); Florida v. Jimeno, 500 U.S. 248, 251 (1991) (holding that the opening of a closed paper bag found on the floor of a suspect's car during a consensual search for narcotics is constitutional). *But cf.* United States v. Ross, 456 U.S. 798, 834-35 (1982) (Marshall, J., dissenting) (asserting that a closed paper bag may be seized, but not searched, without a warrant).

54. For further discussion, see *infra* notes 141-57 and accompanying text.

55. *Terry*, 392 U.S. at 27-28; United States v. Di Re, 332 U.S. 581, 595 (1948).

56. *Terry*, 392 U.S. at 18; *see also* Florida v. Royer, 460 U.S. 491, 500 (1983) (Brennan, J., concurring); Kremen v. United States, 353 U.S. 346, 347-48 (1957) (per curiam); *Di Re*, 332 U.S. at 586-87; Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931).

57. *Terry*, 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967)).

58. *Id.*

59. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) ("'[T]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.'") (quoting Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring)); Brown v. Texas, 443 U.S. 47, 50-51 (1979) (determining constitutionality "involves a weighing of

the United States Supreme Court has required less and less evidence to support a finding of reasonable suspicion to justify an initial stop.[60]

Initially, in *United States v. Brignoni-Ponce,*[61] the Supreme Court extended the *Terry* premise to allow a border stop of a moving vehicle predicated on reasonable suspicion alone.[62] However, after this early expansion, the Court seemed content to leave the *Terry* standard alone for awhile. For example, in the decision of *Brown v. Texas,*[63] the Court readily adhered to the original narrowly circumscribed holding of *Terry* by ruling that a *Terry* stop was unconstitutional where the officer only stopped the defendant to ascertain his identity and did not have a reasonable suspicion to believe he was engaged in criminal conduct.[64] *Brown* is also notable for its holding that presence in a high-crime neighborhood is not enough, standing alone, to support a reasonable, particularized suspicion that the person is committing a crime.[65]

In *United States v. Cortez,*[66] the Court first emphasized the necessity of a totality of the circumstances test, holding that objective facts and circumstantial evidence suggesting involvement in criminal activity will provide a sufficient basis to justify an investigative stop.[67] Additionally, the Court articulated that a police officer is entitled to rely on common sense inferences about human behavior, so long as those inferences establish a particularized and objective basis for the establishment of reasonable suspicion.[68]

Florida v. Royer[69] clarified that an investigatory detention pur-

---

the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty"); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (stating that reasonableness depends on "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers").

60. *See* Harris, *supra* note 34, at 665.
61. 422 U.S. 873 (1975).
62. *Id.* at 879-80.
63. 443 U.S. 47 (1979).
64. *Id.* at 51-52.
65. *Id.* at 52.
66. 449 U.S. 411 (1981).
67. *Id.* at 417-18.
68. *Id.* at 418.
69. 460 U.S. 491 (1983).

suant to a lawful *Terry* stop must be temporary and can "last no longer than is necessary to effectuate the purpose of the stop."[70] *Royer* also re-affirmed the basic constitutional principle that when an officer without reasonable suspicion or probable cause approaches an individual, that individual has a right to ignore the police and go about his business.[71]

In *United States v. Sokolow*,[72] the Court reiterated that the Fourth Amendment requires at least a minimal level of objective justification in order to validate a *Terry* stop, and re-emphasized the necessity of a totality-of-the-circumstances test.[73] In addition, the Court clarified that the "relevant inquiry is not whether conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[74] Notably, in its last Fourth Amendment decision prior to *Wardlow*,[75] the Court held that the right to move from one place to another according to inclination is an attribute of personal liberty protected by the Constitution.[76]

On the other hand, both state and lower federal courts have gradually—and without hesitation—increased the permissible scope of both a seizure[77] and a search[78] based upon reasonable

70. *Id.* at 500.

71. *Id.* at 498.

72. 490 U.S. 1 (1989).

73. *Id.* at 7.

74. *Id.* at 10.

75. Chicago v. Morales, 527 U.S. 41 (1999).

76. *Id.* at 47.

77. When an officer reasonably believes that a suspect is armed, courts have held that he may handcuff the suspect, block the suspect's vehicle, require the suspect to lie prone on the ground, and approach the victim with a drawn firearm. *See, e.g.*, Houston v. Does, 174 F.3d 809, 815 (6th Cir. 1999) (use of handcuffs); Washington v. Lambert, 98 F.3d 1181, 1189-90 (9th Cir. 1996) (stating that "especially intrusive means" may be used in connection with suspicion of a violent crime); United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993) (forcing suspects to lie on ground at gunpoint); United States v. Lechuga, 925 F.2d 1035, 1040 (7th Cir. 1991) (listing cases allowing handcuffing and approach with drawn firearm); United States v. Hardnett, 804 F.2d 353, 357 (6th Cir. 1986) (approach with drawn firearm).

78. For example, prior to the decision in *United States v. Place*, 462 U.S. 696 (1983), various U.S. courts of appeals had held that using a dog to detect drugs in luggage either does not constitute a search (Fourth, Fifth, Tenth, and Eleventh Circuits), or is a search requiring only reasonable suspicion (Ninth Circuit). *See* Florida v. Royer, 460 U.S. 491, 505 n.10 (1983) (listing cases). In *Place*, the Supreme Court settled the question by holding that because a "canine sniff" does not require opening the luggage, the sniff does not constitute a search within the meaning of the Fourth Amendment. 462 U.S. at 707; *see also* Indianapolis v. Edmond, 121 S. Ct. 447, 453 (2000) (holding that walking a dog around the

suspicion. Although the Supreme Court intended the holding of *Terry* to provide only a narrow exception to the probable cause requirement, and explicitly emphasized the need to limit the intrusiveness of a search conducted in the absence of probable cause,[79] courts have been increasingly lenient in allowing stops of a longer duration and searches of a more intrusive nature. Similarly, the requirement that a search based upon reasonable suspicion is permissible only when there is reason to believe the suspect is armed and dangerous has been primarily ignored;[80] instead, courts tend to focus on whether the initial stop was reasonable rather than whether the accompanying search was constitutional.[81]

A frequently overlooked aspect of stop-and-frisk cases is that courts only see "the most skewed sample of all *Terry* stops" since the only reported cases focus on guilty persons—those who were actually found to be in possession of a weapon or other contraband after being detained.[82] Thus, there are "many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."[83] Hence, the judiciary should tread cautiously in expanding the permissible scope of a *Terry* stop, for although a few additional criminals might very well be discovered and detained, each decision that lessens the stringency of the Fourth Amendment standards to which the police are held results in far more innocent

---

exterior of a vehicle is not enough to transform a seizure into a search).

79. *See supra* note 30 and accompanying text.

80. *Cf.* United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971) (announcing "automatic pat down" rule for companions of arrestee). *But see* United States v. Bell, 762 F.2d 495, 499 (6th Cir. 1985); United States v. Sawyers, 74 F. Supp. 2d 784, 792 (M.D. Tenn. 1999).

81. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 n.2 (2000) (stating that certiorari was only granted to address the constitutionality of the seizure, and not the accompanying search).

82. Harris, *supra* note 34, at 679.

83. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); *see also* Harris, *supra* note 34. Harris states that:

> [R]eported cases focus only on those with guilty motivations. Others who are without guilt are nevertheless stopped and frisked. They are not charged because the search yields no evidence and no reported case ever results. Even stops and frisks that do not result in charges carry a cost . . . *Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be.*

Id. at 679.

citizens being robbed of the protection of the Fourth Amendment under the guise of "reasonable" suspicion.

