

# **GEORGE MASON UNIVERSITY SCHOOL of LAW**

## **REASONABLE SUSPICION AND MERE HUNCHES**

**Craig S. Lerner**

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## Reasonable Suspicion and Mere Hunches

Craig S. Lerner\*

### Abstract

In *Terry v. Ohio*, Earl Warren held that police officers could temporarily detain a suspect, provided that they could articulate the “reasonable inferences” for their suspicion, and not merely allude to a “hunch.” Since *Terry*, the American legal system has discounted the “mere” hunches of police officers, requiring them to articulate “specific” and “objective” observations of fact to support their decision to conduct a stop and frisk. The officer’s intuitions, gut feelings and sixth sense about a situation are all disallowed.

This dichotomy between facts and intuitions is built on sand. Emotions and intuitions can be reasonable, and reasons are often predicated on emotions. Even as courts have, over the past two generations, grown more dismissive of hunches, there has been a counter-revolution in the cognitive sciences. Emotions and intuitions are not obstacles to reason, but indispensable heuristic devices that allow people to process diffuse, complex information about their environment and make sense of the world. If the legal rules governing police conduct are premised on a mistaken assumption about human cognition, can one craft a doctrine of policing that credits the wisdom of hunches? Can the legal system defer to police officers’ intuitions without undermining protections against law enforcement overreaching?

This article argues that, to some extent, judicial skepticism about police hunches can and should be abandoned. As a practical matter, the current legal regime substitutes palliative euphemisms for useful controls on police discretion. When an energetic police officer has a hunch that something is wrong and action is imperative, the officer will simply act. Months will pass before a suppression hearing, and by then it will be a simple matter to reverse-engineer the objective “reasons” for the stop—e.g., “I saw a bulge.” The legal system in practice simply rewards those officers who are able and willing to spin their behavior in a way that satisfies judges, while it penalizes those officers who are less verbally facile or who are transparent about their motivations. It would be preferable if politically accountable authorities joined the courts in monitoring police practices. The focus should be less on what police *say* after the fact and more on what they *do*—that is, how successful police officers are in catching criminals and how respectful they are of all citizens.

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\* Associate Professor, George Mason University School of Law, 3301 North Fairfax Drive, Arlington, Virginia 22203, [clerner@gmu.edu](mailto:clerner@gmu.edu), (703) 993-8080. The author thanks Albert Alschuler, Frank Buckley, Gerd Gigerenzer, Renee Lettow Lerner, Daniel Polsby, Paul Slovic, Ronald Rotunda, William Stuntz, and Nancy Tardy for helpful comments. Judges Harold Baer, Douglas Ginsburg, and James Rosenbaum were unpersuaded by the article, but graciously offered criticisms.

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## Reasonable Suspicion and Mere Hunches

Craig S. Lerner\*

### I. Introduction

In the years immediately preceding the September 11, 2001 terrorist attacks, “hunches,” and the police officers who dared to act upon them, were regularly abused in the popular press, courts, and legislatures of America. What was a hunch, after all, but a prejudice, a stereotype, a relic of a benighted past laden with intolerance and bigotry? Then planes crashed into the World Trade Centers, the Pentagon and a field in Pennsylvania, and Americans promptly hectored law enforcement and foreign intelligence officials for their alleged failures. The criticisms were in some part deserved; but in fairness to the FBI, which bore the brunt of the attacks, much of the responsibility could also be laid on the legal regime, designed by Congress and the courts, in which law enforcement operated.<sup>1</sup> And indeed, as it emerged that Americans scattered across the country had inklings that something was afoot, but failed to take action, countless commentary pieces expressed indignation at legal rules that were viewed as preventing or discouraging police officers and citizens from acting upon their hunches.<sup>2</sup>

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\* Associate Professor, George Mason University School of Law, 3301 North Fairfax Drive, Arlington, Virginia 22203, [clerner@gmu.edu](mailto:clerner@gmu.edu), (703) 993-8080. The author thanks Albert Alschuler, Frank Buckley, Gerd Gigerenzer, Renee Lettow Lerner, Daniel Polsby, Paul Slovic, Ronald Rotunda, William Stuntz, and Nancy Tardy for helpful comments. Judges Harold Baer, Douglas Ginsburg, and James Rosenbaum were unpersuaded by the article, but graciously offered criticisms.

<sup>1</sup> See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003) (arguing that the contemporary judicial understanding of probable cause frustrated the investigation of the man once called the “20<sup>th</sup> hijacker,” Zacarias Moussaoui); Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493 (2003) (arguing that the Foreign Intelligence Surveillance Act (FISA) has been interpreted to prevent cooperation between foreign intelligence agents and law enforcement officers).

<sup>2</sup> In 1999-2001, a clever FBI Agent in Phoenix names Kenneth Williams focused his attention on eight Middle Eastern men, who were studying aviation in the Phoenix area. Although the direct evidence was sketchy, Williams suspected that the eight men were tied to a radical Islamic Britain-based group, and he had an inspired hunch, relayed to FBI headquarters: Why not canvass other flight training

Although hunches have made something of a comeback since September 11, 2001, they still seem to generate cognitive dissonance. Consider a recent press release from the City of Austin, Texas's Police Department entitled, *Terrorism: What Citizens Can Do*. On the one hand the Police Department encourages citizens to take active part in terrorism prevention by listening to their hunches:

In all aspects of crime prevention it is important to understand your own survival signals. Often crime prevention professionals refer to your "gut feelings," this in fact one of the messengers of your intuition. The root meaning of intuition is "to guard, to protect," and can serve as an invaluable tool. Call it what you want that nagging feeling, persistent thoughts, hunch or suspicion. It is important not to ignore your survival signals.<sup>3</sup>

Yet lest the citizens of Austin, Texas act upon misguided hunches, the same press release ends with a paragraph, set off in bold, entitled, "Hate Crimes," reminding citizens that "violent acts against people, property, or organizations because of the group to which they belong or identify with are a tragic part of the most recent terrorist act." The citizens of Austin are first encouraged to take seriously their snap judgments about possible threats, and then reminded about the dangers of rushing too quickly to judgment.

This confusion is spun out for two hundred bestselling pages in Malcolm Gladwell's new book *Blink*. The book is an incoherent jumble of anecdotes, spiced with catchy phrases

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schools in the United States for possible terrorist ties? See Mitch Frank, *Four Dots American Intelligence Failed to Connect*, TIME, April 26, 2004, at 30. A thousand miles away, in Minneapolis, a flight training instructor had a bad feeling about a Moroccan student named Zacarias Moussaoui. An FBI Agent named Colleen Rowley soon shared the flight teacher's misgivings about Moussaoui, and she requested that FBI headquarters approve a warrant application with the Foreign Intelligence Surveillance Court. Both Williams' and Rowley's memos ended up on the desk of FBI Supervisor David Frasca, who ignored Williams' advice and rejected Rowley's proposed warrant application. See Lerner, *supra* note 1, at 963-972. A few weeks later, on the morning of September 11, 2001, a U.S. Airway ticket agent in Boston's Logan Airport had a hunch about two men. "I said to myself, 'If this guy doesn't look like an Arab terrorist, then nothing does.'" But the agent recoiled from the very thought that had come, unwanted, to his mind: "Then I gave myself a mental slap, because in this day and age, it's not nice to say things like this." See Michael Smerconish, *Screener Pushed Aside Suspicions on 9/11*, CHICAGO SUN TIMES, March 8, 2005, at 5.

<sup>3</sup> See *Terrorism: What the Citizen Can Do*, at [http://www.ci.austin.tx.us/police/cl\\_terrorism.htm](http://www.ci.austin.tx.us/police/cl_terrorism.htm).

(“the Warren Harding error,” “thin-slicing,” “listening with your eyes,” etc.). Gladwell touts the book in his website as an exploration of the “two seconds [in which we] jump to a series of conclusions. . . I think those instant conclusions that we reach are really powerful and really important and, occasionally, really good.”<sup>4</sup> Oddly, the genesis of the book was when Gladwell let his hair grow wild and started being treated differently, especially by police. Of one incident he writes, “Something about the first impression created by my hair derailed every other consideration in the hunt for the rapist.”<sup>5</sup> Gladwell seems bewildered and dismayed that police officers might instinctively react differently to one person in a crew cut and another in dreadlocks. The lesson of Gladwell’s numbing barrage of anecdotes is something along the lines of: Hunches are good. Except when they are bad. Which is generally when they conform to gender or racial or other stereotypes. So trust your hunches. Except when you shouldn’t.

Of course, it’s easy to be a critic, and I’ve rambled on for several paragraphs about hunches without bothering to define what I meant. I’ve trusted that the reader has a sense of what I mean: We’ve all had hunches, and sometimes they prove valuable and sometimes not. However often hunches have failed us, I still suspect that we all flatter ourselves, as Thomas Hobbes might say, that we’re especially talented in this regard.<sup>6</sup>

When in common discourse we use the word “hunch,” there are several aspects involved, somewhat related and somewhat contradictory. First, a “hunch” is formed quickly. The German cognitive psychologist Gerd Gigerenzer has coined the term “fast and frugal heuristics” to describe the way the human mind operates under real world conditions of

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<sup>4</sup> <http://www.gladwell.com/blink/index.html>.

<sup>5</sup> MALCOLM GLADWELL, *BLINK* 264 (2005).

<sup>6</sup> *Cf.* HOBBS, *LEVIATHAN* Bk. XIII (“such is the nature of men that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned, they will hardly believe there be others as wise as themselves”).

“bounded rationality,” where information is sparse and time is limited.<sup>7</sup> Such conditions are generally understood to prevent optimal thinking, which is said to reflect the methodical incorporation of all possible variables in a complex algorithm. Gigerenzer’s provocative claim is not simply that the “fast and frugal heuristic” is an alternative way of thinking, but that it is often preferable: one can generate better results by stripping out many variables and acting *quickly* and on *less* information.

Gigerenzer offers the following illustration.<sup>8</sup> When a patient with chest pains is rushed into a hospital, doctors need to make judgments about the proper course of action. One model would require them to take dozens of measurements, tabulate the results, and then crunch it all through a “fancy statistical software package.” Emergency room doctors in a Chicago hospital perfected an alternative strategy, classifying possible heart attack patients as low-risk or high-risk on the basis of three simple yes-or-no questions (for example, whether the patient was older than 62.5 years). According to Gigerenzer, doctors achieved greater accuracy with the second method, even though it ignores much potentially relevant information, such as the sex and race of the patient; and even though, with respect to the categories of information deemed relevant, such as age, it relies exclusively on a binary switch (greater or less than 62.5 years), and thus ignores the relevance of gradations. Among other explanations, human beings seem to be distracted by an excess of information: they are prone to focus on irrelevancies or overstate the significance of marginally relevant data. The key to success, according to Gigerenzer, is the formulation of “simple heuristics that make us smart.”

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<sup>7</sup> See generally GERD GIGERENZER AND PETER M TODD, SIMPLE HEURISTICS MAKE US SMART (1999). For a summary, see <http://www-abc.mpib-berlin.mpg.de/users/ptodd/SimpleHeuristics.BBS/>.

<sup>8</sup> He draws the example from L. BREIMAN, J. H. OLSHEN, CLASSIFICATION AND REGRESSION TREES (1993).

A second aspect to “hunches” is that they reflect a manner of thinking that may not be easily, or persuasively, conveyed in words. It is generally assumed that a skilled craftsman can respond to a problem almost without conscious thought, drawing upon his vast recollection of previous experience, whereas a beginner has to work slowly through each of the steps of a puzzle. Recent neurological studies of chess players have confirmed when grandmasters and ordinary chess players are presented with a game position and asked to memorize the placement of the pieces, the former group can tap into their capacious memory of games played and simply “recognize” the key elements to the situation, whereas the latter need to expend far greater mental energy to accomplish the task.<sup>9</sup> As the Hungarian scientist Michael Polanyi has noted, “we know more than we can tell,”<sup>10</sup> and precisely as we become more expert at a task, our knowledge becomes ever more “tacit” or inarticulate; if called upon to explain our actions, we find it difficult to do so, for the knowledge is so deeply hard-wired that it is not easily summoned and articulated. Experts do not repair to first principles, and consciously run through a series of logical steps. Rather, Polanyi argues, they rely on their experience and instinct; they have a sense about what seems right and what feels wrong.

Finally, “hunches” are experienced more as an emotion than as an application of reason. They are instinctive responses that are felt to arise from a part of the brain (or heart) different from where we coolly crunch numbers or analyze data. Although we moderns tend to think that the latter way of thinking is somehow better, political philosophers such as Edmund Burke and James FitzJames Stephen have insisted on the value of emotional responses. A latter-day exponent of this view is Leon Kass, chair of the Presidential Council

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<sup>9</sup> Mangetocephalographic studies of the brains of grandmasters and those of ordinary persons, when playing games against computers provide hard evidence, that the grandmasters really do use a different part of the brain. *Patterns of Focal Bursts in Chess Players*, NATURE (2004).

<sup>10</sup> See generally MICHAEL POLANYI, PERSONAL KNOWLEDGE (1964); TACIT DIMENSION (1966).

of Bioethics, who has argued that, apart from any cost-benefit analysis, we experience feeling of disgust towards certain scientific advances, and that these feelings convey genuine information:

We are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear. Repugnance, here as elsewhere, revolts against the excesses of human willfulness, warning us not to transgress against what is unspeakably profound.<sup>11</sup>

On a more prosaic level, each of us has experienced negative feelings towards a person or speaker, and we often assume those feelings are cues that assist us in detecting deception. We have a hunch, based on demeanor evidence, altogether apart from actual content of what the person is saying, that the person is a liar.<sup>12</sup>

In *Blink*, Gladwell offers an anecdote to illustrate “tacit knowledge” and emotional responses triumphing in a battle with articulable and analytical thinking.<sup>13</sup> In 1983, the Getty Museum in California was presented with opportunity to purchase a marble statue, purportedly dating to the sixth century B.C. The Getty hired a geologist, who spent months conducting various analyses before concluding that the statute was authentic. He even proudly published his findings in *Scientific American*. In the week that the sale was finalized, however, three experts in antiquities viewed the statue and each reacted negatively. Their responses were more emotional than reasoned; they simply said, in various ways, that the

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<sup>11</sup> “The Wisdom of Repugnance” by Leon Kass, *The Ethics of Human Cloning*, quoted in F.H. Buckley, *Are Emotions Moral?*, THE NEW CRITERION, Jan. 2004, at <http://www.newcriterion.com/archive/22/jan04/emotion.htm>.

<sup>12</sup> Whether we really can, through facial or demeanor evidence, detect deception is hotly debated. The psychologist Paul Ekman is the most distinguished exponent of the view that at least certain people are capable of detecting deception based on facial cues. See Paul Ekman, *A Few Can Catch a Liar*, 10 PSYCHOLOGICAL SCIENCE 263 (1999). For a more skeptical review of the literature on the ability to detect detection from facial cues, see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078-91 (1991).

<sup>13</sup> BLINK, *supra* note 5, at 3-8.

statute “didn’t look right.” The Getty, relying upon the scientists and lawyers (who had sifted through the documentary record), went through the purchase. And, inevitably, the statute was soon revealed as a forgery.

How does the legal system deal with hunches? It depends on whose hunch it is. Judges treat their own hunches as virtually infallible. However much they may condemn hunches in others, especially police officers, judges have long congratulated themselves (and juries) on their intuitive powers—their ability to discern which side has the better argument on their basis of their long experience, or their “feel” of a case, or the demeanor of a witness. The legal system is in part premised on the idea that the trial judge and jury, actually seeing the witness and sizing him up, enjoys a privileged fact-finding position entitled to substantial deference.

Judges are more skeptical when others claim to act upon the basis of hunches. In this respect, although Gladwell criticizes the Getty Museum’s actions with respect to the Greek statue, one must sympathize with its board of directors given the legal regime in which they operate. Imagine that a corporation is given a time-sensitive opportunity to purchase a small competitor; the executives are certain, based on their intuition, that the offered price is fair and that the deal will be profitable. Should the board approve the deal? The legal regime of corporate law aspires to ensure that it does not. It encourages the corporation to engage in precisely the kind of systematic and costly due diligence that proved worthless for the Getty Museum.<sup>14</sup> Likewise, should doctors acquire less information, rather than more, when

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<sup>14</sup> In *Smith v. Van Gorkum*, 488 A.2d 858 (Del. Sup. Ct. 1985), for example, the court held that the board of directors had violated its duty of care in arranging for the sale of the company, despite the fact that the board had secured a 45% premium on the current market price, because it had failed to do what the court deemed adequate due diligence (i.e., squander millions in investment banker and legal fees). *See id.* at 895 (McNeilly, J., dissenting) (“These men [on the board of directors] knew Trans Union like the back of their hands and were more than well qualified to make on the spot informed

treating a patient? Again, the law penalizes doctors who adopt a “fast and frugal heuristic,” while rewarding doctors—in terms of decreased legal exposure—who methodically document reams of marginally relevant or even useless data. All this said, courts recognize that corporate executives and doctors should be afforded a substantial scope for their intuitive expertise, and have crafted various doctrines that accord a fair degree of scope for their hunches.<sup>15</sup>

What about police officers? Surely police officers, like corporate executives, doctors, and even judges, get better at what they do with time; and part of what we mean by “get better” is develop a sense of what is right without recourse to first principles. Amongst themselves and in informal discussions with others, police officers insist that their hunches about criminals are often right, and that their “sixth sense” proves invaluable in the field. Yet when police officers testify before a judge during a suppression hearing, a curious thing happens: They almost never use the word “hunch” or any of its variants (“sixth sense,” “gut instinct,” etc.); the entire language of intuitive thinking is excised from their vocabulary, it seems, the moment they assume their place in the witness stand. They seek to curry favor with judges by speaking in an approved discourse, which emphasizes “objective” criteria certified as relevant and acceptable in past cases. Police officers can hardly be faulted for crafting their testimony in this manner, as the judicial system is unrelentingly hostile to their hunches.

Imagine that it is closing time at a bar known to attract some rough customers. A police car arrives at the scene, and the officers see a man run behind the bar. The officers

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business judgments concerning the affairs of Trans Union including a 100% sale of the corporation.”).<sup>15</sup> For example, the business judgment rule largely insulates boards of directors from judicial scrutiny, and courts regularly state that doctors must be able to act based on unwritten guidelines, in accordance with their feel of a patient.

decide to investigate, and they see three men milling about, including the one who fled moments before. One of the officers feels something is wrong with the scene; in an instant, he realizes that the man is holding a beer bottle in his left hand, which is unusual given the fact that most people are right-handed. The officer testifies of the suspect:

[H]is whole attitude, although he was calm, he seemed a little bit almost cocky. But he looked at me, we made eye contact, but then he looked away and acted as though I was not there and tried to walk on by. And that caught my attention.<sup>16</sup>

Does the officer have the authority to stop and frisk him?

