FOURTH AMENDMENT INFRINGEMENT IS AFOOT: REVITALIZING PARTICULARIZED REASONABLE SUSPICION FOR *TERRY* STOPS BASED ON VAGUE OR DISCREPANT SUSPECT DESCRIPTIONS

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INTRODUCTION

On Lawrence Harbin's walk home one Monday night, police officers began to trail close behind him in their cruiser.[1] The officers followed Mr. Harbin for a brief period, and he soon made it to his home in Alexandria, Virginia, stepping onto his front porch.[2] As Mr. Harbin stepped inside his living room, he heard police officers yell to him through the open front door, ordering him to stop and stay in place.[3] He turned to find an officer ordering him to put his hands where the officers could see them.[4] Mr. Harbin complied and, moving carefully to the porch, began to explain to the officers who he was.[5] Officers responded by reinstructing him to keep his hands up, and one officer approached him with his hand ready on his holstered firearm.[6]

Mr. Harbin's wife emerged from their home, insisting to the officers that he was her husband.[7] There on his front porch, an officer patted down Mr. Harbin, finding no weapons.[8] The officer asked Mr. Harbin for identification, which he produced.[9] It was then that an officer asked Mr. Harbin, "Did I see you at 7-Eleven[?] Oh! It must have been someone else. We are stopping everybody—and are not taking any chances."[10] The officers then left.[11]

About thirty or forty minutes prior to these events, and a few blocks away from Mr. Harbin's home, officers had received a report that a man brandished a gun at a 7-Eleven and fled on foot.[12] The officers spotted Mr. Harbin walking home and thought he might be that man.[13] However, the gun-brandishing suspect was described as

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1. Harbin v. City of Alexandria, 712 F. Supp. 67, 69 (E.D. Va. 1989), *aff'd*, 908 F.2d 967 (4th Cir. 1990).
2. *Id.* at 70.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 69.
13. *See id.*

a six-foot-three-inch tall Black man of large and stocky build, wearing a blue knit cap and a waist-length blue jacket that may have been a ski parka.[14] Mr. Harbin was a Black man of average build and was wearing a two-tone gray and black jacket, brown business dress pants, brown dress shoes, a white shirt, a light gray sweater, and no cap.[15]

Displeased with the ordeal to which the police officers subjected him, Mr. Harbin decided to sue the police and the city for civil rights violations, representing himself pro se.[16] He asserted that the police had little reason to think that he was the gun-brandishing man from earlier in the night, and they indeed had the wrong man.[17] However, he would see little relief as the federal district court found "ample" support for upholding the officers' actions—the stop and frisk of Mr. Harbin on his front porch "f[e]ll well within *Terry*."[18]

In *Terry v. Ohio*, the Supreme Court granted law enforcement broad power to perform a limited stop and search of someone when an officer has reasonable suspicion that the person is engaged in criminal activity.[19] The resulting "*Terry* stop" created a way for police officers to investigate a suspicious person without requiring full probable cause for an arrest.[20] The officer need only have "reasonable suspicion supported by articulable facts"[21] based on the circumstances and the officer's policing "experience that criminal activity may be afoot."[22] Reasonable suspicion is—by design—a broad standard, deferential to police officers' judgment.[23] Law enforcement officers across the United States employ this powerful tool extensively, performing millions of *Terry* stops each year.[24]

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14. *Id.*
15. *Id.*
16. *Id.* at 68.
17. *See id.* at 71.
18. *Id.*
19. *See* 392 U.S. 1, 30 (1968).
20. *See id.* at 27.
21. United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 30).
22. *Terry*, 392 U.S. at 30.
23. *See id.* at 10-12; Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998).
24. *See* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 347 n.1 (2019). In New York City alone, about half-a-million people are stopped annually. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(f) n.296 (6th ed. 2020). In Seattle, a city with less than one-tenth the

Mr. Harbin's scenario presents a fairly compelling case for the police having this wide discretion. Someone has just brandished a gun in a patron-filled convenience store and fled to the surrounding neighborhood. The suspect may escape apprehension or may even continue to cause more danger in the immediate community. But the officers have an important piece of information aiding their search: a physical description of the suspect. Undoubtedly, this factor will drive their search of the nearby area. And, should they come upon someone who fits the description, it will substantially—if not wholly—inform the officers' reasonable suspicion to stop that person to investigate.

But what if that suspect description is vague, consisting of few descriptors? Or what if, like in Mr. Harbin's case, there are many discrepancies between the description given and the appearance of the person the officers eventually stop under suspicion that he is the perpetrator? When reasonable suspicion to stop and frisk someone is based largely on a physical description of a criminal suspect, how "particularized"[25] must that description be?

This Note examines this specific reasonable suspicion factor: the resemblance of a person stopped under *Terry* to an active suspect description of someone who has very recently committed a crime. Exploring this scenario, this Note seeks to analyze courts' varying tolerance levels for vague or discrepant suspect descriptions creating reasonable suspicion, discuss the detrimental and unconstitutional impacts of an overly broad standard for this reasonable suspicion factor, and propose a new standard for courts to employ.

Part I describes the *Terry* stop's origin and standards, including the *Terry* Court's balance of public safety and individuals' Fourth Amendment rights. Part II explores the scenario under examination in this Note and analyzes trends in various courts' treatment of this factor in reasonable suspicion determinations. Part III discusses

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population of New York City, police performed over six thousand *Terry* stops in 2020—a year of considerably less criminal activity and fewer street stops. *See* Seattle Police Dep't*, Terry Stops Dashboard*, SEATTLE.GOV, https://www.seattle.gov/police/information-and-data/terry-stops/terry-stops-dashboard [https://perma.cc/NTL6-45F2]; *see also* Neil MacFarquhar & Serge F. Kovaleski, *A Pandemic Bright Spot: In Many Places, Less Crime*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/26/us/coronavirus-crime.html [https://perma.cc/3743-Z2XV].

25. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

the dangers of an overbroad reasonable suspicion standard and argues that courts' high tolerance of vague or discrepant suspect descriptions informing officers' suspicion threatens individuals' Fourth Amendment rights. Finally, Part IV proposes a new legal standard for weighing this reasonable suspicion factor whereby courts look for indicia of particularization when a suspect description contributes to a *Terry* stop. This new standard would revitalize the particularization requirement of *Terry* and the Fourth Amendment, better protect individuals' rights against unreasonable intrusion, and promote more effective and equitable policing. Ultimately, this new standard would better balance the needs with which the *Terry* Court grappled: public safety and individuals' dignity.

I. THE FOURTH AMENDMENT, *TERRY* STOPS, AND REASONABLE SUSPICION

An understanding of Fourth Amendment protections, how the Supreme Court formulated the *Terry* standard, and the development of *Terry* stops thereafter is a critical foundation to a discussion of reasonable suspicion based on suspect descriptions. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons[,] houses, papers, and effects, against unreasonable searches and seizures."[26] Until 1968, the standard for seizing someone in accordance with the Fourth Amendment required probable cause.[27] In *Terry v. Ohio*, however, the Supreme Court adopted a rule permitting brief investigatory detentions pursuant to a standard that falls short of probable cause.[28]

In *Terry*, a police officer witnessed the two codefendants "casing" a store—taking turns repeatedly walking past the store window and looking in.[29] The officer feared a robbery was soon to take place and that the men may have a gun.[30] The officer confronted the men to investigate further and performed a pat-down search of their outer

26. U.S. CONST. amend. IV.

27. Russell L. Jones, Terry v. Ohio*: Its Failure, Immoral Progeny, and Racial Profiling*, 54 IDAHO L. REV. 511, 514 (2018).

28. *See* 392 U.S. at 27; *see also* Jones, *supra* note 27, at 514.

