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Crimes of Suspicion

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ABSTRACT

Requiring that officers have suspicion of specific crimes before they seize people during stops or arrests is a fundamental rule-of-law limitation on government power. Until very recently, the Supreme Court studiously avoided saying whether reasonable suspicion for street and traffic stops must be crime specific, and lower courts are sharply divided as a result. Statements made in Kansas v. Glover *that the Fourth Amendment requires reasonable suspicion of a "particular crime" or of "specific criminal activity" may reflect an effort to rehabilitate this foundational principle, but crime specificity was not the Court's focus in Glover. Meanwhile, Fourth Amendment scholars, even those closely focused on the nuances of probable cause and reasonable suspicion, have mostly ignored these developments.*

Police capitalize on this uncertainty, routinely conducting stops that are not tethered to any particular crime of suspicion. Even when the crime-control stakes for these general suspicion stops are low, they can lead to police violence. The deaths of Elijah McClain and Freddie Gray can be traced back to street stops based only on this sort of formless, general suspicion.

This Article develops a comprehensive case for a Fourth Amendment crime-specificity requirement applicable to street and traffic stops. The historical case is strong: the Framers clearly expected probable cause of a particular crime of suspicion for seizures, at least for elites, and those requirements have largely been preserved for arrests. It is also complicated. These formal rules developed alongside regular practices, which persisted long into the twentieth century

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before being held unconstitutional, of arresting those in poor and minority communities based on status or general suspicion.

After marshaling historical evidence about arrests and crime specificity, this Article undertakes a thorough review of modern stop cases that raise these questions and analyzes relevant policy arguments. The impulses that often lead the Court to defer to law enforcement interpretations of suspicious facts in Fourth Amendment cases, do not apply to this question of law. The crime of suspicion is a bright line, drawn by the legislature into the criminal code, and it is a line that police officers are already expected to know.

In practice, a robust crime-specificity requirement must be paired with decriminalization efforts. Otherwise, the current bloat of American criminal codes may limit the practical impact of a crime-specificity requirement. Officers already exploit low-level offenses to conduct stops and intrusive Fourth Amendment searches. But there is potential here to rein in problematic street enforcement. During encounters where police are not quite sure of what (if any) crime they suspect, a crime-specificity rule requires that they remain in information-gathering mode and develop more specific suspicion before laying hands on a suspect. It is a requirement that makes space for de-escalation, for investigating alternative interventions, or for officers to walk away.

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INTRODUCTION

Requiring that officers have reasonable suspicion of specific crimes before they "lay hands" on people during street and traffic stops is an essential rule-of-law limitation on government power.[1] Until recently, however, the Court studiously avoided acknowledging a crime-specificity requirement for stops and its holdings in *Terry v. Ohio* and a range of precedents decided over five decades have created confusion among lower federal and state courts.[2] Clarification of this basic Fourth Amendment question—or, perhaps, reaffirmation of what should be viewed as a foundational constraint on government power—is overdue.

The Court's clearest statements requiring Fourth Amendment crime specificity are found in search cases. In *Berger v. New York*, for example, the Court explained that "[t]he purpose of the probable cause requirement of the Fourth Amendment" is "to keep the state out of constitutionally protected areas until it has reason to believe that a *specific crime* has been or is being committed."[3] Despite this clear guidance, lower courts have relaxed crime-specificity requirements in some types of search cases, particularly for warrantless searches.[4]

For arrests, modern cases require officers to show probable cause of a particular crime of suspicion,[5] or at least "objectively" reconstruct it after the

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[1] Chief Justice Roberts described seizures in these terms at least seven times in *Torres v. Madrid*. 141 S. Ct. 989, 995–97, 1000 (2021) ("laying of hands," "laying hands").

[2] 392 U.S. 1, 30 (1968) (holding a police officer may stop an individual on the street if the officer has reasonable suspicion that "criminal activity may be afoot"); *see infra* Sections III.A–B (examining crime specificity across Supreme Court cases); *infra* Section III.C (analyzing lower court division).

[3] 388 U.S. 41, 59 (1967) (emphasis added).

[4] *See* Lauryn P. Gouldin, Specific Suspicion 1, 11–12 (Mar. 4, 2023) (unpublished manuscript) (on file with author).

[5] *See* Beck v. Ohio, 379 U.S. 89, 91 (1964).

fact.[6] But until the 1970s, at least, police did not view this constitutional requirement as universally applicable; they regularly arrested those in poor and minority communities on general suspicion.[7] The FBI still tracks data for arrests on "suspicion,"[8] a category defined in earlier reports as "all persons arrested as suspicious characters, but not in connection with any specific offense."[9]

The constitutional status of a crime-specificity requirement is most complicated in the context of stops pursuant to *Terry v. Ohio*, where the governing standard is that an officer making a stop must have "reasonable suspicion . . . that criminal activity 'may be afoot.'"[10] The officer's suspicion must be based on "specific and articulable facts" and "rational inferences [drawn] from those facts."[11] The *Terry* Court noted that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches."[12]

What does it mean to suspect "criminal activity"? More than once in the Court's recent decision in *Kansas v. Glover*, Justice Thomas, writing for the majority, stated that the Fourth Amendment requires suspicion of a "particular crime" for a traffic stop.[13] But this question of crime specificity was not the Court's focus in *Glover*, and prior Court decisions, even cases closely focused on the nuances of reasonable suspicion, have glossed over this requirement. In

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[6] *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (quoting Whren v. United States, 517 U.S. 806, 812–13 (1996) (upholding arrest based on probable cause for a crime other than the crime identified by the officer at the time of the arrest)).

[7] *See infra* Section II.D (discussing "arrests on suspicion"); Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1165 n.24 (2020) ("'[A]rrests on suspicion'. . . were common in the nineteenth century, and for decades into the twentieth." (first citing WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870, at 57–59 (1977); then citing ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800–1880, at 180 (1989); and then citing William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960)); Nathaniel C. Sutton, Note, *Lockstepping Through Stop-and-Frisk: A Call to Independently Assess* Terry v. Ohio *Under State Law*, 107 VA. L. REV. 639, 646 (2021) (analyzing pre-*Terry* data on arrests on suspicion).

[8] *Crime in the United States 2019*, U.S. DEP'T OF JUST. FED. BUREAU OF INVESTIGATION (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-29.

[9] XXVII U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 66 (1956).

[10] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)) (distilling the *Terry* standard).

[11] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[12] *Id.* at 22.

[13] 140 S. Ct. 1183, 1191 n.1 (2020) ("[T]he Fourth Amendment requires . . . an individualized suspicion that a particular citizen was engaged in a *particular crime*." (emphasis added)); *see also id.* at 1190 (explaining that the stop was constitutional because the officer developed "reasonable suspicion that a specific individual was potentially engaged in *specific criminal activity*—driving with a revoked license" (emphasis added)).

Illinois v. Wardlow, for example, the Court quietly upheld a *Terry* stop despite the government's inability at oral argument to specify a crime of suspicion.[14] Not long after that, in *United States v. Arvizu*, the Court upheld a stop based on suspicion of unspecified "illegal activity."[15] The Court's earlier comments on the absence of evidence of "specific misconduct" in *Brown v. Texas* fall, unhelpfully, somewhere in the middle.[16] The majority and dissenting Justices in *Navarette v. California* could not agree on the crime of suspicion, but both opinions seemed to think that specifying one was necessary.[17] That same year—2014—the Court upheld the traffic stop in *Heien v. North Carolina*, despite the fact that the specific crime of suspicion (driving with a broken taillight) was not, in fact, a crime in that jurisdiction.[18]

Police seem to have capitalized on this uncertainty. Data from New York City's stop-and-frisk program shows that in the years after *Wardlow* (2000) and *Arvizu* (2002) were decided, the number of street stops in which the officers could not (or at least did not) pinpoint a particular crime of suspicion increased from 1% in 2004 to 36% five years later.[19] For many of these stops, police based their suspicion on factors like a suspect's "furtive movement" or presence in a "high crime area" that do not suggest any particular crime of suspicion.[20]

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[14] 528 U.S. 119, 125 (2000) ("Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further."); Transcript of Oral Argument at 4–5, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036); *see also infra* notes 214–17 and accompanying text.

[15] 534 U.S. at 277 (justifying the stop based on a number of factors, including defendant's use of "a little-traveled route used by smugglers," the children's bizarre behavior ("mechanical-like waving"), and the children's "elevated knees").

[16] *See* 443 U.S. 47, 49 (1979) (noting the officers stopped and frisked appellant for "look[ing] suspicious" in a "high drug problem area" but did not find weapons or drugs on him, and that they ultimately arrested him for violating a Texas Penal Code for refusing to identify himself).

[17] *See* 572 U.S. 393, 401–02 (2014) (observing that the crime of suspicion was drunk driving); *id.* at 410 (Scalia, J., dissenting) (asserting that the actual crime of suspicion was the completed crime of reckless driving).

[18] 574 U.S. 54, 57 (2014) ("In this case, an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required."). Noting that the North Carolina Supreme Court deemed the officer's mistake reasonable, *id.* at 59, the Supreme Court held that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." *Id.* at 60.

[19] Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 347 (2016) (citing Floyd v. City of New York, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013) (reviewing uncontested reports submitted by the plaintiffs' expert, Jeffrey Fagan, Ph.D.).

[20] *Floyd*, 959 F. Supp. 2d at 559–60 (noting that "'Furtive Movements,' 'High Crime Area,' and 'Suspicious Bulge' are vague and subjective terms" that, without further elaboration "cannot reliably demonstrate individualized reasonable suspicion"); *see also* BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 158 (1st ed. 2017); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 169 (2015) (explaining that "police on patrol looking to prevent crime do not seek out particular crimes in progress" and that "[i]nstead, they engage in assessments of suspicious characteristics—clothes that are out of season, suspicious bulges in clothing, furtive movements, age, gender, and so on").

More recently, the tragic death of Elijah McClain in Aurora, Colorado, in 2019, described in detail in Section I.A, followed a stop that began with the sort of formless, unguided suspicion that is the focus of this Article.[21] Freddie Gray's death in Baltimore in 2015 can similarly be traced back to a street stop based only on general suspicion of criminality.[22] Police stopped Gray because he ran from a bicycle patrol officer.[23] There was no crime of suspicion: Gray's presence in "an area known for drug sales" and "flight" after making eye contact with the officer prompted the officer to pursue him and to frisk him.[24] The frisk yielded an allegedly illegal knife, and Gray was taken into custody.[25] Gray's neck was fractured during the subsequent ride to the police station and within a week he died from his injuries.[26] The Department of Justice subsequently analyzed the officer's conduct and, with a nod to *Wardlow*, declined to pursue false arrest charges, despite the absence of any particular crime of suspicion to justify the initial stop.[27]

These types of general-suspicion stops are common.[28] Even when they begin as low-stakes events for police, these interactions can quickly escalate. Police who believe they are authorized to stop individuals on general suspicion may "give chase" or respond with force to perceived noncompliance.[29]

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[21] *See* Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/article/who-was-elijah-mcclain.html; JONATHON SMITH, MELISSA COSTELLO & ROBERTO VILLASEÑOR, INVESTIGATION REPORT AND RECOMMENDATIONS 1, 79 (2021) (report drafted by independent panel appointed by the Aurora City Council to investigate McClain's death).

[22] *See* Press Release, Federal Officials Decline Prosecution in the Death of Freddie Gray, U.S. Dep't of Just. (Sept. 12, 2017) [hereinafter Press Release], https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1867 (2015) ("Police rely on [*Wardlow*] to justify likely millions of stops and frisks of people based on nothing more than a 'furtive movement' in a 'high crime area.'").

[29] *See* Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1747 (2019) [hereinafter Sekhon, *Police Limit*] ("When it comes to disrespect, running is an unambiguously frontal challenge to police authority, particularly if it follows an express command to remain in place. The imperative for the police to give chase is accordingly high, even in the absence of any obvious crime control exigency. . . . And violence is often the outcome when someone runs from the police." (footnote omitted)); *see also* Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 221–24 (2017) [hereinafter Sekhon, *Police Shootings*] (analyzing officer-involved shootings that began with "proactive" stops of people who fled from police in high crime neighborhoods).

Legal scholars give the idea of crime-specific suspicion too little attention, but there is important work advocating for crime specificity that bears highlighting. Scholars like Barry Friedman, Cynthia Stein, and Andrew Guthrie Ferguson assert that *Terry* stops (should) require crime specificity, but without full explanation of the history and caselaw that support the claim.[30] The American Law Institute's recently revised policing principles encourage law enforcement agencies to "consider requiring officers [making stops] to articulate the specific offense that they believe has occurred or is about to occur" but imply that this is not constitutionally required, acknowledging the post-*Terry* cases that "have upheld stops based on more generalized suspicion of criminal activity."[31]

The project undertaken here—locating the historical sources of a crime-specificity requirement and evaluating the degree to which the requirement is currently enforced—builds from Laurent Sacharoff's recent work unearthing the Fourth Amendment's "broken" oath and affirmation requirements, Laura Donohue's historical analysis of the relationship between the warrant and reasonableness clauses, Thomas Davies's work analyzing the evolution of "bare probable cause," and William Cuddihy's detailed account of the framing of the Fourth Amendment.[32] Requiring crime-specific suspicion is also a predicate to Sherry Colb's efforts to use the Fourth Amendment to test the legitimacy or

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[30] Friedman & Stein, *supra* note 19, at 346 (advocating that stops on less than probable cause should only be permitted when "police can specify *precisely* what they think is occurring and emphasizing that "[i]n Terry, the stop was predicated on the perceived imminence of a specific crime"); FRIEDMAN, *supra* note 20, at 158 (making the same claim, "[a]s a matter of constitutional *law*," that *Terry* must be "return[ed] to its roots" and that police making *Terry* stops must "specify precisely what crime they suspect is in the offing, and have the facts to back it up"); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 380, 387–88 (2015) (recognizing the "general language" used in prior reasonable suspicion cases "does not require discussion of a particular observed crime . . . because the officer actually observed the illegal activity in question," but asserting that in the big data context "suspicious facts must be connected with a suspected crime"); *see also* Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 45 (2016) (comparing suspicion based on "behavioral indicia that are unambiguously indicative of crime" with suspicion based on "the more subjective and vague standards that have become commonplace features of contemporary investigative stop programs"); Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1288 (2020) ("In virtually every Fourth Amendment case, the government makes an assertion, based on a set of supporting facts, that the search or seizure at issue is constitutional because its target is sufficiently connected to some specific illegal act.").

[31] American Law Institute, Principles of Law: Policing, Chapter 4, Encounters, Tentative Draft No. 2, 41 (Mar. 18, 2019); *see also id.* at 43 (Reporter's Note) (detailing cases permitting stops on generalized suspicion) (Barry Friedman, reporter).

[32] *See* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 603, 611 (2022); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1186–87 (2016); Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 11 (2010); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 670 (2009).

reasonableness of the underlying criminal statute as a grant of authority for searches and seizures.[33] Chris Slobogin's recent proposal to rein in problematic street policing by requiring that police observe or establish probable cause for at least the actus reus for an attempt similarly presumes a specific crime of suspicion but this aspect of the analysis was not his focus.[34] Otherwise, even scholarship taking a deep dive into the modern meaning of probable cause or reasonable suspicion does not focus on whether and why crime specificity is required.[35]

Meanwhile, the requirement has lost its footing; lower courts have grappled with these sorts of general suspicion cases for decades. Without guidance from the Court, they are divided into several camps but most now conclude that specifying a crime of suspicion is not required for *Terry* stops.[36]

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[33] *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1644–45 (1998); *id.* at 1658 ("Insisting on a minimum quantum of evidence (probable cause), without a substantive inquiry into evidence of *what*, ultimately leaves privacy vulnerable.").

[34] *See* Christopher Slobogin, *Equality in the Streets: Using Proportionality Analysis to Regulate Street Policing*, 2 AM. J. L & EQUAL. 36, 58–62 (2022). A stop that would be justified under Slobogin's proposed approach would involve a specific crime (satisfying the requirement defined here) but his proposal would narrow the universe of permitted stops even further by requiring proof of a substantial step toward that crime. *Id.* Slobogin has also explored specificity-related questions in the search context, asking whether the government must specify the "object" of a search. Christopher Slobogin, *Cause to Believe What? The Importance of Defining a Search's Object—Or, How the ABA Would Analyze the NSA Metadata Surveillance Program*, 66 OKLA. L. REV. 725, 729–30 (2014) (explaining that this question—which has significant implications for dragnet surveillance programs—has received little attention from courts and experts); *see also* Gouldin, *supra* note 4, at 13–16 (analyzing the relationship between specifying crimes and specifying particular evidence).

[35] *See* Crespo, *supra* note 30, at 1288–321 (closely analyzing the ways that evidence supporting probable cause is evaluated); Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269, 278 (2020) (highlighting variance in Supreme Court's probable cause definitions); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1031–32 (2014) (analyzing definitions of probable cause and reasonableness); Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1326–35 (2010) (analyzing societal changes altering the context of the application of the Fourth Amendment); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811 (2011) (arguing for base level of suspicion for randomized searches); Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 286–90 (2010) (criticizing Supreme Court's oversimplification of probable cause standard in *Gates*); *see also* Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 214, 231–38 (2012) (critiquing the Supreme Court's objective reasonableness standard for allowing police to substitute crimes of suspicion); Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145, 146 (2010) (defining individualized suspicion in relation to probable cause and reasonable suspicion). Legal historians also touch on but do not fully explore crime-specificity questions. *See infra* Part II.

