

RECIPROCITY ON THE STREETS: REFLECTIONS ON THE FOURTH AMENDMENT AND THE DUTY TO COOPERATE WITH THE POLICE

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Illinois v. Wardlow, the Supreme Court's most recent Fourth Amendment decision involving encounters between police and pedestrians, stands for a proposition that, at first glance, appears uncontroversial and commonsensical: If a citizen indicates a desire not to cooperate with a police officer, then that officer has "reasonable suspicion" to justify a limited search of the citizen. This Note argues, however, that the uncooperative citizen is, in many respects, symptomatic of a history of aggressive police activity. While the Fourth Amendment is aimed at preventing arbitrary invasions of liberty, the Wardlow opinion promises only to escalate the level of police activity, thereby fueling the cycle of antagonism between police and citizens. The cooperation of every citizen in the enforcement of our nation's laws is the preferred normative aim, but this Note argues that such a goal will not be achieved unless and until the mutual perceptions of mistrust between the police and citizens are ameliorated. This Note analyzes the role that the Fourth Amendment might play in this endeavor and juxtaposes the right to ignore abusive police officers with the duty to cooperate with officers acting legitimately. The Note concludes that Fourth Amendment doctrine in this area has gradually granted unfettered discretion to police officers without providing appropriate guidelines to restrain the passions which accompany such a dangerous profession. It closes with some proposals by which all parties involved—pedestrians, individual police officers, and entire police forces—can respect one another's interests and better serve society's needs.

INTRODUCTION

While much attention has been given to racial profiling and police harassment generally,¹ these problems continue to plague many com-

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¹ See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 16-55 (1999) (discussing widespread abuse of police authority and use of aggressive tactics against racial minorities and poor); *Police Violence: Understanding and Controlling Police Abuse of Force* (William A. Geller & Hans Toch eds., 1996) [hereinafter *Police Violence*] (exploring abrasive relationship between police and citizens); Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* 26-46 (1998) (detailing police abuse of racial minorities and describing perception of police in those communities); David A. Harris, *Factors*

munities,² and the case can be made that this persistence is having profound effects on America's streets. Widespread abuse of police discretion has polarized the relationship between police and residents of urban communities, leaving each entity to regard the other with distrust and suspicion.³ Indeed, the subjects of abrasive street patrolling have grown to "view[] the police department with mistrust, since they [are] perceived by the police as potential criminals."⁴ Rightly or wrongly, entire communities regard police officers more as enemies than as protectors of liberty.⁵ The sense of distrust resulting from

for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 *Ind. L.J.* 659, 679-81 (1994) (discussing how race affects decision to stop, frisk, and arrest); Erika L. Johnson, "A Menace to Society": The Use of Criminal Profiles and Its Effects on Black Males, 38 *How. L.J.* 629, 646-60 (1995) (discussing judicial acceptance of racial profiling in war on drugs).

² The persistence of these problems may be inferred circumstantially from the prevailing perceptions of police in those communities that are most frequently subject to abrasive police tactics. See, e.g., Steven K. Smith et al., U.S. Dep't of Justice, *Criminal Victimization and Perceptions of Community Safety in 12 Cities* 23-26 (1998) (citing statistics attesting to continuing and substantial negative perception of police in minority communities); 5 U.S. Comm'n on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination* 14-15 (1999) (claiming adversarial relationship between police and minority residents of Los Angeles was catalyst of 1965 Watts riots); see also *infra* note 43 (providing examples of continuing problem of police harassment).

³ E.g., Cole, *supra* note 1, at 46 ("If it means that innocent citizens in the inner city will routinely be subjected to forcible stops and intrusive frisks, [the broad discretion granted to officers] is likely to engender hostility and distrust toward police officers."); Harris, *supra* note 1, at 688 ("The disrespect [abrasive police activity] engenders for law enforcement in people who have to cope with this treatment day in and day out is incalculable."); Jerome H. Skolnick, *Terry and Community Policing*, 72 *St. John's L. Rev.* 1265, 1267 (1998) ("Field interrogations that are excessive, that are discourteous, and that push people around, generate friction.").

⁴ U.S. Comm'n on Civil Rights, *supra* note 2, at 29; see also Johnson, *supra* note 1, at 661-62 (observing that "frequent [and] . . . random stops have led many black males to feel that by just being a black male they become an automatic target of suspicion for virtually any crime, [leading to] mistrust, anger and fear of police authority"); see also Chris Burbach, *Are We Suspects or Citizens? Blacks in North Omaha Talk About Tension With Police Officers*, *Omaha World-Herald*, Mar. 29, 1998, at 1A (reporting that because of strong police presence in black neighborhoods, "there's a feeling of 'us against the Police Department'" and "many residents feel that police view them more as suspects than as citizens").

⁵ See, e.g., Russell, *supra* note 1, at 46 (observing that for many young black men "the police represent Public Enemy number one"); Stephan Thernstrom & Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 269 (1997) (quoting Detroit politician arguing that problem in police-citizen relationships "is not black versus white, but police 'blue versus everybody else'"); Dwight L. Greene, Justice Scalia and Tonto, *Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 *Tul. L. Rev.* 2024 (1993) ("In virtually every encounter between a black male and white male police, there is a palpable tension: Are these white men going to start something?").

abusive police tactics alienates citizens from any notion that the police are acting in their best interests.⁶

Citizens will not assist police officers in achieving a common goal if they do not believe that one exists.⁷ This leads to an unfortunate cycle: As citizens become less likely to cooperate, police respond by intensifying their techniques,⁸ which, in turn, only erodes further the confidence citizens have in police and in the legal system that permits these injustices. This alienation actually may translate into increased criminal activity; when citizens lack any sense of shared purpose in a system that permits widespread abuse, they may have no qualms about abusing it themselves.⁹

The Supreme Court has recognized that “[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”¹⁰ Indeed, as a matter of principle, so long as the legal system imposes norms upon society in a just manner, it is a citizen’s duty to cooperate with the operative aspects of that institution.¹¹ However, justice requires that the state accord a certain level of respect to the individuals subject to its authority. When the state fails in this capacity, it weakens the civic obligations of the com-

⁶ See, e.g., Russell, *supra* note 1, at 143 (arguing that there are “clear links between racial assaults and criminal responses,” and “[i]ncidents of police brutality and harassment create further disillusionment within minority communities”); Greene, *supra* note 5, at 2054 (observing “the absence of the bonds of mutual trust among law enforcement and black communities”); Gromer Jeffers, Jr. & Mary Sanchez, *Poll Shows Distrust of Police, Courts, Kansas City Star*, Sept. 19, 1999, at A1 (noting that “many blacks don’t trust cops or courts”).

⁷ See, e.g., Harris, *supra* note 1, at 681 (“Feeling understandably harassed, [minorities] wish to avoid the police and act accordingly.”); Jeffers & Sanchez, *supra* note 6, at A1 (paraphrasing Professor Randall Kennedy as saying distrust of police makes “blacks less likely to aid in crime-fighting”).

⁸ E.g., Hans Toch, *The Violence-Prone Police Officer*, in *Police Violence*, *supra* note 1, at 94, 102-04 (observing that police officers often respond to uncooperative citizens by engaging in more intimidation).

⁹ Cole, *supra* note 1, at 47 (excessive police activity “may in the long term encourage more criminal behavior than it deters by undermining the very sense of legal legitimacy that it is designed to foster”); Russell, *supra* note 1, at 144 (“For some Blacks, disillusionment with the justice system may become anger, and anger may become rage. Rage may become crime.”).

¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) (observing that while police cannot compel confessions, citizens still should be encouraged to confess voluntarily).

¹¹ The law is a collective activity, the success of which depends on the cooperation of each individual affected by it. The standard justification for a collaborative obedience to legal mandates derives from the benefits incurred within such a system. See, e.g., Ronald Dworkin, *Law’s Empire* 216 (1986) (“[A] general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations.”); John Rawls, *A Theory of Justice* 294 (rev. ed. 1999) (“[I]f the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do what is required of him.”).

munity.¹² In this light, it is not clear whether justice should require innocent citizens to cooperate at all costs with the very individuals who systematically disrespect their integrity and dignity.