29. *Terry*, 392 U.S. at 5-6.

30. *Id.* at 6.

clothing, indeed revealing two firearms.[31] The trial court recognized that the officer's actions fell in some gray area between a probable cause arrest and a consensual encounter.[32] Yet, it held that the officer was right to frisk the men for protective purposes when he had "reasonable cause" to believe that the men might be armed, and a frisk of this nature was different than a full arrest and search for evidence of a crime.[33] The trial court had stated that, without the ability to perform a frisk in this type of situation, "the answer to the police officer may be a bullet."[34]

The Supreme Court agreed that the officer's actions were necessary, despite him lacking probable cause.[35] The Court handed down a new standard, holding that a police officer may briefly detain[36] and perform a limited search of an individual when the officer has reasonable suspicion "in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous."[37] Thus, the "*Terry* stop" was born.

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31. *Id.* at 7.

32. *See id.* at 7-8 ("[I]t 'would be stretching the facts beyond reasonable comprehension' to find that [the officer] had had probable cause."). Officers may approach and question an individual without implicating the Fourth Amendment. Florida v. Bostick, 501 U.S. 429, 434 (1991). In such consensual encounters, a seizure has not occurred "and no reasonable suspicion is required." *Id.*

33. *Terry*, 392 U.S. at 8.

34. *Id.*

35. *See id.* at 24.

36. The majority opinion in *Terry* focused on searches rather than seizures and went as far as denying any intention of ruling for a standard lower than probable cause for detentions—just pat-down searches. *See id.* at 19 n.16. However, the Court soon conceded—as many had already construed—that *Terry* and reasonable suspicion did in fact apply to brief investigatory detentions. *See* Adams v. Williams, 407 U.S. 143, 147-48 (1972); *see also* Jennifer E. Laurin, Terry*, Timeless and Time-Bound*, 15 OHIO ST. J. CRIM. L. 1, 6 (2017).

37. *Terry*, 392 U.S. at 30. The Court strictly limited the scope of a weapons search that may occur during a *Terry* stop, noting that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion." *Id.* at 24-25. Consequently, such a search must be "strictly circumscribed by the exigencies which justify its initiation....[I]t must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search." *Id.* at 26 (citation omitted). In *Terry*, this standard was met because the officer patted down the individuals' outer clothing and reached into pockets or underneath clothing only when he felt weapons. *See id.* at 29-30.

The *Terry* Court established guardrails for what can amount to reasonable suspicion.[38] In justifying a stop and search pursuant to *Terry*, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[39] Reasonable suspicion requires more than an "inchoate and unparticularized suspicion or 'hunch.'"[40] And it must be assessed objectively—the officer's good faith will not carry the day.[41] Putting its new legal standard to work on the facts of *Terry*, the Court found that the officer had reasonable suspicion to stop and frisk the two men because their behavior near the storefront suggested, in the officer's experience, that they were casing the store for a robbery—possibly an armed robbery.[42] The officer was entitled to quickly act to investigate and address the possible danger to himself and others nearby.[43]

However, it would fall upon other cases and other courts to further develop what circumstances and particularized facts would amount to reasonable suspicion for a *Terry* stop. Today, reasonable suspicion is commonly borne out of some combination of factors, such as the detainee being present in a high-crime area,[44] behaving evasively,[45] fleeing from the police,[46] exhibiting nervousness,[47]

38. *See id.* at 21-23.

39. *Id.* at 21.

40. *Id.* at 27.

41. *Id.* at 21-22.

42. *See id.* at 5-6, 30.

43. *Id.* at 30.

44. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000) (defendant fled upon seeing approaching police in an area known for frequent drug crime).

45. *See, e.g.*, State v. Johnson, 444 N.W.2d 824, 827 (Minn. 1989) (defendant, while driving, immediately turned off the highway to avoid a police officer after making eye contact).

46. *See, e.g.*, United States v. Simmons, 351 F. Supp. 3d 214, 217, 220-21 (E.D.N.Y. 2018) (defendant ran from a police officer who had begun to exit his patrol car to approach the defendant and continued running when the officer pursued him).

47. *See, e.g.*, United States v. Atlas, 94 F.3d 447, 449-51 (8th Cir. 1996) (defendant's eyes grew wide upon seeing the police officer, and he appeared very nervous when the officer approached him and asked a few questions).

performing a set of actions consistent with common criminal operations,[48] or exhibiting signs of being armed,[49] among others.[50]

The *Terry* Court was in uncharted territory when tasked with resolving the question of whether brief investigatory stops and frisks comported with the Fourth Amendment, thus rendering evidence acquired during such encounters admissible in subsequent criminal proceedings.[51] The Court was not without concern for overbroad police discretion or potential Fourth Amendment infringement.[52] However, after balancing individuals' Fourth Amendment rights against unwarranted intrusions with the desirability of a flexible tool that allows officers to respond rapidly to dangerous situations,[53] the resulting standard remains highly deferential to police discretion.[54] By design, the reasonable suspicion standard for a lawful *Terry* stop is broadly worded and construed, deferring considerably to the judgment of law enforcement as informed by their daily policing experience.[55]

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48. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 8-9, 11 (1989) (defendant's behavior in an airport was typical of that of a drug courier).

49. *See, e.g.*, Woody v. State, 765 A.2d 1257, 1260, 1264 (Del. 2001) (defendant clutched a large bulge characteristic of a weapon in his jacket pocket).

50. *See* LAFAVE, *supra* note 24, § 9.6(a) (surveying reasonable suspicion factors that have formed the basis for *Terry* stops and citing exemplifying cases).

51. *See* Terry v. Ohio, 392 U.S. 1, 9-10 (1968) ("We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court.").

52. *See 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." (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964))).

53. *See id.* at 10-12.

54. *See* Maclin, *supra* note 23, at 1278 ("Without saying so, *Terry* fundamentally changed Fourth Amendment law.... After *Terry*, police intrusions would be controlled by a malleable 'reasonableness' standard that gave enormous discretion to the police.").

55. *See Terry*, 392 U.S. at 10-12; *see also* United States v. Bowman, 884 F.3d 200, 213 (4th Cir. 2018) ("'Reasonable suspicion is a commonsense, nontechnical standard,' ... 'that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (alteration in original) (first quoting United States v. Palmer, 820 F.3d 640, 650 (4th Cir. 2016); then quoting Ornelas v. United States, 517 U.S. 690, 695 (1996)).

II. WHEN PHYSICAL DESCRIPTIONS CONTRIBUTE TO REASONABLE SUSPICION

Before examining the constitutional and policing issues implicated by *Terry* stops based on active suspect descriptions, it is essential to analyze how courts tend to treat this suspect description factor in reasonable suspicion determinations. This analysis demonstrates that many courts have espoused a tolerance for officers conducting *Terry* stops pursuant to a suspect description that was either vague and applicable to many people in the area or one that was significantly discrepant with the eventual detainee's appearance.[56] Other courts, however, have displayed a lower tolerance, expressing constitutionality concerns when officers conduct *Terry* stops based on insufficiently particularized descriptions.[57] Ultimately, this analysis reveals that courts fall on a vast spectrum of how they treat unparticularized suspect descriptions as the basis for a *Terry* stop.[58] Before examining this spectrum, however, the unique considerations that this particular factor implicates are worth noting.

A. Distinctive Considerations of the Physical Description Factor in Active Suspect Searches

As discussed, the *Terry* Court contemplated the delicate balance between protecting individuals' Fourth Amendment search and seizure rights and the need for police to better protect public safety, even when full probable cause for an arrest is lacking.[59] This balance is particularly salient in the context of law enforcement actively searching for a suspect of a very recently commissioned crime and operating pursuant to a physical description of the perpetrator.