III. *ILLINOIS V. WARDLOW*: ANOTHER REASONABLE SUSPECT

In *Illinois v. Wardlow*,[84] the United States Supreme Court considered the question of whether a man observed in a "high-crime" neighborhood who began to run at the sight of the police could constitutionally be seized based upon a reasonable suspicion of wrongdoing—that is, whether evasion of law enforcement officers in an area known for a high incidence of crime is, without more, sufficient to establish reasonable suspicion.[85]

A. *Facts*

Around noon on September 9, 1995, eight police officers in four police cars were driving through a Chicago neighborhood known for heavy drug trafficking.[86] Officers Nolan and Harvey, both assigned to the special operations section of the Chicago police department, occupied the last car in the caravan.[87] Although Officer Nolan testified that he was in uniform, he could not recall whether he was driving a marked or an unmarked vehicle.[88] As the caravan passed through the area, Officer Nolan observed defendant Wardlow, a forty-four-year-old African-American man, standing next to a building and holding a white bag.[89] Allegedly, Wardlow looked in their general direction and then fled.[90] Officers Nolan and Harvey followed the defendant, and eventually apprehended Wardlow when he began to run toward their car.[91] Officer Nolan exited the vehicle and, without identifying himself as a police officer, conducted an immediate pat-down search for weap-

84. 528 U.S. 119 (2000).

85. *Id.* at 123.

86. *Id.* at 121; People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997).

87. *Wardlow*, 528 U.S. at 121.

88. *Id.* at 137 (Stevens, J., concurring in part and dissenting in part); *Wardlow*, 678 N.E.2d at 66.

89. *Wardlow*, 528 U.S. at 121-22.

90. *Id.* at 122. However, as noted by the Illinois appellate court, the evidence was inconclusive as to whether the presence of the police caravan was the actual stimulus for the defendant's flight. *Wardlow*, 678 N.E.2d at 67.

91. *Wardlow*, 678 N.E.2d at 66.

ons, because, in his experience, "it was common for there to be weapons in the near vicinity of narcotics transactions."[92] After removing the bag from the possession of the defendant, Officer Nolan squeezed the bag and felt an object the weight and size of a gun.[93] The officer then opened the bag and discovered a handgun along with five live rounds of ammunition.[94]

B. *Procedural History*

Following a bench trial, Wardlow was convicted of "unlawful use of a weapon by a felon."[95] He appealed the decision solely on the basis that the trial court erred in not suppressing the gun recovered by Officer Nolan, maintaining that the search and seizure were conducted in violation of his Fourth Amendment rights.[96]

An Illinois appellate court reversed the conviction on the grounds that the evidence was insufficient to indicate that Wardlow was observed in an adequately defined high-crime area.[97] However, the court did not hold that presence in a high-crime neighborhood, when combined with flight, could never establish reasonable suspicion, and limited their decision accordingly.[98] Rather, the court rationalized that the high-crime area should be "sufficiently localized and identifiable"[99] in order "to 'assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions . . .' simply because he or she happens to live in a neighborhood where crime is prevalent."[100] The appellate court also based its decision on the observation that the evidence did not indicate that the defendant's flight was necessarily correlated with an expectation of an encounter with the police.[101]

On appeal, the Illinois Supreme Court upheld the decision of

92. *Wardlow*, 528 U.S. at 122.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Wardlow*, 678 N.E.2d at 66.
97. *Id.* at 67.
98. *Id.*
99. *Id.* at 68.
100. *Id.* (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).
101. *Id.*

the appellate court; however, they disagreed with its finding that the record was too vague to support an inference that the defendant was apprehended in a location with a high incidence of drug trafficking.[102] Rather, the supreme court maintained that "'[a]uthorizing the police to chase down and question all those who take flight upon their approach would undercut [the right to avoid interaction with the police] and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime.'"[103] Since flight is simply an exercise of a right to "go on one's way," and presence in a high-crime area alone is insufficient to justify a *Terry* stop, the supreme court rationalized that the two together, without more, should never provide a sufficiently particularized basis for the establishment of reasonable suspicion.[104] Although the character of the neighborhood and evasive behavior may be considered in determining the existence of reasonable suspicion, these factors need to be corroborated with independent suspicious circumstances suggesting that the defendant's flight was actually motivated by criminal guilt.[105]

C. *Holding and Rationale: The Wicked Flee?*[106]

In a brief opinion by Chief Justice Rehnquist, the United States Supreme Court reversed the decision of the Illinois Supreme Court, holding that while presence in a high-crime area alone is insufficient to support a finding of reasonable suspicion,[107] when combined with "headlong flight" from the police, a rational inference of criminal activity is created.[108]

The Court refused to certify the establishment of a per se rule that flight from the police is always indicative of criminal behav-

---

102. People v. Wardlow, 701 N.E.2d 484, 486 (Ill. 1998).

103. *Id.* at 487 (quoting State v. Hicks, 488 N.W.2d 359, 363-64 (1992)).

104. *Id.*

105. *Id.* at 488.

106. "The wicked flee when no man pursueth, but the righteous are bold as a lion." *Proverbs* 28:1. *But cf. Proverbs* 27:12 ("The prudent see danger and take refuge, but the simple keep going and suffer for it."); *Proverbs* 22:3 ("A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty."); *Romans* 3:10 ("There is no one righteous, not even one.").

107. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

108. *Id.*

ior, but instead reinforced the necessity of a totality-of-the-circumstances test "based on commonsense judgments and inferences about human behavior."[109] However, in an attempt to align *Wardlow* with *Royer*[110] and *Bostick*,[111] the Court held that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning."[112] The majority additionally commented that "[f]light, by its very nature, is not 'going about one's business;' in fact, it is just the opposite."[113] Accordingly, where a suspect flees unprovoked from an officer, regardless of his rationale or intent to do so, police are justified in using that factor to determine the existence of reasonable suspicion.

Ultimately, the Court's holding implies that since both the character of the neighborhood[114] and evasive behavior[115] are among relevant contextual considerations in a *Terry* analysis, the combination of these two factors, without more, is sufficient to establish reasonable suspicion.[116] Although claiming to base its de-

---

109. *Id.* at 124-25.

110. Florida v. Royer, 460 U.S. 491, 498 (1983) (holding that an individual, when approached by an officer in the absence of reasonable suspicion, has a right to ignore the police and continue about his business).

111. Florida v. Bostick, 501 U.S. 429, 437 (1991) (holding that a refusal to cooperate with the police does not, without more, establish reasonable suspicion).

112. *Wardlow*, 528 U.S. at 125.

113. *Id. But cf.* Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) ("Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."); Raymond, *supra* note 41, at 130 n.94 (stating that "at the stage where an officer could not compel cooperation," flight simply anticipates refusal to cooperate with the officer's potential decision to stop).

114. "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that a person is committing a crime," but "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124; *see also* Adams v. Williams, 407 U.S. 143, 144 (1972) (holding the fact that a stop occurred in a high-crime area relevant in the determination of reasonable suspicion).

115. "Headlong flight . . . is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but is certainly suggestive of such." *Wardlow*, 528 U.S. at 124; *see also* Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam) (holding that evasive behavior is relevant in a court's reasonable suspicion determination); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (holding the same).