The Fourth Amendment of the Constitution¹³ is intended to protect individual liberty from arbitrary governmental intrusion.¹⁴ This Note argues that, in many respects, the cycle of antagonism discussed above can be attributed to the Supreme Court's recent Fourth Amendment jurisprudence. In a line of cases starting with *Terry v. Ohio*,¹⁵ the Court has gradually expanded police authority at the cost of individual liberty. It is the citizens whose liberty is most susceptible to police aggression who have begun to retaliate against the police.¹⁶

The *Terry* majority was aware that police routinely were overstepping their constitutional authority already,¹⁷ but, skeptical of its ability to prevent this problem,¹⁸ the Court justified expanding police authority for fear of unreasonably restraining officers whose life might

¹² See, e.g., Ronald Dworkin, *Taking Rights Seriously* 210-22 (1978) (arguing that in cases of ambiguity as to moral validity of particular law, civil disobedience is justified); Rawls, *supra* note 11, at 335 (arguing that civil disobedience is justified when one intends "to address the sense of justice of the majority and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated").

¹³ The Amendment reads in full:

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

U.S. Const. amend. IV.

¹⁴ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349, 400 (1974) (

I believe [the Founders] meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. And, to this end, it seems to me that the guarantee against unreasonable "searches and seizures" was written and should be read to assure that any and every form of such interference is at least regulated by fundamental law . . .);

see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); *The Federalist* No. 51, at 262 (James Madison) (Bantam Books 1982) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.").

¹⁵ 392 U.S. 1 (1968) (permitting officer who suspected pedestrian was engaged in criminal activity to stop and briefly frisk him).

¹⁶ See *supra* notes 1-9 and accompanying text.

¹⁷ Cf. *Terry*, 392 U.S. at 14 (observing that minority groups "frequently complain" of "wholesale harassment by certain elements of the police community").

¹⁸ *Id.* at 13-14 ("Doubtless some police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule.").

be at risk in an increasingly dangerous occupation.¹⁹ The concurring opinions in *Terry*, however, proposed that a citizen approached by a police officer may exercise a form of civil disobedience when the officer lacks constitutional justification to intrude upon her liberty.²⁰ From these ideas a doctrine has developed within Fourth Amendment jurisprudence holding that, when police have no basis to suspect a citizen of any wrongdoing, the citizen has the right to refuse to cooperate with them and simply walk away.²¹

Part I of this Note draws out the legal and historical development of the right to walk away. Although the right is the only recourse provided to citizens whom police subject to flagrant abuse,²² Part II demonstrates that further development of Fourth Amendment jurisprudence has eroded any practical import of the right to walk away. Indeed, the Court has permitted such broad police intimidation that citizens effectively are required to cooperate with the police. Encouraging a cooperative citizenry is a laudable normative aim, but, insofar as cooperation is obtained through abusive police tactics, this aim has backfired; the practical effects of the Court's Fourth Amendment jurisprudence have led to the disintegration of the civic notion of cooperation. Part III advances the notion that justice requires the cooperation of all members of a community in respecting one another's interests. In this light, the right to walk away is an inappropriate consideration in the Fourth Amendment doctrine. Rather than

¹⁹ See *id.* at 10 (“[I]t is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.”).

²⁰ *Id.* at 32-33 (Harlan, J., concurring) (arguing that citizen approached by police officer lacking reasonable suspicion has “right to ignore his interrogator and walk away”); *id.* at 34 (White, J., concurring) (“Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.”).

²¹ See *infra* notes 44-49 and accompanying text.

²² Arguably, citizens whose liberty has been violated may seek recourse by filing a civil rights claim against the officer under 42 U.S.C. § 1983 (1994) (“Every person who, under color of [law] subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .”), assuming individuals are aware of this recourse and are willing to deal with the hassle of litigation. Unfortunately, § 1983 actions are insufficient protections against police abuse. The evidentiary issues involved in such proceedings are difficult to surmount, since the suit pits the citizen's word against the officer's. See, e.g., Carol S. Steiker, *Second Thoughts About First Principles*, 107 *Harv. L. Rev.* 820, 850 (1994) (arguing that civil suit is impractical alternative because “juries will almost always fear the robbers more than the cops, but this fact does not necessarily mean that everything the cops do is ‘reasonable’”). Furthermore, the qualified immunity doctrine provides officers with a good-faith defense, so a plaintiff who does litigate faces difficult odds. Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in *Police Violence*, *supra* note 1, at 247, 264 (describing how good-faith defense confuses juries in § 1983 litigation and leads them to acquit police officers of objectively unreasonable conduct).

encouraging citizens to retaliate against abuses of police authority, courts should apply the Fourth Amendment in a manner that limits the possibility of such abuses in the first place.

This Note proposes an administrative structure that requires police departments to respect the liberty interest of citizens by curbing the discretion afforded to police officers under *Terry*. Although a regime of the type advanced below would help mend police-citizen relationships, its imposition faces significant practical hurdles, and, thus, major judicial reform is unlikely. However, even if the argument from the perspective of justice falls short, police departments should adopt some competent measures to restrain police officers as an instrumental matter. Only then can citizens truly be expected to cooperate with the police in the administration of justice.

I

THE RIGHT TO WALK AWAY FROM POLICE

In *Terry v. Ohio*,²³ the Supreme Court significantly expanded police authority in street encounters by limiting the number of cases in which probable cause applies. In order to strike an appropriate balance with respect to the liberty interests of innocent pedestrians, the *Terry* doctrine preserved the right to walk away from police who could not legitimately justify intruding upon individuals' freedom. This Part discusses the doctrinal basis and evolution of the right to walk away.

A. *The Terry Stop and Frisk*

Crucial to the Fourth Amendment's protections are its procedural safeguards against arbitrary intrusions upon liberty. The Supreme Court has interpreted the Amendment to require that no search or seizure be performed unless authorized by a warrant granted by a "neutral and detached magistrate"²⁴ who finds that "probable cause" justifies such an intrusion.²⁵ The magistrate's neutrality protects

²³ 392 U.S. 1 (1968).

²⁴ The Court in *Johnson v. United States*, 333 U.S. 10 (1948), stated:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

²⁵ The accepted definition of probable cause is found in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949), stating: "Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief

against the danger that improper motivations underlie an officer's decision to restrain a citizen's liberty.²⁶ An officer's failure to satisfy the warrant requirement is only excused in specifically delineated exceptions, such as where the process of obtaining a warrant would pose serious safety risks to society,²⁷ or where there are risks that the evidence would be removed or destroyed.²⁸

Street encounters between police officers and citizens have generally fit within one of the warrant exceptions, since requiring an officer on street patrol to get a warrant before stopping a suspicious individual would hinder law enforcement interests unreasonably.²⁹ However, in *Terry*, the Court held for the first time that strict adherence to the probable cause requirement itself was unreasonable in the face of the exigent law enforcement needs accompanying street encounters.³⁰ The Court asserted that effective law enforcement requires the police to anticipate crime before it happens; as such, society has an interest in having police approach and question suspicious-looking individuals.³¹ Because the officer, by mere observation, has

that an offense has been or is being committed." (alterations in original, internal quotation omitted). The probable cause standard generally requires some evidence or some persuasive indication of the commission of a crime. See, e.g., 2 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.2(e), at 60 (3d ed. 1996) (stating that probable cause standard requires some degree of probability that crime has been committed).

²⁶ For example, the Court in *Johnson* stated:

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 14.

The Court in *United States v. Lefkowitz*, 285 U.S. 452 (1932), said similarly: "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." *Id.* at 464.

²⁷ E.g., *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

²⁸ E.g., *Preston v. United States*, 376 U.S. 364, 367 (1964) (noting exception to warrant requirement for exigent circumstances "to prevent the destruction of evidence of [a] crime").

²⁹ E.g., *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.").

³⁰ *Id.* at 24; see also *id.* at 37 (Douglas, J., dissenting) ("[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*.").

