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CRIMINAL LAW—SEARCH AND SEIZURE: THE INVESTIGATIVE STOP: WHAT HAPPENS WHEN WE RUN? *Illinois v. Wardlow*, 528 U.S. 119 (2000)

"The wicked flee, when no man pursueth, but the righteous are bold as a lion."[1]

I. FACTS

Around noon[2] on September 9, 1995, Sam Wardlow was standing on a Chicago street holding a white, opaque bag when he noticed a police caravan patrolling the area.[3] The police patrolled this area, known for its high drug trafficking, to investigate drug transactions.[4] Upon seeing the caravan, Wardlow took flight on foot away from the vehicles.[5] Two uniformed officers in the last police vehicle intercepted Wardlow, cutting off his escape route.[6] One of the officers then conducted a stop and frisk of Wardlow.[7] During the frisk, the police officer discovered that the white bag contained a handgun with live ammunition, for which the officer arrested Wardlow.[8]

Although the police officers probably did not have an identified location as their destination,[9] the predominately minority area[10] where they confronted Wardlow had a history of criminal activity.[11] In 1997 this district, District Eleven, had the highest number of murders and

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1. Proverbs 28:1. The court in *Alberty v. United States*, 162 U.S. 499, 511 (1896), refuted the argument that this quote is an accepted axiom of criminal law.

2. *See* People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997) (indicating that the time of the arrest was at 12:15 p.m.).

3. *See* Illinois v. Wardlow, 528 U.S. 119, 121-22 (2000) (observing Wardlow standing next to a building and looking in the direction of the officers in the caravan).

4. *Id.* at 121.

5. *Id.* at 122.

6. *Id.* The two uniformed officers, Nolan and Harvey, observed Wardlow run down a nearby alley. *Id.* The officers cornered Wardlow with their vehicle, and Officer Nolan exited the vehicle and detained Wardlow. *Id.*

7. *Id.* Officer Nolan conducted a protective pat-down search for weapons. *Id.*

8. *Id.* During the search, Officer Nolan felt a hard object in the bag that resembled a gun. *Id.* Officer Nolan opened the bag and found a .38 caliber handgun with five live rounds of ammunition. *Id.*

9. *See id.* at 137 (Stevens, J., dissenting) (citing People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. Ct. 1997) ("[I]t appears that the officers were simply driving by, on their way to some unidentified location . . . .")).

10. *See* Brief of the National Association of Police Organizations at 1-31, *Wardlow* (No. 98-1036) (referring frequently to the district as a predominantly minority area). The district's population in 1990 consisted of 3,167 whites; 91,099 blacks; 319 Asians; 132 Native Americans; and 3,387 other. *Id.* at 31 app. 2.

11. *See id.* at 7, 30 app. 1 (providing a breakdown of the major crimes in each of the Chicago districts in 1997).

robberies and the second highest number of criminal sexual assaults and aggravated assaults out of all the twenty-five Chicago districts.[12]

At the Illinois trial court level, the court denied Wardlow's request for a motion to suppress the evidence[13] discovered during the investigative stop and frisk and convicted Wardlow of the unlawful use of a weapon by a felon.[14] Wardlow appealed his conviction to the Illinois Appellate Court.[15] He claimed that the trial court should have suppressed the evidence collected during the stop and frisk because his unprovoked flight did not create a reasonable suspicion of a crime needed under *Terry v. Ohio*[16] to justify an investigative stop.[17] The Illinois Appellate Court agreed and reversed Wardlow's conviction on the grounds that the investigative stop violated his Fourth Amendment rights.[18]

The state appealed the case to the Illinois Supreme Court, which affirmed the decision of the Illinois Appellate Court.[19] The Illinois Supreme Court reasoned that unprovoked flight, in a high crime area, at the sight of a police officer did not constitute a reasonable suspicion that the individual was going to commit or had committed a crime.[20] The court stated that a person has no obligation to respond to police questioning in the absence of reasonable suspicion of a crime and that a person has a right to go on his way—even at a run.[21] Since the police did not have a reasonable suspicion that Wardlow had committed or was about to commit a crime, the Illinois Supreme Court found that the investigative stop violated Wardlow's Fourth Amendment rights against unlawful searches and seizures.[22]

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12. *Id.*

13. *See Wardlow*, 678 N.E.2d at 66 (referring to the handgun and bullets).

14. *Id.* Following a bench trial in the Circuit Court of Cook County, Illinois, the court sentenced Wardlow to two years in prison. *Id.*

15. *Id.*

16. 392 U.S. 1 (1968).

17. *See Wardlow*, 678 N.E.2d at 66-67 (applying the objective *Terry* standard used to evaluate the lawfulness of police detentions of suspicious persons); *see also* Terry v. Ohio, 392 U.S. 1 (1968) (establishing the reasonable suspicion requirement for a brief investigative stop of an individual by a police officer).

18. *See Wardlow*, 678 N.E.2d at 68 (concluding that Wardlow was not in a high crime area and that flight alone can not satisfy an investigative stop).

19. *See* People v. Wardlow, 701 N.E.2d 484, 489 (Ill. 1998) (finding that the appellate court properly reversed the trial court's denial of Wardlow's motion to suppress evidence).

20. *See id.* at 487 (agreeing with the majority of courts that unequivocal flight of a suspect upon seeing the police does not by itself establish reasonable suspicion necessary to conduct an investigative stop of the individual).

21. *See id.* (citing Florida v. Royer, 460 U.S. 491, 498 (1983) (determining that a person can simply refuse to answer police questions and continue on his or her way in the absence of reasonable grounds for temporarily stopping the person)).

22. *See id.* at 489 (finding that the trial court should have suppressed the handgun as the "product of the unconstitutional seizure of [Wardlow]").

After the Illinois Supreme Court's ruling, the state appealed the decision, and the United States Supreme Court granted certiorari.[23] The United States Supreme Court *held* that Wardlow's unprovoked flight in a high crime area did satisfy the reasonable suspicion requirement and reversed the Illinois Supreme Court's decision.[24]

II. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution states:

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

It protects the general public against unnecessary government intrusion into their daily lives.[26] Prior to 1968, police officers had to meet the Fourth Amendment's probable cause standard[27] before detaining an individual.[28] In 1968, a Supreme Court interpretation of the Fourth Amendment justified a police officer's temporary detainment of an individual based on a lower reasonable suspicion standard.[29] This interpretation would leave the Supreme Court and the lower courts with the task of trying to determine what circumstances or set of factors would satisfy the new reasonable suspicion standard.[30]

Flight is an important factor in Fourth Amendment analysis because many citizens automatically associate flight with a presumption of guilt.[31] Several courts, however, have taken a contrary view.[32] Also, citi-

23. Illinois v. Wardlow, 526 U.S. 1097 (1999) (mem.) (granting certiorari).

24. Illinois v. Wardlow, 528 U.S. 119, 125-26 (2000).

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

26. *See id.* (allowing only reasonable searches and seizures).

27. *Infra* Part II.B (defining the probable cause standard).

28. *See* U.S. CONST. amend. IV (requiring probable cause for searches and seizures); *see also* Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

29. *Terry*, 392 U.S. at 20-23; *see also infra* Part II.B (defining the reasonable suspicion standard).

30. *Terry*, 392 U.S. at 21.

> [T]he Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstance.

Id.

31. *See* Brief for Petitioner at 8, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036) (summarizing the common sense approach to flight that most citizens do not flee at the sight of an officer and that fleeing constitutes a suspicious behavior warranting an investigation).

32. *See* People v. Wilson, 784 P.2d 325, 326-27 (Colo. 1989) (finding defendant's flight insufficient to create reasonable suspicion for an investigative stop); *see also* People v. Shabaz, 378 N.W.2d 451, 460 (Mich. 1985) (finding flight of a surveillance subject insufficient to justify an investigative

zens may perceive that Fourth Amendment procedures typically protect the guilty, which clouds their understanding of the amendment's ultimate goal of protecting all citizens against intrusive government actions.[33]

This section will discuss the case law development of the investigative stop, the different types of police-citizen encounters, perceptions of flight, and lower court applications of previous Supreme Court Fourth Amendment decisions, which created the basis for the *Wardlow* opinion.

A. THE *TERRY* STOP

In *Terry v. Ohio*, a police officer conducted an investigative stop and frisk of petitioner Terry.[34] The officer had witnessed Terry and another man making several trips in front of a store window, which raised the officer's suspicion of a possible planned robbery by Terry and two other men.[35] After about ten to twelve minutes of the ritual, the officer approached the men, identified himself, and asked for their names.[36] When the men only mumbled some response, the officer spun Terry around and conducted a protective pat down.[37] During the pat down, the officer found a weapon on Terry and arrested him for carrying a concealed weapon.[38]

At trial, Terry moved to suppress the weapon as evidence, claiming that the officer had conducted an unlawful investigative stop and frisk, because the officer lacked probable cause.[39] The United States Supreme Court, on appeal, upheld Terry's conviction[40] and determined that an investigative stop was Fourth Amendment activity.[41] The Court then decided what level of suspicion an officer had to possess in order to lawfully conduct such a stop.[42] The Court concluded that in certain circumstances a police officer, without probable cause, could stop an individual and conduct a protective search for weapons without violating the individu-

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stop).

33. Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting). Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and guilty alike. *Id.*

34. *Terry*, 392 U.S. at 6-7.

35. *See id.* at 5-6 (describing how Officer McFadden watched the men make five to six trips each in front of the store and then briefly converse with another man).

36. *See id.* at 6-7 (describing that at this point in the encounter, Officer McFadden acted solely on what he had observed and had no other independent knowledge of any criminal activity).

37. *Id.* at 7.

38. *Id.*

39. *See id.* at 7-8 (stating that the trial court denied Terry's motion to suppress evidence, which he appealed).

40. *Id.* at 30-31.

41. *See id.* at 16-17 (determining that the Fourth Amendment applies to an officer's temporary stop of an individual because the officer has restrained the citizen's liberty).