116. *But see generally*, Harris, *supra* note 34. This article, written six years before the *Wardlow* decision, stated that:

> If neither the innocent but necessary activity of being in a high crime area, nor avoidance of the police could supply a sufficient basis for a *Terry* stop,

cision on a totality-of-the-circumstances determination, the Court appears to predicate its entire ruling on these two factors alone, without considering any of the other circumstances in this case that might also have been relevant to the reasonable suspicion analysis.

D. *The Dissent*

Four of the Supreme Court justices dissented from the majority, joining in an opinion authored by Justice Stevens.[117] Although Justice Stevens agreed with the majority's rejection of a per se rule either endorsing or condemning the use of flight in the reasonable suspicion analysis,[118] he did not believe that the circumstances of this case supported a reasonable suspicion of imminent criminal activity.[119]

Initially, Justice Stevens recognized that the motivation behind an apparent evasion of the police will depend in part on the existence of other possible explanations for the flight.[120] Since "[t]he probative force of the inferences to be drawn from flight is a function of the varied circumstances in which it occurs," when flight is used as a factor in the reasonable suspicion analysis, it should be

---

> both factors together should not support one either. Those who find it necessary to be in high crime areas are often the same people who find it prudent to exercise their constitutional right to avoid the police. To allow a seizure based on the combination of the two factors, each insufficient by itself, robs both factors of any significance. Thus, the conjunction of location and evasion should never be enough, alone, to give rise to reasonable suspicion.

Id. at 686. However, the author appears to disregard the fact that the factors upon which the Court based its decision in *Terry* also appear innocent when considered alone (looking into a store window and talking to someone on the street), but when viewed together in light of the circumstances of the case provided a sufficient inference of criminal activity.

117. Justice Stevens was joined in his opinion by Justices Souter, Ginsburg, and Breyer.

118. *Wardlow*, 528 U.S. at 127 (Stevens, J., concurring in part and dissenting in part); *see also* Hickory v. United States, 160 U.S. 408 (1896). In *Hickory*, the Court stated that:

> [T]he evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely, that of a circumstance—a fact which it is always of importance to take into consideration, and combined with others may afford a strong evidence of guilt, but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

Id. at 419-20.

119. *See Wardlow*, 528 U.S. at 137 (Stevens, J., concurring in part and dissenting in part).

120. *Id.* at 129 (Stevens, J., concurring in part and dissenting in part).

evaluated in light of any pertinent attendant circumstances.[121] Relevant considerations listed by Justice Stevens included "the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner is dressed, the direction and speed of the flight," and whether the behavior observed might otherwise be characterized as unreasonable.[122]

Hence, Justice Stevens appears to have placed some importance on the subjective intentions of the defendant, questioning whether there might be a valid reason for the flight other than a mere desire to avoid apprehension, and if so, its relative probability.[123] For although "there are unquestionably circumstances in which a person's flight is suspicious," there are also "undeniably instances in which a person runs for entirely innocent reasons," and the strength of the inference which may be drawn from the flight should depend on those other possible motivations for the flight.[124]

Perhaps the defendant was not running from the police at all—as Justice Stevens pointed out:

> A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity.[125]

However, even if a desire to evade the police did serve as the primary motivation for the defendant's flight, valid reasons for wishing to avoid police contact might include fear of the police themselves (especially in minority communities), fear of being apprehended as a guilty party, a belief that the officer's presence indicates nearby criminal activity, or an unwillingness to appear as a witness.[126]

---

121. *Id.* at 135 (Stevens, J., concurring in part and dissenting in part).

122. *Id.* at 129-30 (Stevens, J., concurring in part and dissenting in part).

123. *Id.* at 131 (Stevens, J., concurring in part and dissenting in part); *cf.* Alberty v. United States, 162 U.S. 499, 510 (1896) (stating that flight may be laid before a jury as evidence of guilt, but may not be dispositive).

124. *Wardlow*, 528 U.S. at 129 (Stevens, J., concurring in part and dissenting in part).

125. *Id.* at 128-29 (Stevens, J., concurring in part and dissenting in part).

126. *See id.* at 131-32 (Stevens, J., concurring in part and dissenting in part); *see also* Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) (noting that "[a]ny person . . .

Hence, Justice Stevens drew attention to the insufficiency of the facts used to support the inference that Wardlow's flight was actually provoked by the presence of the police.[127] Significant unresolved facts included whether Officer Nolan was driving an unmarked vehicle, whether the other officers were in uniform, whether there were other people at the location where Wardlow was first observed, how fast the cars were driving, and whether the caravan had passed by when the defendant began to run.[128]

Further, although Justice Stevens acknowledged that this would be a different case if the officers had possessed credible information identifying a specific address, and the defendant began to run when the police converged upon that particular residence,[129] he implied that the reasonable suspicion analysis should require a more stringent factual inquiry when the area being earmarked as "high-crime" is a much broader and undefined territory.[130] Justice Stevens pointed out that "because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so."[131]

Ultimately, Justice Stevens "[was] not persuaded that the mere fact that someone standing on a sidewalk looked in the direction of a passing car before starting to run is sufficient to justify a forcible stop and frisk."[132] The State has the burden to articulate facts sufficient to support reasonable suspicion,[133] and since Justice Stevens did not believe that Illinois adequately discharged that burden in this instance, he would have affirmed the judgment of the Illinois Supreme Court.[134]

---

is at liberty to avoid a person he considers dangerous").

127. *Wardlow*, 528 U.S. at 137 (Stevens, J., concurring in part and dissenting in part).

128. *See id.* (Stevens, J., concurring in part and dissenting in part).

129. *Id.* at 138 n.16 (Stevens, J., concurring in part and dissenting in part).

130. *Id.* at 138 (Stevens, J., concurring in part and dissenting in part).

131. *Id.* at 139 (Stevens, J., concurring in part and dissenting in part).

132. *Id.* at 140 (Stevens, J., concurring in part and dissenting in part).

133. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing Brown v. Texas, 443 U.S. 47, 52 (1979)).

134. *Id.* (Stevens, J., concurring in part and dissenting in part).

E. *Analysis of Holding*

1. Factual Insufficiency

Initially, as Justice Stevens recognized in his dissent, the majority opinion failed to acknowledge that there are several important factual determinations left to be resolved in this case before a reasonable suspicion determination should be made.[135] As pointed out by the Illinois appellate court, it is far from clear that the police caravan served as the actual stimulus for Wardlow's flight.[136] Certainly, four cars slowly cruising through a neighborhood known for a high incidence of criminal activity would appear suspicious—and conceivably dangerous—even to an impartial bystander, who might then find it prudent to leave the scene at a rapid pace. If the vehicles were unmarked, it is quite plausible that Wardlow did not realize that the cars were actually occupied by law enforcement officers, and that he instead chose to run for reasons entirely unrelated to a police presence. Moreover, the fact that Wardlow was apprehended when he ran *toward* Officer Nolan's car[137] supports the inference that the car was unmarked. Alternatively, if Wardlow ran toward a marked car, then a rational conclusion would be that it was not the police caravan that instigated Wardlow's flight in the first place.

Further, although reasonable suspicion should be determined based upon the facts as they appear to the officer at the time of the seizure,[138] other explanations for the flight should be calculated into the reasonable suspicion analysis, even if those explanations fail to appear as plausible to the officer as they do to an ordinary citizen. Possible interpretations of police behavior, as well as possible interpretations of the defendant's behavior, should thus enter into a reasonable suspicion analysis. Just as flight is susceptible to multiple innocent explanations, so may police behavior be seen as menacing or harassing to the ordinary resident of a high-crime neighborhood whose prior experiences

---

135. *See supra* notes 127-31 and accompanying text.