³¹ *Id.* at 22.

no way of discerning whether such an individual is carrying a weapon, the *Terry* Court held that allowing the high probable cause standard to prevent the officer from finding out by other means would be unreasonable, since the suspect might draw a gun first and shoot his interrogator.³²

Under *Terry*, an officer may permissibly “stop” a citizen provided he does so in a “reasonable” fashion.³³ For example, an officer may briefly pat down suspicious individuals when the officer’s safety is at issue.³⁴ However, a police officer without probable cause may not engage in a full-blown “seizure” as that term historically has been used in Fourth Amendment jurisprudence.³⁵ The intrusiveness of the stop must be proportional in scope to the level of suspicion justifying the intrusion. Upon neutralizing any potential threat that these individuals pose to police safety, officers may intrude no further on their bodily integrity.³⁶ Under the *Terry* doctrine, then, the Fourth Amendment permits police to conduct a “stop and frisk” whenever there is a “reasonable suspicion”³⁷ that the citizen is engaged in criminal activity and is armed and dangerous.

³² *Id.* at 24 (

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. . . . [I]t would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.)

³³ *Id.* at 20 (observing that assessing reasonableness requires examination of “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place”).

³⁴ *Id.* at 29.

³⁵ Prior to *Terry*, the intrusion upon liberty inherent in a seizure was essentially the same as that of an arrest. See *id.* at 16. This conception of the term “seizure,” in light of the requirement of probable cause, theoretically created a structural wall between police and citizens, which ensured that no intrusion upon the citizen’s liberty was justified, absent a justification for arrest:

The danger in the logic which proceeds upon distinctions between a “stop” and an “arrest,” or “seizure” of the person, and between a “frisk” and a “search” is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.

Id. at 17. *Terry* is significant because it removed this wall by introducing the idea of a sliding scale into Fourth Amendment analysis by way of the Amendment’s “reasonableness” clause. Under this scale, the level of permissive intrusiveness increases proportionately to the officer’s level of suspicion. Amsterdam, *supra* note 14, at 375-76.

³⁶ *Terry*, 392 U.S. at 25-26.

³⁷ The terms “stop and frisk” and “reasonable suspicion” are the standard terms describing the *Terry* doctrine—police officers who reasonably suspect that criminality is afoot, may stop individuals whom they suspect to be involved in such activities, and briefly

B. *The Right to Walk Away*

By relaxing the procedural safeguards demanded by the Fourth Amendment, *Terry* effectively removed any immediate restraint on police street patrol. For the first time, the Court permitted an intrusion upon the liberty of an individual without evidence of a specific crime.³⁸ Moreover, *Terry*'s vague "reasonableness" standard provides little guidance for determining what conduct falls within its purview.³⁹ As such, citizens approached by the police merely can hope that a given officer adequately respects their liberty, but they have no assurance that he will. Responding to this possibility, the Court has recognized a doctrine within the Fourth Amendment allowing citizens the right to walk away from police who might abuse their authority.⁴⁰

A crucial shortcoming of *Terry*'s reasonableness standard is its failure to clearly define the appropriate limits of police conduct. As such, there is a risk that the police may not always respect the individual liberty of the innocent. After all, police officers face enormous pressures—both job-related and cultural—in exercising their authority.⁴¹ There is always a risk that they might make impassioned deci-

frisk their bodies. 4 LaFave, *supra* note 25, § 9.5(a), at 245-70 (discussing justifications required for various investigative stops).

³⁸ Under the *Terry* analysis, police officers merely need to suspect that criminality is afoot and that the person stopped was engaged in such criminality. *Terry*, 392 U.S. at 26-27, 30. Thus, police officers merely need to point to suspicious behavior without reference to any specific crime. While the level of intrusiveness in a *Terry* stop is lower than in a seizure under probable cause, see *supra* notes 35-36 and accompanying text, the lower standard of suspicion means that more innocent people will be stopped. See, e.g., *Wainwright v. New Orleans*, 392 U.S. 598, 614 (1968) (Douglas, J., dissenting) (

[Under the reasonable suspicion standard,] the sleepless professor who walks in the night to find the relaxation for sleep is easy prey to the police, as are thousands of other innocent Americans raised in the sturdy environment where no policeman can lay a hand on the citizen without "probable cause" that a crime has been or is about to be committed.).

For a criticism of the subtle expansion of the scope of the reasonable suspicion requirement in Fourth Amendment jurisprudence, see Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 *Cornell L. Rev.* 1258, 1291 (1990) (suggesting that "[p]erhaps the Court's oversight was intentional," when it abandoned requirement that danger to police is needed to justify stop based on reasonable suspicion).

³⁹ See, e.g., *Amsterdam*, *supra* note 14, at 394 (

If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. The ultimate conclusion is that "the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

(citation omitted)).

⁴⁰ See *infra* note 48 and accompanying text.

⁴¹ Indeed, studies have shown that police officers have incentives to be overzealous because they are evaluated by the number of calls they handle and by the number of arrests they make. E.g., *Toch*, *supra* note 8, at 98. The need of some officers "for a positive

sions in the heat of the moment that might prove to be “unreasonable” in retrospect.⁴² When an overzealous police officer does not need to overcome procedural requirements before intruding upon an individual’s liberty, the risk that he might abuse his authority becomes very real.⁴³

reputation, high self-esteem, and organizational approval” also influences their aggressiveness on the beat. *Id.* at 101. Some officers have been shown to take personally the disrespect shown to them, which they may counter by developing a proactive abruptness to preempt any such disrespect. See *id.* at 104. Additionally, the disrespectful responses of many citizens often cause officers to become cynical about their line of work, and even grow to regard with hostility the communities that they have been assigned to protect. *Id.* at 104-05. Finally, many people choose to become police officers simply because the intense nature of the work provides the opportunity to act aggressively. See *id.* at 101-02. While these attitudes certainly do not guide the behavior of all police officers, they still represent a significant cross-section of personalities existing in police forces across the country. See *id.* at 96.

⁴² The Supreme Court has long recognized this risk, see *supra* notes 24-26 and accompanying text, but the *Terry* majority expressed resignation as to preventing the problem. See *supra* note 18 and accompanying text. A more recent Court decision, however, has downplayed this concern. *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (“Only a few of [police orders to stop], we must presume, will be without adequate basis . . .”). Certainly it is to be hoped that officers will act reasonably, but there is no way to ensure this before the fact. By incorporating the presumption of constitutional compliance into its Fourth Amendment analysis, the Supreme Court ignores the realities that many citizens face when they encounter the police. See *infra* note 43. As such, there is a grave risk that the reasonableness review will be flawed since the Court will presume what it should ensure.

⁴³ Indeed, there is much evidence suggesting that police officers frequently stop and frisk individuals for little or no reason. See e.g., Harris, *supra* note 1, at 679 (“Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be.” (emphasis omitted)). For example, over a two-year period starting in 1997, the New York City Police Department Street Crimes Unit stopped and frisked 45,000 citizens in “high crime areas,” only twenty percent of whom were eventually arrested. Holman W. Jenkins, Jr., *What Happened When New York Got Businesslike About Crime*, Wall St. J., Apr. 28, 1999, at A19; see also Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, N.Y. Daily News, Mar. 26, 1999, at 34 (observing that in random survey of one hundred Black and Hispanic men in New York City, eighty-one had been stopped and frisked at least once, yet none had ever been arrested). The relatively low arrest rates accompanying these stops raise an important question: Just what level of reasonable suspicion are police officers acting upon? This question is especially relevant in minority communities where police stops are most prevalent. See, e.g., Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent at 18-19, 1999 WL 606996, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036) (noting that when race was recorded on Philadelphia police department field records, over eighty percent of *Terry* stops were of African-Americans, even though districts in question were racially integrated); Russell, *supra* note 1, at 39 (noting that “more than one-third of all young Black men are stopped by the police”); Albert J. Reiss, Jr., *Police Brutality*, in *Police Behavior* 274, 278 (Richard J. Lundman ed., 1980) (citing survey finding that one in four African American adults in Detroit reported being stopped and questioned by police without any justification whatsoever); Benjamin Weiser, *U.S. Detects Bias in Police Searches: Prosecutors and Mayor’s Office in Talks on Racial Profiling*, N.Y. Times, Oct. 5, 2000, at A1 (observing systematic racial profiling by police in New York City, Los Angeles, and New Jersey). See also Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 *How. L.J.* 567, 576-78 (1991) (arguing

