

# THE SPIRIT OF 1968: TOWARD ABOLISHING *TERRY* DOCTRINE

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## INTRODUCTION

As I understand it, the mission of the Teaching From the Left conference is to “think outside the box.” The box here is the common sense of an increasingly reactionary jurisprudential mainstream. To get out of that box, we need to move beyond liberal scholarship.

Change is necessary because liberal scholars have been tethered to what *is* when imagining what *could be*.<sup>1</sup> For instance, the Fourth Amendment of the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>2</sup>

Even liberal scholars have assumed that the U.S. Supreme Court’s current interpretation of that language—that it only requires reasonable police action and that probable cause is merely one way of clearly passing that threshold—will remain the rule. Conceding that point forecloses the possibility of a truly “Left” interpretation of the Fourth Amendment.

If this conference is not merely about tinkering with what is, it is also about imagining a whole different world. There is indeed a better world that might have been: the world of early 1968. That year began with the voices of Martin Luther King, Jr., and Robert Kennedy calling for radical, concrete change. In so

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\* © 2007. Associate Professor, Suffolk University Law School. J.D., Duke University; B.A., Amherst College. I dedicate this essay to my son, Thelonious Abraham Cooper. May he live in 1968. I thank my research assistant, Audra Medeiros, and legal assistant, Tina Lewis. I also thank Anthony Farley and Maria Grahn-Farley for encouraging me to continue thinking Left. Special thanks to Marcia M. Henry and the staff of the *New York University Review of Law & Social Change* for editorial excellence. I welcome comments at [fcooper@suffolk.edu](mailto:fcooper@suffolk.edu).

1. Anthony Amsterdam and Jerome Bruner describe culture as the dialectic between what is and what might be. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 219 (2000). *See also id.* at 228 (identifying racial dialectic of American culture); *id.* at 230 (noting due process dialectic of criminal procedure law). Elsewhere, I describe my general conception of the relationship between law and culture. *See* Frank Rudy Cooper, *The “Seesaw Effect” From Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 139, 150–51 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) (reviewing Law & Cultural Studies scholarship).

2. U.S. CONST. amend. IV.

many ways, however, 1968 is the year that revolutionary thought was killed off. The FBI assassinated King for linking black civil rights with peace and economic justice.<sup>3</sup> Perhaps more importantly, the FBI killed Kennedy for raising the prospect that a more-than-liberal politician would control the state.<sup>4</sup> Most important of all, and surprisingly rarely mentioned here in the United States, the French government squelched a true revolution that had linked unions, peace activists, and other Leftists.<sup>5</sup>

While 1968 was the death of the Left, it also created ashes from which a new revolution in thought might emerge. For example, we are all steeped in the post-structuralist ideas of Althusser,<sup>6</sup> Foucault,<sup>7</sup> and Derrida,<sup>8</sup> each of whom emerges from the post-1968 French intelligentsia. More mundanely, in its 1968 *Terry v. Ohio* opinion<sup>9</sup>, the U.S. Supreme Court almost made probable cause the sine qua non of the Fourth Amendment. Specifically, in early 1968, the *Terry* Court seriously contemplated a requirement that police “stops”<sup>10</sup> and “frisks”<sup>11</sup> of citizens be based upon a showing of probable cause that the suspect had committed a crime.<sup>12</sup> By mid-1968, however, the final *Terry* decision allowed stops and frisks upon a showing of mere reasonable suspicion that a crime was afoot. If we could return to the spirit of early 1968, we could regenerate a Left Fourth Amendment from the ground the Court has allowed to lie fallow.

3. This is my opinion. See generally MARK LANE & DICK GREGORY, *MURDER IN MEMPHIS: THE FBI AND THE ASSASSINATION OF MARTIN LUTHER KING* (Thunder’s Mouth Press 1993) (1977) (reviewing the circumstances of King’s assassination); WILLIAM F. PEPPER, *ORDERS TO KILL: THE TRUTH BEHIND THE MURDER OF MARTIN LUTHER KING* (Warner Books 1998) (1995) (same).

4. This is my opinion. See generally Lisa Pease, *The RFK Plot Part I: The Grand Illusion*, reprinted in JOE BROWN & ZACHARY SKLAR, *THE ASSASSINATIONS: PROBE MAGAZINE ON JFK, MLK, RFK, AND MALCOLM X* 536, 536–70 (James DiEugenio & Lisa Pease eds., Feral House 2003) (1998) (describing elements of the Robert Kennedy assassination indicating a conspiracy); Lisa Pease, *The RFK Plot Part II: Rubik’s Cube*, reprinted in BROWN & SKLAR, *supra*, at 571, 571–610 (1998) (analyzing possible participants in the assassination plot).

