Illinois v. Wardlow:
The Empowerment of Police, the Weakening of the Fourth Amendment

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The Fourth Amendment of the United States Constitution protects the right of the people against unreasonable searches and seizures by requiring a probable cause showing in order to obtain a warrant before conducting such searches.[1] Since the United States Supreme Court decided *Terry v. Ohio*[2] in 1968, however, the words of the Fourth Amendment have been questioned and the rights of the individual challenged. When the Court decided *Illinois v. Wardlow*[3] in 2000, it was made clear that the words once written to protect all Americans do not pertain to those residing in locations deemed "high-crime areas."[4]

In *Terry*, the Supreme Court held that law enforcement officials could stop and frisk an individual, without probable cause, if there was a reasonable suspicion that the individual is involved in criminal activity.[5] During the next 25 years, many cases fleshed out *Terry's* rules, gradually requiring less and less evidence for a stop and frisk.[6] Most recently, the Supreme Court expanded *Terry* to include justifying a stop and frisk of those located in high-crime areas who take flight upon seeing the police in *Illinois v. Wardlow.*[7]

In *Wardlow,* two officers were patrolling an area known for heavy narcotics trafficking.[8] The officers stopped and frisked a man who took flight upon seeing them.[9] They discovered a .38 caliber handgun and arrested the man.[10]

The Illinois trial court held that the gun was recovered during a lawful stop and frisk.[11] The Illinois Court of Appeals reversed, concluding that the officers did not have enough supporting evidence to show that the location of the stop and frisk was a high-crime area; thus, the officers lacked grounds for reasonable suspicion.[12] The Illinois Supreme Court affirmed, but rejected the intermediate appellate court's reasoning and found that sudden flight in a location deemed a high-crime area by police is insufficient to create reasonable suspicion.[13]

The United States Supreme Court reversed.[14] The Court found that while headlong flight is not indicative of wrongdoing it is certainly suggestive of such.[15] The Court held that Wardlow's presence in a high-crime area and unprovoked flight justifiably led police to believe that he was involved in criminal activity.[16]

This article first progressively examines how the Supreme Court has developed exceptions and limitations to Fourth Amendment protection. Next, it analyzes the reasoning of the majority and dissenting opinions in *Illinois v. Wardlow*. Finally, it analyzes the effect that *Wardlow* will have on future Fourth Amendment cases and concludes that this decision grants the state more power to protect its citizens at the cost of subjecting low-income, primarily minority, Americans to disproportionately higher instances of personal invasion.

THE STEADY PROGRESSION OF STATE DOMINANCE OVER INDIVIDUAL RIGHTS

Reasonable Suspicion Replaces Probable Cause

The Supreme Court broke new ground when deciding *Terry v. Ohio*. For the first time, questions referring to the restrictions placed on law enforcement officials to conduct legal searches and seizures were being raised. Law enforcement was looking to the Court for a little latitude in the "probable cause" requirement of the Fourth Amendment. Their argument was that this would allow them to better fulfill their duties and obligations to the public, while protecting themselves from unnecessary risks; the cost being a relatively slight intrusion on the individual.[17] The Court agreed and held it constitutional to perform a "stop and frisk" with less than probable cause.[18]

In *Terry*, a plainclothes officer was walking his usual beat when he observed two men standing on a corner.[19] After watching the men for some time, their

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Footnotes

1. U.S. CONST. amend. IV.
2. 392 U.S. 1 (1968).
3. 528 U.S. 119 (2000).
4. *See* People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. 1997)(defining high-crime area as a location with a high incidence of narcotics trafficking).
5. 392 U.S. at 30.
6. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994).
7. 528 U.S. at 120.
8. *Id.* at 121.
9. *Id.*
10. *Id.*
11. *Id.* at 122.
12. 684 N.E.2d 1341 (Ill. App. 1997).
13. 701 N.E.2d 484 (Ill. 1998).
14. 528 U.S. at 123.
15. *Id.* at 124.
16. *Id.*
17. *See* Terry, 392 U.S. at 10, 12.
18. *Id.* at 27.
19. *Id.* at 7.

conduct suggested they were planning to rob a nearby jewelry store.[20] The officer approached the men, identified himself as a police officer and asked for their names.[21] When they "mumbled something" in response to his inquires, the officer patted down the outside of the defendant's clothing and discovered a pistol in the breast pocket of his overcoat.[22]

The Supreme Court found that the officer's stopping of the men was a "seizure" under the Fourth Amendment and that the officer had acted without probable cause.[23] The Court then weighed these factors against the state's interests of crime prevention and protection of its police officers.[24] Upon evaluation, the Court held that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer when he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.[25]