Recognizing these risks, Justices Harlan and White wrote separate concurring opinions in *Terry*, attempting to maintain a balance between liberty and law enforcement interests. Justice Harlan insisted that, absent reasonable suspicion, a police officer should have no more right to stop a person on the street than does any other citizen.⁴⁴ The officer's constitutional authority is triggered by suspicious circumstances, and, until such circumstances arise, a police officer should have no authority to intrude upon a citizen's liberty. According to Justice Harlan, when an officer approaches a citizen in circumstances that do not amount to a seizure for Fourth Amendment purposes,⁴⁵ the person addressed may respond as she might to any other citizen with whom she would rather not associate: She has the "right to ignore [her] interrogator and walk away."⁴⁶ In the same vein, Justice White asserted that a citizen approached by an officer whose authority has not yet been triggered is not obliged to submit to the officer's requests, but rather may walk away from him.⁴⁷

When an officer approaches a citizen, he puts her in a precarious position with respect to her liberty interests—by responding to the officer or cooperating with him generally, the citizen necessarily compromises her right to be left alone. An innocent pedestrian cannot prevent a police officer from approaching and asking questions, so walking away is really the only way to limit the officer's authority. Insofar as there is no magistrate to guide the officer's actions, the *Terry* majority basically put its trust in the officer's discretion. To the extent that police will not always restrain themselves, in order to ensure that citizens are free to walk through their neighborhoods peacefully, the Fourth Amendment requires that citizens have the right to refuse to cooperate with the police.

The Supreme Court has explicitly recognized the "right to walk away" articulated by Justices Harlan and White as a crucial element of

that *Terry*'s stop-and-frisk doctrine has gradually resulted in more intrusive police behavior in minority communities since there are no safeguards on police behavior); supra note 1.

⁴⁴ *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) ("[I]n the absence of state authority, policemen have no more right to 'pat down' the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen.").

⁴⁵ *Id.* at 19 n.16 ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

⁴⁶ *Id.* at 33 (Harlan, J., concurring).

⁴⁷ *Id.* at 34 (White, J., concurring) (urging that in encounter where officer lacks reasonable suspicion, "the person approached may not be detained or frisked but may refuse to cooperate and go on his way").

Fourth Amendment doctrine.⁴⁸ Concomitantly, when an officer who lacks reasonable suspicion approaches a citizen, the latter's refusal to cooperate, without more, will not justify a stop.⁴⁹ While the right to refuse to cooperate with the police is no substitute for self-restraint on the part of the police, it presently serves as *Terry's* only immediate external restraint on the police in street encounters.

II

THE DUTY TO COOPERATE

Unfortunately, recent Fourth Amendment jurisprudence has negated the practical impact of the right to walk away, thereby leaving pedestrians with no control over their liberty. Citizens who refuse to cooperate with the police will be presumed to be doing so for suspicious reasons. If an officer merely is suspicious of a citizen's "nervous" behavior, he may justify stopping and frisking her. However, since the police are permitted to use intimidation tactics, citizens invariably will be made to feel nervous, so virtually any encounter may develop into a stop and frisk. Thus, the Court effectively has imposed upon citizens a duty to cooperate with the police.

A. *Deference to Police Suspicion*

The Court has been reluctant to question the judgments made by police officers in the course of their street patrol duties.⁵⁰ Certainly, deference should be accorded to individuals who have a better understanding of the intricacies of criminal investigation, but deference also permits police officers to act without fear of review. Officers are now permitted, and indeed encouraged, to regard uncooperative behavior as inherently suspicious.⁵¹ As a consequence, the right to walk away has been rendered essentially meaningless.

In *Wardlow*,⁵² the Court held that a citizen who chooses to exercise the right to walk away may be stopped simply because of the manner in which he attempted to go about his business.⁵³ The ques-

⁴⁸ See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business."); *Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[A citizen approached by the police] need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.").

⁴⁹ *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (observing that citizen's "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure").

⁵⁰ See *infra* notes 59-65 and accompanying text.

⁵¹ See *infra* notes 63-66 and accompanying text.

⁵² 528 U.S. 119 (2000).

⁵³ *Id.* at 124-25.

tion in *Wardlow* centered on the rights of the respondent, who, upon observing a police car patrolling his neighborhood, began to run.⁵⁴ The officers chased him down and performed a *Terry* stop and frisk, whereupon they discovered he was carrying a handgun illegally.⁵⁵ The *Wardlow* Court, while acknowledging that the “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure,”⁵⁶ gave some contour to the vague term “more.” Specifically, the fact that *Wardlow*’s refusal was accompanied by “nervous evasive behavior” was sufficient for the officer to develop reasonable suspicion, and thus justified the stop.⁵⁷ The *Wardlow* Court purported to preserve the right to walk away by distinguishing unprovoked flight from merely “going about one’s business.”⁵⁸ This distinction suggests that had *Wardlow* simply walked away from the police officers, he would have been free to go. Because he ran, however, his behavior sparked the requisite suspicion to justify a stop.

However, it is important to view the *Wardlow* decision in light of the fact that the Court has accorded significant deference to the judgments that officers make in these circumstances.⁵⁹ While presumably there are a variety of reasons why a citizen might choose not to cooperate with the police,⁶⁰ the Court’s recent jurisprudence has encouraged police to regard uncooperative citizens suspiciously and to

⁵⁴ *Id.* at 122.

⁵⁵ *Id.*

⁵⁶ *Id.* at 125 (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)).

⁵⁷ *Id.* at 124.

⁵⁸ *Id.* at 125.

⁵⁹ See, e.g., *United States v. Cortez*, 449 U.S. 411, 418 (1981) (“[T]he 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.”); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (advising lower courts to place credence in “the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer”). By deferring to officers’ judgments, courts essentially are trusting that officers’ responses were reasonable. This is problematic, since reviewing courts are meant to serve as a gauge on the reasonableness of police activity. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) (“Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime.”).

⁶⁰ For instance, while some might wish to hide something nefarious from the police, other citizens simply might be in a hurry to attend to important matters and cannot be bothered to deal with the police. Furthermore, as various state courts have recognized, citizens living in communities subjected to widespread police harassment simply might wish to avoid such activity. E.g., *State v. Hicks*, 488 N.W.2d 359, 364 (Neb. 1992) (observing that “[f]ear or dislike of authority, distaste for police officers based on past experience, exaggerated fears of police brutality or harassment, and fear of unjust arrest are all legitimate motivations for avoiding the police”); *State v. Arrington*, 582 N.E.2d 649, 652 (Ohio Ct. App. 1990) (“It is not unreasonable for a young, black male living in a neighborhood

investigate them further.⁶¹ Indeed, the Court has recognized that there might be “circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot.”⁶² Since law enforcement officers may base their investigative endeavors on the “formulat[ion of] certain common-sense conclusions about human behavior,”⁶³ the legality of the citizen’s activity is irrelevant so long as it is carried out in a manner deemed suspicious by the officer’s common sense.⁶⁴

The *Wardlow* opinion underscores the fact that the Court will accord great deference to the “commonsense judgments” of the officer who determines that a citizen’s behavior is suspicious.⁶⁵ This deference is critical, for in *Wardlow*, it was the officer’s characterization of

with drug sales and liable to be stopped to run when approached by a police car.”). However, these approaches essentially have been foreclosed by the *Wardlow* opinion.