5. See generally ANDREW FEENBERG & JIM FREEDMAN, *WHEN POETRY RULED THE STREETS: THE FRENCH MAY EVENTS OF 1968* (2001) (describing student and worker protests in France).

6. See generally LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 170–86 (Ben Brewster trans., 1971) (defining interpellation).

7. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979) (1975) (describing contemporary forms of power).

8. See generally JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1998) (1976) (considering and expanding upon post-structuralist linguistic theory).

9. 392 U.S. 1 (1968).

10. A “stop” occurs when an officer halts someone for purposes of questioning and the encounter falls between a mere consensual encounter and an arrest. See Cooper, *supra* note 1, at 141 (citing *Terry*, 392 U.S. at 22).

11. A “frisk” occurs when an officer’s patting down of the outer surface of a suspect’s clothing in search of weapons falls between a mere consensual encounter and a “full blown” search. See Cooper, *supra* note 1, at 141–42 (citing *Terry*, 392 U.S. at 24–25).

12. See John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, in *CRIMINAL PROCEDURE STORIES* 295, 304 (Carol S. Steiker ed., 2006) (describing opinion’s drafting).

In this essay, I summarize how the *Terry* opinion's refusal to apply the probable cause standard made Fourth Amendment doctrine more conservative. I then suggest that the result has gone largely unchallenged because whites have been willing to trade decreases in the civil liberties of blacks for perceived increases in crime control. I conclude by calling on us to consider returning to the spirit of the beginning of 1968 by abolishing *Terry* doctrine.

## I.

## THE ASSASSINATION OF THE PROBABLE CAUSE STANDARD

When I say that 1968 almost saw the Supreme Court make probable cause the sine qua non of the Fourth Amendment, I refer to the *Terry v. Ohio* decision.<sup>13</sup> Therein, the Court considers a case where a white police officer observed two black men take turns peering into a store window, consult with a white man, and then peer into the store window again.<sup>14</sup> The officer grabbed the men and patted down the outsides of their clothing to determine whether they had weapons.<sup>15</sup> The issue was whether a weapons charge should be dismissed on grounds that the stops and frisks of the suspects violated the Fourth Amendment.<sup>16</sup> The *Terry* Court held that the police may stop and frisk people upon *reasonable suspicion* that a crime is afoot rather than *probable cause* that a crime is afoot.<sup>17</sup> Prior to the *Terry* decision, probable cause—a greater quantum of evidence than reasonable suspicion<sup>18</sup>—was the more traditional standard for establishing the Fourth Amendment reasonableness of police actions.<sup>19</sup>

The *Terry* Court borrowed the reasonable suspicion standard from *Camara v. Municipal Court*,<sup>20</sup> a case decided one year earlier. That decision determined whether a municipal inspector may search an apartment for municipal code violations without first procuring a warrant based upon probable cause.<sup>21</sup> The traditional probable cause test would have required the inspector to establish

13. 392 U.S. 1 (1968).

14. *Id.* at 6. Anthony Thompson discusses the way the *Terry* Court hid the fact that the races of the parties affected the officer's suspiciousness. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 964–68 (1999) (critiquing Court's refusal to mention parties' races). David Sklansky links the Court's refusal to explicitly acknowledge the effect of race while implicitly remedying racial discrimination in its criminal procedure jurisprudence to the predominance of pluralist political theory. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1754 (2005) ("Pluralism may well have played a role, though, in keeping [racial equality] 'domesticated' and almost entirely subtextual.").

15. *Terry*, 392 U.S. at 7.

16. *Id.* at 9 (noting the Fourth Amendment standard of reasonableness).

17. *Id.* at 21–22.

18. See *Alabama v. White*, 496 U.S. 325, 330 (1990) (declaring that reasonable suspicion requires less and less-reliable evidence).

19. See *Terry*, 392 U.S. at 11 (referring to Petitioner's argument that "the traditional jurisprudence of the Fourth Amendment" requires probable cause).

20. 387 U.S. 523 (1967); see *Terry*, 392 U.S. at 20–21 (articulating the *Camara* standard).

