THE WARREN COURT AND THE BIRTH OF THE REASONABLY UNREASONABLE POLICE OFFICER

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I. INTRODUCTION

The Warren Court had a complex relationship with policing. On the one hand, it appeared to act as a regulator of police practice.[1] This was its most public face, popularized in opinions like *Miranda v. Arizona*.[2] On the other hand, the Warren Court supported discretionary police practices in opinions that, now 50 years later, reveal themselves as the starting point for the Supreme Court's ultimate deregulation of policing.[3] Two opinions in particular, *Pierson v. Ray*,[4] studied in conjunction with *Terry v. Ohio*,[5] offer a window into the birth of the "reasonably

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1. *See, e.g.*, Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1627 (2006) (expressing the popular view that the Warren Court targeted abuses of everyday policing for constitutional regulation); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 843 (1994) (positing that "the civil rights movement of the 1950s and 1960s informed the Warren Court's fortification of the warrant requirement and extension of the exclusionary rule to the states") [hereinafter Steiker, *First Principles*].

2. 384 U.S. 436, 481 (1966).

3. *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 978 (2010) [hereinafter Davies, *The Supreme Court Giveth*] ("The conventional wisdom regarding this period is that the liberal majority of the Warren Court produced an explosion of pro-defendant rulings. However, at least with regard to search and seizure rulings, the actual story is considerably more complex."); Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 898 (1998) ("The knee-jerk liberal, pro-defendant, anti-police image that the Court in general, and Chief Justice Warren and Justice Brennan in particular, have been saddled with over the years is quite plainly undeserved, at least as far as the Fourth Amendment is concerned."); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1451 (2004) (arguing that Warren Court opinions were not so revolutionary).

4. 386 U.S. 547 (1967).

5. 392 U.S. 1 (1968). *Terry* can be viewed as an opinion regulating previously unregulated police activity and, as argued here, one that nonetheless launched deregulation. Criticisms of *Terry*'s impact on society are legion. *See, e.g.*, Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 45; David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 3 (1994);

unreasonable" officer who operates with relative impunity on the streets today.

The framers adopted the Fourth Amendment to provide people protection against indiscriminate searches and seizures by government officials.[6] Today, that protection is minimal to nonexistent.[7] There are, at least, two primary reasons for its inefficacy. First, over time, the Court has shifted emphasis from the Warrants Clause of the Amendment to the Reasonableness Clause.[8] While the Court used to apply a presumption that warrantless searches and seizures were *per se* unreasonable, it now employs a balancing test for whether a warrantless search or seizure is reasonable, with the balance skewed in favor of the government.[9] The rise of reasonableness balancing and the fall of the warrant requirement have origins in *Terry v. Ohio*.[10]

Second, even if a court finds the rare violation of the Fourth Amendment, the remedies are even more rare. One remedy is suppression in a criminal prosecution of any evidence gained by the violation, limited by whether there *is* any evidence to suppress and

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Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 851 (2014); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–73 (1999).

6. *See generally,* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557 (1999).

7. *See, e.g.*, Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 511–12 (1991); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 261–62 (1984).

8. *E.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 401 (1988) [hereinafter Sundby, *A Return to Fourth Amendment Basics*] (explaining that *Terry* rejected the Warrants Clause and focused on the Reasonableness Clause). The "Reasonableness Clause" of the Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," and is followed by the "Warrants Clause" providing, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

9. The shift is reflected in the move from stock phrasing about the primacy of warrants, *see, e.g.*, United States v. Ross, 456 U.S. 798, 825 (1982) (quoting Katz v. United States, 389 U.S. 347, 357 (1967))(stating that the Warrants Clause is the Amendment's "'cardinal principle . . . subject only to a few specifically established and well-delineated exceptions'"), to language stressing the primacy of "reasonableness," *see, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) ("The underlying command of the Fourth Amendment is always that searches and seizures be reasonable. . . ."), as described in Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1756–57 (1994) [hereinafter Sundby, *Everyman's Fourth Amendment*]. *See also id.* at 1766–69 (describing how shift to "reasonableness" means increased deference to government); Timothy C. MacDonnell, *The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment*, 73 WASH. & LEE L. REV. 1869, 1959 (2016) (arguing that since *Terry,* reasonable suspicion has increasingly favored the police).

10. *See* Sundby, *A Return to Fourth Amendment Basics*, *supra* note 8, at 385 (explaining how Camara v. Municipal Court, 387 U.S. 523 (1967) and *Terry* problematically shifted the analysis to reasonableness); *cf.* Davies, *The Supreme Court Giveth*, *supra* note 3, at 966–67 (noting that the "Reasonableness" Clause was used to create early exceptions to the Warrants Clause, such as the automobile exception declared in Carroll v. United States, 267 U.S. 132, 156–59 (1925)).

further limited in multiple Supreme Court rulings cabining employment of the exclusionary rule.[11] The other remedy is a civil suit against the police officer for violating the Fourth Amendment.[12] This remedy is severely limited by the doctrine of qualified immunity, giving the police officer immunity from suit if she reasonably believed she was in compliance with the Fourth Amendment.[13] Qualified immunity has its origins in *Pierson v. Ray*.[14]

Chief Justice Warren, the author of both *Terry* and *Pierson*, believed each would have a narrow application.[15] The lone dissenter in each, Justice Douglas, was prescient in perceiving the danger.[16] Each opinion separately spawned progeny that expanded its application well beyond its intended borders.[17] *Terry*'s progeny applied the reasonableness framework to sanction a multitude of warrantless searches and seizures.[18] *Pierson*'s progeny moved the inquiry for qualified immunity from the subjective to the objective officer, so that even an officer acting in bad faith could get immunity.[19] The unintended consequence of both cases combined is that, today, qualified immunity is practically absolute. Even if an officer acts without *Terry*'s required "reasonable suspicion" to justify certain searches and seizures,[20] and hence, *without reason*, the officer is immune from suit if a court finds that the officer was nonetheless reasonable in believing she had reasonable suspicion. Given the amorphous nature of reasonable suspicion, reasonable minds will readily differ. The "reasonably unreasonable" officer who engages in activity in violation of the Fourth Amendment will be immune from suit. The legacy of *Pierson* and *Terry* is this perverse result.

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11. On the Court's growing hostility to the exclusionary rule, see generally, e.g., David A. Moran, *Waiting for the Other Shoe:* Hudson *and the Precarious State of* Mapp, 93 IOWA L. REV. 1725, 1732–33 (2008) (quoting Hudson v. Michigan, 547 U.S. 586, 597 (2005)); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 568–69 (2008); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1886 (2008).

12. The remedy is pursuant to 42 U.S.C. § 1983 (Supp. V 2017) ("Section 1983").

13. *See infra* pt. I.C (describing modern qualified immunity doctrine).

14. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52 (2018) (claiming that "[t]he Supreme Court's decision in *Pierson v. Ray* pioneered the key intellectual move" in qualified immunity theory).

15. Terry v. Ohio, 392 U.S. 1, 15–16 (1968); Pierson v. Ray, 386 U.S. 547, 555 (1967).

16. *Terry*, 392 U.S. at 38 (Douglas, J., dissenting); *Pierson*, 386 U.S. at 566–67 (Douglas, J., dissenting).

