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EQUALITY IN THE STREETS
Using Proportionality Analysis to Regulate Street Policing

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The racially disparate impact and individual and collective costs of stop and frisk, misdemeanor arrests, and pretextual traffic stops have been well documented. Less widely noticed is the contrast between Supreme Court case law permitting these practices and the Court's recent tendency to strictly regulate technologically enhanced searches that occur *outside* the street policing setting and that—coincidentally or not—happen to be more likely to affect the middle class. If, as the Court has indicated, electronic tracking and searches of digital records require probable cause that evidence of crime will be found, stops and frisks should also require probable cause that a crime has been committed (in the case of stops) or that evidence of crime will be found (in the case of post-detention searches). This equalization of regulatory regimes not only fits general notions of fairness. It is also mandated by the Fourth Amendment's Reasonableness Clause and the Court's cases construing it, which endorse a "proportionality principle" that requires that the justification for a search or seizure be roughly proportionate to its intrusiveness.

Applying the probable cause requirement to the streets would not prevent police from carrying out investigative detentions when they believe criminal activity "may be afoot." Rather, it would limit such detentions and subsequent searches to situations where they observe or have another good basis for believing that a person has engaged or is engaging in an attempted crime as defined by the law of the jurisdiction. While *Terry v. Ohio* and some of the Supreme Court's other stop cases would still come out the same way under this formulation, judicial decisions that have permitted stops of people simply because they avoided the police, fit a "profile," acted in a "furtive" manner, or appeared out of place would not. The equalization of street and technological policing would bring even more significant changes to the law governing searches incident to arrest, which could occur

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only when police have probable cause to believe the person has a weapon or possesses evidence of crime (although, given the fact that an arrest has been made, handcuffing would be permitted). Imposing the probable cause standard developed in technological search cases on street policing can promote equality without sacrificing public safety.

In *Terry v. Ohio*[1] the Supreme Court held that, despite the Fourth Amendment's reference to "probable cause," police may subject a person to a brief seizure (a stop) on a lesser "reasonable suspicion" showing that "criminal activity may be afoot" and then may conduct a pat-down (a frisk) if they develop reasonable suspicion that the person is armed and dangerous. The *Terry* Court gave two reasons for its invention of the reasonable-suspicion standard. First, stops and frisks are less intrusive than arrests and full searches and therefore can take place on less than the probable cause required to take people into custody or to search them for evidence.[2] Second, police need some mechanism, short of arrest, that allows them to nip crime in the bud and protect themselves and others while doing so.[3] These explanations notwithstanding, critics have claimed that *Terry* is not supported by the Fourth Amendment's language and history,[4] hands too much power to the police,[5] and opens the door to laxer standards whenever government can argue that individual interests are weaker or government interests stronger than in the typical case.[6]

Terry has been particularly controversial among those concerned about racialized policing, who have lambasted the decision's relaxation of the probable-cause standard as an invitation for police to harass people of color. The available data back up these claims. In many American cities, tens of thousands of Black people are subjected to stops

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

2 *Id.* at 27 ("Petitioner's reliance on cases which have worked out standards of reasonableness with regard to 'seizures' constituting arrests and searches incident . . . assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment.").

3 *Id.* at 24 ("[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.").

4 Two scholars who question whether *Terry* can be squared with Fourth Amendment history are David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1804–05 (2000), and George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 Notre Dame L. Rev. 1451, 1514–16 (2005).

5 Lewis R. Katz, Terry v. Ohio *at Thirty-Five*: *A Revisionist View*, 74 Miss. L.J. 423, 458–59 (2004) ("[T]he Terry outcome focused only on the crime prevention issue and ignored the problems associated with the exercise of the enormous power the Court in *Terry* bestowed on the police.").

6 Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 Minn. L. Rev. 383, 403 (1988) ("The problem with the middle position of reasonable suspicion is that it invariably sounds reasonable because its essence is a compromise between the government's need to intrude and the individual's privacy interest.").

every year, well out of proportion to their presence in the city's population or their engagement in illegal activity.[7] Yet in cities like New York during the height of its stop-and-frisk campaign, the percentage of the millions of stopped people who were found to have a gun was well below one percent, the percentage of those arrested for any crime after a stop was well below ten percent, and these "hit rates" were significantly lower for Black people than for white people.[8]

While stopping and frisking pedestrians is the aspect of street policing most maligned by those concerned about racial justice, stops are certainly not street policing's only, or

7 N.Y. State Off. of the Att'y Gen. The New York City Police Department's Stop & Frisk Practices: A Report to the People of the State of New York from the Office of the Attorney General 93–126 (Dec. 1999), https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf [https://perma.cc/7CGK-DPXU] (finding that in 1998–1999 in New York City, while African Americans were stopped six times more frequently than whites, stops of African Americans were less likely to result in arrests than stops of whites, and that adjusting for crime rates by race, the differences in stops of minorities compared to stops of whites was statistically significant, with African Americans stopped more than twice as often as whites for suspected violent crimes and weapons offenses); Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding, based on data from 2004 to 2012 in New York City, that Black and Hispanic people were more likely to be stopped, that Black and Hispanic people were thirty percent more likely to be arrested (as opposed to receiving a summons) after being stopped, and fourteen percent more likely to be subjected to the use of force during the stop, and that the hit rate for Black and Hispanic people (as measured by recovery of contraband, arrests made, or summonses issued following a stop and/or frisk) was eight percent lower for Black and Hispanic people than for whites); Plaintiffs' Sixth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues at 19, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. Mar. 22, 2016) (finding that in the first half of 2015 in Philadelphia, the stop rate by race per 10,000 residents was 1,611 for Black people, 747 for white people, and 583 for Latino people; that nonracial factors did not explain these disparities; and that 1 in 6.4 stops of Black people resulted in a frisk while the frisk rate for whites was 1 for every 15.2 stops); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 Fordham Urb. L.J. 539, 592–93 (2016) (finding, in Boston in 2010, that most of those stopped were Black or Hispanic, "each above their respective share of population," and that, "[a]fter controlling for local crime rates, we observe higher rates of [stop] activity" for people of color and higher rates of frisking and searching these groups after controlling for nonracial aspects); State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (noting that the statistical disparities between African American and white motorists stopped for traffic offenses in New Jersey were "stark" despite the fact that Black and white drivers violated the traffic laws at the same rate); Charles Epp et al., Pulled Over: How Police Stops Define Race and Citizenship 57 (2014) (finding, inter alia, that twenty-five percent of Black drivers are stopped in a year, compared to twelve percent of white drivers, even though Black drivers do not typically violate traffic laws more than white drivers, and that white drivers report being stopped for traffic-safety violations while Black drivers often report being pulled over for ambiguous or unstated reasons).

8 *See supra* note 7; *Floyd*, 959 F. Supp. 2d at 573 (finding that a weapon was found in only 1.5% of frisks and 0.7% of stops and that only 6% of all stops resulted in an arrest, 6% resulted in a summons, and "[t]he remaining 88% of the 4.4 million stops resulted in no further law enforcement action"); Christopher Dunn, N.Y. C.L. Union, Stop-and-Frisk 2012: NYCLU Briefing (2013), https://www.nyclu.org/sites/default/files/publications/2012_Report_NYCLU_0.pdf (finding, using similar data, that "a weapon was found in only 1.8 percent of blacks and Latinos frisked, as compared to a weapon being found in 3.9 percent of whites frisked," percentages that would be much smaller expressed as a fraction of stops rather than stops and frisks).

even primary, component. Millions of times a year, police arrest people outright (rather than merely stopping them based on reasonable suspicion), claiming to have probable cause to arrest for a misdemeanor or traffic violation. And, once again, people of color are disproportionately subjected to such arrests.[9] Black people are also more likely than members of other racial groups to be taken into custody for a misdemeanor crime[10] and more likely to have their car unsuccessfully searched after a traffic violation.[11]

The individual toll of street policing can be significant. A stop and frisk on the street or a search of one's car is humiliating and can easily turn into a violent event unless one complies meticulously with every police command (especially when one is

9 *See* Becca Cadoff et al., Data Collaborative for Just., Misdemeanor Enforcement Trends Across Seven U.S. Jurisdictions 9 (Oct. 2020), https://datacollaborativeforjustice.org/wp-content/uploads/2020/10/2020_20_10_Crosssite-Draft-Final.pdf (survey of Durham; Los Angeles; Louisville; New York City; Prince George's County, Maryland; Seattle; and St. Louis, finding that Black people were arrested at three to seven times the rate of white people and that "these disparities persisted despite the recent overall declines in arrest rates"); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 657 (2021) (describing the "extensive and growing body of literature" on the different experiences of white and Black drivers with police and how the literature indicates "differences in driving behavior generally do not explain this differential treatment"); Jeff Brazil & Steve Berry, *Color of Driver Is Key to Stops on I-95 Videos*, Orlando Sentinel, Aug. 23, 1992 (stating that seventy percent of cars stopped were driven by Black and Hispanic people, eighty percent of cars searched were driven by that group, and tickets were issued in only 9 of 1,084 cases).

10 Megan Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 769–70 (2018) ("We find that black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and 'other offenses.'"); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, Just. Q., Jan. 2013, at 22 ("[R]acial disparity in drug arrests between blacks and whites cannot be explained by race differences in the extent of drug offending, nor the nature of drug offending."); U.S. Comm'n on C.R., Targeted Fees and Fines Against Communities of Color: Civil Rights & Constitutional Implications 13 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/W5B9-FLDR] ("[M]unicipal court and police practices are due, at least in part, to intentional discrimination, as demonstrated by evidence of racial bias and stereotyping of African American residents by certain Ferguson police and municipal court officials.").

11 Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nat. Hum. Behav. 729, 732 (2020) (analyzing 100 million traffic stops and showing that contraband was more likely to be found after traffic stops of white drivers than after those of Black and Hispanic drivers); Dwight Steward & Molly Totman, *Don't Mind If I Take a Look, Do Ya?: A Study of Consent Searches and Contraband Hit Rates at Texas Traffic Stops* 25, 46–47 tbl.4 (2004), https://studylib.net/doc/18186076/don-t-mind-if-i-take-a-look--do-ya%3F (studying Texas police agencies and finding that three of four agencies asked for consent from people of color at least fifty percent more often than for whites, and that thirty-one of forty-eight departments found contraband in more cars driven by white drivers than cars driven by Black drivers, sometimes by a factor of three); *see also* Samuel Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 670 (2002) (similar finding in study of Baltimore traffic stops). *See generally* Vesla M. Weaver et al., *The Great Decoupling: The Disconnection Between Criminal Offending and Experience of Arrest Across Two Cohorts*, 5 Russell Sage Found. J. Soc. Sci. 89 (2019).

