Reasonable Suspicion or a Good Hunch? Dapolito and a Return to the Objective Evidence Requirement

Claire O'Brien

Follow this and additional works at: http://scholarship.law.unc.edu/nclr
Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol93/iss4/6
Reasonable Suspicion or a Good Hunch? Dapolito and a Return to the Objective Evidence Requirement*

INTRODUCTION

The Fourth Amendment protection against unreasonable search and seizure is a fundamental element of American liberty. Courts have long interpreted the amendment as a limit on police officers’ ability to detain citizens, mandating that officers could only detain citizens through arrests related to completed or ongoing offenses.¹ But this strict application of the Fourth Amendment left officers unable to act to prevent crime when faced with suspicious circumstances that fell short of an ongoing offense. Judicial recognition of the need for additional police authority to prevent crime² first appeared in the Supreme Court case, Terry v. Ohio.³ In Terry, the Court held that officers could temporarily detain citizens if the officers had reasonable suspicion that “criminal activity may be afoot.”⁴ What came to be known as “Terry stops”⁵ were initially limited; the intermediate police power created in Terry was intended as a small accommodation to the practical needs of preventative police work and not a significant departure from the protections of the Fourth Amendment.⁶

However, the Supreme Court has allowed a gradual expansion of Terry stops by adopting a deferential stance towards police officers and their assertions of what constitutes suspicious behavior.⁷ The Terry Court intended to expand officers’ power to “approach a person for purposes of investigating possibly criminal behavior even

2. Id.
4. Id. at 30.
5. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 122 (2000) (“[T]he Illinois Supreme Court determined that sudden flight in such an area does not create a reasonable suspicion justifying a Terry stop.” (citation omitted)).
6. Terry, 392 U.S. at 15.
7. See generally Lewis R. Katz, Terry v. Ohio at Thirty-five: A Revisionist View, 74 MISS. L.J. 423 (2004) (arguing that Terry opened the door for later decisions that exposed people in minority neighborhoods to intrusive police investigations); see also Erik Luna, Hydraulic Pressures and Slight Deviations, 2009 CATO SUP. CT. REV. 133, 138 (describing the “doctrinal creep-and-crawl” in Fourth Amendment law and the “unmistakable” post-Terry trend toward greater police power during searches and seizures).
though there is no probable cause to make an arrest," but through increasing reliance on officers’ subjective determinations, the Court has allowed ever-greater police power in this pre-arrest stage. In its attempt to accommodate the practical realities of police work, the Court has departed from the firm objective evidence requirement for reasonable suspicion established in *Terry*.

A recent case out of the First Circuit Court of Appeals, however, represents a pushback against this trend. In *United States v. Dapolito*, the First Circuit upheld a district court decision to grant a motion to suppress evidence. Officers found a handgun on the defendant during a purported *Terry* stop, but the district court rejected the officers’ claim that they had reasonable suspicion of criminal activity to justify the stop. On appeal, the government argued that the district court had inappropriately substituted its judgment for that of the officers on the scene. In a move away from the Supreme Court’s deferential approach to officer testimony in *Terry* cases, the First Circuit approved the lower court’s skeptical review of the officers’ justification for the stop. By rejecting as invalid a police stop that failed to conform to the objective evidence requirements laid out in *Terry*, the First Circuit engaged in a more assertive judicial review. The decision constituted an even-handed weighing of individual constitutional rights and government claims, and represented a return to the balanced judgment exemplified in *Terry*.

Recent events have sparked a national conversation about the scope of police power and the need for greater respect for citizens’ rights. Similarly, there are signs of increased concern for Fourth

---

9. *Id.* at 21–22.
10. 713 F.3d 141 (1st Cir. 2013).
11. *Id.* at 143.
12. *Id.*
13. *Id.*
14. *Id.*
Amendment rights within the judicial system. Dapolito is not the only major ruling in recent years demonstrating an increased consideration of citizens’ rights to be free from unreasonable search and seizure, even at the cost of decreased police efficiency. Indeed, Dapolito may be part of a developing trend in the field of Fourth Amendment rights.

For example, in United States v. Wurie, the First Circuit denied police the ability to conduct warrantless searches of digital information on cell phones seized from arrested individuals. While limiting such searches would impede officers’ ability to fight crime, the First Circuit weighed the balance in favor of citizens’ privacy rights. On appeal, the Supreme Court surprised observers by affirming the First Circuit. Rather than show continued deference to police officers in Fourth Amendment situations, the Court upheld privacy rights despite the detriment to police efficiency. The Court’s decision in favor of privacy for cell phone searches may indicate a general willingness to return to a more traditional interpretation of the Fourth Amendment: one that shows less deference to police officers and more deference to citizens’ rights to be free from unreasonable search and seizure.

This Recent Development argues that Dapolito represents the correct approach to Terry stop analysis, just as Wurie was the correct

16. See Shifting Scales: How the Roberts Court Is Interpreting the Fourth Amendment, OYEZ http://projects.oyez.org/shifting-scales/ (last visited Apr. 9, 2015) (noting that the Roberts Court has increased the scope of individual privacy).

17. See, e.g., Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013) (finding that use of a drug-sniffing dog on the front porch of a home constituted a “search” for Fourth Amendment purposes and that police had no implied license to conduct the search); United States v. Ganias, 755 F.3d 125, 128 (2d Cir. 2014) (holding that the government violates the Fourth Amendment when it retains computer files seized pursuant to a search warrant but not responsive to the warrant); Patel v. City of Los Angeles, 738 F.3d 1058, 1061 (9th Cir. 2014) (finding that a police officer’s nonconsensual inspection of hotel records without a warrant violated the Fourth Amendment).

18. 728 F.3d 1 (2013).

19. Id. at 14.

20. Id. at 13 (dismissing the government’s argument that cell phone data searches are necessary for officer protection and to ensure against data deletion, and finding that the scope of private information potentially discoverable in cell phones was too great to allow warrantless searches).