17. *See infra* pt. II.C (summarizing cases from *Pierson*'s progeny); *infra* pt. III.B (summarizing *Terry*'s progeny).

18. *See infra* pt. III.B.

19. *See infra* pt. II.C.

20. 392 U.S. at 30–31.

This symposium Article first addresses the 1967 case of *Pierson v. Ray*, the lesser known of the two Warren Court cases.[21] It is worth a bit of a digression to describe the background of the case because it is surprising that the Warren Court would begin the development of qualified immunity for police officers under such circumstances. The Article then briefly describes the path from *Pierson* to the much broader qualified immunity doctrine the Court adopts today.[22] Next, the Article addresses the 1968 case of *Terry v. Ohio*, well known to any student of criminal procedure, highlighting the manner in which the Warren Court engaged in a reasonableness balancing that would be the undoing of the Warrants Clause.[23] *Terry*'s progeny then descended into the reasonableness quagmire.[24] Finally, this Article will discuss how the progeny of these two cases interact to provide absolute immunity for the "reasonably unreasonable" police officer.[25]

II. PIERSON V. RAY*: THE ORIGIN OF QUALIFIED IMMUNITY*

Pierson v. Ray is a usual Warren Court era case—a story of civil rights abuses against the African American population in the South—with an unusual Warren Court opinion—the protagonists lost.[26] What started as a lawful civil rights demonstration by a group of clergymen to protest illegal racial segregation in the Deep South ended in a Supreme Court opinion that shielded state officials from being sued for violating the demonstrators' constitutional rights.[27]

A. The Unconstitutional Arrest

The setting for *Pierson v. Ray* was the bus terminal in Jackson, Mississippi, on September 13, 1961.[28] Germane to the background of the case is the Warren Court's opinion one year earlier in *Boynton v.*

21. *Infra* pt. II.A–B.
22. *Infra* pt. II.C.
23. *Infra* pt. III.
24. *Infra* pt. III.A.
25. *Infra* pt. IV.
26. 386 U.S. 547, 553, 557 (1967).
27. *Id.* at 553–57. Professor Eisenberg has observed that, other than *Pierson*, none of the cases in which the Court was developing its Section 1983 qualified immunity doctrine were civil rights movement cases, and he posits that the unusual outcome in *Pierson* was possible because "the police had acted mildly in comparison to official action in other cases involving southern law enforcement." Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 520 (1982).
28. Brief for Petitioners at *6, *Pierson v. Ray*, 386 U.S. 547 (1967) (Nos. 79, 94).

Virginia.[29] In *Boynton*, the Court declared that racial segregation at interstate bus terminals violated the Interstate Commerce Act.[30] In the wake of *Boynton*, groups of black and white people known as the "Freedom Riders" made history by joining together to ride buses to the Deep South to protest segregated bus facilities.[31] The Freedom Riders were inevitably met with arrests and terrible violence.[32]

On May 24, 1961, three and a half months before the events of *Pierson v. Ray*, a group of Freedom Riders traveled by bus from Montgomery, Alabama, to Jackson, Mississippi.[33] When they entered the "Whites Only" waiting area of the bus terminal in Jackson, they were arrested under a Mississippi statute for breach of the peace.[34] They were tried and convicted in front of a judge who made his view known by turning his chair and looking at the wall during the presentation of their defense.[35]

It was no accident, then, that later the same year another group chose the same Jackson, Mississippi, bus terminal as a stopping point.[36] This time, the group consisted of fifteen black and white Episcopal clergymen who were on a "prayer pilgrimage" from New Orleans to Detroit to preach racial equality and integration.[37] The ministers intended to try to use segregated facilities at the bus terminal in Jackson.[38] They assumed they would be arrested.[39]

On September 14, 1961, the ministers walked into the waiting room past the sign that declared, "White Waiting Room Only—By Order of the Police Department."[40] Before they could enter the restaurant, two Jackson police officers stopped them and told them to "move on."[41] The ministers refused and they were arrested.[42] They were arrested under

29. 364 U.S. 454 (1960).
30. *Id.* at 463–64.
31. *See generally* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE xi (2006).
32. *Id.* at 1–3.
33. *See* Ernst H. Rosenberger, Erik Lane & Khalil El Assad, *Remembering the Freedom Riders: An Interview with the Honorable Ernst H. Rosenberger*, 59 N.Y. L. SCH. L. REV. 79, 82 (2014–2015) [hereinafter Rosenberger et al., *Remembering the Freedom Riders*].
34. *Id.* at 83.
35. *Id.*
36. Pierson v. Ray, 386 U.S. 547, 550 n.4, 552 (1967).
37. *Id.* at 548–49, 552; Brief for Petitioners, *supra* note 28, at *6.
38. *Pierson*, 386 U.S. at 552.
39. *Id.*
40. *Id.*; Brief for Petitioners, *supra* note 28, at *6.
41. *Pierson*, 386 U.S. at 552.
42. *Id.* at 553.

the same Mississippi breach of the peace statute that had led to the arrest of the Freedom Riders.[43]

The clergymen were tried by Police Justice Spencer,[44] the same judge who had tried most of the cases that had arisen out of attempts to integrate the bus terminal.[45] The testimony from all the witnesses, both police and civilian, provided that the ministers had been orderly and polite.[46] While defense witnesses testified that there was no crowd gathered and no threatening actions or words from bystanders, the arresting officers testified variably that there were onlookers who were in an "ugly mood," made "threatening gestures," or "were mumbling" under their breath.[47] The officers claimed they feared violence, and that was the reason for the arrest.[48] Judge Spencer convicted the ministers in short order, giving each of them the maximum sentence of four months in jail and a $200 fine.[49]

There was little doubt to any neutral observer of the situation that the arrest and conviction were pretexts by the officers and the judge to enforce unlawful racial segregation.[50] Indeed, the ministers' convictions were vacated after a trial de novo before the county court.[51] Upon retrial of one of the clergymen, the county judge granted the motion for a directed verdict of not guilty.[52] The prosecutor then dismissed the cases against the others.[53] The ministers subsequently sued Judge Spencer and the arresting officers in federal court for a violation of their civil rights

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43. Rosenberger et al., *Remembering the Freedom Riders*, *supra* note 33, at 83. *See Pierson*, 386 U.S. at 549 n.2 (quoting Mississippi Code § 2087.5, stating, "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . [c]rowds or congregates with others in [any public place] . . . and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer . . . shall be guilty of disorderly conduct.").

44. *Pierson*, 386 U.S. at 549.

45. Brief for Petitioners, *supra* note 28, at *11 (stating that Spencer had tried 50 cases, with 300 defendants, related to efforts to integrate the bus terminal).

46. *Pierson*, 386 U.S. at 553; Brief for Petitioners, *supra* note 28, at *7–8.

47. *Pierson*, 386 U.S. at 553; *see also* Brief for Petitioners, *supra* note 28, at *8–9.