Black).[12] Detention on a misdemeanor charge, even one that does not result in conviction, can last for weeks or even months (especially for people of color), with all the personal and familial disruption that entails.[13]

Street policing's collective toll is also huge. Subjection of urban communities to routine stops and arrests for the offenses of "walking while Black" or "driving while Latino" raises tensions,[14] sends the message that people of color are inferior human beings,[15] ruptures relationships with the police,[16] and undermines the legitimacy of the government.[17] Police

12 Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. Rev. 951 (2020) (finding that, when there are no circumstances that would render a shooting objectively reasonable for the purposes of the Fourth Amendment, Black suspects are more than twice as likely as other suspects to be killed by police); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 131 (2017) ("Fourth Amendment doctrine expressly authorizes or facilitates the very social practice it ought to prevent: racial profiling. This authorization and facilitation expose African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse.").

13 Shima Baradaran Baughman, *Dividing Bail Reform*, 105 Iowa L. Rev. 947, 979 (2020) ("Some counties automatically detain without bail, at least for a time, certain categories of misdemeanor defendants."); Lauren E. Glaze & Laura M. Maruschak, U.S. Dep't of Justice, Parents in Prison and Their Minor Children 2, 17 tbl.9 (rev. ed. 2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf [https://perma.cc/HN6B-RZVR] (finding that poor people are more likely to be arrested and jailed, and Black children are twice as likely as white children to have experienced the incarceration of a parent); Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 9–11 (2018) (arguing that, historically, misdemeanors have been central to the criminalization of Black men).

14 *Terry* itself recognized this point. The Court stated that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups," Terry v. Ohio, 392 U.S. 1, 14–15, 39 n.11 (1968) (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967)), and then asserted that such stops "cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets,'" *id.* (quoting Lawrence Tiffany et al., Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 47–48 (1967)).

15 Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2056, 2100 (2017) (advancing "a theory of detachment and eventual alienation from the law's enforcers [that] reflects the intuition among many people in poor communities of color that the law operates to exclude them from society"); Ekow Yankah, *Pretext and Justification: Republicanism, Policing and Race*, *in* The Cambridge Handbook of Policing in the United States 122, 133 (Tamara R. Lave & Eric J. Miller eds., 2017) (arguing that pretextual seizures "are wounding because they undermine the sense that one's claim to civic equality is shared by one's fellow citizens").

16 David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 308–09 (1999) (recounting how mistrust among the Black community undermines the ability to implement community-based policing); Bell, *supra* note 15, at 2100.

17 Harris, *supra* note 16, at 298–99 (asserting, based on interviews with Black people subject to "pretextual" stops, that "[r]acially targeted traffic stops cause deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts" and lead Black jurors to "regard the testimony and statements of police with suspicion").

patrolling practices are a key reason that calls for defunding the police or abolishing police departments outright have become popular with groups like the Movement for Black Lives.[18]

The police will say that street policing is an important way of keeping weapons off the streets, forestalling incipient crime, discovering people with outstanding warrants, serendipitously finding evidence of more serious crime, and, in general, keeping a handle on the neighborhood.[19] They are backed up by research suggesting that "aggressive policing" produces higher arrest rates for robbery, decreases various types of thefts and gun crimes, and increases seizures of guns.[20] But there are also numerous counter-studies suggesting that this type of policing is not very effective at reducing crime or gun violence.[21]

Proposals to mitigate the negative effects of street policing are legion. In an effort to deter the use of street encounters as pretexts to harass or conduct searches incident to arrest, reformers have advocated for decriminalization of misdemeanors,[22] the conversion

18 *Black Lives Matter Goes Big on Policy Agenda*, Politico (Aug. 28, 2020), https://www.politico.com/news/2020/08/28/black-lives-matter-breathe-act-403905 (describing the movement's support for the Breathe Act, which calls for an end to stop and frisk).

19 The two best-known proselytizers of this view were William Bratton, who became famous as New York City's Police Commissioner under Mayor Rudy Guiliani, and James Q. Wilson, a political scientist. *See generally* William Bratton & Peter Knobler, Turnaround: How America's Top Cop Reversed America's Crime Epidemic (1998); James Q. Wilson, Thinking About Crime (2013).

20 Bratton & Knobler, *supra* note 19, at 152–56, 228–29, 233–39; William H. Sousa & George L. Kelling, *Of "Broken Windows," Criminology, and Criminal Justice*, *in* Police Innovation: Contrasting Perspectives 77, 83–87 (David Weisburd & Anthony A. Braga eds., 2006); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 Fordham Urb. L.J. 567, 573–79 (2000); Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & Econ. 235, 250–61 (2005); Lawrence W. Sherman, *Police and Crime Control*, *in* Modern Policing 197 (Michael Tonry & Norval Morris eds., 1992) (reporting studies in San Diego, Newark, and other cities).

21 *See* Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271, 297–99 (2006); Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, in Guns, Crime, and Punishment in America 191, 198 (Bernard E. Harcourt ed., 2003); Yili Xu et al., *Discovering the Impact of Community Policing: The Broken Windows Thesis, Collective Efficacy, and Citizens' Judgment*, 42 J. Res. Crime & Delinq. 147, 154–55 (2005); Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 Brit. J. Criminology 531, 547 (1999); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 Am. J. Socio. 603, 637–39 (1999); Comm. to Rev. Resources on Police Pol'y & Pracs., Nat'l Res. Council, Fairness and Effectiveness in Policing: The Evidence 224–25 (Wesley Skogan & Kathleen Frydl eds., 2004).

22 The Spangenberg Project, An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing (Sept. 2010), https://perma.cc/J9BN-6VLU (calling for full and widespread decriminalization of misdemeanors and other minor offenses as a cost-saving measure that would ease "problems with overcrowding, over-burdened prosecutors and public defenders with unfeasible caseloads and understaffing").

of misdemeanors to citation-only offenses,[23] or the reduction of custodial arrests more generally.[24] For the same reason, some propose that police should no longer have the authority to make traffic stops (a task that would be off-loaded to unarmed government officials)[25] or should be prohibited from asking for consent to search a stopped car.[26] And, most significantly, reformers want stop and frisk to be eliminated; *Terry*, they contend, should be reversed.[27]

No jurisdiction has seriously pursued any of these ideas, however. And far from contemplating these moves, courts have facilitated the current state of affairs. Undoubtedly *Terry* opened the door here, but that decision could have been interpreted narrowly. Instead, the Supreme Court and lower courts have pushed it in the opposite direction. Stops are allowed for conduct that falls far short of criminal activity, and frisks are permitted virtually automatically if a stop has occurred.[28] And the Court has relied on *Terry*'s reasoning and the Fourth Amendment's Reasonableness Clause to bolster decisions that not only permit but *incentivize* the abuse of misdemeanor arrests and traffic stops as pretexts for acting on mere hunches, racially charged or otherwise.[29]

This much has been well-documented. Less widely noticed is that *Terry* and related case law stand in telling contrast to the Supreme Court's recent tendency to put a damper on searches that occur *outside* the street policing setting and that—coincidentally or not—are much more likely to affect the middle class (and, concomitantly, white people). In *Jones v. United States*,[30] for instance, the Court required a court order before prolonged GPS tracking, and in *United States v. Carpenter*,[31] the Court required a warrant before cell

23 Rachel Harmon, *Why Arrest?*, 115 U. Mich. L. Rev. 307, 309 (2017) ("[O]ur traditional justifications for arrests—starting the criminal process and maintaining public order—at best support far fewer arrests than we currently permit."). A similar proposal is to exclude any evidence that is not associated with the purpose of the arrest. *Cf. infra* text accompanying notes 150–163.

24 *Cf.* Mark Goreczny, *Taking Care While Doing Right by the Fourth Amendment: A Pragmatic Approach to the Community Caretaker Exception*, 14 Cardozo Pub. L., Pol'y & Ethics 229, 251 (2015).

25 Jordan Blair Woods, *Decriminalization, Police Authority and Traffic Stops*, 62 UCLA L. Rev. 672, 756–59 (2015) (proposing that "the bulk of noncriminal traffic enforcement . . . be removed from the hands of the police," and detailing a system for doing so).

26 Phyllis Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 523–34 (1991) (stating that "except for routine customs searches at international borders, the Court should eliminate the consent exception totally . . . because it offers too much room for subtle or overt coercion").

27 Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1337 (1990) ("The unstructured balancing formula wrung from *Terry* should be discarded so the fourth amendment can return to its rightful place 'in the catalog of indispensable freedoms' that sets our nation apart from much of the world.").

28 *See infra* text accompanying notes 51–56.

29 *See infra* text accompanying notes 57–74.

30 United States v. Jones, 565 U.S. 400 (2012).

31 Carpenter v. United States, 138 S. Ct. 2206 (2018).

site location data may be obtained. Counterposed to the Court's *Terry* jurisprudence, these cases expose a glaring inequality in Fourth Amendment jurisprudence. The types of searches that took place in *Jones*, *Carpenter*, and other Court cases involving technologically enhanced investigations can work significant infringements of privacy. But they do so remotely and covertly and thus do not trigger the humiliation, stigmatization, and fear that accompany stops and frisks and other types of publicly visible street policing. Not surprisingly, survey research (some of which I have conducted) strongly suggests that, on a spectrum of intrusiveness, stops and frisks are perceived to be similar in impact to the types of searches addressed in *Jones* and *Carpenter*.[32]

If technological tracking and searches of digital records require probable cause that evidence of crime will be found, stops and frisks should require probable cause that a crime has been committed (in the case of stops) or that evidence of crime will be found (in the case of frisks). This equalization of regulatory regimes not only fits general notions of fairness. It can also be derived directly from the Fourth Amendment. For some time, I have been promoting the argument that the amendment's Reasonableness Clause and the Court's cases construing it, including *Terry*, endorse a "proportionality principle," which posits that the justification for a search or seizure should be roughly proportionate to its intrusiveness.[33] Following that reasoning, if stops and frisks are as intrusive as searches that the Court has said require probable cause, they should no longer be permissible on mere reasonable suspicion.