22. Riley, 134 S. Ct. at 2493. (“We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime.”).
approach to search and seizure analysis. The Court’s return to a traditional *Terry* standard would reduce reliance on subjective determinations of police officers, fulfill the Court’s self-described “responsibility to guard against police conduct which is over-bearing or harassing,” and be a positive step toward a more balanced approach to Fourth Amendment rights. When next presented with a *Terry* case, the Supreme Court should follow the First Circuit’s example and reassert a stronger form of judicial review of what constitutes sufficient evidence to create reasonable suspicion, thereby recalibrating the balance between constitutional rights and police accommodations.

Analysis proceeds in four parts. Part I briefly addresses the legal background and facts of *Dapolito*. This Part discusses both the district court’s assessment of the *Terry* stop of Anthony Dapolito and the circuit court’s review of the district court’s holding. Part II explains how *Dapolito* represents a shift away from the analysis the Supreme Court has recently applied to *Terry* cases by contrasting the Supreme Court’s deferential approach to officer testimony with *Dapolito*’s more skeptical review. Part III explores relevant policy considerations, including racial concerns and the need to protect citizens who may not know their rights. Finally, Part IV considers the *Dapolito* decision within the larger context of the resurgence of Fourth Amendment protections, with a particular look at the First Circuit’s role as a leader in this area of constitutional law.

I. FACTS AND BACKGROUND

The incident that gave rise to *United States v. Dapolito* began around 2:00 AM in a public square in Portland, Maine, when two patrolling officers noticed a man, the defendant Anthony Dapolito, standing alone near an ATM. According to the officers, the area had recently experienced burglaries, and the defendant was acting strangely: he appeared intoxicated and made bizarre facial expressions. When asked for identification, Dapolito shared his name, date of birth, and home state. He produced a government benefits card matching the name he had provided, but the officers were not appeased. Because Dapolito misspelled his name the first time.
time he was asked for it, and he therefore did not appear in a search of the state license database, the officers believed he was a wanted person lying about his true identity. One officer told Dapolito to place his hands on his head, and Dapolito complied. During the ensuing frisk, the officers found a handgun on his person.

Dapolito was subsequently charged with possession of a firearm by a convicted felon and moved to suppress the handgun as the result of an invalid stop. Although the officers justified the search by claiming that they believed Dapolito was either a would-be burglar or a fugitive, the United States District Court for the District of Maine dismissed both justifications as unsupported by objective evidence. The court relied on Terry law to determine whether the police had adequate reason to stop and frisk the defendant. Through a skeptical analysis of the officers’ justification for the stop, the court found their explanation lacking and granted the motion to suppress. The court held that the mere fact that Dapolito came across as “odd” was insufficient to create reasonable suspicion and that “[t]he Defendant was acting not unlike many other members of the indigent and/or transient population of Portland.”

The district court similarly rejected the officers’ contention that they suspected Dapolito of involvement in a burglary, noting that neither officer could specify a recent burglary that had taken place in the area, nor could either officer point to burglary tools on or near

29. Id.
30. Id. at *7. The district court refused to infer that Dapolito deliberately misspelled his name, pointing to the fact that he spelled it correctly the second time. Id. at *8. Instead, the court concluded that Dapolito either misspelled his name unintentionally or that the officer simply misheard him. Id.
31. Id. at *5.
32. Id.
33. Id. at *9.
34. Id. at *7–8 (“The police articulated no other suspicion than generalized suspicion and unsupported suspicions of burglary and an outstanding warrant. The officers observed no criminal behavior and had no tips or sources of information notifying them that the Defendant was engaging in any other crime. The officers saw no contraband and no indication of a weapon.”).
35. Id.
36. Id. at *7.
37. Id.
38. Id. Note that by “a good hunch,” the Court seems to mean a hunch that ultimately led to incriminating evidence (in this case, a gun).
Finally, the court denied the officers’ claim that they believed Dapolito was a fugitive and was lying about his true identity. The court held that the officers did not have a “particularized and objective basis for suspecting that the Defendant was wanted on an outstanding warrant” because the officers had received no tip that Dapolito was a wanted person and because their suspicion was primarily based on the fact that his name did not appear in the state license database.

On appeal, the government asserted that the district court had inappropriately rejected the officers’ testimony that the defendant’s location and behavior created reasonable suspicion and that the review therefore misapplied the reasonable suspicion test for Terry stops. The First Circuit rejected the government’s argument and affirmed the lower court, finding that the district court’s skeptical review of the officers’ justification for the stop was appropriate. In fact, the First Circuit held that the district court did not need to “defer to these specific police officers’ view of the situation” to assess whether reasonable suspicion existed and affirmed the district court’s determination that the officers lacked reasonable suspicion to make a Terry stop. By upholding the district court’s assertive review, the First Circuit departed from the Supreme Court precedent in Terry stop cases and displayed a more balanced approach to the reasonable suspicion analysis.

II. THE DAPOLITO COURT’S RETURN TO A FIRM OBJECTIVE EVIDENCE REQUIREMENT

The Supreme Court originally intended Terry stops as minor concessions to the practical need for police to take pre-arrest action to stop crime and protect themselves. The Supreme Court expanded the ability of the police to stop citizens, even in the absence of

39. Id. (“Other than standing near an ATM, the Defendant was doing nothing that suggested that he had committed or was going to commit a burglary.”).
40. Id. (noting that the officers had “scant evidence to support their suspicions” that Dapolito was lying about his identity).
41. Id. at *8.
42. United States v. Dapolito, 713 F.3d 141, 143 (1st Cir. 2013).
43. Id. at 149.
44. Id. at 150.
45. Id. at 153.
46. Throughout this paper, “the Dapolito court” refers to the First Circuit Court of Appeals, and not the United States District Court for the District of Maine.
47. Terry v. Ohio, 392 U.S. 1, 24 (1968) (“We 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.”).
probable cause but only in certain limited circumstances. *Terry* required that police officers use the facts available to them at the moment of the stop to determine if a person of reasonable caution would believe that the action taken was appropriate.48 Part of the problem with this standard is that “reasonable” is not a self-defining term. Rather, it is a flexible guideline that can shift depending on the weight a court gives to Fourth Amendment rights or the practical needs of law enforcement. By setting a firm objective evidence requirement, the *Terry* Court indicated that it intended *Terry* stops to be only a small accommodation to police and that courts should not show disproportionate deference to either the citizen’s constitutional claims or the police officer’s testimony.49 The Supreme Court explained this balancing act several years after *Terry*: “‘Fidelity’ to the commands of the Constitution suggests balanced judgment rather than exhortation. . . . The task of this Court, as of other courts, is to ‘hold the balance true . . . .’”50 In its post-*Terry* decisions, however, the Supreme Court moved away from a balanced approach and showed increased deference to police officers through a less stringent application of the objective evidence requirement. The First Circuit’s decision in *United States v. Dapolito* is therefore significant because it reflects a judicial return to *Terry’s* original objective evidence standard.