136. *Wardlow*, 678 N.E.2d at 68.

137. *Wardlow*, 701 N.E.2d at 485.

138. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (stating that "reasonableness . . . is measured in objective terms by examining the totality of the circumstances"); United States v. Cortez, 449 U.S. 411, 418 (1981); United States v. Silva, 957 F.2d 157, 159 (5th Cir. 1992).

with law enforcement officers might understandably taint his perception of the police activity. In this case, even assuming that the police caravan was the stimulus for Wardlow's flight, the fact that he chose to avoid the police in a dangerous neighborhood in Chicago—a city with a history of poor race relations between citizens and the police and a corresponding history of oppressive police tactics—should be accorded some consideration.[139]

2. High-Crime "Neighborhood"?

Additionally, if the characterization of a neighborhood as "high-crime" is to enter into the reasonable suspicion analysis, the neighborhood itself should be narrowly circumscribed and specifically defined.[140] Otherwise, the character of the "neighborhood" is too broad a factor; it fails to meaningfully distinguish one citizen in that area from another, and therefore should not enter into the reasonable-suspicion analysis at all. If a high-crime "neighborhood" of 98,000 people is considered sufficiently defined, then the police could easily expand this concept in order to characterize entire towns or cities as "high-crime." Then, *any* citizen residing in that "high-crime" town or city could be stopped and searched—under *Wardlow*—for a minimal level of evasive or otherwise suspicious behavior.

In addition, *Wardlow* raises the question of whether the characterization of a neighborhood as "low-crime" could potentially be used to validate otherwise suspicious behavior. If the converse of *Wardlow* is taken as true, then in the absence of other "specific, articulable facts," the exact same behavior being used to establish reasonable suspicion in one part of town could be excused just a few miles away. Such a location-based differential should be vehemently rejected rather than condoned by the Court, for it allows police to use factors which have a disproportionate impact on

139. As Justice Stevens noted:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal."

Wardlow, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part).

140. *See Wardlow*, 678 N.E.2d at 68.

a lower socioeconomic class in order to establish reasonable suspicion, engendering fresh tension between the police and the poor (and often minority) residents of these areas.

3. Scope of the Search

Justice Stevens drew attention to the fact that *Terry* recognized only a "narrowly drawn authority" that is "limited to that which is necessary for the discovery of weapons."[141] Although the majority stated that the Court granted certiorari only on the question of whether the initial stop was supported by reasonable suspicion, and expressed no opinion as to the lawfulness of the frisk itself,[142] the two determinations should not be uncoupled. Even with the existence of reasonable suspicion, a search may be unconstitutional if it is unnecessary (the officer has no reason to believe the suspect is armed and dangerous),[143] or if it exceeds the limited pat-down allowed by *Terry*.[144]

In *Terry*, the Court cautioned that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."[145] Thus, the scope of the intrusion is intended to be a central element in determining its reasonableness.[146] Accordingly, the Court should have considered a second, crucial aspect of this case: since a search conducted pursuant to a *Terry* stop should be limited to that which is reasonably necessary to discover weapons,[147] and in light of the fact that the officer had probable cause to believe that the bag contained a weapon,[148] would the permissible scope of the *Terry* stop then extend to opening this closed container?

Under the circumstances of this case, since the officer appar-

---

141. *Wardlow*, 528 U.S. at 128 (Stevens, J., concurring in part and dissenting in part) (citing Terry v. Ohio, 392 U.S. 1, 26-27 (1968)).

142. *Id.* at 124 n.2.

143. *See Terry*, 392 U.S. at 27.

144. *Id.* at 30.

145. *Id.* at 18; *see also* Florida v. Royer, 460 U.S. 491, 509 (1983) (Brennan, J., concurring in result); Kremen v. United States, 353 U.S. 346, 347-48 (1957) (per curiam); United States v. Di Re, 332 U.S. 581, 586-87 (1948); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931).

146. *Terry*, 392 U.S. at 18 n.15.

147. *See id.* at 26 (citing Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

148. *See* Illinois v. Wardlow, 528 U.S. 119, 122 (2000).

ently felt the gun inside the bag,[149] removal of the bag from the defendant was necessary to ensure the safety of the officers. However, the more pressing question is whether the officer could constitutionally *open* the bag in light of the fact that it was recovered through a search founded on reasonable suspicion rather than probable cause. The Supreme Court has held that investigative methods employed by the police are intended to be the "least intrusive means reasonably available,"[150] and where removal of the bag would suffice, opening it was unnecessary and therefore exceeded the permissible bounds of the stop.[151] In other words, "[t]he scope of a *Terry*-type 'investigative' stop and any attendant search must be extremely limited or the *Terry* exception would 'swallow the general rule that Fourth Amendment seizures [and searches] are reasonable only if based on probable cause.'" [152]

However, since courts have allowed a gradual expansion of the scope of the *Terry* stop,[153] it is likely that the Supreme Court would have ruled that the search was constitutional since the incriminating nature of the recovered evidence was immediately apparent to the searching officer under the so-called "plain-feel" exception to the warrant requirement.[154] That is, once the officer felt the gun inside the bag, he had established probable cause for arrest, and could therefore constitutionally open the bag in order to search its contents.[155] Nevertheless, the Court erred in failing to even consider this question.

---

149. *Id.*

150. *Royer*, 460 U.S. at 500.

151. *See* United States v. Place, 462 U.S. 696, 701 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, *pending issuance of a warrant to examine its contents* . . . .") (emphasis added); *see also* United States v. Ross, 456 U.S. 798, 834-35 (1982) (Marshall, J., dissenting) (asserting that a closed paper bag may be seized, but not searched, without a warrant).

152. *Royer*, 460 U.S. at 510 (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)) (second alteration in original) (internal quotations omitted).

153. *See supra* notes 59-81 and accompanying text.

154. *See* Minnesota v. Dickerson, 508 U.S. 366, 374-77 (1993) (holding that contraband discovered through the sense of touch does not exceed the scope of a permitted search so long as its incriminating character is immediately apparent); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 464-71 (1972) (holding that the warrantless seizure of an item that comes within the plain view of an officer in a position to view the item may be reasonable under the Fourth Amendment).

155. But compare *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court noted that "we do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Id.* at 20.

Further, an even more intriguing question would be whether the officers could have opened a different kind of container recovered incident to a *Terry* stop, such as a locked briefcase. In the absence of the consent of the owner, but with probable cause to believe it contained weapons (perhaps based on the weight of the briefcase), would the officers have been justified in opening it, or would they have had to obtain a search warrant? As noted by Justice Marshall in *Florida v. Jimeno*:[156]

> [T]his Court has soundly rejected any distinction between "worthy" containers, like locked briefcases, and "unworthy" containers, like paper bags.
>
> > Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.[157]

4. Immediacy of the Criminal Conduct

The Court also failed to contemplate another vital aspect of the *Terry* holding: the rationale behind the exception to probable cause is based on a reasonable suspicion of *immediate* criminal activity.[158] That is, if there is no indication that a crime has been committed, is being committed, or is imminently likely to occur, probable cause should be the guiding standard, and the police should be limited to following the suspect and using other evidence gathering techniques in order to establish probable cause.[159]

---

156. 500 U.S. 248 (1991).