The proposition that, in Fourth Amendment terms, street policing and the types of searches involved in *Jones* and *Carpenter* are on the same footing sits in some tension with *Terry*'s two rationales for *not* requiring probable cause on the streets: the fact that short detentions and frisks are less intrusive than custodial arrests and full searches of the person, and the need for a mechanism that allows police to act before crime occurs.[34] But neither rationale justifies *Terry*'s result. While a stop is not an arrest, it still visits constraints on liberty and autonomy that are as intrusive as the privacy invasions associated with the Court's technological search cases. And applying the probable cause requirement of those cases to the streets would not prevent police from carrying out investigative detentions when they believe "criminal activity may be afoot." Rather, it would limit such detentions and subsequent searches to situations where they observe or have another good basis for believing that a person has engaged or is engaging in an attempted crime as defined by the law of the jurisdiction.

32 *See infra* text accompanying notes 93–95.

33 The most recent iteration is found in Christopher Slobogin, Virtual Searches: Regulating the Covert World of Technological Policing (2022). I also developed the proportionality idea in Christopher Slobogin, Privacy at Risk: The Fourth Amendment and the New Government Surveillance 21–47 (2007).

34 *See supra* text accompanying notes 2–3.

As applied to detentions on the street, this rule would not veer significantly from the original *Terry* holding, which involved an attempted robbery.[35] The difference would be that rather than applying the amorphous reasonable suspicion standard that *Terry* conjured out of thin air, police would be implementing the substantive criminal law—specifically, the law of attempts, the primary purpose of which is to criminalize the inchoate behavior that precedes crime. Compared to the courts' interpretation of *Terry*, attempt jurisprudence would cabin police preemptive practices relatively precisely by requiring observation of conduct that amounts to a substantial step toward or dangerous proximity to commission of a crime.[36] While *Terry* and a few other Supreme Court stop cases would come out the same way under this formulation, the many cases approving stops of people because they avoided the police, fit a "profile," acted in a "furtive" manner, or appeared out of place would not.[37]

The proposed equalization of street policing with technological policing would bring even more significant changes to the law governing post-detention searches. If the probable-cause standard currently gaining ascendancy in technological policing cases were also applied to post-detention searches, not only the law of frisks but the law of searches incident to arrest would need to change. Under today's jurisprudence, if a person is arrested for a custodial offense, police may automatically conduct a full search of the arrestee for evidence and weapons, not just frisk for weapons.[38] In contrast, converting *Terry*'s frisk doctrine into one that requires probable cause to carry out a search, as I propose, would mean that a search incident could *not* be automatic. Rather, it could occur only when police have probable cause to believe the person has a weapon or possesses evidence of crime. To minimize the temptation for police to manufacture a more serious crime after they discover a weapon or evidence during a suspicionless search of a misdemeanant, they should also have to announce the offense of arrest at the time it occurs.

While this would work a significant change in search-incident law, note that because the predicate for detention would be an arrest, police could protect themselves and others with handcuffing or other types of restraints.[39] Further, when the arrest is for an attempt to commit or commission of a violent or serious crime (such as the robbery suspected in *Terry*), probable cause to believe a weapon is present would usually exist. Similarly, if police arrest someone in connection with a drug crime, they usually would have probable cause to search for evidence of drug possession or sale. It is only when police arrest someone for a nonviolent crime, such as jaywalking, trespass, or a traffic infraction, that such

35 *See infra* text accompanying notes 130–36.

36 *See infra* text accompanying notes 118–24.

37 *See infra* text accompanying notes 51–56.

38 *See infra* text accompanying notes 62–66.

39 *See infra* text accompanying notes 148–54.

cause would usually be lacking. And that is precisely when neither a frisk nor a full search should be permitted. The Supreme Court itself has come close to recognizing that norm in the traffic-stop context by prohibiting searches of cars incident to arrest unless there is reason to believe that evidence of the offense of arrest will be found.[40]

Thus, the equalization of street policing with technological search jurisprudence would not only significantly restrict stop and frisk practices. It would also have an impact on the other two most-abused aspects of street policing: misdemeanor arrests and traffic stops. In doing so, it would help rectify the racial imbalance inherent in today's street-policing practices. Even if other reforms of these two components of street policing remain stymied, recognizing that equality norms require probable cause for nonconsensual detentions and post-detention searches could go a long way toward accomplishing the same goals.

After rehearsing current law under *Terry*, this article makes clear how disproportionate that law is to the law governing other types of searches and seizures. It then explains further the implications of that comparison for street policing.

THE LAW OF STREET POLICING

The Fourth Amendment places very few constraints on policing of the streets. Beginning with the *Terry* decision, the Supreme Court has approved a wide array of practices that give the police close-to-unlimited discretion to do as they will. While *Terry* jurisprudence on stops and on frisks is the prime example of this permissive attitude, the Court's subsequent decisions on the exclusionary rule, search incident to arrest doctrine, vagueness doctrine, and the (ir)relevance of police motivations have also broadened and deepened that power.

Start with *Terry* and stop and frisk. At the Supreme Court level alone, over two dozen cases address the definition of reasonable suspicion. In all of them, the Court has tried to distinguish between "hunches," on the one hand, and, on the other, "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[41] Applying this distinction, the Court has said that police cannot stop a car near the border solely on the basis that it is full of people of apparent Mexican ancestry[42] but may stop a vehicle near the border that is full of people of apparent Mexican ancestry whose occupants fail to acknowledge the agent and wave "oddly" at him.[43] It has said that police may not

40 *See infra* text accompanying notes 150–55.

41 *See* United States v. Arvizu, 534 U.S. 266, 273–74 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing[;] . . . an officer's reliance on a mere 'hunch' is insufficient to justify a stop.").

42 United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

43 *Arvizu*, 534 U.S. 266 (2002).

stop individuals in a "high drug problem area" who walk away from one another when they see the police[44] but may stop an individual in a high-crime area who runs away from the police.[45] It has invalidated an airport stop of a person who gets off a plane from a supposed drug-source city with no luggage other than a shoulder bag and an apparent desire to conceal that he is traveling with another person[46] but permitted an airport stop of a person coming from a drug-source city who was pale and nervous, appeared to have heavy luggage, used cash to pay for his ticket, and did not provide full identifying information on his luggage tags.[47]

Although there are differences between these pairs of cases, they are ephemeral and have nothing to do with whether the reasons police give for a stop are "particularized" or "objective."[48] Factors such as ancestry, the criminality of a given location, and the city of departure are general characteristics that apply to hundreds of thousands of people. And whether a person has failed to acknowledge the police, waved "oddly," left the scene quickly, or appeared nervous are all subjective judgments, as is the relevance of these factors to whether the person acted "suspiciously." Perhaps realizing this, time and again the Court has stated that police decisions to stop a person should be viewed from the perspective of those who are "versed in the field of law enforcement"[49] and have "specialized training."[50] In effect, this formulation hands the definition of "reasonable suspicion" over to the police.

David Harris's survey of how lower-court decisions applied *Terry* twenty-five years ago supports that view.[51] Harris found that while the courts usually concluded that mere presence in a high-crime area is an insufficient basis for a stop (presaging the Supreme Court's 2000 decision in *Illinois v. Wardlow*[52]), many also decided that such presence combined with evasion can constitute reasonable suspicion, and a few held that avoiding the police, by itself, is a ground for a stop.[53] Harris also noted that many courts allowed police to take

44 Brown v. Texas, 433 U.S. 47 (1979).

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

46 Reid v. Georgia, 448 U.S. 438 (1980).

47 Florida v. Royer, 460 U.S. 491 (1983).

48 This point is emphasized in Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 415 (2006) ("The distinction breaks down almost immediately. Is the fact that a suspect seems nervous to a police officer an objective piece of evidence or a subjective one? Is the fact that a suspect is found in a high-crime area particularized evidence or general evidence? It should not be surprising that the cases are all over the map on these and dozens of similar questions.").

49 United States v. Cortez, 449 U.S. 411, 418 (1981).

50 United States v. Arvizu, 534 U.S. 266, 273 (2002).

51 David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric v. Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975 (1998).

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

53 Harris, *supra* note 51, at 990–96, 998–99.

"racial incongruity" into consideration "along with other factors."[54] Finally, he found that "almost any time that the crime suspected in a *Terry* situation involves drugs, courts routinely allow a frisk following a stop as a matter of course" without distinguishing, for instance, between a stop on suspicion of drug trafficking or of simple possession.[55]

It is unlikely that courts have tightened things up in the past quarter century. In fact, in 2018, Harris and David Rudofsky, relying on data from New York and Philadelphia, noted how frequently the police relied on factors such as a "bulge," uncooperativeness, hands in pockets, presence in a high-crime neighborhood, nervousness, furtive movements, and "flight," or some combination thereof, in stopping individuals, and yet how infrequently—well under one percent of the time—the stops produced a weapon or evidence of serious crime.[56] Although they did not report how New York and Philadelphia courts reacted to these stops, presumably the police did not fear any judicial repercussions in these cities.

Police may be unconcerned about judicial pushback not only because the courts' interpretation of *Terry* has granted them considerable discretion but because the threat of exclusion, which is the courts' only real tool for monitoring street policing, has no direct effect on them, something *Terry* itself recognized;[57] while the police may occasionally get feedback about the constitutionality of their stops during a suppression hearing, their main concern is meeting their stop quotas and getting weapons and drugs off the streets.[58] Additionally, any deterrent effect that exclusion may have vis-à-vis illegal stops has been

54 *Id.* at 996–98.

55 *Id.* at 1001.

56 David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 Ohio St. L.J. 501, 541–43 (2018) (noting that in Philadelphia, "in audits conducted in 2014–2016, of 220 frisks based on a 'bulge,' only one weapon was seized, a hit rate of less than 0.5%," and "[f]risks conducted where officers reported that suspects failed to take their hands out of their pockets, were not 'cooperative,' engaged in furtive movements, or were stopped in high-crime areas were similarly unproductive"; the data in New York City "are strikingly similar," and "the least helpful indicators of weapon possession were amorphous factors like 'furtive movements'").