[36] *See infra* Section III.C; *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 9.5(c) (6th ed. 2020) [hereinafter LAFAVE, SEARCH AND SEIZURE] (collecting cases and discussing "whether [for a *Terry* stop] the available information must support a conclusion that there is reasonable suspicion of a particular offense . . . or whether it should suffice that there is reasonable suspicion of criminality generally"); 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL

The bloat of American criminal codes may suggest that requiring specific suspicion will have little impact because officers can easily conjure an offense to justify their conduct.[37] Officers routinely exploit low-level quality-of-life offenses to conduct stops and intrusive Fourth Amendment searches.[38] For a crime-specificity requirement to have meaningful impact, then, it should be paired with decriminalization efforts.

A more rigorously enforced specific-suspicion requirement has potential to force officers to consider non-criminal explanations for "nonnormative" or "nonconforming behavior" before escalating a situation.[39] The "general suspicion" cases at issue here are frequently low-stakes from a crime-control perspective, and shifting the line between an encounter and a stop in these cases might alter power dynamics in important ways.[40] This question also has increasing urgency as new policing technologies may require greater clarity about this sort of basic legal question.[41] And there are ongoing Fourth Amendment debates—about how to manage pretextual Fourth Amendment intrusions, and whether our objective reasonableness, collective knowledge, and good faith doctrines protect too much problematic police conduct—that would benefit from clearer adherence to the specificity principle outlined here.[42]

PROCEDURE 373 n.145 (4th ed. 2015) [hereinafter LAFAVE, CRIMINAL PROCEDURE] ("The Supreme Court has never expressly ruled on [this] question . . . .").

[37] *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring) ("[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–30 (2006) (describing the political dynamics that produce "expansive criminal laws"); *see also infra* Part IV; *cf.* Colb, *supra* note 33, at 1660 ("If, in order to perform a search, a police officer needs only probable cause to believe that *some* crime has occurred, the legislature can oblige the officer by expanding the scope of the criminal law until the point at which such probable cause (to believe that *some* crime has been committed) easily exists. . . . [T]his has effectively become the state of affairs in the area of traffic stops.").

[38] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 615 (1997) ("[P]olice officers enforcing specific rules against conduct like public drinking, jaywalking, and unlicensed street vending have substantial opportunity to abuse their authority by enforcing these rules in discriminatory ways."). To some extent, crime-specificity requirements entrench the importance of criminal codes at a moment when reformers and abolitionists are successfully scaling back their reach and influence. This work is intended as a complement, not an obstacle, to these efforts to reverse overcriminalization.

[39] *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 525–26 (2022) (relying on social psychology to explain how racial bias, perceptions of "nonnormative" or "nonconforming" behavior, and perceptions of "disability-based behaviors or conditions" contribute to the "construction of reasonable suspicion").

[40] *See infra* Sections IV.B–C.

[41] *See infra* Section IV.D.

[42] *See infra* Part IV.

This Article advocates for more robust enforcement of crime-specificity requirements. Part I reviews the events leading to the police killing of Elijah McClain in 2019, a high-profile tragedy rooted in a *Terry* stop with no crime of suspicion. That Part also explains the relationship between crime-specificity problems and other types of suspicion deficiencies. Because so much of the *Terry* reasonable suspicion standard is modeled on probable cause for arrests,[43] Part II analyzes the modern and historical sources of the crime-specificity requirement for arrests, and the persistence, nevertheless, of arrests on general suspicion. Part III analyzes what *Terry* and subsequent Supreme Court cases have said about crime specificity, before detailing the conflicting approaches developed by lower courts addressing this question. Part IV makes the case for requiring crime-specific suspicion as both a constitutional, rule-of-law-based requirement and a policy imperative.

I. DEFINING THE PROBLEM

Failing to require crime-specific suspicion for stops provides too much latitude to police officers in street and traffic encounters. This Part introduces the problem in two ways. Section A describes the tragic events leading to the death of Elijah McClain, which were the product of a police encounter rooted in officers' formless suspicion of a young Black man behaving atypically. This suspicion problem—the failure to identify a particular crime of suspicion—is distinct from other suspicion deficiencies in important ways, as outlined in Section B, below.

A. The Killing of Elijah McClain

Police officers in Aurora, Colorado, stopped Elijah McClain, a 23-year-old Black man, as he walked home from a convenience store on August 24, 2019.[44] The officers were responding to a 911 call reporting a "suspicious" person who appeared to be walking in a black ski mask (long before pandemic mask-wearing).[45] The caller reported that this "suspicious" walker "put his hands up" when the caller passed him and "look[ed] sketchy," but "might be a good person

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[43] Crespo, *supra* note 30, at 1351 ("*Terry* stops are assessed by traditional probable cause's 'junior partner, reasonable suspicion,' which might as well be called 'probable cause light.'" (quoting Taslitz, *supra* note 35, at 1351)).

[44] SMITH ET AL., *supra* note 21, at 1–2.

[45] *Id.* at 19.

or a bad person."[46] The caller clarified that no one was "in danger" and explicitly told the 911 operator that he did not believe that any weapons were involved.[47]

When Aurora police officers located McClain, who matched the 911 caller's description, he was wearing a ski mask, listening to ear buds, and walking with a phone in one hand and a plastic shopping bag in the other.[48] Office Woodyard, the first on the scene, ordered McClain to stop but McClain refused, stating, "I have a right to walk where I'm going."[49]

The officers responded immediately with force, which escalated quickly.[50] Officers Woodyard and Rosenblatt grabbed McClain's arms, began to try to turn him around, "forcibly moved" him to a grassy area nearby and then pushed him up against a wall.[51] Within seconds, Woodyard and Rosenblatt put McClain in two carotid artery chokeholds (one of which, deemed successful, caused McClain to lose consciousness).[52] When McClain started to regain consciousness, Officer Roedema, a third officer on the scene, forced McClain's arm behind his back in a "bar hammer lock."[53] By his own description, Roedema "'cranked pretty hard' on . . . McClain's shoulder and heard it pop three times."[54]

Because McClain struggled,[55] the three officers eventually pinned him to the ground.[56] McClain vomited several times into the ski mask he was wearing and pleaded with the officers to ease up because he could not breathe and what they were doing "really hurt."[57] The officers continued applying "pain compliance techniques," even as more officers arrived at the scene.[58] They did not take steps to check McClain's vital signs, and Officer Roedema, who was pinning McClain

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[46] *Id.* at 18–19 (alteration in original).

[47] *Id.* at 18.

[48] *Id.* at 2.

[49] *Id.* at 75.

[50] Colorado State Grand Jury Indictment at 7–8, People v. Roedema, No. 20CR01 (Colo. Dist. Ct. Sept. 1, 2021) [hereinafter Indictment] ("[T]he stop quickly turned physical.").

[51] *Id.* at 7.

[52] SMITH ET AL., *supra* note 21, at 35; Indictment, *supra* note 50, at 7–8.

[53] Indictment, *supra* note 50, at 8.

[54] *Id.* at 8.

[55] In its September 2021 report, the Colorado Attorney General's Office found "when using pain compliance techniques to control individuals, [Aurora police] officers often treated the individuals' expected pain response as active—not involuntary—resistance, to justify the use of even greater force." STATE OF COLO. ATT'Y GEN., INVESTIGATION OF THE AURORA POLICE DEPARTMENT AND AURORA FIRE RESCUE 81 (2021).

[56] Indictment, *supra note* 50, at 8.

[57] *Id.* at 9.

[58] SMITH ET AL., *supra* note 21, at 17. "Pain compliance refers to the intentional infliction of pain . . . [to] encourag[e] the subject to comply with an officer's commands." SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 55 (2020).

to the ground, did not let up, even as other officers told him to make sure McClain could breathe.[59]

The paramedics' arrival brought no relief for Elijah McClain. Officers advised paramedics that McClain was experiencing "excited delirium."[60] Without physically examining McClain (and with only one minute of visual observation),[61] the paramedics administered an overdose of ketamine.[62] McClain went into cardiac arrest and stopped breathing on the way to the hospital.[63] He never regained consciousness and doctors declared him brain dead less than three days later.[64]

Although McClain's death at the end of the summer of 2019 immediately drew local attention and criticism in Aurora, it did not become a national news story until the following June.[65] Protests after the May 2020 killing of George Floyd "drew renewed attention" to McClain's death, and, in July 2020, the Aurora City Council appointed an independent three-person panel to investigate

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[59] Indictment, *supra* note 50, at 9.

[60] SMITH ET AL., *supra* note 21, at 7. As Osagie Obasogie explains, "excited delirium is not a psychiatric disorder that is recognized by most medical professionals." Osagie K. Obasogie, *Excited Delirium and Police Use of Force*, 107 VA. L. REV. 1545, 1551 (2021). Obasogie also highlights that the limited data about these cases "suggest that Black people are diagnosed as suffering from it at much higher rates than [w]hite people." *Id.* at 1550. Nearly two years after McClain's death, Colorado passed legislation that clearly states that "[e]xcited delirium . . . is not a justifiable medical emergency." COLO. REV. STAT. § 25-3.5-103 (2021).

[61] Indictment, *supra* note 50, at 10–11 ("Neither [paramedic] ascertained Mr. McClain's vital signs, nor did either of them talk to or physically touch Mr. McClain before diagnosing him with excited delirium."). Officers suggesting this diagnosis to emergency responders was a recurrent problem noted in a Colorado report. STATE OF COLO. ATT'Y GEN., *supra* note 55, at 81 (describing police officers' use of phrases like "superhuman strength" or "he's jacked up" to encourage "an excited delirium diagnosis" and use of ketamine).

[62] Indictment, *supra* note 50, at 11 (explaining that paramedics administered 500 mg of ketamine—substantially more than the 325-mg dose that would have been appropriate for someone of McClain's weight); SMITH ET AL., *supra* note 21, at 7. Ketamine is commonly administered by paramedics in law enforcement situations because it is a fast-acting sedative (taking three to four minutes to take effect). Josiah Hesse, *'Weaponization of Medicine': Police Use of Ketamine Draws Scrutiny After Elijah McClain's Death*, GUARDIAN (Dec. 17, 2021, 5:00 PM), https://www.theguardian.com/us-news/2021/dec/17/ketamine-law-enforcement-deaths-custody-elijah-mcclain. One recent investigation found that, over a two-and-a-half-year period, Colorado paramedics used ketamine to sedate 902 people. Obasogie, *supra* note 60, at 1552. The day before the Colorado Department of Law published its findings that "Aurora Fire [Rescue] ha[d] . . . a pattern and practice of administering ketamine in violation of the law," the Aurora City Council "suspended the use of ketamine for patients exhibiting excited delirium." STATE OF COLO. ATT'Y GEN., *supra* note 55, at 1, 95. The following summer, Colorado passed legislation significantly restricting paramedics' use of ketamine and other chemical restraints. COLO. REV. STAT. § 25-3.5-103 (2021).

[63] Indictment, *supra* note 50, at 12.

[64] *Id.*

[65] Hyoung Chang, *Elijah McClain Timeline: What Happened That Night and What Has Happened Since*, DENV. POST, https://www.denverpost.com/2020/06/26/elijah-mcclain-timeline-aurora-police/ (Sept. 1, 2021, 4:30 PM).

it.[66] In their 152-page report, issued in February 2021, the independent panel analyzed each of the steps in the case, beginning with the initial 911 phone call.[67] Seven months later, in September 2021, a Colorado grand jury (convened by the Colorado Attorney General) indicted three police officers and two paramedics on manslaughter and criminally negligent homicide charges.[68] Within months, the city announced that it had settled a civil suit filed by McClain's parents for 15 million dollars.[69] All five defendants pleaded not guilty in January 2023, and the court scheduled three separate trials for later that year.[70]

Given the outrageous facts outlined above, the independent report and the indictment understandably focused closely on the officers' escalating use of force and the paramedics' administration of ketamine. But the report and indictment also exposed fundamental Fourth Amendment suspicion questions about the officers' initial decision to stop McClain that directly connect to the issue at the heart of this Article.

The independent report emphasized that the officers never pinpointed any crime of suspicion to justify stopping McClain.[71] McClain's behavior on the

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[66] SMITH ET AL., *supra* note 21, at 16; *see also* Hyoung Chang, *Protesters Gather to Remember Elijah McClain, Killed in Encounter with Aurora Police*, DENV. POST, https://www.denverpost.com/2020/06/06/protesters-gather-to-remember-elijah-mcclain/ (June 9, 2020, 11:57 AM) (describing June 2020 protest).

[67] SMITH ET AL., *supra* note 21, at 1. The panel included: Jonathan Smith, an attorney for the Washington Lawyers Committee for Civil Rights and Urban Affairs in Washington, D.C.; Dr. Melissa Costello, an emergency medicine physician; and Roberto Villaseñor, a former police officer with the Tucson police department. *Id.* at 12.

[68] Indictment, *supra* note 50, at 15–22. The thirty-two-count indictment includes additional lesser charges against most of the defendants. *Id.*; *see also* Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/article/who-was-elijah-mcclain.html (explaining the charges). That same month, the Colorado Attorney General's Office also issued its pattern and practice findings about the Aurora Police and Fire Departments. *See* STATE OF COLO. ATT'Y GEN., *supra* note 55.

[69] Elise Schmelzer, *Aurora Agrees to Pay $15 Million to Elijah McClain's Parents to Settle Lawsuit Over 2019 Death*, DENVER POST, https://www.denverpost.com/2021/11/18/elijah-mcclain-aurora-settlement/ (Nov. 19, 2021, 5:20 PM) (describing the settlement as "the largest police misconduct settlement in Colorado history," with the majority paid by Aurora's public liability insurance, which "capped payments for police-related claims at $10 million" in 2019, and the additional $5 million coming from Aurora's general fund).

[70] *See* Allison Sherry, *Elijah McClain Case: Police Officers and Paramedics Plead Not Guilty, Trials Are Scheduled*, COLO. PUB. RADIO NEWS (Jan. 20, 2023, 4:33 PM), https://www.cpr.org/2023/01/20/elijah-mcclain-case-police-paramedics-plead-not-guilty/.

[71] *See* SMITH ET AL., *supra* note 21, at 79 ("Moreover, in their interviews with Major Crime, none of the officers involved identified a suspected crime before they stopped Mr. McClain. Officer Woodyard was, in fact, never asked about his justification for stopping Mr. McClain. During the interview, Detective Ingui elicited from Officer Woodyard that he found Mr. McClain 'suspicious' but it is far from clear that Officer Woodyard found Mr. McClain to be suspicious of criminal conduct." (footnote omitted)).

night in question sounds atypical—the 911 caller and the officers described McClain's unusual behavior in more pejorative or threatening terms as "sketchy," "strange," and "abnormal."[72] The indictment outlined that Woodyard "did not see Mr. McClain with any weapons, but he noted a grocery bag" and concluded that McClain was "suspicious."[73] When asked at the scene by their sergeant whether the officers "[had] anything other than [McClain] being suspicious," one officer responded "no."[74] The independent panel concluded that, without more, the officers lacked reasonable suspicion for the stop.[75]

The officers' failure to identify any particular crime of suspicion did not slow them down: their single-minded focus was on physically subduing and controlling McClain. According to the indictment, Roedema later explained to investigators that "in Aurora, as opposed to other police departments, they tended to 'take control of an individual, whether that be, you know, a[n] escort position, a twist lock, whatever it may be, we tend to control it *before it needs to be controlled*.'"[76]

The Colorado Attorney General's office subsequently confirmed this assessment, finding that Aurora police officers "often approach scenes with a show-of-force mentality, bringing many officers to the scene and using gunpoint and threatened force often disproportionate to the risk presented."[77] The Attorney General's report highlighted particular problems with the use of force (as opposed to less confrontational interventions) against people having a "mental health crisis" and people failing "to comply" with police.[78]

The officers who stopped McClain did not make any effort to confirm any suspicion of wrongdoing. They threw McClain's plastic bag to the ground, without examining its contents (just cans of iced tea).[79] McClain's efforts to speak or ask questions were met with increased physical force.[80] These facts

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[72] *Id.* at 143; *see also* Morgan, *supra* note 39, at 526.

[73] Indictment, *supra* note 50, at 7.

[74] SMITH ET AL., *supra* note 21, at 23 & n.93 (noting that the report could not identify which officer said this).

[75] *See id.* at 76–79; *see also infra* Section III.A (evaluating the requirements of *Terry* and its progeny).

[76] Indictment, *supra* note 50, at 7 (alteration in original) (emphasis added); *see also* Morgan, *supra* note 39, at 572 ("Connecting the command-and-control mode of policing to McRuer's idea of compulsory able-bodiedness provides a framework for understanding how and why disabled people of color, like McClain, are vulnerable to excessive force by police.").