157. *Id.* at 254 (Marshall, J., dissenting) (quoting United States v. Ross, 456 U.S. 798, 822 (1982)).

158. *Terry*, 392 U.S. at 20.

159. *See* United States v. Sokolow, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) ("[B]efore detaining an individual, law enforcement officers must reasonably suspect that he is engaged in, or poised to commit, a criminal act *at that moment.*") (alteration in original).

In *Wardlow*, there is scant evidence that the seizure was necessary to prevent a crime; the flight of the defendant indicated that even if a crime was about to occur, it was no longer so imminent as to justify a search and seizure based on reasonable suspicion alone. The Court's failure to consider this aspect of the case, however, is consistent with the general approach it has taken in stop-and-frisk cases since *Terry*: gradually, reasonable suspicion has been divorced from a dependence upon the immediacy of the criminal conduct of which the individual is suspected.[160]

5. Chipping Away at the "Individual" in Individualized Suspicion

In practice, the rule announced in *Wardlow*—that flight from the police in a high-crime area is sufficient to establish reasonable suspicion[161]—greatly increases the number of people who may now be constitutionally stopped, primarily because a majority of "high-crime" areas are located in the populous inner-cities.[162] Any resident of these areas whose behavior could be seen as evasive may now theoretically be stopped and searched, despite the rationale behind the evasive behavior and notwithstanding the fact that the citizen lives or works in that area.[163]

Further, the Court articulates that the determination of reasonable suspicion must be made "on commonsense judgments and inferences about human behavior."[164] Although appearing to es-

---

160. *Contra* United States v. Cortez, 449 U.S. 411, 417 (1981) (emphasizing that stops must be assessed by viewing all of the facts and asking whether there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

161. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

162. *See* Harris, *supra* note 34, at 677.

163. For an interesting insight, see Harris, *supra* note 34. Harris argues that location may actually be used as a proxy for race in the decision to stop a suspect, since most residents of high-crime areas are poor minorities. Thus, if they decide to evade the police—often based on a fear of the police themselves—the police may stop them. "In other words, every person who works or lives in a high crime area and who avoids the police is subject to automatic seizure, and subject to automatic search if the crime suspected involves drugs." *Id.* at 680-81.

164. *Wardlow*, 528 U.S. at 125. *But see* Milton Hirsch & David O. Markus, *Fourth Amendment Forum:* Illinois v. Wardlow: *The Wicked Flee When No Man Pursueth*, 24 CHAMPION 38, 39-40 (June 2000). The authors criticize the "commonsense judgments" standard, pointing out that:

> [J]udgments and inferences about human behavior, whether commonsensical or otherwise, are inadequate building blocks to support a system of constitu-

tablish a quasi-objective standard, this statement masks the fact that the individual making the "commonsense judgment" is a law enforcement officer, whose conclusions are allowed to be biased by his own experience. To a seasoned police officer, almost *any* conduct may be considered indicative of wrongdoing.[165] Hence, this standard fails to meaningfully distinguish one class of citizens from the next, and ultimately broadens the ability of the police to stop almost any citizen for actions appearing even minimally suspicious.

Thus, *Wardlow* represents a retreat from the *Terry* rationale that a citizen may only be stopped based upon a particularized suspicion of wrongdoing.[166] The *Wardlow* factors considered sufficient to establish reasonable suspicion are not specific enough to permit an innocent citizen to be differentiated from one who is actually guilty. Each fact contributing to the reasonable suspicion analysis should increase the probability that a crime has been, is being, or is about to be committed. Furthermore, the characteristic must be more often present when a crime is being committed

---

> tional jurisprudence. The United States Supreme Court is empowered and obligated to exercise its jurisdiction to correct mistakes of law made by lower courts. It is not obligated to superimpose its own notion of common sense, or of the inferences properly drawn from human conduct, upon lower courts.

Id. at 39.

165. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983). Citing a variety of cases, Johnson notes:

> Law enforcement agents cite an amazing variety of behavior as indicating consciousness of guilt. Police have inferred an attempt to conceal both from a traffic violator's reach toward the dashboard or floor of a car, and from his alighting from the car and walking toward the police. Drug Enforcement Agency officers have inferred a desire to avoid detection both from a traveler's being the last passenger to get off a plane and from his being the first. Immigration and Naturalization Service agents have argued both that it was suspicious that the occupants of a vehicle reacted nervously when a patrol car passed, and that it was suspicious that the occupants failed to look at the patrol car. Finally, the government has argued in a customs case that "excessive" calmness is suspicious.

Id. at 219-20. Thus, no matter how the suspect reacts upon sighting the police, officers appear to be able to interpret that behavior in such a way as to arrive at the same conclusion: that the suspect appears "guilty," and should be detained.

166. *See* Raymond, *supra* note 41, at 108-09 ("[r]easonable suspicion must meaningfully narrow the category of 'stop-eligible' persons."). Raymond goes on to explain that "[i]f the particularized behavior observed does not distinguish the individual stopped from the rest of his neighborhood, the inquiry must come to an end; if he can be stopped, so can everyone who lives in his community, and the limiting function of the reasonable suspicion inquiry is lost." *Id.* at 128.

than when it is not; otherwise, it has no probative value.[167]

The character of the neighborhood, however, is a static designation—that is, it is always present, regardless of whether a crime is being committed or not—and hence can contribute little or nothing to a reasonable suspicion analysis. Consequently, otherwise innocent conduct—or conduct susceptible to multiple innocent explanations—should not become sinister by the mere fact that it takes place in a high-crime area.[168]

In sum, where the character of the neighborhood and evasive behavior are used as the only "specific articulable facts" to establish reasonable suspicion, those facts fail to make one citizen discernable from another for two reasons. One, a large number of people work and live in "high-crime" neighborhoods, and two, almost any behavior may be interpreted as evasive. Hence, *Wardlow* ultimately represents yet another step away from the basic, underlying principles of *Terry*, for it essentially obliterates any meaningful standard by which individualized suspicion may be judged. For all practical purposes, those who have the most to fear from an encounter with the police have now been stripped of their fundamental constitutional right to go about their business (especially if they choose to exercise that right "at top speed"),[169] ultimately leaving the police free to declare open-season on residents of the "high-crime" inner-cities.[170]

---

167. For further discussion, see Johnson, *supra* note 165. Johnson points out that:

> Because probable cause contemplates the totality of the circumstances, a relevant fact is one that adds to the likelihood of criminal activity, given the other facts also observed. On the one hand, a bulge at the waistband may be significantly related to the carrying of contraband, but if it is observed in conjunction with other signs of obesity, it has no probative value. On the other hand, although riding a bike probably is not statistically related to the commission of any crime, riding one late at night in a warehouse district may correlate highly with participation in a burglary. Essentially, a reasonable police officer ignores those facts that, controlling for other observed facts, do not increase the likelihood of criminal activity.

Id. at 217.

168. *See In re* D.J., 532 A.2d 138, 143 (D.C. 1987).

169. *See* People v. Shabaz, 378 N.W.2d 451, 460 (Mich. 1985).

170. *See generally* Adam B. Wolf, Note, *The Adversity of Race and Place: Fourth Amendment Jurisprudence in* Illinois v. Wardlow, 120 S. Ct. 673 (2000), 5 MICH. J. RACE & L. 711 (2000).