57 Terry v. Ohio, 392 U.S. 1, 14 (1968) ("Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.").

58 The sociological literature is unanimous on this point. *See* Jonathan Rubinstein, City Police 45 (1973) ("Arrest activity is computed from what the patrolman 'puts on the books' and not by the disposition of his cases in court. Since activity is a measure of his work, his sergeant has no interest in what eventually happens to the cases."); Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24, 33 (1980) ("[T]hese policemen, especially those who are assigned to narcotics and gambling investigations, are evaluated almost exclusively on their arrest records, and pressures for arrests dominate their working lives."); Jerome H. Skolnick, Justice Without Trial 166, 169 (1975) ("For detectives, clearance rates are the most important measure of accomplishment," and the "designation 'cleared' merely means that the police believe they know who committed the offense.").

further weakened by the Supreme Court's decision in *Utah v. Strieff*,[59] which held that even evidence found during an unconstitutional stop is admissible if, after the stop, police discover an outstanding arrest warrant that authorizes a custodial arrest and a search incident to that arrest. Since in many jurisdictions tens of thousands of these warrants exist, often for picayune offenses like failure to pay court fees or traffic violations,[60] *Strieff* incentivizes stops on less than reasonable suspicion.[61]

As *Strieff* illustrates, the law of searches incident to arrest makes matters worse. Under the Court's decisions, if the police have probable cause to arrest, they can automatically conduct a full search of the person, not just a frisk, regardless of the crime of arrest.[62] The only limitation the Fourth Amendment imposes on such searches is that the officer must be willing to take the person into custody for an offense for which custody is authorized,[63] the latter an issue usually left entirely up to the officer or the police department.[64] Although some state courts have interpreted their own constitutions to prohibit searches incident to arrest in connection with minor traffic infractions and the like,[65] the Supreme Court has refused to do so, providing additional incentive to detain people for minor infractions.[66]

Using vagueness doctrine developed under the Due Process Clause rather than the Fourth Amendment, the Court *has* struck down loitering laws—laws that, ironically, criminalized the type of suspicious conduct that *Terry* jurisprudence says can form the basis for

59 Utah v. Strieff, 579 U.S. 232 (2016).

60 *See id.* at 250 (Sotomayor, J., dissenting) (stating that "[t]he States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses," such as failure to pay traffic fines, missing court appearances, and violation of curfew).

61 *Id*. at 250–51 (citing the Department of Justice's report about police practices in the wake of the Michael Brown killing indicating that "officers 'routinely' stop people—on the street, at bus stops, or even in court—for no reason other than 'an officer's desire to check whether the subject had a municipal warrant pending'" and that "'approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion'").

62 United States v. Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

63 Knowles v. Iowa, 525 U.S. 113 (1998).

64 *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 365 (1973) (O'Connor, J., concurring) (describing the rules of Texas's training program for traffic enforcement regarding when a person should be taken into custody).

65 *See*, *e.g.*, State v. Rodarte, 125 P.3d 647 (N.M. Ct. App. 2005) (rejecting *Atwater*, 532 U.S. 318); Zehrung v. State, 59 P.2d 189 (Alaska 1977) (rejecting *Robinson*, 414 U.S. 218); People v. Clyne, 541 P.2d 71 (1975) (same).

66 *Robinson*, 414 U.S. at 234–35 (permitting a search incident to arrest for a revoked license, pointing to the danger associated with any custodial arrest and the inefficiency of "case-by-case adjudication"); *Atwater*, 532 U.S. at 351 (permitting a search incident for violation of a seat belt law, stating that any attempt to draw lines "would come at the price of a systematic disincentive to arrest in situations where . . . arresting would serve an important societal interest").

a stop—on the ground that these statutes give the police too much discretion![67] Read generously, these cases at least prevent a full search on mere suspicion of wrongdoing. But vagueness doctrine is of virtually no help in regulating most street policing. As William Stuntz pointed out,[68] most of the statutes on which police rely to go after petty antisocial conduct are not vague; rather, they are found in criminal codes that, relatively precisely, penalize an inordinately broad array of routine conduct from which the police can pick and choose. Indeed, traffic violations have been called the new general warrant—not because they fail to particularly describe when police may act but because their ubiquity means that all of us violate them all the time (think not just of speeding and red-light laws, but seat-belt, stop-sign, cell-phone, traffic-lane, turn-signal, and equipment violations).[69] Misdemeanors such as criminal trespass, jaywalking, subway turnstile jumping, simple drug possession, loitering, vandalism, and disorderly conduct serve a similar function with respect to pedestrians.[70] In league with *Terry* and *Strieff*, these statutes give police authority to stop people based on reasonable suspicion (or less) and carry out tens or hundreds of thousands of unnecessary frisks and searches each year.

Finally, lurking in the background of all of this, but highly influential at both the street and the court level, is the Supreme Court's refusal to investigate police motives or beliefs. Most famous in this vein is the unanimous decision in *Whren v. United States*[71] holding that the Fourth Amendment has nothing to say about searches triggered by a mere hunch (or worse) as long as police can also point to a legitimate reason for their arrest or stop. But the Court has pushed the pretext envelope even further with its decisions upholding

67 *See*, *e.g.*, Kolender v. Lawson, 461 U.S. 352, 360 (1983) (holding unconstitutional on vagueness grounds a statute criminalizing a failure to provide "credible and reliable" identification because it "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" (quoting Papachristou v. City of Jacksonville, 504 U.S. 156, 170 (1972)); Chicago v. Morales, 527 U.S. 41, 60 (1999) (holding unconstitutional on vagueness grounds a statute that criminalized a failure to disperse after remaining in any one place "for no apparent purpose" because it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat").

68 William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 Mich. L. Rev. 505, 560 (2001) ("Vagueness doctrine rules out enacting all-encompassing crimes, but it permits the creation of many smaller, more tightly defined offenses. It thus pushes legislatures to expand criminal law by accumulation, by adding ever more distinct acts to the criminal code.").

69 Although several scholars have made this point, the first one to do so, as far as I can tell, was Barbara C. Salken in *The General Warrant of the Twentieth Century?: A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1989).

70 M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 NYU Rev. L. & Soc. Change 351, 360 (2012) (listing these offenses and stating that "[l]ow-level misdemeanors now comprise the overwhelming majority of crimes charged annually. Arrests are so routine, numerous, and seemingly trivial that nearly half of these complaints are resolved at arraignments.").

71 Whren v. United States, 517 U.S. 806, 813 (1996) ("We think [the Court's precedents] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

the validity of searches that occur after an arrest for a different crime than the one committed,[72] or crimes that are not even on the statute books,[73] as long as a reasonable officer could have concluded that the arrest was valid based on the known facts. These cases may be understandable on formal grounds (the Fourth Amendment prohibits only "unreasonable" searches) or practical ones (reading an officer's mind is difficult). But, together with the Supreme Court's stipulation that proof of discriminatory intent must be shown to prove a violation of the Equal Protection Clause,[74] they allow both police and courts to turn a blind eye toward biased and racialized policing practices.

Street policing will continue to generate abysmally low hit rates, disproportionately affect people of color, disrupt police-community relations, and provide fodder for the anti-policing movement unless the legal bases for stops, frisks, and searches incident to arrest are radically changed. New developments in the Court's search jurisprudence may provide a rationale for doing so.

THE LAW OF TECHNOLOGICAL POLICING

The same term it handed down *Terry*, the Supreme Court decided *Katz v. United States*,[75] which has come to stand for the proposition that a Fourth Amendment search occurs whenever the police infringe an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"[76] An electronic surveillance case, *Katz* was meant to move the scope of the Fourth Amendment beyond the property orientation that had permeated the Court's earlier cases to a more capacious conception. Neither the phone booth that the police bugged in *Katz* nor Katz's conversation over the booth's phone was a house, person, paper, or effect (the four "constitutionally protected areas" found in the Fourth Amendment)

72 Devenpeck v. Alford, 543 U.S. 146, 153 (2004) ("[T]he officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.").

73 Heien v. North Carolina, 574 U.S. 54, 61 (2014) ("Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground.").

74 Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."); *see also* David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 S. Ct. Rev. 271, 308, 325 (1997) ("The Supreme Court has construed the Equal Protection Clause to permit almost any government action that avoids explicit discrimination, unless it can be shown to be based on outright hostility to a racial or ethnic group. . . . And even when a police officer *does* act out of racial animus—pulling over a black motorist, for example, simply because the officer does not like blacks—*demonstrating* that typically proves impossible.").

75 Katz v. United States, 389 U.S. 347 (1967).

76 This language comes from Justice Harlan's opinion in *Katz*, 389 U.S. at 361 (Harlan, J., concurring), but the Court has since adopted it as the definition of search. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 39–40 (1988).

as those terms are traditionally defined.[77] Nor did the placement of a bugging device on top of the booth work a common-law trespass.[78] Yet the Court's sense was that the privacy of Katz's communication was worth constitutional protection and that its interception required a warrant.[79]

However, over the next twenty years, the Court developed four doctrines that pretty much confined application of *Katz* to government attempts to discover the content of private communications. Through its "knowing exposure" doctrine, the Court left unprotected from surveillance any activity that an individual knowingly displays to the public.[80] The Court's "general public use" doctrine allowed police to use any technology generally available to private citizens to observe not just public activities but goings-on inside the home.[81] The "evidence-only" doctrine declared that an investigation that revealed only evidence of crime and no other fact (as allegedly occurs with drug-detection dogs) is not a Fourth Amendment search.[82] And the "assumption of risk" or "third party" doctrine provided that information that a person knows or should know is in the possession of a third party assumes the risk that the third party will turn that information over to the government.[83] If these doctrines apply, the Court pronounced, the Fourth Amendment is irrelevant; the police do not need even reasonable suspicion, much less probable cause.

Beginning at the dawn of the twenty-first century, however, the Court began a slow about-face. The first doctrine to take a hit, albeit a glancing one, was the general-public-use doctrine. In *Kyllo v. United States*,[84] the Court held that police need a warrant to use a thermal imager to gauge heat differentials inside a house, even though such devices are relatively easy to obtain. Eleven years later the Court decided *Jones v. United States*,[85]

77 *Katz*, 389 U.S. at 519 (Black, J., dissenting) ("The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions.").

78 *See* Olmstead v. United States, 277 U.S. 438. 457 (1928) (holding that insertions of wires on telephone lines outside the defendant's property "were made without trespass upon any property of the defendants").