[77] STATE OF COLO. ATT'Y GEN., *supra* note 55, at 67 ("Aurora Police has a pattern and practice of using force excessively.").

[78] *Id.* at 71, 74.

[79] *See* Indictment, *supra* note 50, at 7.

[80] *See id.* at 9; SMITH ET AL., *supra* note 21, at 42–43.

undermined the officers' post hoc attempts to shape their suspicion toward any particular crime.[81] During subsequent interviews, the officers explained that their suspicion of McClain was based on the 911 call describing McClain's "abnormal" behavior, his wearing dark, heavy clothing, and a ski mask during a warm summer evening,[82] and his presence in a "high crime" area at night.[83] The officers also viewed McClain's failure to comply with Woodyard's orders and his continued walking away from the officers as suspicious.[84] In interviews with investigators, the officers speculated that McClain may have been concealing a weapon or that McClain's failure to comply with Officer Woodyard's orders to stop tended to suggest that McClain had either committed a crime and was evading police, was concealing weapons or drugs, or had an outstanding warrant.[85] But the 911 report specifically advised the officers that the call involved "no known weapons."[86]

The McClain case is rife with overreaction by responding officers; there are many layers of police violence and misconduct that led to his death. But McClain's and Woodyard's initial exchange cuts right to this Article's focus. When the officers approached McClain, he said: "I have a right to walk where I'm going."[87] Woodyard's reply: "I have a right to stop you because you're being suspicious."[88]

Does the Fourth Amendment permit officers to stop individuals for "being suspicious" if that suspicion is not tethered to any particular criminal offense? Suspicion has, since the founding, been envisioned as a meaningful constraint on the government's power to seize individuals.[89] But even the outrageous facts outlined here may not push the McClain case clearly past the reach of some of

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[81] *See* SMITH ET AL., *supra* note 21, at 2.

[82] The grand jury indictment notes that McClain "was frequently cold." Indictment, *supra* note 50, at 7.

[83] *See* SMITH ET AL., *supra* note 21, at 2.

[84] The panel explained that "declining to submit to a consensual stop cannot serve as the basis of reasonable suspicion." SMITH ET AL., *supra* note 21, at 2. This is settled Fourth Amendment law. Florida v. Royer, 460 U.S. 491, 498 (1983) ("[An individual approached without reasonable suspicion] need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (citations omitted)).

[85] *See* SMITH ET AL., *supra* note 21, at 24–26. It is worth noting that Colorado allows its citizens to obtain concealed carry permits, so the prospect that an individual may have a weapon does not necessarily represent criminal conduct. *Colorado: Concealed Carry Reciprocity Map & Gun Laws*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/ccw_reciprocity_map/co-gun-laws/ (Apr. 4, 2022).

[86] SMITH ET AL., *supra* note 21, at 3.

[87] *Id.* at 22.

[88] *Id.*

[89] *See* Crespo, *supra* note 30, at 1279.

the Supreme Court's most permissive post-*Terry* precedents, discussed in Section III.A below. The McClain case highlights the problematic state of the doctrine and the need for clarification.

B. Crime Specificity and Other Suspicion Problems

The crime-specificity issues that are the focus of this Article are only one type of suspicion problem. Before turning to history and case law to analyze the crime-specificity requirement for arrests and stops, this section outlines a model for thinking about the relationship between crime specificity and other types of suspicion questions. This may clarify the crime-specificity issue and situate it within existing caselaw and scholarship.

To justify a seizure of a person, an officer needs to point to facts and circumstances that connect the person to be stopped or seized with a suspected crime.[90] Suspicion for a seizure can be deficient in at least three interrelated ways.

First, suspicion may be too general to justify a seizure when government actors cannot "individualiz[e]" their suspicion to a specific person.[91] This kind of problem arises when, for example, government officials know that a crime has been committed but lack suspects or are unable to identify which individuals within a group are the appropriate subjects of their suspicion.[92] The Fourth Amendment requires officers to specify the "persons . . . to be seized," so a lack of individualized suspicion violates the Constitution.[93]

Second, even where a particular person is identified as potentially suspicious, that suspicion may be inadequate to justify a Fourth Amendment seizure if the suspicion is not tied to a particular crime. As outlined in Part II, this crime-specificity requirement is grounded in the text and original understanding of the Fourth Amendment and recognized in modern arrest cases. For *Terry* stops based on reasonable suspicion, however, the consensus on this question breaks down, as Part III demonstrates.

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[90] *See id.* at 1279–80.

[91] *See id.* at 1296.

[92] *Maryland v. Pringle* arguably presents this type of problem, though the Court held that it was reasonable "to infer a common enterprise" among the defendant and two other men who were riding together in a car where drugs were found. 540 U.S. 366, 373 (2003).

[93] U.S. CONST. amend. IV. For a thoughtful conceptualization of the requirement of individualized suspicion, see Crespo, *supra* note 30, at 1294–96, and Taslitz, *supra* note 35, at 145 & n.1.

The stop of Elijah McClain typifies this crime-specificity problem. This problem also arises when, for example, police make arrests "on suspicion" with no crime specified,[94] or view some known individuals in their communities as generally suspicious usual suspects.[95] This crime-specificity requirement, and particularly the confusion over its application in the reasonable suspicion context, is the focus of this Article.[96] It is a question that the Court has studiously avoided resolving,[97] and it has been largely overlooked by Fourth Amendment scholars.

Finally, even where a particular person is identified, and a particular crime is suspected, the facts and circumstances that police can muster may be insufficient to connect the two. The Fourth Amendment specifies this suspicion threshold (probable cause) for arrests, and the Court has since determined that a stop requires a lower quantum of suspicion (reasonable suspicion).[98] The Court has scrupulously avoided quantifying either of these suspicion thresholds,[99] but two things are clear: reasonable suspicion requires (i) less evidence (i.e., fewer facts and circumstances) and (ii) less reliable evidence than probable cause.[100]

The Court has never explicitly held that reasonable suspicion requires less specificity or confidence about the crime of suspicion than probable cause. The Court has also never developed the case for requiring crime specificity, although the *Glover* Court's "particular crime" language nods in that direction.[101]

Terry reduced the quantity and quality of the evidence required, but not below the person- and crime-specificity minimums described above. In other words, when the quantum of suspicion is so low that government officials cannot identify individuals who deserve scrutiny, an arrest or stop would be unconstitutional. And, as outlined below, when the information available to the government does not take the shape of a particular crime of suspicion, a *Terry* stop is unconstitutional.

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94 *See infra* Section II.D.

95 *See* Beck v. Ohio, 379 U.S. 89, 94 (1964).

96 In the search context, crime specificity is part of both the probable cause and particularity requirements. *See* Gouldin, *supra* note 4, at 13–16.

97 *See infra* Section III.A.

98 *See infra* Section III.A.

99 *See* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.").

100 *See* Alabama v. White, 496 U.S. 325, 330 (1990).

101 Kansas v. Glover, 140 S. Ct. 1183, 1190 n.1 (2020); s*ee also infra* Section III.A.

II. CRIME SPECIFICITY FOR ARRESTS

Scholars describe reasonable suspicion, the standard that justifies *Terry* stops, as "probable cause's 'junior partner,'" or "probable cause light."[102] As Andrew Manuel Crespo recently explained:

> [T]he [*Terry*] opinion frames its core holding in terms virtually identical to a traditional probable-cause analysis. Indeed, the "reasonable suspicion" standard adopted in *Terry* was itself once a synonym for probable cause. And, to this day, *Terry* is the namesake of a doctrine that assesses searches and seizures in a manner that is methodologically identical to any other probable-cause analysis—save for its lower standard of proof.[103]

Given this connection, before shifting to the analysis of crime specificity for reasonable suspicion,[104] this Part examines crime-specificity requirements for arrests based on probable cause. The following subsections review modern arrest standards and marshal historical support for a crime-specificity requirement for arrests, while also highlighting police practices and court decisions that have weakened that requirement.

A. Modern Cases: Requiring Crime Specificity for Arrests

For an arrest—the "quintessential[]" Fourth Amendment seizure of a person[105]—officers must have probable cause at "the moment the arrest [is] made,"[106] whether they act with a warrant or without one.[107] As in the search context, the Court has emphasized that probable cause is a "practical, nontechnical conception"[108] that falls on a continuum between "mere suspicion" and the standard for conviction after a trial (beyond a reasonable doubt).[109] The

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102 Crespo, *supra* note 30, at 1351 (quoting Taslitz, *supra* note 35, at 146).

103 *Id.* at 1350–51 (footnotes omitted); *see also* Dunaway v. New York, 442 U.S. 200, 208–10 (1979).

104 *See infra* Part III.

105 Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

106 Beck v. Ohio, 379 U.S. 89, 91 (1964).

107 *See Watson*, 423 U.S. at 417 ("The necessary inquiry . . . was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest.").

108 Brinegar v. United States, 338 U.S. 160, 176 (1949).

109 Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("[A]n arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . ." (citing Henry v. United States, 361 U.S. 98, 101 (1959))); *Brinegar*, 338 U.S. at 176–78; *Henry*, 361 U.S. at 101 ("[A]s the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." (footnotes omitted) (quoting Conner v. Commonwealth, 3 Binn. 38, 43 (Pa. 1810))).

standard reflects a "compromise" to "accommodat[e]" competing law enforcement and individual interests.[110]

The facts of *Beck v. Ohio* present the question of crime specificity for arrests most clearly.[111] William Beck claimed that his arrest was invalid because the officers lacked probable cause.[112] Beck and his criminal record were known to Cleveland police, and, one afternoon, based on vague "'information' and 'reports,'" two officers from his local precinct set out looking for him.[113] The officers ended up arresting Beck without a warrant.[114] It was clear that Beck had been rounded up as a "usual suspect" of sorts, and the Court held the arrest unlawful.[115] The *Beck* Court explained that to establish probable cause for an arrest, officers must show that "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[116] This standard, echoed across

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[110] *Brinegar*, 338 U.S. at 176 ("Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.").

[111] It is worth noting here that the Court's earlier decision in *United States v. Henry* provided a detailed review of the Framers' intent to require specific arrests, and to reject arrests on "mere suspicion." 361 U.S. at 101. The issue in *Henry* related to the lack of individualized suspicion tying the defendants to the suspected crime; the crime of suspicion (a whiskey theft) was clear. *See id.* at 103–04.

[112] *See* Beck v. Ohio, 379 U.S. 89, 91 (1964).

[113] *Id.* at 94.

[114] *See id.* at 90.

[115] *Id.* at 93–94 (explaining that the record reviewed by the Court consisted only of vague testimony from one arresting officer at the suppression hearing); *see also id.* at 95 ("No decision of this Court has upheld the constitutional validity of a warrantless arrest with support so scant as this record presents."). As the Court noted, the officer never "saw, heard, smelled, or otherwise perceived anything else to give [him] ground for belief that the petitioner had acted or was then acting unlawfully." *Id.* at 94.

[116] *Id.* at 91.

modern arrest[117] and search[118] cases, anticipates a particular offense of suspicion.[119]

More recently, however, without explicitly addressing this question of crime-specific suspicion, the Court watered down this fundamental requirement. In *Devenpeck v. Alford*, for example, the Court upheld an arrest where it found that officers would have had probable cause to arrest Tony Alford for a different crime (based on facts known to them at the time of his arrest) than the crime identified as the basis for the arrest.[120] The Court noted that it has never interpreted the Constitution to require arresting officers to "inform a person of the reason for his arrest at the time he is taken into custody."[121] Allowing officers

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[117] Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (collecting cases); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring) (explaining that warrantless arrests are permitted "so long as the officer possesses probable cause to believe a crime has been committed"); District of Columbia v. Wesby, 138 S. Ct. 577, 585 (2018) (same); Corbin Houston, Comment, *Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense*, 2016 U. CHI. LEGAL F. 809, 809–10 (2016) (describing circuit split among the federal appellate courts as to whether probable cause must be established "for each element of an offense in order to make a warrantless arrest").

[118] Berger v. New York, 388 U.S. 41, 59 (1967) (explaining that the probable cause requirement's purpose is "to keep the state out of constitutionally protected areas until it has reason to believe that a *specific crime* has been or is being committed" (emphasis added)); *see also* Messerschmidt v. Millender, 565 U.S. 535, 552 (2012) (evaluating whether it was reasonable to believe that the evidence obtained during a search "would aid the prosecution of Bowen" for the criminal acts at issue).

[119] United States v. Brown, 234 F. App'x 838, 845 (10th Cir. 2007) (noting that officers with "probable cause to arrest for a *particular offense*" are justified in making a warrantless arrest (emphasis added)); Estep v. Combs, 467 F. Supp. 3d 476, 487 (E.D. Ky. 2020) ("Probable cause exists if there is a reasonable basis for belief that a person committed a *particular crime*." (emphasis added)); Rapuzzi v. City of New York, 131 N.Y.S.3d 76, 78 (App. Div. 2d Dep't 2020) ("Generally, the 'information provided by an identified citizen accusing another individual of the commission of a *specific crime* is sufficient to provide the police with probable cause to arrest.'" (emphasis added) (quoting Carlton v. Nassau Cnty. Police Dep't, 761 N.Y.S.2d 98, 100 (App. Div. 2d Dep't 2003)); Sloop v. Kan. Dep't of Revenue, 290 P.3d 555, 559 (Kan. 2012) ("Probable cause is the reasonable belief that *a specific crime* has been or is being committed and that the defendant committed the crime." (emphasis added) (quoting State v. Abbott, 83 P.3d 794, 797 (Kan. 2004))); State v. Camp, 590 N.W.2d 115, 119 (Minn. 1999) ("Lt. Lillis had probable cause to believe that a *specific crime had occurred*." (emphasis added)); State v. Rinck, 280 S.E.2d 912, 921 (N.C. 1981) ("The existence of probable cause to arrest an individual is a pragmatic question to be determined in each case in light of the particular circumstances and the *particular offense* involved." (emphasis added) (citing State v. Harris, 182 S.E.2d 364 (N.C. 1971))). *But cf.* United States *ex rel.* Fraiser v. Henderson, 464 F.2d 260, 262–63 (2d Cir. 1972) (emphasizing that officers need suspicion of "an offense" but are not required to "know positively that any crime had been committed or precisely what type of crime may have been committed," and upholding arrest where officers were not certain "whether, for example, it was robbery, armed robbery, or burglary").

[120] Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (holding that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause . . . 'as long as the circumstances, viewed objectively, justify that action'" (quoting Whren v. United States, 517 U.S. 806, 815 (1996))).

[121] *Id.* at 155.

to reconstruct an objectively reasonable basis for an arrest after the fact reflects a weak commitment to the constraints that crime-specific suspicion imposes on government conduct.[122]

B. Framing the Fourth Amendment's Crime-Specificity Requirement

The crime-specificity requirement described above has deep historical roots.[123] Leading seventeenth- and eighteenth-century common-law treatises endorsed a "felony-in-fact" requirement for arrests and searches.[124] According to Davies:

> [A]t common law, an arrest or search usually was justified only if there was both (1) a sworn accusation that a crime *actually* had been committed "in fact" and (2) a sworn factual showing of at least "probable cause of suspicion" (alternatively stated as "reasonable cause of suspicion") as to *who* had committed the crime. Of the two, the required accusation that a crime had been committed "in fact" was the more fundamental—so much so that common-law authorities often used the term "fact" as a synonym for the crime charged.[125]

Sacharoff explains that, in the Hale treatise, for example, the requirements for arrest warrants paralleled those for warrants of commitment and both types of warrants were required to "state the crime with specificity."[126]

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[122] *Wesby*, 138 S. Ct. at 593–94 (Ginsburg, J., concurring in part) ("This case . . . leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. . . . The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection.").

[123] And these historical perspectives shape modern interpretations of the Fourth Amendment. Sacharoff, *supra* note 32, at 619 (describing the modern Court's reliance on "original public meaning"); Donohue, *supra* note 32, at 1182–85 (justifying originalist interpretation of the Fourth Amendment). *But see* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 898 (2002) (describing the Court's inconsistent and sometimes inaccurate historical analysis); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1814 (2000) ("[T]he new Fourth Amendment originalism will do little to make search-and-seizure doctrine more principled or predictable.").

[124] Sacharoff, *supra* note 32, at 629 (analyzing common-law sources endorsing "felony-in-fact requirement" and tracing the requirement back at least to Dalton in the 1600s).

[125] Davies, *supra* note 32, at 11; *see also* Sacharoff, *supra* note 32, at 629; Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 381–82 (2011) ("A victim's oath that a crime had occurred, and that he suspected a particular person, was both necessary and sufficient to initiate a criminal prosecution . . . .") (contrasting customs searches).

[126] Laurent Sacharoff, *Pre-Trial Commitment and the Fourth Amendment*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 15–16) (on file with author) (citing 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 111, 122 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736)).

