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RATIONAL HUNCHES AND POLICING

BOOK REVIEWS

AN INTRODUCTION TO POLICE HUNCHES

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In the years immediately preceding the September 11, 2001 terrorist attacks, "hunches," and the police officers who dared to act upon them, were regularly abused in the popular press, courts, and legislatures of America. What was a hunch, after all, but a prejudice, a stereotype, a relic of a benighted past laden with intolerance and bigotry? Then planes crashed into the World Trade Center, the Pentagon, and a Pennsylvania field, and Americans promptly hectored law enforcement and foreign intelligence officials for their alleged failures. The criticisms were in some part deserved; but in fairness to the FBI, which bore the brunt of the attacks, much of the responsibility could also be laid on the legal regime, designed by Congress and the courts, in which law enforcement operated.[1] As stories emerged that Americans scattered across the country had inklings that something was afoot but failed to take action, countless commentators expressed indignation at legal rules that were viewed as preventing or discouraging police officers and citizens from acting upon their hunches.[2]

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[1] *See, e.g.*, Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003) (arguing that the contemporary judicial understanding of probable cause frustrated the investigation of the man once called the "20th hijacker," Zacarias Moussaoui); Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493 (2003) (asserting that the Foreign Intelligence Surveillance Act (FISA) has been interpreted to prevent cooperation between foreign intelligence agents and law enforcement officers).

[2] In 1999-2001, a clever FBI Agent in Phoenix, Kenneth Williams, focused his attention on eight Middle Eastern men who were studying aviation in the Phoenix area. Although the direct evidence was sketchy, Williams suspected that the eight men were tied to a radical, Britain-based Islamic group. Williams then relayed his inspired hunch to FBI headquarters: Why not canvass other flight-training schools in the United States for possible terrorist ties? *See* Mitch Frank, *Four Dots American Intelligence Failed to Connect*, TIME, April 26, 2004, at 30. A thousand miles away, in Minneapolis, a flight-training instructor had a bad feeling about a Moroccan student named Zacarias Moussaoui. FBI Agent Colleen Rowley soon shared the flight teacher's misgivings about Moussaoui and requested that FBI headquarters approve a warrant application with the Foreign Intelligence Surveillance Court. Both Williams and Rowley's memos ended up on the desk of FBI Supervisor David Frasca, who ignored Williams' advice and rejected Rowley's proposed warrant application. *See Reasonableness of Probable Cause, supra* note 1 at 963-72. A few weeks later, on the morning of September 11, 2001, a U.S. Airway ticket agent, in Boston's Logan Airport, had a hunch about two men. "I said to myself, 'If this guy doesn't look like an Arab terrorist, then nothing does.'" But the agent recoiled from the very thought that had come, unwanted, to his mind: "Then I gave myself a mental slap, because in this day and age, it's not nice to say things like this." *See* Michael Smerconish, *Screener Pushed Aside Suspicions on 9/11*, CHICAGO SUN TIMES, March 8, 2005, at 5.

Although hunches have made something of a comeback since September 11, 2001, they still generate cognitive dissonance. Consider a recent press release from the Austin, Texas, police department entitled, "Terrorism: What Citizens Can Do." Initially, the police department encourages citizens to take an active part in terrorism prevention by listening to their hunches:

> In all aspects of crime prevention it is important to understand your own survival signals. Often crime prevention professionals refer to your "gut feelings," this in fact is . . . one of the messengers of your intuition. The root meaning of intuition is "to guard, to protect," and can serve as an invaluable tool. Call it what you want—that nagging feeling, persistent thoughts, hunch or suspicion. It is important not to ignore your survival signals.[3]

As for what should alert those "survival signals," the press release hovers at a level of inoffensive and unintelligible abstraction: "Be aware of conspicuous or unusual behavior . . . . Are you suspicious about your tenants?"[4] What does this concretely mean? Especially given the widely reported fact that many of the 9/11 terrorists were Arab men, renting apartments in American cities while studying aviation,[5] one might infer that the press release was condoning sensitivity to racial and ethnic variations in terrorist proclivities. Lest this conclusion be drawn, the press release concludes with a bracing section on "hate crimes," defined capaciously to include "intolerance and bigotry intended to hurt and intimidate someone on the basis of race, ethnicity, national origin, religion, sexual orientation, or disability."[6] The citizens of Austin are first encouraged to take seriously their snap judgments about possible threats, which might arise from racial or ethnic stereotypes, and then reminded about the dangers of rushing too quickly to judgment, especially on the basis of racial or ethnic stereotypes.