⁶¹ In *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court basically encouraged police officers to respond to uncooperative behavior with an element of suspicion by holding that police officers lacking reasonable suspicion do not effect a seizure when they pursue a citizen who lawfully has refused to cooperate. *Id.* at 576. In this case, police officers in a marked patrol car observed a man stop his car and approach respondent Chesternut, who, upon noticing the police, began to run. *Id.* at 569. The patrol car then began to drive alongside Chesternut for an unspecified distance, purportedly so the officers could “see where he was going,” until the point at which he threw some pills from his pocket and stopped running. *Id.* Concluding that the pills were codeine, the officer arrested Chesternut for possession of narcotics. *Id.* Only at this point were there grounds to stop Chesternut (this case was decided prior to *Wardlow*), but the Court concluded that a seizure did not occur while the police were following him since a reasonable person in his situation would have believed that he “was . . . free to disregard the police presence and go about his business.” *Id.* at 576. While acknowledging that the very presence of a police car driving parallel to a running pedestrian could be “somewhat intimidating,” the Court held that it was not so intimidating such that it would “have communicated to the reasonable person an attempt to capture or otherwise intrude upon [her] freedom of movement.” *Id.* at 575. The message of *Chesternut* is that the police need not respect a citizen’s decision to walk away. Indeed, the opinion applauded police for treating uncooperative behavior with suspicion. See *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (“That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic at the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense.”).

⁶² *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (recognizing role played by “drug courier profile” in “reasonable” police perception of criminal behavior).

⁶³ *Cortez*, 449 U.S. at 418.

⁶⁴ A significant drawback to this deference lies in the fact that police officers, regarding an uncooperative citizen as an affront to their authority, often concoct charges of resisting arrest as a basis for an unjustified arrest. E.g., *Toch*, *supra* note 8, at 103-04 (observing that repeated filings of charges of resisting arrest is strong indication of excessive use of force by particular officers).

⁶⁵ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (“[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”). For a criticism of this approach, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 989 (1999) (“Where the Court went wrong in *Terry* was in assuming (and defining) [Officer] McFadden’s visceral reaction as the instinctive judgment of an expert on criminality.”).

the suspect's conduct as "nervous evasive behavior" that formed the basis of the Court's decision—it is not clear that running away itself was determinative. Indeed, an officer might regard *any* refusal to cooperate, regardless of its manifestation, as evasive. This is especially true if officers are already given sanction to presume the citizen's guilt.⁶⁶ If an officer merely needs to convince a reviewing judge that the citizen refused to cooperate in a "nervous evasive" manner, then the right to walk away has little significance.⁶⁷

B. *The Permissibility of Police Intimidation*

Unfortunately, the *Wardlow* Court overlooked the fact that encounters with the police tend to intimidate even the most cooperative of citizens.⁶⁸ The very "common sense" upon which the Court relies could lead equally to the conclusion that many citizens are nervous when approached by police officers, especially when they live in communities that are subjected to abusive police tactics.⁶⁹ This intuition is strengthened upon consideration of the fact that police officers do not need reasonable suspicion to approach citizens, provided the encounter does not constitute a stop under *Terry*.⁷⁰ Since the Court has held

⁶⁶ Consider, for example, Justice Scalia's ominous footnote in *Hodari D.*: "The wicked flee when no man pursueth." *Hodari D.*, 499 U.S. at 623 n.1 (citing Proverbs 28:1). *Contra* *Alberty v. United States*, 162 U.S. 499, 511 (1896) ("Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'").

⁶⁷ It might be countered that, because the *Wardlow* Court rejected Illinois's request for a per se rule stipulating that any flight serves as a basis to justify reasonable suspicion, *Wardlow*, 528 U.S. at 126 (Stevens, J., concurring in part and dissenting in part), the decision does not decrease the scope of Fourth Amendment protections. However, the deference accorded to police officers in determining whether or not the decision to walk away is sufficiently suspicious indicates that, for all practical purposes, there is a per se rule: So long as an officer asserts that the citizen refused to cooperate in an evasive manner, a reviewing judge will defer to that assertion.

⁶⁸ See, e.g., Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 *J. Crim. L. & Criminology* 437, 450 (1988) (noting that Court downplays facts that "most citizens do not feel free to walk away from a police officer who approaches to ask them questions" and that "the officer does not intend to let the citizen[s] continue on their way if they assert their right to do so").

⁶⁹ See, e.g., *Hodari D.*, 499 U.S. at 630 n.4 (Stevens, J., dissenting) (criticizing Court's "ivory-towered analysis of the real world" for its failure to account for perspectives of those citizens often subjected to police abuses); Johnson, *supra* note 1, at 663 ("Given the history of police brutality against blacks in this country, as well as the . . . fear and distrust toward police officers, very few black citizens would feel free to ignore an officer."); see also *supra* notes 1-10 and accompanying text (discussing sense of mistrust and fear many citizens feel toward police officers).

⁷⁰ Because "not all personal intercourse between policemen and citizens involves 'seizures' of persons," *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), there is a gray area of police activity in which an officer may engage without being required to justify his actions by reasonable suspicion. See also *id.* at 34 (White, J., concurring) ("There is nothing in the

that police may engage in a broad level of intimidation before their activities will implicate Fourth Amendment concerns, virtually any police encounter can create the requisite level of nervousness to justify a stop under *Wardlow*.

The Court's decision in *California v. Hodari D.*⁷¹ provides the relevant standard for the level of police activity that will invoke Fourth Amendment scrutiny. In this case, a police cruiser came upon several youths huddling around a car, all of whom scattered upon sight of the police, some in the car and others on foot.⁷² The cruiser chased after the car in one direction, while one officer chased respondent Hodari down the street in the other.⁷³ Just before the officer tackled and handcuffed him, Hodari discarded an object that later was found to be crack cocaine.⁷⁴ While this particular fact pattern certainly is covered now by the *Wardlow* opinion, *Hodari D.* is still operative in its holding that the officer's pursuit did not constitute a seizure under the Fourth Amendment, and thus needed no justification whatsoever.⁷⁵ The *Hodari D.* Court observed that absent an overt act bringing the citizen "within [the officer's] physical control,"⁷⁶ any police activity, no matter how intimidating it might be, will be permitted under the Fourth Amendment so long as the citizen does not submit.⁷⁷ Only when Hodari submitted to the officer's "show of authority" (i.e. when he was tackled) did a seizure take place.⁷⁸

Since the *Terry* stop and frisk clearly involves an element of physical touching, it is consistent with *Hodari D.*'s definition of a seizure.⁷⁹ But while *Terry* addresses the level of suspicion needed for a brief physical intrusion, it does not speak to circumstances leading up to

Constitution which prevents a policeman from addressing questions to anyone on the streets.").

⁷¹ 499 U.S. 621 (1991).

⁷² *Id.* at 622-23.

⁷³ *Id.* at 623.

⁷⁴ *Id.*

⁷⁵ See *id.* at 629.

⁷⁶ *Id.* at 626.

⁷⁷ *Id.* at 624. The previous test the Court had used to determine whether or not police activity implicated Fourth Amendment concerns was an objective inquiry as to whether or not "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The *Hodari D.* Court found the "free to leave" standard to be a necessary, but not sufficient, analysis of stops under the Fourth Amendment. Only when an officer's "show of authority" is accompanied by submission or a common-law touching will courts find a stop. See *Hodari D.*, 499 U.S. at 628.

⁷⁸ *Hodari D.*, 499 U.S. at 629.