42. *See id.* at 20-21 (examining the reasonableness of an officer's action in light of his or her observations on the beat).

al's Fourth Amendment rights against unlawful searches and seizures.[43] The Court clearly stated, however, that the police officer must have specific and articulable facts, coupled with a reasonable inference of criminal activity, in order to justify the investigative stop.[44]

Further, the Court determined that future courts should use an objective standard to assess whether an officer conducted a lawful stop.[45] The objective standard required the fact finder to determine what a reasonable and prudent person would have concluded about the observed individual given the particular circumstances.[46] This standard eliminated mere suspicions or hunches as justifiable reasons for conducting an investigative stop.[47]

Following *Terry*, the Supreme Court continued to define what police actions fell into the exception to the Fourth Amendment probable cause standard that *Terry* provided.[48] For example, the Court found that a police officer could approach a vehicle and remove a weapon from the driver's waistband based solely on an informant's tip.[49] These circumstances satisfied the reasonable suspicion standard because the informant had provided the officer with reliable information in the past, and the officer could have arrested the informant for a false complaint.[50]

In contrast, the Court determined that border police could not stop vehicles to check for illegal aliens because the passengers looked like Mexicans.[51] The Court concluded that the officer's reliance on one single factor—the apparent Mexican ancestry of the occupants—did not suffice to establish reasonable suspicion of illegal aliens.[52]

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43. *Id.* at 30.

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

44. *See id.* at 21 (setting the requirements for an investigative stop).

45. *See id.* at 21-22 (referring to whether a man of reasonable caution would find the stop justified).

46. *Id.*

47. *See id.* at 22 (requiring something more than inarticulate hunches for a stop); *see also id.* at 27 (stating that inchoate or unparticularized suspicion or hunch is not enough to determine whether an officer acted with reasonable suspicion).

48. *See* Florida v. Royer, 460 U.S. 491, 493, 499 (1983) (utilizing the *Terry* analysis to determine whether police illegally detained an individual based on a drug courier profile); *see also* Brown v. Texas, 443 U.S. 47, 52-53 (1979) (holding that the Fourth Amendment, in light of *Terry*, does not allow officers to stop a person and demand his identification without more information to support the individual's participation in criminal activity).

49. *See* Adams v. Williams, 407 U.S. 143, 147 (1972) (rejecting the argument that an officer can only justify a stop and frisk through his own personal observation).

50. *Id.* at 146-47.

51. United States v. Brignoni-Ponce, 422 U.S. 873, 874-76, 886 (1975).

52. *See id.* at 886 (finding appearance alone not a sufficient reason to detain an individual).

In *Brown v. Texas*,[53] a unanimous Court held that a police officer could not stop and frisk an individual walking in a known drug area or request his identification without connecting that individual with involvement in a particular crime.[54] The Court reasoned that the police lacked reasonable grounds for the stop because Brown's acts did not differ from those of any other member of the neighborhood.[55] *Brown* made location alone an insufficient basis for an investigative stop.[56]

As a result of its varying opinions, the Court realized that the process of finding reasonable suspicion would never "deal with hard certainties," but instead "with probabilities."[57] The Court determined that the proper way to deal with these various probabilities involving police investigative stops was to apply the totality-of-the-circumstances approach.[58] This approach required courts to look at the whole picture, the particular circumstances of each case, to determine if the detaining police officer had reasonable suspicion to conduct an investigative stop.[59] The Court decided to adopt this approach because terms such as "founded suspicion" and "articulable reasons," used by lower courts to determine the lawfulness of an investigative stop, did not provide sufficient clarity and guidance to address all of the possible factual situations that could arise.[60]

These opinions also led to the development of four distinct categories of the investigative stop and frisk.[61] These areas, two involving the stop and two involving the frisk, create generic questions used by courts to analyze whether a police officer properly conducted a stop and frisk: (1) whether there was even a stop, which required defining "stop" and "seizure" under the Fourth Amendment, (2) whether the stop/seizure was reasonable (justified), (3) whether a frisk could take place, and (4) whether the scope of the frisk was proper.[62] As a result, the investigative stop and the protective pat down for weapons have emerged as separate entities, each requiring its own Fourth Amendment analysis.[63]

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53. 443 U.S. 47 (1979).
54. Brown v. Texas, 443 U.S. 47, 48-50 (1979).
55. *Id.* at 52.
56. *See id.* ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, [was] not a basis for concluding that appellant himself was engaged in criminal conduct.").
57. United States v. Cortez, 449 U.S. 411, 412-16, 418 (1981).
58. *Id.* at 417.
59. *Id.* at 417-18.
60. *Id.* at 417.
61. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 11.01, at 237 (4th ed. 2000) (describing the four distinct issues that *Terry* raised).
62. *Id.*
63. *See* United States v. Davis, 202 F.3d 1060, 1062 (8th Cir. 2000) (clarifying the differences between an investigative stop and a frisk in a case involving a Minneapolis police officer's consensual search of an individual).

B. THE TIERS OF POLICE-CITIZEN ENCOUNTERS

The reasonable suspicion or "reasonableness test" of *Terry* created three tiers or levels of suspicion needed to justify different types of police-citizen encounters.[64] The three tiers consist of (1) a mere suspicion or hunch,[65] (2) a reasonable, articulable suspicion or "founded suspicion,"[66] and (3) probable cause.[67] Based upon a police officer's different observations, and the inferences the officer can draw from them, the Fourth Amendment applied different limitations to the officer's interference with a citizen's freedom.[68]

A suspicion or hunch permits police questioning of an individual and is not considered Fourth Amendment activity because the individual has the right to decline to answer and walk away at any time; thus, no seizure occurs.[69] For example, a police officer observed an individual walking in an area known for drug trafficking and prostitution.[70] The officer confronted the person and asked him questions about what he was doing, but the individual lawfully chose not to respond and continued on his way.[71]

In order for an officer to have a reasonable suspicion or founded suspicion, the officer must have a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.[72] This reasonable suspicion tier justifies an investigative (*Terry*) stop.[73] For example, a police officer, experienced in drug sales, observed two individuals exchanging small objects for money in an area known for open drug transactions.[74] The police officer properly conducted an investigative stop and temporarily detained the individuals in order to clarify the officer's suspicion of drug dealing.[75]

As for the final tier, probable cause requires a "reasonable" ground to suspect that a person has committed or is committing a crime

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64. People v. Shabaz, 378 N.W.2d 451, 457-58 (Mich. 1985).
65. *See supra* note 47 (defining mere suspicion).
66. *See* United States v. Cortez, 449 U.S. 411, 417 (1981) (describing how the various courts use words such as "articulable reasons" or "founded suspicion" to describe what police officers must have to conduct a lawful investigative stop).
67. *See Shabaz*, 378 N.W.2d at 458 (describing the three tiers).
68. *Id.* at 457-58.
69. *Id.* (citing *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring); 34 (White, J., concurring)); *see also infra* discussion Part II.C.
70. United States v. Gray, 213 F.3d 998, 999-1001 (8th Cir. 2000).
71. *Id.* at 1001.
72. *See Terry*, 392 U.S. at 21 (explaining the reasonable suspicion standard).
73. *See Shabaz*, 378 N.W.2d at 458 (allowing police officers to conduct a temporary stop of an individual to clarify reasonable police suspicions).
74. Commonwealth v. Valentine, 748 A.2d 711, 712 (Pa. Super. Ct. 2000).
75. *See id.* at 714-15, 712 (finding that officer who observed a drug sale had a reasonable suspicion to make an investigative stop).

or that a place contains specific items connected with a crime.[76] Probable cause justifies an arrest.[77] For example, a well-trained police officer observed an individual who displayed drugs to another person and then placed the drugs in his pocket.[78] The police officer legally detained and arrested the individual for possessing an illegal substance.[79]

In brief, reasonable suspicion requires more indications of a crime than a mere hunch, but still allows an officer to temporarily detain an individual without probable cause.[80] A police officer meets this reasonable suspicion standard in conducting an investigative stop when "a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal activity."[81] Officers must rely on their experience and training to analyze the particular situation and to determine if reasonable suspicion of criminal activity exists.[82]

C. THE *MENDENHALL-ROYER* "FREE TO LEAVE" TEST

As the case law emerged, the Court continued to find that police officers could approach an individual on the street or in a public place and ask the individual questions without violating his or her Fourth Amendment rights.[83] The Court also routinely held that the individual could refuse to answer these questions and simply go on his or her way unless the police had a reasonable justification for further detaining the person.[84] Professor LaFave, in his treatise, referred to this act as the *Mendenhall-Royer* "free to leave" test, based upon the respective Supreme Court decisions.[85]

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76. *See Shabaz*, 378 N.W.2d at 458 (citing Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (explaining that probable cause to justify an arrest refers to the facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense)).

77. *Id.*

78. *See* State v. Beras-Calletano, No. 43863-8-I, 2000 Wash. App. LEXIS 449, at *9-*10 (Mar. 20, 2000) (upholding a drug possession conviction based upon an officer's observation of the defendant putting drugs in his front pocket in an area known for drug trafficking).

79. *Id.*

80. State v. Kenner, 1997 ND 1, ¶ 8, 559 N.W.2d. 538, 540-41.

81. *See* State v. Ova, 539 N.W.2d 857, 859 (N.D. 1995) (citing State v. Hornaday, 477 N.W.2d 245, 246) (N.D. 1991) (explaining how North Dakota, following the U.S. Supreme Court, utilizes an objective standard in reviewing an investigative stop).

82. *Id.*

83. *See* Florida v. Royer, 460 U.S. 491, 497 (1983) (citing Terry v. Ohio, 392 U.S. 1, 31, 32-33 (1968) (Harlan, J., concurring); *Id.* at 34 (White, J., concurring)).

84. *See id.* (stating that an individual had no legal requirement to stop and answer police questions unless the officer had reasonable, objective grounds for the stop); *see also Terry*, 392 U.S. at 32-33 (Harlan, J., concurring) (finding that a citizen had the right to ignore his interrogator and walk away unless the police officer had some constitutional grounds to insist upon an encounter).

85. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(a) (3d ed. 1996) (explaining the

In *United States v. Mendenhall*,[86] Drug Enforcement Agents, suspecting illegal drug transportation, approached Mendenhall in an airport concourse, identified themselves as federal agents, and asked to see her airline ticket and identification.[87] During the course of their questioning, the agents became suspicious of Mendenhall's actions and discovered heroin on her person in a subsequent search.[88] Mendenhall attempted to have the evidence suppressed, claiming that the stop violated the Fourth Amendment.[89] The Court reasoned that an illegal seizure would have occurred only if Mendenhall believed that she was not free to leave.[90] It maintained the view that the Fourth Amendment does not prevent all police-citizen contacts and that a person becomes "seized" only when the police, by show of authority or physical force, obstruct a person's liberty.[91] Consequently, the Court concluded that the police did not improperly detain Mendenhall because she had no reason to believe that she could not end the conversation with the agents at any time and continue on her way.[92]

Florida v. Royer involved detectives who approached Royer in an airport concourse and asked him for his airline ticket and driver's license, believing that Royer fit a drug courier profile.[93] In contrast to *Mendenhall*, during routine questioning the detectives told Royer that they suspected him of narcotic transportation, asked him to accompany them to a police room, and maintained possession of his airline ticket and driver's license.[94] The Court found that these circumstances constituted an official show of authority.[95] As a result, the Court determined that an illegal seizure had occurred because a reasonable person in Royer's position would not have felt that he or she was free to leave.[96]

Justices Marshall, Stevens, and White supported this constitutional right to leave.[97] In subsequent opinions, Justices Marshall and Stevens argued that a citizen's response to police contact should not govern the

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development and effects of the free to leave test based on Fourth Amendment jurisprudence).

86. 446 U.S. 544 (1980).

87. United States v. Mendenhall, 446 U.S. 544, 547-48 (1980).

88. *Id.* at 548-49.

89. *See id.* at 549 (explaining that the trial court denied Mendenhall's motion to suppress).

90. *Id.* at 554.

91. *Id.* at 553-55.

92. *Id.* at 555.

93. *See* Florida v. Royer, 460 U.S. 491, 493-94 (1983) (explaining the factors used to determine if an individual meets a drug courier profile).

94. *Id.* at 501.

95. *Id.* at 502.

96. *See id.* at 503 (affirming the Florida District Court of Appeal's decision that Royer was never free to board his plane).

97. *Royer*, 460 U.S. at 493, 496-97. Justice White announced in the majority opinion, joined by Justices Marshall and Stevens, that an unreasonable seizure had occurred because Royer was never free to leave. *Id.* In *Mendenhall*, Justice White, joined by Justices Stevens and Marshall, argued that Mendenhall never was free to leave. 466 U.S. at 566-577.

constitutionality of the officer's conduct.[98] They maintained the position that if a citizen did not feel free to leave in a police encounter, the police must have reasonable suspicion for the detainment.[99] Justice Marshall noted that police officers should only restrict a person's freedom to leave to investigate use "ongoing crimes, to prevent imminent crimes, and to protect law enforcement officers in highly charged situations"[100] in order to prevent police harassment based only on imprecise stereotypes.[101] Given these strong arguments for the right to leave test, some lower courts have concluded that individuals may have the right to avoid police contact—even at top speed.[102]

D. STATE COURTS' INTERPRETATION OF FLIGHT

For many courts, flight once provided a clear indication or maybe even a confession of guilt, especially if the flight occurred after a crime.[103] If a court treated flight as a conclusive presumption of guilt, a defendant's flight would likely result in a guilty verdict even if innocent reasons for the flight existed.[104] Unfortunately, some innocent individuals have fled from the authorities out of emotion such as fear.[105]

In contrast, if a court considered flight simply another factual circumstance, the defendant's flight alone could not lead to a guilty

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98. California v. Hodari D., 499 U.S. 621, 645 (1991). Justice Stevens, joined by Justice Marshall, dissented to the Court's finding of reasonable suspicion because a seizure must be justified by the facts at the time of the police encounter and not by the individual's subsequent reaction. *Id.* In *Hodari D.*, a group of youths, including Hodari, fled at the sight of oncoming police officers. *Id.* at 622-23. The officers gave chase, and Hodari discarded some crack cocaine during his flight. *Id.* at 623. Hodari moved to have the cocaine suppressed arguing that the officer had seized him without a reasonable suspicion. *Id.* The majority reversed the lower court's granting of the motion to suppress, concluding that the officer had not seized Hodari until after he dropped the cocaine and the officer tackled him. *Id.* at 629.

99. Florida v. Bostick, 501 U.S. 429, 442 (1991). Justice Marshall, joined by Justices Stevens and Blackmun, dissented to a majority opinion finding that police officers can conduct sweeps of buses during which the officers ask the passengers questions in an attempt to identify drug couriers. *Id.* Justice Marshall determined that the passengers were in no position to evade the police questioning and did not have the freedom to leave the bus. *Id.*

100. *See* United States v. Sokolow, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968) (explaining how the reasonable suspicion standard, as a derivative of probable cause, should only be used for brief detentions necessitated by law)).

101. *Id.* (citing *Terry*, 392 U.S. at 14-15 & n.11).

102. *See* People v. Shabaz, 378 N.W.2d 451, 460 (Mich. 1985) (rationalizing that if an individual has the constitutional right to go on his or her way, it should not matter at what pace the individual exercises this right).

103. *See* Alberty v. United States, 162 U.S. 499, 510 (1896) (rejecting the common argument or perception that flight after a crime is a presumption of guilt or a confession).

104. *See* Hickory v. United States, 160 U.S. 408, 422 (1896) (examining how the legal system once treated concealment, such as flight, as clear proof of guilt and quoting *Proverbs* 28:1, that "the wicked flee, when no man pursueth, but the innocent are as bold as a lion").

105. *See* Alberty, 162 U.S. at 511 (explaining that some innocent individuals flee from the scene of a crime out of fear of being detained as suspects, to avoid being a witness, or having to clear their own name).

verdict, and the trier of fact would have to consider it along with other evidence.[106] A court could simply allow the jury to reach its own inferences from the flight or give the jurors an inference instruction about the flight.[107]

The Supreme Court rectified this problem and concluded that flight did not create a presumption of guilt; however, this still left the Court and the lower courts to determine how much emphasis to put on flight as an indicator of criminal activity.[108] For example, in *Sibron v. New York*,[109] the Supreme Court labeled flight as a strong indication of mens rea.[110]

Consequently, the state courts have disagreed on whether flight alone warranted reasonable suspicion to conduct an investigative stop.[111] For example, California,[112] Colorado,[113] Georgia,[114] Michigan,[115] Nebraska,[116] and New Jersey[117] have held that police officers cannot question individuals solely due to the individuals' flight from police, because flight alone did not create reasonable suspicion of criminal activity. Indiana,[118] Minnesota,[119] Ohio,[120] and Wisconsin, [121] in comparison, have found that flight alone justified an investigative stop because

106. *See* Hickory, 160 U.S. at 420-21 (rationalizing that flight after a crime is only a factual circumstance that the trier of fact must consider along with the other evidence to determine an individual's guilt, and it is not an automatic legal presumption of guilt); *see also Alberty*, 162 U.S. at 511 ("[I]t certainly would not be contended as a universal rule that the fact that a person, who chanced to be present on the scene of a murder, shortly thereafter left the city, would, in the absence of all other testimony, be sufficient in itself to justify his conviction of the murder.").

107. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 775 (2000) (defining a presumption in fact); *see also id.* at 77 & n.5 (describing the potential difficulties of inviting the jury to consider flight as evidence of possible guilt).

108. *See Hickory*, 160 U.S. at 416-17 (finding that acts of concealment, such as flight, are not conclusive indications of guilt but are mere circumstances that courts must consider and weigh in conjunction with other evidence with the "caution and circumspection which their inconclusiveness when standing alone require").

109. 392 U.S. 40 (1968).

110. *Id.* at 66-67.

111. *See* Iver Peterson, *States Are Split on Whether Flight is Reason Enough for a Search*, N.Y. TIMES, Jan. 13, 2000, at A29 (listing states that do and do not find flight sufficient for an investigative stop).

112. *See, e.g.*, People v. Souza, 885 P.2d 982, 983 (Cal. 1994) (declining to establish a bright-line rule that flight, without more, justifies an investigative stop).

113. People v. Wilson, 784 P.2d 325, 327 (Colo. 1989).

114. *See* Harris v. State, 423 S.E.2d 723, 724-25 (Ga. Ct. App. 1992) (determining that flight in a high crime area is sufficient for a stop).

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

116. *See* State v. Hicks, 488 N.W.2d 359, 364 (Neb. 1992) (finding that flight is sufficient support for an investigative stop only when combined with other indications of criminal activity).

117. State v. Tucker, 642 A.2d 401, 409 (N.J. 1994).

118. *See, e.g.*, Platt v. State, 589 N.E.2d 222, 226 (Ind. 1992) (holding that flight alone is sufficient to establish a reasonable suspicion).

119. St. Paul v. Vaughn, 237 N.W.2d 365, 369 (Minn. 1975).

120. State v. Hoaja, No. 17383, 1999 Ohio App. LEXIS 2536, at *8 (June 4, 1999).

121. State v. Anderson, 454 N.W.2d 763, 767 (Wis. 1990).

flight's evasive nature did support reasonable suspicion for a temporary stop. Some states, such as North Dakota, have not decided cases directly involving an individual's unprovoked flight, but have decided investigative stop cases, which indicate that they would likely require more than flight alone for reasonable suspicion.[122] Even the speed at which the flight occurred has come into question; some courts have held that quickening one's pace at the sight of the police does not justify a stop, while others have held that high speed flight does.[123]

Several courts have required the presence of additional factors along with flight to achieve the proper level of suspicion to conduct a stop and frisk.[124] Some of these factors include: observed criminal activity, particularized suspicious conduct (i.e. exchanging money and/or a suspicious package), reports of nearby crimes, descriptions of recent crime suspects, or a nearby vehicle matching a description of a vehicle involved in recent crime.[125] For example, in *Harris v. State*,[126] the Georgia Court of Appeals examined the totality of the circumstances and concluded that the defendant's flight in a known drug area created a sufficient articulable suspicion for a stop and frisk.[127]

In sum, the *Terry* decision left the courts trying to determine what factor or set of factors, known as the totality of the circumstances, would establish reasonable suspicion for a lawful investigative stop.[128] Some factors included the defendant's location,[129] the reliability of police information,[130] and the defendant's reaction to police.[131]

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122. *See* State v. Langseth, 492 N.W.2d 298, 299-302 (N.D. 1992). A police officer drove up behind a van parked on a gravel road. *Id.* at 299. The van had its lights on and its engine running. *Id.* The officer then flashed his warning lights, and the van slowly drove away. *Id.* The officer followed with lights flashing, and the van stopped about 20 feet later. *Id.* The court found that this investigative stop of a moving van, similar to an individual running away, alone did not constitute reasonable suspicion. *Id.* at 302.