To create the balance that needed to be struck in this type of case, the Court formed a two-part test.[26] First, the officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion.[27] Due weight must be given, not to the officer's inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences that he is entitled to draw from the facts in light of his experience.[28] Second, the suspect must be believed to be armed and dangerous and the frisk must be limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others nearby.[29]

Terry gave police the power to stop and frisk civilians when they reasonably believe criminal activity is afoot during street encounters, but limited that power by excluding an officer's unsubstantiated suspicion. What the Court did not do was to explain what the boundaries were concerning reasonable suspicion and hunches. What did the Court believe the proper balance was between a precautionary frisk for police protection and an unjustifiable intrusion into an individual's privacy? Four years after *Terry*, this issue presented itself in *Adams v. Williams*,[30] when the Supreme Court was asked if reasonable suspicion could be inferred from a tip received by an informant and not from actual events witnessed by the officer himself.[31]

In *Adams*, an officer was patrolling a high-crime area when an informant told him that an individual seated in a nearby car was in possession of a gun and narcotics.[32] Acting on this tip, the officer approached the parked car and asked the man inside to step out.[33] When the suspect opted to roll down the window instead, the officer reached into the car and removed a fully loaded revolver from the man's waistband, precisely the place indicated by the informant.[34]

The Supreme Court agreed with the state and found that reasonable cause can be based on information supplied by another person.[35] The Court held that in instances when a credible informant warns of a specific impending crime it is justifiable that the officer act on his tip and conduct a further investigation.[36]

The decisions in *Terry* and *Adams* gave the lower courts a reference point to look to when deciding whether to suppress evidence produced from a stop and frisk. From *Terry*, it was understood that a police officer might stop and frisk an individual with a reasonable suspicion that the person was involved in criminal activity. It was also understood that officers were expected to use their experience to draw rational inferences that would then lead to reasonable suspicion. *Adams* supplemented *Terry* by allowing a tip received from an informant to be used to create a reasonable suspicion. However the lower courts still did not know at this point what was not a sufficient basis for a *Terry* stop. The Supreme Court got an opportunity to answer this in *United States v. Brignoni-Ponce,*[37] and later in *Brown v. Texas*.[38]

A Look into What Is Not a Sufficient Basis for Reasonable Suspicion

In *Brignoni-Ponce,* the issue before the Supreme Court was whether to allow the Border Patrol to stop vehicles solely because the driver or occupants appeared to be of Mexican descent.[39] The Supreme Court balanced the public interest served by the prevention of illegal aliens with the interference of individual liberty that results when an officer stops an automobile and questions its occupants.[40] The Court concluded that to allow patrol stops of all vehicles, without any suspicion that the vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of highways, solely at the discretion of Border Patrol officers.[41]

20. *Id.*
21. *Id.* at 6-7.
22. *Id.* at 7.
23. *Id.* at 16, 20. The Court defined a "seizure" as whenever a police officer accosts an individual and restrains his freedom to walk away. These seizures were then described as more than a "petty indignity," but a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment. *Id.* at 16.
24. *Id.* at 21-27.
25. *Id.* at 27.
26. *Id.* at 20-27.
27. *Id.* at 21.
28. *Id.* at 27.
29. *Id.* at 26.
30. 407 U.S. 143 (1972).
31. *Id.* at 144.
32. *Id.* at 144-45.
33. *Id. at 145.*
34. *Id.*
35. *Id.* at 147.
36. *Id.* at 146-47; *see id.* at 156-57 (Marshall, J., dissenting) (noting that the only tip the informant had given the officer previously pertained to alleged homosexual conduct in a local train station; the officer used the tip to conduct a further investigation that resulted neither in an arrest nor in any finding of substantiating evidence).
37. 422 U.S. 873 (1975).
38. 443 U.S. 47 (1979).
39. 422 U.S. at 874.
40. *Id.* at 878-89.
41. *Id.* at 880, 882.

Although the Court held it unconstitutional to allow the Border Patrol to stop drivers strictly due to ethnicity, it did go on to conclude that the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor in determining reasonable suspicion.[42] The Court permitted trained officers to use this factor, along with others,[43] to create rational inferences that would lead to reasonable suspicion.[44]

With this new limit set on *Terry*, the Court would next have to decide whether reasonable suspicion was created when an individual was observed in a high-crime area, in *Brown v. Texas*.