48. Brief for Petitioners, *supra* note 28, at *9. This claim was made despite the fact that the officers "did not claim it was beyond their power to control the allegedly disorderly crowd." *Pierson*, 386 U.S. at 553. The officers also testified that they did not act against any of the allegedly threatening persons because they had determined that the ministers were "the cause of the violence if any might occur." Brief for Petitioners, *supra* note 28, at *9 (citing the record).

49. *Pierson*, 386 U.S. at 549–50.

50. There was police testimony "that it was wrong for whites and Negroes to be together in bus stations or anywhere," and "that a Negro had never gone into that part of the station and not been arrested." Brief for Petitioners, *supra* note 28, at *9 (citing the record).

51. *Pierson*, 386 U.S. at 550; Brief for Petitioners, *supra* note 28, at *11.

52. *Pierson*, 386 U.S. at 550; Brief for Petitioners, *supra* note 28, at *11.

53. *Pierson*, 386 U.S. at 550; Brief for Petitioners, *supra* note 28, at *11–12.

under the Ku Klux Klan Act of 1871, codified as 42 U.S.C. § 1983 ("Section 1983").[54]

B. The Warren Court's Surprising Opinion

By the time *Pierson v. Ray* made its way to the Warren Court in 1967, the plaintiffs had directly relevant precedent on their side.[55] Two years earlier, the Supreme Court ruled that the Mississippi breach-of-the-peace statute was unconstitutional as applied to the arrest of the Freedom Riders in May 1961 under practically identical circumstances.[56] The Court simply cited *Boynton*, indicating that the statute, as applied, contravened federal law prohibiting enforcement of segregation at bus terminals.[57] Thus, the plaintiffs' arrest in *Pierson* was plainly unconstitutional.[58]

However, the Warren Court did not take the *Pierson* case to reiterate the unconstitutionality of the arrests and convictions. Rather, the Court agreed to decide (1) whether a local judge could be held liable for damages under Section 1983 for an unconstitutional conviction, and (2) whether police officers were entitled to a defense of good faith and probable cause in a Section 1983 action.[59] These were both issues of first impression.[60] It was by no means a clear case in favor of the immunities the Warren Court would find.[61]

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54. *Pierson,* 386 U.S. at 550. Section 1983 provided,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. at 548 n.1 (quoting statute).

55. *See* 386 U.S. at 550 (discussing the *Thomas* decision, which provided favorable precedent for the plaintiffs).

56. Thomas v. Mississippi, 380 U.S. 524 (1965); *see Pierson,* 386 U.S. at 551 n.4 (acknowledging the similar factual scenarios between *Thomas* and *Pierson*).

57. *Thomas*, 380 U.S. at 524.

58. *See* 386 U.S. at 550 (noting that the lower court recognized the Mississippi statute was held unconstitutional).

59. *Pierson*, 386 U.S. at 551–52.

60. *Id.* at 553–56 (adopting the common law presumption against judicial liability and explaining that *Monroe v. Pape*, the case the Court of Appeals relied on, was not applicable to *Pierson* because the Court did not answer the question of immunity).

61. Given the sympathetic facts of *Pierson*, the Warren Court's holding in favor of the defendants seems uncharacteristic. Professor Eisenberg has posited that the development of immunities can be explained by the fact that, other than *Pierson*, modern doctrinal development of Section 1983 was "remarkably free of influence of the most important social force of the time, the civil rights movement—the one force capable of generating cases that would remind the Court of section 1983's origins." Eisenberg, *supra* note 27, at 519 ("If Section 1983 had developed in the

When interpreting Section 1983, the Supreme Court has consistently taken the approach that the intent of Congress in passing it in 1871, as the "Ku Klux Klan Act," is controlling.[62] The history of the 1871 Act demonstrates its particularly relevant application to the facts of the *Pierson* case. The Act was passed in response to the intimidating and violent actions of the Ku Klux Klan against African Americans in the South.[63] Because the Klan was doing so under the cover of consent of various state officials, Congress passed the law to allow aggrieved persons to sue state actors complicit in the deprivation of the "rights, privileges, or immunities secured by the Constitution."[64]

The first question for the Court in *Pierson* was whether, in 1871, Congress intended that state judges have immunity from liability for civil rights infringements under the Act.[65] With minimal historical sleuthing and in two short paragraphs, Chief Justice Warren, for the majority, found that it must have.[66] Chief Justice Warren reasoned that the doctrine of judicial immunity was "solidly established at common law"[67]—that a judge cannot be held liable for damages for acts committed within their judicial jurisdiction. Since "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities,"[68] the Court "presume[d] that Congress would have specifically so provided had it wished to abolish the doctrine."[69] To preserve the independence of the judiciary, the

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1870s in the context of cases involving overt legislative, judicial, and prosecutorial hostility to Blacks—the very type of official misbehavior that helped prompt its enactment—there would have been great pressure to limit the availability of absolute immunity.").

62. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 170–74 (1961); Karen E. Woodward, *Mob Violence and the Ku Klux Klan Act: State of the Law After* Park v. City of Atlanta, 28 STETSON L. REV. 699, 699 (1999).

63. *Monroe*, 365 U.S. at 174–76 (discussing history of the passage of the Act); *see Pierson*, 386 U.S. at 560 (Douglas, J., dissenting) ("The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied.").

64. 42 U.S.C. § 1983 (Supp. V 2017); *see Monroe*, 365 U.S. at 175–76 (stating that "the remedy created was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law.").

65. 386 U.S. at 551.

66. *Id.* at 554–55.

67. *Id.* at 553–54.

68. *Id.* at 554.

69. *Id.* at 555.

doctrine would shield judges from suit even if the judge acted "maliciously and corruptly."[70]

The matter-of-factness of this conclusion may make it seem foregone. But it is actually quite surprising, given the sympathies of the Court and given that a slightly deeper historical analysis would have allowed the Court to reach the opposite conclusion.[71] Justice Douglas' compelling dissent makes two important points against an importation of common law judicial immunity into the Act.[72] First, when the Act was adopted with the purpose of combatting civil rights violations, it was well known to Congress that judges were part of the problem. As Justice Douglas explained,

> A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify.[73]
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> . . .
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> [The very purpose of the Act was] to remedy the inadequacies of the pre-existing law, including the common law.[74]

Second, the commentary by senators in 1871 indicated that they saw the phrase "every person" as, in fact, encompassing "every person."[75] As Justice Douglas observed, "every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable."[76] Hence, a number of specific objections

70. *Id.* at 554 ("This immunity applies even when the judge is accused of acting maliciously and corruptly . . . 'for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" (citation omitted)).

71. There was some precedent in a prior decision, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), that used similar reasoning to grant absolute immunity to legislators and "supplied all the interpretive weapons necessary to extend its holding." Eisenberg, *supra* note 27, at 500–01; *id.* at 491–99 (analyzing the flawed reasoning of the Court in *Tenney*).

72. *Pierson*, 386 U.S. at 558–63 (Douglas, J., dissenting).

73. *Id.* at 559 (citing support from the congressional record and the comments of congressmen); *see also* Brief for Petitioners, *supra* note 28, at *23 (citing congressional record).