In this scenario, the public safety concerns are especially heightened for several reasons. First, the officer knows going in (barring

56. *See infra* Part II.B.
57. *See infra* Part II.C.
58. *See infra* Part II.B-C.
59. *See supra* Part I.

false reporting) that criminal activity is "afoot"[60] rather than developing such suspicion anew based on the actions of a person the officer encounters.[61] In some cases, the person reporting the crime may be able to provide details that indicate the level of danger the suspect poses—for example, whether the person has a weapon. These elements—whether a person is engaged in criminal activity and whether he or she poses a danger warranting a frisk—are central to the purpose and function of *Terry* stops and reasonable suspicion[62] and would be much more established in this scenario. Lastly, because someone has just committed a crime and departed the scene, he or she may be more volatile or may perpetrate further wrongdoing to evade apprehension.[63] This context enhances the desirability of granting police fairly wide latitude to quickly stop someone they believe to be the offender. The urgency and high stakes of this scenario support the need for a flexible standard for law enforcement.[64]

However, just as this scenario presents heightened public safety needs, it also presents a situation in which the factors contributing to an officer's reasonable suspicion that an individual is the suspect for whom they are searching will likely be—or should be—relatively narrow. Because the officer is operating pursuant to a known location, criminal act, and physical description of the suspect, these factors should predominately drive the officer's reasonable suspicion. Other common reasonable suspicion factors may be rendered irrelevant by virtue of the officer having this concrete information about the crime.[65] With the spotlight narrowed by the information

60. *Terry*, 392 U.S. at 30.

61. *See* Aliza Hochman Bloom, *When Too Many People Can Be Stopped: The Erosion of Reasonable Suspicion Required for a* Terry *Stop*, 9 ALA. C.R. & C.L. L. REV. 257, 262-63 (2018).

62. *See Terry*, 392 U.S. at 24-26, 30.

63. One can imagine this dynamic at play in the example of an armed robbery. The perpetrator, having fled the scene, may continue carrying out crimes ancillary to completing the robbery, such as stealing a car or driving away in a manner that endangers others on the road. Further, because the robber is actively evading apprehension, there is a heightened possibility for additional danger if the robber encounters obstacles, as tension and self-preservation instincts will be high. This hypothetical contrasts with the common *Terry* stop scenario in which an officer happens upon someone displaying suspicious conduct, rather than a reported crime initiating the officer's actions. *See* Bloom, *supra* note 61, at 262.

64. *See Terry*, 392 U.S. at 10.

65. *Cf.* Bloom, *supra* note 61, at 263, 266 (arguing that, once an officer is responding to a completed, reported crime, some other reasonable suspicion factors become irrelevant, such

at the officer's disposal, the basis for reasonable suspicion should also be more circumscribed. In sum, this scenario should provide officers with more targeted information and particularized suspicion from the outset, but it also tends to amplify the need for latitude in performing *Terry* stops.

B. Courts' High Tolerance for Vague or Discrepant Suspect Descriptions that Contribute to Reasonable Suspicion for a Terry *Stop*

Plenty of courts have found the requisite reasonable suspicion for a *Terry* stop present when officers acted pursuant to a sparse, widely applicable suspect description. In *Commonwealth v. Mercado*, officers responded to a shooting in which the suspects' description was merely "three Hispanic males."[66] Upon the officers' arrival to the scene, a bystander told them that a shirtless Black or Hispanic man was acting aggressively in a nearby store.[67] An officer witnessed two "Spanish" males begin to exit the store, hesitate upon seeing the officer, but eventually step outside.[68] The officer immediately stopped and frisked the men.[69] The Supreme Judicial Court of Massachusetts found that this satisfied reasonable suspicion, reversing the lower court that held otherwise, even stating that "it would have been poor police work" to *not* perform the stop.[70]

The Seventh Circuit recently demonstrated a similarly high tolerance in *United States v. Street*.[71] Police responded to an armed robbery perpetrated by two Black men wearing hooded sweatshirts.[72] The officers saw a vehicle containing the items stolen in the robbery and noticed three Black men nearby walking toward a store entrance.[73] After losing sight of two of the men, the officers executed an evacuation of the entire nearby store.[74] When the defendant

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as whether the person is in a high-crime neighborhood).

66. 663 N.E.2d 243, 244 (Mass. 1996).

67. *Id.*

68. *Id.*

69. *Id.* at 245.

70. *Id.* at 245-47 (quoting Terry v. Ohio, 392 U.S. 1, 23 (1968)).

71. 917 F.3d 586, 589-90 (7th Cir. 2019).

72. *Id.* at 590.

73. *Id.*

74. *Id.*

exited, his clothing did not match the suspect description, but he was the only Black man among the crowd of store patrons.[75] Officers stopped and questioned him, gaining information later used to arrest him.[76]

The Seventh Circuit acknowledged that the Fourth Amendment does not permit "dragnet[ ]" searches, and a broadly applicable physical description will not, without more, justify a seizure.[77] Yet, it held that *Terry* "does not require perfection or precision" and found the requisite reasonable suspicion present.[78] Citing numerous comparable precedents, the court stated that the officers "had more general descriptions than was ideal.... But a lack of better, more detailed descriptions does not mean officers must disregard the limited information they do have."[79] Thus, the totality of the circumstances compensated for the fact that such vague physical descriptions typically "are not enough to support reasonable suspicion."[80]

Courts' high tolerance continues in cases with many discrepancies between the operative suspect description and the physical appearance of who officers stopped. In *United States v. Shelton*, an armed robber was described as "wearing a black long-sleeved shirt, black long sweater, black pants.... [A] black male, five-feet five-inches tall, weighing approximately 140 pounds, and wearing sunglasses, what appeared to be black tape or covering on his fingers, and a 'tan camo[uflaged] bucket hat.'"[81] The officer soon happened upon the defendant close to the robbery location, walking down the street and talking on his phone.[82] While he was indeed a Black male around the robber's reported height, no other descriptors matched—Shelton was wearing blue jeans and a gray tank top, no hat, had nothing on his fingertips, and was holding nothing else in his hands.[83] The officer sat the defendant on a curb to investigate further, which the court held was a lawful *Terry* stop based on reasonable, articulable

75. *Id.* at 591.
76. *Id.*
77. *Id.* at 594.
78. *Id.*
79. *Id.*
80. *Id.* at 589-90, 595 (quoting United States v. Arthur, 764 F.3d 92, 99 (1st Cir. 2014)).
81. No. 1:11CR397-1, 2012 WL 13075291, at *2 (M.D.N.C. Feb. 22, 2012) (alteration in original).
82. *Id.*
83. *Id.*

suspicion that Shelton was the suspect for whom the officer was searching.[84] The court scarcely discussed the stark differences between the suspect description and the defendant's appearance, instead heavily weighing the fact that Shelton and the robbery suspect both had facial hair, a fact that the officer learned *after* detaining Shelton on the curb.[85]

This level of discrepancy—and courts' tolerance of it—is also present in Mr. Harbin's case discussed at the outset of this Note.[86] Despite the disparities in body type and clothing, these "minor discrepancies" were nonetheless deemed "far too slender a reed on which to base a constitutional violation."[87] The court upheld the officers' *Terry* stop and frisk, finding that they "undeniably had a reasonable, articulable suspicion."[88]

In addition to a high tolerance for appearance discrepancies generally, courts also tolerate discrepancies with "readily modifiable aspect[s] of one's appearance such as outerwear."[89] Courts' acceptance of both highly discrepant physical appearances and vague, widely applicable descriptions forming the basis for a stop demonstrates that police officers in many jurisdictions enjoy a low bar to exercising the discretion *Terry* gives them.[90]

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84. *Id.* at *5.