79 *Katz*, 289 U.S. at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

80 *Katz* itself stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351; *see also* United States v. Knotts, 460 U.S. 276, 281 (1983) (tracking a car on public thoroughfares is not a search); California v. Ciraolo, 476 U.S. 207, 211 (1986) (observing a backyard from public airspace is not a search).

81 Dow Chemical v. United States, 476 U.S. 227, 231 (1986) (use of surveillance technology that is "generally available to the public" is not a search).

82 Illinois v. Caballes, 543 U.S. 405, 408 (2005) (citing, among other cases, United States v. Place, 462 U.S. 469 (1983)).

83 United States v. Miller, 425 U.S. 435, 443 (1976).

84 Kyllo v. United States, 533 U.S. 27, 40 (2001).

85 Jones v. United States, 565 U.S. 400 (2012).

which more directly attacked both the general-public-use and knowing-exposure doctrines in holding that planting a simple GPS device on a car and tracking it is a Fourth Amendment search, even if the car travels only on public thoroughfares. A year later, in *Jardines v. Florida*,[86] the Court held that a warrant is needed to use a drug-sniffing dog near a house, putting a dent in the evidence-only doctrine. And, in its most momentous decision in this vein to date, in *Carpenter v. United States*[87] it held that a warrant is required to obtain a person's cell site location data from the person's common carrier, a decision that the dissenters declared marked the beginning of the end for the third-party doctrine.[88]

For present purposes, the importance of this set of decisions—what I will call the Court's technological search cases—is in their contrast to the holdings in *Terry* and its progeny. Whereas a stop involves a physical confrontation that can legally last for up to twenty minutes and often goes much longer[89] and a frisk involves systematically running hands over a person's limbs and crotch, all of which takes place in full view of the public,[90] technological searches occur remotely and covertly. While the searches in *Kyllo*, *Jardines*, *Jones*, and *Carpenter* all involved serious invasions of privacy—a point I have emphasized in my writing[91]—they did not trigger the humiliation, physical discomfort, or fear and anger that a stop and frisk does, particularly for people of color.[92] Surveys that I and others have conducted asking participants to rate the "intrusiveness" of various types of policing practices confirm that a pat-down is viewed as more intrusive than short-term

86 Jardines v. Florida, 569 U.S. 1 (2013).

87 Carpenter v. United States, 138 S. Ct. 2206 (2018).

88 *Id.* at 2247 (Alito, J., dissenting) ("Unless [*Carpenter*] is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval.").

89 *See* United States v. Sharpe, 470 U.S. 675 (1985) (upholding a stop of twenty minutes, at least when police are diligent and the suspect is partially to blame for the delay); *see also* Tracey Maclin, *Anthony Amsterdam's Perspectives on the Fourth Amendment, and What It Teaches About the Good and Bad in* Rodriguez v. United States, 100 MINN. L. REV. 1939, 1980 (2016) (describing "the discretionary tasks that courts currently allow, such as checking on outstanding warrants, requesting criminal history reports, seeking consent to search a motorist's vehicle, and questioning motorists about topics unrelated to the traffic stop").

90 Consider this excerpt about frisks from Rubinstein, *supra* note 58, quoting a police academy trainer:

> "Put your leg inside his, and if he moves you can trip him up. If he takes a few bumps, that's resisting. Frisk him systematically. Don't use your fingertips. Use your palms. Start with the palms on his head and work one side of his body and the other. Look at his hair, and don't be afraid to put your hands in his crotch, it won't bite. And if the guy gives you any shit, why you can give him a little shot to remember you while you're there."

Id. at 310–11.

91 *See* SLOBOGIN, VIRTUAL SEARCHES, *supra* note 33, at 54–56. Chapter 2 in this book also explains in more detail the Court's shifts in regulating technological policing.

92 Yankah, *supra* note 15, at 122–23 (stating that traffic stops "usually have a dangerous charge felt particularly by Black and Hispanic men who are pulled over at disproportionate rates—the feeling barely hidden by steeled voice, suppressed fury, slightly trembling hands, and knowing exhaustion").

tracking and thermal imaging[93] and as about as intrusive as dog sniffs,[94] albeit somewhat less intrusive than accessing months of location data and financial records.[95] Yet under the Fourth Amendment today, only technological searches require probable cause that a crime is occurring or has occurred. The Court could have adopted the reasonable suspicion standard in any of its technological search cases; in *Carpenter*, the government explicitly asked it to do so.[96] Yet the Court has insisted on probable cause in this setting, not the reasonable-suspicion test that applies in stop-and-frisk cases.

Formal explanations for this state of affairs do not quite ring true. Consider again *Terry*'s two rationales for creating the reasonable-suspicion standard in connection with stops and frisks.[97] The first is that short-term investigative detentions and pat-downs are less intrusive than arrests and full searches. There is no doubt that an arrest is a much greater insult to autonomy and liberty than the short detention associated with a stop and that a pat-down is less intrusive than a full search of all a person's belongings. But arrests and full-body searches are also much more intrusive than technological searches, unless, perhaps, the latter are very prolonged or accumulate significant amounts of private information (as with wiretapping). In other words, the fact that stops and frisks are less

93 *See* Slobogin, Privacy at Risk, *supra* note 33, at 112 (table showing results of a survey of lay people finding that "monitoring a beeper on a car for three days" was seen as less intrusive than "conducting a pat down of outer clothing; feeling for weapons"); Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing "Lay Expectations of Privacy,"* 11 U. Pa. J. Const. L. 331, 355 (2009) (same); Bernard Chao et al., *Why Courts Fail to Protect Privacy: Race, Age, Bias and Technology*, 106 Calif. L. Rev. 263, 300 (2018) (table showing results of a survey of lay people finding that "[p]olice taking images of your house using an infrared device to determine whether some surfaces (walls and roof) of your house are hotter than others" was seen as less intrusive than "[p]olice stopping you on the street and patting down your outer clothing to feel for weapons").

94 Christopher Slobogin & Joseph Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L.J. 727, 762 (1993) (table showing results of a survey of lay people finding that a dog sniff for drugs was seen as slightly more intrusive than a pat-down "at the airport after a terrorist threat," the latter a situation that, because of the danger involved and the implicit consent to pat-downs at airports, probably produced significantly deflated intrusiveness ratings, *id.* at 767–69); Blumenthal et al., *supra* note 93, at 355 (same).

95 Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. Chi. L. Rev. 317, 335 (2008) (table showing results of a survey of lay people finding that a pat-down was seen as about as intrusive as accessing phone, website, and credit card records (as well as searching a car) but less intrusive than accessing bank records); Blumenthal et al., *supra* note 93, at 355 (same); Chao, *supra* note 93, at 300 (finding that a pat-down was perceived as less intrusive than accessing *seven months* of phone location data).

96 The government had obtained an order under the Electronic Communications Privacy Act that required a showing of "specific and articulable facts showing that there are reasonable grounds to believe" that the information sought was "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(c)(1), (d). The Court was unimpressed. *See* Evan Caminker, *Location Tracking and Digital Data: Can* Carpenter *Build a Stable Privacy Doctrine*, 12 Sup. Ct. Rev. 411, 463 (2018) (noting that "the *Carpenter* Court wasted no words—literally zero—rejecting" an intermediate standard like reasonable suspicion).

97 *See supra* text accompanying notes 2–3.

intrusive than arrests and full searches of the person is not determinative of whether they should be regulated less strictly than technological searches.

Terry's second rationale was that probable cause must be dispensed with on the streets if police are to have an effective means of preventing crime. But, of course, technological searches are also often aimed at crime prevention; the police went after Kyllo, Jones, and Jardines because they believed those individuals were actively involved in drug production or drug trafficking,[98] and they focused on Carpenter because they suspected he was involved in a string of robberies over the previous four months that showed no signs of stopping.[99] I have argued in favor of a "danger" exception to the probable-cause requirement when police can identify a specific, serious, imminent threat (for instance, a bomb about to go off or kidnappers who might otherwise escape with their victim).[100] But a more general prevention exception to that standard would apply to a large proportion of searches and seizures and be contrary to most of the Court's search cases, not just those in the technological realm.

In short, *Terry*'s reasoning does not explain the Court's dichotomy between street policing and technological searches. A third explanation, admittedly speculative, has to do with the Court's failure of imagination rather than its legal reasoning. This explanation can perhaps best be illustrated by reciting an exchange during the oral arguments in *Jones* between Chief Justice Roberts and U.S. Solicitor General Michael Dreeben, who had just resorted to both knowing-exposure and assumption-of-risk language in arguing that Jones had no constitutionally recognized expectation of privacy while he drove the public thoroughfares.

> Roberts: You think there would also not be a search if you put a GPS device on all of *our* cars, monitored *our* movements for a month—you think you are entitled to that under your theory?
>
> Dreeben: Ah, the Justices of this Court?
>
> Roberts: Yes.
>
> Dreeben: Ah . . .
>
> Dreeben: Under our theory and this Court's cases, the Justices of this Court when driving on public roadways have no greater expectation of privacy . . .

98 *See* Kyllo v. United States, 533 U.S. 27, 30 (2001); Jones v. United States, 565 U.S. 400, 402 (2012); Jardines v. Florida, 569 U.S. 1, 3 (2013).

99 *See* Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018).

100 Slobogin, Privacy at Risk, *supra* note 33, at 28.

> Roberts: So your answer is yes. You could tomorrow decide to put a GPS device on every one of *our* cars, follow *us* for a month; no problem under the Constitution?
>
> Dreeben: Yes.[101]

The words "our" and "us" are italicized in this exchange to emphasize that Chief Justice Roberts, and presumably the rest of the Court, recognized that technological searches make it much easier to surveil not only those "other" people but also the justices themselves and people like them. That fact, by itself, may explain some of the Court's willingness to rethink its Fourth Amendment precedent as applied to technological searches.

In other work, I have argued that this expansion in the definition of search is a good thing, regardless of how it came about.[102] But the point here is that the type of questioning witnessed in *Jones* has never taken place in a stop-and-frisk case. While technology is bringing home to the justices in a personal way the implications of their knowing-exposure, general-public-use, evidence-only, and third-party doctrines, they continue to be insulated from the impact of *Terry* and its progeny. Perhaps a justice or two, or some of their good acquaintances, have been stopped by the police, had their car searched, or been frisked. But they have not been accosted by the police in the degrading, routine, and seemingly random way it happens to people of color living in our urban areas. It is more likely the specter of violent crime than concern about detentions on the street that influences many of the justices' decisions about *Terry*, the exclusionary rule, searches incident to arrest, and pretextual seizures.[103]

Whatever the explanation for the differential treatment of street policing and technological searches, the result is an unequal Fourth Amendment.