21. See *Camara*, 387 U.S. at 526–27.

suspicion as to the particular dwelling being searched. The *Camara* Court decided municipal inspections are a special case requiring “balancing” the government’s general interest in inspecting the houses in an area against the individual’s private interest in her particular building.<sup>22</sup> Accordingly, it held that such inspections are constitutionally reasonable whenever the balancing test weighs in the government’s favor.<sup>23</sup> But the *Camara* decision explicitly states that the probable cause test is the standard for criminal investigations.<sup>24</sup>

The February 1968 first draft of the *Terry* opinion followed the *Camara* decision’s interpretation of probable cause. Chief Justice Warren originally intended to write lengthy *Miranda*-type<sup>25</sup> instructions for police officers wishing to conduct stops and frisks.<sup>26</sup> Perhaps because of widespread popular criticism of the Warren Court in general and the *Miranda* opinion in particular,<sup>27</sup> the other Justices had no stomach for such an approach.<sup>28</sup> Warren’s first draft of the *Terry* opinion thus straightforwardly holds that probable cause is the standard for both stops and frisks.<sup>29</sup> The first draft concludes that the *Terry* facts meet that standard.<sup>30</sup>

When Justice Brennan got his hands on the opinion, the holding shifted dramatically.<sup>31</sup> Brennan’s redraft of the *Terry* opinion, which is essentially the final version, implicitly rejects the *Camara* Court’s bar against applying the balancing test to criminal investigations. Instead, the final version of the *Terry* opinion holds that probable cause is actually irrelevant to activity governed only by the Fourth Amendment’s Reasonableness Clause.<sup>32</sup> Without mentioning the prior stricture against applying the balancing test to criminal investigations, the final *Terry* opinion cites the *Camara* decision when describing the test for stops and frisks of suspects.<sup>33</sup> Stops and frisks need only be based on reasonable suspicion, not probable cause.<sup>34</sup>

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22. *Id.* at 536–37.

23. *See id.* at 535.

24. *Id.* (“For example, in a criminal investigation . . . a search for [stolen] goods, even with a warrant, is ‘reasonable’ only when there is ‘probable cause’ to believe that they will be uncovered in a particular dwelling”); *id.* at 538 (rejecting argument that “vary[ing] the probable cause test from the standard applied in criminal cases would . . . lessen the overall protections of the Fourth Amendment”).

25. *See Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (invalidating confession evidence that did not protect Fifth and Sixth Amendment rights to the degree of specified warnings).

26. *See Barrett, supra* note 12, at 304 (describing opinion’s drafting).

27. *See* MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* 3 (2005) (describing conservatives’ extreme dislike for the Warren Court).

28. *Barrett, supra* note 12, at 304.

29. *Id.*

30. *Id.* at 305.

31. *See id.* (describing Brennan’s change of heart about probable cause).

32. *See id.* (summarizing Brennan’s rewrite).

33. *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968).

34. *See id.* at 20 (distinguishing Fourth Amendment clauses governing different types of

Reconsider the text of the Fourth Amendment in light of the *Terry* opinion's evisceration of the probable cause standard. One might easily think, as Tracey Maclin does, that the clause containing the probable cause standard explains the clause requiring reasonableness.<sup>35</sup> Until the *Camara* decision, the Court generally interpreted the Fourth Amendment as requiring probable cause.<sup>36</sup> So why did the *Terry* Court abandon probable cause? Some, such as Akhil Reed Amar, argue that the logic of the Fourth Amendment required the determination that probable cause is not required.<sup>37</sup> Looking with a more jaundiced eye—one made that way by our nation's history of unconstitutionally searching and seizing Leftists and racial minorities<sup>38</sup>—I suspect the *Terry* decision expresses a prioritization of “law and order” over civil liberties, particularly the civil liberties of racial minorities.<sup>39</sup> Chief Justice Warren circulated the final *Terry* draft opinion for approval of the other Justices in May 1968, just after the country had been engulfed in extensive urban riots responding to the assassination of Martin Luther King, Jr.<sup>40</sup> Justice Douglas's dissent suggests that concern about such “modern forms of lawlessness”<sup>41</sup> may have led the Court to abandon its prior interpretation of what the Fourth Amendment requires of criminal investigations.

## II.

### THE CONTRACT AGAINST BLACK CIVIL LIBERTIES

Why has the assassination of the probable cause standard gone largely unchallenged? One reason is the common assertion that conditions must be “right” before we try to combat the erosion of civil liberties. The problem is that there will never be a “good time” for the expansion of Fourth Amendment rights. Yale Kamisar identifies the problem:

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police conduct).