123. *See* LAFAVE, *supra* note 85, § 9.4(f), at 181 (quoting several cases that outline the courts' different approaches to a fast walk versus running away from police in reasonable suspicion analysis).

124. *See* State v. Tucker, 642 A.2d 401, 407 (N.J. 1994) (requiring more than just flight to have reasonable grounds for a stop); *see also* Harris v. State, 423 S.E.2d 723, 724 (Ga. Ct. App. 1992) (requiring flight and a high crime area).

125. *See Tucker*, 642 A.2d at 407 (listing examples of other facts needed in conjunction with flight to justify an investigative stop).

126. 423 S.E.2d 723 (Ga. Ct. App. 1992).

127. *Id.* at 724.

128. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (describing the totality-of-the-circumstances approach).

129. *See* Brown v. Texas, 443 U.S. 47, 52 (1979) (finding that a defendant standing in a known drug area in itself is not enough to justify a police investigative stop of the individual).

130. *See* Adams v. Williams, 407 U.S. 143, 147 (1972) (allowing a police officer relying on an informant's tip to stop and frisk an individual, while rejecting the argument that an officer could only justify a stop and frisk through his own personal observation).

131. *See* California v. Hodari D., 499 U.S. 621, 622-23 (1991) (involving a group of youths, including Hodari, who fled at the sight of oncoming police officers).

From this reasonable suspicion standard, three tiers of police-citizen encounters developed based on differing degrees of suspicion: a hunch, reasonable suspicion, and probable cause.[132] A hunch would only allow an officer to question a person, and the individual had the right to refuse to answer and could leave at anytime.[133] Since flight has invoked perceptions of guilt,[134] the courts had to determine whether the *Mendenhall-Royer* "free to leave" test[135] protected the defendant's flight in each particular case or whether the defendant's flight supported a lawful stop.[136]

III. ANALYSIS

Chief Justice Rehnquist delivered the Court's opinion, which Justices O'Connor, Scalia, Kennedy, and Thomas joined.[137] In a five-to-four decision, the Supreme Court declared that an individual's unprovoked flight at the sight of a police officer in a "high crime area" created the reasonable and articulable suspicion needed for a lawful *Terry* stop.[138] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part.[139] Justice Stevens agreed with the majority that the Court should not adopt a bright-line rule regarding flight[140] but disagreed with the Court's assessment of the totality of the circumstances to convict Wardlow.[141]

A. THE MAJORITY OPINION

Analyzing the four broad case law areas of the stop and frisk,[142] Wardlow argued question number two—that the officers subjected him to an unreasonable seizure.[143] The police seized Wardlow when they stopped his flight and conducted a protective pat down of Wardlow

132. *See* People v. Shabaz, 378 N.W.2d 451, 457-58 (Mich. 1985) (dividing police-citizen encounters into three tiers).

133. *See* Florida v. Royer, 460 U.S. 491, 497-98 (1983) (stating that an individual has no legal requirement to stop and answer police questions unless the officer has reasonable, objective grounds for the stop); *see also* Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring) (finding that a citizen has the right to ignore his interrogator and walk away, unless the police officer has some constitutional grounds to insist upon an encounter).

134. *Cf.* Alberty v. United States, 162 U.S. 499, 510 (1896) (rejecting the common argument or perception that flight after a crime is a presumption of guilt or a confession).

135. *See supra* Part II.C.

136. *See supra* notes 112-21 (listing cases where the lower courts are split on whether flight alone, or flight coupled with certain circumstances, is enough to justify an investigative stop of a fleeing individual).

137. Illinois v. Wardlow, 528 U.S. 119, 120 (2000).

138. *Id.* at 124-25.

139. *Id.* at 126-40 (Stevens, J., concurring in part and dissenting in part).

140. *Id.* at 126-36.

141. *Id.* at 137-40.

142. WHITEBREAD & SLOBOGIN, *supra* note 61.

143. *See* Brief for Respondent at 6, *Wardlow* (No. 98-1036) (arguing that flight alone does not support reasonable suspicion for an investigative stop).

based upon the officer's past experience with weapons in the area.[144] However, Wardlow did not appeal the lawfullness of the frisk.[145] As a result, the sole issue revolved around whether the police had reasonable grounds, based upon the particular circumstances, to seize Wardlow.[146]

The Court reached its conclusion by applying the controlling language in *Terry* and by looking at the record for reasonable suspicion of a crime.[147] It analyzed the two factors of reasonable suspicion, flight and location, starting with the location of the investigative stop.[148] The Court based its finding, regarding the location of the stop, on the precedent established in *Brown v. Texas* and *Adams v. Williams*.[149]

In *Brown*, the Court held that location alone was too ambiguous to justify a stop.[150] The Court compared *Wardlow* to *Brown* because police apprehended both Wardlow and Brown in areas known for heavy drug trafficking.[151] However, the Court distinguished *Wardlow* from *Brown* because Wardlow took flight at the sight of the officers, while Brown was walking along when officers stopped him.[152]

The Court then referred to *Williams* where it considered the location of the stop, a "high crime area," as a contextual consideration in a *Terry* stop analysis.[153] Similar to *Wardlow*, the police also detained Williams in a high crime area.[154] As a result, the Court concluded that a high crime area alone does not create a reasonable suspicion of a crime; however, location may be considered as one factor in establishing reasonable suspicion.[155]

Next, the Court analyzed flight in three parts.[156] First, it examined the evasive nature of flight.[157] Prior case law established that "nervous, evasive behavior [wa]s a pertinent factor" in reasonable suspicion analysis.[158] Since no empirical studies dealing with the inferences that

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144. *See Wardlow*, 528 U.S. at 124 n.2.

145. *Id.* at 124 n.2.

146. *Id.*

147. *Id.* at 123-26.

148. *Id.* at 124.

149. *Id.* (citing Brown v. Texas, 443 U.S. 47, 52 (1979) (determining that a person's presence in a particular area was not enough to conclude that the individual was engaged in criminal conduct); Adams v. Williams, 407 U.S. 143, 144 (1972) (finding a high crime area relevant in a *Terry* analysis)).

150. *Brown*, 443 U.S. at 52.

151. *Wardlow*, 528 U.S. at 124 (citing *Brown*, 443 U.S. at 52).

152. *Id.*

153. *Id.* (citing *Williams*, 407 U.S. at 144).

154. *Id.*

155. *Id.*

156. *Id.* at 124-26.

157. *Id.* at 124-25.

158. *See id.* at 124 (citing United States v. Sokolow, 490 U.S. 1, 8-9 (1989) (stating that agents had reasonable suspicion in part because the defendant paid $2,100 in $20 bills for two airplane tickets); Florida v. Rodriguez, 469 U.S. 1, 3-4, 6 (1984) (stating that the defendant's urging of others to "get out of here" and his running away from police were factors in finding reasonable suspicion);

suspicious behavior causes existed, the Court reasoned that the law must allow police officers to defer to "commonsense judgments and inferences about human behavior."[159] The Court also explained that although an individual's flight does not conclusively indicate criminal activity, it does imply such activity.[160] Consequently, the Court considered "[h]eadlong flight [to be] . . . the consummate act of evasion" and found that Officer Nolan had reasonable grounds to suspect Wardlow of criminal activity.[161]

Second, the Court found its decision consistent with *Florida v. Royer* because unprovoked flight is more than a "mere refusal to cooperate."[162] *Royer* established that individuals could refuse to cooperate with police questioning and go on their way in the absence of reasonable suspicion of criminal activity or probable cause for an arrest.[163] The Court distinguished Wardlow's situation from Royer's because Royer did not take flight when police officers, who only had a hunch, approached him.[164] The Court reasoned that the right to go on one's way only preserved the right to go about one's business and that flight was the complete opposite of going about one's business.[165] The Court concluded that the *Mendenhall-Royer* "free to leave" test did not include unprovoked flight.[166]

Third, the Court found that *Terry* accepted the risk that the police may stop innocent people who take flight for innocent reasons.[167] In comparing *Terry* to *Wardlow*, the Court identified that in *Terry* the defendant's conduct in itself was ambiguous and susceptible to an innocent explanation, as was Wardlow's flight.[168] But the Court also noted that the defendant's behavior in *Terry* suggested criminal wrongdoing, which supported an investigative stop.[169] The Court rationalized that even under a probable cause standard the police could detain, and have detained, some innocent people.[170] Consequently, the Court's decision allowed

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United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (stating that driving erratically in an attempt to avoid the border patrol is a factor in determining reasonable suspicion to stop a car)).

159. *Id.* at 124-25.

160. *Id.* at 125.

161. *Id.* at 124-25.

162. *Id.* at 125 (citing Florida v. Royer, 460 U.S. 491, 498 (1983)).

163. *Royer*, 460 U.S. at 498; *see also supra* Part II.C (explaining the *Mendenhall-Royer* "free to leave" test).

164. *See Wardlow*, 528 U.S. at 125 (finding decision consistent with *Royer*, 460 U.S. at 493-94).

165. *Id.*

166. *Id.*; *see also supra* Part II.C.

167. *Wardlow*, 528 U.S. at 126 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

168. *See id.* at 125 (citing *Terry*, 392 U.S. at 22-23 (stating that walking along a sidewalk, staring into a store window, and standing on a street corner are independently subject to an innocent explanation)).

169. *See id.* (citing *Terry*, 392 U.S. at 30 (finding that hovering around a street corner for an extended period of time, staring into a business window twenty-four times, and routinely conversing with others after each pass by the window did create reasonable suspicion of criminal activity)).