85. *Id.* at *3, *5 ("Officer Price then noticed Shelton's facial hair. While a determination that the robber did not have facial hair would have excluded Shelton as a suspect, its presence would be an additional factor linking Shelton to the crime.").

86. *See supra* notes 1-18 and accompanying text.

87. Harbin v. City of Alexandria, 712 F. Supp. 67, 69, 71 (E.D. Va. 1989), *aff'd*, 908 F.2d 967 (4th Cir. 1990).

88. *Id.*

89. United States v. Slater, 979 F.3d 626, 628, 632 (8th Cir. 2020) (finding reasonable suspicion despite the detainee's khaki jacket over a gray hoodie and bulky winter coat not matching the suspects' clothing description of "brown hoodies"); *see also* United States v. Scott, 420 F. Supp. 3d 295, 304, 312 (E.D. Pa. 2019) (finding reasonable suspicion when the defendants were not wearing the hooded sweatshirt and turquoise scarf worn by the robbery perpetrators because "[o]uter clothing such as a woolen mask, scarf, and sweatshirt, can be discarded within a few seconds").

90. *See supra* notes 52-55 and accompanying text.

C. Courts' Low Tolerance for Vague or Discrepant Suspect Descriptions that Contribute to Reasonable Suspicion for a Terry *Stop*

Many courts have demonstrated that suspect descriptions providing little more than race and gender are unacceptable as the grounds for an officer's reasonable suspicion for a *Terry* stop. In *United States v. Jones*, an anonymous 911 caller reported "several black males" drinking and causing a disturbance in a road intersection.[91] An officer spotted four Black men in a vehicle within a quarter mile of the reported intersection and, pursuant to the "several black males" description, stopped the vehicle.[92] Noticing an open beer bottle in the vehicle, the officer asked the passengers to exit the vehicle, searched the entire car, and arrested the defendant.[93]

The Fourth Circuit reversed the trial court's denial of a motion to suppress evidence recovered on the defendant during the stop and vacated the conviction.[94] It held that the officer's suspicion and stop of the men based on the anonymous tip's description of several Black males was "insufficient to establish reasonable suspicion for a stop."[95] The tip was "barren of detail about the alleged culprits' physical descriptions ... and apart from mentioning their race, gave no information about their appearance."[96]

Other courts have agreed that "[u]nparticularized racial descriptions, devoid of distinctive or individualized physical details ... cannot by themselves provide police with adequate justification for stopping an individual member of the identified race who happens to be in the general area."[97] In *Commonwealth v. Grinkley*, police responded to a witness report that a group of Black and Hispanic youths had a gun at a public tennis court and that a fight was soon

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91. 242 F.3d 215, 216 (4th Cir. 2001).

92. *Id.*

93. *Id.* at 216-17.

94. *Id.* at 216.

95. *Id.* at 218-19. Although weighing into the Fourth Circuit's analysis of the officer's actions was the fact that the description was provided by an anonymous, uncorroborated 911 tip, the court's decision conveys a general intolerance of such an unparticularized physical description of a suspect. *See id.*

96. *Id.* at 218.

97. Commonwealth v. Grinkley, 688 N.E.2d 458, 463 (Mass. App. Ct. 1997).

to break out.[98] The officers approached a group of Black youths in the tennis court's vicinity, who began to walk away upon the officers' arrival, and stopped and frisked them.[99] On these facts, the appellate court reversed the trial court's finding of reasonable suspicion for a *Terry* stop because the witness report was a mere general description of race and location.[100]

In the striking case of *Brown v. City of Oneonta*, the Second Circuit reinforced this lower tolerance for unparticularized physical descriptions.[101] In *Brown*, a class action civil rights suit,[102] the city police responded to a break-in and violent attack of an elderly woman by performing a "sweep of Oneonta, stopping and questioning" individuals who matched the description given by the victim.[103] The physical description of the suspect was that of a young Black male with a cut on his hand.[104] In just a few days, police questioned over two hundred individuals, relying almost entirely on this sparse physical description.[105] Although some of the questionings did not amount to a *Terry* stop,[106] the Second Circuit sided with several plaintiffs who *were* seized within the meaning of the Fourth Amendment.[107] The court disapproved of basing reasonable suspicion on such a vague and widely applicable physical description of a suspect, stating that "a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure."[108]

Courts have also drawn a line when suspects' physical descriptions included features beyond race or gender but still could have applied to an impermissibly large number of individuals in the area.

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98. *Id.* at 460.

99. *Id.* at 460-61.

100. *Id.* at 462, 467.

101. 221 F.3d 329, 334 (2d Cir. 2000).

102. In many cases, including some mentioned throughout this Note, individuals challenge the reasonableness of a *Terry* stop to which they were subjected on Equal Protection Clause or Fourth Amendment grounds in a civil rights suit pursuant to 42 U.S.C. § 1983.

103. *Brown*, 221 F.3d at 334.

104. *Id.* The victim identified the suspect's race from seeing his hand and forearm and his youth based on the speed with which he traversed the room. *Id.*

105. *See id.* The police never apprehended the attacker. *Id.*

106. *Id.* at 341. In consensual police-citizen encounters, officers may approach and question someone without implicating the Fourth Amendment or needing reasonable suspicion. Florida v. Bostick, 501 U.S. 429, 434 (1991).

107. *Brown*, 221 F.3d at 340-41.

108. *Id.* at 334.

In *Commonwealth v. Cheek*, for example, a stabbing suspect's description—a Black male wearing a black three-quarter length down jacket—could have fit a large number of men in the predominantly Black neighborhood.[109] Thus, the officers' suspicion was not sufficiently particularized.[110] In *Washington v. Lambert*, the Ninth Circuit demonstrated a low tolerance for descriptions that were "exceedingly vague and general" as well as quite discrepant with the appearance of the eventual detainees.[111] There, the description was too general because it amounted to two Black males, one somewhat short and one somewhat tall.[112] Additionally, the discrepancies in weight and body type with the men stopped pursuant to this description were substantial enough for the court to find an insufficient basis for the *Terry* stop.[113]

The sentiments of various courts around reasonable suspicion based on vague or discrepant physical descriptions, as well as the pervasive and racially biased stop and frisk practices of some localities,[114] culminated in the landmark case *Floyd v. City of New York*.[115] The 195-page opinion reflected deep concerns with not only the soaring number of *Terry* stops and frisks performed,[116] but also

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109. 597 N.E.2d 1029, 1031 (Mass. 1992).

110. *Id.*; *see also, e.g.*, Faulk v. State, 574 S.W.2d 764, 766 (Tex. Crim. App. 1978) (holding that an armed robbery suspect description of a young Black male wearing a multicolored shirt "contained no identifiable characteristics which would serve to distinguish them from the general populace" (quoting Brown v. State, 481 S.W.2d 106, 111 (Tex. Crim. App. 1972))).

111. 98 F.3d 1181, 1190 (9th Cir. 1996).

112. *Id.* at 1190-91 ("If the general descriptions relied on here can be stretched to cover Washington and Hicks, then a significant percentage of African-American males walking, eating, going to work or to a movie, ball game or concert, with a friend or relative, might well find themselves subjected to similar treatment, at least if they are in a predominantly white neighborhood. Moreover, other equally general descriptions could serve as the basis for similar demeaning treatment of many other African-Americans.").

113. *See id.* The two suspects were described as about 6'1" and 150-170 pounds and about 5'6" and 170-190 pounds. *Id.* at 1183-84. The detainees, conversely, were 6'4" and 235 pounds and 5'7½" and 135-140 pounds. *Id.* at 1184.