Colonists' well-documented opposition to the British crown's use of writs of assistance, general warrants, and other indiscriminate searches and arrests drove the creation and adoption of the Fourth Amendment.[127] The Framers were particularly concerned with creating protections against general warrants for arrests.[128] According to Cuddihy, these writs and warrants "excited criticism not only because they facilitated general searches and seizures but because they issued without prior charges of particular criminal acts."[129] During this period, "[m]any commentators on search and seizure wanted informants to allege specific infractions under sworn oath as the foundation for both search and arrest warrants."[130]

In some of the early statements of rights that served as models for the Fourth Amendment, there were clear statements that a seizure or a search must be based on suspicion of a particular offense. Virginia was the earliest of the former colonies and new states to adopt a Declaration of Rights.[131] That document's description of Virginians' rights against searches and seizures called for crime specificity:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places *without evidence of a fact committed*, or to seize any person or persons not named, or *whose offence is not particularly described and supported by evidence*, are grievous and oppressive, and ought not to be granted.[132]

The North Carolina Declaration of Rights was modeled closely after Virginia's. It contained the same proscription against seizures of persons "whose offences are not particularly described, and supported by evidence."[133] The declaration

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[127] *See* CUDDIHY, *supra* note 32, at 569–75; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999); Sacharoff, *supra* note 32, at 652.

[128] *See* FRIEDMAN, *supra* note 20, at 134; Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 83 (1988) (noting the Framers were particularly concerned with "outlawing" the use of "general warrants"); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 69 (1996) (highlighting Framers' particular concern about "bodily arrests" after the *Wilkes* and *Entick* cases).

[129] CUDDIHY, *supra* note 32, at 580. Sacharoff clarifies that in some framing-era cases, the term "general warrant" was used to describe a warrant of commitment that failed to specify a crime of suspicion. Sacharoff, *supra* note 126, at 7, 25.

[130] CUDDIHY, *supra* note 32, at 580; *id.* at 580–81 (citing contemporaneous publications from *The London Magazine*, Father of Candor, and Sir William Blackstone); *see also* Donohue, *supra* note 32, at 1207–08 ("General warrants lacked specificity: the person to be arrested, the place to be searched, or evidence of the crime for which the individual or information was being sought.").

[131] Donohue, *supra* note 32, at 1264–65.

[132] VA. CONST. art. I, § 10 (emphasis added).

[133] N.C. CONST. art. XI.

described such seizures as "dangerous to liberty" (instead of using the "grievous and oppressive" language from Virginia).[134]

In addition to calling for specificity of a particular "offence" for seizures of persons, the restriction on searches without "evidence of a fact committed" is best read to require evidence that a specific "crime" had been committed.[135] As noted above, Davies explains that "common-law authorities often used the term 'fact' as a synonym for the crime charged."[136]

The Pennsylvania and Massachusetts constitutions required that warrants for searches and seizures be based on "oaths or affirmations" setting forth a "sufficient foundation" (Pennsylvania)[137] or "cause or foundation" (Massachusetts).[138] This "oath or affirmation" requirement, also found in Maryland's Declaration of Rights,[139] and later incorporated into the Fourth Amendment,[140] replaced the crime-specificity language in the Virginia and North Carolina declarations but to the same effect.[141] The "oath or affirmation" required that someone with personal knowledge of the alleged crime swear that some sort of crime or wrongdoing had occurred.[142]

The Fourth Amendment text incorporates very similar language, requiring that an "oath or affirmation" establish "probable cause" for a search or seizure.[143] The "probable cause" language incorporated both the underlying

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134 N.C. CONST. art. XI ("That general warrants—whereby an officer or messenger may he commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, *whose offences are not particularly described, and supported by evidence*—are dangerous to liberty, and ought not to be granted." (emphasis added)). Both Cuddihy and Levy provide detailed analyses of the development of these provisions. CUDDIHY, *supra* note 32, at 604; Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 93 (1999).

135 Davies, *supra* note 32, at 11 n.29.

136 *Id.* at 11; *see also* Levy, *supra* note 134, at 93 (explaining that the declarations permitted searches under warrant "if the fact of a crime has been established").

137 PA. CONST. art. X; *see also* CUDDIHY, *supra* note 32, at 605–06.

138 MASS. CONST. pt. I, art. XIV.

139 MD. CONST. art. IV.

140 U.S. CONST. amend. IV.

141 CUDDIHY, *supra* note 32, at 754; *see also* Sacharoff, *supra* note 32, at 657–58; Davies, *supra* note 127, at 654 n.297 ("[I]t is fitting [for the magistrate who hears a warrant application] to examine upon oath the party requiring a warrant [i.e., the complainant], as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed." (alterations in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 287 (1979))).

142 Sacharoff, *supra* note 32, at 606; CUDDIHY, *supra* note 29, at 754.

143 U.S. CONST. amend. IV ("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

wrongdoing and the evidence for suspecting a particular person for it.[144] In the search context, the requirement that warrants specify the particular "things to be seized" imposed additional crime-specificity requirements.[145] Operating together, the oath, probable cause, and particularity provisions were intended to limit government power and to prevent searches or seizures on generalized suspicion.[146]

Early state court arrest cases preserved the idea that the requisite suspicion for an arrest needed to attach to a particular offense. The Pennsylvania Supreme Court's 1810 decision in *Conner v. Commonwealth* reflects the protection that the oath provided for crime specificity:

> If the constitution did not mean, that a man charged with or suspected of a particular offence, should not be arrested, unless some person swore either that he believed him to be guilty, or to some facts from which it might be reasonably inferred that he was guilty, then I confess I can see no meaning in it.[147]

The following year, *Munns v. De Nemours* defined probable cause with specific reference to a charged crime:

> What, then, is the meaning of the term "probable cause?" We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

144 CUDDIHY, *supra* note 32, at 664 ("The belief that arrests, searches, and seizures required adequate cause, which a disinterested magistrate had found to be so, existed long before the revolution."). Davies explains that "the leading framing-era treatise on criminal procedure by Serjeant Hawkins . . . defined probable cause of suspicion as information that would create a 'strong' suspicion sufficient to cause a prudent man to suspect a person to be guilty of a crime." Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 967 n.156 (2010).

145 At the time that language was drafted, officials were only authorized to take specified stolen goods or contraband; the description of those items inevitably specified the crime of suspicion. It was only much later in America's history that the Court permitted the seizure of "mere evidence," which might not be as obviously linked to a particular offense. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 302–03 (1967) (documenting this history in more detail); *see also* Gouldin, *supra* note 4, at 16 (analyzing crime specificity and particularity requirements in the context of Fourth Amendment searches).

146 Colb explains that the Framers sought to deprive government officials of the power to "search anyone at any time for any reason" or to "target" individuals based on "illegitimate considerations," such as criticism of the government. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1499 (1996); *see* CUDDIHY, *supra* note 32, at 692–94, 727.

147 3 Binn. 38, 43–44 (Pa. 1810) (interpreting Pennsylvania constitutional provisions that mirrored Fourth Amendment text); *see also* Grumon v. Raymond, 1 Conn. 40, 45–46 (1814) (explaining the need for an oath to establish the crime of suspicion (stolen goods)).

> belief, that the person accused is guilty of the offence with which he is charged.[148]

These early cases did not suggest any framing-era reduction in confidence that a crime had been committed. As noted below, that shift came later.[149]

The warrant forms used by justices of the peace in the early years after the Fourth Amendment was adopted provide further insight into contemporaneous understandings about crime specificity. Arrest warrants used in Virginia and New York, for example, justified arrests on particular "causes of suspicion."[150] These "causes of suspicion" would not "justify an arrest, where in truth no such crime ha[d] been committed."[151] As Laura Donohue explains, early nineteenth-century legal treatises directed magistrates to "ascertain that a felony or other crime [had] actually been committed" before signing warrants.[152] Specific crimes prompted arrests; the early warrant forms were specific to particular offenses, including affray,[153] assault,[154] larceny,[155] battery,[156] burglary,[157] or house-burning.[158] The warrants would issue based on either the constable or justice of the peace physically witnessing a crime, or upon a victim coming forward and providing a complaint or information made under oath to the justice of the peace.[159]

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148 17 F. Cas. 993, 995 (C.C.D. Pa. 1811).

149 *See infra* Section II.C.

150 WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPROMISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE IN THE COMMONWEALTH OF VIRGINIA 33–34 (1795). These "causes of suspicion" included "[t]he common fame of the country," "[b]eing found in such circumstances as induce a strong presumption of guilt," "[b]ehaving one's self in such a manner as betrays a consciousness of guilt," "[b]eing found in company with one known to be an offender, . . . or [otherwise] keeping company with persons of scandalous reputation," "living an idle, vagrant, and disorderly life, without having any viable means to support it," or "[b]eing pursued by hue and cry." *Id.*; *see also* JAMES PARKER, THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE 440–43 (1788) (describing similar practices in New York). *See generally* RICHARD BURN, AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER 14 (1773) (describing similar practices under English law in pre-Revolutionary Boston).

151 HENING, *supra* note 150, at 34. One exception to this rule was an arrest based on "hue and cry," where it was understood that the person responding to the hue and cry did not have firsthand knowledge and could rely on another person's accusation. *Id.* In New York, justices were authorized to grant arrest warrants "upon strong grounds of suspicion, for a felony or other misdemeanor." PARKER, *supra* note 150, at 442.

152 Donohue, *supra* note 32, at 1235–36 (alteration in original).

153 HENING, *supra* note 150, at 17, 19–21; PARKER, *supra* note 150, at 26, 29.

154 PARKER, *supra* note 150, at 46–47.

155 HENING, *supra* note 150, at 302.

156 *Id.* at 42–43; PARKER, *supra* note 150, at 46.

157 HENING, *supra* note 150, at 103; PARKER, *supra* note 150, at 82–83.

158 HENING, *supra* note 150, at 103.

159 Sacharoff, *supra* note 32, at 628–29.

C. Losing Confidence: From Certainty to Probability

Historians have documented important shifts in the nineteenth century away from the framing-era certainty about a crime having been committed. As noted above, at common law, "arrest or search authority arose from, and depended upon, a foundational accusation by a named and potentially accountable complainant that a crime *actually* had been committed 'in fact.'"[160] Over time, however, justices of the peace began authorizing warrants based on "suspicion" or belief that a particular crime had been committed (and not only where someone attested that a particular crime was "*certainly* committed").[161] Sacharoff explains that this shift was accomplished, in part, by changes in practice that permitted those without first-hand knowledge to give an "oath or affirmation."[162] Davies documents that "[b]y the end of the nineteenth century," this new standard, what he calls "bare probable cause," had become the warrantless felony arrest standard across "most American jurisdictions."[163] The bare-probable-cause standard, requiring "probable cause to think a crime *might have been committed*," reflected a downward shift in the level of confidence required for both searches and arrests.[164] Davies explains that this shift, which was more pronounced for warrantless arrests, significantly broadened police investigative power, "transform[ing] criminal procedure."[165]

Sacharoff's careful examination of the historical record suggests that, although this shift permitted less certainty about *who* might have committed a particular crime, it did not alter the firsthand knowledge requirement for those who gave oaths.[166] Sacharoff's examples demonstrate that the shift to investigations "on suspicion" preserved certainty about a specified underlying crime having been committed even if the suspect's identity was not certain.[167]

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160 Davies, *supra* note 32, at 1.

161 Sacharoff, *supra* note 32, at 629; Davies, *supra* note 127, at 633–34.

162 Sacharoff, *supra* note 32, at 607–08.

163 Davies, *supra* note 32, at 6.

164 *Id.*

165 *Id.* at 2, 53 ("[T]he post-framing adoption of the bare-probable-cause standard by American judges was itself a drastic relaxation of the arrest and search protections that the American Framers thought they had preserved in constitutional provisions.").

166 Sacharoff, *supra* note 32, at 629 (explaining that the shift to searches and seizures on "*suspicion* of felony" did not permit "thirdhand account[s]").

167 *Id.* at 629 ("[S]uspicion did not relate to whether a felony had been committed—the fact of a felony must be established beyond mere suspicion. Instead, it was suspicion as to whether a specific person had committed an already-established felony. Thus Hale provided an example: '[S]uppose a robbery upon A.' That is, the victim explains that someone robbed him, not that he *suspects* someone robbed him. Hale continued on to explain that the suspicion related to who committed this felony." (footnote omitted)).

This permitted two significant shifts away from the vision at the Framing: less confidence about whether a *particular person* committed a suspected crime and, perhaps, less confidence or less reliable evidence about whether a particular offense had *actually been committed*.[168] But this record does not suggest a reduced commitment to identifying a *particular crime* of suspicion.

D. Arrests on General Suspicion

While the text, historical context, and early cases outlined above clearly establish a founding-era crime-specificity requirement for arrests of elites, those rules did not apply universally.[169] Since the Founding, government agents have stopped and arrested some members of the community without any crime of suspicion. In some cases, this was accomplished by criminalizing status. In others, as both Nirej Sekhon and Alice Ristroph have explained, more aggressive suspicionless stop and arrest authority was given to those who policed populations deemed to pose risks of crime or disorder.[170] These practices justified arrests and stops of Black people by slave patrols;[171] the detention of

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[168] *See* Davies, *supra* note 32, at 2.

[169] *See* Sklansky, *supra* note 123, at 1744–45 (describing the ways that the Fourth Amendment "protected class privilege"). Fabio Arcila argues that while the Framers and elite legal scholars may have intended judges to act as "vigilant sentries" of probable cause when signing warrants, "the legal elite did not implement and enforce search warrant procedures." Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 2 6 (2007); *id.* at 6 ("[I]t seems likely that, even after the Fourth Amendment's ratification, two conflicting legal worlds existed during the Framers' era: the legal elites' aspirational one, and the non-elites' reality.").

[170] Sekhon explains that these practices formed the core of urban policing practices as they developed. Sekhon, *Police Limit*, *supra* note 29, at 1717 ("Municipal policing in the United States was not conceived as a response to crime. The police were conceived as a tool for managing those segments of the lower classes that the upper and middle classes found threatening."); *see also* Ristroph, *supra* note 7, at 1168 ("[T]he very label *police* for organized law enforcement agencies came from the concept of police as an all-purpose power to govern. When we understand police (as in law enforcement agencies) in this historical light, it is hardly surprising to see them possessing wide discretion from their earliest stages." (footnote omitted)); Ristroph, *supra* note 7, at 1164 (describing the broad power held by nineteenth century urban police who "patrolled the streets, looking for people out of place or signs of criminality or disorder in general" and who would "stop, question, and sometimes arrest persons they found suspicious").

[171] *See* CUDDIHY, *supra* note 32, at 218–27 (describing aggressive search and seizure tactics of slave patrols across southern states who were authorized to stop "unauthorized" Black people found in "suspicious places").

"night-walkers"[172] or other strangers;[173] arrests to find sureties for good behavior;[174] and other arrests of the poor.[175]

The documented history of police making "arrests on suspicion" without a clear sense of the particular crime that a person might be committing or contemplating reflects the persistence of these policing practices.[176] A D.C. Circuit Court of Appeals decision issued in 1900 was highly critical of the appellee's arrest "upon mere suspicion" and subsequent charge for "being a *suspicious person*, without any relation whatever to crime committed in the past, or crime intended to be committed in the future."[177] The court elaborated on the fundamental problem with arrests based only on general suspicion:

> General suspicion, without even reference to a propensity or intent to commit some particular crime or offense against the law or police of the Government, must be conceded to be wholly inoperative and without effect, as a definition of crime. Mere suspicion is no evidence of crime of any particular kind, and it forms no element in the constitution of crime.[178]

Justice Douglas explained in 1960 that these policing tactics were reserved for poor and minority communities:

> The persons arrested on "suspicion" are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves,

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[172] *See* Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (analyzing "so called night-walker statutes, and their common law antecedents" to conclude that *Terry* stops might be justified because "it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves"). *But see* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH. L. REV. 299, 330–37 (2010) (analyzing the nightwalker statutes and casting doubt on arguments that those statutes make out an originalist case for *Terry* and investigative stops on less than probable cause); Sklansky, *supra* note 123, at 1804.

[173] Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-era Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 330 (2002) ("As with nightwalkers, this provision reflected a concern with the possibility that a stranger might commit or might have committed a serious crime.").

[174] Sacharoff, *supra* note 126, at 32, 34 (explaining the use of warrants of commitment to detain persons of "ill-fame" who were accused of being "likely to commit some crime in the future").

[175] *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 921–22 (2001) (describing the crime-preventive justifications offered to support eighteenth century English vagrancy laws); Ristroph, *supra* note 7, at 1167 ("Class and social rank, often determined by dress, defined the usual suspects.").

[176] *See* Ristroph, *supra* note 7, at 1164–69 (describing this history).

[177] Stoutenburgh v. Frazier, 16 App. D.C. 229, 234 (D.C. Cir. 1900).