170. *Id.* at 126.

police officers to combat crime by temporarily stopping individuals that take unprovoked flight in a high crime area.[171]

B. JUSTICE STEVENS' CONCURRENCE & DISSENT

Justice Stevens concurred with the majority's refusal to establish a per se rule with regard to flight.[172] Both parties had asked the Court to create a bright-line rule to resolve whether flight alone sufficed to create reasonable suspicion of a crime.[173]

Although the underlying tone of the majority's opinion seemed to favor the state's request, the Court's words in regard to flight—that "it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"[174]—indicated the Court's unwillingness to adopt a per se rule. Justice Stevens pointed out that from its establishment in *Terry,* an investigative stop is an intrusive, intimidating act requiring a particular degree of suspicion arising from certain non-criminal acts.[175] Analyzing an investigative stop requires weighing the various factors to see if police protection outweighs the individual's personal security.[176]

The question then became the degree of suspicion the Court should attach to flight, a non-criminal act in and of itself.[177] Justice Stevens provided several examples of instances when people might take flight for innocent reasons—to catch up with a friend, to meet the bus, to avoid a bully or a bore, or to answer the call of nature.[178] He also noted that innocent people sometimes flee out of fear of being apprehended as the guilty party, being called as a witness, or being injured as a bystander.[179] He concluded that the diversity and frequency of possible motivations for flight and the many variables associated with the flight itself—

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171. *Id.*

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

173. *Id.* (citing Brief for Petitioner at 7-36, *Wardlow* (No. 98-1036); Brief for Respondent at 6-31, *Wardlow* (No. 98-1036)). The state wanted a rule that authorized the detention of anyone who flees "from a clearly identifiable police officer . . . without provocation." Oral Argument on Behalf of Petitioner at 6-7, *Wardlow* (No. 98-1036), *available at* 1999 WL 1034479. In the alternative, the state requested a rule holding that flight in a high crime area would create reasonable suspicion. Brief for Petitioner at 5, *Wardlow* (No. 98-1036). Wardlow, on the other hand, wanted a decision that never made flight alone at the sight of a police officer grounds for an investigative stop. Brief for Respondent at 6-31, *Wardlow* (No. 98-1036).

174. *Wardlow,* 528 U.S. at 124.

175. *Id.* at 127-28 & n.1. Noncriminal acts, for example, include standing on a street corner, strolling down the street, or looking through a store window in a business district. Terry v. Ohio, 392 U.S. 1, 22-23 (1968). None of these acts are against the law; however, in certain contexts, or taken together, these acts can create a reasonable suspicion of a crime. *Id.*

176. *Terry,* 392 U.S. at 26-27; *see also* Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (identifying the need for a balancing test between necessary police work and personal invasion).

177. *Wardlow,* 528 U.S. at 128 (Stevens, J., concurring in part and dissenting in part).

178. *Id.* at 128-29.

179. *Id.* at 131 & n.6.

location, speed, direction, time of day—support the Court's denial to accept a per se rule.[180]

Justice Stevens also considered the argument that some citizens, particularly minorities, view contact with police as hostile and dangerous.[181] He found that many African-Americans consider police harassment a serious problem in their communities and believe that police indiscriminately and abusively conduct investigative stops of minorities.[182]

Justice Stevens provided evidence to support African-Americans' negative response toward police encounters.[183] For example, in an informal survey of 100 young black and Hispanic men living in New York City, eighty-one responded that they had been stopped and frisked, with none of the stops resulting in an arrest.[184] Based upon these situations, Justice Stevens concluded that some people do consider "unprovoked flight" a normal response to a police presence.[185]

Since possible reactions to police contact vary widely, Justice Stevens continued to support the totality-of-the-circumstances approach,[186] instead of adopting a per se rule.[187] He maintained that the courts should "avoid categorical rules concerning a person's flight and the presumptions to be drawn therefrom" when making a decision involving reasonable suspicion.[188]

Although Justice Stevens supported the Court's use of the totality-of-the-circumstances approach, he disagreed with the majority's finding of reasonable suspicion to justify this particular stop.[189] He closely analyzed the important facts of Wardlow's stop for their value in establishing reasonable suspicion.[190] First, he considered standing on a street corner at 12:15 p.m. and holding a white bag as completely normal activity.[191] Second, the police were traveling to an unidentified location and were expecting to see a large group of people; therefore, Justice Stevens found that Wardlow's location and isolation did not match the

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180. *Id.* at 129-30.

181. *Id.* at 132-33. *See generally* Brief Amicus Curiae of the ACLU for Respondent at 21-24, *Wardlow* (No. 98-1036) (listing several examples of minority mistrust for police authority).

182. *See Wardlow*, 528 U.S. at 132 n.7 (citing Jean Johnson, *Americans' Views on Crime and Law Enforcement: Survey Findings*, 233 NAT'L INST. JUST. J. 13 (Sept. 1997) (finding that 43% of African-Americans consider police brutality and harassment as a serious community problem)).

183. *Wardlow*, 528 U.S. at 132-35 (Stevens, J., concurring in part and dissenting in part).

184. *Id.* (citing Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, Mar. 26, 1999 at 34).

185. *Id.* at 132-33 (Stevens, J., concurring in part and dissenting in part).

186. *Supra* notes 58-60 and accompanying text.

187. *Wardlow*, 528 U.S. at 134 n.11.

188. *Id.* at 135; *see also supra* Part II.D (addressing the legal development of the perceptions of flight).

189. *Id.* at 137.

190. *Id.* at 137-39.

191. *See id.* at 139 (finding nothing suspicious about the time of day or the white bag).

police's profile.[192] Third, the record did not clearly show when or if Wardlow recognized the police officers because the record failed to state whether the police drove marked vehicles, whether officers besides Nolan wore uniforms, or at what point in the procession Wardlow took flight.[193] The only evidence that Wardlow's flight resulted from seeing the police was Officer Nolan's statement that he "looked in our direction and began fleeing."[194]

In summary, Justice Stevens agreed with the Court's rejection of a bright-line rule regarding flight, and he also agreed that in specific circumstances unprovoked flight may constitute the proper degree of suspicion for an investigative stop.[195] However, he found that the totality-of-the-circumstances approach required a more in depth or extensive review of all the facts,[196] while the Court seemed to focus only on two: flight and location.[197] Consequently, Justice Stevens concluded that all of the facts, in this specific case, did not support reasonable suspicion.[198]

IV. IMPACT

Overall, the Court's decision in *Wardlow* expanded Fourth Amendment precedent dealing with reasonable suspicion and the investigative stop. The decision made unprovoked flight in a high crime area proper grounds for an investigative stop and narrowed an individual's right to leave when confronted with police questioning.[199] Since the Court utilized the totality-of-the-circumstances approach,[200] lower courts will still have to examine each situation involving flight on a case-by-case basis to determine reasonable suspicion and what actions constitute flight.[201]

On a more specific level, the decision granted police officers greater authority to detain individuals without probable cause.[202] The Court

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192. *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens found no testimony that any one besides Wardlow was on the street corner of 4035 West Van Buren. *Id.* at 138. The lower court concluded from the record that the police were "simply driving by, on their way to some unidentified location, when they noticed the defendant standing at 4035 West Van Buren." *Id.* (quoting People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. Ct. 1997)).

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

194. *Id.* at 137.

195. *Id.* at 136.

196. *Id.* at 137-39.

197. *The Supreme Court 1999 Term Leading Cases*, 114 HARV. L. REV. 179, 215-216 (2000).

198. *Wardlow*, 528 U.S. at 139.

199. *Id.* at 124-25.

200. *See id.* (refusing to adopt a per se rule for flight and looking instead at the totality of the circumstances).

201. In an Amicus Curiae Brief, the ACLU wondered what other actions, such as riding away on a bicycle or entering a vehicle and driving away, would fall into the realm of flight if the Court determined flight to be innately suspicious. Brief Amicus Curiae of the ACLU at 16-17, *Wardlow* (No. 98-1036).

202. *See* Jan Crawford Greenburg, *Top Court: Cops Can Chase Those Who Flee*, CHI. TRIB., Jan.

applied a colorblind test that made no distinction between police investigative stops of majority or minority citizens.[203] This increase in police authority should reach from the inner cities to the smaller cities and rural areas across the United States.[204]

A. THE MACRO-EFFECTS

Both flight and a high crime area have gained weight as important factors in determining whether reasonable suspicion of a crime exists.[205] Collectively, because the Court only focused on these two factors, the presence of flight and a high crime area in a police-citizen encounter now appear to justify an investigative stop,[206] making Illinois's request for an alternative rule, that flight in a high crime area created reasonable suspicion,[207] a reality by default.[208] As a result, the Court continued to create a categorical list of factors that could serve as general guidelines for justifying an investigative stop.[209]

This decision also narrowed the "right to leave" test.[210] An individual could still refuse to answer police questioning and turn and walk away in the absence of reasonable suspicion, but the same individual could not avoid the questioning altogether by taking flight; in essence, the person could walk away, but not run away, from the police.[211]

Moreover, the Court's refusal to adopt a per se or bright-line rule in this matter preserved the totality-of-the-circumstances approach.[212] The

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13, 2000, at N1 (citing Tracey Maclin, a professor at Boston University School of Law, who found that the *Wardlow* ruling is consistent with previous criminal law decisions of the Court, which have generally given police broader power to stop and search people).

203. *See* Reply Brief for Petitioner at 16, *Wardlow* (No. 98-1036) (arguing for a colorblind approach to applying the Fourth Amendment). *See generally Wardlow*, 528 U.S. at 121-26 (making no reference to Wardlow's race in the Court's opinion).

204. *Infra* Part IV.C.

205. *Wardlow*, 528 U.S. at 123-26; *see also* Watkins v. City of Southfield, 221 F.3d 883, 889 & n.3 (6th Cir. 2000) (stating that "*Wardlow* makes it clear that the 'events' that may be considered include flight of the suspect"); United States v. Lewis, Nos. 98-6068/98-6348, 2000 U.S. App. LEXIS 3308, at *4-*5 (6th Cir. Feb. 29, 2000) (finding a heavy drug trafficking area, based upon the *Wardlow* decision, as an important factor in justifying an investigative stop of suspicious juveniles); United States v. Gooden, No. 00-092 sec. J(5), 2000 U.S. Dist. LEXIS 11369, at *7 (E.D. La. Aug. 1, 2000) (citing *Wardlow* in referring to the "location where the encounter occurs . . . [as an] important element[ ] in assessing the totality of the circumstances").

206. *The Supreme Court 1999 Term Leading Cases*, *supra* note 197, at 215.

207. *See* Brief for Petitioner at 5-7, *Wardlow* (No. 98-1036) (finding the combined weight of flight and location as sufficient for a reasonable suspicion of a criminal activity).

208. *Wardlow*, 528 U.S. at 124-26. Although the Court did not hold that flight in a high crime area always creates a reasonable suspicion for a *Terry* stop, it did place a significant amount of emphasis on the flight and the area in upholding the conviction. *Id.* Lower courts could easily interpret this to imply that flight in a high crime area supports reasonable suspicion.