A. *The Supreme Court’s Shift Away from Terry*

*Terry v. Ohio* represented the Supreme Court’s recognition that an overly strict application of the Fourth Amendment to police arrest power led to undesirable results. The Supreme Court noted that limiting the police arrest power to ongoing crime or past crime could “exact a high toll in human injury and frustration of efforts to prevent crime,”51 and created a doctrine that broadened the types of situations in which the police could stop and investigate citizens. The Court also balanced the practical need for a “set of flexible responses”52 for

48. *Id.* at 22.
49. *Id.* at 24 (acknowledging the physical risks for police officers in a situation where the officer lacks probable cause for an arrest but concluding that the court “must still consider, however, the nature and quality of the intrusion on individual rights”).
50. *Illinois v. Gates*, 462 U.S. 213, 241 (1983) (“The highest ‘fidelity’ is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities.”).
52. *Id.* at 10.
police officers with the constitutional requirements of Fourth Amendment freedom from unreasonable search and seizure.\footnote{53. U.S. CONST. amend. IV.} Although the Court held that officers could make pre-arrest stops, it limited that power by stating: “[I]t is imperative that the facts be judged against an objective standard. . . . [S]imple good faith on the part of the arresting officer is not enough.”\footnote{54. \textit{Terry}, 392 U.S. at 21–22.} The Court emphasized that at the moment of seizure or search, a \textit{reasonable person} would have to believe that the action was appropriate and warned that any lesser standard would cause the Fourth Amendment to “evaporate,” exposing citizens to unreasonable search and seizure at the whim of police.\footnote{55. See \textit{id.} at 22. (“If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.”).} Indeed, the Court even discussed the importance of maintaining the integrity of the objective evidence requirement, noting that “[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.”\footnote{56. \textit{Id.}} Thus, \textit{Terry} was only intended to grant police officers a limited pre-arrest power and to permit a minor weakening of Fourth Amendment protections to accomplish the practical goal of preventative police work and ensure officer safety.\footnote{57. See \textit{id.}}

In subsequent decisions, the Court has paid lip service to \textit{Terry}\footnote{58. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (describing the “reasonable suspicion” standard set forth in \textit{Terry}); United States v. Arvizu, 534 U.S. 266, 275 (2002) (rejecting a lower court’s approach to determining the existence of reasonable suspicion for failing to take into account the totality of the circumstances and holding that the officer had reasonable suspicion to believe the defendant was engaged in criminal activity).} but has gradually expanded what constitutes permissible police action by showing increasing deference to police testimony of what constitutes suspicious behavior. In \textit{Illinois v. Wardlow},\footnote{59. 528 U.S. 119 (2000).} for example, the Court accepted the officers’ justification that they suspected the defendant was engaged in criminal activity based on his presence in a high-crime area and what the officers interpreted as his “unprovoked flight.”\footnote{60. \textit{Id.} at 124.} The \textit{Wardlow} decision highlighted the Supreme Court’s interpretation of \textit{Terry} in favor of police and at the expense of Fourth
Amendment rights. In its explanation of its approval of the officers’ stop, the Court noted, “Terry recognized that officers can detain individuals to resolve ambiguities in their conduct, and thus accepts the risk that officers may stop innocent people.”61 The Court gave great weight to the officers’ testimony that the incident occurred in “an area well known for heavy narcotics trafficking”62 and demanded no explanation of the size of the area identified or the frequency of crimes in the area.63

The Court showed further deference to police officers by agreeing with the government’s argument that a citizen running away from officers justified reasonable suspicion of criminal activity, despite the existence of many nonsuspicious reasons why a person might break into a run (such as trying to make it home in time for dinner or to catch a bus).64 The Court held that “[h]eadlong flight . . . is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”65 The officers failed to provide much evidence for suspicion other than the defendant’s flight and his presence in a high crime area.66 The stop occurred in the middle of the day, and the officers were not responding to a report of suspicious activity in the area.67 Even so, the Court upheld the search.68 This heavy reliance on flight as a factor contributing to reasonable suspicion contradicted the established rule that a citizen has the “right to ignore the police and go about his business.”69 Under this expansive view of what constitutes suspicious conduct, a citizen who simply walked away from an approaching police officer might be seen as acting in an evasive manner sufficiently suspicious to justify a Terry stop.70 Thus, the Wardlow decision greatly

---

61. Id. at 120.
62. See id. at 124.
63. Id. at 121 (stating that respondent Wardlow was in an area known for heavy narcotics trafficking, with no further discussion of whether or not the area was indeed high crime); see also id. at 122 (noting that the Illinois Appellate Court concluded that Wardlow was not in a high crime area, but not delving into the question itself).
64. Id. at 129 (Stevens, J., concurring in part and dissenting in part).
65. Id. at 124 (majority opinion).
66. Id. at 137–139 (Stevens, J., concurring in part and dissenting in part) (noting that the “terse” police report was “most noticeable for what it fails to reveal” and that the appellate court found the record “too vague to support the inference that . . . defendant’s flight was related to his expectation of police focus on him”).
67. Although the defendant was carrying a white, opaque bag under his arm, the dissent noted that “there is nothing at all suspicious about that.” Id. at 139.
68. Id. at 121 (majority opinion).
69. Id. at 120.
70. At least one court has already extended the Court’s holding. See United States v. Bumpers, 705 F.3d 168, 177 (4th Cir. 2013) (holding that where an individual walked
increased the number of circumstances in which an officer could claim reasonable suspicion and showed a continued preference for the practical needs of police work over the protections of the Fourth Amendment.\textsuperscript{71}