Such were the facts of *United States v. Michelletti*,<sup>17</sup> and the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, split almost exactly down the middle. At a suppression hearing, Officer George Perry did his best to manufacture “objective” justifications for the stop and frisk (the bar, the hour, the beer bottle in the left hand, the direction in which the suspect was walking) but half the judges spotted the case for what it was: A police officer had a hunch that a guy had a gun. For all we know, Perry is the most exceptional police officer in Houston, and his hunches have proven flawless. (He was right this time.) In the eyes of the judicial system, however, the evidence provided by the officer in the suppression hearing must fall under certain headings—”objective,” “particularized,” “articulable.” Should a police officer ever admit the truth—that he had a subjective, inchoate and inarticulable hunch—courts rain down abuse on the poor fellow and enter upon a long-winded and sanctimonious lecture on the meaning of civil liberties. Ever since the 1968 Supreme Court decision in *Terry v. Ohio*,<sup>18</sup> police officers have learned the importance of fashioning their

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<sup>16</sup> *United States v. Michelletti*, 13 F.3d 838, 843 (5<sup>th</sup> Cir. 1994) (en banc).

<sup>17</sup> 13 F.3d 838 (5<sup>th</sup> Cir. 1994) (en banc).

<sup>18</sup> 392 U.S. 1 (1968).

testimony in a way that satisfies the court's fetish for neatly packaged "reasonable articulable suspicion."

At the risk of casting myself as the skunk at this party, I have my doubts about this system. At bottom it rests upon the idea that we cannot trust police officers to act upon their hunches; for if we did, they would have boundless discretion: they could always say, "I had a hunch." The problem, however, is not with boundless discretion in and of itself, but with the possibility that the discretion will be abused—that police will unreasonably stop and frisk people. So the operative question is: Does the current system meaningfully restrict the police officers' ability to act unreasonably? I am not sure that the answer to that question is yes; and I am sure that the costs of the current system are considerable.

Basically, the current legal regime substitutes palliative euphemisms for useful controls on a police officer's discretion. When a diligent and talented police officer has a hunch that something is wrong, he will, one sincerely hopes as a citizen, take action, long before he has tabulated the reasons in his mind, certified that they are "objective," and satisfied himself that there are not innocent explanations for each of the constituent pieces of evidence that mitigate the force of his felt hunch. He will simply act, in accordance with the dictates of a "fast and frugal" heuristic, and hope that he will be able to reverse-engineer the "reasons" after the fact—e.g., "I saw a bulge," "The suspect made a move."

Meanwhile, the case law that has emerged since *Terry v. Ohio* is a hopeless clutter, the inevitable result of an artificial distinction between *reasonable* suspicion, which arises from the cool analysis of objective and particularized evidence, and *mere hunches*, which are subjective, generalized, unreasoned and therefore unreliable. 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 be little surprising that the cases are all over the map on these and dozens of similar questions. The effectual truth of the current system is that judges have arrogated to themselves what is in effect a pardon power, to be exercised at whim. The system is, I presume, much to their own liking, as well as to the liking of criminals, law professors and lazy police officers, the last of whom are now afforded yet another ready excuse to do nothing. Such must be the inner monologue of many a police officer when he spots a criminal: “That guy looks fishy to me, but do I really want to stop him? First of all, he might shoot me: that wouldn’t be good. Second, what do I care if he’s a gang banger; I don’t live here. Third, if I do stop him and he turns out to be carrying drugs, I’ll have to fill out an incident report, mostly on my own time. And finally, if I’m proven right, I’ll get a lecture from a judge about how great civil liberties are and how all I had was a hunch the guy was a scum-bag. Yeah, right, I know as sure as I’m sitting here the guy’s a drug-dealer. But who needs the trouble? I’ll finish my donut.”

What if we abandoned the current euphemism-laden system and adopted, in effect, something closer to a statistical quality control regime?<sup>19</sup> What if, furthermore, the courts, especially in the federal system, retreated from their micro-management of police forces across America? If a cop working drug interdiction stops 100 people and in 90 instances a drug-sniffing dog alerts, and the suspect turns out to be a drug dealer, I’m hard-pressed to understand how it could be said that the officer was acting unreasonably *regardless* of what reasons he gives after the fact. If the officer said, “I have no idea why I stopped them; I just knew something was wrong,” why would we care, given his evident success? Isn’t this precisely the kind of cop to be rewarded, promoted, praised? Why should such a police

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<sup>19</sup> On statistical quality control, see generally W. EDWARDS DEMING, *OUT OF THE CRISIS* (1986).

officer not be preferred to another who, in the same time period, stops 10 people for an assortment of objective, particularized and articulable reasons and only 2 turn out to be drug dealers? Why did the first police officer act unreasonably and the second one act reasonably? And more pointedly, why are courts dictating which method of police regulation is not simply preferable, but constitutionally required? As Judge Carl McGowan wrote over thirty years ago, “The judge might say in effect to the police: If you can satisfy us that you are doing everything you can to reduce the incidence of violations through meaningful disciplinary action, we will no longer need to seek deterrence through the indirect sanction of exclusion. This would be a sensible approach, since direct discipline imposed by police internally is far more likely to deter than remote exclusions of evidence in criminal trials.”<sup>20</sup>

Two years ago, I criticized the trend in modern Supreme Court opinions to cast “probable cause,” which is required under the Fourth Amendment for the issuance of warrants or to make an arrest or to conduct an automobile search, as an inflexibly high standard.<sup>21</sup> As I then argued, even when a search is minimally intrusive or especially imperative, courts have preserved “probable cause” in all its pristine glory, as a fixed standard—that is, one that admits of no nuances.<sup>22</sup> I proposed a more reasonable approach to probable cause, which factored in the gravity of the investigated offense and the intrusiveness of a proposed search. Most simply put, it is unreasonable to demand the same quantum of proof of police when they propose to search a car trunk for a kidnapped child as when they propose to ransack a home for a gram of cocaine.<sup>23</sup>

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<sup>20</sup> Carl McGowan, *Rule Making and The Police*, 70 MICH. L. REV. 659, 690 (1972).

<sup>21</sup> Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEXAS L. REV. 951 (2003).

<sup>22</sup> See *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>23</sup> See *Brinegar v. United States*, 338 U.S. 160, 175 (Jackson, J., dissenting).

This article takes issue with the modern Court's approach to the "reasonable suspicion" standard, which courts require police to satisfy before they conduct a "stop and frisk." Although nominally reasonable, the standard in actual practice has failed to deliver on its promise. In large part this difficulty is born of the impractical—and unreasonable—dichotomy between *reasonable* suspicion, based on objective (reliable) evidence, and "mere hunches," which are inchoate and subjective and therefore supposedly valueless.

Bowing to the ruthless dictates of the fourth dimension, the article is roughly divided into Past, Present, and Future. Section II, which sketches the development of rules governing police stops and frisks, argues that the novelty of *Terry v. Ohio* consisted in its depreciation of police hunches and its creation of a distinction between "objective" and "subjective" evidence. Section III, which focuses on a recent and typical *Terry* decision, argues that courts are prone to overstate the value of "objective" factors and understate the value of "subjective" factors. Section IV, which notes some costs of the current approach to reasonable suspicion, looks ahead to a happy future in which courts recognize that greater deference should be accorded police hunches, especially when the privacy intrusion is negligible and the suspected offense especially grave.

## **II. *Terry v. Ohio***

In terms of regulating police conduct on the streets of America, *Terry v. Ohio* is probably the most important Supreme Court decision in modern criminal procedure. Chief Justice Earl Warren's opinion for the Court held that a police officer, even without "probable cause," can stop someone and ask him questions; and if in the course of doing so the officer senses possible danger to himself, he can conduct a frisk—something more than a cursory pat-down, but more akin to a feeling with "sensitive fingers," to be sure that the subject is not armed. Frisking in such circumstances is not an "arrest" for constitutional purposes, and need

not be justified by “probable cause.” All the officer requires is “reasonable suspicion,” which the Court contrasted with “a mere hunch.”

This section begins by considering the *Terry* opinion itself, which suggests that, unbeknownst to its author, the officer who initiated the most famous stop and frisk in our nation’s history began his investigation on the basis of nothing more than a mere hunch. Ironically, the major innovation and lasting impact of the *Terry* decision was its disparagement of mere hunches. Although contemporary critics of *Terry* have argued that the decision conferred historically unprecedented discretion on police officers, the legal regime governing pre-*Terry* policing was in fact remarkably lenient. Since *Terry*, however, the Supreme Court has more comprehensively monitored police practices and become ever more watchful of anything that resembles a “hunch.” The Court has emphasized the distinction between an approved category of evidence, which is “objective and particularized,” and a disapproved category of evidence, which is subjective and generalized.

**A. Officer’s McFadden’s Hunch**

Martin McFadden may be the only cop ever cast in a heroic role in an Earl Warren opinion.<sup>24</sup> A police officer for nearly four decades, McFadden walked the beat in downtown Cleveland one weekday in autumn 1963. Amidst the pageant of democracy—the parade of bustling citizens, gawking shoppers, and indolent scoundrels—two individuals caught McFadden’s eye. In Earl Warren’s words: “He had never seen the two men before, and he was unable to say precisely what first drew his eye to them.”<sup>25</sup> Warren, wholly unintentionally, makes an important point: McFadden was suspicious of these two men *before there was any apparent reason for suspicion*. And he was proven right. Surely, there

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<sup>24</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>25</sup> *Id.* at 5.

were other socially useless individuals—a pair of law professors, perhaps—strolling along Huron Avenue that day. But it was Terry and Chilton that excited McFadden’s curiosity. But what was it about these two men, as opposed to the two professors, that struck him as suspicious? Warren writes approvingly:

[McFadden] testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would ‘stand and watch people or walk and watch people at many intervals of the day.’ He added: ‘Now, in this case *when I looked over they didn’t look right to me at the time.*’<sup>26</sup>

Why did McFadden follow these fellows? He is “unable to say”; he simply thought they “didn’t look right.” Or to put this more directly: McFadden had a hunch.

Fortunately for the good citizens of Cleveland, if not for Terry and Chilton, McFadden acted upon his hunch. He followed these two men, and thus witnessed them walk back and forth several times along a certain block, pausing to look into the same store, gathering repeatedly in hushed conversation, at one point joined by another individual. McFadden eventually approached the three men and asked their names. After receiving “mumbled” answers, he pushed them into a store and performed the first *Terry* frisk in our nation’s history.<sup>27</sup> By the time McFadden actually confronted the three men, any nitwit could have gathered that something untoward was afoot, a fact not lost on Warren: “It would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.”<sup>28</sup>

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<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 23.

Warren is generous in his praise of McFadden's police work, referring to him throughout the opinion as "Officer McFadden." But the irony is that Warren fails to see the important point lurking in his own recitation of the facts. Warren writes, "There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in."<sup>29</sup> Precisely so, which is why Earl Warren (or I, or you) would likely never have noticed Terry and Chilton in the first place: they would have been lost in the crowd. Seeing nothing suspicious about them, we would have tracked other individuals, or walked to a different location. By the time, McFadden had watched Terry and Chilton "hover about a street corner for an extended period of time . . . pausing to stare in the same store window roughly 24 times," no congratulations are in order to the police officer who took action. The impressive aspect of the story is McFadden's suspicions when there was "nothing unusual" about their actions.

Of course, we have no idea how many times McFadden's eyes were drawn to people who "didn't look right" to him, but who were in fact innocently shopping. For all we know, the vindication of McFadden's hunch in this case should be seen against a backdrop of Inspector Clouseau-like bumbling. Perhaps the day before McFadden's triumphant arrest, he had trailed a pair of law professors around Cleveland, oblivious to the pickpockets and jewel thieves plying their trade all about him. And this assumes good faith, if incompetence, on McFadden's part. Perhaps he made a practice of following African Americans for no other reasons than their race, or bearded young men because of their anti-war patches. But Terry's own attorney (and subsequently a member of the U.S. Congress) has conceded that McFadden

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<sup>29</sup> *Id.* at 22-23.

was widely regarded as a “straight-shooter” and good cop,<sup>30</sup> so let us assume for the moment, subject to revisiting later, that McFadden’s hunches served him well, not only that spring day in 1966, but other times in his 30-year career as well.

Yet when Warren states the rule of law to emerge from *Terry*, he deprecates hunches—never acknowledging that without McFadden’s original hunch, there would likely have been no case at all. Warren writes that an “officer need not be absolutely certain that the individual is armed” in order to stop and frisk him. “The issue,” Warren writes, “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. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, *not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences* which he is entitled to draw from the facts in light of his experience.”<sup>31</sup>

### **B. The Disparagement of Hunches**

Chief Justice Warren’s decision to place the word “hunch” in quotation marks, a stylistic choice that has since become common practice in judicial opinions,<sup>32</sup> can be interpreted in two ways. First, Warren may have doubted that hunches provide any meaningful information and are therefore worthless data; in this respect Warren may have adopted the modern view, discussed in the introduction of this article, that if you cannot articulate an opinion and reason it out from objective first principles, it is simply unreliable. Second, Warren may have accepted the premise that hunches were not wholly unreliable, but

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<sup>30</sup> See Louis Stokes, *Representing John W. Terry*, 72 ST. JOHNS L. REV. 727 (1998) (“He was a real character—a tall, stately guy, and basically a good policeman. “Mac,” as we called him, was really a guy that we really liked. He was straight. One thing about him—as a police officer, he came straight down the line. You did not have to worry about him misrepresenting what the facts were.”).

<sup>31</sup> 392 U.S. at 23 (emphasis added).

<sup>32</sup> See, e.g., *United States v. Arvizu*, 534 U.S. 266 (2002) (“an officer’s reliance on a mere ‘hunch’ is insufficient to justify an investigatory stop”).

may have doubted that the legal system could be fashioned in a way that gave any credence to a police officer's "inchoate and unparticularized suspicion." My sense is that Warren's decision to place "hunch" in quotation marks suggests he inclined particularly to the first view—that hunches are not really probative "evidence" at all.

Prior to *Terry*, courts were receptive to the idea that police officers, through time and experience, might develop a heightened ability to detect criminal wrongdoing and that some degree of judicial deference might be owed these abilities. For example, a 1963 California state court opinion observed that "[e]xperienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens."<sup>33</sup> Since *Terry*, however, Fourth Amendment opinions follow a predictable trajectory. An opinion that begins by highlighting how "experienced" the police officer is will likely culminate in the denial of a motion to suppress and a defendant dispatched to prison. By contrast, an opinion that employs the adjective "subjective" when describing the evidence to justify a stop spells trouble for the state; and if ever the word "hunch" should grace the pages of the "statement of facts," that likely means one happy criminal defendant. "Hunch"<sup>34</sup> (and its cousins "instinct," "gut feeling,"<sup>35</sup> and "sixth sense"<sup>36</sup>) generally portend the collapse of the prosecution's case.

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<sup>33</sup> *People v. Cowman*, 223 Cal.App. 109 (1963).

<sup>34</sup> *See, e.g., People v. Croft*, 805 N.E.2d 1233, 1239 (Ill. App. 2004) ("In short, Officer Row had merely a hunch, not the reasonable suspicion necessary to effect a *Terry* stop."); *United States v. Farias*, 43 F.Supp.2d 1276, 1284 (D. Utah 2001) ("Mangelson's detention of defendants was based upon merely a 'hunch' that criminal activity was afoot."); *United States v. Roggeman*, 2001 WL 34008491 (D. Ill. 2001) ("Trooper Moore was acting on nothing but a 'hunch' but a 'hunch' or subjective belief unsupported by objective facts."), *rev'd* 279 F.3d 573 (8<sup>th</sup> Cir. 2002); *Bowen v. State*, 685 So.2d 942, 944 (1996) ("Croser's testimony amounts to merely a hunch, which is insufficient to justify an investigatory search"); *United States v. Morris*, 910 F.Supp. 1428, 1446 (N.D. Iowa, 1995) ("the court concludes instead that Trooper Hindman was acting on nothing but a 'hunch' or subjective belief unsupported by objective facts"); *Rogers v. State*, 426 S.E. 2d 209, 213 (Ga. App. 1992) ("That [Officer Bunn's] 'hunch' about [appellant] proved correct is perhaps a tribute to his policeman's intuition, but it is not sufficient to justify, *ex post facto*, a seizure that was not objectively reasonable at

One can sympathize with police officers lured by defense attorneys into an admission that they acted on a “hunch.” How the prosecutor and the police supervisor must abuse the poor fellow at the break—“What were you thinking when you said that!?” Officer Heath’s fate in *State v. Emilo*<sup>37</sup> can serve as a cautionary tale for naïve police officers preparing to endure the perils of cross-examination. While driving home at 3:00 a.m. on a deserted gravel road, Officer Heath saw a Saab that he did not recognize as belonging to anyone in the neighborhood. Lacking a front license plate, the car piqued his curiosity, and Officer Heath pulled it over. Alas, the officer’s premonition that something was amiss turned out to be correct; for the car thieves tried to flee on foot as soon as the car stopped. Here, however, was the cross-examination at the suppression hearing:

Q. [I]t was basically your belief that no cars should be on Route 66 at that time in the morning that prompted the stop; is that correct?

A. I felt it was very . . . unusual . . . .

Q. But there is nothing in particular about that unusualness that would tie . . . this particular car to any particular crime?

A. No . . .

Q. *So, more or less, it was just a hunch that you had?*

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its inception. Because (the record contains no evidence that [Bunn] had) a reasonable suspicion that [appellant was] hauling drugs [or weapons], the stop cannot be upheld on that ground.”).

<sup>35</sup> See, e.g., *United States v. Hyde*, 1993 WL 733094 (“Lambert herself articulated that she acted as much on a “gut feeling” that something was amiss as on any or all of the factors she recited.”).

<sup>36</sup> See, e.g., *State v. Costa*, 742 A.2d 599, 603 (N.J. Super. A.D. 1999) (“[The officer] stated that the manner in which defendant and Priate exited their car set off his “sixth sense.” . . . We conclude that a non-specific “sixth sense” does not equate with a reasonable suspicion that criminal activity is afoot.”); *United States v. Fernandez*, 18 F.3d 874, 881 (D. Utah 1994) (“[Officer] Bushnell’s testimony regarding his “sixth sense,” his detection of a “tension in the air,” and his belief that something was “afoot,” strongly suggests he was acting more on an unparticularized hunch than on reasonable and objective suspicion.”); *Columbus v. Holland*, 601 N.E. 2d 190, 192-93 (Ohio Ap. 3d 1991) (“sixth sense” of arresting officer does not constitute reasonable suspicion).

<sup>37</sup> 479 A.2d 169 (Vt. 1984).

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A. *Well, if that's the way you want to put it, yes.*<sup>38</sup>

The court, of course, cast the defendant free, but not before a mocking reference to the police officer's "suspicion."<sup>39</sup> One wonders if the prosecutor took Officer Heath aside after the hearing and gave him a quick lesson in Testifying 101: Never allow a defense attorney to put words in your mouth. You never pull someone over on just a hunch. The correct answer, of course, was:

A. "Hunch? No, I wouldn't call it that, sir. I would say there were a number of objective factors which, viewed in their totality through my experienced eyes, rose to the level of reasonable suspicion."