209. *See* People v. Pigford, 17 P.3d 172, 175-76 (Colo. Ct. App. 2000) (considering flight a significant factor in evaluating the totality of the circumstances).

210. *See supra* Part II.C (explaining the development and effects of the "right to leave" test on Fourth Amendment jurisprudence).

211. Greenburg, *supra* note 202, at N1.

212. *See Wardlow*, 528 U.S. at 124 ("Headlong flight . . . is not necessarily indicative of wrongdoing . . . ."). For an application of the applying the totality-of-the-circumstances approach to

decision has left future courts with the same task of reviewing the circumstances surrounding an individual's flight before making a determination about the lawfulness of the stop.[213] The Court has not provided a firm determination of whether unprovoked flight by itself, in all situations, could justify an investigative stop.[214] For example, if around noon Wardlow had been standing without a bag in a residential neighborhood not known for crime and had started running at the sight of a police officer, the case may have turned out differently. Several courts have interpreted the *Wardlow* decision to mean unprovoked flight by itself justifies an investigative stop.[215] Other courts, however, have interpreted *Wardlow* as requiring flight in conjunction with another factor to constitute reasonable suspicion.[216]

The Court authorized only the temporary detention of an individual who flees at the sight of an officer in a high crime area without any provocation[217] by the police.[218] Presumably, unprovoked flight is still not sufficient to support probable cause for an arrest,[219] a higher standard than the reasonable suspicion needed for a *Terry* stop.[220]

In contrast, provoked flight in certain circumstances may support probable cause for an arrest.[221] If an officer, acting on reasonable suspicion, gives an individual a command to stop, and the individual takes flight, the individual's provoked flight alone, in certain jurisdictions, could establish probable cause for an arrest.[222] Additionally, one court has held that if an officer attempted an improper stop and the individual

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determine whether a police officer had a proper basis for suspecting a detained person of criminal activity, see *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

213. *See* Joan Biskupic, *Police May Stop, Frisk Those Who Flee at Sight of Officer; Court Says Action Can Lead to "Reasonable Suspicion,"* WASH. POST, Jan. 13, 2000, at A10 (commenting that the *Wardlow* decision did not break new ground).

214. *See generally Wardlow*, 528 U.S. 119.

215. *E.g.*, United States v. McGrath, 89 F. Supp. 2d 569, 576 (E.D. Pa. 2000); State v. Jones, No. 99AP-704, 2000 Ohio App. LEXIS 2495, at *13 (June 13, 2000) (stating that "unprovoked flight may fuel reasonable suspicion"); State v. Fencl, No. 24439-0-II, 2000 Wash. App. LEXIS 805, at *5 n.9 (May 26, 2000).

216. *See* United States v. Sanders, No. 99-1486, 2000 U.S. App. LEXIS 3794, at *4 (2d Cir. Mar. 9, 2000) (holding that an individual's flight upon noticing a police officer, in conjunction with a high crime area, may constitute reasonable suspicion); *see also* People v. Delaware, 731 N.E.2d 904, 910 (Ill. App. Ct. 2000) (finding that the patrolling officer's reliance on hearing sounds of gunshots and subsequently seeing defendant take to unprovoked flight at the sight of the officer was enough to justify a stop).

217. *See* Oral Argument on Behalf of Petitioner at 17, 20, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), *available at* 1999 WL 1034479 (defining for the Court that unprovoked flight occurs when "a reasonable police officer can say it's the presence of the police officer that has caused the flight" and nothing more, such as the officer's sirens or flashing lights).

218. *Wardlow*, 528 U.S. at 124-25.

219. In *Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963), the Court found that the ambiguity involved with flight prevents it from being sufficient to support probable cause.

220. *See supra* Part II.B (explaining the differences between the probable cause and reasonable suspicion standards).

221. *See, e.g.*, N.D. CENT. CODE § 12.1-08-11 (1997) (making flight from a police officer, after the officer has given an audio or visual signal to stop, a class B misdemeanor).

222. *See e.g.*, *id.*

took flight to avoid the officer (provoked flight), that subsequent flight might turn an impermissible stop into a lawful one.[223]

Further, the Court's decision left police officers, judges, and lawyers with the problem of defining what actions constitute flight.[224] Given the constitutional right to go on one's way[225] and the current decision that flight raises a high degree of suspicion,[226] courts will now have to decide what individual actions will cross the line from a protected right to an unprotected right.[227] For example, driving off in a car, hurrying into a building, riding off on a bike, or jogging across the street at the sight of the police may or may not constitute flight.[228]

Wardlow also served as a guide to analyzing evasive behavior because the Court labeled flight the "consummate act of evasion."[229] Several courts have used *Wardlow* as the standard test against which to compare other evasive behavior to determine if the evasive behavior created reasonable suspicion for temporary detainment.[230]

B. THE MICRO-EFFECTS

Wardlow has several potential ramifications for police officers, criminals, and ordinary citizens, both from a minority and majority perspective. First, the police officer now has broader discretion in dealing with police-citizen encounters.[231] Flight coupled with any other suspicious factor—time of day, direction and speed of flight, location of flight, etc.—may permit a police officer to stop an individual without violating the individual's Fourth Amendment rights.[232] The effects of

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223. *See* People v. Thomas, 734 N.E.2d 1015, 1021-22 (Ill. App. Ct. 2000) (finding that a defendant's flight, induced by an officer's attempted unlawful stop, could turn an "otherwise ungrounded suspicion into a suspicion that justifies the defendant's ultimate stop and detention").

224. LAFAVE, *supra* note 85, § 9.4, at 48 (Supp. 2001).

225. *Supra* Part II.C.

226. *See Wardlow*, 528 U.S. at 124 (finding flight the "consummate act of evasion").

227. LAFAVE, *supra* note 85, § 9.4, at 48 (Supp. 2001).

228. *See generally id.*; ACLU Brief at 16-17, *Wardlow* (No. 98-1036). The ACLU questioned what other actions would fall into the category of flight or become equivalent to flight if the Court created a bright-line rule. *Id.* If other actions, such as riding away on a bicycle, became grounds for a *Terry* stop, the ACLU contended that the citizen's right to avoid police would be reduced to only the privilege of "walking away." *Id.*

229. *See Wardlow*, 528 U.S. at 124 (analyzing evasive behavior such as flight).

230. *See* United States v. Smith, No. 217 F.3d 746, 750 (9th Cir. 2000) (finding reasonable suspicion in part because the defendant tried to evade the police by turning around while driving a vehicle); United States v. Dupree, 202 F.3d 1046, 1049 (8th Cir. 2000) (comparing the defendant's action of dropping a small package over a bridge railing to headlong flight); *see also* United States v. Woodrum, 202 F.3d 1, 7 (1st Cir. 2000) (determining from *Wardlow* that evasive behavior, which is at some level ambiguous, is now a pertinent factor in finding reasonable suspicion); Copeland v. Florida, 756 So. 2d 180, 181 (Fla. Ct. App. 2000) (relying solely upon the *Wardlow* decision and finding defendant's actions of backing away from police officers, putting himself between a woman and the police, and keeping his hands concealed all provided a founded suspicion for stopping the defendant).

231. Greenburg, *supra* note 202.

232. *See, e.g.*, State v. Wright, 752 A.2d 1147, 1155 (2000) (concluding that movement away

this increase in police authority are three-fold: (1) police can react more quickly to suspicious, evasive behavior, especially in the inner cities;[233] (2) motions to suppress evidence will continue to challenge this increase in authority;[234] and (3) the detention of innocent individuals may increase.[235] Overall, the *Wardlow* decision should help reduce the amount of crime in America's cities.[236]

As for the accused, unprovoked flight may become an automatic justification for a lawful investigative stop since the police now need little else.[237] Arrested persons will have a difficult time suppressing evidence on grounds of an impermissible stop when unprovoked flight is an applicable factor,[238] and innocent persons with valid reasons for flight may legally fall victim to an investigative stop.[239] "As a practical matter, a post-*Wardlow* defendant must assume the burden of rebutting the adverse inference arising from his flight, and must do so even if the surrounding circumstances are entirely consistent with his innocence."[240] However, since the Court applied the totality-of-the-circumstances approach and did not define flight, defense attorneys and defendants can still continue to make motions to suppress evidence from investigative stops, which police base on the defendant's evasive behavior.[241]

Although the ruling provided an easier justification for investigating evasive behavior, it also made it easier for the authorities to intrude into the private security of each and every citizen.[242] Instead of stopping the

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from officers plus the odor of marijuana created a reasonable suspicion).

233. *See* Brief of Americans for Effective Law Enforcement, Inc. at 6-7, *Wardlow* (No. 98-1036) (stating that affirming the Illinois Supreme Court's ruling for Wardlow would greatly reduce the effectiveness of the police in combating drug-related crimes in the inner cities); *see also* Brief for the United States as Amicus Curie for Petitioner at 17, *Wardlow* (No. 98-1036) (supporting the immediate seizure of individuals who take flight, otherwise, police officers would have no reasonable means of further investigating the suspicious behavior).

234. *See, e.g.,* United States v. Jordan, 232 F.3d 447, 450 (5th Cir. 2000) (affirming the trial court's denial of defendant's motion to suppress evidence). In *Jordan*, the police conducted an investigative stop of the defendant after his flight in a high crime area. *Id.* at 448.

235. *See Wardlow*, 528 U.S. at 125 (recognizing that innocent people may flee from the police).

236. *Cf.* Brief of the National Association of Police Organizations, et al. at 2, *Wardlow* (No. 98-1036) (claiming that more crimes would go unsolved and that America would become a more dangerous society if the Court overturned Wardlow's conviction).

237. *See* State v. Belcher, 725 N.E.2d 92, 95 (Ind. Ct. App. 2000) (determining that flight from an officer at three in the morning after changing direction to avoid contact constitutes reasonable suspicion).

238. *See Wardlow*, 528 U.S. at 124 (finding that headlong flight is "certainly" suggestive of wrongdoing, which supports further investigation).

239. *See id.* at 125 (recognizing that innocent people may flee from the police).

240. Milton Hirsch & David O. Markus, *Fourth Amendment Forum:* Illinois v. Wardlow: *The Wicked Flee When No Man Pursueth*, 24 CHAMPION 38, 40 (June 2000).