114. *See* N.Y. CIV. LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING 1-2 (2012), https://perma.cc/TQ4Q-J537; Press Release, ACLU, Boston Police Data Shows Widespread Racial Bias in Street Encounters with Civilians (Oct. 8, 2014), https://www.aclu.org/press-releases/boston-police-data-shows-widespread-racial-bias-street-encounters-civilians [https://perma.cc/8426-V8X5].

115. *See* 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

116. *See id.* at 591-92 ("How did the NYPD increase its stop activity by roughly 700%, despite the fact that crime continued to fall during this period?").

the disproportionate number of stops aimed at racial minorities.[117] The opinion discussed the dangers of permitting broad *Terry* stops based on a general physical description, stating that "'Fits Description' is a troubling basis for a stop if the description is so general that it fits a large portion of the population in the area, such as black males between the ages of 18 and 24."[118] The court detailed examples of this impermissible standard, the result often being that all nearby individuals within a wide demographic were "subjected to heightened police attention."[119] *Floyd* emphatically held that the vague description of a young Black male suspect could not supply the requisite individualized suspicion for a *Terry* stop of someone matching that description.[120]

These cases demonstrate a fairly widespread recognition that a suspect description relaying merely race, gender, and general age or body type will not provide a sufficient basis for reasonable suspicion. Additionally, there is an unwillingness among some courts to consider a slightly more detailed physical description to be "particularized" if those additional details could apply to many individuals in the area or do not adequately match the detainee's appearance. However, these holdings are almost always case-specific and rarely draw a clear line for future cases due to reasonable suspicion being a totality-of-circumstances analysis. Thus, while these cases help preserve the particularization requirement of *Terry* for this reasonable suspicion factor, they nonetheless exhibit a wide spectrum of treatment by the courts.

III. THE IMPORTANCE OF PARTICULARIZED SUSPICION IN THE CONTEXT OF SUSPECT DESCRIPTIONS

The Fourth Amendment's shield against unreasonable searches and seizures and its protection of the right for people to enjoy personal security free from unreasonable governmental intrusion were

117. *See id.* at 556, 562.

118. *Id.* at 578.

119. *Id.* at 605, 630-33 (detailing Cornelio McDonald's case and stating "because two black males committed crimes in Queens, all black males in that borough were subjected to heightened police attention").

120. *See id.* at 630.

fundamental considerations in *Terry*.[121] Thus, despite *Terry* stops being intended as an expansion of police power to seize and search people,[122] the bar for reasonable suspicion should not be set too low.

The degree to which an operative suspect description is overly discrepant or vague will typically be just one of several factors contributing to an officer's reasonable suspicion.[123] *Terry* is a totality-of-the-factors standard, meaning each factor does not need to establish reasonable suspicion standing alone.[124] In fact, there will be cases in which the suspect description is generic or discrepant with the detainee's appearance to an arguably impermissible degree, but the other factors and circumstances surrounding the *Terry* stop justify the officer's decision.[125] It is still vital, however, that this factor be properly particularized, and that an impermissibly unparticularized description does not become muddled in the balance of the other reasonable suspicion factors in a given case. If an apparently strong showing of reasonable suspicion is due to a collection of factors that, when examined alone, are not worthy of much weight, courts risk betraying the particularized, "articulable" suspicion standard that the *Terry* Court imparted.[126]

This Part explores the importance of truly particularized reasonable suspicion in the context of both *Terry* stops generally and the suspect description factor. The myriad negative impacts of *Terry* stops and the issues with particularization found in other common reasonable suspicion factors demonstrate the need for a narrowly crafted reasonable suspicion standard. Considering many courts' high tolerance for vague or discrepant suspect descriptions discussed in Part II.B, the lack of particularization allows for Fourth Amendment infringement. To prevent the *Terry* stop from being a tool so flexible that it provides a blank check for officers to stop too

121. *See* Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

122. *Id.* at 10-11.

123. *See generally supra* Part II.

124. *See* United States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999).

125. *See, e.g.*, United States v. Swann, 149 F.3d 271, 276 (4th Cir. 1998) (finding reasonable suspicion when an officer approached two men matching the description of two Black men, one of whom was wearing a black leather jacket, when they were very close to the recent crime scene, one man was unusually nervous, and the second began circling behind the officer threateningly).

126. *Terry*, 392 U.S. at 21, 27.

many individuals, the reasonable suspicion standard around physical descriptions must change.

A. A Narrowly Crafted Reasonable Suspicion Standard Is Critical

Terry's lone dissenter, Justice Douglas, expressed deep concerns over the new reasonable suspicion standard falling short of probable cause and what power that would bestow upon law enforcement.[127] He stated: "The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion' .... [I]f the police can pick [an individual] up whenever they do not like the cut of his jib, ... we enter a new regime."[128] These concerns were apt as, over five decades later, *Terry* stops are a pervasive policing tool.[129]

Today, *Terry* stops have far-reaching harms for those subjected to them, including legal consequences and physical and psychological harms.[130] Further, racial minorities are disproportionately subjected to *Terry* stops.[131] These impacts, as well as evidence of insufficient particularization in several other common reasonable suspicion factors, demonstrate that a narrowly crafted standard is critical.

1. The Harms of Terry *Stops and the Disparate Policing and Stops of Racial Minorities*

The *Terry* Court itself recognized over fifty years ago the potential harms of over-policing, especially for racial minorities.[132] Investigatory stops and frisks, however brief and limited, are more than a minor indignity or inconvenience[133]—they can "be an annoying, frightening, and perhaps humiliating experience."[134] Stops and frisks are "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [they

127. *See id.* at 38 (Douglas, J., dissenting) ("The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him.").

128. *Id.* at 37, 39.

129. *See supra* note 24 and accompanying text.

130. *See infra* notes 143-49 and accompanying text.

131. *See supra* note 114 and accompanying text.

132. *See Terry*, 392 U.S. at 10-15.

133. *See id.* at 10-11.

134. *Id.* at 25.

are] not to be undertaken lightly."[135] These encounters can be "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[136] The Court specifically noted that minority groups, especially Black communities, disproportionately feel the brunt of police harassment.[137]

The *Terry* Court was right to worry. Police perform millions of *Terry* stops every year,[138] a disparately high proportion of which involve racial minorities.[139] Implicit racial bias almost certainly contributes to this high number.[140] It is no coincidence that the cases examined herein largely involved Black individuals.[141] Additionally, studies that have analyzed police behavior *during* these stops show that law enforcement officers are more likely to use force against racial minorities than against white people, and investigatory stops of racial minorities are more likely to progress into a full arrest.[142]

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135. *Id.* at 17.

136. *Id.* at 13.

137. *Id.* at 14.

138. *See supra* note 24 and accompanying text.

139. *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2412, 2418-29 (2017) (finding that *Terry* stop and frisk measures are highly concentrated in minority neighborhoods and refuting arguments that this type of *Terry* stop provides the crime control benefits to justify such concentration); Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (finding, based on expert testimony, that the New York Police Department performed *Terry* stops on Black and Hispanic residents at rates higher than white residents); ACLU FOUND. OF MASS., BLACK, BROWN, AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010 1 (2014), https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf [https://perma.cc/MP6G-UE7G] (finding that, between 2007-2010 in Boston, over 63 percent of those subjected to *Terry* stops and similar police encounters were Black, despite Black residents making up just 24 percent of Boston's population).

140. *See* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1543-49 (2018) (discussing research on implicit racial bias, such as officers' increased likelihood to interpret innocuous behavior or expressions as violent and aggressive when from Black people as opposed to from white people, and arguing that this bias contributes to the increased policing of Black individuals). *See generally* L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73 (2017) (discussing implicit racial bias in the policing context and finding that the *Terry* standard results in police interactions being driven by racial hunches, racial anxiety, and bias).