Likewise, in *State v. Thompson*,<sup>40</sup> the officer's failure to couch his testimony in appropriate language (that is, excising any reference to "hunches") doomed the case. There, a radio dispatcher notified State Patrol Trooper Jacobson that an occupant of a car traveling along Interstate 5 had been waving a handgun. A description and license plate was reported, and Officer Jacobson must have felt the stars were aligned when he soon saw the car whiz by. He followed the car into a deserted parking lot, and watched as it "meandered" to a distant corner, where it stopped near a lone parked car without another in the near vicinity. He approached the two cars, and observed the driver of the parked car emerge and begin walking quickly away. The officer stopped him, radioed back for information about the stopped car, and learned within one minute that there was an outstanding traffic violation. The driver was arrested and searched, and drugs were found on his person and in the car. Of course, given the peculiarities of modern American criminal procedure, the decisive event was the one-minute stop while the police officer radioed for information; if that was illegal, then all the

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<sup>38</sup> *Id.* at 170.

<sup>39</sup> *Id.* at 171 ("Here, Officer Heath's 'suspicion' that the Saab did not belong in the particular area in the early morning hours, without more, clearly falls outside of an 'articulable and reasonable' suspicion of some criminal wrongdoing.")

<sup>40</sup> 601 P.2d 1284 (Wash. App. 1979), *rev'd* 613 P.2d 515 (Wash. 1980).

subsequently discovered evidence was the poisonous fruit of an improper stop, and therefore suppressible. On this point, here was Officer Jacobson's disastrous testimony:

I had a suspicious circumstance. Call it instinct or whatever. Something told me that I should keep this gentleman long enough to I.D. him. Call it instinct, intuition, hunch, sixth sense, or whatever, there was reason for a trained police officer to believe that something untoward was afoot.<sup>41</sup>

The trial court and the appellate court labored to rescue Officer Jacobson from his own honesty, emphasizing that it was not any "sixth sense" on his part, but "objective criteria" amounting to reasonable suspicion justifying the stop. Such a conclusion was quite defensible. There was probable cause to believe the one car contained a person with a handgun; when that car stopped next to the parked car in a deserted parking lot that hinted at some collaborative undertaking. The Supreme Court of Washington nonetheless reversed, stating "that this 'inarticulate hunch' is precisely the type of subjective basis which is constitutionally insufficient, because it creates a risk that a person may be detained solely at the unfettered discretion of officers in the field."

### **C. *Terry's Civil Libertarian Critics***

But does *Terry* and the case law applying it go far enough in constraining the discretion of the police? When it was decided, *Terry* was celebrated in the academic community as a compromise position—a happy mean between the claim (urged by the State of Ohio) that a frisk is not a "search" at all and therefore outside the Fourth Amendment and the competing claim (embraced by a dissenting Justice Douglas) that a frisk is a full-fledged constitutional event, governed as if it were any other event by the Fourth Amendment's probable cause requirement. Earl Warren, it was said, struck a Solomonic note, holding a frisk, even if minimally intrusive, to be a "search," but adding that police need not have

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<sup>41</sup> 613 P.2d at 519.

probable cause to conduct a frisk; merely reasonable suspicion would be sufficient. In recent years, however, a growing number of scholars have had second thoughts about the legal regime supposedly erected by *Terry*. Spurring such criticisms on, and seizing the imagination of some in the academy, are hazy ideas about a civil libertarian pre-*Terry* time; alas, like many golden ages, this belongs more in the realm of mythology than actual history.

According to the contemporary fabulists, “[N]ever before [*Terry*] had the Court recognized an exception to the probable cause requirement.”<sup>42</sup> Allowing police to detain and frisk suspects with less than probable cause, it is claimed, effected a dramatic diminution of civil liberties: “Prior to *Terry*, the Court’s Fourth Amendment jurisprudence championed the rights of the individual in encounters between civilians and the police.”<sup>43</sup>

It is, needless to say, a little more complicated than that, but the scholars now peddling this erroneous theory may be forgiven; after all, the Supreme Court itself led them astray. In *Dunaway v. New York*,<sup>44</sup> the Court wrote that “*Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.” According to the *Dunaway* court, “*Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth

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<sup>42</sup> Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1439 (2004). See also Frank Rudy Cooper, *Cultural Context Matters, Terry’s Seesaw Effect*, 56 OKLA. L. REV. 833 (2003) (“Prior to *Terry*, the Fourth Amendment required probable cause for a criminally-oriented search or seizure to be deemed constitutionally permissible.”); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1308 (1998) (“A search based on police suspicion may be expedient, but it is an intrusion that, prior to *Terry*, the Court had declared the Constitution does not permit.”). But see Christopher Slogobin, *Let’s Not Bury Terry: A Call for the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053, 1095 (1998) (“Police were conducting preventive stops and frisks long before that decision. Most of the special needs searches and seizures that have been approved using *Terry*’s balancing formula were already routine prior to *Terry*. *Terry* didn’t alter law enforcement practices; it just provided, in the hands of the post-Warren Court, a rationale for the status quo.”).

<sup>43</sup> Lenese C. Herbert, Bete Noir, *How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & LIT.

<sup>44</sup> 442 U.S. 200 (1979).

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Amendment “seizures” so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment “seizures” reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.”<sup>45</sup>

There is a great deal of compounded error here. First, the juxtaposition of a “balancing test” on the one hand, and the probable cause standard on the other, impliedly pictured as an inflexible and timeless standard, is inaccurate. Probable cause has in fact fluctuated over time. In the early years of the American republic, probable cause was a remarkably low (and therefore pro-government) evidentiary standard;<sup>46</sup> it rose slightly (therefore tilting in a somewhat civil libertarian direction) in the early nineteenth century,<sup>47</sup> only to retreat once more to a relatively low standard in the Prohibition era,<sup>48</sup> only to become more stringent in the early years of the Warren Court,<sup>49</sup> then to retreat in the early years of the Rehnquist Court,<sup>50</sup> and then yet again to tilt in a civil libertarian direction in recent years, at least prior to the September 11, 2001 terrorist attacks.<sup>51</sup> More relevant for our purposes here, the *Dunaway* Court, and sundry academics, labor under the misapprehension that, prior to *Terry*, police lacked the authority to detain suspects for investigative reasons unless they

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<sup>45</sup> *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>46</sup> *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813) (“It is contended, that probable cause means prima facie evidence, or in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. [However,] the term “probable cause” according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.”).

<sup>47</sup> *Apollon v. United States*, 22 U.S. (9 Wheat) 362 (1824) (“the question whether the Apollon was designed to engage in this unlawful traffic, must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources”).

<sup>48</sup> *Carroll v. United States*, 267 U.S. 132 (1924) (defining probable cause as merely “a reasonable ground for belief”).

<sup>49</sup> *Spinelli v. United States*, 393 U.S. 410 (1969).

<sup>50</sup> *Illinois v. Gates*, 462 U.S. 213 (1983)

<sup>51</sup> See Lerner, *supra* note 1, at 994-95.

had an evidentiary predicate (often called probable cause) than would suffice to conduct a full-blown arrest. This is wrong as a matter of English common law and wrong as a matter of American constitutional law.

In medieval times, various statutes authorized town guards to detain “any Stranger” walking the roads at night,<sup>52</sup> and anyone, during the day or night, who showed an “evil suspicion” of having committed a felony.<sup>53</sup> The constable was commanded to bring the suspect to a magistrate, who conducted further inquiries to determine if the suspect had in fact committed a crime. Although the constable’s detention powers waned over the next few centuries,<sup>54</sup> the pendulum swung back in the seventeenth century, according to Hale, “in these times, where felonies and robberies are so frequent.”<sup>55</sup> By the nineteenth century, English common law was clear that police had a power of detention altogether apart from a technical power of arrest. In one 1810 case, the court curtly dismissed a false imprisonment claim by a person stopped by a constable when the only apparent ground for suspicion was that he was carrying a bundle at night. The court intoned, “In the night, when the town is asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion. There was abundant suspicion here. We should be very sorry if the law were otherwise.”<sup>56</sup>

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<sup>52</sup> Statute of Winchester, 13 Edw. 1, stat.2, c.4. (1285).

<sup>53</sup> Statute of Winchester, 5 Edw. 3, c. 14 (1331).

<sup>54</sup> See 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 189 n.2 (“[Although] [t]he Statute of Winchester was not repealed till 1828, it had for centuries before that time been greatly neglected.”).

<sup>55</sup> See 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN at 149.

<sup>56</sup> *Lawrence v. Hedger*, 128 Eng. Rep. 6 (1810), quoted and discussed in John A. Ronayne, *The Right to Investigate and New York’s “Stop and Frisk*, 33 FORDHAM L. REV. 211 (1964). Furthermore, the Metropolitan Police Act of 1839, 2 & 3 Vict. c. 47, § 66, permitted London police “to search vessels and carriages on reasonable suspicion that they were being used to convey stolen goods, and also to

Crossing the Atlantic, we find that the law here never unambiguously “championed the rights of the individual in encounters between civilians and the police,” whatever such grandiose language might mean. As already noted, for various periods in American history, courts took a relatively lenient attitude towards claims by government agents that probable cause of criminal activity had justified a full-blown arrest or property seizure. Indeed, at certain times officials seem to have had the authority to arrest suspects when, were the same fact present today, it is unlikely courts would have countenanced a temporary stop or frisk. For example, in *Carroll v. United States*,<sup>57</sup> the Supreme Court upheld an arrest for violation of the Volstead Act on the flimsiest of evidence. The facts were as follows: One day in the winter of 1921, a pair of federal officers, disguised as undercover agents, approached Carroll about purchasing alcohol. Carroll expressed interest in the project, went off to find his source, but returned empty-handed and the deal fell through. Two months later, the same Prohibition agents happened to see Carroll and two other persons driving in an Oldsmobile not far from the Canadian border, allegedly a source of alcohol. On these bare facts, the agents stopped the car and searched it, finding alcohol in the trunk. Chief Justice Taft, defining probable cause as simply a “reasonable ground for belief of guilt,”<sup>58</sup> concluded that probable cause was present because the area between Detroit and Grand Rapids was “one of the most active centers for introducing illegally into this country spirituous liquors”; and that Carroll and the other defendants had offered to sell liquor two and a half months before the search.<sup>59</sup> There is little doubt that *Carroll* is no longer an accurate reflection of the detention

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search persons who may be reasonably suspected of such possession.” John A. Ronayne, *The Right to Investigate and New York’s “Stop and Frisk*, 33 FORDHAM L. REV. 211, 214 (1964).

<sup>57</sup> 267 U.S. 132.

<sup>58</sup> *Id.* at 159.

<sup>59</sup> *Id.* at 160 (“They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed

powers of American police officers. Consider the following hypothetical: On February 1, a person agrees to sell drugs to undercover agents, leaves to find his source, and then returns return empty-handed. Two months later, the agents see the same person driving near a source city for cocaine, arrest him, and search his car. On these facts, any court would invalidate the arrest and the search: probable cause, at least as it is now understood, was not present. Indeed, it is likely that such facts would fail even to rise to the level of reasonable suspicion sufficient to justify a *Terry* stop.

To be sure, there are also cases from the early part of the twentieth century that are somewhat consonant with contemporary notions of “reasonable suspicion” and the evidentiary predicate needed to justify any intrusion on a citizen’s liberty. For example, the 1923 Michigan Supreme Court case of *People v. Guertins*<sup>60</sup> closely resembles the 2000 United States Supreme Court case of *Florida v. J.L.*<sup>61</sup> In both cases, police received an anonymous tip that someone was up to no good (which in the 1920s meant dealing in alcohol, and eighty years later of course means narcotics); and the court in *Guertins*, like the *J.L.* Court, held that an anonymous tip, taken alone and “without the disclosure of the informant and the source of his information” was insufficient to authorize the police to make an arrest. Notwithstanding the *Guertins* case, the case law in the early part of the twentieth century

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that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.”).

<sup>60</sup> 224 Mich. 8 (1923).

<sup>61</sup> 529 U.S. 266 (2000). The facts in *J.L.* were as follows: An anonymous caller reported to Miami police that at a particular bus stop a young man black man wearing a plaid shirt was carrying a gun. Police officers arrived at the bus stop and saw three black males “just hanging out,” one of whom was wearing a plaid shirt. Other than the anonymous tip, there was no reason to suspect the three young men of criminal activity, but police officers approached and frisked them, and lo and behold the one in a plaid shirt—ten days shy of his 16<sup>th</sup> birthday and thus immortalized through his initials—was carrying a gun. As Justice Ginsburg noted in a unanimous opinion reversing the Florida Supreme Court, “All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.” *Id.* at 271.

accorded far greater weight to anonymous tips that were infinitesimally corroborated than the case law today. Courts at the time, although reluctant to authorize full-blown arrests based on anonymous tips, often deemed it reasonable for police to forcibly detain suspects based on anonymous tips and to demand an explanation of their whereabouts; and if the suspect refused to consent to a search of his person or property, courts then often deemed the police authorized in making an arrest.<sup>62</sup> In one such case, *People v. Ward*,<sup>63</sup> the Michigan Supreme Court posed an elaborate hypothetical demonstrating this point. I quote from the Ward opinion at length because it seems so dramatically different from modern case law, not only in substance but also in spirit:

Supposing that the officer had been informed by telephone that Harry Ward had robbed a bank at Spring Lake, had taken a car going in the direction of Grand Haven, and had the proceeds of the robbery in a suit case; that on the arrival of the car at Grand Haven he saw the defendant with the suit case in his possession—would not the officer have been derelict in his duty had he not accosted Ward, asked to see the contents of the suit case, and, on refusal, placed him under arrest and examined its contents? While the rights of individuals to be protected from unwarranted arrests must be carefully guarded, the rights of the public must also be considered. Robberies and holdups are now so frequent, and the opportunity to get away quickly so convenient that, unless officers may act promptly on information apparently reliable and circumstances reasonably convincing, there is but little hope of apprehending the guilty parties. If the officer must delay to ascertain that the information received comes from a responsible person, in many cases the opportunity to arrest will have passed. That officers do make arrests on such information, and that they are complimented on their promptness in doing so, is a matter of common knowledge.<sup>64</sup>

When was the last time an American court “complimented” police officers for their “promptness” in acting on little more than an anonymous tip? Although “robberies and holdups” are now more frequent than in the 1920s, courts confronting the facts presented in

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<sup>62</sup> See *State v. Kittle*, 137 Wash. 173 (1926); *Cortes v. State*, 135 Fla. 589 (1938). See also Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940).

<sup>63</sup> 226 Mich. 45 (1924).

<sup>64</sup> *Id.* at 49.

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*Ward* would be far more likely to agonize noisily over their role as protectors of civil liberties; and should they, in the end permit the evidence to be admitted in a criminal trial, it would not be without elaborate hand-wringing and a parting shot at the police that their conduct was “on the line.” Actually, on the facts presented in the *Ward* hypothetical, a modern American court would almost surely reach the opposite conclusion and suppress any evidence. Imagine that police today received an anonymous tip that an individual had robbed a bank and hidden the proceeds in a suitcase. If police had seen the suspect arrive home and remove a suitcase from a car trunk, courts would be unlikely to find that the police were authorized to order him to open the suitcase. Far from complimenting the police officers, courts would scold them for violating constitutional rights.

The *Dunaway* Court’s statement that *Terry* effected a radical break in Fourth Amendment law, bestowing an unprecedented power on police to stop and search suspects when less than probable cause was present, is, in short, inconsistent with the documentary record. Many statutes from the first half of the twentieth century appear to confer even more discretion on police to stop people, at least at night, when they suspect the person is up to no good; and those same statutes provide that when the suspect fails to give an adequate explanation of his whereabouts, police officers can detain him, possibly overnight:

N.H. Pub. Laws (1926) c.363, § 12: “Every watchman may arrest any person whom he shall find committing any disorder, disturbance, crime or offense, or such as strolling about the streets at unreasonable hours, who refuse to give an account, or who are reasonably suspected of giving a false account, of their business or design, or who can give no account of the occasion of their being abroad.”<sup>65</sup>

Mass. Gen. Laws (1932) c.41, § 98: “During the night time [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are

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<sup>65</sup> Quoted in Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 319-20 n.15 (1942).

going . . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested.”<sup>66</sup>

Rules and Regulations of the Police Department of Chicago (1933) Rule 465(6) provides: “A person shall be arrested who is found prowling around at night, who is unable to give a satisfactory account of his conduct under such circumstances, or who has in his possession dangerous weapons or instruments ordinarily used by housebreakers.”<sup>67</sup>

Section 2 of the Uniform Arrest Act of 1942 provides:

- (1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad, and whither he is going.
- (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
- (3) The total period of detention provided for by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.<sup>68</sup>

These laws very much resemble the medieval English nightwatchmen statutes, allowing constables to stop and detain persons, even when there was not probable cause to make an arrest. The suspect would be taken back to the police station, possibly detained overnight, and then brought before a magistrate for a determination of whether there was probable cause to make a full-blown arrest. If anything, the *Dunaway* Court’s statement that *Terry* conferred more discretion on police officers than had existed earlier in the century gets it exactly backwards. Before *Terry*, police, when making a stop based on reasonable suspicion, could demand that the person answer questions or consent to a search; and were he to refuse, the police could simply arrest him then and there. Modern American courts have held that

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<sup>66</sup> *Id.* at 322

<sup>67</sup> *Id.* 319-20 n.15.

<sup>68</sup> *Id.* at 320

persons detained during a *Terry* stop are free to refuse an officer's request for consent to search his belongings and to answer questions (other than the suspect's name)<sup>69</sup> and such refusals cannot themselves be cited by police as evidence that there was probable cause to make an arrest.

**D. *Terry's* Legacy**

Despite the breadth of its legacy, the *Terry* decision was actually a quite limited one. The sole issue under review was whether, having struck up a conversation with the three suspects and receiving mumbled answers, McFadden could frisk the men for weapons. Chief Justice Warren offered no opinion as to what McFadden could have done had the three men calmly announced that they were looking for gifts for their wives and had then walked away. Could the officer have forcibly detained them? For how long? Could he have compelled them to answer questions? To produce identification?<sup>70</sup>

Narrowly read, then, *Terry* simply stands for the proposition that cops can frisk a suspect whom they are questioning when there is reasonable suspicion to fear for their safety. Given that the focus of the *Terry* decision was the safety of police officers, it is remarkable how quickly the Court expanded the application of the "reasonable suspicion" evidentiary standard. Over the past 35 years, the Supreme Court has considered the constitutionality of countless police practices, and again and again the Court has framed the issue as was whether "reasonable suspicion" justified the police actions. Thus, citing *Terry*, the Court has upheld

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<sup>69</sup> *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S.Ct. 2451 (2004)

<sup>70</sup> In subsequent decisions, the Supreme Court has opined on such questions as the duration of *Terry* stops, *United States v. Sharpe*, 470 U.S. 675 (1985) (upholding *Terry* stop of 40 minutes' duration); *United States v. Place*, 462 U.S. 696 (1983) (rejecting detention of 90 minutes), and the requirement that those stopped provide identification, *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 124 S.Ct. 2451 (2004).