241. *See, e.g.*, Peters v. State, 531 S.E.2d 386 (Ga. Ct. App. 2000) (reversing a conviction due to the trial court's denial of a motion to suppress evidence collected from an investigative stop of an individual who exited from a breeze-way known for drug sales and hurried to his vehicle at the sight of the police officers).

242. *See* Greenburg, *supra* note 202, at N1 (stating that some criminal defense lawyers and legal observers question whether *Wardlow* has given the police too much authority to detain innocent people).

person, the police could simply follow and observe a fleeing individual to see if the individual takes further action to justify an investigative stop (i.e. discards a weapon or drugs along the route).[243] Each time the Court has expanded the reasonable suspicion standard, it has permitted more police interference with the public in areas that once required probable cause.[244] The Court justified this increased interference by balancing it with the need for more drastic police action to combat crime.[245] Consequently, the decision minimized the protection the Fourth Amendment gives to the pre-*Terry* probable cause standard, which served as the citizen's protector against unlawful searches and seizures.[246]

Defense lawyers now have the task of preventing prosecutors from using *Wardlow* as a stepping stone in creating a bright-line rule that flight alone permits a search and seizure.[247] Unfortunately, the police may subject an innocent individual to the humiliation, fear, and annoyance of an investigative stop and frisk[248] simply based upon the individual's visual identification of the police and his or her subsequent rapid movement away from them.[249]

In contrast, the general public must understand the Court's balance between intrusion upon individual rights and the necessity for effective law enforcement.[250] In spite of the *Wardlow* decision, citizens still have the right to refuse to answer police questioning and simply walk away, in the absence of a reasonable suspicion for the stop.[251] Although society

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243. *See* Brief Amicus Curiae of the ACLU at 26, *Wardlow* (No. 98-1036) (stating that police do not need a reasonable suspicion just to pursue and observe a fleeing individual).

244. *See infra* Part II.

245. *See Wardlow*, 528 U.S. at 126 (stating that the Fourth Amendment accepts the risk that police may stop innocent people in connection with more drastic police action).

246. *Terry* established an exception to the Fourth Amendment probable cause standard—that police could detain individuals with a reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 20-23 (1968). Therefore, each Court decision that upholds an officer's reasonable suspicion in a particular set of circumstances increases this exception and decreases the protection of probable cause. *See id.* at 36 (Douglas, J., dissenting) (finding that the Court's decision in *Terry* ignored the existence of probable cause). Increasing the scope of the exception increases the number of citizen activities that police can inquire into with a lesser degree of suspicion. *See id.* at 36 n.3 (Douglas, J., dissenting) (stating that allowing less than probable cause would leave citizens at the mercy of police whims). Although increased police authority may help the police, the Court must also put limitations on the reach of this authority. *See id.* at 38-39 (Douglas, J., dissenting) (stating that changing the probable cause requirement should be the deliberate choice of the people).

247. Hirsch & Markus, *supra* note 240, at 40.

248. *Terry*, 392 U.S. at 24-25.

249. *See* Hirsch & Markus, *supra* note 240, at 40 ("It will be all too easy for courts and prosecutors to interpret *Wardlow* as meaning that flight alone permits search.").

250. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (referring to the balancing test); *see also* Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (applying the balancing test to Fourth Amendment analysis).

251. *See* Jacobs v. Village of Ottawa Hills, 111 F. Supp. 2d 904, 913-14 (N.D. Ohio. 2000) (upholding the right of an individual to break off a voluntary police encounter and then walk away). However, at least one judge questioned how many reasonable people would feel free to leave or know that they have the right to leave when approached by a police officer and questioned about his

has lost some of its protection against police searches and seizures,[252] it has gained protection through increased police preventive measures against crime.[253] Given the limited scope of the Court's decision—that unprovoked flight in a high crime area created reasonable suspicion[254]—this trade-off appeared appropriate.

As for the minority citizen, the Court seemed to have taken the approach that the Fourth Amendment applied a colorblind test.[255] This decision did not justify minority flight from police officers due to abusive investigative stops in the past, which would create racial profiling in itself.[256] Instead, the decision tended to reflect the argument that law-abiding, minority citizens want adequate police protection and expect police officers to conduct investigative stops of suspicious individuals in their neighborhoods.[257] As a result, the police will continue to conduct investigative stops of fleeing individuals in minority areas known for high crime,[258] and the courts will have to determine to what extent the race of an individual should affect their reasonable suspicion analysis of flight.[259]

Unfortunately, even with the best training efforts and proper supervision, instances of abusive police stops may still occur.[260] Citizens, especially minorities, will continue to question the investigative stop practices and procedures used by police officers, often with good reason.[261] For example, an article sharply criticizing the Supreme Court's decision in *Wardlow* examined police racial discrimination throughout the country.[262] It concluded that *Wardlow* eroded the Fourth Amendment

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or her activities. Overstreet v. State, 724 N.E.2d 661, 665 (Ind. Ct. App. 2000) (Robb, J., dissenting).

252. *Supra* note 246.

253. *See generally* Greenburg, *supra* note 202 (quoting Cook County State's Attorney Richard Devine, that the city streets "will be safer because of this decision").

254. Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000).

255. *See generally id.* at 121-26 (making no reference to Wardlow's race in the Court's opinion).

256. *See* Brief for Petitioner at 16, *Wardlow* (No. 98-1036) (emphasizing *Terry's* application of an objective standard, which prevents varying racial standards and racial profiling). *See generally Wardlow*, 528 U.S. at 121-26 (giving no reference to Wardlow's race in the Court's opinion, but referring to an objective justification for making a stop).

257. Brief of Americans for Effective Law Enforcement, Inc. at 8, *Wardlow* (No. 98-1036).

258. *See Wardlow*, 528 U.S. 119 (making no distinction between minority or nonminority areas in enforcing the Court's opinion).

259. *See The Supreme Court 1999 Term Leading Cases*, *supra* note 197, at 210 (pointing out that the Court in *Wardlow* did not address Wardlow's race in its analysis of reasonable suspicion).

260. *See* Brief Amicus Curiae of the Rutherford Institute at 11, *Wardlow* (No. 98-1036) (citing DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (noting that a recent poll found that nearly 90% of African-Americans in New York thought the police force often engaged in brutality against minorities and two-thirds said such brutality was widespread)).

261. *See Police vs. The Community, NYPD Acquittalls in Diallo Slaying Send a Sobering Message*, DALLAS MORNING NEWS, Mar. 5, 2000, at 3J (Letter to the editor from Kirk Alan Jones) (referring to the shooting of Amadou Diallo, a West African immigrant, by New York City Policeman, and noting that maybe Diallo should have fled). The police shot at Mr. Diallo forty-one times and hit him ninteen times. *Id.*

262. *See* Adam B. Wolf, Note, *The Adversity of Race and Place: Fourth Amendment*

protections for indigent minorities because minorities, who often consider flight from police reasonable, will feel the brunt of the more lenient *Terry* stop standards.[263] Evolving from these types of arguments, the Court can expect continued efforts to persuade the Court to reverse its position regarding flight in a high crime area and to prevent a future Supreme Court case from authorizing flight alone as sufficient for reasonable suspicion.[264]

Although the Court's ruling did not address remedies for abusive stops of minorities by holding that police departments could detain those fleeing in a high crime area, it did imply that preventing police officers from investigating suspicious behavior was not the solution to curtailing these abusive stops.[265] Instead, reporting the improper police activities served as a more viable remedy. Minorities, faced with negative police encounters, will have to consider equal protection claims, section 1983 claims,[266] or administrative charges against particular police departments[267] in order to rectify abusive police investigative stops.[268]

C. A RURAL PERSPECTIVE

Although the *Wardlow* opinion involved flight in a high crime area in a large city,[269] the decision also had implications for a small city or rural setting. As an example, consider North Dakota's smaller cities and

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Jurisprudence in Illinois v. Wardlow, 528 U.S. 119 (2000), 5 MICH. J. RACE & L. 711 (2000) (providing an argument that the *Wardlow* decision will continue to promote the inequalities and injustice involved with investigative stops of minorities).

263. *Id.*

264. *See* Hirsch & Markus, *supra* note 240, at 40 (addressing life after *Wardlow* that prosecutors can easily use flight as a powerful factor to determine reasonable suspicion and could attempt to create a bright-light rule that flight alone or flight in a high crime area always equals reasonable suspicion, unless defense lawyers continue to argue against the rule).

265. *Wardlow*, 528 U.S. at 126. "While all power is subject to abuse, the solution is not to eliminate power, and place us at the mercy of the lawless; rather, the solution is for the Law to curb the abuse." Brief of Wayne County Prosecuting Attorney at 21, *Wardlow* (No. 98-1036).

266. *See* 42 U.S.C. § 1983 (1994 & Supp. IV 1998) (creating a tort applicable against state actors who violate the federal constitution).

267. *See* Choi v. Gaston, 220 F.3d 1010, 1010 (9th Cir. 2000). *Choi* involved a lawsuit brought by an Asian man against the Anaheim Police Department for an unreasonable stop and arrest.

268. *See* Oral Argument on Behalf of Petitioner at 14, *Wardlow* (No. 98-1036), *available at* 1999 WL 1034479 (answering Court's question about dealing with the problem that some individuals may flee from police out of racial fear).

> My response is that since *Terry*, when the Court discussed that issue, this Court has said that under the Fourth Amendment we apply a colorblind test. We look at the balancing outside of those issues [racial reasons for fleeing from police], and if those issues are there, application of sanctions under the Fourth Amendment isn't going to resolve them. They should be handled, as this Court has said, as recently as *Whren*, either by equal protection claims or section 1983 claims or administrative charges within the particular police department.

Id.

269. *See Wardlow*, 528 U.S. at 121 (stating that the arrest of Wardlow took place on the streets of Chicago, Illinois).

agricultural environment.[270] North Dakota codified the *Terry* standard in 1969 by requiring the police to have a reasonable suspicion of criminal activity before conducting an investigative stop.[271] *Wardlow* will impact the state in several ways.