74. *Pierson*, 386 U.S. at 561; *see* Eisenberg, *supra* note 27, at 485 ("[The 1871 Act's] history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations.").

75. *Pierson*, 386 U.S. at 559.

76. *Id.* at 561.

were made to the Act's applicability to judges.[77] Yet despite those objections, the wording of the statute remained as proposed.[78] Indications were that common law immunity was in fact rejected.[79]

After holding judges immune from suit, the Court then considered the arresting police officers' liability.[80] Again here, the Court looked to the common law in 1871 and found evidence that "the prevailing view" was that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."[81] Importing tort liability principles, which included a "defense of good faith and probable cause . . . in the common law action[s] for false arrest and imprisonment," Chief Justice Warren held that the defense was likewise available to the police in a Section 1983 action.[82] Then, he took a step further to reach the facts of *Pierson*. Admitting "the matter is not entirely free from doubt, the same consideration would seem to require excusing [the peace officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held [to be] unconstitutional, on its face or as applied."[83]

However, neither the history of the Act nor the common law fully supports this conclusion. In 1871, not only were judges complicit in civil rights violations, so too were police officers, the front line in law enforcement in the South.[84] Further, the common law defense was *not*

77. *Id.* at 561–62 (quoting three different members of Congress who objected to the Act's imposition of liability on judges).

78. *Id.* at 563.

79. Further, Professor Eisenberg points out that nineteenth century common-law immunity doctrine had little application to assertions of constitutional claims against state officials, which did not arise until the twentieth century. Eisenberg, *supra* note 27, at 494–95. *But see* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for Legislative Will*, 86 NW. U. L. REV. 497, 502–11 (1992) (arguing against the "literalist approach" of Justice Douglas' dissent).

80. *Pierson*, 386 U.S. at 555 (majority opinion).

81. *Id.*

82. *Id.* at 556–57.

83. *Id.* at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). The Court ultimately found that the jury, who returned a verdict for the defendant officers in federal court, must have believed the officers acted in good faith belief the statute was constitutional and arrested to keep the peace, not to preserve racial segregation. *Id.* at 557. The Court remanded the case for a new trial based on a separate issue involving the admission of irrelevant and prejudicial evidence. *Id.* at 557–58.

84. *See* Steiker, *First Principles*, *supra* note 1, at 833 & nn.75–76 (citations omitted) (discussing the role of the police as "slave patrols" in controlling the slave and then freed-black population and citing sources); *see also* Monroe v. Pape, 365 U.S. 167, 177 (1961) (quoting Congress members' concern with lack of enforcement of the law by various officials, with one stating, "Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."). One congressman, summarizing the problem faced by the 1871 Congress, stated,

applicable to constitutional violations.[85] Instead, there is historical support that the common law in 1871 did not allow good faith defenses against constitutional violations.[86]

Chief Justice Warren could well have thought that the holding in *Pierson* would have limited applicability only in cases of wrongful arrest. Not only was the good faith defense specific to faulty arrests, but in 1967, other than arrests, almost all police searches and seizures required a warrant issued by a magistrate after a finding of probable cause.[87] Yet the unraveling of the warrant requirement came only one year later in Chief Justice Warren's opinion in *Terry v. Ohio*.[88] Undoubtedly, the Chief Justice did not see the link between *Pierson* and *Terry* that would lead to the demise of the Court's regulation of police search and seizure.

C. *Pierson*'s Progeny

The expansion of the holding in *Pierson v. Ray* became inevitable as the decades passed. A more conservative Court under Chief Justice Burger responded to the War on Drugs in the 1970s and 80s.[89] To ease investigation, arrest, and conviction of criminal defendants, the Court watered down the protections of the Fourth Amendment, seen as a boon to the guilty drug dealer.[90] To further support law enforcement, the

"Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices." CONG. GLOBE, 42d Cong., 1st Sess., app. at 78 (1871), *quoted in* Eisenberg, *supra* note 27, at 484–85.

85. *See* Eisenberg, *supra* note 27, at 501 (explaining that the common law defense had developed in an entirely different context than one involving state officials violating federal constitutional rights). Also, "in the older common law tradition ministerial police officers who made an arrest under a statute that they reasonably believed to be valid, but which was later held [to be] unconstitutional, acted at their own peril." Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 961 & n.107 (1989) (citing Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927)).

86. *See* Baude, *supra* note 14, at 55–57 (gathering sources and describing that the common law focus was on legality, not good faith); *id.* at 60–61 (making the point that the common law defense to the tort of false arrest has been distorted to apply an immunity defense to all constitutional claims).

87. This assumption of limited applicability is reflected in the arguments to the Court. *See, e.g.*, Brief for Respondents in Cause No. 79 & Petitioners in Cause No. 94 at 65–66, Pierson v. Ray, 386 U.S. 547 (1967) (Nos. 79, 94) (noting that "there is no immunity involved in search and seizure cases where the search and seizure is without a warrant and where it is not incident to any arrest"); *Pierson v. Ray*, OYEZ, https://www.oyez.org/cases/1966/79 (under "Media," click "Oral Argument – January 11, 1967") (last visited Nov. 11, 2019) (Respondents' lawyer conceding in "search and seizure case[s] there is no defense of probable cause").

88. 392 U.S. 1, 30 (1968).

89. *See* Davies, *The Supreme Court Giveth*, *supra* note 3, at 1003–05.

90. *See id.* at 1003–13 (describing the Burger Court's pro-law enforcement Fourth Amendment jurisprudence).

Court expanded police officer immunity from Section 1983 lawsuits beyond *Pierson*.[91]

In 1982, in *Harlow v. Fitzgerald*,[92] the Burger Court broke with the common law rule and fashioned the purely objective qualified immunity doctrine we know today.[93] Based largely on concerns about the "social costs" of litigating a Section 1983 claim, the Court made the issue of qualified immunity a question of law, ensuring that judges would be able to dismiss a claim on summary judgment.[94] An allegation of subjective bad faith or malice would no longer be sufficient to sustain a claim.[95] An officer was "shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."[96] Qualified immunity was immunity from suit and not a mere defense.[97]

From there, what was "clearly-established law" became "the battleground of the eighties."[98] It did not take long for the Court to interpret this phrase to the benefit of the police officer. In *Anderson v. Creighton*,[99] the Court cautioned against defining the law at a high level of generality, but rather held that the right "must have been 'clearly established' in a more particularized . . . sense."[100] So, for example, in the case of *Anderson*, where an FBI agent engaged in a warrantless search of a home, the Court reasoned that even though the requirement of probable cause and exigent circumstances was "firmly established," such law was not specific enough to the circumstances confronted by the officer.[101] *Anderson* sealed *Harlow*'s expansion of qualified immunity by holding that an officer who violated the Fourth Amendment because he did not in fact have "probable cause" could still receive the benefit of immunity.[102] Hence, neither "good faith" nor "probable cause," the

91. *Id.* at 1006.
92. 457 U.S. 800, 815–19 (1982).
93. *Id. Harlow* came after the Court had taken an interim step of combining an objective and subjective test in Wood v. Strickland, 420 U.S. 308, 322 (1975).
94. *Harlow*, 457 U.S. at 816–18; *see* Oren, *supra* note 85, at 976–80 (describing *Harlow*'s reasoning and result).
95. *Harlow*, 457 U.S. at 817–18.
96. *Id.* at 818.
97. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
98. Oren, *supra* note 85, at 992.
99. 483 U.S. 635 (1987).
100. *Id.* at 640; *see also* Oren, *supra* note 85, at 992 ("[I]t is clear that, even for claims that are fact-specific by their nature, a very close resemblance is required between the controlling case law and the case at bar.").
101. 483 U.S. at 641.
102. *Id.*

original ingredients of the common law defense as articulated in *Pierson*, were required.