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the detention of property when there is reasonable suspicion that contraband was inside;<sup>71</sup> “protective sweeps” of a house when there is reasonable suspicion that suspect’s armed associates might be present;<sup>72</sup> searches of a car when there is reasonable suspicion that weapons are present there;<sup>73</sup> and search of a probationer’s home on basis of reasonable suspicion.<sup>74</sup>

Some critics of the Court have lamented the imperialistic nature of the “reasonable suspicion” standard. Probable cause, the competing evidentiary standard that once served as the North Star of Fourth Amendment jurisprudence, has lost much of its luster, and it is to the reasonable suspicion standard that courts now regularly look for guidance. It is my contention, argued at oppressive length in another article,<sup>75</sup> that this development is the predictable consequence of the Court’s decision to cast probable cause as a high and inflexible standard,<sup>76</sup> and therefore in its very nature inapplicable to the wide range of actions expected of police. Courts have rigorously applied the probable cause standard to full custodial arrests and house searches, but plainly a lesser and more nuanced evidentiary standard is appropriate in other contexts, such as investigatory stops.

But how much suspicion is needed to qualify as “reasonable suspicion?” In *United States v. Cortez*,<sup>77</sup> the Court ruminated on the meaning of reasonable suspicion and belabored the obvious in noting that such a term “fall[s] short of providing clear guidance dispositive of

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<sup>71</sup> *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (upholding detention of mail when there reasonable suspicion that it contained drugs).

<sup>72</sup> *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>73</sup> *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>74</sup> *United States v. Knights*, 534 U.S. 112 (2001).

<sup>75</sup> See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2002).

<sup>76</sup> See *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>77</sup> 449 U.S. 411 (1981). The discussion of the meaning of reasonable suspicion in *Cortez* is still the basis of Supreme Court decisions interpreting reasonable suspicion. See, e.g., *United States v. Arvizu*, 534 U.S. 266 (2002) (quoting and discussing *Cortez*).

the myriad factual situations that arise.”<sup>78</sup> “But,” the Court quickly added, “the essence of all that has been written is that *the totality of the circumstances*—the whole picture—must be taken into account.”<sup>79</sup> One wonders what this adds to our understanding. Was someone suggesting that reasonable suspicion should be based on only a sliver of the circumstances, a shorn picture? Well, if so, the Court squarely rejects such a view: reasonable suspicion is based on the “totality of the circumstances.” Perhaps sensing that the illumination provided is at best diffuse, the Court proceeded: “Based upon that whole picture the detaining officers must have a *particularized* and *objective* basis for suspecting the particular person stopped of criminal activity.”<sup>80</sup> Presumably, “particularized” and “objective” are to be distinguished from “generalized” and “subjective,” but what separates these two categories of evidence (the one legitimate, the other not)? Is the fact that a suspect is loitering in a “high-crime area” particularized or generalized evidence? Is the fact that a police officer detects anxiety and nervousness in a suspect objective or subjective evidence? As we explore in the next section, the case law applying *Terry* is a muddled and often incoherent answer to questions such as these.

### **III. The Unreasonable “Reasonable Suspicion” Standard**

Whether a police officer’s suspicions authorize a stop and frisk depends on whether his suspicions were “reasonable”; and that in turn depends on the nature of the evidence adduced by the officer at a suppression hearing. Reasonableness is equated with objective and particularized evidence, which is distinguished from subjective and generalized evidence. Driving the judicial skepticism about the latter category of evidence is the determination to root out and expunge police hunches: Cops can interfere with a citizen’s liberty only when the

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<sup>78</sup> *Id.* at 417.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 418

evidence is somehow objective, and not the product of a subjective sense or a feel or an instinct. This section considers the current case law applying *Terry v. Ohio*, and argues that courts are on the one hand too impressed with objective criteria and on the other too dismissive of subjective criteria. I compare the probative value assigned to a piece of objective evidence (that a car has a freshener, which is supposedly linked to drug dealing) and a piece of subjective evidence (that a suspect was nervous), and speculate that, contrary to the reception accorded such evidence in the courts, it is the latter, not the former evidence, that more highly correlates with criminal activity. The focus on objective evidence renders the reasonable suspicion standard an unreasonable one. And when one compares the judicial reception of police hunches to those of other actors in the judicial system, one discovers that courts are not skeptical of hunches *per se*; they are simply skeptical of cops.

**A. Nervousness, “Subjective” Evidence, and “Mere Hunches”**

Imagine that a pair of cops are cruising an area with a high crime rate and known (at least by the police and other citizens who care to know about such things) as a clearinghouse for illegal drugs. The police officers see a car blocking an intersection; the driver “looks startled” when he realizes that police have arrived at the scene. The driver, looking anxious, averts his gaze from the police officers. He reaches over to the console and grabs something. The police officers decide to investigate, and as they approach, the driver reaches for something else out of view. One of the officers, fearing for his safety, orders the driver out of the car, and during the frisk discovers an illegal substance.

Such were the essential facts of *United States v. McKoy*,<sup>81</sup> and in broad strokes, countless other arrests over the past decades. In essentials, the government defended the frisk on three grounds: the suspect’s nervousness, his furtive gestures, and the high-crime area in

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<sup>81</sup> 2004 WL 2851950 (D. Mass).

which the stop occurred. I consider below the *McKoy* opinion in some detail not because it is an especially important decision, but quite the opposite: its ordinariness affords us some insight into the typical difficulties confronted in a reasonable suspicion decision.

*Nervousness.* First, Judge Woodlock considered the police officer’s testimony that the suspect “looked away” when the police made eye contact and “began to act a little nervous.”<sup>82</sup> After a cursory acknowledgment that “nervousness is a factor the police may consider,” the judge proceeded to discount the officer’s observation.<sup>83</sup> He wrote that nervousness “alone is not sufficient.”<sup>84</sup> This is true, as well as irrelevant, for the government was not arguing that nervousness alone justified the stop. The issue was whether, taken together with furtive gestures in a high-crime area, the police officer’s observation of unusual nervousness contributed in any way to a finding of reasonable suspicion. Judge Woodlock added that “nervousness is a natural reaction to police presence,”<sup>85</sup> a commonplace observation generally offered in opinions that culminate in disregarding the officer’s testimony on this score.

According to Judge Woodlock, “[n]ervousness may even warrant less weight when it is manifested in particular contexts.”<sup>86</sup> In something of a detour, he then quotes a lengthy passage from Justice Stevens’ dissenting<sup>87</sup> opinion in *Illinois v. Wardlow*,<sup>88</sup> where the

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<sup>82</sup> *Id.* at \*1.

<sup>83</sup> *Id.* at \*4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*5.

<sup>87</sup> Judge Woodlock identifies Stevens’ opinion as “concurring in part and dissenting in part,” which is technically true. Stevens concurred insofar as he rejected the suspect’s argument that flight could *never* contribute to a finding a reasonable suspicion. But while Stevens rejected a *per se* rule, he agreed with the defendant that, on the facts present, flight did not lead to a finding of reasonable suspicion. In this respect, Steven *dissented* from the majority, which held that “[h]eadlong flight—when it occurs—is the consummate act of evasion.”

<sup>88</sup> 528 U.S. 119 (2000)

question was whether a suspect's headlong flight when a dozen police cars converged provided reasonable suspicion for a stop and frisk:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence . . . . [U]nprovoked flight can occur for other, innocent reasons.<sup>89</sup>

Immediately after quoting Stevens' dissenting opinion, Judge Woodlock ambiguously notes, "Much the same could be said about nervousness in the presence of police officers." There was, however, a yawning chasm between the facts of *Wardlow* and *McKoy*. In the former, four police cars converged, sirens blazing. In such a circumstance, a wholly innocent person may well be startled into headlong flight. And yet even on these facts, it is worth recalling, a *majority* of the Supreme Court Justices found that "headlong flight" is still the "consummate act of evasion." The suspect in *McKoy* was sitting in a car at an intersection one afternoon when a single police car pulled up. Surely, such a situation is less startling and less likely, in and of itself, to generate feelings of anxiety on the part of a wholly innocent person.

Stevens' observation that minorities may be more fearful of the police is repetitively quoted in lower court opinions<sup>90</sup> but one might pause to consider its accuracy. The suggestion seems to be that nervousness among minorities is less probative of criminality than nervousness in non-minorities. How do we (or Justice Stevens) know that? An upper middle class white person may have almost no experience with police officers and may truly be startled and anxious on the rare occasion that he is confronted by the police. When lower courts suggest the heightened nervousness of minorities, the proof, such as it is, consists of a

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<sup>89</sup> Id. at 132-33 (Stevens, J. dissenting).

<sup>90</sup> See, e.g., *State v. Nicholson*, 2005 WL 434646 Tenn.Crim.App.,2005; *State v. Jordan*, 104 Ohio St. 3d 21 (Ohio App. 2004); *State v. McKinnon Andrews*, 846 A.2d 1198 (N.H. 2004); *State v. Kelly*, 119 S.W.2d 587 (Mo.App. 2003).

citation to Stevens' dissenting opinion from *Wardlow*, bolstered perhaps by a law review article or two, but it is doubtful that law professors or judges have any first-hand knowledge of the feelings of inner city minorities. True, there are some studies that indicate minorities have more negative feelings towards the police than non-minorities, but this suggests simply that minorities would be more *hostile* when police arrived on a scene, not that they would be more *nervous*. In fact, to the extent that young African American men have more dealings, albeit often unwanted, with the police, why does one assume that they are more nervous, and not less nervous, when confronting the police than a sheltered upper-middle class white person?

In any event, underlying the *McKoy* opinion, and numerous others, is a skepticism about the probative value of a police officer's testimony that a suspect is "nervous." Virtually any behavior has been deemed suspiciously nervous by police officers.<sup>91</sup> In some cases, officers testify that nervousness is evidenced when a suspect avoids eye contact.<sup>92</sup> In other cases, nervousness is discerned when suspects repeatedly stare at police officers.<sup>93</sup> Some suspects display their nervousness by being jittery;<sup>94</sup> others by being too calm.<sup>95</sup> As one judge complained, "This court has heard every imaginable basis for searching so-called "suspicious" luggage: it is old, it is new; it had a handwritten identification tag or it did not; it is a soft bag, a garment bag, a duffel bag; the possessor is too nervous, too self-assured, too calm, too jittery; the bags are overstuffed or they are underpacked."<sup>96</sup> Although police officers will informally tell you that they can somehow distinguish between ordinary

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<sup>91</sup> Cf. *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (referring to a drug profile's "chameleon-like way of adapting to any particular set of observations")

<sup>92</sup> See, e.g., *State v. Jackson*, 892 So.2d 71 (La.App.5<sup>th</sup> Cir. 2004).

<sup>93</sup> See, e.g., *United States v. West*, 2004 WL 1465690 (3<sup>rd</sup> Cir. 2004).

<sup>94</sup> See, e.g., *Adams v. State*, 103 P.3d 908 (Ak.App. 2004).

<sup>95</sup> See, e.g., *United States v. Cardona*, 955 F.2d 976 (5<sup>th</sup> Cir. 1992).

<sup>96</sup> *United States v. Va Lerie*, WL 21956437 (D.Neb.2003).

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nervousness and suspicious nervousness, one may wonder whether they are deluding themselves as to their powers of observation. A panel of the Tenth Circuit suggested as much on one case: “Nothing in the record indicates whether Agent Ochoa had any prior knowledge of Defendant, so we do not understand how Agent Ochoa would know whether Defendant was acting nervous and excited or whether he was merely acting in his normal manner. Rather, Defendant’s appearance to Agent Ochoa is nothing more than an inchoate suspicion or hunch.”<sup>97</sup> An officer’s testimony that a suspect was nervous is occasionally credited,<sup>98</sup> but many courts have doubted how the officer could reasonably make such a judgment and therefore minimized its significance in a reasonable suspicion determination.<sup>99</sup> As a Minnesota state court recently explained, “the officer must demonstrate *objective* facts to justify that suspicion and may not base it upon a mere hunch. Nervousness alone is not an objective fact, but a *subjective* assessment derived from the officer’s perceptions.”<sup>100</sup> When a police officer reports his sense that a suspect was unusually nervous, even if he is being wholly honest, he is merely confessing his subjective impression—a mere hunch.

*High-crime area.* The next factor Judge Woodlock considered was that the location of the encounter was a high-crime area. There are literally hundreds of opinions in which courts

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<sup>97</sup> United States v. Bloom, 975 F.2d 1447, 1458 (10th Cir.1992)

<sup>98</sup> See Bergmann, 633 N.W.2d at 337 (defendant’s nervousness near the trunk of the vehicle created reasonable suspicion to call for drug dog); see also United States v. Hunnicutt, 135 F.3d 1345, 1350 (10th Cir.1998) (finding reasonable suspicion to wait for drug dog based on defendant’s extreme nervousness and inconsistent statements); United States v. Bloomfield, 40 F.3d 910, 912-13, 918-19 (8th Cir.1994) (concluding wait for drug dog justified by defendant’s nervousness, evasive answers, and refusal to consent to search).

<sup>99</sup> State v. Gibson, \_\_\_ P.3d \_\_\_ (Id.App. 2005)(“a person’s nervous demeanor during such an encounter is of limited significance in establishing the presence of reasonable suspicion”). Accord Brent v. Ashley, 247 F.3d 1294, 1302 (11th Cir.2001); United States v. Beck, 140 F.3d 1129, 1139 (8th Cir.1998); United States v. Fernandez, 18 F.3d 874, 879 (10th Cir.1994); Laime v. State, 347 Ark. 142, 60 S.W.3d 464 (2001).

<sup>100</sup> State v. Rahkola Not Reported in N.W.2d, 2004 1327339 Minn.App.,2004

have struggled with the relevance of this factor in reasonable suspicion determinations.<sup>101</sup> As Judge Woodlock notes, the police are permitted to cite this factor, but “alone [it] is not a sufficient basis to frisk or even, for that matter, to stop.”<sup>102</sup> (Again, no one suggested as much; the issue was the relevance of the prevalence of crime in the area taken together with other factors.) To be sure, the facts in *McKoy* were compelling on this score. The stop in question occurred on February 6; just five days earlier, on February 1, there were two shootings at security vehicles reported in the area. Surely, one would think, it was objectively reasonable for the police officers to be somewhat wary as they approached the car on February 6. Judge Woodlock escapes this conclusion as follows:

[W]hile a factor, the neighborhood is one with limited significance in this case, particularly where no connection was made by the government between the nature of the crimes committed in the neighborhood and the violation suspected here . . . . This is not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected. The only reason for the stop was a traffic violation. No assumption about weapons can be drawn from Mr. McKoy’s traffic violation. Nor is there any indication that they suspected Mr. McKoy was involved in the two recent nighttime shootings of security car windows.<sup>103</sup>

Judge Woodlock’s point in *McKoy* seems to be that although there was an objective basis for suspicion as they patrolled the area near the intersection of Maple and Cheney Street, the suspicion was not particularized to the suspect McKoy: “It is not enough to say that such events occur in the area or even that two specific events occurred recently in the neighborhood, for then everybody stopped for a traffic violation that week would be subject

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<sup>101</sup> Compare, e.g., *State v. Wilson*, 2005 WL 273050 (Ohio App. Feb 3. 2005) (“Even in high-crime areas, a citizen is entitled to the presumption that he obeys the law.”) with *D.T.B. v. State*, 2004 WL 2955034 (Fla.App. 2004) (“whether the stop occurs in a high-crime area is a relevant factor to be considered in a Terry”).

<sup>102</sup> 2004 WL 2851950 at \* 5.

<sup>103</sup> *Id.*

to the presumption regardless of whether their conduct could fairly be interpreted as dangerous.”

One might argue that the district judge distorted the government’s claim, which was not that *everyone* stopped for a traffic violation near the intersection Maple and Cheney Streets could be frisked, but that this particular suspect could be frisked, given his nervousness and furtive gestures. But the nub of the problem is drawing a meaningful distinction between particularized and generalized evidence. The Supreme Court in *United States v. Cortez* emphasized that particularized evidence could contribute to a reasonable suspicion finding, and in so doing it implicitly excluded “generalized” evidence. In what category does “high-crime area” fall? In *Arvizu*, the Supreme Court included several factors as contributing to a finding of reasonable suspicion, one of them that the van was “registered to an address . . . that was four blocks north of the border in an area notorious for alien and narcotics smuggling.” One might respond that such evidence is merely generalized, just like McKoy’s presence in a high-crime area, but the Supreme Court in *Arvizu* nonetheless deemed it relevant, at least when added to other pieces of evidence more directly linked to the suspect.

That being said, the regularity with which police officers cite the “high-crime area” in which a stop occurred does give one pause. Concurring in the 9th Circuit’s en banc decision in *United States v. Montero-Camargo*,<sup>104</sup> Judge Kozinski complained about the use of this factor in reasonable suspicion decisions:

Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop’s repertoire of war stories

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<sup>104</sup> 208 F.3d 1122 (9<sup>th</sup> Cir. 2000) (en banc).

to determine what is a “high crime area”—and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion—strikes me as an invitation to trouble.<sup>105</sup>

Granted, the facts regarding the “high-crime area” in *McKoy* were quite compelling—the two shootings at security vehicles in the past week—but what if there had been only one shooting, and what if it had been a month ago? At what point does a neighborhood qualify as “high-crime” for *Terry* purposes?<sup>106</sup> In a recent case, a suspect asked the Seventh Circuit to require the police to provide “specific data” confirming their claim that a stop occurred in a high-crime area, but the court rejected the invitation.<sup>107</sup>

It is not surprising that most criminals are stopped in neighborhoods where most crimes occur (also known as “high crime areas”); what is surprising is that some courts seem to find it preferable to defer to a police officer’s testimony that a stop occurred in “high crime” area than an officer’s testimony about a suspect’s nervousness. Surely, the former gives the officer nearly as much carte-blanche as the latter. Given the courts’ preference for certain kinds of testimony, however, one would predict police officers to craft their testimony accordingly; and one indeed finds officers reciting “high crime area” like a mantra in suppression hearings. *Montero-Camargo* is an illustrative case, in which police officers stopped a car that had made a U-turn just before it was to have been stopped at a checkpoint. Ninth Circuit case law bafflingly prohibited police officers from citing this piece of evidence (apparently, innocent drivers make U-turns all the time as they approach checkpoints, or so believe the judges of the Ninth Circuit). Consequently, the police officers in *Montero-*

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<sup>105</sup> *Id.* at 1142 (Kozkinski, J., concurring).