The Supreme Court’s continued preference for practicality over privacy was highlighted in \textit{Maryland v. King},\textsuperscript{72} a recent Fourth Amendment decision focused on police collection of citizen DNA. Although \textit{King} concerned the scope of permissible police action after an arrest (as opposed to the pre-arrest considerations of a \textit{Terry} stop), the holding highlights the Court’s willingness to allow decreased privacy for citizens in the name of efficient crime prevention.\textsuperscript{73} The Court held that the Fourth Amendment did not bar police from swabbing the inside of an arrestee’s cheek to acquire his DNA,\textsuperscript{74} finding that the diminished expectations of privacy inherent in an arrest justified the “minor intrusion” to the human body and that any indignity the arrestee might suffer was counterbalanced by the “significant state interest[ ]” in the identification of arrestees.\textsuperscript{75} As in the earlier post-\textit{Terry} cases, the Court’s concern for the practical needs of police work in \textit{King} exceeded its concern for citizens’ privacy rights. This attitude reflects the Court’s gradual shift away from stringent Fourth Amendment protections in the decades since \textit{Terry}.

\textsuperscript{71} This preference may also be seen in the Court’s refusal to require a “knowing and intelligent” waiver of Fourth Amendment rights. \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 241 (1973). Additionally, the Court’s acceptance of testimony about “furtive gestures” to support an officer’s reasonable suspicion shows a tilt away from the objective evidence requirement. The “furtive gestures” phrase can be used to characterize a wide range of activity and can be used to support a claim of reasonable suspicion even when an officer never actually sees a suspicious object and has no other reason to suspect a citizen of unlawful activity. \textit{See 2 LAFAYE, supra note 1, § 3.6(d) (5th ed. 2012); see also People v. Superior Court}, 478 P.2d 449, 455 (Cal. 1970) (“[I]f words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer may view that context quite otherwise from the actor: not only is his vantage point different, he may even have approached the scene with a preconceived notion—consciously or unconsciously—of what gestures he expected to see and what he expected them to mean.”).

\textsuperscript{72} 133 S. Ct. 1958 (2013).

\textsuperscript{73} \textit{Id.} at 1962 (explaining that the defendant was arrested and taken to a facility where booking personnel used a cheek swab to take a sample of his DNA).

\textsuperscript{74} \textit{Id.} at 1980.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{See Los Angeles County, California v. Rettele}, 550 U.S. 609, 615–16 (2007) (denying citizens redress for a mistaken search in which the police held the citizens at gunpoint, naked; the Court stated that that innocent people may “bear the cost” of valid searches, and casually accepted that “the resulting frustration, embarrassment, and humiliation may be real”); \textit{Minnesota v. Carter}, 525 U.S. 83, 90 (1998) (holding that while
B. The First Circuit’s Return to the Objective Evidence Requirement

Unlike the Supreme Court decisions of recent decades, the First Circuit’s *Dapolito* decision gave precedence to citizens’ privacy rights over police practicality. The First Circuit rejected evidence acquired in a police stop because the officers were unable to provide sufficient objective evidence to support their claim of reasonable suspicion.\(^77\) This demanding review of officer testimony represents a pushback against the Supreme Court’s *Terry* law trend. In contrast to the Supreme Court’s passive review of police determinations in *Wardlow*, and its deference to state interests in *King*, the *Dapolito* court held that a court need not “defer to . . . specific police officers’ view of the situation, and cast aside its individual judgment about what an objective officer’s view would be.”\(^78\) Instead, the First Circuit reviewed the officers’ testimony that they were suspicious of Dapolito with great skepticism.\(^79\) By treating pre-arrest stops as a limited grant

---

\(^{77}\) United States v. Dapolito, 713 F.3d 141, 143 (1st Cir. 2013) (upholding the district court’s determination that the police officers did not have sufficient objective evidence to justify their search of defendant Dapolito).

\(^{78}\) Id. at 150.

\(^{79}\) See id. at 151–52 (rejecting the government’s assertion that the officers had reasonable suspicion by pointing out that the officers did not observe Dapolito engaging in
of authority that officers must justify with objective evidence, the court’s analysis aligned with the standard set in Terry: pre-arrest police action is appropriate only when the “facts available to the officer at the moment of seizure . . . warrant a man of reasonable caution in the belief that the action taken was appropriate.” The Court created this standard to prevent intrusions on individuals’ Fourth Amendment rights based on “nothing more substantial than inarticulate hunches” and intended the resulting analysis to reflect an even-handed consideration of citizen’s constitutional rights and officer’s testimony. Despite the trend of Terry law in favor of a more deferential approach to officer testimony, the First Circuit returned to the classic Terry objective evidence requirement with its decision in Dapolito.

The Dapolito decision reflected a Terry-style analysis in its application of the requirement that intrusions on citizens’ Fourth Amendment rights be based on more substantial support than what Terry defined as “inarticulate hunches.” Rather than rely on the word of the specific officers in the case, the First Circuit held that the district court was correct to view the situation “through the lens of a reasonable police officer.” The court elaborated: “[T]he government argues the district court needed to . . . cast aside its individual judgment about what an objective officer’s view would be, that is not the law.” It affirmed the lower court’s holding that because the officers in this case had neither tips nor visual evidence suggesting that Dapolito was involved in criminal activity, their suspicions were not sufficiently “particularized and objective” to questionable behavior such as “fiddling with doorways,” that Dapolito readily provided his personal information to the officers and engaged in conversation with them, and that there was no outstanding warrant matching Dapolito’s name or appearance.