⁷⁹ See, e.g., *id.* at 627 n.3 ("Terry unquestionably involved conduct that would constitute a common-law seizure; its novelty (if any) was in expanding the acceptable justification for such a seizure, beyond probable cause.").

that intrusion. *Hodari D.* addresses this area of police activity—when accosting a citizen, an officer’s intimidating demeanor is irrelevant so long as he refrains from physically touching the citizen. Unless the citizen submits to police authority,⁸⁰ the officer’s actions will not constitute a seizure, and thus need no justification. However, submission alone will not suffice—the submission must be in response to a level of police intimidation under which “a reasonable person would have believed he was not free to leave.”⁸¹

Under the “free to leave” standard, the Court has held that police officers actually may intimidate citizens so long as the nature of their actions is not “so intimidating” as to cause a reasonable person to no longer feel free to leave.⁸² Unfortunately, the standard of permissible intimidation is quite high. For instance, the Court has held that a patrol car’s pursuit of a pedestrian does not reach this level, and thus need not be justified by reasonable suspicion.⁸³ Similarly, the presence of armed officers in a crowded space posing questions to frightened individuals has been deemed to be permissible under the Court’s analysis.⁸⁴ The inevitable consequence of such a high standard is that many “reasonable people” will be intimidated by, and submit to, police who lack any suspicion whatsoever, yet their submission will be regarded as consensual, and not as a seizure.⁸⁵

The broad range of intrusive police tactics permitted under the Court’s Fourth Amendment jurisprudence creates an incentive for an

⁸⁰ See *id.* at 626 (observing that seizure requires “either physical force . . . or, where that is absent, *submission* to the assertion of authority”).

⁸¹ *Mendenhall*, 446 U.S. at 554 (providing definition of seizure based upon reasonable person’s perception of police authority); see also *Hodari D.*, 499 U.S. at 628 (same).

⁸² *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988). See *supra* note 61 for a discussion of *Chesternut*.

⁸³ See *id.*

⁸⁴ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 431-32, 439 (1991) (holding that two armed police officers boarding bus and randomly asking passenger for consent to search his duffel bag is not seizure *per se* since passenger was “free to decline the officers’ requests or otherwise terminate the encounter”); *INS v. Delgado*, 466 U.S. 210, 218 (1984) (holding that INS factory raid involving multiple armed agents systematically requesting workers’ immigration status “should have given respondents no reason to believe that they would be detained . . . if they simply refused to answer”).

⁸⁵ E.g., *Kolender v. Lawson*, 461 U.S. 352, 364 (1983) (Brennan, J., concurring) (observing that when police encounters involve “show of authority, . . . few people will ever feel free not to cooperate fully with the police by answering their questions” (internal quotation marks omitted)); *Yale Kamisar, Confessions, Search and Seizure and the Rehnquist Court*, 34 *Tulsa L.J.* 465, 492 (1999) (

[W]e are supposed to believe that a reasonable person would feel free to terminate the encounter or to ignore the police presence and continue to do what he was doing

I can think of a few, a very few, people who might react this way—but I would not call any of them “reasonable persons.”).

officer to approach innocent citizens in a highly menacing manner, knowing that this will be likely to ensure cooperation.⁸⁶ But if the citizen chooses not to submit to the display of authority, under *Wardlow* the uncooperative response may be regarded as “nervous evasive behavior,” and thus will justify a stop and frisk.⁸⁷ These two rules read together indicate that a citizen approached by the police really has no choice at all: For all practical purposes, the Court has read into the Fourth Amendment a duty to cooperate with police officers.⁸⁸

III

THE RECIPROCAL DUTY OF RESPECT

While a functioning civil society depends upon citizens cooperating with the police, the Court has erred in requiring cooperation through aggressive police activity. As discussed at the outset of this Note, any normative aim of cooperation actually has backfired to the extent that citizens subject to police abuse become less likely to aid in the effective enforcement of the law.⁸⁹ The problem is one of reciprocity—the officers with whom citizens are compelled to cooperate are not required to respect fully the liberty of citizens. This Part concludes that the right to walk away is an inappropriate consideration in the Fourth Amendment analysis—all members of a community, including the police, should cooperate in the administration of justice. It then proposes an administrative regime that can ensure constitutional compliance on the part of the police, while responding to the legitimate concerns underlying the *Terry* analysis. When police officers act in accordance with what justice requires, trust between citizens and the police can be restored. To the extent that improved police-citizen relationships will lead to more effective law enforcement, police departments should be encouraged to adopt some administrative structure which would limit abuses of police discretion.

⁸⁶ See, e.g., *Hodari D.*, 499 U.S. at 646-47 (Stevens, J., dissenting) (criticizing majority’s expansion of police authority since it “encourage[s] unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have”); see also Maclin, *supra* note 38, at 1294 (“If the police know that they are free to groundlessly accost citizens, . . . the temptation to use this authority will be considerable.”).

⁸⁷ See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting that police may justify stop upon observing “nervous” behavior).

⁸⁸ Cf. *Hodari D.*, 499 U.S. at 627 (“[C]ompliance with police orders to stop should therefore be encouraged. . . . [I]t almost invariably is the responsible course to comply.”); see also Maclin, *supra* note 38, at 1294 (“The likely reward for those few citizens courageous enough to resist the police will be the indignity of arrest. The rest of society, innocent and guilty, will be required to submit to arbitrary insults to individual sovereignty.”).

⁸⁹ See *supra* notes 1-9 and accompanying text.

A. *Mirandizing the Right to Walk Away*

The only recourse offered to citizens by the *Terry* opinion is the right to walk away, which, as discussed above, is a toothless right at best. Part of its ineffectiveness, however, lies in the information disparity between police and citizens. First of all, a citizen has no way of knowing why a police officer has approached her, and thus has no way of knowing whether she may permissibly walk away without suffering the consequences. Furthermore, it is doubtful whether citizens even know that they have a right to walk away. If justice requires that citizens have the right to take steps to preserve their liberty from unreasonable intrusion, perhaps it requires that they be informed of this right. One solution would be to require officers who approach citizens to inform them of their reasons for doing so. Then, if officers cannot justify stopping citizens, they should preface encounters with *Miranda*-type warnings,⁹⁰ telling citizens that they are free to walk away.

When police officers approach citizens, the encounter is often so intimidating as to cause the citizen to believe that cooperation is compelled.⁹¹ Since the right to walk away is the only external restraint upon the police under *Terry*, arguably the right of a citizen to be left alone is of such significance that waiver of that right must be knowing and voluntary. However, the Court held otherwise in *Schneckloth v. Bustamonte*.⁹² The *Schneckloth* Court explicitly rejected any analogy between the right against self-incrimination and the right to refuse to cooperate, finding that the minimal level of intimidation inherent in a request for consent to search is “immeasurably far removed from [the]

⁹⁰ In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court recognized that, in the intimidating atmosphere created by police interrogations in confined spaces, the risk of a suspect being coerced into speaking against her self-interest is of constitutional proportions. *Id.* at 457. The preservation of the right against self-incrimination is so fundamental to our adversarial system that any waiver thereof must be voluntary, a quality that can be assured only when the detained has knowledge that such a right exists and will be respected. *Id.* at 466-67. Therefore the *Miranda* Court required that a detained suspect must be informed that the Fifth Amendment protects his right to remain silent, and that this right can be waived only when he has been notified of it. *Id.* at 478-79.

⁹¹ See *supra* notes 82-85 and accompanying text (discussing level of intimidation permissible in police activity).

⁹² 412 U.S. 218 (1973). *Bustamonte* dealt with consensual searches, holding that the voluntariness of consent is to be determined from the totality of the circumstances, in which knowledge of the right to refuse is merely one factor to consider. *Id.* at 227. When a citizen consents to a search, he removes himself from the scope of the Fourth Amendment's protections: A consensual search need not be reasonable and need not be justified by any minimum quantum of suspicion. See *id.* at 222. Thus, by consenting to a search, a citizen also surrenders his right to walk away, because his consent renders moot any inquiry into whether the police officer has made a legitimate stop or any stop at all. As such, surrender of the right to walk away, like consent, is governed by the rule of *Bustamonte*.