<sup>106</sup> *Compare* *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir.1999) (“In less than one year there had been some 2,500 drug arrests in the five-block-by-five-block area where the incident occurred.”); *United States v. Morales*, 191 F.3d 602, 604 (5th Cir.1999) (“In the past year alone, the Agent had detained approximately 600 illegal aliens on this stretch of the highway.”).

<sup>107</sup> *United States v. Baskin*, 2005 WL 613395. *But see* *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir.2002).

*Camargo* loaded up their testimony with as many acceptable “objective” pieces of evidence as possible. By denying the relevance of the U-turn, Ninth Circuit case law implicitly demanded that police officer say different things. Judge Kozinski wrote,

It also creates an incentive for officers to exaggerate or invent factors, just to make sure that the judges who review the case will approve their balancing act. I understand that it’s not always possible to eliminate uncertainty, and that weighing and balancing is the stuff of many legal doctrines. But what excuse is there for resorting to a totality-of-the-circumstances approach when a single factor—the turnaround right before the checkpoint—alone justifies the search?<sup>108</sup>

As Judge Kozinski notes, courts seem to forget that police officers, just like criminals, respond to judicial decisions; and if courts signal their skepticism about “nervousness” testimony, police officers will simply alter what they say. Whether they will meaningfully alter their behavior is another question altogether.

*Furtive gestures.* Finally we come to the suspect’s furtive gestures in *McKoy*, yet another factor that appears in countless *Terry* opinions, some courts according it weight,<sup>109</sup> others not.<sup>110</sup> Of course, there are movements, and then there are *furtive* movements, and one cannot necessarily assume that any deviation from immobility gives rise to suspicion. After all, unnatural stiffness may also be cited as a factor contributing to reasonable suspicion, as was the case in *Arvizu*. Judge Woodlock writes, “The movement must be interpreted in context to determine if it is actually furtive, if it in fact gives rise to a reasonable belief that the suspect is armed and dangerous.”<sup>111</sup>

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<sup>108</sup> Id. at 1142 (Kozinski, J., concurring).

<sup>109</sup> State v. T.N.T. 106 Wash.App. 1026, Not Reported in P.3d, 2001 WL Wash. App. Div. 1, 2001 (“Factors relevant to a reasonable safety concern include . . . furtive gestures”).

<sup>110</sup> See, e.g., Joshua v. DeWitt, 341 F.3d 430 (6<sup>th</sup> Cir. 2003) (“The Ohio Court of Appeals’ use of the phrase “furtive gestures” is a characterization, not an independent fact. From our review, there is no objective evidence in this record that would support the trooper’s opinion upon which the Ohio Court of Appeals relied for its characterizations that Petitioner and his companion exhibited furtive gestures.”).

<sup>111</sup> 2004 WL 2851950 at \*6.

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The government in *McKoy* argued that the gestures cited by the police officers as suspicious in that case were similar to movements deemed furtive in other cases. Judge Woodlock, however, sifted through the facts of the cases cited and concluded otherwise. (In one case, he conceded, the facts were similar, but he criticized the decision as “too broad.”) For example, Judge Woodlock distinguished *United States v. Nash*,<sup>112</sup> where an Illinois state trooper stopped a car in Gulfport, Illinois, in the early morning. As the trooper approached, he saw the driver reach toward the floor of the car. The driver’s face was unshaven and puffy and his breath smelled of alcohol. In addition, a jacket was tucked under the driver’s lap and stretched onto the floor. The Seventh Circuit upheld the officer’s decision to frisk the suspect. Judge Woodlock cabined the implications of the case to miniscule dimensions: “The proposition for which *Nash* stands is that a sole officer, approaching a car driven by someone who appears disheveled and drunk and having witnessed movement toward an area of the car where he later sees something that could obscure a weapon, may conduct a limited search for weapons.”<sup>113</sup>

Judge Woodlock is surely right that there are factual differences between *McKoy* and *Nash*, but there were similarities as well, as he notes: in both cases, suspects during traffic stop violations made “volitional movements” that sparked concern on the part of police officers. Yes, in *Nash* the suspect appears to have been inebriated, but under Judge Woodlock’s reasoning, it is not clear why this provides grounds for a frisk as there is “no connection” between the consumption of alcohol and the possession of a firearm. And yes, it is true that in *Nash* a single officer approached the car, whereas in *McKoy* a pair of officers approached, but Judge Woodlock would need to explain how the threat to Officer Joyce, as

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<sup>112</sup> 876 F.2d 1359 (7<sup>th</sup> Cir. 1989).

<sup>113</sup> 2004 WL 2851950 at \*6.

he approached the driver's side of the car, was so substantially diminished by the fact that his partner was trailing him and approaching the passenger side. The most meaningful distinction is the presence of the coat on the suspect's lap, but surely this is susceptible to an innocent explanation—the stop occurred on an early morning in November. Meanwhile, there were factors present in *McKoy* that were not present in *Nash*—the fact that the suspect was nervous and, more importantly, the fact that in the very area where the stop occurred there were two shootings at security vehicles less than a week previous.

In which of the two scenarios would it be more objectively reasonable for a police officer to fear for his safety? It is difficult for me to say, as I would be terrified in either scenario. Judge Woodlock, however, felt confident drawing a clear distinction between the two cases. He concludes his opinion as follows:

The only indications in this case that Mr. McKoy was dangerous were (a) generalized notions regarding the neighborhood, not inferences drawn from his suspected crime, and (b) movements and nervousness in the presence of police, not physical reactions in contravention of an order to stop moving or apparent efforts at concealment. To admit the evidence would be a legal determination that if one commits a traffic violation in a high-crime neighborhood he will be subject to a frisk whenever he appears nervous and moves. The case law does not support such a simplistic and far-reaching conclusion and I decline to adopt it.<sup>114</sup>

According to the district court, denying the defendant's suppression motion in this case would be tantamount to conferring unlimited discretion on police officers in high-crime areas. After all, they will always be able to claim that the suspect was nervous and furtive, and therefore they will be able to stop and frisk every suspect. Earlier in the opinion, Judge Woodlock quoted approvingly from a law review article that complained that "observations of minimal

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<sup>114</sup> 2004 WL 2851950 at \*9.

significance are sometimes elevated to reasonable suspicion based on the character of the neighborhood in which the suspect is found.” I will return to this point later in the article.<sup>115</sup>

### **B. Car Fresheners, Objective Evidence, and the Base Rate Fallacy**

We turn now to more concrete—and objective evidence. Courts are more receptive when police officers announce that they saw a “bulge” in a suspect’s pocket,<sup>116</sup> or that the suspect carried a pager,<sup>117</sup> or that the suspect’s origin was one of the countless “source cities of illegal narcotics.”<sup>118</sup> This evidence, the thinking goes, is not a “mere hunch,” or subjective impression, but something objective, and therefore worthy of more serious attention.

A curious example of objective evidence, that has spawned a surprisingly substantial body of case law, is the presence of one or more deodorizers in a suspect’s car. In dozens of cases, police officers or highway troopers cite this piece of evidence as a factor contributing to reasonable suspicion; for as police repeatedly tell judges at suppression motions, drug traffickers frequently use such devices in the belief that they mask the odor of drugs. In general, courts credit this testimony,<sup>119</sup> which suggests the following puzzle: Why are judges, who are so wary of police officers when they announce that a suspect was “nervous,”

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<sup>115</sup> See *infra* at IV.A.

<sup>116</sup> See, e.g., *State v. Cothran*, 115 S.W.3d 513 (Tenn.App. 2003) (approving frisk when police report a “characteristic bulge in the suspect’s clothing”).

<sup>117</sup> See, e.g., *United States v. Kirkpatrick*, 5 F. Supp.2d 1045 (D. Neb 1998) (one of the factors supporting reasonable suspicion was that the suspect was carrying a pager).

<sup>118</sup> See, e.g. *United States v. Wisniewski*, 358 F. Supp.2d. 1074 (D. Utah 2005).

<sup>119</sup> See *United States v. Foreman*, 369 F.3d 776, 786 (4th Cir. 2004); *United States v. Lebrun*, 261 F.3d 731, 734 (8th Cir. 2001); *State v. O’Meara*, 9 P.3d 325, 326 (Ariz.App. 2000); *State v. Taylor*, 2000 WL 33250186 (Utah. App. 2000); *United States v. Alvarez*, 68 F.3d 1242, 1245-46 (10th Cir. 1995) (McKay, J., concurring); *United States v. Bloomfield*, 40 F.3d 910, 919 (8th Cir. 1994); *State v. Guzman*, 879 P.2d 114, 115 (N.M. 1994); *United States v. Solis-Serrano*, 982 F.2d 530, 1992 WL 372405 (10th Cir.1992); *United States v. Sanchez-Valderuten*, 11 F.3d 985, 989 (10th Cir.1993); *State v. Alonzo*, 587 So.2d 136, 140 (La.Ct.App.1991); *United States v. Reyna*, 546 F.2d 103 (5th Cir.1977); *United States v. Medina*, 543 F.2d 553 (5th Cir.1976); *United States v. Gutierrez-Espinosa*, 516 F.2d 249 (9th Cir.1975); *United States v. Alvarado*, 519 F.2d 1133 (5th Cir.1975).

relatively deferential when police officers testify as to significance of car fresheners in signaling the presence of drugs?

A moment's reflection should make one realize that, in and of itself, the existence of a car deodorizer is of very little significance in deciding whether a car contains drugs, *even if*, as the police regularly maintain, many drug traffickers use such devices. Indeed, the failure to appreciate this fact points to what Gerd Gigerenzer has termed the "base rate fallacy." We have no empirical studies as to what percentage of drug traffickers use car fresheners, but let us assume that the overwhelming majority, or 80%, do. Of course, some innocent people also like to freshen their cars. Let us assume that 5% of innocent people use car fresheners. Courts seem to be duped into thinking, apparently on the basis of such "evidence," that a car freshener can give rise to reasonable suspicion.

But such thinking is flawed. It is premised on a "base rate fallacy," that is, a failure to consider the natural frequency in which drug traffickers prowl our nation's highways. Let us assume that a mere .1 % (or 1 in a 1000) of the nation's drivers are transporting drugs, at least at any randomly chosen point along the nation's highways and byways. In any random sampling of 10,000 drivers, then, there will be 10 drug traffickers and 9,990 innocents. Of the 10 drug traffickers, 80%, or 8 will have car fresheners. Of the 9,990 innocents, 5%, or 500, will car fresheners. Thus in any group of 10,000 drivers, a total of 508 will have car fresheners. The upshot: The percentage of drivers with car fresheners who are drug traffickers is 8/508 or just 1.57%.

Some federal judges, writing in dissent, have alluded to this point, albeit without resort to numbers or pretentious citations to the "base rate fallacy."<sup>120</sup> As Judge McMillian,

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<sup>120</sup> See *United States v. Foreman*, 369 F.3d 776 (Gregory, J. dissenting) ("The prevalence of [car fresheners] in American automobiles does little to eliminate innocent people within the context of

dissenting in an en banc decision of the Eighth Circuit, wrote: “the ‘masking odor’ factor could apply to millions of motorists who use car deodorizers.”<sup>121</sup> Although true, one should not minimize the significance of car fresheners. Assuming my arbitrary numbers bear some relation to reality, a car with a freshener is 157 times (.0157/.0001) more likely than a car without one to be used by a drug trafficker. Nonetheless, in and of itself, the car freshener’s presence is not nearly as significant as courts (and perhaps troopers) seem to think, for only 1-2% of the cars with fresheners are carrying drugs.

This raises the comparative question: Which piece of evidence, taken alone, is more probative of criminal activity: the objective presence of a car freshener or a police officer’s subjective impression that a suspect is unusually nervous? Alternatively put, if the *only* piece of evidence one knew was either that (a) a car had a freshener or (b) an experienced police officer had a “mere hunch,” which factor—the objective or the subjective one—better predicts the presence of drugs? We have, of course, no hard data with which to answer the question, but it seems entirely possible, or even probable, that a “mere hunch” is more probative. Consider that in *City of Indianapolis v. Edmond*,<sup>122</sup> the Indianapolis Police Department set up six roadblocks at selected locations and conducted random stops. Of the 1,161 cars stopped over a three month period, an astonishing 104 arrests were made. (Fifty five arrests were made for drug-related crimes and another 49 for offenses unrelated to drugs.)<sup>123</sup> That works out to a hit rate of nearly 9%. Simply by using their knowledge of the city of Indianapolis and

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reasonable articulable suspicion.”); *United States v. Bloomfield*, 40 F.3d 910 (8<sup>th</sup> Cir. 1994) (en banc) (McMillian, J. dissenting) (“Even the ‘masking odor’ factor could apply to millions of motorists who use car deodorizers.”).

<sup>121</sup> *Id.*

<sup>122</sup> 531 U.S. 32 (2000).

<sup>123</sup> *Id.* at 34-35.

the preferred routes of drug traffickers, police were able to attain a far higher success rate than would have been obtained had they stopped every car with a car freshener.<sup>124</sup>

But let us assume that police are relatively inept in their hunches, and only 1% of their subjective and inchoate impressions prove accurate. It is still worth noting that when police have a hunch about someone *and* that person has a freshener in his car, the odds that the person is a drug trafficker may become relatively substantial. (I am assuming that it is not solely because of the presence of the car freshener that the officer develops a hunch.)

Consider: Of any 10,000 people that are stopped by police and as to whom they have a “mere hunch,” let us assume that a mere 1%, or 100 will be drug traffickers, and 9900 will be innocent. Of the 100 drug traffickers 80 will have car fresheners, and of the 9900 innocents 495 will too. So of the sample of 575 car fresheners, 80/575 or 16% will be indicative of drug traffickers. If we assume that police are somewhat better, but still quite inept, in the hunches, and that they generate true positives 5% of the time, the numbers become even more compelling. Then, if a police officer has a hunch and the person has a car freshener, a drug trafficker will be present 46% of the time.<sup>125</sup> The upshot is that an “objective” piece of evidence, such as the presence of a car freshener, only becomes statistically meaningful when it exists in tandem with another, often subjective piece of evidence, such as an impression of anxiety or even a “mere hunch.” Yet courts persist, following Warren’s opinion in *Terry*, in deprecating “mere hunches.”

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<sup>124</sup> The Supreme Court overturned the random checkpoints in *Edmond* because its purpose was a “general interest in crime” and not some non-law enforcement purpose that would qualify the program for treatment under the more deferential “special needs” jurisprudence. Thus, police have more leeway when searching for drunk drivers than drug dealers—a result that defies easy explanation.

<sup>125</sup> Of the 10,000 people stopped and as to whom the police have a hunch, 500 will be drug traffickers and 9500 will be innocent. Of the former, 80%, or 400 will have car fresheners; of the latter, 5% or 475 will have car fresheners. Therefore, car fresheners indicate drug traffickers 400/875 or 46% of the time.

### **C. Hunches and Demeanor Evidence in the Judicial System**

But a caveat is now in order. Courts are not simply disparaging of hunches. It is often assumed that prosecutors, jurors, and judges gather genuine information on the basis of nonverbal cues; and the judicial system, far from discounting this information, treats it as valuable and worthy of deference.

#### **1. Prosecutors**

Imagine that at a suppression hearing a police officer conceded, “I [didn’t] like the way he look[ed], with the way the hair [was] cut . . . . And the mustache and the beard look[ed] suspicious to me.” If on the basis of this, for lack of a better word, *hunch*, a police officer stopped a person, there is not the slightest doubt that any evidence eventually obtained would be suppressed as the product of an illegal stop. For surely the officer’s impression of how someone “looked,” as well as the cut of his mustache and beard, do not qualify as *reasonable* suspicion. In the case *Purkett v. Elem*,<sup>126</sup> however, such an admission was made—and no illegality was found. The author of the statement was not a police officer, however, but a prosecutor, who was justifying his use of a peremptory strike against a potential juror. The Missouri Court of Appeals affirmed the conviction, finding that the “state’s explanation constituted a legitimate ‘hunch,’”<sup>127</sup> and the United States Supreme Court agreed.

Courts regularly condone prosecutorial hunches in the context of equal protection (or *Batson*) challenges to peremptory strikes to prospective jurors. The typical sequence of events is as follows: A defendant claims that a prosecutor used his peremptory challenges to systematically remove minorities from the jury panel. A *Batson* hearing is held, in which the

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<sup>126</sup> 514 U.S. 765 (1991) (per curiam).

<sup>127</sup> *State v. Elem*, 747 S.W.2d 772, 776 (Mo.App.1988).

prosecutor mumbles something about the juror's hair,<sup>128</sup> or "body language,"<sup>129</sup> or jewelry<sup>130</sup> or youth<sup>131</sup> or apparent intelligence.<sup>132</sup> Then, to complete the protocol, a trial judge holds (on the basis of his observation of the prosecutor) that the proffered reasons were "race-neutral," and therefore legitimate. At the risk of belaboring the point, then: Were a police officer to offer such "reasons" as the justification for a three-minute *Terry* stop, court would ridicule him; but when a prosecutor, for the very same reasons, strikes a prospective juror, court generally defer,<sup>133</sup> exalting the prosecutor's ability to act on a mere "hunch."<sup>134</sup> In her concurring opinion in *J.E.B. v. Alabama ex rel. T.B.*,<sup>135</sup> Justice O'Connor defended the institution of peremptory challenges, noting that its "essential nature" is that it is exercised "without a reason stated, without inquiry and without being subject to the court's control.

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<sup>128</sup> *State v. Jones*, 98-842 (La.App. 5 Cir. 12/10/99), 729 So.2d 57, 61 (purple-haired juror struck).

<sup>129</sup> *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987) (peremptory strike based on "body language" was acceptable), *rev'd on other grounds*, 485 U.S. 58 (1988); *State v. Brown* Not Reported in N.E.2d, 2003 WL 21210456 Ohio App. 2 Dist., 2003 (struck juror's "body language" suggested he was impressed by defense counsel); *State v. McRae*, 49 N.W. 2d 252, 257 (Minn. 1992) (stating that "the demeanor of the juror, the tone used in responding, and other similar factors certainly are factors that a trial court may consider in reviewing the prosecutor's exercise of a peremptory challenge").

<sup>130</sup> *State v. Banks*, 96-652 (La.App. 5Cir. 1/15/97), 694 So.2d 401, 408 (gold jewelry and T-shirt and alleged he was disabled).

<sup>131</sup> *State v. Perrilloux*, 864 So. 2d 843 La.App. 5 Cir. 2003 (too young and wearing a gold and diamond earring).

<sup>132</sup> *State v. Herring*, 94 Ohio St.3d 246, 762 N.E.2d 940 Ohio, 2002 (prosecutor regarded her as "not too bright" given that "[h]er hobbies [listed on a questionnaire] are eating, doing hair and watching Oprah").

<sup>133</sup> The phenomenon has its critics. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System* 50 U. CHI. L. REV. 931 (1983) (criticizing the Court for permitting preemptory strikes against blacks in the absence of a compelling state reason and "on the basis of a prosecutor's whim or hunch").