First, even in smaller cities without police-designated high crime areas for street narcotics trafficking, the police departments still have locations that receive increased patrols because of higher criminal activity.[272] For example, in Fargo, North Dakota, the police often increase their efforts in downtown commercial areas and in concentrated residence locations due to higher levels of crime in these areas.[273] Although the Fargo Police Department did not have any police-defined "high crime areas,"[274] the *Wardlow* decision added significant weight to these areas of increased criminal activity as pertinent factors in making an investigative stop.[275]

Second, the *Wardlow* decision will probably not change any of the Fargo Police Department's current practices in establishing reasonable suspicion in regard to a fleeing individual.[276] Currently, the officer must either observe other suspicious activity[277] or have some knowledge as to why the person took flight before conducting an investigative stop.[278] The North Dakota State Attorney General's office reported that the

270. *See Metropolitan Area Population Estimates for July 1, 1999 and Population Change for April 1, 1990 to July 1, 1999 Census Population Counts*, United States Census Bureau Web Site, *at* <http://www.census.gov> (last visited Apr. 8, 2001). Compare 1999 population estimates for Chicago, Illinois (8,008,507) and Fargo-Moorhead, North Dakota-Minnesota (170,122) and Grand Forks-East Grand Forks, North Dakota-Minnesota (95,461). *Id.*

271. *See* N.D. CENT. CODE § 29-29-21 (1991) (codifying case law that allowed a peace officer to stop any person abroad in a public place whom he or she reasonably suspects is committing, has committed, or is about to commit a crime).

272. Letter from Captain Ronald F. MacCarthy, Assistant to the Chief of Police, Grand Forks, North Dakota, Police Department (July 5, 2000) (on file with author); Letter from Lt. Thorvald Dahle, Officer, Fargo, North Dakota, Police Department (July 18, 2000) (on file with author); E-mail from Lt. Thorvald Dahle, Officer, Fargo, North Dakota, Police Department (Jan. 31, 2001, 10:22 CST) (on file with author) (stating that the police departments focus on fights outside bars, noise complaints, and traffic problems as some of the areas of higher criminal activity).

273. Letter from Lt. Thorvald Dahle, *supra* note 272.

274. *Id.*

275. *See Wardlow*, 528 U.S. at 124 (finding that although location alone is not enough to justify an investigative stop, officers should not ignore location as a relevant characteristic in establishing reasonable suspicion).

276. *See* Letter from Lt. Thorvald Dahle, *supra* note 272 (noting that in his opinion it is relatively easy for officers to establish reasonable suspicion). Other police departments probably will not change any of their current practices. Steve Lash, *Decision Clears Way for Chases by Police; High Court Splits 5-4 in Stop-and-Frisk Case*, HOUSTON CHRON., Jan. 13, 2000 at A1 (quoting a local sheriff as saying that the *Wardlow* decision "would not cause any policy changes or reviews at the Sheriff's Department"); Greenburg, *supra* note 202 (quoting a police spokesman as saying that the Chicago police have always considered all the circumstances when responding to a fleeing person and that the *Wardlow* decision would not change their procedures).

277. *See generally* State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992) (stating that in a casual encounter an officer "may learn" or observe something that leads to a reasonable suspicion).

278. Letter from Lt. Thorvald Dahle, *supra* note 272.

state's law enforcement officials did not seem to have any "substantial confusion or uncertainty" as to when these officers have reasonable suspicion for a stop.[279] Some officers have had innocent kids take flight at the sight of an officer for the excitement or to see if the police will chase them.[280] However, this activity has happened very infrequently, and the officer usually has some other suspicious behavior associated with the flight to assess before giving chase.[281] As a result, the officers will attempt to follow *Wardlow*'s guidance in reacting to unprovoked flight,[282] but will still have to make good faith judgments on whether a particular individual's flight is comparable to the *Wardlow* situation.[283]

Third, the *Wardlow* decision will help officer's verbalize the basis for their suspicions.[284] Officers can easily remember and refer to the defendant's flight and increased criminal activity in a particular area as important factors to justify their stops in a court of law. This will allow officers to focus on other factors such as reports of nearby crimes, suspect descriptions, and observed criminal activity needed in conjunction with the flight or location to support their investigative stops.

Finally, *Wardlow* works in conjunction with current North Dakota statutes.[285] The North Dakota Century Code contains two fleeing statutes, which, when combined, make it illegal for an individual to flee a "pursuing" police officer, whether by foot, motor vehicle, or other means of movement, after the officer has given an audio or visual signal

279. Letter from Robert P. Bennet, Assistant Attorney General, Bismarck, North Dakota (July 12, 2000) (on file with author). Although the officers may not have indicated any confusion in determining reasonable suspicion, the totality of the circumstances analysis does not provide any clear guidance on what constitutes reasonable suspicion—it only tells an officer or the court to look at the whole picture. United States v. Cortez, 449 U.S. 417, 417-18 (1981). The officer's level of "certainty" may come from experience and the ability to compare current situations with previous circumstances that supported reasonable suspicion. *Id.* at 418. However, it is unlikely that an officer will have this "certainty" in every fact pattern that arises, especially when left with an analysis that is inherently uncertain. *See id.* (stating reasonable suspicion analysis does not deal with hard certainties but with probabilities).

280. Letter from Lt. Thorvald Dahle, *supra* note 272.

281. E-mail from Lt. Thorvald Dahle, *supra* note 272.

282. *See* E-mail from Mike Wardzinski, Sergeant, Bismarck, North Dakota, Police Department (Jan. 30, 2001, 9:16 CST) (on file with author) (stating that his department conducted training on *Wardlow* and concluded that the fleeing of an individual from police coupled with one other aspect that can be articulated by the officer is enough to establish reasonable suspicion).

283. Letter from Lt. Thorvald Dahle, *supra* note 272. Although the Fargo Police Department does not have any policy regarding foot pursuits, the department expects officers to follow the decisions of the courts. *Id.* If an officer could not in good faith come up with any reason why a person was fleeing, there is a good chance the officer would do nothing. E-mail from Lt. Thorvald Dahle, *supra* note 272.

284. Letter from Captain Ronald F. MacCarthy, *supra* note 272 (stating that many times officers are unable to verbalize the basis for their "hunches").

285. *See* N.D. CENT. CODE § 12.1-08-11 (1997) (covering an individual's provoked flight from police but not unprovoked flight); N.D. CENT. CODE § 39-10-71 (Supp. 1999) (entitled: fleeing or attempting to elude a police officer–penalty).

to stop.[286] Therefore, it is likely that the statutes apply only to an individual's "provoked" flight—a reaction to a police show of authority[287]—and not just to police presence.[288]

The *Wardlow* decision, in contrast, covered the action of the fleeing individual up to the point of time that an officer instigated the required signal.[289] The defendant's flight in *Wardlow* was unprovoked, and it helped create reasonable suspicion.[290] As a result, a North Dakota police officer would have reasonable suspicion needed for a stop if the officer observed an individual's flight in a high crime area.[291] The officer could then flash his or her lights or give the individual a verbal command to stop running, and if the individual refused to stop, the officer could then arrest the individual for the same flight that created the reasonable suspicion.[292]

The state has further complicated this flight analysis by statutorily limiting the use of investigative stops.[293] When the state codified the *Terry* standard, it limited the use of investigative stops to only certain types of crimes.[294] Other crimes appeared to require probable cause before an officer could detain an individual.[295] This restriction has left the state courts with trying to determine if the legislature intended these restrictions to be all-inclusive, and if not, to what extent the courts can go beyond them.[296] Consequently, without further clarification from the state legislature or the state courts, a police officer, applying *Wardlow*, could lawfully stop a fleeing individual suspected of a felony, but

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286. *See* N.D. CENT. CODE § 12.1-08-11 ("Any person, other than the driver of a motor vehicle . . . who . . . flees or attempts to elude, in any manner, a pursuing peace officer, when given a visual or audible signal to stop, is guilty of a class B misdemeanor . . . ."); N.D. CENT. CODE § 39-10-71 (making it a class A misdemeanor for a motor vehicle operator to flee a pursuing police officer after the officer has given an audio or visual signal to stop).

287. N.D. CENT. CODE §§ 12.1-08-11, 39-10-71.

288. *See* Oral Argument on Behalf of Petitioner at 17, 20, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), *available at* 1999 WL 1034479 (stating that unprovoked flight occurs when "a reasonable police officer can say it's the presence of the police officer that has caused the [flight]" and nothing more, such as the officer's sirens or flashing lights).

289. *See Wardlow*, 528 U.S. at 124 (noting that Wardlow's flight was unprovoked).

290. *Id.* at 124-25.

291. *Id.*

292. N.D. CENT. CODE §§ 12.1-08-11, 39-10-71.

293. *See* N.D. CENT. CODE § 29-29-21 (1991) (authorizing a temporary stop for any felony, misdemeanor relating to the possession of a concealed or dangerous weapon or weapons, burglary or unlawful entry, and a violation of any provision relating to possession of marijuana or of narcotic, hallucinogenic, depressant, or stimulant drugs).

294. *Id.*

295. *Id.*

296. *See* City of Bismarck v. Uhden, 513 N.W.2d 373, 374-76 (N.D. 1994) (providing a motor vehicle stop exception to the limiting language of section 29-29-21 of the North Dakota Century Code and leaving open the question of what other types of crimes could also justify an investigative stop exception); Interview with Thomas Lockney, Law Professor, University of North Dakota School of Law, in Grand Forks, N.D. (Feb. 16, 2001).

the officer could not stop the same fleeing individual suspected of a misdemeanor unrelated to the possession of a concealed weapon.[297]

V. CONCLUSION

In *Wardlow*, the Supreme Court held that in certain circumstances an individual's unprovoked flight upon seeing the police in a high crime area meets the reasonable suspicion requirement for an investigative stop of the type established in *Terry v. Ohio*.[298] Preserving the totality-of-the-circumstances approach, the Court declined to declare a bright-line rule that flight alone would or would not always support reasonable suspicion.[299] Although the Court established no bright-line rule regarding flight,[300] its decision did put significant weight behind the factors of flight and a high crime area in finding reasonable suspicion, which left the police and the lower courts, in practice, leeway to create bright-line rules regarding flight.

Keven Jay Kercher[*]

297. N.D. CENT. CODE § 29-29-21.

298. Illinois v. Wardlow, 528 U.S. 119, 121-26 (2000); *see also* Terry v. Ohio, 392 U.S. 1, 4-23 (1968).

299. *Wardlow*, 528 U.S. at 121-26.

300. *See id.* at 126 (Stevens, J., dissenting) (highlighting the Court's refusal to endorse a bright-line rule for flight).

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