'custodial interrogation'” at issue in *Miranda*.⁹³ Rather, the Court held that the question of whether a citizen voluntarily consented to be searched is to be determined from the totality of the circumstances.⁹⁴ The citizen's knowledge of the right to refuse to cooperate is simply one factor to consider in the analysis.⁹⁵

Thus, it is possible for consent to be deemed freely given even though the citizen actually is unaware of the right to refuse to cooperate with the officer's request, and an officer is under no obligation to inform the citizen of this right.⁹⁶ The *Bustamonte* Court suggested that requiring the police to inform citizens that they have a right to refuse might lead more people to exercise this right.⁹⁷ Police officers often make snap judgments arising out of suspicious circumstances, and a requirement that they inform citizens of the right to refuse consent might render their tactics ineffectual. The Court has noted that requiring a warning of the right to walk away would be “thoroughly impractical” because it would hinder the officers' capacity to investigate a situation adequately, thereby impeding law enforcement interests.⁹⁸

Certainly, effective law enforcement is an important goal, but if a citizen aware of her right to refuse to cooperate would exercise it,

⁹³ *Id.* at 232; cf. *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984) (observing that, given brief and public quality of street encounters, expectations of citizens stopped on street differed from expectations of citizens subjected to police-dominated “stationhouse interrogation . . . in which the detainee is often aware that questioning will continue until he provides his interrogators the answers they seek”).

⁹⁴ *Bustamonte*, 412 U.S. at 227.

⁹⁵ *Id.*

⁹⁶ *Id.* at 231-32 (observing that it would be “thoroughly impractical” to require officers to inform citizens of right to refuse). While the *Bustamonte* holding specifically addresses only consent searches, its implications in the area of street encounters is clear: The citizen is not entitled to know whether or not the encounter actually was based on an officer's suspicion. See also *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (holding that it would be “unrealistic to require police officers to always inform detainees that they are free to go”); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (“Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed.”).

⁹⁷ See *Bustamonte*, 412 U.S. at 231-32; see also *Berkemer*, 468 U.S. at 441 (refusing to extend *Miranda* rights to citizens subject to *Terry* stop since such requirement would “substantially impede the enforcement of the Nation's . . . laws”). But cf. Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and *Miranda's* Concept of Custody*, 1993 U. Ill. L. Rev. 379, 409 (arguing that *Berkemer* opinion should not be read to rule out requirement of *Miranda* warnings in all *Terry* stops).

⁹⁸ *Tennessee v. Garner*, 471 U.S. 1, 19 (1985) (“We would hesitate to declare a police practice . . . unreasonable if doing so would severely hamper effective law enforcement.”); *Bustamonte*, 412 U.S. at 243 (“[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime . . .”).

then one who submits to police authority while unaware of her right clearly is not acting voluntarily. However, the Court has refused to accept this proposition,⁹⁹ and in doing so it has ignored the possibility that the high level of permissible police intimidation is likely to lead to widespread, unintentional waiver of Fourth Amendment rights.¹⁰⁰ Indeed, police officers are given an incentive to employ intimidating tactics to compel innocent citizens to cooperate when they would rather be on their way.¹⁰¹ To the extent that *Terry's* sliding scale requires that an appropriate balance be struck between law-enforcement interests and liberty, the *Bustamonte* decision arguably disrupted the balance.¹⁰²

It is not clear, however, whether the *Bustamonte* Court could have reached an appropriate equilibrium. Although its decision has contributed to widespread intrusions upon liberty, a contrary holding would have created a legitimate risk that an excessively uncooperative citizenry unduly would encumber effective law enforcement. Faced with a decision that would necessarily tilt the balance in one direction or the other, the Court could not easily have elevated a citizen's right to refuse to cooperate above effective law enforcement. Indeed, to the extent that a legal system depends upon a collaborative effort of the citizenry, the right to refuse to cooperate with the agents of that system seems anomalous.¹⁰³

Of course, the right to walk away grew out of a recognition that often the very agents of law enforcement fail to act in accordance with

⁹⁹ The Court has "reject[ed] the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions." *Mendenhall*, 446 U.S. at 555; accord *Florida v. Bostick*, 501 U.S. 429, 437-38 (1991) (rejecting defendant's argument "that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs"). That the Court has refused to consider this possibility further underscores the high threshold of intimidation permissible under its jurisprudence. See, e.g., *Greene*, supra note 5, at 2038-39 (arguing that *Bostick* really had no choice but to submit to police and would not have save compulsion by officers).

¹⁰⁰ See, e.g., Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 *How. L.J.* 239, 254 (1993) ("Some members of minority and poor inner city communities, however, may be so intimidated that 'consent' to a search may be granted out of fear of police retaliation.").

¹⁰¹ See supra notes 85-87 and accompanying text (arguing that officers use intimidating tactics as means of ensuring compliant citizenry).

¹⁰² See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (noting that reasonableness requires examination of "whether the officer's action was justified at the stop's inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place").

¹⁰³ See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) ("[I]t is no part of the policy underlying the Fourth . . . Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.").

the normative aims of justice underlying the system.¹⁰⁴ Since the Fourth Amendment serves as a prophylactic measure against arbitrary invasions of liberty, its application should limit the potential for such intrusions, rather than encourage the abused to retaliate against the police.¹⁰⁵ As such, the following section proposes an application of the Fourth Amendment that requires police to cooperate in according citizens the respect that justice demands. By holding police officers accountable for their actions, the *Terry* standard can be effectuated in a manner that better protects liberty, thus engendering among the citizenry reciprocal cooperation essential for effective law enforcement.

B. *The Reasonable Administration of Justice*

The crucial shortcoming of *Terry* and its legacy lies in the fact that the standard of "reasonable suspicion" is so vague as to leave officers little practical guidance in their actions.¹⁰⁶ Not only has the Court issued a vague standard, it has required that judges defer to the reasonableness of police judgments.¹⁰⁷ Police officers, then, are left free to determine their own standards of behavior, making a mockery of the Fourth Amendment's requirement of a neutral magistrate.¹⁰⁸ The following proposal applies *Terry*'s reasonableness standard in a manner that can ameliorate the problems surrounding undue deference. By asking police departments to cooperate in the administration of justice, fundamental Fourth Amendment values can be respected in such a way as to restore respect for the police, thereby improving law enforcement generally.

Judicial deference to an officer's judgments unduly permits impassioned decisions to abuse the vague reasonableness standard. This problem can be minimized by an administrative requirement that an officer record, with some degree of specificity, the nature and extent

¹⁰⁴ See *supra* notes 39-49 and accompanying text (discussing risks of police officers' abuse of authority and Supreme Court's subsequent recognition of right to walk away).

¹⁰⁵ Cf. Dworkin, *supra* note 11 at 198-202 (discussing reciprocal obligations required of all members and institutions within community). Without reciprocity, community obligations break down, for an individual only will fulfill his obligations to others if they assiduously satisfy their responsibilities to him. *Id.* at 198. Thus, the right to walk away undermines the protections of the Fourth Amendment because, in exercising the right, citizens neglect their responsibility to cooperate with the police. Without reciprocal compliance, police are more likely to neglect their own obligation to respect citizens' liberty.

¹⁰⁶ See, e.g., Maclin, *supra* note 38, at 1317 (noting that Court's jurisprudence "provides little guidance to police officers, slight protection to citizens, and no objective criteria by which to review police behavior").

¹⁰⁷ See *supra* notes 59-67 and accompanying text.

¹⁰⁸ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 38 (1968) (Douglas, J. dissenting) ("To give the police greater power than a magistrate is to take a long step down the totalitarian path.").

of the stops he conducts and the reasons justifying them.¹⁰⁹ A checklist of sorts would provide more guidance for an officer *ex ante*, and would give a reviewing authority—either a judge or a ranking officer—a more trustworthy means of determining the reasonableness of an intrusion *ex post*. The effectiveness of such an administrative requirement can be ensured by supplementing it with efficient complaint procedures that give citizens an incentive to bring problematic officers to the attention of police departments.¹¹⁰

Such administrative constraints would give the police department a means of determining which officers need to be disciplined for repeated Fourth Amendment violations. When the sole incentive of police officers is to increase their arrest rates,¹¹¹ the Fourth Amendment represents little more than an encumbrance. However, if police departments were to use constitutional compliance as a factor in determining promotions, setting pay raises, and allocating preferred assignments, they would provide officers with an incentive to treat citizens more respectfully.¹¹²

Certainly, the multitude of possible scenarios that might present themselves to an officer on a given shift makes difficult the task of delineating specific guidelines for every police-citizen encounter. Just as judges reviewing Fourth Amendment claims must defer to the judg-

¹⁰⁹ Many police forces already require officers to record stops and frisks, but there is a genuine concern that, upon discovering no evidence, officers simply refuse to record their activity. See, e.g., Richard Perez-Pena, *Police May Have Understated Street Searches*, Spitzer Says, *N.Y. Times*, Mar. 23, 1999, at B5 (observing that many New York City police officers “do not fill out the forms . . . for every stop-and-frisk, and they may fill out, at most, 1 in 5, or 1 in 10” (internal quotations omitted)). This worry makes crucial the streamlined complaint procedures proposed below, *infra* note 110 and accompanying text, because numerous complaints can pinpoint noncompliant officers.