In *Brown*, officers were patrolling an area of El Paso with a high incidence of drug traffic when they saw a man unknown to them who looked suspicious.[45] The officers stopped and questioned the man.[46] When he refused to identify himself, the officers frisked and arrested him, charging him with violating a Texas statute that made it a criminal act for a person to refuse to give his name and address to an officer.[47]

The Supreme Court found that there was no basis for suspecting Brown of any misconduct.[48] The fact that he was in a neighborhood frequented by drug users, standing alone, was not a basis for concluding that he was himself engaged in criminal conduct.[49]

In *Brignoni-Ponce* and *Brown*, the Supreme Court began to set limits on what could constitute a *Terry* stop. No longer could one's ethnicity be the sole cause for reasonable suspicion, nor could one's location in a high-crime area. The pendulum seemed to swing, although slightly, back in the direction of protecting an individual's right to freedom from police intrusions. After *Brown*, though, the pendulum began to swing back in favor of law enforcement and protecting the states' interests in preventing crime, beginning with *United States v. Cortez*[50] and *United States v. Sokolow*.[51]

The Supreme Court Reinforces Its Belief in Law Enforcement's Ability to Define Reasonable Suspicion

Cortez concerned the stop of a vehicle believed to be transporting illegal aliens.[52] In deciding *Cortez*, and to clarify which factors constituted sufficient cause for a *Terry* stop, the Court devised the "whole picture" test. Instead of making a specific factor a *per se* rule of law in determining reasonable suspicion, all the circumstances and evidence are to be examined and weighed accordingly by law enforcement officials.[53] Although this gave a great amount of power to officers to determine inferences based on the evidence they had weighed, the Court believed this power was warranted since some inferences and deductions can elude an untrained person.[54]

In *United States v. Sokolow*, the Court needed to determine whether the "whole picture" test would include stopping an individual at an airport for committing a large cluster of innocent activities that could also be associated with the transporting of narcotics.[55] *Sokolow* involved a nervous young man traveling under an alias to a known drug-trafficking city, Miami, who paid for his ticket with $2,100 in cash.[56] He did not check his luggage and was traveling from Honolulu, a 20-hour round-trip flight, to stay in Miami for only 48 hours.[57]

The Court found that although any of these factors by itself may not be proof of illegal conduct, taken together they amount to reasonable suspicion.[58] Thus, *Sokolow* reemphasizes the message that lower courts should defer to law enforcement and its collective knowledge and experience in passing upon the propriety of *Terry* stops.[59]

DOES LOCATION PLUS EVASION EQUAL REASONABLE SUSPICION?

State Courts Were Split

The Supreme Court previously determined in *Brown v. Texas* that an individual's location in a high-crime area alone is insufficient to provide reasonable suspicion, but, until *Wardlow*, it had yet to hear a case that involved whether evasion from the police in a high-crime area would constitute a *Terry* stop. State courts were split three ways on deciding this issue. Some believed that evasion from police alone was sufficient grounds for a *Terry* stop,[60] for others an evasion from police in a high-crime area was sufficient,[61] but still

42. *Id.* at 884-87; s*ee also id.* at 886 n.12 (stating that Mexican appearance could be used as a factor, citing a 1970 census that 12.4% of persons of Mexican origin were aliens in Texas, 8.5% in New Mexico, 14.2% in Arizona, and 20.4% in California).
43. *Id.* at 884-85. The Court named other factors that may be taken into account in deciding whether there is reasonable suspicion to stop a car in a border area. Some include proximity to the border, whether the vehicle appears to be heavily loaded, and the characteristic appearance of persons who lived in Mexico, such as the mode of dress and haircut. *Id.* at 885.
44. *Id.* at 884.
45. 433 U.S. at 48-50.
46. *Id.* at 49.
47. *Id.* at 49.
48. *Id.* at 52.
49. *Id.*
50. 449 U.S. 411 (1981).
51. 490 U.S. 1 (1989).
52. 449 U.S. at 413-15.
53. *Id.* at 418.
54. *Id.*
55. 490 U.S. at 3.
56. *Id.* at 4-6.
57. *Id.* at 4-6.
58. *Id.* at 10. *Cf.* Florida v. Royer, 460 U.S. 491 (1983). Decided six years before *Sokolow*, the Supreme Court held in *Royer* that it could not allow every nervous young man exhibiting multiple characteristics that meet the "drug courier profile" to be arrested and held to answer for trafficking drugs. *See id.* at 504-07.
59. Harris, *supra* note 6, at 507.
60. *See* State v. Anderson, 454 N.W.2d 763 (Wis. 1990)(allowing police officers to stop an individual engaging in flight upon sighting law enforcement officers). *See also* Harris, *supra* note 6, at 673, n.137 (1994) (citing four other courts concluding that merely avoiding the police is enough to justify a *Terry* stop).
61. *See* Harris v. State, 423 S.E.2d 723 (Ga. App. 1992) (finding that a defendant's flight after observing police car in high-drug area gave officer sufficient articulable suspicion to conduct stop and frisk).

others believed neither scenario was acceptable.[62] The Supreme Court granted certiorari in *Wardlow* to clarify whether a location-plus-evasion stop was constitutional and set forth a bright-line rule.