[178] *Id.*

> and who do not have the prestige to prevent an easy laying-on of hands by the police.[179]

Despite these critiques, the problem of arrests on general suspicion persisted. The Federal Bureau of Investigation has long tracked data of all persons "arrested on suspicion (but not in connection with any specific offense) and subsequently released without prosecution."[180] The Court acknowledged this data: in 1959, the *Henry* Court noted that FBI reports for 1956 estimated 111,274 arrests on suspicion,[181] but the actual number for 1956 appears to have been 84,063 (with vagrancy arrests an additional 75,478).[182]

In its 1972 decision in *Papachristou v. City of Jacksonville*, the Court invalidated Jacksonville, Florida's vagrancy ordinance, purportedly on vagueness grounds,[183] although, as Michael Mannheimer explains, "the real problem with the vagrancy ordinance in Papachristou was that it criminalized status."[184] The *Papachristou* decision, authored by Justice Douglas, cited the same FBI data on arrests on suspicion and vagrancy.[185] From 1968 to 1970, the FBI reported an average of 82,808 arrests on suspicion per year for the cities it tracked; combined with vagrancy arrests, this was an average of almost 185,000 arrests per year.[186]

The *Papachristou* win against arrests for vagrancy or on suspicion came on the heels of *Terry v. Ohio*, another landmark decision that would, as implemented over time, absorb these practices and undermine any gains

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[179] Douglas, *supra* note 7, at 13; *see also* Ristroph, *supra* note 7, at 1165 n.24; Sutton, *supra* note 7, at 646–47.

[180] Henry v. United States, 361 U.S. 98, 101 n.6 (1959) (citing XXVIII U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 64–65 (1957)). The Court later cited the same FBI data on arrests on suspicion and vagrancy in its 1972 decision in *Papachristou v. Jacksonville*, authored by Justice Douglas. 405 U.S. 156, 169 n.15 (1972). From 1968 to 1970, the FBI reported an average of 82,808 arrests per year for the cities it tracked; combined with vagrancy arrests, this was an average of almost 185,000 arrests per year. *Id.*

[181] *Henry*, 361 U.S. at 101 n.6.

[182] U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 110 (1956).

[183] 405 U.S. at 162.

[184] Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1110 (2020) (reading the *Papachristou* decision with Justice Douglas's prior dissents and scholarship).

[185] *Papachristou*, 405 U.S. at 169 n.15.

[186] *Id.* Over time, this category has been reduced considerably, dropping to 579 arrests in 2019. *See Crime in the United States 2019*, U.S. DEP'T OF JUST. FED. BUREAU OF INVESTIGATION (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-29.

made.[187] The *Terry* Court acknowledged (in a footnote) complaints from minority communities about "'aggressive patrol,' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident."[188] Some members of the *Terry* majority may have envisioned that they were bringing some of these general suspicion seizures to heel by extending them partial Fourth Amendment protection.[189] In reality, as outlined in Part III, the *Terry* doctrine has evolved to effectively relabel what was previously called arrest on suspicion.[190] The gradual erosion of crime-specificity requirements for street stops has helped undercut any potential protections.

III. SUSPICION FOR *TERRY* STOPS: THE DOCTRINE

Do officers conducting street or traffic stops need to have reasonable and articulable suspicion of a specific crime? Supreme Court doctrine is not clear despite many opportunities over fifty-plus years to resolve this fundamental question. Given this lack of decisive guidance, lower courts have adopted conflicting approaches, and stops on general suspicion are now commonplace.[191]

This Part opens by examining relevant Supreme Court doctrine, and then briefly reviews cases that highlight the role crime specificity plays in narrowing the scope of a stop. As outlined in the final section of this Part, lower courts attempting to make sense of the Supreme Court's inconsistent commitment to crime specificity have issued decisions falling into at least three categories. Some lower courts require crime-specific suspicion, others explicitly reject a

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[187] Risa Goluboff details the simultaneous efforts of anti-vagrancy advocates and those fighting to curtail stop-and-frisk practices. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 198–220 (2016); *cf.* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1528–29 (2019) ("No sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage." (footnote omitted)).

[188] Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968) (quoting PRESIDENT'S COMM'N ON L. ENFORCEMENT AND ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 183 (1967)).

[189] *See* GOLUBOFF, *supra* note 187, at 209–12 (describing the negotiation of the majority opinion in *Terry*). *But see* Sekhon, *Police Limit*, *supra* note 29, at 1739 ("*Terry* should thus be thought of as an ambivalent regulatory gesture at best.").

[190] Risa Goluboff makes clear that advocates and commentators at the time were aware of the tradeoff being made: she describes the drafters of the American Law Institute's Model Penal Code, for example, weighing these questions deliberately. GOLUBOFF, *supra* note 187, at 202 ("[The ALI] wondered whether instead of criminalizing suspicious behavior, they should treat the issue 'as a matter of procedure, outside the Penal Code, relating to definition of police power to question and detain.'").

[191] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013).

crime-specificity requirement, and some courts adopt a compromise approach, weighing crime specificity as a relevant factor in their totality-of-the-circumstances calculus of reasonable suspicion.

A. Crime Specificity in the Supreme Court

In its 1968 decision in *Terry v. Ohio*, the Supreme Court began a decades-long process of delimiting the government's power to conduct investigative street stops.[192] The facts of that case are worth revisiting here, with particular attention to whether the officer involved, Officer McFadden, had suspicion of a specific crime before he approached John Terry and his companions, Richard Chilton and Carl Katz.[193] At the suppression hearing, McFadden explained that the men drew his attention because "they didn't look right to me at the time."[194] Scholars have highlighted that what may not have "looked right" to Officer McFadden (who was white) about the three men was their race: Terry and Chilton were Black, Katz was white.[195] This sort of general suspicion creates too much space for police to make biased decisions.[196]

For purposes of this project, it is important to highlight that the Court did not uphold McFadden's conduct based on this initial, general suspicion that the men "didn't look right."[197] Officer McFadden observed the men for a period of time.[198] By the time he approached them, he claimed to have developed more

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[192] *See Terry*, 392 U.S. at 22. The *Terry* Court technically claimed not to resolve the constitutional legitimacy of the seizure, instead focusing on the legality of the frisk. *Id.* ("[The general interest of] effective crime prevention and detection . . . [permits a] police officer [to] . . . approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.").

[193] *See id*. at 5 ("At the hearing on the motion to suppress this evidence, Officer McFadden . . . was unable to say precisely what first drew his eye to [Chilton and Katz].").

[194] *Id.*

[195] *See, e.g.*, GOLUBOFF, *supra* note 187, at 211 (noting the Court's "[r]hetorical[]" choices to address race selectively in *Terry*); John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 772 (1998) (noting the *Terry* opinion "does not mention the race of any individual."). The Court's silence about the race of the men is curious because in other parts of the opinion, the Court described resentment among Black Americans about police conduct during investigatory stops. *Terry*, 392 U.S. at 14–15 (describing complaints from "minority groups" about "wholesale harassment by certain elements of the police community," but suggesting that evidence suppression would not address this issue); *id*. at 14 n.11 ("[I]n many communities, field interrogations are a major source of friction between the police and minority groups." (quoting PRESIDENT'S COMM'N ON L. ENFORCEMENT AND ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 183 (1967))).

[196] *Terry*, 392 U.S. at 14 & n.11.

[197] *Id*. at 5, 22.

[198] Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 431–32 (2004) (explaining that McFadden's account of the number of times Terry, Chilton, and Katz passed in front of the store

specific suspicion that the three men were "casing a job, a stickup."[199] McFadden testified that he stopped the men, received mumbled replies when he asked them to identify themselves, and subsequently frisked Terry, finding a gun.[200]

The *Terry* Court, in an 8–1 decision, held that McFadden's conduct did not violate the Fourth Amendment.[201] After *Terry*, if officers can point to "specific and articulable facts" that a particular individual is involved in criminal activity, they may detain a person briefly to investigate.[202] *Terry* is sometimes described as requiring reasonable suspicion that "criminal activity may be afoot" to justify a stop.[203] Although McFadden's suspicion was crime specific (robbery), this oft-quoted and vague phrase drawn from the final paragraph of the *Terry* opinion may obscure that important fact.[204]

The *Terry* Court also blessed—and was more focused on—the more intrusive part of the encounter: Officer McFadden's pat-down frisk of Terry.[205] Although both stops and frisks employ a reasonable suspicion standard, suspicion for a frisk is not directly linked to suspicion of a particular crime.[206]

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increased over time from McFadden's police report filed on the day of the incident (three times), to the Court's opinion (twenty-four times between the three of them)).

199 *Terry*, 392 U.S. at 6; *see also* FRIEDMAN, *supra* note 20, at 145.

200 *Terry*, 392 U.S. at 6–7.

201 *See id.* at 30–31, 35.

202 *Id.* at 21. The cases are clear that an officer cannot make a stop based on a "mere 'hunch.'" United States v. Arvizu, 534 U.S. 266, 274 (2002). As with probable cause, courts evaluate the reasonableness of the officer's conduct in making a stop under the totality of circumstances. *See* Brown v. Texas, 443 U.S. 47, 50–51 (1979); Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000). These are always *ex post* judicial analyses; no warrant is required for a *Terry* stop. *See Terry*, 392 U.S. at 20.

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

204 *See id.*; *see also, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 ("In *Terry v. Ohio*, we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." (citation omitted)). Note that in *Terry*, Justice Douglas dissented because he would have required probable cause for the stop; he mentioned the need to connect Fourth Amendment suspicion to a "particular crime." *Terry*, 392 U.S. at 35–38 (Douglas, J., dissenting). In *Sibron v. New York*, a companion case to *Terry*, Justice Harlan stated in his concurrence that "[t]here must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended." 392 U.S. 40, 73 (1968) (Harlan, J., concurring). Both Harlan and the majority agreed that Sibron's conversations with known drug addicts were insufficient to meet the standard. *Id.* at 64 (majority opinion); *id.* at 73 (Harlan, J., concurring).

205 *Terry*, 392 U.S. at 30 (explaining that an officer with reasonable suspicion 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").

206 *See id.* at 10–11.

Instead, it is focused on the question of whether the subject of the search is "armed and presently dangerous."[207]

Ten years after *Terry* was decided, the Court in *Brown v. Texas* held a stop unlawful because the officers lacked suspicion of "specific misconduct."[208] The officers asserted that they stopped Brown because the situation "looked suspicious"—Brown had just terminated a conversation with another person—and because Brown was a stranger to the neighborhood.[209] The officers also characterized the neighborhood as one known for drug trafficking.[210] The Court explained that these thin justifications were inadequate to meet the reasonable suspicion standard.[211] At various points, however, the *Brown* Court also described the requisite suspicion in more general terms as suspicion of "criminal activity" or "criminal conduct."[212] At least one leading treatise interprets this general language from *Brown* to justify a finding of reasonable suspicion even where a specific crime is not identified.[213]

In *Illinois v. Wardlow*, the Court seemed to reverse course from *Brown* on similar facts, but did not explicitly address the issue of crime specificity in the opinion.[214] In *Wardlow*, reasonable suspicion was upheld based on Sam Wardlow's unprovoked flight in a neighborhood "known for heavy narcotics trafficking," but Wardlow's conduct did not connect him to any particular crime of suspicion.[215] Justice Breyer asked at oral argument "[w]hat crime" the officers suspected, and the state's attorney asserted that "it is not required . . . that the

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[207] *Id.* at 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."). A more robustly enforced crime-specificity requirement could improve the frisk analysis too, but in an indirect way: for some types of crimes, specificity about the crime that motivated the stop may make it easier to justify a frisk.

[208] Brown v. Texas, 443 U.S. at 49, 52–53 (1979). The Court would later use similarly specific language in *Hensley*. United States v. Hensley, 469 U.S. 221, 227 (1985) ("This is the first case we have addressed in which police stopped a person because they suspected he was involved in a completed crime. In our previous decisions involving investigatory stops on less than probable cause, police stopped or seized a person because they suspected he was about to commit a crime, or was committing a crime at the moment of the stop." (citations omitted)).

[209] *Brown*, 443 U.S. at 48–49.

[210] *Id.* at 49.

[211] *Id.* at 51–52.

[212] *Id.* at 51, 53.

[213] LAFAVE, CRIMINAL PROCEDURE, *supra* note 36 ("The Supreme Court has never expressly ruled on the question of whether the available information must support a conclusion that there is reasonable suspicion of a particular offense (just as probable cause to arrest must relate to a specific offense), or whether it should suffice that there is reasonable suspicion of criminality generally.").

[214] *See* 528 U.S. 119, 124 (2000).

[215] *Id.*

officer have reasonable suspicion of a particular crime."[216] When pressed to elaborate, the state's attorney seemed to reject specifying even a particular category of crimes.[217] The Court did not incorporate that language into the opinion, but it quietly followed it.

Not long after *Wardlow*, the *Arvizu* decision upheld a stop based on suspicion of "illegal activity."[218] Ralph Arvizu's use of a "little-traveled route used by smugglers" and his children's "mechanical-like waving" and raised knees ("suggest[ing] the existence of concealed cargo") were the primary bases for the stop.[219] As in *Wardlow*, without explicitly addressing a crime-specificity requirement, the *Arvizu* decision undermined it.[220]

The Court has continued to decide cases that provided opportunities to address the question of crime specificity explicitly. In *Navarette v. California*, for example, the majority and the dissent seemed to agree that the reasonable suspicion in the case needed to be attached to a specific crime.[221] Justice Thomas's efforts in the majority opinion to fashion the case into one of suspected drunk driving drew sharp criticism from Justice Scalia, who emphasized that the record did not support suspicion of that offense.[222] Justice Scalia accused the majority of trying to sidestep an unresolved *Terry* issue: whether a stop could be based on reasonable suspicion of a completed crime (here, reckless driving).[223] But crime specificity as a requirement was not explicitly addressed by either opinion.

In *Kansas v. Glover*, decided in 2020, the Court used unambiguous language that supports a crime-specificity requirement: "[T]he Fourth Amendment

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[216] Transcript of Oral Argument, *supra* note 14, at 4–5.

[217] *Id.*

[218] United States v. Arvizu, 534 U.S. 266, 277–78 (2002).

[219] *Id.* at 277.

[220] Friedman & Stein, *supra* note 19, at 349 ("The [*Arvizu*] Court held the officer had reasonable suspicion of 'illegal activity'—but of what, exactly?"). *Arvizu* is cited by lower courts holding that officers do not need to have reasonable suspicion of a particular crime. *See, e.g.*, United States v. Pack, 612 F.3d 341, 356 (5th Cir. 2010); cases cited *infra* Section III.C.3.

[221] *See* Navarette v. California, 572 U.S. 393, 401–02, 402 n.2 (2014) ("Because we conclude that the 911 call created reasonable suspicion of an ongoing crime [(drunk driving)], we need not address under what circumstances a stop is justified by the need to investigate completed criminal activity."); *id.* at 410–12 (Scalia, J., dissenting) (arguing that the officer's actual suspicion was for reckless driving).

[222] *Id.* at 409–10 (Scalia, J., dissenting) ("All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not.").

[223] *Id.* at 410–11 ("The stop required suspicion of an ongoing crime, not merely suspicion of having run someone off the road earlier. . . . In other words, in order to stop the petitioners the officers here not only had to assume without basis the accuracy of the anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior.").

requires . . . an individualized suspicion that a particular citizen was engaged in a *particular crime*."[224] Justice Thomas, writing for an eight-Justice majority, offered this statement to rebut Justice Sotomayor's claim in dissent that the case would open the floodgates for traffic stops based on suspicious demographic profiles.[225] In *Glover*, the Court considered whether it was reasonable to justify a traffic stop based on an officer's assumption that the driver of the vehicle being stopped was the vehicle's owner.[226] The officer had information that the registered owner had a revoked license.[227] The key question in *Glover* was whether that fact was a sufficient basis for reasonable suspicion, given that the officer was not able to confirm that the owner was actually the one driving the car until the car and driver were stopped.[228] Writing for the majority and upholding the stop, Justice Thomas explained that the stop was constitutional because the officer developed "reasonable suspicion that a specific individual was potentially engaged in *specific criminal activity*—driving with a revoked license."[229]

Glover provides the clearest statements that the Court has issued on crime specificity in years, but the passages italicized above are emphasized by this author, not the Court. The Court did not analyze crime specificity, and it did not address prior cases that undermined a crime-specificity requirement. It did not need to. In *Glover*, the crime of suspicion was not disputed.[230]

Where this doctrinal review leaves crime specificity as a requirement is hard to say, as the review of lower court decisions in Section III.C demonstrates. Cases after *Terry* explained that the Court relaxed the quantity and quality of proof for reasonable suspicion,[231] but the Court has never explicitly relaxed the requirement that officers have suspicion of a particular crime.

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[224] *See* 140 S. Ct. 1183, 1191 n.1 (2020) (emphasis added).

[225] *Id.* ("The dissent contends that this approach 'pave[s] the road to finding reasonable suspicion based on nothing more than a demographic profile.'").

[226] *Id. at* 1188–89 (considering whether reasonable suspicion could be based on probabilities and an officer's "common sense" evaluation or whether the officer needed to testify about his law enforcement training or experience).

[227] *Id.* at 1188.

[228] *Id.* ("[K]ansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving.").

[229] *Id.* at 1190 (emphasis added).

[230] *See id*. at 1188.

[231] *See, e.g.*, Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.").