¹¹⁰ Administrative proceedings exist in police forces nationwide, but often prove ineffective. See, e.g., Wayne A. Kerstetter, *Toward Justice for All: Procedural Justice and the Review of Citizen Complaints*, in *Police Violence*, *supra* note 1, at 234, 240-41 (discussing flaws in existent administrative proceedings); Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Police Brutality*, in *Police Violence*, *supra* note 1, at 213, 222 (describing example of abuse of discretion in Los Angeles Police Department in internal, informal handling of excessive force complaints). Unfortunately, police forces often are unresponsive to complaints, and the procedures provided to citizens are so cumbersome as to prove a waste of time. *Id.* (describing how citizens in Los Angeles wishing to file complaint had “to wait for hours, alone”). The procedures can be made more effective by streamlining the processes by which citizens’ complaints are heard, assuming departments begin to take these complaints more seriously. See Kerstetter, *supra*, at 243-44 (providing suggestions for more effective process). When citizens are provided with the knowledge, means, and incentive to report, misbehavior patterns in a particular officer’s methods may become apparent and give the police department assistance in reining in its officers.

¹¹¹ See *supra* note 41.

¹¹² See, e.g., Toch, *supra* note 8, at 107-11 (arguing that such procedures allow departments to isolate egregiously aggressive police officers).

ment of officers who understand the pressures involved in street patrol work,¹¹³ judges would be an inappropriate group to promulgate internal police standards for street encounters. However, police departments are run by officials who are acutely familiar with these circumstances, and these officials should draw on their experiences in order to incorporate certain standards of police behavior into the regimen for training new officers.¹¹⁴ Police departments should cooperate by taking an active role in respecting the liberties of pedestrians as required by justice. Justice could be served by a collaborative effort between police departments and the judiciary, whereby the latter drafts guidelines, thereby obviating the concerns justifying the Supreme Court's deference to police decisions. Provided the overall structure of the departmental guidelines survives general reasonableness review by a judge, police restraint could be effectuated in the context of the various situations a particular precinct might encounter.

Unfortunately, the review of any such administrative requirement, let alone its imposition by the courts, faces significant legal hurdles. In *Rizzo v. Goode*,¹¹⁵ the Court rejected a federal court's imposition of a complaint procedure of the sort proposed in this Note. In a class action suit under § 1983,¹¹⁶ the *Goode* Court held that the plaintiffs, former victims of police brutality, lacked standing to bring such an injunctive suit insofar as the future remedy offered by any such mechanism was too tenuously related to protection of their respective rights.¹¹⁷ The Court held that relief of this sort requires a plaintiff class to demonstrate a sufficiently "pervasive pattern of intimidation" in which their future harm is all but guaranteed.¹¹⁸

Furthermore, the *Goode* Court also held that the plaintiff class's "novel" claim—that departments should be required to cooperate in assuring that the Fourth Amendment is respected—would, if imposed, unduly intrude upon federalism and comity concerns.¹¹⁹ Like all government entities, the police department should be given extreme "lati-

¹¹³ See *supra* notes 59-65 and accompanying text.

¹¹⁴ See, e.g., Timothy J. Flanagan & Michael S. Vaughan, Public Opinion About Police Abuse of Force, in *Police Violence*, *supra* note 1, at 113, 127 (arguing that effective training is "essential" responsibility of police departments).

¹¹⁵ 423 U.S. 362 (1976).

¹¹⁶ *Id.* at 373.

¹¹⁷ *Id.* at 373-75, 377 (holding that twenty violations in city of three million inhabitants did not establish "pervasive pattern of intimidation").

¹¹⁸ *Id.* at 375. For a proposal of legislative action designed to overcome § 1983's strict standing requirement, see Cheh, *supra* note 22, at 268-69 (observing proposed legislation must create right to be free of "a pattern or practice of conduct by law enforcement officers that deprives persons of rights").

¹¹⁹ *Goode*, 423 U.S. at 377-80.

tude in the dispatch of its own internal affairs”;¹²⁰ federalism concerns can be overcome only by a showing of irreparable harm that is “both great and immediate.”¹²¹ Consequently, any successful litigation resulting in the imposition of the procedures proposed in this Note would have to distinguish *Goode* with a significant evidentiary showing of a pervasive pattern of police activity—a difficult, if not insurmountable problem.¹²²

While standing and comity issues render highly unlikely a just application of the Fourth Amendment that requires police departments to cooperate in ensuring that liberty is respected,¹²³ police departments across the country should still be encouraged to do so. Not only do civic obligations counsel in favor of administrative restraints, but police departments also have an instrumental justification for ensuring that citizens’ liberty is protected. By taking affirmative steps to improve the public’s perception of police efforts, police departments can go a long way toward reestablishing the citizenry’s trust of the police.¹²⁴ As a result, the use of administrative procedures along the lines proposed in this Note actually might lead to greater citizen cooperation with police investigations. When police departments cooperate in the just administration of the law, not only will they improve the effectiveness of law enforcement generally, but they will do a better job of respecting the liberty of countless citizens, thereby adhering to—and, indeed, improving upon—the principles inherent in *Terry*’s Fourth Amendment analysis.

CONCLUSION

In the best of all possible worlds, the police would accord every citizen respect, and, in turn, citizens willingly would assist the police in

¹²⁰ *Id.* at 378-79 (internal quotations omitted).

¹²¹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (“[T]he need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States’ criminal laws in the absence of irreparable injury which is both great and immediate.”).

¹²² But see *supra* note 43 (observing that abuse of police discretion is widespread problem).

¹²³ Of course, a state court action would face lesser difficulties given the absence of federalism concerns. Still, the standing requirements serve as a significant encumbrance to any successful imposition upon police departments through the judicial process, regardless of the venue.

¹²⁴ Indeed, a recent survey conducted by Quinnipiac University shows that the New York City police department’s efforts to mend relationships with minority communities have succeeded in restoring the public’s trust in the police as a whole, particularly within the black and Hispanic communities. Kevin Flynn, *Poll Reveals Higher Marks for the Police: Blacks and Hispanics React to Fence-Mending*, *N.Y. Times*, Feb. 3, 2001, at B1. But see *id.* (“For all the indications of progress, the survey also revealed evidence that many Blacks and Hispanics view the police force with trepidation.”).

the enforcement of the law. The shortcoming of the Court's Fourth Amendment doctrine, however, is that, in the real world of police-citizen interactions, there comes a point where jurisprudence can do little to ensure such reciprocity. It is not enough merely to presume that police will act in a just manner. Nor is it sufficient to rely upon the citizenry to defend its liberty in the face of unconstitutional exercises of authority. Unless some external factor can guide police officers toward constitutional compliance, ours will not be the best of all worlds.

Citizens also should be encouraged to cooperate with the police, but aggressive compulsion is a far cry from mere encouragement. So long as citizens perceive their liberty interests to be systematically infringed, they will continue to retaliate against that very system.¹²⁵ The poor and minorities are no more enemies of peace than are the police, but when the criminal justice system implicitly stages the two groups against one another, it is natural for each to regard the other as such, and thus the sense of civic obligation disintegrates. Under the present regime, citizens might reluctantly cooperate under compulsion. Police energies could be exerted more efficiently if the people with whom they interact actually believed that a common good lay at the heart of their exchange. To the extent that cooperation begets cooperation, a crucial first step in this process can be achieved by police forces policing themselves.

¹²⁵ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").