35. See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 20 (1994) (declaring that “the Warrant Clause defines and interprets the Reasonableness Clause”).

36. Cf. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967) (citing no precedent for the proposition that “reasonableness is still the ultimate standard”).

37. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994) (contending “[t]he Warrant Clause says only when warrants may not issue, not when they may, or must”).

38. See generally Natsu Taylor Saito, *For “Our” Security: Who is an “American” and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 31–40 (2003) (detailing CIA and FBI abuses of authority against Leftist and racial minority groups).

39. See FLAMM, *supra* note 27, at 7 (arguing that economic stagnation made working-class whites “more receptive to messages that blamed others—especially minorities . . .”). Another way of thinking about the *Terry* opinion is that it responds to a “masculinity crisis.” See Frank Rudy Cooper, *Policing Masculinities* (Mar. 26, 2007) (unpublished manuscript, on file with author) (citing *Terry v. Ohio*, 392 U.S. 1, 14–15 n.11 (1968)) (theorizing that the *Terry* Court refused to deter officers from using stops and frisks “to maintain the power image of the beat officer” because it wanted to allow officers to be manly in interactions with citizens).

40. See Barrett, *supra* note 12, at 306 (describing timing of circulation).

41. *Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

According to the media, the claims of law enforcement officials and the statements of politicians, we have *always* been experiencing a “crime crisis”—*at no time* in our recent, or not-so-recent past, has there *been a time* when “society” *could afford* a strengthening or expansion of the rights of the accused.<sup>42</sup>

If we wait for a time when the mainstream is ready to prioritize rights, the spirit of 1968 will never return. An obvious example of this delay is the current argument that civil liberties are inappropriate in a “post-9/11 world.”<sup>43</sup> As Green Day sings, “Wake me up when September ends.”<sup>44</sup> Our role as Left theorists is to declare an end to the latest “crisis” and demand an expansion of rights rather than a mere return to the already truncated rights that existed on September 10, 2001.

A second reason that politically conservative *Terry* doctrine has gone largely unchallenged is that the mainstream of the public has made an implicit contract with those seeking law and order: the police are granted nearly unfettered discretion so long as they do not use those powers on “good” citizens. Donald Dripps reveals why this contract is formed: “Almost everyone has an interest in controlling crime. Only young men, disproportionately black, are at a significant risk of erroneous prosecution for garden-variety felonies.”<sup>45</sup> We must recognize that this is the linchpin of the denial of rights. People are willing to trade rights for law enforcement protection based on the implicit bargain that excessive law enforcement power will be utilized primarily against the marginalized. As Natsu Taylor Saito argues, measures designed for “our” security have never considered Leftists or racial minorities to be part of the “us.”<sup>46</sup> Likewise, Anthony Amsterdam and Jerome Bruner point out that the way that the U.S. has resolved the conflict between its espousal of egalitarian values and its encouragement of the pursuit of self-interest is by presuming that some people are not part of the “us.”<sup>47</sup>

The resolution of the egalitarianism versus self-interest conflict is played out

42. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 46 (1995).

43. This argument has roots in the 1960s. See FLAMM, *supra* note 27, at 3 (describing conservative argument that “the community’s right to order—to public safety as they saw it—took precedence over the individual’s right to freedom”).

44. GREEN DAY, *Wake Me Up When September Ends*, on BULLET IN A BIBLE (Reprise Records 2005) (lamprooning post-9/11 militarism).

45. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 46 (2001).

46. See generally Saito, *supra* note 38, at 23–24 (connecting current push for PATRIOT Act to past counter-intelligence against Leftists and racial minorities).

47. AMSTERDAM & BRUNER, *supra* note 1, at 262 (“By dividing humanity into ‘Us’ and ‘Others’—the naturally entitled and the naturally unentitled—racism permits Us to believe that We have limitless opportunities and are right to enjoy them without concern that any scarcity of opportunities for Them will encumber Our future . . .”); see also *id.* at 262–63 (discussing the effects of the “Us” and “Them” divide).

on the backs of blacks, especially by means of law enforcement. There was a virtually uninterrupted tradition of excluding blacks from taking a piece of the pie from 1619 to 1964.<sup>48</sup> By 1980, the majority of whites had come to resent having to share the pie with blacks, as reflected in Ronald Reagan's capture of the "white ethnic" vote.<sup>49</sup> Increasingly, the white mainstream has engaged in the psychological process of "splitting": blacks are either fully assimilationist "good blacks" or "bad blacks."<sup>50</sup> The latter are deemed to be the "dregs" of the black community and presumed to be dangerous.<sup>51</sup> It is the presumption of black dangerousness that drives a "culture of control" in which surveillance and preemptive strikes are normalized as methods of dealing with the marginalized.<sup>52</sup> This is a culture wherein the present interpretation of the Fourth Amendment trades black civil liberties for a (false) white sense of protection.<sup>53</sup> A revitalization of the Fourth Amendment will seek to void that bargain.