In 2009, the Court further ensured in *Pearson v. Callahan* that qualified immunity would be the dominating force of any lawsuit.[103] It held that courts did not need to decide if the Constitution was violated before directly addressing the qualified immunity issue of whether the right was "clearly established."[104] This has meant that courts do not have to clarify constitutional law so that officers may know what is required to comply with the commands of the Fourth Amendment.[105]

Recently, the Supreme Court has taken an unusual number of Section 1983 cases.[106] Given the rulings in those cases, it appears to an observer that "the Court's agenda is to especially ensure that lower courts do not improperly deny any immunity."[107] Today, it is the rare case where a police officer does not get the benefit of the Court's defense-friendly doctrine on qualified immunity.[108] *Pierson v. Ray* was the first move in this direction. Ultimately, the merging of this opinion with the opinion penned by Chief Justice Warren one year later in *Terry v. Ohio* created the fiction of the "reasonably unreasonable" officer.

III. TERRY V. OHIO*: THE DOMINANCE OF REASONABLENESS*

A. *Terry*: The Opinion

In 1968, the Warren Court decided *Terry v. Ohio*, another case that would loosen the grip of the courts on law enforcement.[109] In *Terry*, the Court took a major step away from the warrant requirement and probable cause.[110] *Terry* was the leading edge of a movement toward

103. 555 U.S. 223 (2009).
104. *Id.* at 236–37.
105. *See* David Rudovsky, *Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 53 (1989) (arguing that this doctrinal "approach would eventually leave no true corpus of law on the fourth amendment. Because rights are defined by court decisions, the substantive standards of the fourth amendment soon would be quite unknown, and the controlling standards would reflect the immunity rule, rather than the established concept of probable cause.").
106. *See* Baude, *supra* note 14, at 48; *see, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); San Francisco v. Sheehan, 135 S. Ct. 1765 (2015); *Pearson*, 555 U.S. at 223.
107. Baude, *supra* note 14, at 48.
108. Rudovsky, *supra* note 105, at 77.
109. 392 U.S. 1, 12–13 (1968).
110. *See id.* at 39 (Douglas, J., dissenting) (reasoning that the ruling creates a watered-down version of the constitutional protections of the Fourth Amendment).

"[t]he general touchstone of reasonableness . . . govern[ing] Fourth Amendment analysis."[111]

The case the Supreme Court often cites when it employs the reasonableness balancing test is another Warren Court case, *Camara v. Municipal Court*.[112] However, significantly, the Court in *Camara* did *not* authorize a search without a warrant.[113] Rather, the Court used the balancing test to decide whether a search for noncriminal law purposes—for purposes of performing housing safety inspections—was compliant with the Fourth Amendment.[114] The Court weighed the government's need for housing inspections against the intrusion such inspections have on the individual and decided that such searches were reasonable *if carried out pursuant to a warrant based on probable cause*.[115] Hence, *Camara* only employed reasonableness as a check on the requirement of a warrant.

Terry, on the other hand, was the first Fourth Amendment case where the Court applied the *Camara* balancing test to approve a search without a warrant and without probable cause.[116] At issue in *Terry* was the widely used and abused police tactic of "stop and frisk."[117] In an effort to ensure that the practice was subject to Fourth Amendment scrutiny, the Court made some crucial missteps.[118] Chief Justice Warren believed, wrongly, that *Terry* would only create a very narrow exception to the requirement of a warrant based on probable cause.[119] If held to narrower circumstances, *Terry* might be read to approve a limited pat down search for weapons when there is reason to believe an individual is suspected of committing a crime of violence and hence reason to

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111. United States v. Ramirez, 523 U.S. 65, 71 (1998); *see* Sundby, *A Return to Fourth Amendment Basics*, *supra* note 8, at 395–97, 401–04 (describing *Terry*'s problematic move to reasonableness).

112. 387 U.S. 523 (1967); *see also* Sundby, *A Return to Fourth Amendment Basics*, *supra* note 8, at 391–94, 399–401 (describing *Camara*'s problematic reasonableness balancing).

113. 387 U.S. at 540 (holding that the inspectors needed a warrant to enter appellant's household when appellant was adamant that inspectors needed to obtain a warrant).

114. *Id.* at 536–37.

115. *Id.* at 538–39.

116. Terry v. Ohio, 392 U.S. 1, 27 (1968).

117. 392 U.S. at 10 (acknowledging entry into "the public debate over the power of the police to 'stop and frisk' . . . suspicious persons").

118. *See* Dudley Jr., *supra* note 3, at 893 (noting that, among the Justices, there was "an almost complete lack of consensus about just *how* simultaneously to recognize and to cabin this new police authority").

119. *See* 392 U.S. at 15 (referring to "the quite narrow question posed by the facts before us"); *id.* at 27 ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons."). *See generally* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 925–26 (1998) (arguing that *Terry*, interpreted as Warren intended it, is a focused and narrow opinion).

believe the individual is presently armed and dangerous.[120] The Court specifically claimed it was not deciding the issue of whether an investigatory detention, the "stop," was authorized by the Fourth Amendment.[121]

Instead of a limited holding, however, the *Terry* decision now represents two significant departures from established Fourth Amendment doctrine. First, the Court abandoned the Fourth Amendment's requirement of probable cause for any search or seizure.[122] We now know the lowered standard as one of "reasonable suspicion."[123] A study of the Court's decision-making in conference between oral argument and issuance of the opinion reveals the struggle the Justices had in relinquishing probable cause.[124] Probable cause for arrest of a person required that police had reason to believe a person committed a crime.[125] *Terry* presented a potential crime in progress, not a crime already committed.[126] Police needed to have latitude to investigate without yet having probable cause to believe a crime had already been committed.[127] The original draft opinion circulated among the Justices retained the "probable cause" standard: an investigatory stop would require probable cause that a crime *was being or going to be* committed.[128] The Court understandably utilized probable cause as the minimal standard, as Court doctrine had already recognized probable cause as an extraordinarily low and malleable threshold.[129]

120. United States v. Brignoni-Ponce, 422 U.S. 873, 888–89 (1975) (Douglas, J., concurring) ("Hopes that the suspicion test might be employed only in the pursuit of violent crime . . . have now been dashed, as it . . . has come to be viewed as a legal construct for the regulation of a general investigatory police power."); *see* Adams v. Williams, 407 U.S. 143, 151 (1972) (Douglas, J., dissenting) (expressing "a concern that the easy extension of *Terry* . . . to 'possessory offenses' is a serious intrusion on Fourth Amendment safeguards"); *id.* at 153 (Brennan, J., dissenting) (quoting with approval lower court opinion by Judge Friendly that *Terry* "'was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses'"); *Terry*, 392 U.S. at 27 (concluding "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual").