The Supreme Court Resolves the Issue

Officers Nolan and Harvey were working as uniformed officers in a special operations section of the Chicago Police Department.[63] The officers were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking.[64]

As the caravan passed a street, Officer Nolan observed Wardlow standing next to the building holding an opaque bag.[65] Wardlow looked in the direction of the officers and fled.[66] The officers eventually cornered him on the street.[67] Nolan then exited the car and stopped Wardlow.[68] He immediately conducted a protective patdown search for weapons because in his experience it was common for weapons to be found in the near vicinity of narcotics transactions.[69] Officer Nolan opened the bag and discovered a .38 caliber handgun.[70]

The Illinois trial court denied Wardlow's motion to suppress, finding the gun was recovered during a lawful stop and frisk.[71] The Illinois Court of Appeals reversed, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify a *Terry* stop.[72] The court found the evidence presented by the state insufficient to prove that Wardlow was found in a high-crime area.[73]

The Illinois Supreme Court affirmed, but on a different basis than the intermediate appellate court.[74] The Illinois Supreme Court determined that sudden flight in a high-crime area does not by itself create a reasonable suspicion justifying a *Terry* stop.[75] The court concluded that while police have a right to approach individuals and ask questions, the individual has no obligation to respond and may simply go on his or her way.[76] The court then determined that flight may simply be an exercise of this right to "go on one's way," and thus, could not constitute reasonable suspicion justifying a *Terry* stop.[77]

The Supreme Court rejected this rationale and reversed. The majority concluded that flight, by its very nature, is not "going about one's business," but is just the opposite.[78] The Court then reiterated its previous holdings, explaining that an officer may conduct a brief introductory stop when an officer has a reasonable, articulable suspicion that criminal activity is afoot.[79] The determination of reasonable suspicion is to be based on commonsense judgments and inferences about human behavior.[80]

The dissenting opinion focused on how much weight should be given to unprovoked flight in determining reasonable suspicion. After recognizing the fact that sometimes those who flee may be guilty of a crime, the dissent gave credence to the fact that there are those, particularly minorities, residing in high-crime areas who flee because they believe contact with the police itself can be dangerous.[81] The dissent argued that since many factors provide innocent motivations for unprovoked flight in high-crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so.[82]

WHAT ARE THE IMPLICATIONS OF *WARDLOW* AND WHAT WILL THE FUTURE HOLD?

Will Location-Plus-Evasion Stops Actually Reduce Crime?

Wardlow has removed the aura of unconstitutionality regarding location plus evasion in *Terry* stops. The majority justified its holding in part by reiterating the fact that the officers in *Wardlow* were in an area of expected criminal activity, but noted that this standing alone is not enough to support a reasonable suspicion.[83] The majority then turned to its belief that evasion is suggestive of wrongdoing.[84] The two factors combined would determine reasonable suspicion due to commonsense judgments and inferences about human behavior.[85]

This reasoning supported the Court's view that police need a freer hand to combat crime and to protect themselves,[86] but the majority offered no supporting evidence that allowing location plus evasion as a lawful basis for *Terry* stops would do this. While people may avoid the police for a variety of reasons,

62. *See* State v. Tucker, 642 A.2d 401 (N.J. 1994) (finding that flight alone, without other articulable suspicion of criminal activity, does not meet *Terry* standards); *see also* State v. Hicks, 488 N.W.2d 359 (Neb. 1992)(holding that flight is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct).
63. *Wardlow*, 528 U.S. at 121.
64. *Id.*
65. *Id.* at 121-22.
66. *Id.* at 122.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.; see also* People v. Wardlow, 701 N.E.2d 484, 487 (Ill. 1998) (finding, contrary to the intermediate appellate court, that Officer's Nolan's uncontradicted testimony was sufficient to establish that the incident occurred in a high-crime area).
76. 528 U.S. at 122.
77. *Id.* at 123.
78. *Id.* at 125.
79. *Id.* at 123 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).
80. *See id.* at 125.
81. *Id.* at 132.
82. *Id.* at 139.
83. *Id.* at 124.
84. *Id.*
85. *Id.* at 125.
86. *See generally* Williams, 407 U.S. at 148 n.3 (noting that officers have reasons to fear for safety, citing studies that found 97% of policemen murdered in 1972 were killed by gunshot wounds and 30% of police shootings occurred when a police officer approached a suspect seated in an automobile).