B. Crime Specificity and the Scope of a Stop

The brief street or traffic stops permitted by *Terry* are limited in scope. Since *Terry*, the Court has emphasized that the crime of suspicion plays an essential role in defining those limits.[232] As the *Terry* Court explained, "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was *reasonably related* in scope to the circumstances which justified the interference in the first place."[233] These scope limitations are meaningless if general suspicion of criminality is sufficient to justify a *Terry* stop.

The Court has applied this scope-limiting language to two aspects of stops. First, the Court limits the investigatory methods used by police during the stop to those that are reasonably related to the purpose of the stop.[234] In its opinion in *Royer*, the plurality wrote that the investigatory methods employed by an officer during a stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion."[235] Whether narrowly tailored or reasonably related, these tests turn on the same reference point: the crime of suspicion.

Terry's scope limitations also apply to the duration of a stop. The Supreme Court has expressly rejected any fixed or "rigid" time limits for *Terry* stops.[236] Instead, the Court applies a reasonableness standard, requiring officers making stops "to graduate their responses to the demands of any particular situation."[237]

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[232] *See* Rodriguez v. United States, 575 U.S. 348, 354 (2015).

[233] Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (emphasis added).

[234] *Id.* at 20; *see also* Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

[235] *Royer*, 460 U.S. at 500. The Court has limited the reach of this "least intrusive means" language from *Royer* but has not explicitly reversed this. *See* United States v. Sokolow, 490 U.S. 1, 10–11 (1989) (addressing arguments that *Royer* compels law enforcement agents to use the "lease intrusive means"). For example, in *Sokolow*, the Court clarified that *Royer* did not mean that officers with reasonable suspicion needed to consider alternatives to a stop, it only limited the things that officers could do *during* a stop. *Id.* ("That statement . . . was directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions before stopping Royer. The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.").

[236] United States v. Sharpe, 470 U.S. 675, 685–87 (1985) (rejecting twenty minutes, or any other "bright line," for the duration of a reasonable stop, instead emphasizing "the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes").

[237] *Id.* at 686 (quoting United States v. Place, 462 U.S. 696, 709 n.10 (1983)); *see also* Arizona v. United States, 567 U.S. 387, 448 (2012) (Alito, J., concurring in part and dissenting in part) ("We have held that a detention based on reasonable suspicion that the detainee committed a particular crime 'can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.' But if during the course of a stop an officer acquires suspicion that a detainee committed a different crime, the detention may be extended for a

In assessing whether a stop has been prolonged beyond its justifiable duration, courts will consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."[238] In *Rodriguez*, the Court explained that the duration of a stop must be limited to the time reasonably needed to "complete th[e] mission" of the stop—in that case, issuing a ticket for a traffic violation.[239] If the government detains an individual longer than is necessary to resolve that purpose, it violates the Fourth Amendment.[240] The Court found that the dog sniff that occurred after the issuance of the traffic ticket in *Rodriguez* violated the Fourth Amendment because it was the product of an unlawful seizure.[241]

Crime-specific suspicion is essential to setting meaningful limitations on the substantive breadth of the police inquiry during a stop and on the length of a stop. Requiring officers to identify a specific crime of suspicion for a stop will make these scope limitations a meaningful constraint. The *Rodriguez* Court focused on this precise connection between the "mission" of the stop (the suspected offense) and the "tolerable duration of police inquiries."[242] If the Court were to permit stops on general suspicion, that would inevitably permit longer and more intrusive stops. Indeed, this approach might perversely encourage more general suspicion stops for precisely these reasons.[243]

C. Conflicts in the Lower Courts

Police practices reflect the doctrinal muddle.[244] Where information about stop practices is tracked and publicized, it suggests that police conduct many non-crime-specific stops.[245] The *Floyd v. City of New York* lawsuit challenging

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reasonable time to verify or dispel that suspicion." (citation omitted) (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005))).

238 *Sharpe*, 470 U.S. at 686.

239 *See* Rodriguez v. United States, 575 U.S. 348, 351, 354–55 (quoting *Caballes*, 543 U.S. at 407).

240 *See id.* at 354 ("Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'"); *id*. ("Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.").

241 *See id.* at 357.

242 *Id.* at 354.

243 *Cf. id.* at 357 (expressing concerns that an officer might act strategically during a stop to "earn bonus time to pursue an unrelated criminal investigation").

244 *See generally* Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491, 499 (2020) ("At the same time that the Court accepted a growing list of scenarios in which mere reasonable suspicion would suffice, officers and courts began defining reasonable suspicion as a less and less demanding standard.").

245 *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 559, 575 (S.D.N.Y. 2013) (this fact was not contested by the parties); *see also* Gentithes, *supra* note 244 ("Recent studies suggest that officers have taken to

the New York Police Department's ("N.Y.P.D.") stop-and-frisk program revealed significant increases, beginning in 2004, in the number of street stops where officers did not identify a crime of suspicion.[246] Perhaps N.Y.P.D. leaders developing preventive policing programs after *Wardlow* and *Arvizu* saw the Court giving them license to be more proactive and to make stops with less suspicion.[247] As noted above, this muddled doctrine also lurks around the tragic deaths of Elijah McClain[248] and Freddie Gray.[249]

Too few of these non-crime-specific stops are challenged in court. But when they are, the results are mixed. For years, state courts and lower federal courts have disagreed—in cases that directly address this question that the Supreme Court has perennially dodged—about whether a specific crime of suspicion must be identified to establish reasonable suspicion for a stop.[250] The approaches taken by courts that acknowledge this question are organized into three categories. The first category—decisions that expressly require crime specificity—includes a recent district court decision that relies on the *Glover* "particular crime" language. Most courts, however, reject the idea that crime specificity is a standalone requirement. Those in the second category do this by folding crime specificity into the totality-of-the-circumstances analysis. The third and final category of cases simply state that reasonable suspicion is not required to be crime specific and may be based on more general suspicion of criminal activity. Each of these categories is described in more detail, and with examples, below.

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generating 'reasonable suspicion' *post hoc*, if at all."); Friedman & Stein, *supra* note 19, at 347 ("In Newark, police articulated sufficient justification for their stops just 25% of the time.").

246 959 F. Supp. 2d at 559 (noting that from 2004 to 2009, the number of street stops where the officers did not identify a crime of suspicion rose from 1% to 36%); *see also* Friedman & Ponomarenko, *supra* note 28, at 1866–67 (estimating millions of *Wardlow*-type stops).

247 Friedman & Stein, *supra* note 19, at 347 ("Police no longer even attempt to specify the crime for which they supposedly have suspicion."); *see also supra* note 220 and accompanying text. To be clear, criticism of *Terry*'s evolution to permit stops on general suspicion dates to the 1970s, long before *Wardlow* and *Arvizu* were decided. Justice Douglas, who dissented from the *Terry* majority, lamented in 1975 that the doctrine had evolved to "permit[] the police to interfere . . . with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude." United States v. Brignoni-Ponce, 422 U.S. 873, 888–90 (1975) (Douglas, J., concurring) ("To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim." (quoting Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974))).

248 *See supra* Section I.A.

249 *See* Press Release, *supra* note 22.

250 LAFAVE, SEARCH AND SEIZURE, *supra* note 36, § 9.5(c). The treatise suggests that these cases fall into two categories, those that require specificity of a particular crime and those that do not, *see id.*, but the full picture, as outlined below, is somewhat more complicated.

1. Requiring Crime Specificity

Some courts require an officer to articulate "specific, articulable reasons for believing that a person may be connected to the commission of a particular crime" to justify a stop.[251] For example, a 2020 California district court case cited *Glover* in denying summary judgment for San Bernadino County, its sheriff's department, and several individual officers in a 42 U.S.C. § 1983 lawsuit alleging unlawful seizure and excessive force.[252]

Marlon Johnson was a bystander at the scene of his friend's arrest for driving with expired registration tags and for following another vehicle too closely.[253] Johnson came to provide support to the friend's four-year-old daughter, and he was also filming on his phone from across the street as Sheriff's Deputy Ramos effected the custodial arrest.[254] When another officer, Deputy Baltierra arrived at the scene, Ramos directed Baltierra to "detain" Johnson.[255] After Johnson asked, "Detain me for what?," the deputies gave him no answer.[256] As the District Court explained, "[w]hat crime Ramos could have reasonably suspected [Johnson] of having committed from across the street . . . is decidedly unclear."[257] The two deputies escalated the violence quickly:

> Baltierra knee-kicked Plaintiff four times in Plaintiff's kidneys. Ramos shoved his retractable collapsible baton into Plaintiff's jaw and kicked Plaintiff in the face. Later, when Plaintiff was getting into the car, Baltierra slapped Plaintiff's head on the side of the car door and slammed his leg in the car door.[258]

Citing *Glover*, the *Johnson v. County of San Bernardino* court held that "the case law appears to require that officers have a 'particular crime' in mind in forming 'reasonable suspicion.'"[259] Johnson prevailed at summary judgment because it was "not at all clear" to the court "what suspected 'criminal activity'

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[251] United States v. Lee, 317 F.3d 26, 31 (1st Cir. 2003).

[252] Johnson v. County of San Bernardino, No. EDCV 18-2523-GW-AFMx, 2020 U.S. Dist. LEXIS 165647, at *20–21, *26–29, *33–34 (C.D. Cal. June 24, 2020).

[253] *Id* at *8–9.

[254] *Id.* at *8–10.

[255] *Id.* at *10.

[256] *Id.* at *11.

[257] *Id.* at *22.

[258] *Id.* at *12 (citations omitted).

[259] *Id.* at *20 (citing Kansas v. Glover, 140 S. Ct. 1183, 1185 n.1 (2020)); *see also* United States v. Brown, 925 F.3d 1150, 1154 (9th Cir. 2019) ("None of the officers who responded to the 911 call articulated what crime they suspected Brown of committing."); Alford v. Commonwealth, No. 1775-19-2, 2020 Va. App. LEXIS 308, at *21–22 n.7 (Va. Ct. App. Dec. 15, 2020) (Huff, J., dissenting) (criticizing the majority's failure to identify a crime of suspicion in its reasonable suspicion analysis (citing *Glover*, 140 S. Ct. at 1190 n.1)).

or 'particular crime' was at issue."[260] But the *Johnson* court also acknowledged the division across courts on the question of a crime-specificity requirement.[261]

Other federal and state courts have used similar language to require reasonable suspicion of a specific crime, including the First and Ninth Circuits, as well as states like California, Oregon, and Washington.[262] Some of the state cases interpret state constitutional provisions to require officers making stops to articulate suspicion of a specific crime.[263] In some of these decisions, courts have distinguished their state privacy protections from what they perceive to be less protective federal standards. In Washington, for example, the Supreme Court has interpreted relevant constitutional provisions to require specificity about the crime of suspicion before an investigatory stop will be permitted; that decision also states that the Fourth Amendment, as interpreted after *Terry*, does not require that level of specificity.[264]

It is important to note here that state statutes and local regulations governing street and traffic stops typically require a crime of suspicion.[265] Some states with stop-and-frisk statutes simply state that officers must have reasonable suspicion

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[260] *Johnson*, 2020 U.S. Dist. LEXIS 165647, at *21.

[261] *See id.* at *21 n.14 (noting the officer was not required to "identify the exact crime he suspects" (citing *Brown*, 925 F.3d at 1154)); Wilson v. Porter, 361 F.2d 412, 415–16 (9th Cir. 1966) (same).

[262] *See* United States v. Campbell, 741 F.3d 251, 261 (1st Cir. 2013) ("A warrantless traffic stop satisfies the Fourth Amendment's reasonableness requirement if 'police officers have a reasonable suspicion of wrongdoing—a suspicion that finds expression in specific, articulable reasons for believing that a person may be connected to the commission of a particular crime.'" (citation omitted) (quoting United States v. Lee, 317 F.3d 26, 31 (1st Cir. 2003))); United States v. Jones, 438 F. Supp. 3d 1039, 1057 (N.D. Cal. 2020), *appeal dismissed sub nom.* United States v. Walker, No. 20-10099, 2020 WL 3067525, at *1 (9th Cir. Mar. 18, 2020) (noting that officers did not articulate "what specific criminal conduct [they] suspected defendants were engaged in" and that they acted "on an unparticularized suspicion or hunch that there was something 'a little weird' going on" (footnote omitted)); Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) (requiring a stop to be based on suspicion of a "specific crime"); State v. Maciel-Figueroa, 389 P.3d 1121, 1123 (Or. 2017) (noting an officer meets the reasonable suspicion standard when he can point to facts "that give rise to a reasonable inference that the defendant committed or was about to commit a specific crime or type of crime"); State v. Z.U.E., 352 P.3d 796, 800 (Wash. 2015) ("[F]acts must connect the particular person to the *particular crime* that the officer seeks to investigate.").

[263] In *State v. Maciel-Figueroa*, for example, the Oregon Supreme Court held that the state constitution's search-and-seizure provision required suspicion of a "specific crime or type of crime," not merely suspicion of "general 'criminal activity.'" 389 P.3d at 1132 (interpreting OR. CONST. art. I, § 9, which mirrors the Fourth Amendment).

[264] *Z.U.E.*, 352 P.3d at 800 (interpreting WASH. CONST. art. I, § 7, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law"); *see also id.* ("[B]ecause article I, section 7 provides for broader privacy protections than the Fourth Amendment, our state constitution generally requires a stronger showing by the State."); *id.* ("The available facts must substantiate more than a mere generalized suspicion that the person detained is 'up to no good'; the facts must connect the particular person to the *particular crime* that the officer seeks to investigate.").

[265] For a detailed history of state stop-and-frisk approaches before *Terry*, see Sutton, *supra* note 7, at 669.

of "a crime" or "an offense."[266] New York's statute is more specific, stating that "a police officer may stop a person . . . when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law."[267] Colorado's new statute, drafted after Elijah McClain's death, requires police to keep detailed records of stops, including specifying "the suspected crime."[268]

2. Deeming Crime Specificity a Relevant Factor

As opposed to a strict crime-specificity requirement, some courts consider an officer's ability to articulate a specific crime of suspicion as one factor in the totality of circumstances analysis. In these jurisdictions, an officer's ability to articulate a specific crime of suspicion is a heavily weighted factor but is not necessary to establish reasonable suspicion. The Sixth Circuit took this approach in a case where Karl See was stopped by police for sitting in his parked car with two companions at 4:30 AM.[269] Police said that the car was parked in a "high-crime area."[270] The District Court denied See's motion to suppress,[271] but the Sixth Circuit reversed, finding that See was clearly seized by housing patrol officers when they parked to block him from moving his car and holding that the officers lacked reasonable suspicion for the stop.[272] In its totality-of-the-

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[266] *See, e.g.*, KAN. STAT ANN. § 22-2402 (West 2021) ("[A] law enforcement officer may stop any person . . . whom such officer reasonably suspects is committing, has committed or is about to commit a crime . . . ."); WIS. STAT. ANN. § 968.24 (West 2021) ("[A] law enforcement officer may stop a person . . . when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime . . . ."); MONT. CODE ANN. § 46-5-401 (West 2021) ("[A] peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense."); LA. CODE CRIM. PROC. ANN. art. 215.1 (2020) ("A law enforcement officer may stop a person . . . whom he reasonably suspects is committing, has committed, or is about to commit an offense . . . .").

[267] N.Y. CRIM. PROC. § 140.50 (McKinney 2021).

[268] S.B. 20-217, 72 Gen. Assemb., 2d Reg. Sess. (Colo. 2020); *see also* COLO. REV. STAT. ANN. § 16-3-103 (2001) (empowering an officer to "stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime").

[269] United States v. See, 574 F.3d 309, 311 (6th Cir. 2009).

[270] *See id.*

[271] *Id.* at 314 ("The district court listed the following reasons to support its finding that Williams had reasonable suspicion: (1) it was 4:30 a.m.; (2) the men were parked in a high-crime area; (3) before beginning his shift, Williams had been instructed to pay special attention to non-resident loiterers because of a recent increase in robberies; (4) there were three men in the car; (5) the car's interior light was off; (6) the car was parked away from the apartment building in a dim portion of the lot; and (7) the car did not have a front license plate.").

[272] *Id.* at 313. One of the judges on the panel concurred, emphasizing that the case was "extremely close." *Id.* at 315 (Gilman, J., concurring) (arguing that the officer would have had reasonable suspicion to stop See if the officer "had been responding to a complaint, if he had acted on a tip, if he had seen the men doing anything potentially criminal, or if the men had tried to flee as Williams approached.").

circumstances analysis, the court highlighted as relevant factors that the patrol officer "was not responding to a complaint" and "did not suspect the men of a specific crime," but did not identify those factors as singularly dispositive of the question of reasonable suspicion.[273]

The Third Circuit's decision in *Johnson v. Campbell* arguably falls within this second category, too.[274] Police stopped Steven Johnson, a Black high school basketball coach who was traveling with his team, after a motel clerk reported him as a "suspicious person."[275] The clerk became nervous because she said Johnson had been "agitated," "drinking coffee, flipping through a newspaper, pacing, and rubbing his head" in the lobby.[276] Because Johnson muttered "son of a bitch" during a subsequent interaction with police, the officers arrested him, in front of his team, for disorderly conduct.[277] Johnson filed a section 1983 action challenging the stop and the arrest.[278] A trial jury ruled against Johnson, and the district court denied his motion to set aside the verdict.[279] After a detailed analysis of the facts leading to the stop, the Third Circuit, applying the totality-of-the-circumstances standard, reversed, entering judgment as a matter of law for Johnson and holding that "the activity of which the detainee is suspected must actually be *criminal*."[280]

The Middle District of Alabama and state courts in Kansas and Pennsylvania have adopted similar approaches.[281] A federal district court employing a totality-of-the-circumstances approach—holding that "the fact an officer does not suspect someone of a specific crime cuts against her suspicion's

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[273] *Id.* at 314.