121. *Terry*, 392 U.S. at 19 n.16 (declining to rule on "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation").

122. *Id.* at 22.

123. *E.g.*, Sundby, *A Return to Fourth Amendment Basics*, *supra* note 8, at 401–03.

124. *See* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 790–92 (1998).

125. *See* Sundby, *A Return to Fourth Amendment Basics*, *supra* note 8, at 392.

126. *Terry*, 392 U.S. at 22 (holding that an investigation of *possibly incriminating behavior* without probable cause is justified in the interest of crime prevention).

127. *Id.* at 24.

128. Barrett, *supra* note 124, at 797.

129. As an illustration that anything lower than probable cause would be meaningless, there is the Court's oft-stated description of "probable cause" from Brinegar v. United States, 338 U.S. 160,

Instead, the Court opinion in *Terry* did not refer to "probable cause" for a frisk, but nonetheless referred to language that, confusingly, sounded a lot like probable cause. The Court held that an officer could frisk for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual" and "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[130] Somewhere between the conferences, the writing of the opinion, and subsequent interpretations of the language in *Terry*, this language has been translated into an articulation of a lower standard of "reasonable suspicion."[131]

While the Court asserted it was deciding nothing about the validity of the stop,[132] it was clear to observers that the Court believed that Mr. Terry had been seized and assumed he could be detained briefly for investigation of crime.[133] It was not until 1975, in *United States v. Brignoni-Ponce*,[134] that the Court explicitly recognized the constitutionality of an investigatory "stop" upon reasonable

176 (1949): "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating [the opposing interests of law enforcement and the citizenry]. . . . Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." As to this unfortunate new standard, Justice Douglas quoted Anthony Amsterdam, who observed, "'Police power exercised without probable cause *is* arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim.'" United States v. Brignoni-Ponce, 422 U.S. 873, 889 (1975) (Douglas, J., concurring) (quoting Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974)).

130. *Terry*, 392 U.S. at 27. The Court then cites three cases, including Brinegar v. United States, 338 U.S. 160 (1949), the case widely cited for describing "probable cause." *Terry*, 392 U.S. at 175–76.

131. In *Terry*'s companion case, *Sibron v. New York*, the Court declined to address the constitutionality of New York's statute allowing for a "stop and frisk" on "reasonable suspicion": "it is impossible to tell whether the standard of 'reasonable suspicion' connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment." 392 U.S. 40, 60 n.20 (1968); *see also* Dudley Jr., *supra* note 3, at 896 (acknowledging that the terms "reasonable suspicion" appear nowhere in the opinion, and instead, the Court cited to *Brinegar*'s language of "probable cause").

132. *Terry*, 392 U.S. at 19 n.16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation.").

133. Justice Harlan's concurrence supplied language that would become the teaching of *Terry*, namely the right to "stop and frisk" on the basis of reasonable articulable suspicion. In order to "fill in a few gaps" in the Court's decision, Justice Harlan "would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime. Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence." *Id.* at 31, 33 (Harlan, J., concurring).

134. 422 U.S. at 873.

suspicion.[135] Over the years, the Court has recognized "the elusive[ness of the] concept of what cause is sufficient to authorize police to stop a person" such that "[t]erms likes 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise."[136]

The lone dissenter in *Terry* was, as in *Pierson*, Justice Douglas.[137] He mourned the abandonment of a requirement of probable cause before a search or a seizure.[138] By 1972, he was joined by Justice Marshall, who wished he had heeded Justice Douglas' warning in *Terry* of the "'powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees.'"[139]

The second, and in some ways more significant, departure from previous Fourth Amendment jurisprudence in *Terry* was the employment of the reasonableness balancing test to justify an exception to the warrant requirement, as well as an exception to probable cause.[140] The Court shifted away from the Warrants Clause and "'balanc[ed] the need to search (or seize) against the invasion which the search (or seizure) entails.'"[141] Under this test, the Court found that an officer's interest in protecting himself when he is investigating a crime outweighed the brief intrusion entailed in a frisk for weapons.[142] *Terry*'s use of this test to sidestep the Warrants Clause and its requirement of probable cause was a blueprint for the future dilution of Fourth Amendment protections. As the next Part outlines, the move from warrants to reasonableness balancing overwhelmingly favored the interests of law enforcement.[143]

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135. *Id.* at 881.

136. United States v. Cortez, 449 U.S. 411, 417 (1981); *see also* Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions. . . .").

137. *Terry*, 392 U.S. at 35 (Douglas, J., dissenting); *Pierson*, 386 U.S. at 558 (Douglas, J., dissenting).

138. *Terry*, 392 U.S. at 35–38.

139. Adams v. Williams, 407 U.S. 143, 161 (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 39 (Douglas, J., dissenting)).

140. 392 U.S. at 20–21.

141. *Id.* at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967)); Dudley Jr., *supra* note 3, at 894 (noting that Justice Brennan suggested the doctrinal solution of separating the two clauses of the Fourth Amendment, freeing "reasonableness" from "probable cause").

142. *Terry*, 392 U.S. at 27.

143. *See* Steiker, *First Principles*, *supra* note 1, at 854 (arguing that the warrant requirement is "the triumph of rules over standards in Fourth Amendment adjudication. Police officers constrained by a warrant requirement are not invited to make ad hoc decisions about whether a search or a seizure is reasonable").

B. *Terry*'s Progeny

Stretching *Terry* beyond its original bounds, later Court opinions expanded upon *Terry*'s doctrinal departures. *Terry* spawned two kinds of progeny. First, there were the direct descendants of *Terry*, further interpreting and diluting "reasonable suspicion" for a "stop" or "frisk," securing its position as a virtually meaningless standard.[144] Second, subsequent opinions used the reasonableness balancing to justify a host of other kinds of warrantless searches and seizures, securing the dominance of reasonableness over warrants.[145]

As to the former, two examples illustrate the outer bounds of "reasonable suspicion." First, in *Illinois v. Wardlow*,[146] the Court adopted a view of "reasonable suspicion" that made the old vagrancy statutes, struck down as void for vagueness, look like models of precision.[147] The Court held that when an individual in a "high crime area" takes headlong flight upon seeing the police, the police have reasonable suspicion to stop him.[148] No longer would an officer have to "articulate" his reasonable suspicion—it was enough that an individual engaged in ambiguous activity that might mean *something* suspicious. To many observers, this looked like endorsement of seizing an individual on an inarticulable hunch.[149]

In *Navarette v. California*, the Court further demonstrated the elasticity of the low standard for an investigative stop.[150] An anonymous 911 caller gave a description of a car that they claimed had just run their car off the road.[151] The police spotted the suspect car and followed it but did not observe any problematic driving.[152] Nonetheless, a majority of the Court held there was "reasonable suspicion" to stop the car for

144. *See, e.g.*, Navarette v. California, 134 S. Ct. 1683, 1692 (2014); Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

145. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Maryland v. Wilson 519 U.S. 408, 414–15 (1997); Maryland v. Buie, 494 U.S. 325, 337 (1990); New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985); Michigan v. Long, 463 U.S. 1032, 1052–53 (1983); Michigan v. Summers, 452 U.S. 692, 705 (1981); Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977).