THE EQUALIZING IMPACT OF PROPORTIONALITY REASONING

Even if one agrees with the proposition that the differing standards applied to street and technological policing are unfair or racist, the Court's antidiscrimination jurisprudence will be of no help in changing the situation. The Court's cases interpreting the Equal Protection Clause require proof of both racially disparate treatment of otherwise similarly

101 Transcript of Oral Argument at 9–10, United States v. Jones, 615 F.3d 544 (2013) (No. 10-1259) (emphasis supplied).

102 *See* Slobogin, Virtual Searches, *supra* note 33, at 56–57.

103 For other evidence of the justices' apparent obliviousness to the class-based distinctions they have endorsed in their opinions, see Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 U. Fla. L. Rev. 391, 399–406 (2003) (comparing, inter alia, decisions that require a warrant for home investigations of tax fraud but hold that the Fourth Amendment does not apply to home investigations of welfare fraud, a decision that distinguished between search of a paper bag and search of a locked briefcase, and decisions that privilege property over privacy).

situated individuals and discriminatory intent, and evidence of either is very difficult to come by.[104] The fact that Black and brown people are more likely to be negatively affected by street policing is irrelevant.

But there is another pathway toward equalization, one that runs through the Fourth Amendment. For the past three decades, I have argued that the Fourth Amendment's Reasonableness Clause endorses what I call a proportionality principle.[105] Stated simply, the principle posits that the justification for a search or seizure should be roughly proportionate to its intrusiveness. Less-intrusive searches and seizures might be permissible on reasonable suspicion or something less; more-intrusive searches and seizures would be permissible on probable cause or something more.

The strongest support for constitutionalizing the proportionality principle comes, interestingly enough, from *Terry* and the Court's technological policing cases. Quoting from the year-old decision in *Camara v. Municipal Court*,[106] a home-inspection case, the Court in *Terry* endorsed the precept that there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[107] That is a proportionality test, and the Court has routinely applied it in analyzing the justification required for a seizure.[108]

Admittedly, the Court has proceeded somewhat differently in its search cases. Even though both *Camara* and *Terry* involved searches, for many years the Court claimed that it would "ordinarily" adhere to the probable-cause standard in the search setting.[109] But that claim is much harder to sustain now, in light of the Court's adoption of proportionality reasoning in its technological search cases as well as in its so-called special-needs decisions. In *Jones*, five justices distinguished short-term and "prolonged" tracking, with only the latter situation requiring a warrant.[110] In *Carpenter*, the Court expressly limited its warrant requirement to the facts of the case, which involved acquisition of seven days of cell site location data; in a footnote the Court stated that it "need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI

104 *See*, *e.g.*, Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001); *see also supra* note 74.

105 The first article in this vein was Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 68–75 (1991). *See also* Slobogin, Privacy at Risk, *supra* note 33, at 23–47; Slobogin, Virtual Searches, *supra* note 33, at 40–46.

106 Camara v. Municipal Court, 387 U.S. 523 (1967).

107 Terry v. Ohio, 392 U.S. 1, 21 (1967) (quoting *Camara*, 387 U.S. at 534–35).

108 *See*, *e.g.*, Michigan v. Summers, 452 U.S. 692 (1981) (detention during house search); Rodriguez v. United States, 575 U.S. 348 (2015) (traffic stop); Martinez-Fuerte v. United States, 428 U.S. 543 (1973) (checkpoint).

109 New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

110 Three justices joined Justice Alito's concurring opinion making this distinction, United States v. Jones, 565 U.S. 400, 431 (2012) (Alito, J., concurring), and Justice Sotomayor, who expressed concern about the "aggregated" data that tracking devices allow, appeared to agree with it, *id.* at 416 (Sotomayor, J., concurring).

free from Fourth Amendment scrutiny and, if so, how long that limit might be."[111] In another case involving technology and searches, *Riley v. California*,[112] the Court dismissed the relevance of centuries-old precedent holding that a warrant is not required to search an arrestee's effects (such as a wallet or purse) by asserting that comparing those actions to search of an arrestee's phone "is like saying a ride on horseback is materially indistinguishable from a flight to the moon."[113] And in over a dozen cases involving "special needs, beyond the normal need for law enforcement,"[114] the Court has permitted searches on less than probable cause because of its perception that they infringed lesser privacy interests.[115]

All these cases explicitly or implicitly recognized that the intrusiveness of a government action determines the justification needed to carry it out.[116] *Terry*'s conclusion that the Fourth Amendment endorses a proportionality analysis was correct. But—aided in hindsight by the Court's technological search cases—it should now be apparent, if it was not before, that *Terry*'s application of that analysis was wrong. The rough equivalence in the intrusiveness of stops and frisks on the one hand and technological searches on the other requires that police have probable cause—not just reasonable suspicion—that criminal activity is afoot before a stop or frisk may occur.

The challenge then becomes figuring out how to implement this equalization of street and technological policing. That implementation plays out differently depending on whether a seizure or a search is at issue.

111 Carpenter v. United States, 138 S. Ct. 2206, 2217 n.3 (2018).

112 Riley v. California, 575 U.S. 373 (2014).

113 *Id.* at 393.

114 *T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring). This terminology is now applied to a wide array of "administrative" searches and seizures. *See* City of Los Angeles v. Patel, 576 U.S. 409, 420 (2015) ("Search regimes where no warrant is ever required may be reasonable where "'special needs . . . make the warrant and probable-cause requirement impracticable'" and citing probationer, drug-testing, checkpoint, and inspection cases as examples).

115 *See, e.g.*, *T.L.O.*, 469 U.S. 325, 348 (1985) (permitting search of a purse on less than probable cause because, inter alia, "students within the school environment have a lesser expectation of privacy than members of the population generally"); Vernonia School District 47J v. Acton, 515 U.S. 646, 657–58 (permitting drug testing of student athletes for the same reason); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (permitting searches of employee's effects because, inter alia, "as with the building inspections in *Camara,* the employer intrusions at issue here 'involve a relatively limited invasion' of employee privacy"); Griffin v. Wisconsin, 483 U.S. 868, 879 (1987) (permitting searches of probationers on less than reasonable suspicion because "we deal with a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker," citing *T.L.O.*, 469 U.S. 325, and *Ortega*, 480 U.S. 709).

116 In my work, I have relied on this point in arguing that, while *Jones* and *Carpenter* correctly required probable cause for the searches in those cases, short-term tracking and limited digital searches should require only reasonable suspicion. *See* Slobogin, Virtual Searches, *supra* note 33, ch. 3.

THE STOP/ARREST

A stop is a detention that would lead a reasonable innocent person to believe they are not permitted to leave.[117] Under proportionality reasoning, police should not be able to carry out a stop unless they have probable cause to believe the person they want to detain is committing, has committed, or is about to commit a crime. *Terry*'s reasonable-suspicion standard, at least as applied by the Supreme Court and the lower courts since that case, allows a stop on much less.

Despite *Terry*'s insinuation to the contrary, a probable-cause requirement would not nullify police ability to tackle incipient crime. Every jurisdiction criminalizes attempts to commit crime as well as completed crimes. Attempt jurisprudence developed for the same reason *Terry* adopted the reasonable-suspicion standard—both bodies of law aim to authorize police intervention before a person intent on committing crime is able to cause harm.[118] The difference is the point at which that intervention may take place. In language familiar to those who know attempt law, *Terry* permits stops based on conduct that is well short of "mere preparation";[119] in contrast, the *actus reus* for attempt requires more than preparation to commit a crime before arrest may occur.[120]

The *actus reus* requirement for attempt varies from jurisdiction to jurisdiction. For instance, the common-law courts developed numerous, sometimes vague, definitions of the conduct necessary for attempt, all aimed at trying to capture when an individual is in "dangerous proximity" to committing a crime.[121] In part because of this imprecision and in part in an effort to move away from the "dangerousness" rubric and toward a less-demanding standard, the Model Penal Code (MPC) defined the *actus reus* for attempt as "conduct that constitutes a substantial step" toward commission of a crime and then provided that

> the following [steps], if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
>
> (a) Lying in wait, searching for or following the contemplated victim of crime;
>
> (b) Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

117 *See* Michigan v. Chesternut, 486 U.S. 567, 569 (1988); Florida v. Bostick, 501 U.S. 429, 438 (1991).

118 On the rationale for criminalizing attempts, see Wayne R. LaFave, Criminal Law 615–16 (5th ed. 2010) (stating that "attempt law makes possible preventive action by the police before the defendant has come dangerously close to committing the intended crime" and ensures that failure to commit crime merely because of a fortuity is punished).

119 *Id.* (distinguishing arrest law from stop and frisk practices, which may "not at all involve the substantive law of crimes").

120 *Id.* at 622 ("It is commonly stated that more than an act of preparation must occur.").

121 *See id.* at 623–28 for a description (and criticism) of the various common-law tests, including the dangerous-proximity, last-proximate-act, probable-desistance, indispensable-element, and *res ipsa loqitur* tests.

(c) Reconnoitering the place contemplated for the commission of the crime;

(d) Unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) Possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) Possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) Soliciting an innocent agent to engage in conduct constituting an element of the crime.[122]

The rationale for the MPC's approach could just as easily be applied to an analysis of stop-and-frisk jurisprudence:

> When a person is seriously dedicated to commission of a crime, a firm legal basis is needed for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge."[123]

There is much to this logic, which is in part why a majority of jurisdictions today follow the MPC's formulation rather than endorse one of the common-law tests for the *actus reus* of attempt.[124]

In an MPC jurisdiction that also abided by proportionality reasoning, police could be told they may make an investigative stop only under these types of circumstances. If such a stop is made and further inquiry (perhaps including, as discussed below, a search) makes

122 Am. L. Inst., Model Penal Code and Commentaries (Vol. II) 296 (1985).

123 *Id.* at 294.