141. *See generally supra* Part II.

142. *See* LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 1 (2013, rev. 2016), https://bjs.ojp.gov/content/pub/pdf/pbtss11.pdf [https://perma.cc/DA9J-22C6]; Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops,*

The harms of *Terry* stops go well beyond physical injuries or harsher legal consequences. *Terry* stops cause stigma and shame, particularly when people are stopped despite being innocent, while with family, or as a result of being singled out for their race.[143] *Terry* stops can provoke reactive physical violence and can be rife with verbal aggression, racial remarks, or sexual overtones.[144] Studies have even found elevated rates of post-traumatic stress disorder symptoms among those most often stopped.[145] Increased policing is also linked to greater instances of stress, high blood pressure, diabetes, asthma, and other health conditions.[146]

Beyond inappropriate encounters, trauma, and physical harm, improper arrests have collateral consequences, such as loss of employment, housing, benefits, or family stability.[147] Stories from those subjected to *Terry* stops are punctuated with feelings of confusion, fright, embarrassment, and dehumanization.[148] In other words, the humiliation and fear that the *Terry* Court acknowledged as a risk in increased police-citizen investigatory encounters[149] has hardly abated.

2. Other Terry *Stop Reasonable Suspicion Factors with Particularization Problems*

In the years since *Terry*, advocates, judges, and legal minds alike have identified particularization issues with other common

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Surveillance, and Race in the New Policing, 43 FORDHAM URB. L.J. 539, 560-61 (2016); Huq, *supra* note 139, at 2412.

143. *See* Fagan et al., *supra* note 142, at 559.

144. *See id.*

145. *See id.*

146. *See* Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URB. HEALTH 542, 542-43, 554-55 (2016); *see also* Jessie Hellmann, *Health Groups Call Police Brutality a Public Health Issue*, THE HILL (June 1, 2020, 6:34 PM), https://thehill.com/policy/healthcare/500568-health-groups-call-police-brutality-a-public-health-issue [https://perma.cc/VRM8-Q27D].

147. *See* CTR. FOR CONST. RTS., STOP AND FRISK: THE HUMAN IMPACT 5-10 (2012), https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf [https://perma.cc/4YUC-7MVT].

148. *See* NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 13-14 (2014), https://www.prisonpolicy.org/scans/naacp/Born_Suspect_Report_final_web.pdf [https://perma.cc/H467-9R4D]; ACLU FOUND. OF MASS., *supra* note 139, at 12-13.

149. *See* Terry v. Ohio, 392 U.S. 1, 25 (1968).

reasonable suspicion factors. One such factor is when the subject of a *Terry* stop was in a "high crime area."[150] Although the Court clarified that this factor standing alone is not sufficient for reasonable suspicion,[151] its legitimacy as a reasonable suspicion factor *at all* has been heavily questioned.[152]

These criticisms note that this factor has dangerous racial discrimination implications, is vastly undefined, and does not indicate an individual's activity or criminality.[153] In short, one's mere location in a certain neighborhood does not adequately contribute to particularized suspicion of an individual's criminal activity and arguably should not be entitled to much weight.[154] As such, some courts have begun to shy away from affording this factor much influence in reasonable suspicion determinations.[155]

Similarly, legal minds have pointed to nervousness—another common reasonable suspicion factor—as problematically unparticularized.[156] They argue that "[v]irtually any behavior has been

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150. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (holding that running from the police or otherwise behaving evasively in a high-crime area amounted to the requisite reasonable suspicion for a stop).

151. *Id.* at 123.

152. *See* Holt Ortiz Alden, Note, *Discovering the Victim: The Enduring Problem with "High-Crime Areas*," 16 STAN. J. C.R. & C.L. 385, 403-09 (2020) (surveying various critiques of this factor in judicial and academic spheres).

153. *See id.*

154. *See, e.g.*, *id.* at 407-09 (collecting sources arguing for a narrower and more objective definition of high-crime area and other sources calling for abolishing this factor altogether); Bloom, *supra* note 61, at 266 (arguing that, in the context of *Terry* stops in response to completed, reported crimes, the high-crime area factor "is irrelevant—the crime has already occurred").

155. The Fourth Circuit recently "emphatically reject[ed]" giving this factor "any special weight in determining whether the officers faced exigent circumstances," stating that "[t]o do so would deem residents of ... any ... high-crime area[ ]less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live." United States v. Curry, 965 F.3d 313, 331 (4th Cir. 2020); *see also, e.g.*, United States v. Pedicini, 804 F. App'x 351, 355-56 (6th Cir. 2020) (stating that being in a high-crime area is relevant but "not absolute" and in this case was "further cabined by the fact that [the defendant] merely drove through the area").

156. *See, e.g.*, Anthony J. Ghiotto, *Traffic Stop Federalism: Protecting North Carolina Black Drivers from the United States Supreme Court*, 48 U. BALT. L. REV. 323, 367-68 (2019) (arguing that the reasonable suspicion standard is largely "built upon the subjective whims of a police officer" and thus stops often lack the requisite particularized suspicion of criminal activity); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 437-38 (2006).

deemed suspiciously nervous by police officers."[157] Nervousness is also highly subjective and a common response to the presence of police, especially for historically over-policed or mistreated communities.[158] Critics also signal a more general problem with the *Terry* standard's clarity, arguing that the line between objective and subjective evidence, or between particularized or generalized evidence, is blurry.[159] Justice Thurgood Marshall similarly sounded alarm bells that the basis for reasonable suspicion has become unparticularized, pointing to the Drug Enforcement Administration's drug courier profile's "chameleon-like way of adapting to any particular set of observations."[160]

The emergence of particularization concerns in the context of so many other common reasonable suspicion factors demonstrates the problems that result from a standard not carefully, narrowly crafted. *Terry* stops in practice seem to have strayed from the foundational intent of the *Terry* opinion, which stressed the need for particularized, articulable suspicion.[161] Additionally, the concerns with other reasonable suspicion factors reveal that unparticularized hunches have the ability to convincingly pass for articulable, reasonable suspicion due to *Terry* being a totality-of-factors standard. In other words, can a handful of factors legitimately add up to reasonable suspicion if several—or all—of them have fundamental problems regarding insufficient particularization? The ideal answer—no—demonstrates the need for more vigilance toward the particularized nature of the factor at the heart of this Note: active suspects' physical descriptions.

B. Courts' Tolerance for Vague or Discrepant Suspect Descriptions in Reasonable Suspicion Determinations Is Too High

The cases discussed in Part II, in which various courts made reasonable suspicion determinations when an active suspect

157. Lerner, *supra* note 156, at 437.

158. *Id.* at 435-36.

159. *See id.* at 414-15.

160. United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)).

161. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968); *supra* Part I.

description formed the primary basis for a *Terry* stop, demonstrate inconsistency in courts' interpretation of what amounts to reasonable suspicion. Courts' tolerance levels for *Terry* stops based on unparticularized descriptions—whether due to vagueness or appearance discrepancies—varied greatly from case to case.[162]

For courts that demonstrated an arguably high tolerance,[163] the police-deferential and public safety-concerned side of the *Terry* Court's balance[164] tipped the scales too much. With such a highly deferential application of *Terry*, law enforcement in many jurisdictions enjoy a very low bar as to how particularized this reasonable suspicion factor must be before stopping an individual. Given the disparate rates at which racial minorities, especially Black men, are the subjects of *Terry* stops,[165] a low bar enabling so many stops is impermissible. This opens the floodgates for all the harms—legal, physical, psychological, and otherwise—that flow from *Terry* stops and increased policing.[166]

Even for those courts that demonstrated a low tolerance for vague or discrepant descriptions leading to *Terry* stops, it is important to note that many were appellate courts reversing the decisions of courts below that *did* find reasonable suspicion on the same facts.[167] This demonstrates that there is disparity and inconsistency between courts' analysis of this factor—even within jurisdictions.