80. Terry v. Ohio, 392 U.S. 1, 22 (1968) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).
81. Id. at 22.
82. Id.
83. Dapolito, 713 F.3d at 148.
84. Id. at 152.
85. Compare id. at 151 (emphasizing that the officers had been given no information on any individual’s wanted status), with United States v. Hensley, 469 U.S. 221, 222 (1985) (holding that if police are acting off information from a “wanted flyer,” that fact will justify a Terry stop).
86. Compare Dapolito, 713 F.3d at 151 (noting that Dapolito had no tools to burglarize, such as pliers or a pry bar), with Terry, 392 U.S. at 23 (finding it suspicious that a person would pace back and forth in front of a store twenty-four times and then conference with two other men).
constitute reasonable suspicion.88 To the Dapolito court, even the fact that Dapolito was “grimacing, squinting, and making strange facial expressions”89 was not enough to create reasonable suspicion in the absence of behavior specifically suggesting criminal activity, such as casing a building or holding burglary tools.90 When the officers testified that they suspected Dapolito was a fugitive because the name he provided did not appear in the state license database, the court dismissed the suggestion outright: “It simply cannot be that reasonable suspicion of a person being a wanted fugitive is created by the failure to find the name, given by the person, in a government database.”91 The Dapolito court thus engaged in a more forceful review than the Supreme Court has applied in similar Terry stop cases92 and gave less weight to officers’ testimony when considering what constitutes reasonable suspicion.93

Additionally, the First Circuit showed that it was not afraid of charges of “unrealistic second-guessing.”94 The First Circuit turned away from a deferential review of police behavior and ignored Supreme Court warnings that “[a] creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”95 It engaged in assertive judicial review by critically assessing officer testimony that Dapolito was in a “high crime area” where burglaries had recently occurred.96 The court noted that the downtown area the officers identified was in fact a large area comprising many streets.97 This nuanced consideration of

88. Dapolito, 713 F.3d at 153.
89. Id. at 144.
90. Id. at 151.
91. Id. at 152.
92. See Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (holding that running away from police is conduct sufficient to give rise to reasonable suspicion); Florida v. Bostick, 501 U.S. 429, 441 (1991) (refusing to recognize coercive police action even when police stood over a bus passenger and asked him intimidating questions); United States v. Mendenhall, 446 U.S. 544, 571–72 (1980) (White, J., dissenting) (criticizing the majority for finding reasonable suspicion when officers approached the defendant based only on their visual observations, as opposed to specific tips).
93. The dissent criticized this analysis and accused the majority of “picking out the suspicious factors one-by-one and offering an innocent explanation for each,” thereby failing to consider how suspicious Dapolito’s behavior was in context. See Dapolito, 713 F.3d at 157 (Howard, C.J., dissenting) (citing United States v. McGregor, 650 F.3d 813, 822 (1st Cir. 2011)).
95. Id. at 686–87.
96. Dapolito, 713 F.3d at 151.
97. Id.
what an officer meant by “high crime area” is a clear departure from cases in which the Supreme Court accepted without question officers’ assertions that an area was “high crime.”98 Because there was no evidence that the square in which the defendant stood was a “particular hot spot,” nor evidence as to what the officers meant by “recent,”99 the court was unconvinced by the claim that the officers had reason to suspect Dapolito based on his location.100 Thus, the First Circuit engaged in a nondeferential review of the officers’ testimony and took a positive step back toward the balance between Fourth Amendment rights and police efficiency so carefully set in Terry.

III. Dapolito Is a Positive Development for Fourth Amendment Jurisprudence

Strong policy considerations support the argument in favor of a more assertive judicial review of police power on Fourth Amendment issues. Dissenting voices on the Supreme Court have repeatedly pointed to the risks of judicial failure to restrict police power to intrude on citizens’ lives.101 For example, in the Wardlow dissent, Justice Stevens stated that minority citizens are often the victims of racial bias in subjective police assessments of suspicious behavior102 and noted that such unequal treatment caused fear, anger, and

98. See Illinois v. Wardlow, 528 U.S. 119, 121 (2000) (accepting without question the officers’ assertion that the area was “known for heavy narcotics trafficking”); United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (accepting without question the government’s assertion that the defendant was suspicious partially due to the origin of her airline flight). For further discussion of the questionable use of the “high-crime area” label to support reasonable suspicion, see Hannah Rose Wisniewski, It’s Time to Define High-Crime: Using Statistics in Court to Support an Officer’s Subjective “High-Crime Area” Designation, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 102–04 (2012) (critiquing the idea of “guilt[] by location” and arguing that in today’s high-tech world, a defendant arrested in an allegedly high-crime area should be able to demand statistical evidence as objective support for the arresting officer’s subjective assessment); see also United States v. Montero-Camargo, 208 F.3d 1122, 1143 (2001) (Kozinski, J., concurring) (“Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area.” (citing Price v. Kramer, 200 F.3d 1237, 1247 (9th Cir. 2000))).
99. Dapolito, 713 F.3d at 151.
100. Id. at 153.
102. Wardlow, 528 U.S. at 133 n.9 (Stevens, J., concurring in part and dissenting in part).
mistrust toward the police among minority citizens. Recent events in Ferguson, Missouri, and New York City highlight the fact that racial tensions between citizens and police are as serious a consideration today as when Justice Stevens expressed his concerns nearly a decade ago and suggest a need for greater skepticism toward police assessments of “suspicious” behavior. Indeed, the risks of reliance on police assessments of what constitutes reasonable suspicion are highlighted by the wide variety of behaviors that officers have used to justify their suspicions. For instance, staring too long at officers and avoiding eye contact with officers have both been proposed as support for reasonable suspicion. The risks of racial bias and government overreach underline the importance of a stringent application of the objective Terry standard and highlight the need for more decisions like Dapolito.

It is tempting for courts to defer to police judgments about what is necessary for good police work based on the belief that those judgments are rooted in years of street experience. Indeed, police officers often do have a knowledge base that allows them to assess a situation more judiciously than the average citizen. But a skeptical judicial review that demands the presence of objective evidence to support reasonable suspicion better protects the Fourth Amendment for all citizens by guarding against biased stops of minority citizens.