F. *Current Court Interpretations*

Despite the possible negative implications of *Wardlow*, most lower courts have been hesitant to invoke its holding in order to diverge from pre-existing Fourth Amendment jurisprudence. Courts still recognize the right of a citizen to refuse to cooperate with the police and continue about his business,[171] and have continued to hold that the factors considered by the police must serve to distinguish the stopped individual from "the broader universe of law-abiding citizens."[172] In addition, courts have reaffirmed the principles that evidence recovered from a pat-down conducted in the absence of a belief that the defendant is armed and dangerous is inadmissible,[173] that the reasonable suspicion exception to the probable cause requirement is not designed to uncover evidence of illicit activity but is instead intended to allow the officer to safely pursue his investigation,[174] and that the factors used to establish reasonable suspicion must indicate imminent criminal activity.[175]

Courts have differed in their determination of behavior sufficient to invoke the holding in *Wardlow*. For example, the Supreme Court of Virginia has stated that evasive behavior not amounting to "headlong flight" is insufficient to establish reasonable suspicion under *Wardlow*.[176] However, a Florida court has

171. *See, e.g.*, United States v. Burton, 228 F.3d 524, 527 (4th Cir. 2000) (citing Terry v. Ohio, 392 U.S. 1, 33 (1968)); Peters v. State, 531 S.E.2d 386, 388 (Ga. Ct. App. 2000); Banks v. Commonwealth, No. 1999-CA-000692-MR, 2000 Ky. App. LEXIS 66, at *9 (Ky. Ct. App. June 23, 2000); State v. Warfield, No. 23932-9-II, 2000 Wash. App. LEXIS 1299, at *5 (Wash. Ct. App. July 21, 2000). *But see, e.g.*, State v. Hill, No. 1999-CA-00196, 2000 Ohio App. LEXIS 1699, at *10-11 (Ohio Ct. App. Apr. 17, 2000) (affirming the reasonableness of a stop based on flight in a high-crime area after the officer had indicated a desire to speak with the suspect).

172. United States v. Powell, No. 99-5137, 2000 U.S. App. LEXIS 6131, at *9 (6th Cir. Mar. 29, 2000) (reported in table format at 210 F.3d 373); *see also* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000), *cert. denied sub nom.* Sanchez-Guillen v. United States, 121 S. Ct. 211 (2000) (holding that the Hispanic appearance of a suspect is of so little probative value that it may not be considered where particularized suspicion is required).

173. State v. Myers, 756 So. 2d 343, 355 (La. Ct. App. 2000).

174. *See Powell*, 2000 U.S. App. LEXIS 6131, at *14.

175. United States v. Ubiles, 224 F.3d 213, 218 (3d Cir. 2000).

176. Bass v. Commonwealth, 525 S.E.2d 921, 925 n.3 (Va. 2000); *cf.* Smith v. State, 538 S.E.2d 517, 520-21 (Ga. Ct. App. 2000) (holding that in the absence of evidence that the police presence served as the stimulus for defendant's departure, the defendant's actions did not constitute flight from the police); Peters v. State, 531 S.E.2d 386, 389 (Ga. Ct. App. 2000) (holding that the defendant's act of continuing toward his car after spotting the police in a high-crime area was insufficient to establish reasonable suspicion).

held that the act of merely backing away from the police after the suspect's companions had already fled was sufficiently evasive to establish reasonable suspicion in an area known for narcotics transactions.[177] Similarly, the Eighth Circuit has supported an inference of reasonable suspicion drawn from the combination of an anonymous tip and the evasive action of dropping an object off a bridge before talking with the police.[178]

In the absence of flight, when the defendant is seized in a high-crime neighborhood, courts have required some other independently suspicious behavior in order to establish reasonable suspicion.[179] Generally, courts have also required evasive behavior to be corroborated with another suspicious activity or circumstance to establish reasonable suspicion,[180] even if the defendant is encountered in a high-crime area.[181] For example, courts have supplemented the two *Wardlow* factors with holdings that the time of arrest should also be a significant factor where flight occurs in a high-crime neighborhood,[182] and that the act of disposing of a paper bag after noticing police in the area was sufficient to establish reasonable suspicion when combined with unprovoked flight in a neighborhood known for narcotics transactions.[183] Courts have additionally utilized the decision in *Wardlow* to hold that evasive behavior, when coupled with a reliable description of the suspect, is sufficient to establish probable cause for an arrest.[184]

---

177. Copeland v. State, 756 So. 2d 180, 181 (Fla. Dist. Ct. App. 2000).

178. United States v. Dupree, 202 F.3d 1046, 1049 (8th Cir. 2000).

179. *See Ex parte* James, No. 1980820, 2000 Ala. LEXIS 272, at *10 (Ala. June 23, 2000); State v. F.J., 734 N.E.2d 1007, 1010 (Ill. App. Ct. 2000).

180. *See, e.g.*, United States v. Bradley, No. 8:00CR147, 2000 U.S. Dist. LEXIS 13552, at *2 (D. Neb. Sept. 19, 2000); United States v. Johnson, 212 F.3d 1313, 1316 (D.C. Cir. 2000); State v. Wright, 752 A.2d 1147, 1155 (Conn. App. Ct. 2000); State v. Delaware, 731 N.E.2d 904, 910 (Ill. App. Ct. 2000).

181. *See, e.g.*, United States v. Gordon, 231 F.3d 750, 755-56 (11th Cir. 2000); United States v. Stone, No. 00-1156, 2000 U.S. App. LEXIS 23458, at *11 (2d Cir. Sept. 14, 2000); United States v. Fisher, No. 99-5979, 2000 U.S. App. LEXIS 22214, at *4 (6th Cir. Aug. 21, 2000).

182. State v. Belcher, 725 N.E.2d 92, 95 (Ind. Ct. App. 2000). This holding implies that a suspect observed fleeing at 3:00 a.m. in a high-crime neighborhood could appear reasonably suspicious to justify a stop, although the same suspect fleeing in the same neighborhood at 3:00 p.m. might not be.

183. Wise v. State, 751 A.2d 24, 27 (Md. Ct. Spec. App. 2000).

184. United States v. Simms, No. 99-0661-02, 2000 U.S. Dist. LEXIS 15467, at *7-9 (E.D. Pa. Oct. 23, 2000); Menard v. Chicago, No. 98 C 4859, 2000 U.S. Dist. LEXIS 6381, at *7-8 (N.D. Ill. May 8, 2000); State v. Hammond, 759 A.2d 133, 137-38 (Conn. App. Ct. 2000); *see also* United States v. Gooden, No. 00-092, 2000 U.S. Dist. LEXIS 11369, at *7,

IV. INCREASING THE PROBABILITY OF APPEARING "REASONABLY SUSPICIOUS"

The Supreme Court has held a number of factors relevant in determining reasonable suspicion of criminal activity, including the physical appearance of the defendant,[185] the behavior of the defendant,[186] the place where the stop occurs,[187] and other information made available to the police prior to sighting the defendant.[188] Generally, in order to establish reasonable suspicion, courts have required both a behavioral and a circumstantial element. Considering the holding in *Wardlow*, the main question now becomes which factors, standing alone (if any), and which combinations of factors, might now be sufficient to establish reasonable suspicion.

A. *Circumstantial Elements*

1. Physical Appearance

Physical characteristics considered relevant in a Fourth Amendment analysis include mode of dress and haircut,[189] a "hippie" appearance,[190] race,[191] gender,[192] age,[193] and factors correlated

---

(E.D. La. Aug. 2, 2000) (holding that an anonymous tip and threatening motions are sufficient to establish reasonable suspicion); Sullivan v. State, 753 A.2d 601, 605 (Md. Ct. Spec. App. 2000) (holding that the act of walking away and a reliable description of the suspect are sufficient to establish reasonable suspicion).