Further, courts only make reasonable suspicion determinations once a defendant (if a *Terry* stop led to criminal charges) or plaintiff (when an individual sues on civil rights grounds regarding the stop) proceeds past the plea bargaining or settlement stage, respectively. This is exceedingly rare, as at least 90 percent of criminal defendants take a guilty plea deal,[168] and civil cases settle about as frequently.[169] For an individual to be in court challenging the

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162. *See supra* Part II.

163. *See supra* Part II.B.

164. *See supra* notes 53-55 and accompanying text.

165. *See supra* notes 137-42 and accompanying text.

166. *See supra* notes 143-49 and accompanying text.

167. *See, e.g.*, *supra* notes 94, 100 and accompanying text.

168. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://pewrsr.ch/2F1Qxn7 [https://perma.cc/922G-58A8].

169. *See* Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html [https://perma.cc/

reasonableness of a *Terry* stop, it means he or she had the wherewithal and financial means to persist past these earlier stages and into a suppression hearing, trial, or possibly even an appeal.[170] For civil plaintiffs suing under 42 U.S.C. § 1983 for constitutional rights violations, qualified immunity makes holding police officers accountable exceptionally difficult.[171]

This context requires one to consider how many individuals experience potentially unreasonable *Terry* stops but never have the opportunity or forum for a meaningful examination of the stop's legality. In other words, there are enough problematic stops and differing reasonable suspicion interpretations to deduce that this issue is even more pervasive than one sees. Therefore, it is critical that police officers in the field have a clear understanding of what amounts to reasonable suspicion regarding suspect descriptions. The demonstrated variety in courts' treatment of such physical descriptions—particularly those courts showing a high tolerance for vagueness or discrepancies—signals that how particularized this factor must be is anything but clear.

C. Courts' High Tolerance Allows for Infringement of Individuals' Fourth Amendment Rights, and the Standard Must Change

The Fourth Amendment serves to limit police conduct toward individuals, keeping citizens protected from unreasonable intrusion.[172] In creating a new doctrine that expanded rather than constricted police latitude, the *Terry* Court stated that it must be

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MB4M-9MQV] (finding that 80 to 92 percent of cases settle); *see also Judicial Business 2017 Table C-4—U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken*, U.S. CTS. 1 (Sept. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2017.pdf [https://perma.cc/J34T-S4H4] (finding that less than 1 percent of federal civil cases reached trial in fiscal year 2017).

170. For a discussion on the additional disadvantages that indigent criminal defendants in particular face while advancing through the legal process, see generally Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007).

171. *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 636-37, 644, 646, 652, 657 (2013).

172. *See* Terry v. Ohio, 392 U.S. 1, 11, 15-16 (1968) ("The heart of the Fourth Amendment ... is a severe requirement of specific justification for any intrusion upon protected personal security.").

"narrowly drawn."[173] The Court acknowledged the dangers and detriments of investigatory stops[174] and reaffirmed the gravity of the personal right at stake.[175] When the time came to lay down a new standard, the *Terry* Court intended it to be limited: reasonable suspicion that criminal activity is afoot based on "specific and articulable facts,"[176] not merely an "inchoate and unparticularized suspicion or 'hunch.'"[177] Without this particularization, then, an investigatory stop pursuant to *Terry* cannot comport with the Fourth Amendment.[178]

Courts' tolerance of unparticularized suspect descriptions providing reasonable suspicion for a *Terry* stop therefore threatens the infringement of individuals' Fourth Amendment liberties. When a physical description is either so generic that it could apply to many individuals in the area or is highly discrepant with the eventual subject's physical appearance, it lacks the particularization that *Terry* requires. Of course, an unparticularized suspect description may not disturb the presence of reasonable, articulable suspicion if the totality of other factors and circumstances justified the *Terry* stop.[179] However, as discussed in Part II.A, in the context of an active search for a suspect, the provided physical description will often be the key driver of officers' suspicion and the decision to stop someone.

Therefore, given the harms and disparate policing that result from description-based *Terry* stops, and given that *Terry* requires particularized suspicion to comport with the Fourth Amendment, the suspect description factor cannot continue to be weighed and treated as it is now. Courts should no longer tolerate vague or discrepant suspect descriptions contributing to reasonable suspicion.

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173. *Id.* at 27.

174. *See id.* at 11-15, 24-26.

175. *See id.* at 8-9 ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891))).

176. *Id.* at 21.

177. *Id.* at 27.

178. *See id.*

179. *See, e.g.*, *supra* note 125 and accompanying text.

IV. HOW COURTS SHOULD WEIGH THE SUSPECT DESCRIPTION FACTOR IN REASONABLE SUSPICION DETERMINATIONS

The deleterious effects of widespread and unreasonable *Terry* stops, and the inconsistent and often highly police-deferential way that courts approach the suspect description factor explored herein, reveal a pronounced problem with modern *Terry* stop practices. A new standard is needed to revitalize the particularization that *Terry* and the Fourth Amendment require.

This new standard would foster consistency among courts, ensure suspect descriptions informing reasonable suspicion are properly particularized, and promote more reasonable and equitable police conduct in the field. Because the new standard would simply reinvigorate what *Terry* and the Fourth Amendment demand, rather than restrict police latitude, public safety would not suffer as a result of the proposed new standard.

A. A New Standard

When an officer's reasonable suspicion to perform a *Terry* stop is based in any part on the target of the stop matching a physical description of an active criminal suspect, the court's reasonable suspicion analysis should look for indicia that the description was sufficiently particularized. This additional analysis regarding the description factor will supplement—not replace—the typical totality-of-factors analysis. For this indicia-of-particularization analysis, the court should consider: (1) the degree of discrepancy, including the type of discrepancies,[180] between the suspect description and the detainee's appearance, (2) the degree of vagueness of the description, and (3) the context in which the search for the suspect and eventual *Terry* stop occurred as it relates to the likelihood that many individuals in the area could have matched the description.

180. For example, a discrepancy between a navy blue jacket and a black one is quite different from the suspect having black shoulder-length hair and the person stopped having a blonde crew cut. Courts also, often rightfully, distinguish descriptors that can be easily changed in a moment. *See supra* note 89 and accompanying text.

These additional considerations will not result in a bright-line rule—reasonable suspicion is, appropriately, a totality-of-the circumstances analysis. Rather, this new standard would require courts to go through a supplementary layer of analysis on top of the usual reasonable suspicion examination, still looking at the totality of the circumstances.

Courts are already accustomed to performing an additional layer of analysis with respect to an individual reasonable suspicion factor. When an informant's tip or 911 report of criminal activity contributes to an officer's reasonable suspicion, courts look for "indicia of reliability" of the information given.[181] Courts perform a supplementary analysis with this factor, considering the degree to which the tip's predicted events or information are corroborated by the police's observations, the degree to which the tip provided information about future acts or in-depth details rather than readily observable facts, and whether the tip was anonymous or from a known informant or citizen who identifies themself.[182]

Just as the additional standard around informant tips recognizes the need for extra reliability considerations to ensure a *Terry* stop possessed the requisite level of suspicion, the suspect description factor warrants additional consideration as well. As discussed, the courts' inconsistency and high tolerance for lack of particularization with this factor, coupled with the fact that it will often be the key driver of suspicion for a stop in active suspect searches, demonstrate the need for a supplementary standard.