reported cases focus only on those with guilty motivations.[87] Others who are without guilt are nevertheless stopped and frisked.[88] They are not charged because the search yields no evidence and no reported case results.[89]

Will the Strained Relationship Between Minorities and the Police Become Further Aggravated?

The majority did not consider that most of these location-plus-evasion stops will involve disproportionately higher amounts of minorities and certainly will only involve those among the low-income class of society. Consequently, these are the same people who are more likely to evade police for reasons other than guilt.[90]

The dissenting opinion recognized that there are entirely innocent persons residing in high-crime areas who have reasons to flee from police.[91] Using compiled data from several sources, the dissent pointed to several specific reasons one may have for evading police: police brutality,[92] harassment,[93] and racial bias.[94] These factors were given little, if any, weight by the majority before rendering its opinion.

The majority saw the intrusion of a *Terry* stop as minimal and believed that the Fourth Amendment accepts the risk that innocent people may be temporarily detained.[95] The Court did not consider that these "minimal intrusions" are more than just physical—they are emotional as well. Since the stops must be conducted in high-crime areas, the innocent residents of those locations who are stopped could feel stigmatized as criminals by law enforcement simply due to their economic status and legitimate fear of police.[96] This could lead to the communities most in need of police protection regarding the police as a racist, occupying force.[97]

How Much Weight Will the Court Give an Officer's Testimony?

The dissent also discussed the vague testimony provided by Officer Nolan.[98] Officer Nolan could not recall whether he was driving in a marked or unmarked car, or whether any of the other cars in the caravan were marked.[99] The testimony also did not reveal whether anyone besides Wardlow was nearby when the incident occurred, nor how fast the caravans were driving.[100] The dissent reasoned that the testimony of Officer Nolan's observation gave insufficient weight to the reasonable-suspicion analysis.[101]

The majority and the Illinois trial court seemed to trust Officer Nolan's ability to interpret the situation and did not question the gaps left after his testimony. This is in line with the Court's decision in *Cortez* to allow officers to interpret evidence because of their experience and training in law enforcement. If Nolan believed Wardlow fled after noticing the caravan of cars containing officers, then it is assumed by the Court to be true. This clearly demonstrates the overwhelming power that police officers now possess in determining reasonable suspicion.

CONCLUSION

By allowing location plus evasion to provide reasonable suspicion, the Supreme Court has given police more power to fulfill their obligations to the public and to protect themselves from the possible risks associated with crime prevention. Officers have been given the authority to deem locations "high-crime" areas. While in those areas, police are allowed to stop and frisk anyone who happens to flee from them, regardless of the reason. These benefits come with the high price of depriving residents in low income areas from the same protection against personal invasion than those living in more affluent parts of America. Although some of the persons temporarily detained by officers will be guilty of some crime, the majority will not, leaving the taste of bitter resentment toward law enforcement and a greater probability of police evasion again in the future.

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87. Harris, *supra* note 6, at 679.
88. *Id.*
89. *Id.*
90. *See generally* Harris, *supra* note 6, at 681 (stating that police use *Terry* stops aggressively in high-crime areas; as a result African-Americans and Hispanics are subjected to a high number of stops and frisks. Feeling understandably harassed, they wish to avoid the police and act accordingly.).
91. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting).
92. *Id.* at 132 n.7 (citing a study finding that 43% of African-Americans consider police brutality and harassment of African-Americans to be a serious problem).
93. *Id.* at 133 n.10 (arguing that the problem of disparate treatment felt by minorities is real—not imagined).
94. *Id.* at 133 n.8 (noting that many stops never lead to an arrest, which further exacerbates the perception felt by racial minorities and people living in high-crime areas); *see also* Harris, *supra* note 6, at 679 (police are much more likely to stop African-American men than white men).
95. *Id.* at 126.
96. *See generally* Harris, *supra* note 6, at 680 (finding that many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process).
97. Harris, *supra* note 6, at 681.
98. *Id.* at 138-39.
99. *Id.* at 138.
100. *Id.* at 138.
101. *Id.* at 139.