124 *See* Avani Mehta Sood, *Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 Stan. L. Rev. 593, 604 n.40 (2019) (stating the MPC is "currently the standard for attempt among a majority of the states and in the federal system," and providing statutory citations).

clear that no crime was intended, then release should follow. If after further inquiry there is probable cause to believe the actor intended to commit a crime, the person could be taken into custody (although the decision whether to do so would be up to the officer).

While still leaving the police some discretion, the rule that police may detain a person only on a probable-cause belief they have completed or attempted a crime would significantly curtail street policing. First, it would import into street policing all the rules, stemming from cases like *Illinois v. Gates*,[125] requiring at least some indicia of reliability with respect to information from informants that police use in deciding whether probable cause exists. If that importation occurred, the stop and search that produced a gun in *Adams v. Williams*[126] might still be upheld because the informant who told the searching officer about the weapon was known to the officer, had come forward "personally to give information that was immediately verifiable at the scene," and was "subject to immediate arrest for making a false complaint" if the tip had proven incorrect.[127] But it would not support the stop for drunken driving in *Navarette v. California*,[128] which was based on a tip from an anonymous informant that a car had run another car off the road and was driving south on a certain highway, the latter assertion the only fact corroborated by the police.[129]

More significantly, the proposed rule would have a huge impact on stops involving direct police observation. No longer would factors such as presence in a high-crime neighborhood, nervousness, or evasion of the police, alone or in combination, be sufficient. Bulges underneath clothing and furtive movements would also often be inadequate, although much would depend on the context; for instance, a bulge under a coat of a person who appears to be stalking someone, or a furtive gesture by an individual who refrains from entering a vehicle when he sees the police, is different from a bulge or furtive movement by someone simply walking down the street. Most dramatically, in none of the six Supreme Court stop-and-frisk cases described in part II would there have been probable cause that a criminal attempt was afoot; all of the stops in those cases should have been declared unconstitutional.

This does not mean that the proposed formulation would require reversal of every decision in which the Court upheld a stop and frisk. Consider *Terry* itself. The facts of

125 Illinois v. Gates, 462 U.S. 213, 233 (1983) (stating that while the informant's 'veracity' or 'reliability' and his 'basis of knowledge' are both relevant factors in gauging whether the informant's information is sufficiently reliable for probable cause, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability").

126 Adams v. Williams, 407 U.S. 143 (1972).

127 *Id.* at 146–47.

128 Navarette v. California, 572 U.S. 393 (2016).

129 *See id*. at 407 (Scalia, J., dissenting) (stating that the tip was not even reliable enough for reasonable suspicion, and comparing the stop upheld in *Alabama v. White*, 496 U.S. 325 (1990), where an anonymous tipster provided significant detail unlikely to be known by many people and most of which was corroborated by police, to this case, where "generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road").

the case are well-known[130] but can be retold in a way that emphasizes their relationship to substantive criminal law. Officer McFadden, on his daily beat, saw Terry and Chilton walking past two establishments, a jewelry store and travel agency, at least four or five times, peering into the windows each time.[131] After completion of some or all of these circuits, McFadden saw Terry and Chilton confer with a third person, who turned out to be one Katz. Katz swiftly left the scene after one such meeting, but Terry and Chilton eventually joined him a few blocks away near an alley that offered a low-visibility shortcut to the store.[132] It was at this point that McFadden intervened. The trial court stated that it "would be stretching the facts beyond reasonable comprehension" to conclude that probable cause existed when the stop occurred.[133] Justice Harlan, in his concurring opinion in *Terry*, similarly stated that "Officer McFadden had no probable cause to arrest Terry for anything."[134] Yet probable cause does not require proof beyond a reasonable doubt. And under the MPC, as noted above, conduct that can form the *actus reus* for attempt includes "reconnoitering the place contemplated for the commission of the crime." *Terry*'s facts could easily give an officer probable cause to believe a burglary or robbery was underway. [135] In fact, McFadden later said he suspected the men were "casing a job, a stickup."[136] And if that was the crime warranting a stop, there was also probable cause to believe one or more of the three had weapons on their person (Terry and Chilton did; Katz did not).

In the same vein is a companion case to *Terry*, *Peters v. New York*,[137] where an off-duty officer saw, through the peephole in the door of his apartment, two strangers to his building tiptoeing down the hallway at 1 p.m. and then witnessed them take flight when he came into the hallway and slammed the door loudly behind him. These facts, like *Terry*'s, fit within the MPC's reconnoitering category. Indeed, the *Peters* Court stated that "it is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity."[138]

130 These facts are taken from Terry v. Ohio, 392 U.S. 1, 5–7 (1967), with the noted exceptions.

131 *See* John Q. Barrett, State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts*, 73 St. John's L. Rev. 1387, 1407 (1998).

132 *See* John Q. Barrett, *The Street Locations, Downtown Cleveland, October 31, 1963*, 72 St. John's L. Rev. 1384 (1998), https://ssrn.com/abstract=2857201 (map of the area in which the *Terry* stop occurred).

133 Barrett, *supra* note 131, at 1445.

134 *Terry*, 392 U.S. at 33 (Harlan, J., concurring).

135 Interestingly, at various points during the drafting process, Chief Justice Warren (the author of the opinion) and Justices Brennan, Black, and Douglas (the lone dissenter) all indicated they thought McFadden had probable cause to detain Terry. *See* John Q. Barrett, *Deciding the Stop and Frisk Cases: Inside the Supreme Court's Conference*, 72 St. John's L. Rev. 749, 798 (1998) (Warren); *id.* at 795 (Brennan); *id.* at 804–05 (Black); *id.* at 810 (Douglas).

136 Barrett, *supra* note 131, at 1418.

137 Peters v. New York, 392 U.S. 40 (1968).

138 *Id.* at 66.

Tying police preventive efforts to the law of attempts also has implications for the most important recent development in street policing: the use of big data to try to determine where crime might occur and who might commit it. Sometimes called predictive policing, the initial goal of this type of policing was to identify "hot spots" for crime relying on various place-related factors, such as crime data, calls for service, weather patterns, and the number and location of abandoned properties, schools, bars, and transportation centers.[139] In some cities, this effort has expanded into an effort to identity "hot people," relying on crime-related variables as well as age, gang membership, and social media references to gangs or violence.[140] While it is unlikely that the algorithms used in predictive policing could ever produce anything approaching reasonable suspicion, much less probable cause,[141] even if they did, they could not form the basis for a detention under an attempt-based approach to street policing unless the requisite *actus reus* for attempt was also observed. If, as appears to be the case, these algorithms rely solely on static factors such as previous arrests, location, and so on—data, by the way, that are often highly correlated with race[142]—they could not be used as grounds for a stop because they do not include the types of conduct required by attempt jurisprudence.

In sum, the equation of technological searches and investigative detentions would work major changes to street policing. Its impact on post-detention searches would be even more significant.

THE FRISK/SEARCH

Terry sensibly held that a stop does not automatically justify a frisk. Rather, the Court stated,

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and

139 *See* Andrew Ferguson, The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement 64–67 (2017).

140 *Id.* at 35–40.

141 *See* Slobogin, Virtual Searches, *supra* note 33, at 104 (arguing that reasonable suspicion should normally be quantified at about a thirty percent level of certainty and pointing out that achieving that hit rate with data-driven analysis would be very difficult).

142 Ferguson, *supra* note 139, at 73–76 (noting, inter alia, that "issues of race are bound up with issues of place. . . . Targeting areas with foreclosures or places of multifamily dwellings may too easily correlate with poor areas. Targeting areas with populations of returning citizens or probationers may too easily correlate with poor areas. Targeting areas with populations of returning citizens or probationers may not be severable from the policing strategies that cause those individuals to be in the criminal justice system in the first instance.").

> makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area 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.[143]

As to when it is "reasonable to conclude" that a person is armed and dangerous, the Court stated that "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[144]

It is worth noting that this latter language sounds remarkably like the definition of probable cause, which the Court has long defined as whether police have "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[145] In fact, in support of its "reason to conclude" language, the Court cited *Beck v. Ohio*,[146] the case from which the "prudent man" formulation comes (albeit with a "*cf.*" signal). Also signaling that the *Terry* Court would not have subscribed to the automatic frisks that are permitted today is the decision in *Sibron v. New York*,[147] another companion case to *Terry*, where the majority invalidated a frisk by an officer who had merely seen Sibron talking to individuals known to be addicts before he confronted him.

Whatever *Terry*'s original intent was regarding frisks, proportionality reasoning would require probable cause for all searches carried out after a street detention. Sometimes the offense of arrest will automatically provide probable cause. As argued above, *Terry* was such a case; Officer McFadden had grounds to believe a robbery was about to occur, which gave him probable cause to believe that the suspects would have a weapon on them. In *Sibron*, had the officer had probable cause to arrest for possession or attempted possession of drugs (he did not), he also would have had probable cause to search Sibron for those drugs. And sometimes probable cause to believe a person possesses a weapon or evidence will develop *after* an arrest. For instance, a person arrested for a traffic infraction may, upon closer examination, have a weapon underneath his clothing or a set of burglary tools in the back seat.

In the absence of such cause, however, a search should not take place. While current law, based on centuries of precedent, holds otherwise,[148] there are two countering considerations. The first, already noted, is that searches of the person are at least as invasive as

143 Terry v. Ohio, 392 U.S. 1, 30 (1967).

144 *Id.* at 27.

145 Beck v. Ohio, 370 U.S. 89, 91 (1964).

146 *Id.*

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

148 *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (noting "the right on the part of the government always recognized under English law and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidence of crime").

the technological searches that require probable cause. Second, automatic searches are not needed to protect the police or the public. Because, under the proposed regime, these searches may take place only after an arrest, police may handcuff the individual if their "spidey-sense" detects any danger in cases where the offense of arrest or other factors do not give them probable cause.[149] Once handcuffing occurs, any potential harm to officers or others is significantly mitigated.

The Supreme Court has recognized both of these rationales in connection with stops of cars. In *Arizona v. Gant*,[150] it reversed its previous cases allowing police to automatically search the interior of a car when its occupants have been arrested, holding that a search of the car incident to arrest is permissible only if it is "reasonable to believe" that evidence of the offense of arrest is in the vehicle.[151] Consistent with the concern driving its technological search cases, the Court stated that "a rule that gives police the power to conduct [a search of a car] whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals."[152] The same can be said for searches of arrested pedestrians.