Courts undertaking this additional consideration for the physical description factor would better expose any lack of particularization that may have otherwise been lost in the usual totality-of-factors balance. This would foster more consistent approaches to this reasonable suspicion factor, as well as decrease courts' tolerance of unparticularized descriptions. Some courts appear to weigh these considerations already,[183] but a clearer, more standardized approach is needed to truly ensure consistency among all courts.

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181. Alabama v. White, 496 U.S. 325, 328-30 (1990); *see also* Adams v. Williams, 407 U.S. 143, 147-48 (1972).

182. *See White*, 496 U.S. at 330-31; *Adams*, 407 U.S. at 146-48.

183. *See, e.g.*, United States v. Quinn, 812 F.3d 694, 699 (8th Cir. 2016) (discussing that vague suspect descriptions can still provide reasonable suspicion when there is a lack of other individuals or vehicles in the search area at the time).

Further, this new standard would promote more reasonable and particularized *Terry* stops by police officers. Rules excluding evidence seized in violation of the Fourth Amendment deter unreasonable police conduct, as "limitations upon the fruit to be gathered tend to limit the quest itself."[184] As the *Terry* Court noted, while exclusionary rules will not affect all police behavior, they serve to discourage police misconduct.[185] Courts indeed have the "responsibility to guard against police conduct which is overbearing or harassing," and do so through their exclusionary rulings.[186] Thus, this proposed reasonable suspicion standard with respect to physical descriptions would help address unreasonable *Terry* stops and searches in the field and the disparate impacts and harms that flow from them.[187]

B. Counterargument: Public Safety Will Suffer if Police Latitude Is Restricted

As discussed in Part I, "the *Terry* Court had the difficult task of balancing the police-purported need for a workable tool short of probable cause to use in temporary investigatory detentions and protecting the people's constitutional right against ... abusive police power."[188] The purpose of authorizing *Terry* stops was to provide law enforcement with more flexibility and "not prevent proactive policing."[189] The clear counterargument to the proposed new standard will naturally be that placing limitations on the current *Terry* standard "will unnecessarily constrain [law enforcement's] expertise and intuition in detecting crime."[190] If the police's latitude and flexibility are limited, some will argue, public safety will suffer.

While the impact that increased *Terry* stops have on general crime reduction is debatable,[191] these concerns are undoubtedly

184. Terry v. Ohio, 392 U.S. 1, 29 (1968) (quoting United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930)).

185. *Id.* at 12-15.

186. *Id.* at 15.

187. *See generally supra* Part III.A.1.

188. Jones, *supra* note 27, at 513.

189. *Id.*

190. Henning, *supra* note 140, at 1566.

191. *Compare* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1520-35 (2014) (finding

prominent in the context of police conducting a *Terry* stop pursuant to an active criminal suspect's description. This particular scenario contemplates a situation in which a crime is known to have very recently been committed in the immediate area.[192] When an individual has just committed a crime, particularly a violent or serious offense, the desirability for police to be able to swiftly apprehend that individual is high.

However, this proposed new standard is simply a return to the particularization that *Terry* and the Fourth Amendment require. The rules and standards of *Terry* are unchanged, and the additional indicia of particularization analysis ensures that investigatory stops better comport with *Terry*'s principles. When the Supreme Court crafts a new constitutional rule, it is impermissible to stray outside of that standard over the years. As such, this new standard represents a critically needed fine-tuning of modern stop and frisk practices, grounded in *Terry* itself.

Requiring increased particularization with this factor is not only essential for maintaining constitutionality and protecting individuals' rights. Particularization also aids police officers in crime prevention and apprehension. When police are actively searching for a suspect, a more particularized physical description actually enhances public safety and ensures more efficient use of police resources. When a suspect description is highly discrepant with the appearance of an individual that officers encounter, this should signal to the officers that they likely should continue searching. Stopping this individual who is likely not their suspect wastes precious time in an active search. If the discrepancies are reasonably explained, perhaps because it is dark outside or a physical descriptor is one that could be easily and quickly changed, the proposed standard examining indicia of particularization would take that into account.

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that New York City's mass stop and frisk efforts may have reduced gun possession and thus violent crime and incarceration), *with* Press Release, N.Y. Civ. Liberties Union, Latest Data: Stop-and-Frisk and Crime Both Lowest in Years (Oct. 11, 2016) [hereinafter NYCLU, Latest Data], https://www.nyclu.org/en/press-releases/latest-data-stop-and-frisk-and-crime-both-lowest-years [https://perma.cc/3DKL-PKA6] (finding that "dramatic reduction in stops is not jeopardizing public safety" as crime in New York City continued to fall to record lows alongside a dramatic reduction in *Terry* stops).

192. *See generally supra* Part II.A.

For example, in Mr. Harbin's case discussed at the outset of this Note, considering more carefully the many physical discrepancies between him and the suspect, and perhaps the context of the search area, would have helped officers realize that Mr. Harbin was not their suspect.[193] Mr. Harbin could have been spared the distressing encounter, and officers could have saved time and effort better spent on locating and apprehending the actual perpetrator.

Similarly, for descriptions that are unparticularized due to vagueness, the new standard would help instruct officers to consider the context of the suspect search and whether a physical description is so scant that it could apply to many individuals in the vicinity. This would aid officers by signaling that they should gather more physical descriptors from witnesses, if possible, or look for additional suspicious circumstances beyond the description—*before* performing the stop—such as the way the individual is behaving.

Thus, whether officers are dealing with discrepant or overly vague descriptions, the new standard would help—not hinder—in identifying the perpetrator for more prompt and effective apprehension.[194] The proposed new standard revitalizes the particularization requirement of *Terry*. Because this standard's impact on police work would improve public safety in active suspect searches, and because it acts to reinforce individuals' essential rights, it will better allow the police to "serve and protect" their communities.

CONCLUSION

Courts' tolerance of highly discrepant or vague suspect descriptions forming the basis of reasonable suspicion for a *Terry* stop threatens Fourth Amendment infringement. A new standard is critical to addressing this problem and revitalizing the particularization requirement handed down in *Terry*. The *Terry* Court navigated a delicate balance between public safety needs and

193. *See supra* notes 1-18 and accompanying text.

194. New York City saw this effect following a dramatic reduction in *Terry* stops and frisks, when data suggested that "fewer stops correspond[ed] to more effective stops." NYCLU, Latest Data, *supra* note 191. The proportion of stops that led to an arrest jumped from less than 10 percent each quarter from 2004 to 2012 to over 20 percent in the first quarter of 2016. *Id.* Similarly, police stopped nearly 320,000 innocent people in the first six months of 2011 but fewer than 6,000 innocent people in the first six months of 2016. *Id.*

individuals' constitutional protections against unreasonable search and seizure. However, courts in the decades since have strayed past the careful narrowness stressed in *Terry*, often demonstrating inconsistency and impermissible tolerance of unparticularized suspect descriptions.

As a result, police perform *Terry* stops expansively today, targeting racial minorities disproportionately. This disparity, coupled with the harms that *Terry* stops cause and the fact that particularization has been found to be lacking in several other common reasonable suspicion factors, demonstrates the need for a restored focus on particularized suspicion for *Terry* stops. A new standard is needed to protect against infringement of individuals' Fourth Amendment rights against unreasonable searches and seizures.

A new standard requiring courts to look for indicia of particularization regarding the physical description factor in reasonable suspicion determinations would address this problem. By considering the three factors outlined herein, courts would help ensure the particularization requirement around *Terry* stops is reinvigorated and more carefully adhered to. The new indicia-of-particularization standard would promote consistency among the courts when weighing this factor in reasonable suspicion determinations, and it would improve police conduct and investigatory practices. This revitalization of truly particularized suspicion would refortify the constitutionally protected personal security rights that hang in the balance when too many people can be stopped.

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