146. 528 U.S. at 119.

147. *Id.* at 123; *see also* Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149 (2011) (discussing these overbroad, unconstitutional vagrancy statutes).

148. *Wardlow*, 528 U.S. at 124–25.

149. *See id.* at 131–36 (Stevens, J., concurring in part and dissenting in part) (cataloguing the many innocent reasons a person may flee the police).

150. 134 S. Ct. 1683, 1687–92 (2014).

151. *Id.* at 1686.

152. *Id.* at 1687.

drunken driving.[153] The opinion drew a blistering dissent from Justice Scalia, who wrote,

> The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness.[154]

As to the second trend—importation of the "reasonableness" balancing to justify many forms of warrantless police intrusions beyond the "stop and frisk"—the cases are numerous.[155] Some of the opinions used balancing to import *Terry*'s "reasonable suspicion" standard to new situations.[156] For example, *Maryland v. Buie* held that police can engage in a protective sweep of a home on reasonable suspicion that dangerous persons may be lurking.[157] *Michigan v. Long* held that police can search the passenger compartment of a car for weapons on reasonable suspicion the occupants may gain a weapon from within.[158] And after *New Jersey v. T.L.O.*, public school officials can search a student's person and belongings upon reasonable suspicion that the student violated a school rule or broke the law.[159]

Other cases used the reasonableness balancing to authorize police activity upon no suspicion at all.[160] Thus, *Pennsylvania v. Mimms* and *Maryland v. Wilson* authorize police to order drivers and passengers to step out of a car during any traffic stop.[161] *Michigan v. Summers* held that police can detain occupants of the premises where a search warrant is being executed.[162] In *Atwater v. City of Lago Vista*, the balancing test led the Court to rule that it was reasonable for police to do a full custodial

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153. *Id.* at 1688–89.

154. *Id.* at 1697 (Scalia, J., dissenting); *see also id.* ("Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference.").

155. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Maryland v. Wilson 519 U.S. 408, 414–15 (1997); Maryland v. Buie, 494 U.S. 325, 334 (1990); New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985); Michigan v. Long, 463 U.S. 1032, 1049–50 (1983); Michigan v. Summers, 452 U.S. 692, 703–05 (1981); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

156. *See Buie*, 494 U.S. at 334; *T.L.O.*, 469 U.S. at 341–42; *Long*, 463 U.S. at 1049–50.

157. 494 U.S. at 337.

158. 463 U.S. at 1049–50.

159. 469 U.S. at 341–42.

160. *See Atwater*, 532 U.S. at 354; *Wilson*, 519 U.S. at 414–15; *Summers*, 452 U.S. at 702–05; *Mimms*, 434 U.S. at 111.

161. *Wilson*, 519 U.S. at 414–15; *Mimms*, 434 U.S. at 111.

162. 452 U.S. at 703–05.

arrest for a minor traffic offense, such as a seatbelt violation.[163] The Court also condoned a host of suspicion-less special needs or administrative needs searches and seizures under the balancing test.[164]

Thus, Chief Justice Warren's "narrow" holding in *Terry* spurred the shift in Fourth Amendment doctrine from the primacy of the Warrants Clause to the primacy of the Reasonableness Clause.[165] We are solidly in the age of reasonableness. What happens when *Terry*'s legacy meets *Pierson*'s legacy?

IV. PIERSON*,* TERRY*, AND THE IMMUNITY OF THE UNREASONABLE OFFICER*

Today, the progeny of *Pierson v. Ray* and *Terry v. Ohio* meet in Section 1983 litigation to produce a distorted form of absolute immunity from suit for a police officer. According to *Harlow v. Fitzgerald*, qualified immunity protects an officer who acted as a fictional reasonable officer would, even if the officer violated the Fourth Amendment, and even if he did so intentionally.[166] This has created a bizarre "double standard" of immunity.

There are potentially two stages to a court's analysis of qualified immunity. First, although not a required step, a court can determine whether there in fact was a violation of the Fourth Amendment; and second, even if there was a violation, a court can find that a reasonable officer could have believed he acted constitutionally. The *Terry* progeny tell us that the first question itself turns on reasonableness.[167] Under such an impressionistic standard, the Fourth Amendment is not easily violated. For example, probable cause is simply a matter of reasonable

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163. 532 U.S. at 354.

164. *See, e.g.*, Illinois v. Lidster, 540 U.S. 419, 424 (2004) (upholding suspicion-less highway information checkpoint); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding suspicion-less DUI checkpoint); United States v. Martinez-Fuerte, 428 U.S. 543, 562–64 (1976) (upholding suspicion-less border checkpoint). *See generally* Carol S. Steiker, Terry *Unbound*, 82 MISS. L.J. 329 (2013) (cataloguing Chief Justice Rehnquist's expansion of *Terry* beyond its narrow application) [hereinafter Steiker, Terry *Unbound*].

165. *See Adams v. Williams*, 407 U.S. at 162 (Marshall, J., dissenting)

> It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the 'hydraulic pressures' of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. . . . Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.

Id.

166. 457 U.S. at 817–19.

167. *Id.* at 818.

belief. Reasonable minds can always differ on this murky, fact-intensive evaluation.

Nonetheless, assume a court finds that an officer did not have reason to believe that the person was committing a crime or that evidence would be found. Therefore, the officer did not act reasonably. The next step of the qualified immunity analysis is then incomprehensible and rudderless, i.e., could an officer nonetheless be reasonable in this unreasonable belief?

In *Anderson v. Creighton*, the Supreme Court addressed the interaction of qualified immunity's reasonableness standard with an underlying constitutional right that is also defined by a reasonableness standard.[168] At issue in *Anderson* was whether, assuming the FBI agent violated the Fourth Amendment when he engaged in a warrantless search of a home, he was nonetheless entitled to qualified immunity.[169] The underlying Fourth Amendment issue was whether the officer had probable cause and an exigency, i.e., whether the officer's entry into the home was reasonable; and the qualified immunity issue was, even if he violated the Constitution, whether that was a reasonable mistake given the state of the law.[170] The plaintiffs understandably and cogently argued that to allow *Harlow*'s reasonableness test to apply in such a case would give the "reasonably unreasonable" officer immunity.[171] The Court gave short shrift to this argument, not addressing it directly.[172]

In dissent, Justice Stevens argued against the establishment of this "double standard of reasonableness,"[173] which effectively gave police officers "two layers of insulation from liability."[174] The bottom layer was the probable cause standard, which was "itself a form of immunity."[175] The top layer could establish that, even if an officer was found not to have had probable cause (or "reason to believe"), an officer could nonetheless be found to have reasonably believed he had a reasonable belief. Stevens argued that qualified immunity according to the majority

168. 483 U.S. 635, 648 (1987). Although this was an action against a federal official and not a Section 1983 claim, the Court has applied the same doctrine to such claims. *See, e.g.*, Bivens v. Six Known Unnamed Fed. Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971).
169. 483 U.S. at 640–41.
170. *Id.*
171. *Id.* at 643 (describing homeowners' arguments).
172. *Id.* at 643–44 (deflecting this argument).
173. *Id.* at 659 (Stevens, J., dissenting).
174. *Id.*
175. *Id.* at 660.