[274] *See* 332 F.3d 199, 208, 215 (3d Cir. 2003).

[275] *Id.* at 201–02.

[276] *Id.* at 209.

[277] *Id.* at 203.

[278] *Id.* at 203, 205.

[279] *Id.* at 215.

[280] *Id.* at 208, 215. It is possible to view this holding as one that effectively required crime specificity, but the court did not rest its decision solely on that proposition; its close review of all of the facts is why it is categorized here.

[281] *See* United States v. Mastin, No. 2:16cr542-MHT-SRW, 2018 U.S. Dist. LEXIS 28586, at *20–21 (M.D. Ala. Jan. 2, 2018) (explaining that the absence of suspicion of "specific criminal activity" was "one factor in assessing the totality of the circumstances" but noting that it did not "rel[y] exclusively on the absence of suspicion of a particular crime"); State v. Green, No. 96,336, 2007 Kan. App. Unpub. LEXIS 874, at *8 (Kan. Ct. App. July 13, 2007) ("[T]he fact that a law enforcement officer suspected an individual of involvement in a *particular* crime is a frequently mentioned fact in the determination of whether the officer's suspicion was sufficiently particularized."); Commonwealth v. Freeman, 757 A.2d 903, 908 (Pa. 2000) (explaining that one significant problem with the government's claim of reasonable suspicion was the failure to identify any "specific crime" of suspicion).

reasonableness"—was recently reversed by the Eighth Circuit, which continues to reject crime specificity as a requirement as outlined in the next section.[282]

3. Explicitly Rejecting a Crime-Specificity Requirement

Finally, some courts expressly reject the idea that an officer must articulate a specific crime to establish reasonable suspicion.[283] For courts in this category, it is sufficient if officers have a reasonable suspicion that the person stopped was engaged in *some* kind of criminal activity generally. This approach is not necessarily incompatible with the totality-of-the-circumstances approach outlined above. Both reject the idea that specificity of a particular crime is required for reasonable suspicion, and some of the jurisdictions listed here might also view crime specificity as a relevant factor for a totality-of-the-circumstances approach. But these cases are noteworthy for their express rejection of a crime-specificity requirement. The Fifth, Seventh, Eighth, and Tenth Circuits, as well as many state supreme and appellate courts, including those in Arkansas, New Mexico, Texas, Virginia, and Wisconsin, have issued decisions that fall into this category.[284]

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[282] United States v. Callison, 436 F. Supp. 3d 1218, 1228 (S.D. Iowa 2020), *rev'd and remanded*, 2 F.4th 1128 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 830 (2022).

[283] *See* United States v. Pack, 612 F.3d 341, 356 (5th Cir. 2010) ("Requiring police to have particularized facts that support a finding that 'criminal activity may be afoot' is different from requiring the police to articulate particularized facts that support a finding that a particular specific crime is afoot."); *see also* United States v. Guardado, 699 F.3d 1220, 1225 (10th Cir. 2012) (rejecting the idea that reasonable suspicion requires a link to "particular criminal activity").

[284] *See* Tom v. Voida, No. IP89857C, 1991 U.S. Dist. LEXIS 22076, at *9–10 (S.D. Ind. May 3, 1991), *aff'd*, 963 F.2d 952 (7th Cir. 1992) ("[T]he law only requires that the officer have specific and articulable facts giving rise to reasonable suspicion of criminal activity, not a specific crime."); United States v. Fields, No. 14-00017-01-CR-W-HFS, 2014 U.S. Dist. LEXIS 147806, at *11–12 (W.D. Mo. Sept. 10, 2014), *adopted by* 2014 U.S. Dist. LEXIS 146026 (W.D. Mo. Oct. 14, 2014), *aff'd*, 832 F.3d 831 (8th Cir. 2016) ("Officers 'need not be able to identify the specific crime the officer is investigating; rather the officer need only reasonably suspect that the individual is engaged in some kind of criminal activity.'" (quoting United States v. Noonan, No. 12-CR-1016-LRR, 2013 U.S. Dist. LEXIS 17794, at *10 (N.D. Iowa Feb. 11 2013))); *Guardado*, 699 F.3d at 1225 ("Direct evidence of a specific, particular crime is unnecessary."); Jackson v. State, 197 S.W.3d 468, 483 (Ark. 2004) ("We do not agree . . . that the police officers had to be investigating . . . a specific crime."); State v. Levya, 250 P.3d 861, 870 (N.M. 2011) ("Suspicion of criminal activity need not necessarily be of a specific crime."). *But see* State v. Jones, 835 P.2d 863, 867 (N.M. Ct. App. 1992) (calling for "reasonable suspicion of particular criminal activity"); Stephens v. State, 629 S.E.2d 565, 568 (Ga. Ct. App. 2006) (contrasting *Terry*'s "reasonable suspicion of general criminal activity" with the requirement for probable cause which "requires that the particular crime be specified"); Derichsweiler v. State, 348 S.W.3d 906, 916–17 (Tex. Crim. App. 2011) (noting that the defendant was stopped because he was observed peering into parked cars, and that "[u]nlike the case with probable cause to justify an arrest, it is not a *sine qua non* of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction"); Commonwealth v. Spence, 2015 Va. App. LEXIS 7, at *6 (Va. Ct. App. Jan. 9, 2015) ("[A]n officer need not . . . suspect a particular crime to justify the stop.").

The Fifth Circuit's decision in *United States v. Pack* exemplifies this approach.[285] Kevin Pack was riding with Courtney Williamson in her car when she was stopped for speeding.[286] During the course of the stop, the officer observed that Pack was "extremely nervous."[287] Pack and Williamson also gave conflicting accounts of where they had been traveling, and the officer claimed that the highway on which they were traveling was a "drug trafficking corridor."[288] Although the officer had initially advised Williamson that he planned to issue her a warning, he detained them until a drug-sniffing dog could arrive (because Williamson refused to consent to a search of the car).[289] Pack and Williamson were charged with gun and drug offenses after the dog alerted and the officer discovered a Luger pistol and nearly eighteen pounds of marijuana in the trunk of the car.[290]

The pivotal question for the Fifth Circuit was whether these facts—Pack's nervousness, contradictory stories, and traveling on an interstate labeled a "drug trafficking corridor"—justified the seizure of Pack and Williamson past the initial traffic infraction.[291] In the court's view, the facts suggested criminal activity even if they did not point clearly to a specific crime.[292] The Fifth Circuit concluded that such circumstantial evidence sufficiently supported a finding of reasonable suspicion and, citing *Arvizu*, held that reasonable suspicion is not required to "be directed toward a particular crime."[293]

It is worth noting that in *Pack*, a case frequently cited on this crime-specificity question, the court acknowledged that Pack had not "address[ed] whether or not there was reasonable suspicion in any detail in his brief."[294] As the dissent explained, this was because the district court had ruled against him on standing grounds and never developed an appropriate record on the reasonable suspicion question.[295]

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285 *See* 612 F.3d at 341, 356.

286 *Id.* at 345.

287 *Id.* ("Pack was breathing heavily, his hands were shaking, and his carotid artery was visibly pulsing.").

288 *Id.* at 345–46.

289 *Id.*

290 *Id.* at 346.

291 *Id.* at 352 ("The central issue in this appeal is whether or not Worley had reasonable suspicion that Pack was engaged in criminal activity before Worley's routine computer checks were completed.").

292 *See id.* at 361.

293 *Id.* at 353, 356–57 (attempting to reconcile conflicts between prior Fifth Circuit opinions).

294 *Id.* at 352.

295 *Id.* at 364–65 (Dennis, J., dissenting).

This conflict between lower courts about whether crime specificity is required demands resolution from the Supreme Court. The historical record and the Court's precedents make a strong case for requiring crime-specific suspicion. Part IV outlines additional legal and policy support for such a requirement.

IV. REQUIRING CRIME-SPECIFIC REASONABLE SUSPICION

The question debated across lower courts—whether police should be required to specify a crime of suspicion for *Terry* stops—highlights the persistence of seizures of people based on only general suspicion of criminality. The early race- or status-based distinctions that justified arrests without a crime of suspicion are legally indefensible today.[296] But in the modern era, we sort community members according to their perceived riskiness or presence in high-crime neighborhoods in ways that permit similar police interference.[297] And we increasingly rely on technology to do this type of risk assessment more efficiently.

This history of suspicion tainted by race and class biases continues to confound efforts to fix policing. The institution of policing was developed around these divisions, and arguably to preserve them.[298] Our modern obsession with risk prevention maps quite neatly onto this prior class- and race-ordering.[299] The Court has helped to preserve these two sets of rules—for the elites and for the risky—by giving police significant latitude to stop people they deem generally suspicious.[300] The relaxation of a requirement of crime-specific suspicion after *Terry* has facilitated this process.

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[296] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 168–69 (1972) (vagrancy laws are "are not compatible with our constitutional system").

[297] *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 147 (2017) (explaining the implications of flight in a "predominantly black or brown neighborhood"); Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas,"* 63 HASTINGS L.J. 179, 183 (2011) (describing irregular processes used to define "high-crime area").

[298] *See* Sekhon, *Police Limit*, *supra* note 29, at 1738 ("History suggests that police's raison d'être is not crime control but rather containing those groups generically believed to be 'dangerous.'"); *see also* Ristroph, *supra* note 7, at 1164.

[299] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 199–200 (2001).

[300] Carbado, *supra* note 297, at 129 ("[I]t is helpful to distinguish between the de jure legalization of racial profiling (or instances in which it is permissible as a matter of law under Fourth Amendment doctrine for police officers to employ race as a basis for suspicion) and the de facto legalization of racial profiling (or instances in which Fourth Amendment law turns a blind eye to racial profiling or makes it easy for the police to get away with the practice).").

The final Part of this Article develops the case for crime-specific reasonable suspicion as both a constitutional rule-of-law requirement and a policy imperative and considers the implications of this requirement for other aspects of the Fourth Amendment seizure doctrine.

A. Crime Specificity and the Rule of Law

Requiring that officers have crime-specific suspicion before they may "lay hands" on a person protects fundamental rule of law and separation of powers principles.[301] Those principles require that government power is limited by clearly defined laws.[302] Substantive criminal laws set boundaries for the "government" as well as the "governed."[303] Joseph Goldstein explained this succinctly more than sixty years ago: "Under the rule of law, the criminal law has both a fair-warning function for the public and a power-restricting function for officials."[304] Josh Bowers describes this formal commitment to criminal law's legality principle this way:

> A precise penal code was thought to announce its commands comprehensibly and comprehensively to both audiences—to the lay individuals who are the designated subjects of sufficiently precise

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[301] *Cf.* Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 38 (2021) ("Separation of powers ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency." (quoting State v. Rice, 279 P.3d 849, 857 (Wash. 2012) (en banc))); Barkow, *supra* note 36, at 1012; Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 814 (1999) ("Constitutional guarantees were intended precisely to thwart the will of the majority and its political representatives, and to reserve an indelible compass of freedom for the individual.").

[302] Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) (describing central requirement that "people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong"); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 191–92 (1908) ("[The 'rule of law'] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 191 (Thomas I. Cook ed., Hafner 1967) (1690) (explaining that government must be constrained by laws that "guide and justify" its actions).

[303] *See* THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); *see also* Friedman & Ponomarenko, *supra* note 28, at 1835–36 ("Police are authorized only to enforce the existing substantive criminal law—they certainly are not permitted to alter people's rights . . . .").

[304] Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 547 (1960) (footnote omitted).

> criminal codes and to the law enforcers who are authorized to enforce these rules (and only these rules).[305]

The *Papachristou* Court relied heavily on rule-of-law arguments in finding Jacksonville's vagrancy ordinance unconstitutional:

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment.[306]

Although the Court cast it as a vagueness decision, it was intended to outlaw seizures of people based on status or general suspicion, the focus of this Article.[307] The Court explicitly stated the Constitution would not permit a legislature to empower police "to arrest all 'suspicious' persons."[308]

The Fourth Amendment text and its origins clearly reflect these rule-of-law commitments. The oath and affirmation, suspicion, and particularity requirements described above in Section II.B were framed as boundaries around government conduct by requiring that searches and seizures are connected to particular crimes.[309] Requiring crime-specific suspicion—in the manner envisioned in the Amendment—tethers law enforcement to the laws and regulations that delimit the scope of their authority.

Crime-specificity requirements for arrests and stops protect fundamental liberty rights, whether characterized as protections for "dignity" or personhood,

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[305] Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 146–47 (2017); *see also* Bowers, *supra* note 35, at 997–98 ("[T]he legality principle is taken to require that legislators codify offenses ex ante, and that police and prosecutors confine their collective attention to the 'catalogue of what has already been defined as criminal.' . . . In constitutional terms, the most obvious expression of the legality principle is the due process requirement that the legislature define substantive criminal law with precision sufficient to provide notice to the public and enforcement criteria to authorities." (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 90 (1968))).

[306] Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972); *see also id.* ("The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.").

[307] *See* Mannheimer, *supra* note 184, at 1110 (evaluating the text of the decision and its connection to Justice Douglas's other decisions and writing); *see also* GOLUBOFF, *supra* note 187, at 323–26 (analyzing *Papachristou* as the culmination of a long campaign against vagrancy laws).

[308] *Papachristou*, 405 U.S. at 169 ("A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest.").

[309] *See supra* Section II.B.

or as rights to "locomotion" or "free movement."[310] The Court and scholars also describe these rights in terms of "control" or "autonomy," or as a "right to be let alone," with emphasis on the ability to "exclude the government."[311] Erik Luna tries to capture these components in the concept of "personal sovereignty," explaining that "[t]he government demonstrates respect for the individual, for her zones of sovereignty and her basic dignity, when it acts only with the predicate level of suspicion."[312] Andrew Guthrie Ferguson describes the need to better protect these security interests for people in public spaces, calling for recognition of a right to "personal curtilage" to rein in police stops.[313] Courts[314] and commentators[315] recognize these principles in the probable cause context—at least in theory—but in practice the commitments to crime specificity are inconsistent across Fourth Amendment contexts.[316]

But a crime-specificity requirement is not a complete solution to the problems outlined here. Practically speaking, the overbreadth of criminal laws—and routine policing of broad categories of low-level offenses—may mean that a crime-specificity requirement, by itself, will change outcomes in only a limited number of cases.[317] An idealized vision of the separation of powers envisions

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[310] Bowers, *supra* note 35, at 1010–13 (analyzing dignity interests implicated by Fourth Amendment seizures); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 346 (1998) (summarizing Court descriptions of "protected personhood interests" as including "the right to be left alone, individual freedom, personal dignity, bodily integrity, the 'inviolability of the person,' the 'sanctity of the person,' and the right of free movement" (footnotes omitted)); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328–30 (1990) (describing the Court's inadequate protection of "rights of personal security and locomotion"); Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 83–84 (reviewing case and scholar descriptions of the rights implicated by arrests and stops).

[311] Clancy, *supra* note 310, at 346, 358, 367–68 (collecting cases); Gouldin, *supra* note 310, at 83–85; *see also* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 11 (1960) (describing "freedom" as "[t]he state in which a man is not subject to coercion by the arbitrary will of another").

[312] Luna, *supra* note 301, at 844.

[313] Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1327 (2014).

[314] *See, e.g.*, Berger v. New York, 388 U.S. 41, 59 (1967) ("[T]he purpose of the probable cause requirement . . . [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed."); *see also* Dunaway v. New York, 442 U.S. 200, 213 (1979) ("The central importance of the probable-cause requirement to the . . . Fourth Amendment's guarantees cannot be compromised in this fashion.").

[315] *See, e.g.*, FRIEDMAN, *supra* note 20, at 140 ("'[C]ause' is what spells the line between lawful and lawless policing: without just cause—a good reason—the government's use of coercive force runs the risk of being arbitrary, discriminatory, or just plain senseless."); *see also* Crespo, *supra* note 30, at 1279 (explaining that this requirement to establish suspicion for a search or seizure "constitutes the core substantive constraint on police power in the United States").

[316] Gouldin, *supra* note 4, at 1.