<sup>134</sup> See, e.g., *Straughter v. State*, 801 S.W.2d 607, 614 (Tex. App.-Houston [1st Dist.] 1990, no writ) ("[A] challenge to a juror may be based upon the manner in which the juror reacts to defense counsel, as well as upon the juror's verbal statements in the record. The State may also base its preemptory strikes on the prosecutor's legitimate "hunches" and past experience, as long as such strikes are not racially motivated."); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996) ("Peremptory challenges are based upon professional judgment and educated hunches rather than research.") *But see United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir.1989) (holding that the prosecutor failed to satisfy his burden of production when he stated that he struck a black juror because he "just got a feeling about him").

<sup>135</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)

Indeed, *often a reason for it cannot be stated*, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's 'bare looks and gestures.'"<sup>136</sup> Contrary to the implicit rationale of *Terry*, O'Connor concedes that not all reasonable suspicions are articulable. After citing secondary literature that "nonverbal cues can be better than verbal responses at revealing a juror's disposition," she concludes that, "experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, *and our understanding that the lawyer will often be unable to explain the intuition*, are the very reason we cherish the peremptory challenge."<sup>137</sup>

Judicial deference to prosecutors is not confined to the *Batson* context. The criminal justice system gives vast scope to the intuitions and hunches of prosecutors. As Professors Bibas and Bierschbach write, "Contrition and apologies influence prosecutors' decisions, including decisions not to charge, to accept proposed pleas, to enter into cooperation agreements, and to recommend favorable sentences."<sup>138</sup> In effect, then, the judicial system implicitly recognizes that a prosecutor has an ability to distinguish between the truly penitent and those merely scheming to obtain an advantage.

## **2. Judges**

Whatever misgivings judges might have about police officers acting intuitively, they seem to have few qualms about their own use of hunches. At the turn of the twentieth

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<sup>136</sup> *Id.* at 147. (O'Connor, J., concurring).

<sup>137</sup> *Id.* Judge Richard P. Matsch, chief judge of the U.S. District Court for the District of Colorado, was asked: "Do you believe peremptory challenges still serve any purpose other than allowing a lawyer's whimsy and hunch to play into jury selection?" He answered, "I believe that intuition is an important and legitimate reason for excluding persons from jury service in every case. Peremptory challenges serve that purpose." Sandra I. Rothenberg, *Question And Answer With Judge Richard P. Matsch*, CRIMINAL JUSTICE (1999).

<sup>138</sup> Stephanos Bibas, Richard A. Bierschbach, *Integrating Remorse And Apology Into Criminal Procedure*, 114 YALE LAW JOURNAL 95 (1005).

century, judges at least had misgivings about candor on this score. When asked whether he would consider publishing a series of lectures at Yale Law School describing the judicial decision-making process, Benjamin Cardozo remarked, “If it were published, I would be impeached.”<sup>139</sup> His hesitation apparently arose from concern that his frank praise for the “trained intuition”<sup>140</sup> of the judge would upset legal formalist notions of the judge as scientist, coldly and impersonally bringing detached reason to bear to any problem. To the contrary, Cardozo wrote, “The doctrine of the hunch, if viewed as an attempt at psychological analysis, embodies an important truth: it is a vivid and arresting description of one of the stages in the art of thought.”<sup>141</sup>

This view would soon be elaborated upon by Judge Joseph Hutcheson, a self-described convert from legal formalism to a more intuitive approaching to judging.

Hutcheson explained,

When the case is difficult or involved . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.<sup>142</sup>

A few years later, Jerome Frank, a Chicago attorney destined for the bench, wrote, *What the Courts Do In Fact* (1932). For Frank, “[t]he process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judgment begins rather the

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<sup>139</sup> Quoted in A Arthur L. Corbin, [*The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 198 (1961)].

<sup>140</sup> Benjamin N. Cardozo, *The Growth of the Law* 93, 98 (1924) quoted in Richard H. Weisberg, *A Response On Cardozo To Professions Kaufman And Schwartz*, 50 DEPAUL L. REV. 535, 536 (2000).

<sup>141</sup> Benjamin N. Cardozo, *Jurisprudence*, in *Selected Writings Of Benjamin Nathan Cardozo*, 27-28 (Margaret E. Hall ed., 1947), quoted in Dan Simon, *A Psychological Mode of Judicial Decision Making*, 30 RUTGERS L.J. 1, 120 (1998)

<sup>142</sup> Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it.”<sup>143</sup>

When Frank, a decade later, ascended to the U.S. Court of Appeals for the Second Circuit, he would use his bully pulpit to mock the “cloistered scholars,”<sup>144</sup> who persisted in the view of the law as a coldly rational enterprise. Springing forward to the late twentieth century, the “legal realism” that was once outré is now passé. Such varied jurists as William Brennan,<sup>145</sup> Richard Posner,<sup>146</sup> Patricia Wald,<sup>147</sup> and Judith Kaye<sup>148</sup> have all embraced the view that intuitive thinking is part of a judge’s job description. Equally interesting, academics, who are so relentlessly anti-hunch when it is a police officer engaged in such an enterprise, often fall over themselves in a clutter in defending, and even lauding, the same sort of cogitating by judges.<sup>149</sup>

Significant aspects of the American judicial system are premised on a trial judge’s capacity to make all kinds of judgments not reducible to hard logic. Courts regularly speak of a judge’s ability to evaluate a witness’s credibility through observation of his testimony and demeanor; and it is allegedly for this reason that appellate courts are so deferential on witness

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<sup>143</sup> What the Courts Do In Fact (1932). Kevin W. Saunders, *Realism, Ratiocination, And Rules*, 46 OKLA. L. REV. 219 (1993).

<sup>144</sup> Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943).

<sup>145</sup> William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law”*, 42 REC. ASS’N B. CITY N.Y. 948, 950 (1987).

<sup>146</sup> Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S.CAL.L.REV. 1653, 1656 (1990).

<sup>147</sup> Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W.VA.L.REV. 1, 12 (1984) (noting judicial decision-making process).

<sup>148</sup> Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L.REV. 1004, 1005, 1009-10, 1015 (1988)/

<sup>149</sup> See, e.g., Charles M. Yablon, *Justifying the Judge’s Hunch, An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990); Mark. C Kodak-Turan, 35 U. Rich. L. Rev. 55 (2001); Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 OKLA L. REV. 219 (1993); Dan Simon, *A Psychological Mode of Judicial Decision Making*, 30 RUTGERS L.J. 1, 120 (1998); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L.REV. 37, 52-53 (1988).

veracity issues.<sup>150</sup> There is a widespread belief among judges that “the trial judge is more likely than an appellate court to be correct in his judgments about which witnesses are telling the truth.”<sup>151</sup> This belief in the trial judge’s ability to size up a person’s heart and mind by actual observation threads through the case law in various contexts. For example, the United States Supreme Court has approved a trial judge’s authority to enhance a defendant’s sentence for lying under oath, emphasizing the judge’s ability to see the witness with her own eyes: According to the court, the “opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition,” and “the defendant’s readiness to lie under oath . . . is among the more precise and concrete of the available indicia” to be used by a judge when sentencing a defendant.<sup>152</sup> Likewise, the Court has advised appellate courts to defer to trial courts in a *Batson* challenge to a prosecutor’s use of peremptory strikes, again emphasizing the trial judge’s ability to assess the prosecutor’s motives with her own eyes. As the Supreme Court explained, “[T]he decisive question will be whether [the prosecutor’s proffered] race-neutral explanation . . . should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.”<sup>153</sup>

But deference to trial judges extends beyond a supposed ability to evaluate a witness’s or prosecutor’s credibility. In the bail context, trial judges purport to determine a defendant’s

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<sup>150</sup> See *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (“When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”).

<sup>151</sup> Stephen C. Yeazell, *Civil Procedure* 790 (5th ed. 2000).

<sup>152</sup> *United States v. Grayson*, 438 U.S. 41, 52 (1978). See Jeremy A. Blumethal, *A Wipe Of The Hands, A Lick Of The Lips: The Validity Of Demeanor Evidence In Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1167-69 (1993).

<sup>153</sup> *Hernandez v. New York*, 500 U.S. 351, 361 (1991).

propensity to violence.<sup>154</sup> And in the sentencing context, deference to trial judges is premised on, among other factors, a judge's supposed ability to probe a defendant's soul and determine whether he is genuinely sorry for the crimes he committed.<sup>155</sup> Again, one cannot but be impressed by the powers claimed by judges in assessing, through verbal *and nonverbal cues*, what is occurring inside a defendant's mind and soul.

### **3. Jury**

The institution of the American jury unfailingly excites panegyrics on the intuitive wisdom of the common man. A recent book announced that “[j]uries remain our most enduring expression of a bedrock American principle: we can, and should, put our trust in the wisdom, knowledge, decency, and common sense of ordinary Americans.”<sup>156</sup> The great thing about typical jurors, it is said, is precisely that they are not burdened with postgraduate degrees in logic, and that they are free to exercise a deeper wisdom than that possessed by any philosopher. To be sure, in theory, jurors follow the law and not their instincts. Judges and lawyers devote hours to the precise formulation of jury instructions, the implicit rationale being that jurors should be meticulously guided by the law, as if they were students of Euclid engaged in the most rigid of geometrical proofs. Minute errors, sometimes amounting to a single word,<sup>157</sup> can provide grounds for reversal, the pretence being that jurors, though likely less educated than the typical citizen and often unable even to take notes, are following

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<sup>154</sup> Memorandum from the Federal Public Defender, Southern District of Texas to the Honorable Judge George P. Kazen, United States District Judge, Southern District of Texas 4 (June 1, 1992), quoted in Ronnie Thaxton, *Injustice Telecase: The Illegal Use Of Closed-Circuit Television Arraignments And Bail Bond Hearings In Federal Court*, 79 IOWA L. REV 175, 179 n.34 (2004).

<sup>155</sup> See Stanton Wheeler, Kenneth Mann & Austin Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminals*. 115-18 (1988) (recounting interviews with several federal judges who indicated the importance of remorse and contrition as a sentencing consideration, and not only in white-collar cases)

<sup>156</sup> RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* (2003).

<sup>157</sup> See *United States v. Lacy*, 131 F.3d 137 (4<sup>th</sup> Cir. 1997) (overturning conviction after four-day trial because trial judge omitted one word requested by defense from jury instruction).

complex jury instructions to the letter and applying them with the utmost rigor. In reality, jurors are to a great degree free to indulge “intuitive notions of right and wrong.” Jury trial “tolerates and even encourages decisions made not through the application of logic but through the use of common folk wisdom.”<sup>158</sup>

In modern times, trial judges are loath even to provide minimal guidance to juries. Hence, the once-common practice of judge’s commenting on the evidence has fallen out of favor.<sup>159</sup> And of course, on appeal, the greatest deference is enjoyed by jury verdicts, insulated from assault like impregnable citadels. Along with the trial judge, the jury is “the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.”<sup>160</sup> The United States Supreme Court, in a characteristically faulty historical reading,<sup>161</sup> has infused policy considerations with Constitutional pretensions, announcing that the Confrontation Clause of

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<sup>158</sup> Paul Bergman, *The War Between the States (of Mind): Oral Versus Textual Reasoning*, 40 ARK. L. REV. 505, 509 (1987).

<sup>159</sup> A development lamented in Renee Lettow Lerner, *The Transformation Of The American Civil Trial: The Silent Judge*, 42 WM & MARY L. REV. 195 (2000).

<sup>160</sup> *Bolin v. State*, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966).

<sup>161</sup> In *Coy v. Iowa*, 487 U.S. 1012 (1988), Justice Scalia scoured English history for support for the proposition that underlying the Confrontation Clause of the Sixth Amendment is the belief that there is an informational value in assessing the demeanor of a witness when responding to questions. Scalia cites the example of Sir Walter Raleigh, during his treason prosecution, demanding that his accuser, Lord Cobham, personally present himself. *Id.* at 1017. But Raleigh’s purpose in demanding Cobham to present himself was not that he believed that his accuser’s demeanor would betray his false testimony, but simply that Cobham would not give his false testimony if he were forced to do under oath. See Olin Guy Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075, 1093 (1991). Likewise, Scalia cites Shakespeare’s *Richard II*, in which Richard demands that two feuding noblemen be summoned “to our presence/face to face and frowning brow to brow/ourselves will hear the accuser and accused/speak freely.” 487 U.S. at 1017 (quoting William Shakespeare, *Richard II*, act 1, sc 1). First of all, *contra* Scalia, Richard’s statements are not a fair depiction of any jurisprudential principles in King Richard’s or Shakespeare’s time. See Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1185 n.167 (1993). Second, by the end of the scene—that is, after the two noblemen have presented themselves—the King is unable to resolve the dispute, and orders the two to settle their differences by trial by battle. So much for the value of demeanor evidence.

the Sixth Amendment mandates “compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”<sup>162</sup> Through cross-examination, famously touted as the “greatest legal engine ever invented for the discovery of truth,”<sup>163</sup> jurors get to study the nonverbal performance of a witness—that is, “[w]hether the witness fidgets, gesticulates, averts her gaze, whether her voice cracks, stutters, or rises in pitch, how frequently she pauses and for how long—all these are demeanor cues.”<sup>164</sup> And supposedly, such “demeanor evidence” supplies valuable information in evaluating a witness’s credibility: “the Anglo-American trial mode assumes that accuracy is optimized by having the court or jury hear[s] live testimony by every witness.”<sup>165</sup>

In sum, prosecutors, judges and juries act upon hunches all the time, and rather than mocking such hunches as irrational and capricious, observers traditionally celebrate them as a sort of “better guide than reason.” Juries and judges, we are assured, can assess a witness’s credibility from his demeanor—whether he averts his eyes, rakes his hair, scratches his nose, coughs, stutters, laughs, giggles, hiccups, blinks, etc. Police officers who mentioned such actions in a *Terry* suppression hearing to support a stop would likely receive an ill-tempered judicial lecture on the difference between rational and articulable suspicion and the dreaded “mere hunch.” But much of the fact-finding in the American judicial system is predicated, rightly or wrongly, on reliance on demeanor evidence. One should, thus, unpack judicial skepticism about a police officer’s “mere hunches.” It’s not that courts distrust hunches: they just distrust cops.

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<sup>162</sup> *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980).

<sup>163</sup> 5 John Henry Wigmore, *Evidence* § 1367 (James H. Chadbourn rev ed. 1970)

<sup>164</sup> Chris William Sanchiro, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 297, 310 (2004).

<sup>165</sup> Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL’Y & LAW 485 (1999).

#### **IV. Towards a Reasonable “Reasonable Suspicion” Standard**

Judicial hostility to police hunches unquestionably alters the behavior of police officers in the courtrooms of America, but to what extent it meaningfully or beneficially alters their conduct on the streets of America is another matter. As argued below, the judicial disparagement of police hunches, although justified as a means of constraining police, may entail a number of costs. This section offers some suggestions as to how the reasonable suspicion judicial standard might be rendered more reasonable. For starters, courts could acknowledge that the evidentiary standard, to be reasonable, must be calibrated to the particular circumstance confronted by the police—that is, they should take into account the gravity of the crime under investigation and the intrusiveness of the proposed search or seizure. Where police are searching for a radiological bomb it would be unreasonable to expect an identical evidentiary predicate for a stop and frisk as when they are searching for a gram of cocaine. Likewise, when police haul someone off the street, detain him for twenty minutes, and perform a full-body frisk, they had better have a more substantial evidentiary predicate to justify their actions than if, having pulled a car over for perfectly legitimate reasons, they detain the driver for an additional ten seconds while they have a drug-sniffing dog circle the car. Furthermore, the reasonable suspicion standard would be more reasonable if courts expended less energy in the hopeless task of distinguishing subjective from objective evidence and more holistically considered the reasonableness of the entirety of the police officer’s actions, which would mean not only the nature of suspicions that spurred the police officer to act in the first place, but also the officer’s treatment of the suspect throughout the encounter. If courts reacted with less instinctive repugnance to a hunch, or anything that

seemed to hint at a hunch, police officers might be more candid about what they did and why they did it.

**A. The Costs of Excluding Police Hunches**

Law has an educative and morality function; it is not simply a set of incentives, nor a catalog of prices attached to various kinds of conduct. Law sends messages, and the message sent by judicial hostility to police hunches specifically and the reasonable suspicion case law generally is that police officers do *not* have boundless discretion, nor should they think of themselves in this way. We equip them with badges and armor and pistols and then we quite sensibly try to drill into their heads that they are not gods, but public servants.

How well does this strategy work? Let us consider again the *McKoy* case, in which the district court found that the officer's impressions that the suspect was anxious and had made furtive gestures did not warrant a frisk, even in a high-crime area. As the judge wrote, quoting a law review article, "observations of minimal significance are sometimes elevated to reasonable suspicion based on the character of the neighborhood in which the suspect is found." I assume that the author of this article would agree that a police officer is entitled to be warier as he approaches a double-parked car at the intersection of Maple and Cheney Streets (in down-scale Boston) than at the intersection of Brattle and Sparks Street (in up-scale Cambridge). So it is the case, then, that observations that might not constitute reasonable suspicion in the latter location could be sufficient in the former. The claim is that the officer's observations in *McKoy* were so "minimal" in their probative value that even in a location where there had been two shootings less than a week before the evidence did not rise to "reasonable suspicion." If so, what do we want the officers to have done that afternoon on February 6 when they saw a double-parked car and the driver looked around nervously when

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he espied the police? Three options present themselves: (a) stay in the car, (b) call for backup, or (c) approach the suspect but not frisk him. Option (b) is a non-starter (though a favorite of law students whenever I pose similar hypotheticals): any police officer who called in backup when he saw a double-parked car would be the object of ridicule. Option (c) is problematic. Let's understand this from the police officer's point of view: "I'm supposed to approach the car, though the guy looks fishy and seems to be reaching for something, but I can't frisk him, though there were two shootings here a few days ago. Forget it: If you want me to investigate this guy, I get to frisk him; otherwise, I stay in the car."

What do we tell this officer? Should he have stayed in his car or should he have investigated but not frisked? The latter answer is unrealistic. The police officer is a civil servant, and it is no more sensible to expect selfless courage from him than it is to expect it of a City Councilman, a judge or a law professor. If one's answer is that the officer should have stayed in the car, then perhaps the rule articulated by Judge Woodlock in *McKoy* will on the margin contribute to that result: Police officers who were on the fence about doing nothing or doing something will, with fewer misgivings, just roll on by, finishing out their shift without breaking a sweat. The question arises whether this is a victory for civil liberties or a defeat for effective policing. In any event, most of those police officers who were inclined to investigate before *McKoy* will frisk anyhow. Cases such as *McKoy* simply ensure that they prepare more diligently for the suppression hearing, formulating more objective pieces of evidence and adding details to their "nervousness" and "furtive movements" testimony in the hopes of satisfying the judge.