103. See id. at 133 n.10.

104. See Larry Buchanan et al., What Happened in Ferguson? N.Y. TIMES http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0 (last updated Nov. 25, 2014) (explaining the community uproar after a police officer shot and killed unarmed teenager Michael Brown and noting that a civil rights inquiry was opened due to allegations that the shooting was racially motivated); Editorial, It Wasn’t Just the Chokehold: Eric Garner, Daniel Pantaleo and Lethal Police Tactics, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/opinion/eric-garner-daniel-pantaleo-and-lethal-police-tactics.html (demanding “major changes in policy” after the death of black citizen Eric Garner, who died as police put him in a chokehold, and describing the public fury surrounding Garner’s death).

105. See Craig S. Lerner, Reasonable Suspicions and Mere Hunches, 59 VAND. L. REV. 407, 437 (2006); see, e.g., United States v. West, 103 F. App’x. 460, 462 (3d Cir. 2004) (noting the fact that defendants “repeatedly stared” at officers as contributing to a totality of circumstances that supported a finding of reasonable suspicion); State v. Jackson, 892 So. 2d 71, 76 (La. Ct. App. 2004) (finding an officer justified in requesting that the defendant remove his hands from his pockets and present identification after defendant “refused to make eye contact,” among other nervous behaviors).

106. A simple example would be that an officer might recognize code words or gang symbols to a greater degree than would an inexperienced layman. Terry itself recognized that an officer determines whether criminal activity is afoot “in light of his experience.” Terry v. Ohio, 392 U.S. 1, 30 (1968).

107. This is especially true considering criticisms of the accuracy of police hunches: some have suggested that officers are “deluding themselves as to their powers of observation” when they claim to be able to “distinguish between ordinary nervousness and
When police officers know they must present objective evidence in court, they may be less likely to rely on potentially racially motivated hunches to justify Terry stops.\(^{108}\)

Additionally, restrictions on pre-arrest police power are beneficial because many citizens do not know their Fourth Amendment rights.\(^ {109}\) If the courts do not enforce the constitutional limitations on police power, the police may freely commit Fourth Amendment violations.\(^ {110}\) As one scholar noted, “The basic right to be free from unreasonable searches and seizures is, for most people, either unknown or fuzzy in the extreme.”\(^ {111}\) The Terry Court considered this fact when it demanded objective evidence from police officers, holding that the “major thrust” of the Fourth Amendment is to deter improper police misconduct by excluding unlawfully seized evidence.\(^ {112}\) The knowledge that any evidence gathered during an invalid stop will be useless in a subsequent criminal case may deter officers from making an invalid stop in the first place. This deterrent role is especially powerful in light of the fact that an innocent citizen who is subject to an unlawful Terry stop will very rarely have the opportunity to vindicate his rights. Standing problems will challenge

suspicious nervousness.” Lerner, supra note 105, at 437. Subjective assessments may often be driven by bias, although such bias may not necessarily be intentional. Police officers, like everyone else, may be susceptible to making unconscious race-based assessments. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE, at xii (2013) (describing how implicit bias can affect behavior). In the context of pre-arrest stops, such implicit bias means that departure from an objective standard could lead to a disproportionate number of stops of minority citizens. But see Pat J. Merriman, Consent Searches and the Narcotics Offender, 49 J. MO. B. 479, 480–81 (1993) (explaining that officers’ decisions to stop suspects based on criteria rather than observation of suspicious activity are rooted in “background, training, and work experience” that allow the officers to identify “common indicators” for certain types of criminality). For an officer’s perspective on the power of hunches, see Dan Horan, A Hunch, or the Whispered Voice of Experience?, 4 J.L. ECON. & POL’Y 13, 13–15 (2007) (describing his own experience stopping a suspect based on an accurate hunch, including his reliance on “visual clues” that were “surely overlooked” by non-officers).

108. For a discussion of racially motivated police stops and the necessity of stronger judicial rules to deter such stops, see generally Brooks Holland, Racial Profiling and a Punitive Exclusionary Rule, 20 TEMP. POL. & CIV. RTS. L. REV. 29 (2010).

109. See Daniel J. Steinbock, The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine, 38 SAN DIEGO L. REV. 507, 527 (2001) (“It is highly unlikely that the average citizen, or reasonable person, is aware of the notion of consensual encounters with police, let alone the doctrine’s parameters. To begin with, citizens’ awareness of even the broad outlines of their constitutional rights is severely limited.”).

110. See id.

111. Id.

the more ambitious suits,\textsuperscript{113} and even in a best-case scenario, a citizen would have to expend a great deal of time and financial resources for a simple civil judgment.\textsuperscript{114}

Two counterarguments weigh against limiting police power in favor of Fourth Amendment considerations. First, increased limitations on police power may hinder police efforts to prevent crime. The fear of hampering preventative crime efforts is especially potent in our modern era, where the realities of high-impact weapons and terrorist activity mean that “a good hunch”\textsuperscript{115} could be the difference between life and death for hundreds of people. The dissent in \textit{Dapolito} noted that \textit{Terry} stops are meant to clarify ambiguous situations and concluded that when the police believe there is “concrete cause for concern,” they should have the power to act.\textsuperscript{116}

Second, limiting police power may prevent officers from discovering weapons and thereby expose officers to physical harm. Judges, sitting in the security of their chambers, hesitate to limit the ability of officers on the street to protect themselves.\textsuperscript{117} Fear of this “unreasonable” notion was originally expressed in \textit{Terry}, when the Court stated: “[W]e cannot blind ourselves to the need for law

\textsuperscript{113} See Matthew McKnight, \textit{The Stop-and-Frisk Challenge}, NEW YORKER (Mar. 27, 2013), http://www.newyorker.com/news/news-desk/the-stop-and-frisk-challenge (explaining the heightened standing requirements for plaintiffs who seek to use the court system to change police tactics, as opposed to simply seeking a money judgment); see, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (applying a higher standing threshold for anyone who uses the court system to attempt to force a change in police tactics where the plaintiff fails to “establish a real and immediate threat” that such harmful police tactics would be used against plaintiff in the future).