[317] *See* Livingston, *supra* note 38, at 615.

legislators with "strong incentives to define punishable misconduct with precision and moderation,"[318] but those are not the legislators we have.[319] Because so much low-level conduct is criminalized, there is likely a specific law that could be invoked to justify most police stops.[320] In this way, a crime-specificity requirement is the sort of "formal" or "structural" rule-of-law mechanism that may only have meaningful impact if paired with other reforms, including substantive criminal law reforms.[321]

Finally, a crime-specificity requirement will only have impact if police officers comply with changed rules.[322] Sekhon outlines significant reasons to be skeptical of the potential to use rule-of-law reforms to change the realities of street policing, or to diminish the power of police who function as "street sovereigns."[323] Nothing here addresses the problem of police who adapt to the new rules by manufacturing crime-specific suspicion even where there is none.[324]

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[318] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 63 (1st ed. 2005).

[319] *See* Barkow, *supra* note 37, at 1029–30; Colb, *supra* note 33, at 1660; Epps, *supra* note 301, at 47 ("[L]egislators have (at least until quite recently) seemed surprisingly uninterested in supervising or checking abuses by executive-branch law-enforcement officials."); Wasserstrom and Seidman, *supra* note 128, at 86 ("So long as the Constitution provides no substantive protection for the activity in question, the government can evade the probable cause standard by redefining the substantive offense to include activity that the disputed search will probably uncover.").

[320] *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 36 (considering whether the grounds for a stop must be connected to a particular crime and concluding that "[t]he issue is not a very important one in the real world because ordinarily it will be possible to connect the reasonable suspicion to some particular variety of criminal activity"); *cf.* Heien v. North Carolina, 574 U.S. 54, 74 (2014) (Sotomayor, J., dissenting) ("One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so.").

[321] Waldron, *supra* note 302, at 7; *see also* MARK DAVID AGRAST, JUAN CARLOS BOTERO & ALEJANDRO PONCE, THE WORLD JUST. PROJECT, RULE OF LAW INDEX 9 (2011), https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf (describing the "distinction between what scholars call a 'thin' or minimalist conception of the rule of law that focuses on formal, procedural rules, and a 'thick' conception that includes substantive characteristics, such as self-governance and various fundamental rights and freedoms"); AGRAST ET AL., *supra* ("Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is 'an empty vessel into which any law could be poured.'"). The World Justice Project emphasizes that the "rule of law" focuses both on the existence of rules and laws that are "clear, publicized and stable" to constrain government power and on the "substantive component" and procedural fairness of those laws. AGRAST ET AL., *supra.*

[322] *See* Sekhon, *Police Limit*, *supra* note 29, at 1749 ("[T]he police wield a form of extreme discretion that cannot be readily checked by other government actors.").

[323] *Id.* at 1766, 1771 ("Courts and scholars have misconceived the municipal police as legality's agents (and subjects) when history and sociology suggest otherwise.").

[324] *See* David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 34 (1994) ("[T]here are genuine reasons to be skeptical—not just unbiased—about police testimony in search and seizure cases.").

B. Specificity and Deference

The Court has not directly addressed this question during the more than five decades since *Terry*.[325] By declining to address the issue, the Court effectively gave police the authority to make lots of general suspicion stops. The fuzziness of Fourth Amendment reasonableness as a standard facilitates this transfer of power to the police.[326] Particularly in jurisdictions where crime specificity is folded into the totality of the circumstances, this problem of stops without crime-specificity may be hard to isolate.[327]

But the impulses that lead the Court to defer to law enforcement interpretations of suspicious facts do not apply to this question of law. The crime of suspicion is a bright, legislatively drawn line.[328] It is one that, since the Founding, has been understood as a fundamental constraint to criminal enforcement power.[329] A crime-specificity requirement is already there; the task is one of excavation, not invention. And the substantive laws are lines that police officers are already expected to know, even if not perfectly,[330] so this requirement imposes minimal training burdens.

Although the Court is concerned with deferring to law enforcement needs,[331] specificity about a crime of suspicion will not hamper law enforcement efforts in high-stakes cases. This is a requirement that would shift the line between an encounter and a Fourth Amendment stop in those cases where officers cannot articulate a crime of suspicion. It is much more likely to arise in the context of low-stakes street enforcement,[332] and it imposes minimal burdens. During encounters where police are not quite sure of what (if any) crime they suspect, this rule requires that they remain in information-gathering mode and develop a

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325 *See supra* Section III.A (describing missed opportunities).

326 *Cf.* Kathleen M. Sullivan, *The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) (explaining arguments for rules over standards).

327 *See supra* Section III.C.2.

328 This is precisely the line the *Atwater* Court embraced. Atwater v. City of Lago Vista, 532 U.S. 318, 347, 354 (2001) (recognizing the interest in "readily administrable rules," to authorize arrests for even "very minor criminal offense[s]").

329 *See supra* Section II.B.

330 *Cf.* Heien v. North Carolina, 574 U.S. 54, 57 (2014) (upholding traffic stop despite officer's mistake of law).

331 *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

332 *See* Sekhon, *Police Limit*, *supra* note 29, at 1737 ("Broken windows policing focused largely on young people of color for minor pedestrian infractions, having alcohol or marijuana in public, or for nothing at all. The policing strategy generated huge numbers of stops, arrests, and outstanding warrants for young people of color. Experts are skeptical that the campaign has had meaningful effect on serious crime rates in New York City or elsewhere." (footnotes omitted)).

clearer sense of the criminal conduct they suspect before laying hands on a suspect or otherwise escalating a situation.[333]

This is not to say that the principle of crime specificity should be limited to this context. For both arrests and stops, the Court's weak protection of the principle of crime specificity has shaped the development of other problematic doctrines, including controversial decisions about pretextual police conduct,[334] objective reasonableness,[335] collective knowledge,[336] and good faith mistakes of law.[337] Those doctrines could be adapted to a reinvigorated crime-specificity requirement,[338] but full consideration of these implications is beyond the scope of this Article.

C. Improving Police Decision-Making and Judicial Review

Asking police to identify and articulate a crime of suspicion may also improve decision-making in at least two ways that bear highlighting. Asking officers to identify a specific crime of suspicion may force more deliberative decision-making, potentially reducing the impacts of implicit racial (or other) biases. In addition, a crime-specificity requirement might function like other types of reason-giving requirements, improving the accuracy or quality of the underlying decision. These are both questions that deserve additional study.

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[333] *Cf.* Gouldin, *supra* note 310, at 103–04 (explaining that the government's widespread use of "physical and transactional surveillance ought to reduce or delay the need for seizures in criminal investigations" (footnote omitted)).

[334] Whren v. United States, 517 U.S. 806, 813 (1996); *see* Bowers, *supra* note 305, at 155–57 (describing the ways that pretextual stops and arrests undermine the legality principle).

[335] *See* Utah v. Strieff, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting) ("The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous." (citing Devenpeck v. Alford, 543 U.S. 146, 154–55 (2004))).

[336] *See, e.g.*, United States v. Banks, 514 F.3d 769, 776 (8th Cir. 2008) ("The collective knowledge doctrine imputes the knowledge of all officers involved in an investigation upon the seizing officer in order to uphold 'an otherwise invalid search or seizure.'" (quoting United States v. Gillette, 245 F.3d 1032, 1024 (8th Cir. 2001))).

[337] Heien v. North Carolina, 574 U.S. 54, 57 (2014).

[338] District of Columbia v. Wesby, 138 S. Ct. at 593–94 (Ginsburg, J., concurring) ("I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry."); Colb, *supra* note 146, at 1458 ("[T]he government's state of knowledge—probable cause, reasonable suspicion, 'reasonableness'—[] mediates . . . when the individual has a right not to have a particular search take place. Some government searches are unconstitutional [when] the government lacked knowledge before the fact that would have provided a legitimate motive for the search.").

1. Reducing Discretion and Bias

First, requiring officers to identify a specific crime of suspicion may narrow discretion and reduce the impacts of implicit biases that plague street policing.[339] As Song Richardson has explained, much of what *Terry* permits is the interpretation of ambiguous conduct in ways that clearly make space for and potentially legitimize officers' implicit biases.[340] Those biases too often "link[] Black individuals with criminality and [w]hite individuals with innocence," so that "officers will be more likely to judge the ambiguous behaviors of [Black people] as suspicious while ignoring or not even noticing the identical ambiguous behaviors of [w]hites."[341]

Continuing to allow imprecision about the crime of suspicion exacerbates the ambiguity problems that Richardson describes.[342] Richardson cautions that we should not overestimate the degree to which reasonable suspicion can be treated as "an objective concept."[343] Her concerns are amplified significantly under a regime where officers are empowered to gauge whether someone is generally suspicious. Crime-specificity requirements might force more deliberation and improve decision-making.

A recent Chicago study analyzing disparities in street enforcement according to the race and gender of the officers, finds the greatest enforcement disparities for low-level crimes, where the crime-specificity issues described in this Article are likely to be concentrated.[344] The study's authors concluded that "Black, Hispanic, and female officers made fewer stops and arrests and used force less often than white, male officers."[345] The study suggests that these low-stakes encounters—involving "relatively minor crimes, not violent offenses"—are

339 *See* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1154–55 (2012) ("The science of implicit social cognition provides compelling evidence that implicit racial bias can affect both who will capture an officer's attention and whether an officer will interpret the individual's behaviors as criminal." (footnote omitted)).

340 *Id.* at 1151.

341 L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 74 (2017); *see also* Miller, *supra* note 3529, at 260–61 (explaining that "by permitting pro-active, preventative policing, *Terry* allows negative racial stereotypes, often implicit and operating on the police officer at an unconscious level, to determine who the police select to stop and frisk" and cautioning that the exclusionary rule will provide limited protection against "volume policing" that is intended to regulate communities, and not necessarily to produce evidence for future prosecutions).

342 Richardson, *supra* note 339, at 1154–55.

343 *Id.* at 1777.

344 STATE OF COLO. ATT'Y GEN., *supra* note 55, at 63–64.

345 *Id.* at 63.

where the greatest disparities are concentrated.[346] Mechanisms to slow these encounters and to force officer deliberation are worth consideration, given this evidence.

Time-buying and deliberation-forcing rules might facilitate efforts to divert mental health crises away from aggressive enforcement responses and toward appropriate supportive interventions.[347] Officers required to specify the misconduct they are observing may also have the opportunity to consider non-criminal explanations for atypical or non-normative behavior they observe.[348] Jamelia Morgan's work explaining how calculations of reasonable suspicion incorporate racial bias, misinterpretations of "nonnormative" or "nonconforming" behavior, and ableist perceptions of "disability-based behaviors or conditions" is particularly relevant here.[349]

2. Reason-Giving and Specificity

Belief in the significance of reason-giving—and its potential to improve the quality of decision-making—undergirds the Fourth Amendment.[350] Although empirical research on the effects of reason-giving in the policing context is difficult to find, studies from other fields "suggest that police who know that they must explain their actions to third parties will make fewer errors in the first place, because a justification requirement appears to compensate significantly for subconscious biases."[351] Andrew Taslitz concluded that requiring more

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[346] *Id.* at 63–64.

[347] *See* Katherine Beckett, Forrest Stuart & Monica Bell, *Decarceral Pathways: From Crisis to Care*, INQUEST (Sept. 2, 2021), https://inquest.org/from-crisis-to-care/; Jackson Beck, Melissa Reuland & Leah Pope, *Behavioral Health Crisis Alternatives*, VERA (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives.

[348] *See* STATE OF COLO. ATT'Y GEN., *supra* note 55, at 71, 76 (describing particular issues with police use of force in cases involving people in a "mental health crisis," and people viewed as "failure to obey" police orders).

[349] Morgan, *supra* note 39, at 526.

[350] As Ashley Deeks explains, "'[r]eason-giving' refers to justifications offered in support of and accompanying a legal or policy decision, whether those justifications are required by statute, formal executive guidance, or informal executive practice." Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 618 (2020); *id*. at 615 ("Reason-giving—the process of offering justifications for a decision—is essential to our system of governance.").

[351] Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 66 (2010) (citing to MICHAEL KAPLAN & ELLEN KAPLAN, BOZO SAPIENS: WHY TO ERR IS HUMAN (2009)); *see also* Robert H. Ashton, *Pressure and Performance in Accounting Decision Settings: Paradoxical Effects of Incentives, Feedback, and Justification*, 28 J. ACCT. RSCH. 148, 155–56 (1990) ("When individuals know they will be required to justify a decision to another person, the accuracy and consistency of decision making tends to increase, and the impact of information-processing biases—such as overconfidence, susceptibility to order effects, and insensitivity to new

detailed justifications would further improve decision-making.[352] The limited studies that are available, including work by Jeffrey Fagan and others, "suggest that stops based on more specific, behavioral factors are more likely to turn up evidence or contraband and lead to overall reductions in crime."[353]

The hope is that a specificity requirement would cause officers to be more objective and analytical before performing stops and arrests, relying less often on mere hunches or subconscious biases.[354] It is worth highlighting that requiring police officers to articulate a specific crime of suspicion requires only the most basic and bare-bones sort of reason-giving. This is far less than what administrative officials are expected to provide.[355]

Specifying a crime of suspicion also has benefits similar to the particularity requirements for warrants.[356] It reminds an officer of the limits of their authority and marks meaningful limits on the scope and duration of a stop. Where the suspected crime is disclosed to the suspect of a stop, it may also provide some assurance for the suspect of the limits of the government's intrusion, reducing anxiety and potentially increasing perceptions of legitimacy.

In addition, requiring officers to specify a crime of suspicion also empowers more robust court review.[357] Courts with more specific information are better able to evaluate the necessity or reasonableness of a particular government search or seizure.[358]

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information—tends to decrease."); Robert H. Ashton, *Effect of Justification and a Mechanical Aid on Judgment Performance*, 52 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 292, 301 (1992); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 651 (1995).

352 Taslitz, *supra* note 351, at 66 ("The more detailed justifications police must offer, the less willing they should be to act without good reason. A good-reason limitation necessarily constrains discretion.").

353 American Law Institute, *supra* note 31, at 45 (Reporter's Note) (Barry Friedman, reporter) (collecting studies); *see also* Fagan, *supra note* 30, at 86 ("[T]hese analyses show in New York City that stops based on general categories of suspicion that are not tied to a particular behavior have no crime reduction benefit, even though they were encouraged in an effort to reduce crime.").

354 *Cf.* Philip E. Tetlock & Jae II Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCH. 700, 707 (1987) ("Accountability motivates subjects to process social information in more analytic and complex ways that can substantially reduce judgmental biases such as belief perseverance, the fundamental attribution error, and overconfidence.").

355 Bowers, *supra* note 35, at 1027–28.

356 *See supra* Section II.B.

357 *Cf.* Deeks, *supra* note 350, at 620 (explaining that part of the value of judicial reason-giving is that it facilitates "hierarchical judicial review").

358 *See* Gouldin, *supra* note 310, at 95 ("[I]f police are not required to disclose their purposes, the Court will be unable to tailor seizure power to the government's actual needs.").

D. Implications for New Technologies

Finally, this question about specific suspicion has increasing urgency as new policing technologies must be designed with a clearer understanding of what constitutes reasonable suspicion.[359] The problems with police reliance on "usual suspects" lists in an analog era—based on known reputations or lists of "usual suspects" tacked to department bulletin boards—are amplified, as Andrew Guthrie Ferguson explains, when police use big data or "heat lists" to speculate about future criminality.[360] Ferguson contrasts "small data" policing (where suspicion is generated by information that is discrete, fixed in time, and isolated in context; i.e., police observations of an unknown person on the street) with "big data" suspicion, where the information known to police is acquired "by searching vast networked information sources."[361] For suspicion developed in reliance on big data, Ferguson argues that it will be much more important for courts to connect the bases of suspicion with a suspected crime.[362]

CONCLUSION

Although the Supreme Court glossed over this question in prior cases,[363] recent statements in *Glover* and the sharp division between lower courts suggest that consideration of a crime-specificity requirement may be on the Court's horizon. The text, historical evidence about the Framers' intent, and compelling policy arguments outlined here suggest the possibility for even a divided court to reach consensus. Since the Founding, specificity about crimes of suspicion has been understood as a fundamental constraint to criminal enforcement power.[364] The erosion of the Fourth Amendment's crime-specificity requirement over time is hard to explain or justify. In retrospect, it is difficult to identify any public safety gains that were obtained in return.

Modern calls for reform demand precisely this sort of boundary around police action. In tandem with efforts to decriminalize low-level offenses, a

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[359] This same process is occurring across the criminal justice system, as algorithms and other technologies purporting to improve criminal justice decision-making require clear answers to murky legal questions. *See* Jessica Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 79 (2017); *see also* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 721–23 (2018).

[360] Ferguson, *supra* note 30, at 380, 386 ("Of course, suspicious facts must be connected with a suspected crime. . . . [A]s long as the data are connected to both the suspected criminal activity and the suspected criminal, it would likely be persuasive in evaluating reasonable suspicion in observation cases.").

[361] *Id.* at 329.

[362] *Id.* at 388.

[363] *See supra* Sections III.A–B.

[364] *See supra* Section II.B.

crime-specificity requirement might rein in problematic street enforcement. During encounters where police cannot specify a crime of suspicion, this rule requires that they remain in information-gathering mode and develop more specific suspicion before laying hands on a suspect. It is a requirement with potential to protect liberty, autonomy, and dignity rights by making space for officers to deescalate, investigate alternative interventions, or just walk away.