185. *See infra* notes 189-98 and accompanying text.

186. *See infra* notes 208-15 and accompanying text.

187. *See infra* notes 199-205 and accompanying text.

188. *See infra* notes 216-17 and accompanying text.

189. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).

190. *See* United States v. Sherman, 430 F.2d 1402, 1404 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971).

191. *See Brignoni-Ponce*, 422 U.S. at 877 (stating that Mexican ancestry, while alone insufficient to establish suspicion, may be considered in determining illegal alien status); *see also* United States v. Anderson, 923 F.2d 450, 456 (6th Cir. 1991) (holding that the "entire situation" may be considered when formulating probable cause, including the fact that the suspected burglars were racially "out of place"), *cert. denied sub nom.* McNeil v. United States, 500 U.S. 936 (1991); State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (allowing ethnicity to be used as one of "several factors" warranting further investigation). For a list of sources discussing the use of race in law enforcement decisions, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957 n.1 (1999). For a list of examples illustrating the proposition that African-American men and women are stopped more frequently than their white counterparts, see *Washington v. Lambert*, 98 F.3d 1181, 1183 n.1 (9th Cir. 1996), and Schwartz, *supra* note 2, at 360 n.184.

with wealth or poverty.[194] None of these factors alone has been held to constitute reasonable suspicion,[195] although frequently they are grouped together to form a drug courier profile[196] or are otherwise considered together to establish a general likelihood of wrongdoing.[197] However, reliance on personal appearance alone, especially immutable characteristics such as gender, race, and age, should never be enough to constitute reasonable suspicion;[198]

Five places in which courts have allowed race to "tip the scale" in determining reasonable suspicion are in identifying a particular subject, when a member of a particular race appears incongruous in his surroundings, in searching for illegal aliens, as a part of drug courier profiles, and as proof of a general criminal propensity. *See* Johnson, *supra* note 165, at 225-37. Johnson, in arguing that strict scrutiny should be applied to any decision to use race in the reasonable suspicion analysis, makes the insightful point that police action based on racial incongruity fosters racial separation by deterring residential integration because it sends an implicit message to blacks that their decision to live in "white" areas is unwelcome. *Id.* at 245-46.

In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court declared that possible racial motivations of the arresting officer were irrelevant in a Fourth Amendment analysis since the reasonableness of the intrusion should be measured in objective terms based on the totality of the circumstances. *Id.* at 813. See also *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996), and *Michigan v. Chesternut*, 486 U.S. 567, 576 n.7, where the Court held that the subjective intent of the officer is relevant only to the extent that the intent is conveyed to the person confronted. Thus, any perceived racial discriminatory animus behind a *Terry* stop may be vindicated only by resorting to the Equal Protection Clause. For further discussion on this topic, see Thompson, *supra* note 191 at 960-61 & n.17, and Tracey Marlin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 354-62 (1998).

192. An example would be stopping a man because he is carrying a woman's purse. *See* Johnson, *supra* note 165, at 252-53.

193. Generally, police will claim that young adults have a higher propensity for being involved in criminal activity. *See id.* at 221 n.31.

194. For example, a well-dressed man in a low-income neighborhood may appear suspicious, as could a shabbily dressed man in a wealthy neighborhood. *See id.* at 253-54.

195. *See, e.g., Brignoni-Ponce*, 422 U.S. at 885-86 (stating that Mexican ancestry, while alone insufficient to establish reasonable suspicion, may be considered).

196. *See* United States v. Sokolow, 490 U.S. 1, 10 (1989) (holding that the use of a "drug courier profile" was permissible in establishing reasonable suspicion). *But see* Harris, *supra* note 34, at 666. Harris advocates the elimination of the use of a drug courier profile to justify a *Terry* stop due to the fact that the suspected criminal activity is not immediate, and hence there is no reason officers should be exempt from the probable cause requirement in those situations.

197. *See, e.g.,* Florida v. Royer, 460 U.S. 491, 502 (1983) (stating "appearance and conduct in general" were adequate to establish reasonable suspicion).

198. *See, e.g., Sokolow*, 490 U.S. at 12 (Marshall, J., dissenting) ("By requiring reasonable suspicion . . . the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.") (quoting Terry v. Ohio, 392 U.S. 1, 15 (1968)); *Brignoni-Ponce*, 422 U.S. at 889 (Douglas, J., concurring) (criticizing the reasonable suspicion standard because the "nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude").

rather, physical appearance, if used at all, should only be considered in conjunction with a circumstantial or behavioral element. The *Wardlow* decision, especially because it dealt primarily with the site of the encounter and the behavior of the defendant, should not have much of an impact on this aspect of Fourth Amendment analysis, for it is doubtful that courts would loosen their standards to the point that a stereotype alone would be sufficient to establish reasonable suspicion.

2. Surroundings

The Supreme Court recognized as long ago as 1824 that the location of suspicious behavior is relevant to, though not dispositive of, Fourth Amendment analysis.[199] Since that time, the environment in which the suspect is located has gradually been allowed to assume more and more importance,[200] although courts still refuse to rule that the character of the neighborhood alone is sufficient to establish probable cause.[201] Since *Wardlow* explicitly reaffirmed this principle, this area of Fourth Amendment law should not undergo any significant modification.

However, allowance of this consideration has come under increasing attack in recent years. It has been noted by the courts that doubt exists as to whether there is "any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center."[202] In addition, one commentator has noted that "[s]ome police officers describe all areas as 'crime-prone.'"[203] Wealthy areas may be classified as "high-crime" because they are burglary-prone, whereas low-income areas may be classified as "high-crime" because they

199. *In re* the Appollon, 22 U.S. (9 Wheat.) 362, 374 (1824) (holding that the geographical position of a vessel seized in a remote area known for smuggling was relevant to the determination of probable cause).

200. Some police will attempt to detain a suspect for mere residence in a ghetto. *See* Johnson, *supra* note 165, at 222 n.42 (listing cases).

201. Illinois v. Wardlow, 528 U.S. 119, 123 (2000); *Brignoni-Ponce*, 422 U.S. at 884; *see also* Harris, *supra* note 34, at 672 n.135 (listing cases); Raymond, *supra* note 41, at 114 n.58 (listing cases).

202. United States v. Andrews, 600 F.2d 563, 567 (6th Cir. 1979), *cert. denied sub nom.* Brooks v. United States, 444 U.S. 878 (1979).

203. Johnson, *supra* note 165, at 222 n.42; *see also* Raymond, *supra* note 41, at 116 n.63.

have high incidences of violence or drug-related crimes.[204]

Further, when a neighborhood is classified as "high-crime," that classification should only be used to establish reasonable suspicion in situations in which the suspected crime is the same as the crime having a high prevalence in the area. That is, if the area is said to have a high incidence of burglary, but a low incidence of rape, the character of the neighborhood should not factor into the reasonable suspicion analysis for a rape suspect, although it could if the same individual were suspected of burglary instead.[205]

An interesting and logical proposition has been set forth, contending that the character of the neighborhood should not be considered in a reasonable suspicion analysis unless the behavior of the suspect "is not common amongst law-abiding persons at the time and place observed."[206] That is,

> By allowing the evidence of the character of the neighborhood to dominate the reasonable suspicion inquiry, courts may become predisposed to believe the worst of persons found there and, accordingly, to accept the most minimal particularized observations as sufficient to support a determination of reasonable suspicion. But if those particularized observations merely identify behavior in which law-abiding persons in the area routinely engage, they do nothing to narrow the class of "stop-eligible" persons, as the reasonable suspicion inquiry requires.[207]

Thus, a logical conclusion would be that the behavior of the suspect should be considered before the character of the neighborhood is permitted to enter into the reasonable-suspicion analysis.