The *Gant* Court also had an answer to the government's claim that automatic searches of arrestees' cars are necessary to protect the police. The majority cited Justice Scalia's concurring opinion in the earlier case of *Thornton v. United States*[153] for the proposition that handcuffed individuals who have been placed in the back seat of a squad car are not likely to be able to access weapons or evidence.[154] While a handcuffed individual may find it easier to access weapons or evidence that are on their person rather than in a car, any increased risk of that happening is not likely due to an inability to search; in the few cases the lower courts cite as examples of handcuffed individuals able to gain access to weapons, all the suspects retrieved either well-hidden weapons, the officer's own weapon, or weapons from another location.[155]

Of course, pedestrians who are taken into custody will be searched at the station after booking. Thus, one might argue, any evidence discovered during a suspicionless search in the street will inevitably be discovered at the jail and there is no point to limiting searches

149 *Cf.* Seth Stoughton, Terry v. Ohio *and the (Un)Forgettable Frisk*, 15 Ohio St. J. Crim. L. 19, 24 (2017) ("My training had included the frequent admonition to pay attention to what was referred to as the police version of 'Spidey-Sense'; officers' ability to recognize at an unconscious level when things were out of place.").

150 Arizona v. Gant, 556 U.S. 332 (2009).

151 *Id.* at 346.

152 *Id.* at 345.

153 Thornton v. United States, 541 U.S. 615, 624 (2004) (Scalia, J., concurring in part).

154 *Gant*, 556 U.S. at 342.

155 *See* United States v. Sanders, 994 F.2d 200, 210 n.60 (5th Cir. 1993) (describing two cases of arrestees using well-hidden weapons and two involving use of the officer's weapon); U.S. Dept. of Just., Fed. Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 49 (1998) (describing one of each type of incident); *Plakas v. Drinski,* 19 F.3d 1143, 1144–46 (7th Cir. 1994) (suspect escaped to a house and struck officer with a fireplace poker).

incident to arrest in the field. But note three things. First, the so-called inevitable-discovery exception to the exclusionary rule is more accurately described as the "hypothetical independent source" doctrine,[156] and an arrest and search of a person on the street is hardly "independent" of any inventory search that follows it. Second, cars of arrestees are, like pedestrians, also routinely (inevitably) subject to impoundment and inventory,[157] yet that fact did not give the Court pause in *Gant*. And most importantly, forcing officers to wait until they get to the station to carry out searches for which they do not have probable cause provides a disincentive to make the arrest in the first instance, which is one goal of those who think street policing has become too aggressive.[158]

The Supreme Court's decision in *Knowles v. Iowa* [159] could be said to provide the same disincentive. There the Court held that unless the officer takes the arrestee into custody, a search incident is not permitted; when instead the officer simply issues a citation, the rationales for the search-incident doctrine—protection of the police and preservation of evidence—do not apply.[160] On its face, this holding, like my proposal, dissuades pretextual arrests for petty offenses by requiring a trip to the booking desk of anyone searched. But in practice today, a search incident often *precedes* the decision about whether to take the person into custody and sometimes even the decision to arrest.[161] Because *Knowles* allows

156 This is how the exception was initially described by the Supreme Court decision that endorsed the "inevitable discovery" exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 428 (1984) (using the hypothetical independent source language in upholding the admissibility of a body found through an illegally obtained confession because, given the independent efforts of a search party, the evidence "would inevitably have been discovered without reference to the police error or misconduct," *id.* at 448).

157 *See* Colorado v. Bertine, 479 U.S. 367, 372–73 (1987) (upholding a warrantless inventory of a car impounded after the occupant was arrested by noting that "the government interests" involved in such a case "are nearly the same" as those that justify suspicionless inventories of arrested persons).

158 *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand. L. Rev. 1055, 1057 (2015) ("The misdemeanor machinery is a major source of overcriminalization; it produces much of the racial skew of the U.S. criminal population; and it exacerbates the dysfunction of our public-defense bar, overwhelming public defenders with hundreds, sometimes thousands, of minor cases.").

159 Knowles v. Iowa, 525 U.S. 113 (1998).

160 *Id.* at 117–18 ("The threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest. . . . No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.").

161 Furthermore, many courts seem to have no problem with this practice. *See* Joshua Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Calif. L. Rev. 1061, 1065 (2018) ("The federal circuit courts number 9–1 in support of the rule that a warrantless search may be justified as incident to a subsequent arrest, and the split is roughly 20–9 in the same direction in the state courts."). This situation is exacerbated by the Supreme Court's decision in *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), which stated that "[w]here the formal arrest follow[s] quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa" so long as probable cause to arrest existed prior to the search. *See* Marissa Perry, *Search Incident to Probable Cause? The Intersection of* Rawlings *and* Knowles, 115 Mich. L. Rev. 109, 112 (2016) ("Considering the high number of arrestable offenses for which officers generally issue a warning or citation, the practical consequence of the rule articulated by the Eighth, Ninth, and Tenth Circuits creates a substantial risk for pretextual searches.").

police to carry out a search incident on the street for any custodial arrest, police are tempted to stop people for traffic or misdemeanor violations, conduct a full search, and then decide whether to take the person into custody depending on what is found, perhaps on different charges than the crime that triggered the initial stop.[162] That subterfuge would not be possible if probable cause to search as well as to arrest were required at the outset. Further, to remove all temptation to engage in pretextual actions under the proposed regime, the officer should also have to announce the offense of arrest at the time it occurs. This practice, which is standard protocol in most departments,[163] ensures that the offense of arrest will not subsequently be "adjusted" depending on the evidence found after a search.

CONCLUSION

If street policing and technological searches were treated equally, police would need probable cause to believe a completed or attempted crime has occurred or is occurring before they detain a person and probable cause to believe that a weapon or evidence of crime will be found before they may search the detained person. In theory, those rules should significantly reduce the absolute number of the detentions and searches that are today called stops and frisks. They should also substantially decrease arrests for petty offenses that are really pretexts to harass and search individuals. If that is so, they will also seriously curtail unnecessary detentions and searches of people of color.

Whether these proposals in fact have that effect will depend, of course, on the will to enforce them. I have argued elsewhere that the best vehicle for such enforcement is a revamped damages regime that makes officers who act in bad faith individually liable for liquidated damages and police departments liable in all other cases.[164] But in the meantime, we are stuck with the exclusionary rule, a particularly weak sanction when police have control of whether a prosecution occurs and the stakes involved are often not high enough to interest any but the most energetic advocates.[165] Co-option of the rules proposed here is also possible: efforts to diminish the impact of a proportionality-driven

162 *See*, *e.g.*, United States v. Diaz, 122 F. Supp. 3d 165 (S.D.N.Y. 2015), *aff'd*, 854 F.3d 197 (2d Cir. 2017) (before issuing a citation for an open container violation the officer searched the individual and then arrested him for unlawful possession of a gun, but not for possession of an open container).

163 *See* Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 24-Hour Hold*, 63 Case West. Res. L. Rev. 815, 852 (2013) ("It is generally contemplated that a charge accompanies an arrest. It is, literally, hornbook law. Federal courts have held that police are under a general obligation to inform arrestees of the charges against them at the time of arrest, although exigent circumstances like violent resistance or hot pursuit may excuse police from this requirement.").

164 Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 Ill. L. Rev. 363, 405–506 (1999).

165 *See id.* at 368–400 (explaining why the rule is bad at individual and systemic deterrence).

Fourth Amendment could result in expansion of the *actus reus* for attempt, dilutions in the definitions of "probable cause" and "seizure," or perhaps even a temptation to rethink the current move toward stricter regulation of technological policing.[166]

Finally, many are likely to be concerned that the strictures proposed here would both reduce police ability to prevent crime and increase the danger to police and others—harms that are more likely to occur in poorer neighborhoods, where crime tends to be more prevalent.[167] Here the research of Jeffrey Fagan looking at the impact of stop and frisk in New York is highly relevant.[168] Based on data collected about thousands of police-citizen encounters, he and his colleagues distinguished between what they called probable-cause (PC) stops (more than half of which involved "casing" of the type observed in *Terry*) and non-probable-cause stops (NPC). They found that PC stops, by themselves, produced significant (double-figure) reductions in weapons, property, and violent crimes,[169] but concluded that "a higher concentration of NPC stops [was] unproductive and add[ed] nothing to the crime control effects of law enforcement."[170]

Pending additional empirical evidence on this score,[171] those who are concerned about the public-safety cost of a probable-cause requirement should keep several considerations in mind. First, police would still have significant preventive power; while they may detain a person only when they have probable cause to arrest for crime or its attempt, when they do so they will often have probable cause to search the individuals most likely to have weapons or evidence on their persons. Second, for the same reason, police will have the authority to handcuff those they detain, whether or not they end up taking the person into custody, an option that will significantly reduce risk to the police and others. Third, and most importantly, the current regime that allows stops for conduct many steps short of

166 At the same time, all four of these pillars—attempt jurisprudence, the meaning of probable cause, the threshold for a seizure, and the Court's technological search decisions—are today firmly ensconced as a legal matter. Probably most vulnerable to manipulation is the definition of seizure. Under the Court's cases, the police may, without worrying about the Fourth Amendment, subject people to brief questioning, ask for permission to search or interview, and even chase them. *See* Devon W. Carbado, *Race, Pedestrian Checks, and the Fourth Amendment*, *in* The Cambridge Handbook of Policing in the United States 309 (Tamara Rice Lave & Eric J. Miller eds., 2019). If police cannot seize a person without probable cause, they can be expected to argue that detentions that today are considered stops are not seizures at all.

167 *Cf.* Randall Kennedy, Race, Crime, and the Law 19 (1997) ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.").

168 Jeffrey Fagan, Terry's *Original Sin*, 2016 U. Chi. L.F. 43 (2016).

169 *Id.* at 79 ("These estimates show reductions for each increase in PC stops from 16.2% for weapons offenses to approximately 32% for property and violent crimes. . . . The implication as well is that higher concentrations of NPC stops are unproductive.").

170 *Id.*

171 For a sampling, see *supra* notes 7–12.

crime, and that allows searches after almost every such stop as well as after any custodial arrest, annually visits indignity on tens of thousands of innocent or minimally culpable individuals, most of them people of color; it beleaguers thousands more who are found to have a weapon or evidence of crime on their person that, under the circumstances, does not pose a significant danger to anyone. The individual and collective costs of that regime must be part of the calculus.