Consider the matter from the energetic police officer's perspective. He sees the double-parked car; he sees the driver's anxiety and arm movement. The officer decides to

investigate. What has gone through his mind at this point? Probably nothing more than, “this guy looks fishy.” He is more courageous than the typical law professor or judge, but he is not a fool; and he has every intention of frisking the suspect. It is unlikely that he is worried about case law such as *McKoy*. If one could freeze the moment and inquire, he would assure you that, in the event of suppression hearing months from now, there is a capacious menu of “objective” factors from which to choose. Will they persuade the judge? “Probably,” he thinks, “and in any event, that will be the prosecutor’s problem, not mine. The worst case scenario is the guy goes free. That would be bad, but in the end, it’s not my concern: I live in the suburbs and the kids this guy is peddling drugs to are no relation to mine.” The reality is that cops in the field have vast discretion—to do something or nothing—and judicial supervision is so tenuous and temporally distant that it is unlikely to affect most police officers. The judicial insistence that only “objective” criteria can form the basis for a *Terry* stop in practice simply rewards those officers who are able and willing to spin their behavior in a way that satisfies judges. It rewards articulate officers and penalizes those who are less verbally facile or who are transparent about their motivations.

Even assuming that some segment of police officers behaves differently as the result of decisions such as *McKoy*, preferring to coast through their shift rather than rousting a suspected criminal, the question remains whether this is a desirable result. Less rousting means fewer encroachments on civil liberties to be sure, but also means more crime. More rousting means more constitutional encroachments on civil liberties and less crime.<sup>166</sup> To

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<sup>166</sup> The experience in Los Angeles in the late 1990s is illustrative. In the wake of the Ramparts investigation of the Los Angeles Police Department in the mid-1990s, the LAPD brass, bowing to political pressure, created multiple layers of bureaucratic oversight and massively increased penalties for police officers charged with civil rights violations. The number of citizens’ complaints skyrocketed and police altered their behavior, although not in the way that had been hoped. According to a study by a University of Chicago Business School professor, “Officers used to drive into low-

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state the obvious: there's a balance that needs to be struck; and it's not entirely clear why courts should take the lead in so doing. Some have argued that the "political process" is so deficient, so institutionally rigged against certain allegedly disfavored communities, that judicial activism is needed.<sup>167</sup> Boston would seem to be a perfect candidate for such a view, given that of major American cities, its African American community is relatively small (25% of the city's population). Yet the actual experience disappoints the predictions of the "political process" school. In the late 1980s, Boston experienced a sharp increase in violent crime, and police adopted an aggressive stop-and-frisk policy. The policy was referred to within the police department as "tipping kids upside down" and, arguably, in practice meant the indiscriminate stopping and frisking of African American youths. Within two years, homicide rates dropped nearly 50%,<sup>168</sup> and some members of the African-American community applauded the police for, at long last, taking an interest in minority neighborhoods. Many others, however, were critical of the police, and there undoubtedly were a number of "bad seed" police officers who abused their powers; and as the result of

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income black and Hispanic neighborhoods and confront suspects, but now there is a danger that they will face an investigation. The new strategy of LAPD officers seems to be "drive and wave," whereby officers drive through low-income black and Hispanic neighborhoods, and instead of getting out of their car, they keep driving, essentially avoiding doing their jobs. After many years of decline, gang-related violence in Los Angeles increased significantly between 1999 and 2001."

<http://gsbwww.uchicago.edu/news/capideas/feb05/inefficiency.html>. I offer this anecdote not to defend the LAPD's abusive practices in the mid-1990s, but simply to point out the rousting/crime trade-off. To fail to acknowledge this point requires a certain detachment from reality, often fueled by excessive (and credulous) reading of Michel Foucault. See, e.g., Bernard E. Harcourt, *Reflections on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (relying in part on Foucault in criticizing the "zero-tolerance" approach to policing advocated by George Kelling and others).

<sup>167</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). See also Michael J. Klarman, *The Puzzling Persistence to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991). ("Because the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political process theory demands judicial superintendence.")

<sup>168</sup> See Christopher Winship and Jenny Berrien, *Boston Cops and Black Churches : New Approaches to Fighting Crime*, PUBLIC INTEREST.

[http://www.findarticles.com/p/articles/mi\\_m0377/is\\_136\(1999\)](http://www.findarticles.com/p/articles/mi_m0377/is_136(1999)).

political pressure, the police department abandoned its “tipping kids upside down” policy and forged instead a “broad alliance between police, social service agencies, and leaders of churches, schools, and community groups.”<sup>169</sup> What is noteworthy about developments in Boston is that the political process, not the courts, was responsible for an evolving understanding of reasonable suspicion, gauged to public perceptions of an appropriate balancing of the interests at stake. And if such developments could occur in Boston, with a relatively small minority population, why are not they equally or even more likely in communities where minorities have substantial political power.<sup>170</sup>

But let us stipulate that at times the political process will fail; and let us further stipulate that, as the result of opinions such as *McKoy*, there are some police officers who behave differently, by which I mean “better” or more respectful of civil liberties. Surely one would also have to concede that the approach to reasonable suspicion articulated in such an opinion has costs. First, it may make cops more cynical—about their own jobs, judges, and the law. They learn that the public wants them to catch criminals and also wants them to be

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<sup>169</sup> Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1296, 1347 (2001).

<sup>170</sup> See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis in Criminal Procedure*, 68 GEO. L. J. 1153, 1173 (1998) (“[I]nstead of subjecting all law-enforcement techniques to searching scrutiny, courts should now ask whether the community itself is sharing in the burden that a particular law imposes on individual freedom. If it is, the court should presume that that the law does not violate individual rights”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 660-61 (1997) (“By openly discussing the formulation of guidelines, police effectively announce in advance the approach to a problem that the department has tentatively decided to take. Police can obtain information from neighborhood residents or from advisory councils and the larger community about the acceptability of the planned approach.”). See also Randall Kennedy, *Changing Images of the State: The State, Criminal Law and Racial Discrimination*, 107 HARV. L. REV. 1255, 1255 (1994) (“Like many social ills, crime afflicts African-Americans with a special vengeance.... Many of those who seek to champion the interests of African-Americans, however, wrongly retard efforts to control criminality.”); RANDALL KENNEDY, RACE CRIME AND LAW 19 (1997) (“[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.”).

sly about what they do when they appear in court.<sup>171</sup> Furthermore, a view of reasonable suspicion that depreciates the value of hunches increases the costs of policing. To the extent that some police officers, in obedience to decisions such as *McKoy*, meaningfully change their behavior, it becomes relatively more difficult to catch criminals. As the evidentiary predicate required to stop suspects increases, police officers need to devote additional resources to catch any one particular criminal; and it perhaps little surprising that as judicial interpretations of “reasonable suspicion” become more stringent, public funding for police departments soars. Professor William Stuntz has observed that legislatures have often actively undercut the effectiveness of judicially created procedural protections, by underfunding criminal defense counsel, increasing sentences for numerous offenses, and expanding substantive criminal liability.<sup>172</sup> As Stuntz has argued, judicially created criminal procedure rules have thus driven an ill-advised expansion of the substantive law, which in turn makes courts more protective of the rights of suspects, and so on in a vicious cycle. My suggestion here is that another dynamic might be occurring—as courts ramp up judicial protections through ever more stringent interpretations of “reasonable suspicion,” the politically accountable branches counter by hiring more and more police. The number of police officers across America rose dramatically in the 1980s and 1990s, and as one might expect the quality of recruits fell.<sup>173</sup>

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<sup>171</sup> As David Simon has written about the *Miranda* decision,

[I]ts lawyers, the Great Compromisers of our age, who have struck this bargain, who still manage to keep cuffs clean in the public courts, where rights and process are worshipped faithfully . . . . Trapped in that contradiction, a [police officer] does his job the only possible way. He follows the requirements of the law to the letter—or close enough not to jeopardize his case. Just as faithfully, he ignores the law’s spirit and intent. He becomes a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding.

DAVID SIMON, *HOMICIDE* 212-13 (1991).

<sup>172</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L. J.* 1, 7-12, 55-59 (1997).

<sup>173</sup> Dave Kopel and Mike Krause, *Officer Politics*, at [http://www.americanoutlook.org/index.cfm?fuseaction=article\\_detail&id=1120](http://www.americanoutlook.org/index.cfm?fuseaction=article_detail&id=1120)

Ironically, if the purpose of stringent “reasonable suspicion” case law was to reign in police, that case law may have contributed to the perceived need to expand police forces, diluting quality, and thereby increasing the rate of police abuses.

**B. “Reasonable Suspicion” First Principles**

To the extent that the Supreme Court has, over the years, attempted to clarify the meaning of “reasonable suspicion,” it has done so without recourse to irksome numbers, but relying instead on, as Hamlet said in disgust, “words, words, words.”<sup>174</sup> Perhaps, however, it would be helpful to think about the problem in more quantitative terms. In the context of the typical investigatory stop, how much suspicion is needed to qualify as “reasonable?” If we imagine a spectrum of probability, from a zero percent likelihood of criminal activity to a one hundred percent certainty, where along the line does reasonable suspicion fall? Courts have clarified that “probable cause” is less than the “more probable than not” or “preponderance of the evidence” standard,<sup>175</sup> which has sensibly been put at roughly 50%;<sup>176</sup> and reasonable suspicion is itself a “less demanding standard than probable cause.”<sup>177</sup> Indeed, “the likelihood of criminal activity” that would constitute reasonable suspicion for a *Terry* stop “falls considerably short of satisfying a preponderance of the evidence standard.”<sup>178</sup> Thus, a likelihood of criminal activity perhaps far less than 50% would amount to reasonable suspicion.

This is, needless to say, not very helpful, and must be further qualified with the realization that reasonable suspicion cannot plausibly be a fixed standard: If reasonable

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<sup>174</sup> William Shakespeare, *Hamlet* II.2.200-201.

<sup>175</sup> *See, e.g.,* *United States v. Limares*, 269 F.3d 794 (7<sup>th</sup> Cir. 2001) (“‘Probable cause’ is something less than a preponderance.”).

<sup>176</sup> *See, e.g.,* *United States v. Fautico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (ten district judges were surveyed and placed the “preponderance of the evidence” standard at a 50-51% certainty).

<sup>177</sup> *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

<sup>178</sup> *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

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suspicion is truly to be reasonable, it must be calibrated to the circumstance. It would be unreasonable to require the same evidentiary predicate for an investigatory stop when police are searching for a radiological bomb or a mass murderer as when they suspect someone of being a drug mule transporting a kilogram of cocaine. Events during the fall of 2002 in the Washington, D.C. area confirmed this view. For several weeks, the area was paralyzed by a series of sniper attacks. One or two witnesses reported a white van near a few of the shootings. After one murder, police stopped traffic on a major interstate and, with guns drawn, searched “hundreds of white vans.”<sup>179</sup> Obviously, the likelihood that any single one of the tens of thousands of vans harbored the sniper was infinitesimal, but the compelling social interest was deemed to justify casting a broad net.

But let us, for the time being, set aside radiological bombs, and confine ourselves to the happily more typical case, when police officers are searching for drugs or guns. When conducting an investigatory stop or frisk in such a context, how certain must they be that illegal activity is afoot? If a police officer stops ten people on a given day and in one instance his suspicion is borne out—that is, evidence of drugs or an illegally concealed gun is discovered—would we say that, *ex ante*, his actions were reasonable in all ten instances? What if his suspicion is borne out in two instances, or three? Courts have eschewed this sort of analysis, inquiring not about a police officer’s overall success rate, but about the metaphysical nature (objective vs. subjective; particularized vs. generalized) of the evidence he cited in any individual case; but surely there is an implicit claim that there is a connection between the nature of the evidence and its probative value: The thought must be that objective evidence is preferable to subjective evidence. Even if one could distinguish among

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<sup>179</sup> Carol Morello & Josh White, *8th Killing Intensifies Search For Sniper, Pa. Father of 6 Slain at Spotsylvania Pump*, WASH. POST, Oct. 13, 2002, at A1.

evidence in that way, the preference for objective to subjective is, as I have already argued, not necessarily supported in the real world.

Put another way, the weighing of some evidence and the disregarding of other ultimately rests upon empirical judgments about the probative value of evidence. Consider the case of *Florida v. J.L.*,<sup>180</sup> in which police received an anonymous tip that at a bus station a black youth wearing a plaid shirt was carrying a gun.<sup>181</sup> The police found such a youth at a bus station and, upon searching him, found a gun. The Supreme Court was dismissive of the anonymous tip, but why? One might suggest that the opinion reflected a distaste for anonymous tips, which evoke concerns about citizens falsely ratting out their enemies simply to harass them. Yet the legal system *does* credit anonymous tips, if they are richly detailed or satisfactorily corroborated.<sup>182</sup> The question in *J.L.* was the probative value to assign to an anonymous tip that was corroborated in one sense (accurate description of present activity) but not another (a prediction of future activity that came to fruition).

It is one of the curious features of American criminal procedure today that judges, and especially Supreme Court Justices, who live some of the most sheltered and privileged lives of any Americans, and generally have no practical experience in policing, are regularly called upon to make *empirical* judgments as to which their own life experiences leave them wholly unprepared. A police officer who receives the tip over the telephone presumably makes an initial judgment about the information. Some tipsters, whose voices reveal them as children, perhaps playing a prank, are discounted immediately; other tipsters sound credible enough to pass on; and of the latter tips, some are quickly revealed as faulty (*e.g.*, there are no black

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<sup>180</sup> 529 U.S. 266 (2000).

<sup>181</sup> See *supra* at note 61 and accompanying text.

<sup>182</sup> See, *e.g.*, *United States v. Bold*, 19 F3d 99 (2<sup>nd</sup> Cir. 1994) (discussing the ways in which reliance on anonymous tips is appropriate).

youths in a bus station where a tipster reported they would be). So the question is: how reliable are anonymous tips that pass through some crude filtering? Frankly, I have no idea; and one can rest assured that neither do United States Supreme Court justices. It would not be implausible to speculate that one in twenty anonymous tips, or at least those that pass through some initial screening for plausibility, are reliable. So one might restate the problem posed by the *J.L.* case as: is a 5% likelihood of criminal activity sufficient “reasonable suspicion” to merit a stop and frisk. This is perhaps a sensible result, given that the suspected offense was merely possession of a firearm—a serious offense, to be sure, but not one of especial gravity. But what if police receive an anonymous tip a particular person, of a specific description, is carrying a bomb aboard a plane. As Wayne LaFave has written, “No one would seriously question the authority of the police to detain for investigation an individual who was reported by an anonymous informant to be planning to bomb an airplane and who appears at the airport carrying a suitcase.”<sup>183</sup>

To state the obvious: Reasonable suspicion must be reasonable. As I have previously argued,<sup>184</sup> in trying to imbue some reasonableness into the law of criminal investigations, one might try taking our bearings from Learned Hand’s celebrated formula for evaluating claims of negligence.<sup>185</sup> we might propose that a particular stop or frisk is reasonable whenever the expected social benefit exceeds the social cost. Reasonableness would thus be cast roughly as follows:

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<sup>183</sup> Wayne R. LaFave, “*Street Encounters*” *And The Constitution: Terry, Sibron, Peters & Beyond*, 67 MICH.L.REV. 40, 78 (1968). See also *Schroeder v. Lufthansa*, 875 F.2d 613.

<sup>184</sup> See Lerner, *supra* note 1, at 1019-21.

<sup>185</sup> Hand’s formula provides that a party’s duty to take precautions to prevent accidents turns on three variables: (1) the probability of the occurrence of an accident (P), (2) the social loss caused by the accident (L), and (3) the burden of taking precautions to prevent an accident (B). When  $B < P \times L$ , a party is negligent if it fails to take precautions and an accident occurs. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2<sup>nd</sup> Cir. 1947).

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$$P(s) \times B > C,$$

where  $P(s)$  is the probability of a successful search,  $B$  is the social benefit associated with the prevention or detection of a particular crime, and  $C$  is the social cost (or privacy intrusion) resulting from a particular kind of search. The evidentiary predicate needed to stop a suspected serial murderer is far less than what would be needed to stop a suspected drug mule. Just as all crimes are not equal, not all searches are equal either: Some involve far more substantial privacy intrusions than others. Stopping a car at a random checkpoint for one minute, while police ask the driver for identification and a drug-sniffing dog circles the car, is far lesser privacy intrusion than pulling a particular car over on the highway and delaying the driver for twenty minutes. I hope this would be obvious, but courts sometimes seem treat reasonable suspicion as a binary problem (yes or no, present or absent) and not as a nuanced one.

Consider the case of *United States v. Davis*,<sup>186</sup> in which someone selling athletic jerseys was robbed at gunpoint by six young African American men who had jumped out of a car. A few minutes after later and within two blocks of the robbery, police pulled over a car meeting the description given by the victim. Two police officers rushed to the area to investigate whether any other suspects were on foot. One or two blocks from the robbery, the officers saw two young African American men in athletic jerseys. Detective Favor testified as follows:

[W]hen I came up on Jackson [street], I could see where Sergeant Loria had the vehicle stopped. When I made the left [turn] and started down High Street, I could see these two gentlemen walking right in front of the Chevron station. That's why I stopped them. They were in the area. They were two black males fitting the description wearing jerseys and I was simply checking them out. I didn't--there's no need--I wasn't jumping out, throwing them on the car and arresting them or anything like that. It was simple--I just--you know, it would be--it would be dereliction of my

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<sup>186</sup> 354 F.Supp.2d 1271 (M.D.Ala. 2005).

duty if I did not stop them and see if these were possibly suspects. I was polite to them, they were polite to us, and everything went well.<sup>187</sup>

When asked to confirm his absence of knowledge that Davis and his companion had been in the vehicle stopped, Detective Favor responded:

Only my prior experience with pulling over vehicles, prior experience with--I had six subjects rob somebody. We had a suspect vehicle parked. One person is in that vehicle. Other people went somewhere if that is in fact the correct vehicle. I don't-- it's a time frame here where you don't have time to wit. You know, five, ten minutes, 20 minutes for all that information to get out on the radio. The problem is, at this point, they've got a suspect vehicle stopped; I've got young men fitting the physical description wearing jerseys; jerseys were stolen. I stopped those young men to find out whether or not they had any involvement in it. Like I say, everybody was polite. They went back with us afterwards, and I turned the younger one over to his mother.<sup>188</sup>

It is worth emphasizing how candid Detective Favor was in describing the encounter, never gilding the lily with observations of suspicious behavior or “furtive” movements or “bulges”; rather, he commended the suspects for “behaving very well.” It turned out neither had anything to do with the reported robbery, but a frisk of one of the young men uncovered a gun and drugs. Charged with illegal possession, he moved to suppress the evidence as the fruit of an illegal stop. In granting the motion, the district court’s opinion emphasized how spare was the evidence supporting the stop: the neighborhood was predominantly African American so there was nothing unusual about African American men walking in the neighborhood; there was no evidence that the criminals had put on the jerseys; and the officer did not testify that the suspects were loitering or walking quickly or in any way acted out of the ordinary.<sup>189</sup> The court wrote, “While this court can appreciate this officer’s experience in detecting criminal activity and his usual investigative practice, it remains mindful that if undue reliance is placed upon an agent’s ‘perception’ or ‘interpretation’ of observed conduct, then the requirement of

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<sup>187</sup> *Id.* at 1272.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1275.

specific, objective facts may be easily circumvented.”<sup>190</sup> Nowhere in the court’s analysis did it acknowledge that police were investigating a serious crime (armed robbery) or that the police had conducted the most minimally intrusive search to determine whether the suspects were involved in the robbery.