B. *Behavior Element*

Behavioral factors which have been considered relevant to a reasonable-suspicion determination include obvious attempts to evade detection by law enforcement officers,[208] paying cash for ex-

---

204. *See* Johnson, *supra* note 165, at 222 n.42.

205. *Id.*

206. Raymond, *supra* note 41, at 127.

207. *Id.*

208. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000); *Brignoni-Ponce*, 422 U.S. at 885; United States v. Silva, 957 F.2d 157, 160 (5th Cir. 1992) (citing United States v. Amuny, 767 F.2d 1113, 1124 (5th Cir. 1985)); *see also* Raymond, *supra* note 41, at 131 nn.94-95

pensive plane tickets,[209] failure to check luggage,[210] traveling under an assumed name,[211] and staying only forty-eight hours in a city known to be a center of drug activity after a twenty-hour flight.[212] Mere association with suspicious characters has been held insufficient to establish reasonable suspicion,[213] although no court has held that it may not be considered at all.[214] The two ways in which behavior may be considered relevant are as conduct resembling a crime or necessary preparation for a crime, and as conduct that appears to reflect a consciousness of guilt.[215] The holding in *Wardlow* gives an added legitimacy to the use of factors which fall into the second category; hence, lower courts will become increasingly lenient when faced with defendants seized and searched because of evasive behavior. Also, since *Wardlow* failed to hold that flight alone would be insufficient grounds for reasonable suspicion, there should be a gradual increase in courts permitting similar rationalizations. Thus, behavior from which an inference of wrongdoing can logically be drawn will retain a prominent place in the reasonable-suspicion analysis, and courts will likely begin to allow increasingly broad interpretations of otherwise innocent behavior in order to establish reasonable suspicion.

C. *Information Available to the Police*

Terry stops have also been approved when the evidence used to establish reasonable suspicion is either a suspect profile or an anonymous tip.[216] In cases involving the latter, courts are permit-

---

(listing cases). On an interesting note, although flight may be used to establish reasonable suspicion, the Supreme Court has held that mere pursuit does not constitute a seizure. Michigan v. Chesternut, 486 U.S. 567 (1988); *accord Silva*, 957 F.2d at 159.

209. *See* United States v. Sokolow, 490 U.S. 1, 8-9 (1989). Justice Marshall concluded that "using cash may simply reflect inability to obtain or aversion to plastic money." *Id.* at 16-17 (Marshall, J., dissenting).

210. *See Sokolow*, 490 U.S. at 8-9.

211. *See id.*

212. *See id.*

213. Sibron v. New York, 392 U.S. 40, 43 (1968).

214. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 91 (1979); *Sibron*, 392 U.S. at 62-63; People v. Pugh, 217 N.E.2d 557, 559 (1966).

215. *See* Johnson, *supra* note 165, at 218. In addition, it should be clarified that "the 'relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that is attached to particular types of noncriminal acts.'" *Sokolow*, 490 U.S. at 10 (quoting Illinois v. Gates, 463 U.S. 213, 243-44 n.13 (1983) (internal quotations omitted)).

216. *See* Alabama v. White, 496 U.S. 325, 332 (1990); *see also* Florida v. J.L., 529 U.S.

ted to use a sliding scale in making their evaluation, where the trustworthiness of the informant determines the degree of corroboration required before the seizure may occur.[217] *Wardlow* should have little or no impact on the use of these factors in the reasonable-suspicion analysis, for officers in these situations are attempting to discover a described suspect for a known crime, and their observations necessarily differ from those of an officer who notices suspicious behavior and only then is alerted to the possibility of criminal activity.

D. *Combining Factors to Establish Reasonable Suspicion: Everyone's a Suspect*

To date, the combination of factors most likely to establish reasonable suspicion requires a behavioral element (such as flight) and a circumstantial element (such as location).[218] Generally, the factors most frequently used in the reasonable-suspicion analysis appear innocent when considered alone; the taint of guilt attaches only when one element is considered in conjunction with another.

Wardlow, by condoning the combination of behavior and location without consideration of specific relevant facts,[219] nudged the judiciary one step closer to the establishment of a dreaded "bright line" rule. Thus, courts will be increasingly lenient when considering cases involving behavior and any other circumstantial element, regardless of possible motivations for the suspicious behavior or reason for the existence of the circumstance. Ultimately, the end result will be the obliteration of any meaningful differentiation between classes of citizens. One way or another, police are now able to "constitutionally" classify essentially anyone as a suspect and subject him to the "limited" search and seizure sanctioned by *Terry*.

266, 270 (2000) ("[T]here are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'") (quoting *White*, 496 U.S. at 327).

217. *See* Harris, *supra* note 34, at 667-68; *see also J.L.*, 529 U.S. at 275-76 (Kennedy, J., concurring) (discussing factors to be weighed in determining reliability of an anonymous tip).

218. For cases describing suspicious behavior in a high-crime location held sufficient to establish reasonable suspicion, see Harris, *supra* note 34, at 675 n.139 and Raymond, *supra* note 41, at 119 nn.64-65. For cases describing suspicious behavior in a high-crime location held insufficient to establish reasonable suspicion, see Harris, *supra* note 34, at 675 n.140.

219. *See supra* notes 135-39 and accompanying text.

V. CONCLUSION: READY TO RUN? WATCH YOUR STEP. . . .

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . ."[220]

Ultimately considered a victory for the law enforcement community, *Terry* weakened the rights not just of criminal defendants, but of the public at large, greatly increasing the likelihood that innocent people will be stopped and subjected to a search which has ceased to be reasonably (or constitutionally) limited in scope.[221] Since its inception, the concept of reasonable suspicion has undergone a gradual metamorphosis; it has expanded to encompass increasingly indiscriminate factors, and the assessment of those factors requires less and less justification.

Wardlow's apparent legacy is the addition of another combination of factors sufficient to establish reasonable suspicion, serving to further broaden instances in which an acceptable inference of criminal wrongdoing may be drawn. By holding that the act of fleeing from the police in a high-crime neighborhood is sufficient to constitute reasonable suspicion of wrongdoing, *Wardlow* adds yet another "constitutional" set of circumstances upon which the police may depend in their ever-vigilant quest to arbitrarily enforce the power granted to them by the courts.[222] As the judicial system continues to loosen the constraints originally imposed by the Fourth Amendment, more and more citizens are being stopped for little or no justification, and those stops are being explained away by a combination of any number of innocent factors.[223] Unless the courts are willing to backpedal and return to

220. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (*quoted in* Terry v. Ohio, 392 U.S. 1, 9 (1968)).

221. Schwartz, *supra* note 2, at 331.

222. "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which has produced the evidence . . . ." *Terry*, 392 U.S. at 13.

223. Increasingly, the Supreme Court seems to have forgotten that "[t]he [Fourth] Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

the original, narrowly circumscribed holding of *Terry*, citizens on the street will continue to see their rights and expectations gradually fade into nonexistence.

Margaret Anne Hoehl

***