\textsuperscript{114} Consider the experience of Mandrel Stuart, who was detained without charges after a routine traffic stop for overly tinted windows. See Robert O’Harrow, Jr., \textit{They Fought the Law. Who Won?}, WASH. POST (Sept. 8, 2014), http://www.washingtonpost.com /sf/investigative/2014/09/08/they-fought-the-law-who-won. The officer on the scene seized $32,934, and Stuart spent $9,000 in legal fees to negotiate a government deal for a return of half the money. \textit{Id}. Stuart ultimately recovered only $7,000 of the $32,934. \textit{Id}. For an example of the extended length of time a citizen must commit to a wrongful arrest suit, see, for example, \textit{Burr} v. \textit{Burns}, 439 F. Supp. 2d 779, 782–84, 793 (2006). In \textit{Burns}, the progression of plaintiffs’ suit is tracked from the time of their thirty-two-hour detention in 2004 to their initial filing of a wrongful-arrest suit, removal of the suit to a different location, the partial granting of defendants’ motion to dismiss, and the subsequent motion to dismiss on the remaining claims before the district court. \textit{Id}. The district court ordered that the case “be set for trial as soon as practicable”—a full two years after the original incident. \textit{Id}.


\textsuperscript{116} United States v. \textit{Dapolito}, 713 F.3d 141, 159 (1st Cir. 2013) (Howard, C.J., dissenting).

\textsuperscript{117} See \textit{Terry} v. \textit{Ohio}, 392 U.S 1, 23 (1968) (“[E]very year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.”).
enforcement officers to protect themselves.” 118 The Supreme Court’s caution against “unrealistic second-guessing” 119 is recognition of the fact that the police operate in a unique and often dangerous environment, and must often make challenging decisions to protect themselves and bystanders. However, by limiting the extent to which officers’ subjective assessments will be accepted as support for reasonable suspicion, the Dapolito court did not deprive officers of all their power. As Justice Marshall noted in his dissent against suspicionless searches in Florida v. Bostick,120 even if police action is limited to circumstances that meet the original Terry requirements of objective evidence, police still have the power to make stops so long as they have a “reasonable, articulable basis to suspect of criminal wrongdoing.” 121 The Dapolito decision simply emphasizes that police officers must meet these requirements before intruding on citizens and may no longer cut constitutional corners.122

IV. POSSIBLE CONSEQUENCES OF THE DAPOLITO DECISION

At first glance, the Dapolito decision made no change to police powers under Terry stop law in the First Circuit. Police officers may still approach individuals as to whom they have reasonable suspicion and ask them incriminating questions. 123 But Dapolito stands for the proposition that there should be a more assertive judicial review of officers’ testimony about what evidence gave rise to their suspicion. Under Dapolito, adequate objective evidence to support claims of reasonable suspicion is necessary to justify the intrusion into the individual’s life.124

Of course, Dapolito is a circuit court decision and can only mandate change to the courts beneath it. But Dapolito may have

118. Id. at 24.
119. 4 LAFAVE, supra note 1, § 9.5(d) (quoting United States v. Sokolow, 490 U.S. 1, 11 (1989)).
121. Id. at 450 (Marshall, J., dissenting).
122. See United States v. Dapolito, 713 F.3d 141, 152 (1st Cir. 2013) (stating that there “simply cannot” have been reasonable suspicion on the facts of the case); see also United States v. Dapolito, No. 2:12-cr-00045-NT, 2012 WL 3612602, at *3 (D. Me. Aug. 21, 2012) (criticizing the officers for providing “conflicting testimony” about whether the search was conducted for protection or identification).
123. See Dapolito, 713 F.3d at 153 (“But where . . . the police did not have reasonable suspicion to believe that the defendant had been or was going to be engaged in a crime, the consensual inquiry (with which Dapolito complied) cannot be converted into an investigatory stop. The law requires this result.”).
persuasive impact on courts in other circuits\textsuperscript{125} and even on the Supreme Court itself. Changes in technology make privacy from government intrusion an even more significant concern than it was when \textit{Terry} was decided five decades ago,\textsuperscript{126} and there is a sense that there has been mission creep in the judiciary’s attempts to promote preventative crime efforts.\textsuperscript{127} Recent events have cast doubt on the abilities of officers to self-regulate the constitutionality of their actions, and citizen-police tensions are high.\textsuperscript{128} Consequently, the nation is increasingly interested in a more thorough review of police action to limit officer power.\textsuperscript{129} The \textit{Dapolito} decision reflects the

\textsuperscript{125} At least one other circuit has recently showed similar skepticism toward officers’ characterizations of suspicious activity. \textit{See, e.g.}, United States v. Black, 707 F.3d 531, 539 (4th Cir. 2013) (“At least four times in 2011, we admonished against the Government’s misuse of innocent facts as indicia of suspicious activity.”).

\textsuperscript{126} The Supreme Court acknowledged the pervasive presence of technology and the ensuring expanded opportunities for government intrusion in citizens’ lives in \textit{Riley v. California}. 134 S.Ct. 2473, 2488–89. In response to the government argument that searches of cell phone data are indistinguishable from searches of other physical items, the Court replied, “That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” \textit{Id.}

\textsuperscript{127} \textit{See, e.g.}, \textit{Katz}, supra note 7, at 424 (“[T]he \textit{Terry} Court dismally failed to strike an adequate balance between effective law enforcement and individual freedom. The Court struck that balance completely in favor of the police, and the balance has been further tipped in favor of police by later Supreme Courts.”).


current feeling that courts should expand their review of officers’ interactions with citizens. In light of these circumstances, the Supreme Court may be persuaded to act more assertively to protect Fourth Amendment rights, even considering its general reluctance to insert the judiciary into the on-the-spot decisions of police on the streets. The Court would do well to remember Justice Douglas’ warning in his Terry dissent: “To give the police greater power than a magistrate is to take a long step down the totalitarian path.”