Perhaps it is time to step back and reflect on some first principles. Courts do not have a roving commission to regulate police conduct on the highways and byways of America. In theory at least, their power arises from a phrase in the Fourth Amendment of the United States Constitution (and, in the case of state courts, almost identical provisions in the state constitutions). In relevant respect, the Constitution provides that the people are to be secure from “unreasonable searches and seizures.”<sup>191</sup> One might naively think that in judging whether a search or seizure is reasonable, there are many, many things to be considered: What made the police suspicious in the first place? What time constraints did the police face? How serious is the crime under investigation? How intrusive was the search or seizure? How did the police behave during the encounter? How did the police behave after the encounter? Yet as we see in *Davis*, courts focus exclusively on what police knew before the stop, and even with respect to such evidence, they narrow their gaze to those “objective” facts the police officer can manufacture months after the incident in a suppression hearing. The fact that police were investigating a serious crime such as armed robbery? Irrelevant. The fact that police needed to act quickly if they were going to solve the crime? Irrelevant. The fact that police adopted the least intrusive means to determine whether the suspects were involved in the crime? Irrelevant. The fact that the police acted politely during the search? Irrelevant. The fact that the police acted in commendable fashion after the search (returning one youth to

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<sup>190</sup> *Id.*

<sup>191</sup> Of course, the Fourth Amendment provides also that warrants shall issue only upon probable cause, but we are here dealing with contexts in which police can act without first obtaining a warrant.

his mother)? Irrelevant. Detective Favor, who thought it would be a “dereliction of [his] duty” if he had not stopped the two men is informed by the district court that he could not be more wrong about what his duties entail. Far from having a duty to stop the two suspects, he had a constitutional duty *not* to stop them, a duty that he had violated, and which at least in theory could form the basis of a civil suit against him. In the future, we may assume that Detective Favor will either not bother stopping suspects in similar circumstances, or he will embellish his testimony with the sort of objective details that the district court lamented were lacking.

### **C. Taking Hunches Seriously**

Another important way that courts can enhance the reasonableness of reasonable suspicion is to abandon the distinction between “objective” and “subjective” evidence and by giving police hunches their due. Especially in light of recent advances in cognitive sciences, Chief Justice Warren’s disparaging remarks in *Terry* about “inchoate and inarticulate” evidence is ripe for reconsideration.<sup>192</sup> Just because police officers fail to frame their words in the approved language of the courts, or are unable to express themselves with the glibness of a skilled litigator, does not mean that they acted unreasonably given the factual situation they faced. There may be circumstances in which it is entirely reasonable that police officers take measures even when they have a “mere hunch.” If an experienced police officer has a mere hunch that a person boarding a plane is carrying a bomb, that might warrant a detention of a minute or so to make inquiries. Likewise, if the officer suspects the person is about to reach for a gun, it may be reasonable for the officer to order the suspect to remove his hands slowly from his pockets. After all, the intrusion is relatively small and the social harm that would result from a failure to stop the particular crime is great.

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<sup>192</sup> See 392 U.S. at 23.

Although courts are routinely dismissive of “mere hunches,” in the vast majority of cases in which the issue arises, the hunches have proven accurate. There are some cases in which erroneous hunches form the basis of a civil suit against an officer, but far more commonly police hunches arise during suppression motions in a criminal trial. Of course, there is a selection problem; for we have no idea how many times a police officer’s hunches prove erroneous, but no civil suit is filed. (It is worth recalling that there may be many cases in which the officer is unable during a *Terry* stop to develop probable cause to justify an arrest—that is, the officer’s hunch that criminal activity is afoot is correct, but the officer is unable during a ten-minute stop to accumulate evidence sufficient to establish probable cause, and thus the officer must let the suspect go on his way.) Still, it is hard, for me at least, to read some judicial opinions without wanting to learn more about the officer—how often he has hunches and how accurate they are. In *United States v. Foreman*,<sup>193</sup> an officer parked himself on a road allegedly renowned as a drug trafficker’s corridor, and saw a driver who struck him as suspicious. What was it about the driver? Trooper Wade mumbled something at a suppression hearing about the suspect’s “tense posture” and the fact that he was “staring straight ahead” (as opposed to admiring the scenery, presumably). Wade pulled the driver over on the pretext that he was speeding, and while issuing a citation, peppered him with questions, getting inconsistent answers while the suspect perspired away. After issuing the citation, the trooper detained the suspect for an additional minute while a drug-sniffing dog circled the car, and alerted for the presence of drugs. A split panel of the Fourth Circuit reversed a trial court’s decision to suppress the evidence, laboring to total up the objective evidence (which included a car freshener!). This little story is of course susceptible to two stories—first, that Trooper Wade is a marvel at detecting criminals and second, that he was

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<sup>193</sup> 369 F.3d 776, 786 (4th Cir. 2004).

pulling over all African American males that morning and happened to hit paydirt with Mr. Foreman. Why don't we find out? Or to state that another way, why don't we let Trooper Wade's supervisor supervise him (rather than deputize assorted federal judges for this role)? If Trooper Wade's incident reports for that week, confirmed by the video camera with which his cruiser was equipped, indicate that he pulled over ten people and all ten proved to be drug traffickers, what possible problem is there?<sup>194</sup>

What I am suggesting is that judges show a little humility when called upon to second-guess police officers, who do not have the luxury of evaluating the data before them as an appellate judge would, surrounded by clerks and secretaries eager to answer every possible inquiry before a decision must be made. This is not really such a novel suggestion: The Supreme Court itself suggested as much in *United States v. Cortez*, cautioning its judicial charges to be somewhat deferential to the police officer:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.<sup>195</sup>

In the last sentence quoted above, the Court acknowledges that scholars (and judges?) may “see and weigh” evidence differently than police officers. In some cases, the Court had made this point precisely to denigrate the perspective of the police officer, who “engaged in the competitive enterprise of ferreting out crime,” sees the world through glasses clouded by zeal,

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<sup>194</sup> In theory, at least, Wade might be both a detecting marvel *and* a racist, in the sense that he saw 30 persons he knew to be drug traffickers, 20 white and 10 African American, but he let the white ones pass and stopped only the African Americans. I postpone the question of racial profiling to the conclusion.

<sup>195</sup> *Id.*

and who must be reined in by a “neutral and detached magistrate.”<sup>196</sup> But here in *Cortez*, the Court suggests a deficiency in the scholar’s and magistrate’s viewpoint. “Those versed in the field of law enforcement” apparently have access to information denied to those us (scholars, judges) in cloistered libraries.

In practice, this would mean abandoning second-by-second analyses of police actions. Should we really care whether a police officer sees a furtive gesture five seconds before ordering a suspect out of a car or five seconds after.<sup>197</sup> Does it really matter if a police officer, during a car stop, questioned one passenger at 4:17 and another at 4:20?<sup>198</sup> The more fundamental questions would be: Is this a good police officer? Did he treat the suspect with respect throughout the encounter? Given the officer’s stated reasons for stopping or frisking the suspect, was the intrusion upon the suspect reasonable? Did the officer work as quickly as possible to determine whether or not there were grounds to detain the suspect longer? It is at this relatively higher level of supervision that courts would be well-advised to remain.

Furthermore, courts should never forget that police officers live in a world where threats are real. Some judicial opinions are almost comically forgetful of this fact. Consider *United State v. Upshur*,<sup>199</sup> in which two police officers in a high-crime area witnessed a hand-to-hand transaction between two men, one of whom sped off in a car, nearly hitting the police officers.<sup>200</sup> As the officers approached the other, he balled up his hands into fists.<sup>201</sup> The officers asked him to open his hands, which he refused, and ultimately one of the officers

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<sup>196</sup> *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>197</sup> *See* McKoy.

<sup>198</sup> In *United State v. Brigham*, 343 F.3d 490 (5<sup>th</sup> Cir. 2004) a panel of the Fifth Circuit created a minute-by-minute timeline, from 4:13 to 4:43, in an opinion suppressing evidence obtained during a car stop. The Fifth Circuit reheard the case en banc and reversed the panel. *United States v. Brigham*, 382 F.3d 500 (2004) (en banc)

<sup>199</sup> 716 A.2d 981 (D.C. 1998)

<sup>200</sup> *Id.* at 982.

<sup>201</sup> *Id.* at 983.

grabbed his hands, forcibly opened them, and drugs fell out.<sup>202</sup> The court suppressed the drugs, finding that police lacked reasonable suspicion to order the suspects to open his hands.<sup>203</sup> First of all, the court failed to acknowledge how infinitesimal the privacy intrusion in question was. Even more amazingly, it never dawned upon the judges—who must have grown up in a schoolyard far, far away, in far, far more peaceful galaxy than the one most of us inhabit—that *a fist is itself a weapon*.

Abandoning the impracticable distinction between objective and subjective evidence would have at least one certain benefit: It would promote police candor. When asked as to why he frisked someone, the officer might say:

“Things didn’t look right to me. He seemed to be reaching for something and there had been a lot of crimes in the area the past month. It was dark and frankly I was scared. I was concerned the guy might have a gun. I was polite the whole time; I didn’t throw him to the ground; I tried to check the information as quickly as I could. I want to do my job and I want to be a good citizen. Check my record—I do a good job in catching criminals.”

Instead we hear:

“I saw an illegally double-parked car in a high-crime area. The fellow made a furtive gesture as I approached. I noticed a car freshener in the car. There was a pager in the car. The car was registered to a person who lives in a neighborhood known for drug trafficking. The suspect seemed very nervous.”

The police officer will say either at a suppression hearing, and the principal question is which makes us feel better about ourselves as a society. As David Simon suggests with respect to the *Miranda* decision, certain criminal procedure rules are mostly about a society’s self-image and only incidentally about checking police abuses.<sup>204</sup> Why it pleases society to have its officers parrot back slogans from previous judicial opinions is not entirely clear to me; and those who enthusiastically support the current regime would need to acknowledge that its

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 984.

<sup>204</sup> See *supra* note 171.

costs, already summarized above, which doubtless include the breeding of cynicism among police officers.

There will always be rotten cops, and unlike rotten law professors, bad cops can do a great deal of harm.<sup>205</sup> Of course, there are also hundreds of rotten judges in America,<sup>206</sup> which is not an argument for abolishing the judiciary, or for the creation of an entirely new institution devoted to the regulation of the courts. The best solution to the problem of bad judges is transparency and meaningful self-regulation, and likewise with bad cops. Should police be able act upon their “mere hunches,” insofar as those hunches reflect the accumulated wisdom of years of policing? To some degree, my suggestion is yes. If the privacy intrusion is slight, or the gravity of the suspected offense very high, perhaps a mere hunch alone might justify action. Furthermore, if the officer had a hunch and there was other evidence consistent with criminal activity, perhaps it would be reasonable to allow the police to take some action. Does such a rule mean letting police run wild? No. Transparency and internal accountability, rather than judicial supervision should provide some assurances against police overreaching. With respect to transparency, one of the most notable developments in policing over the past decade has been the increasingly routine deploying of video cameras in police cruisers.<sup>207</sup> Although not without their limitations (stationary cameras have a limited viewing area) and drawbacks (some officers complain that they are a distraction), this equipment has many salutary consequences. Police officers, aware that their actions are being recorded, are obviously more likely to be on their best behavior. And the public, which now has more information about what police officers actually do can invest greater confidence in them.

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<sup>205</sup> This fact gives me great comfort.

<sup>206</sup> See Geoff P. Miller, *Bad Judges* (available on SSRN).

<sup>207</sup> <http://www.policeone.com/police-products/vehicle-equipment/in-car-video/articles/93475/>

## V. Conclusion

It would seem necessary at long last to address a problem that I have skirted at various points during the article without ever squarely addressing: racial profiling. Early on, I assumed that Officer McFadden, the officer who nabbed Terry and his two criminal associates, was a good cop and straight shooter.<sup>208</sup> But what if, instead, he had made a practice of following and harassing African Americans. Likewise, I provisionally applauded Officer Wade in the *Foreman* case for having a hunch about a drug dealer that proved accurate.<sup>209</sup> But perhaps Wade pulled over any young African American man that struck his fancy. I have urged judicial deference to police officers' hunches, but in practice will this condone racial discrimination in policing? Whereas irrational racism and stereotypes are often penalized in the market setting,<sup>210</sup> state actors can indulge in racial prejudices and are largely insulated from the costs of their errors. As Nelson Lund writes, "When governments discriminate . . . the costs and benefits are entirely political--not economic. Governments do not go out of business, no matter how inefficient they are, and they do not respond to economic incentives except when economic forces and political forces are aligned in the same direction."<sup>211</sup>

The search for the snipers in the Washington, D.C. area during the fall of 2002 illustrates governmental ineptitude in racial profiling. For reasons that were never clear, although incompetent processing of witness statements and bogus psychological profiles<sup>212</sup>

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<sup>208</sup> See *supra* at text accompanying notes 24-31.

<sup>209</sup> See *supra* at text accompanying notes 193-195.

<sup>210</sup> See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS*.

<sup>211</sup> Nelson Lund, *The Conservative Case Against Racial Profiling*, 66 ALB. L. REV. 329, 335 (2003).

<sup>212</sup> I remember one of the "experts" peddling this theory on all the television shows at the time was a retired FBI profiler whose claim to fame, breathlessly repeated whenever he was introduced, was that he had been the lead investigator for the Unabomber for twenty years. Needless to say, the

were likely candidates, the police forces in the area were convinced that the suspect was a “lone white male.” Vast energies were focused in this direction; and then it turned out that the crimes had been committed by a pair of African American men. It would seem to have been a case of “politically correct racial profiling,” nor is this the first time the government has rounded up suspects based on dubious racial stereotypes (consider the internment of Japanese Americans during World War II) and it likely will not be the last.<sup>213</sup> The sixty four thousand dollar question is, what should be done to prevent government employees from engaging in improper racial profiling, and, like Lund, I confess that I am not sure what the answer is. The nub of the problem is that individuals do and will prejudge people according to age, sex and race, and it is not entirely clear that we *want* police officers to ignore such data, even if we could effectively monitor and punish such behavior.

Consider a police officer driving down a street with two seconds of eyeball time to allocate. On one side of the street are three elderly white women; on the other side are three young African American men.<sup>214</sup> What should he do? Should he swivel from one side of the street to the other, devoting one second to each? Should he mentally flip a coin and then accord either side his full attention? Or should he look straight ahead and drive directly to the nearest Dunkin Donuts, thereby ensuring that there cannot be the slightest accusation of racial/sex/age discrimination? The young men are almost surely doing nothing wrong, but the operative question is the differential likelihood of criminal activity. It takes a certain blindness to reality to suggest that there is in this respect no difference between the two

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Unabomber was only captured after he was identified by his brother--that is, without any assistance from the government “expert.”

<sup>213</sup> Lund, *supra* note 211, at 341.

<sup>214</sup> To be clear, I have stacked the deck in the example. If there were three elderly African American women on one side of the street and three young white men on the other, my suggestion is that the latter side of the street is more worthy of his consideration.

groups, and that we should be indifferent as to which group attracts the police officer's attention. That being said, it may well be the case that police officers overstate the significance of gender and racial data, and, unlike private actors, there is no possibility of market correction. In other words, an employer who irrationally discriminates against African Americans decreases the available labor pool and increases labor costs; a police officer who devotes all or most of his attention to African American men may be a less effective cop, measured by his number of arrests, but it is unclear whether he personally will pay any price, and it is certain that the police force as an entity, were of composed of such employees, is in no danger of going out of business.

There is some,<sup>215</sup> albeit challenged,<sup>216</sup> evidence that police forces have been guilty of improper racial profiling. Assuming that there really is such a thing as improper racial profiling and one's only goal were to abolish it, one could implement police guidelines requiring officers to tabulate racial data on every person whom they investigated, followed, stopped and frisked; one could require comparisons of this data to the racial breakdown in the population at large; in the event of any departure along any matrix, the individual officer would bear the burden of proving to his superior that he did not behave improperly (or face demotion, suspension and discharge); and the superior would then have the burden of proving to a court that the officer did not behave improperly (or face personal and institutional liability). Such a proposal would likely diminish improper racial profiling, but it would be certain also to have calamitous consequences for policing effectiveness. Thousands of police

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<sup>215</sup> See, e.g., David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highway*, ACLU Special Report (June 1999), available at <http://www.aclu.org/profiling/report/index.html>; David Cole, *The Color of Justice: Courts are Protecting, Rather than Helping to End, Racial Profiling by Police*. THE NATION, (Oct. 11, 1999).

<sup>216</sup> See Chet Pager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13-SUM Kan. J. L. & Pub Pol'y 515 (2004); Heather Macdonald, *The Myth of Racial Profiling*, 11 City J. 14 (2001), available at [http://www.city-journal.org/html/11\\_2\\_the\\_myth.html](http://www.city-journal.org/html/11_2_the_myth.html).

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officers would need to leave the streets and become bureaucrats; and those poor souls left behind on the streets would be more determined to avoid the wrath of the racial bean counters than to catch criminals.

Police officers are, or should be, in the business of policing. To do this difficult job well, police officers, just like judges and prosecutors, need a realm of freedom in which to act, and to some degree this means a freedom to act upon their hunches. Police officers, even more than judges and prosecutors, must be able to act quickly, without access to all relevant information, and frequently they must tap into an experiential wisdom that may not be conveyable in terms that satisfy a learned jurist. But *contra* Chief Justice Warren, the fact that a police officer cannot glibly articulate his suspicions, does not mean that he is without reasonable suspicion.

The basic argument for stringent judicial supervision is that the police—and really no one—can be trusted, which is of course an excellent political principle. The problem is that some people have to be trusted to some degree, and a lot of people have to be trusted to a great degree to have a free country, so education in the use of power is needed, rather than quixotic attempts to eliminate all risks attendant to the bestowal of power. What this means is simple: Be selective about who becomes police officers; train them well; install diligent supervisors; make the supervisors accountable to politicians; and compel the politicians to answer to the people. There is a role for courts in regulating police conduct as well, but not nearly as enthusiastic as current practice assumes. The American criminal justice system is bizarrely more focused on the regulation of police conduct (during searches and seizures and in the interrogation room) than it is on the accurate sorting of the innocent

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and the guilty. One would think it is in the latter role that courts would have a comparative advantage, rather than as meta-supervisors of the police forces of America.