"counts the law enforcement interest twice and the individual's privacy interest only once."[176]

Professor Alan Chen has ably dissected the problematic issues of constitutional dimension when, as is the case with qualified immunity in Fourth Amendment claims, there is a "standard stacked on top of another standard."[177] He explains that the underlying substantive constitutional law is obscured by the immunity analysis.[178] The immunity balancing is *not* the same balancing that would lead to a finding that the underlying right was violated:

> The substantive justice theoretically achieved by the applicable balancing test is not served because, under the constitutional balancing test, the plaintiff's injury should have outweighed the government's interests. But once immunity comes into play, the pendulum swings back the other way. The qualified immunity standard may not, therefore, promote substantive equality in actual outcomes, since the individual factors used to determine the applicability of immunity are not the same factors relevant to constitutional balancing.[179]

Hence, in *Anderson*, the Court did not engage in the reasonableness balancing test to determine the existence of probable cause and exigent circumstances, but rather the opinion "focuses on broad policy arguments concerning the imposition of civil rights litigation on public officials."[180] The analysis contributes nothing to the law of search and seizure.[181]

The "double standard," to the extent it is comprehensible at all, will almost always inure to the benefit of law enforcement. If "clearly established law" in Fourth Amendment cases cannot be determined at a high level of generality because each case is intensely fact-dependent,

176. *Id.* at 664. Judge Posner has echoed this sentiment, stating, "[t]o go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple." Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985). Similarly, Judge Newman has observed, "[s]urely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause." Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 460 (1978).

177. Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 267 (1995).

178. *Id.*

179. *Id.* at 311, 315 ("The doctrine obscures the underlying constitutional directive by substituting in its place a more abstract form of balancing.").

180. *Id.* at 318.

181. *Id.*

then it will be reasonable for an officer to make a mistake as to whether, for example, there was "reasonable suspicion" for a stop or probable cause for an automobile search.

There are many lower court cases illustrating this double standard. One here will suffice to demonstrate the constitutional and sub-constitutional problems with the "reasonably unreasonable" officer analysis. In *Arrington ex rel. Arrington v. City of Davenport*,[182] a police officer initially detained Zachariah Arrington for walking through someone's yard, but then continued to detain him solely because his last name was the same as that of a suspect in a bank robbery that occurred in a nearby town earlier that day.[183] Arrington was held for ten-to-fifteen minutes before the officer received information excluding him and he was released.[184] Arrington sued the police, merging the underlying law on "reasonable suspicion" with the qualified immunity standard.[185]

First, as to whether there was an unlawful *Terry* stop, the court emphasized Supreme Court opinions describing "reasonable suspicion" as a low bar.[186] It easily concluded, "[t]hough the question is a close one, the Court is inclined to believe as a matter of law on this record that [the officer] had the minimal justification necessary to continue the stop until he received further information about the suspect."[187]

Then, assuming the plaintiffs could nonetheless show a Fourth Amendment violation, the *Arrington* court addressed the issue of qualified immunity. Here, it said that the state of the law on "reasonable suspicion" had no "clearly established" rules or guidelines: "[t]he case law . . . is clear in principle but has not developed in a way which provides much notice to police officers of what is in or out of bounds except in the clear case."[188] Further making the point that there is nothing about "reasonable suspicion" to hang one's hat on, the court expounded:

> "Reasonable suspicion" has been described by the Supreme Court as a "somewhat abstract" concept, not "finely tuned," "elusive," and not subject to a "neat set of rules." The analysis is highly fact-specific and context-driven, and recognizes officers often must act immediately. It is sometimes difficult for an officer to tell how legal doctrine

182. 240 F. Supp. 2d 984, 984 (S.D. Iowa 2003).
183. *Id.* at 986–87.
184. *Id.* at 987.
185. *Id.* at 985–86, 990.
186. *Id.* at 989.
187. *Id.* at 990.
188. *Id.*

> applies to a factual situation and where that is the case a reasonable mistake entitles the officer to immunity from suit.[189]

Without further ado, the court found that there was no clearly established law that would have put an officer on notice that the detention was unlawful.[190]

It is easy to see how, for this court and likely for most courts, there will almost never be clearly established law on "reasonable suspicion." Police are doubly insulated from liability for acting unreasonably. What started with the Warren Court in *Pierson* as a limited defense to an unconstitutional arrest has become a virtual blank check on unconstitutional searches and seizures.

V. CONCLUSION

If you follow the Mississippi River to its source, you find Lake Itasca, a small glacial lake in Clearwater County, Minnesota.[191] The mighty and destructive river has deceptively serene and tidy beginnings. Likewise, this Article followed the thread of current Supreme Court doctrine on police violations of the Fourth Amendment back to its unassuming origins. The overly deferential doctrine's sources are not found in the notoriously conservative Courts of Chief Justice Burger or Chief Justice Rehnquist.[192] Rather, Chief Justice Earl Warren penned the two opinions that spawned the doctrine.[193]

In 1967, in *Pierson v. Ray*, and in 1968, in *Terry v. Ohio*, the Warren Court, over the lone dissent of Justice Douglas, cleared the pathway for disavowal of Fourth Amendment protection. With establishment of qualified immunity for police officers in civil rights lawsuits and abandonment of the supremacy of the Warrants Clause of the Fourth Amendment, the end result today is "nonsense on stilts."[194] The doctrines merged together mean police officers are insulated from

189. *Id.* (citations omitted).
190. *Id.*
191. John Misachi, *Where Is the Source of the Mississippi River?*, WORLDATLAS (Dec. 8, 2017), https://www.worldatlas.com/articles/where-is-the-source-of-the-mississippi-river.html.
192. Steiker, Terry *Unbound*, *supra* note 164, at 332–33.
193. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (applying a balancing test to approve a search without a warrant or probable cause); Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding for the first time that police officers may be immune from liability in civil rights violations through common law defense of good faith and probable cause).
194. This fitting phrase has been attributed to Jeremy Bentham. *See* Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on the Tempting of America*, 13 AVE MARIA L. REV. 47, 66 n.78 (2015) (citing Ross Harrison, *Jeremy Bentham*, *in* TED HONDERICH THE OXFORD COMPANION TO PHILOSOPHY, 85, 85–88 (1995)).

liability for Fourth Amendment violations based on a nonsensical standard of "reasonable unreasonableness." Even if the Warren Court had no intention of opening this door, the Burger, Rehnquist, and Roberts Courts have nonetheless walked right through it and knocked it off its hinges.