There are some signs that the Supreme Court may be willing to join the turning tide on Fourth Amendment analysis. In a joint decision addressing Riley v. California and United States v. Wurie, the Supreme Court held that police could not conduct a warrantless search of digital information on a cell phone seized from an arrested individual. Observers were surprised that the Court declined to

130. One manifestation of this desire for greater police review is increased interest in police body cameras. These cameras could remove the inevitable “he said, she said,” element of post-incident testimony and could greatly enhance a court’s ability to determine if a police officer’s assessment was reasonable. See Can Body Cameras ‘Civilize’ Police Encounters?, NPR (Sept. 5, 2014, 3:32 AM), http://www.npr.org/blogs/alltechconsidered/2014/09/05/345784091/can-body-cameras-civilize-police-encounters (noting the increase in citizen demands for police body cameras to “provide a permanent video record of what happens during a police-citizen encounter”); see also Martin Kaste, Can Cop-Worn Cameras Restore Faith in New Orleans Police?, NPR (May 22, 2014, 5:38 PM), http://www.npr.org/blogs/alltechconsidered/2014/05/22/314912840/can-cop-worn-cameras-restore-faith-in-new-orleans-police (profiling the New Orleans Police Department’s use of body cameras as an attempt to “rebuild the public’s trust” and noting that cameras are “especially appealing to troubled police departments that are under federal scrutiny”). Indeed, in response to the “simmering distrust” between police departments and minority communities, President Obama proposed $263 million in funding for police body cameras and training. See Carrie Dann & Andrew Rafferty, Obama Requests $263 Million for Police Body Cameras, Training, NBC NEWS (Dec. 1, 2014, 1:17 PM), http://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161. The program would offer $75 million over three years, matching state funding by fifty percent. Id.

131. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting). Justice Douglas found even “reasonable suspicion” too great a deterioration of the probable cause standard and believed that any such weakening of the Fourth Amendment should come in the form of a constitutional amendment. Id.


133. United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), aff’d sub nom. Riley, 134 S. Ct. 2473.

134. Riley, 134 S. Ct. at 2495.
extend the rule of previous cases, 135 which allowed police to search personal property found on the person of the arrestee, 136 but instead found that the scope of information potentially revealed during a cell phone search was too great to allow for warrantless police access. 137 Indeed, the Court seemed to depart from the logic of its recent decision in King when it said that “[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” 138 Most significantly, the Court explicitly recognized that its holding would impede officers’ efforts to fight crime. 139 In recognizing that its decision would make it harder for law enforcement to learn incriminating information about “dangerous criminals,” the Court flatly acknowledged that “[p]rivacy comes at a cost.” 140 This is a clear change in the tenor of the Court’s approach to Fourth Amendment analysis, and attentive observers might well have anticipated the Court would decide the cell phone issue in the exact opposite way, perhaps proclaiming that safety comes at a cost.

Despite this positive development, it remains unclear whether the joint Riley and Wurie decision is the sign of a new trend in the Supreme Court’s Fourth Amendment jurisprudence or whether it is an anomaly. The Court’s decision in Maryland v. King shows that the Court has not fully made up its mind regarding the balance between Fourth Amendment rights and the judicial deference necessary to accommodate the practicalities of police work. But with the cell phone cases, the Court has, at the very least, shown itself open to the argument that the balance has tilted too far in favor of the police and that it is willing to acknowledge that not all Fourth Amendment rights should be subsumed by deference to police action.

135. For an example of a Supreme Court observer who predicted a more law-enforcement-friendly decision from the Court, see Orin Kerr, Initial Impressions from the Oral Argument in the Supreme Court Cell Phone Search Cases, VOLOKH CONSPIRACY (Apr. 29, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/29/initial-impressions-from-the-oral-argument-in-the-supreme-court-cell-phone-search-cases/ (“If I’m right about where the Justices are, I suspect we may end up with some kind of middle-ground rule that says that some kind of warrantless cell phone searches are permitted incident to arrest . . . . I suspect they’ll find a way to say that the narrow search in Wurie (the flip-phone case) was allowed . . . .”).
137. Id. at 2489 (“Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so.”).
138. Id. at 2488.
139. Id. at 2493 (“We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime.”).
140. Id.
CONCLUSION

Recent Supreme Court cases on Fourth Amendment issues show that the balancing act between the practical need for police investigation and the constitutional need for protection against unreasonable search and seizure has gone off-kilter. The Court’s deferential approach to officers’ testimony and its focus on the practical needs of police work have tipped the scales that were so carefully set in Terry,141 at the expense of the integrity of the Fourth Amendment.142

In Dapolito, the First Circuit pushed back against this trend and reasserted the Fourth Amendment rights of citizens. The court engaged in skeptical review of police action and demanded objective evidence to support reasonable suspicion. With this decision, the court returned to Terry’s limited version of permissible pre-arrest police power. Similar to the Supreme Court’s decision in Riley, the First Circuit’s holding in Dapolito reflected less concern for the practical considerations of police work and greater concern for the Fourth Amendment. Dapolito is therefore a positive development in the field of Fourth Amendment rights, and courts that adopt its framework will do their part to ensure an even-handed balance between citizens’ rights and government claims. The First Circuit’s interpretation of the Fourth Amendment rang true with the Court in Riley. Now the Court should follow Dapolito’s example and re-evaluate its approach to Terry stop jurisprudence.

CLAIRE R. O’BRIEN**

---

141. Terry v. Ohio, 392 U.S. 1, 21 (1968) (“[F]or there is ‘no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which a search . . . entails.’ ” (alteration in original) (quoting Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967))).

142. See Schneckloth v. Bustamonte, 412 U.S. 218, 288 (1973) (Marshall, J., dissenting) (“[W]hen the Court speaks of practicality, what it is really talking of is the continued ability of the police to capitalize on the ignorance of citizens.”).

** Special thanks go to Sam Hofstetter for his unwavering support and patience through every stage of this project. I also thank my parents for their encouragement and strong example. Finally, thanks to Professor Robert P. Mosteller for his insightful comments on several drafts of this piece, and to Charles Loeser for his thorough edits.