#### CONCLUSION

If we are to overcome the barriers to the promotion of civil liberties, we must return to the spirit of 1968. Everything must go! That includes *Terry* doctrine as a whole.

*Terry* doctrine is not fixable. Its language of "reasonable" suspicion is inherently ambiguous.<sup>54</sup> It therefore has a tendency to be reduced to its lowest

48. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the "Race Question" in the U.S.*, 13 NEW LEFT REV. 41, 44 (2002) (identifying continuous U.S. use of "instruments for the conjoint extraction of labo[r] and social ostracization of" blacks).

49. See *id.* at 49 ("But while whites begrudgingly accepted 'integration' in principle, in practice they strove to maintain an unbridgeable social and symbolic gulf . . ."); cf. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 136 (2001) (saying of Reagan anti-crime message, "The public knows, without having to be told, that these 'superpredators' and high-rate offenders are young minority males . . .").

50. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 874–86, 888–95, 896–903 (2006) (explicating process, motivations, and effects of splitting black men into Bad and Good groups).

51. AMSTERDAM & BRUNER, *supra* note 1, at 277–78.

52. See, e.g., GARLAND, *supra* note 49, at 136 (revealing Reagan administration's implicit argument that "[t]he only practical and rational response to [young minority male superpredators and high-rate offenders], as soon as they offend if not before, is to have them 'taken out of circulation' for the protection of the public.").

53. Whites' sense of protection is false in that the contemporary approach to crime seeks only to reduce the fear of crime, not crime itself. See *id.* at 122:

When a series of police research studies suggested that some measures might fail to reduce actual crime rates but nevertheless succeed in reducing the reported levels of fear and insecurity, the way was opened for a new policy aim. From the 1980s onward, police departments and government authorities . . . began to develop mission-statements and practices that took the reduction of fear as a distinct, self-standing policy goal.

*Id.* I presume that actually solving street crime would require, *inter alia*, a massive fiscal and psychological investment in public schooling that the mainstream is not willing to make.

54. See Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 885 (2002) ("The very terminology

possible level in order to find a stable standard. Even in its original form, the *Terry* opinion contained the seeds of racial profiling because it lowered the threshold for police interference with citizens and rejected the National Association for the Advancement of Colored People's critique of the reasonable suspicion doctrine's tendency toward harassment of racial minorities.<sup>55</sup> Those seeds have grown into decisions like *Whren v. United States*.<sup>56</sup> There, the Supreme Court refused to consider racial motivations for an arrest on grounds that officers with probable cause have already surpassed what the Fourth Amendment minimally requires.<sup>57</sup>

I began this essay by arguing that liberal scholarship has failed us by accepting the idea that probable cause is merely one way of clearly surpassing what is usually a reasonableness requirement. What I propose, therefore, is the abolishment of the right to make *Terry* stops and frisks based on mere reasonable suspicion. While we cannot "go home" in the sense of returning to a 1968 that does not include the contemporary culture of control that I mentioned earlier, we can return to the probable cause standard. I call for no more, and no less, than a return to the default position that probable cause is required for all seizures and searches, including stops and frisks, and that a lesser standard is an exception.

To some, my call for abolishing *Terry* doctrine as we know it will seem an unrealistic goal. But is that not what the spirit of 1968 is all about? Yes. 1968 was a time when we dared to dream big. I call on us to dream big again.

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of the reasonable suspicion doctrine, therefore, prevents meaningful review of an officer's decision to stop or frisk a suspect.").

55. See Frank Rudy Cooper, *Cultural Context Matters: Terry's "Seesaw Effect"*, 56 OKLA. L. REV. 833, 854–57 (2003) (explaining how the *Terry* decision's rearticulation of the Fourth Amendment ignores the risk of racial profiling); Thompson, *supra* note 14, at 963–78 (demonstrating that the *Terry* opinion led to approval of racial profiling).

56. 517 U.S. 806 (1996).

57. See *id.* at 811–13 (holding officer's subjective intent generally not considered when she objectively has probable cause).