This confusion is spun out for two hundred bestselling pages in Malcolm Gladwell's 2005 book *Blink*. On his website, Gladwell touts the book as an exploration of the "two seconds [in which we] jump to a series of conclusions," and posits that "those instant conclusions that we reach are really powerful and really important and, occasionally, really good."[7] Oddly, the genesis of the book was when Gladwell let his hair grow wild and started being treated differently, especially by police, who drew *erroneous* conclusions from his tousled locks.[8] Of one incident he writes, "Something about the first impression created by my hair derailed every

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[3] *See* Austin Police Department, *Terrorism: What the Citizen Can Do*, *available at* http://www.ci.austin.tx.us/police/cl_terrorism.htm (last visited Feb. 21, 2008).

[4] *Id.*

[5] *See* Frank, *supra* note 2, at 30.

[6] Austin Police Department, *supra* note 3.

[7] Malcolm Gladwell, *What is Blink About?*, *available at* http://gladwell.com/blink/index.html (last visited Feb. 21, 2008).

[8] MALCOLM GLADWELL, BLINK 264 (2005).

other consideration in the hunt for the rapist."[9] Gladwell seems bewildered and dismayed that police officers might instinctively react differently to one person in a crew cut and another in dreadlocks. The lesson of Gladwell's numbing barrage of anecdotes is something along the lines of, hunches are good. Except when they are bad. Which is generally when they conform to gender, racial, or other stereotypes. So trust your hunches. Except when you should not.

Of course, it is easy to be a critic, and I have rambled for several paragraphs about hunches without defining them. I have trusted that the reader has a sense of what I mean: We have all had hunches, and sometimes they prove valuable and sometimes they do not. However often hunches have failed us, I suspect that we all still flatter ourselves, as Thomas Hobbes might say, that we are especially talented in this regard.[10]

When in common discourse we use the word "hunch," several somewhat related and somewhat contradictory aspects are involved. First, a "hunch" is formed quickly. The German cognitive psychologist, Gerd Gigerenzer, coined the term "fast and frugal heuristics" to describe the way the human mind operates under real world conditions of "bounded rationality," where information is sparse and time is limited.[11] Such conditions are generally understood to prevent optimal thinking, which reflects the methodical incorporation of all possible variables in a complex algorithm. Gigerenzer's provocative claim is not simply that the "fast and frugal heuristic" is an alternative way of thinking, but that it is often preferable: One can generate better results by stripping out many variables and acting *quickly* and on *less* information.[12]

Gigerenzer offers the following illustration.[13] When a patient with chest pains is rushed into a hospital, doctors need to make judgments about the proper course of action. One model would require them to take dozens of measurements, tabulate the results, and then crunch it all through a "fancy statistical software package." Emergency room doctors in a Chicago hospital perfected an alternative strategy, classifying possible heart attack patients as low-risk or high-risk on the basis of three simple yes-or-no questions (for example, whether the patient was older than 62.5 years). According to Gigerenzer, doctors achieved greater accuracy with the second method, even though it ignores potentially relevant information such as the sex and race of the patient. Furthermore, with respect to the categories

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9 *Id.*

10 *Cf.* THOMAS HOBBES, LEVIATHAN BK. XIII (1881) ("Such is the nature of men that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned, they will hardly believe there be others as wise as themselves.").

11 *See generally* GERD GIGERENZER & PETER M. TODD, SIMPLE HEURISTICS MAKE US SMART (1999).

12 *See id.* at 14.

13 He draws the example from L. BREIMAN & J. H. OLSHEN, CLASSIFICATION AND REGRESSION TREES (1993).

of information deemed relevant, such as age, it relies exclusively on a binary switch (greater or less than 62.5 years), thus ignoring the relevance of gradations. Among other explanations, Gigerenzer suggests that human beings seem to be distracted by an excess of information: They are prone to focus on irrelevancies or overstate the significance of marginally relevant data. The key to success, according to Gigerenzer, is the formulation of "simple heuristics that make us smart."

A second aspect to "hunches" is that they reflect a manner of thinking that may not be easily, or persuasively, conveyed in words. It is generally assumed that a skilled craftsman can respond to a problem almost without conscious thought by drawing upon his vast recollection of previous experience, whereas a beginner has to work slowly through each of the steps of a puzzle. Recent neurological studies of chess players have confirmed when grandmasters and ordinary chess players are presented with a game position and asked to memorize the placement of the pieces, the former group can tap into their capacious memory of games played and simply "recognize" the key elements to the situation, whereas the latter need to expend far greater mental energy to accomplish the task.[14] As the Hungarian scientist Michael Polanyi has noted, "we know more than we can tell,"[15] and precisely as we become more expert at a task, our knowledge become ever more "tacit" or inarticulable; if called upon to explain our actions, we find it difficult to do so, for the knowledge is so deeply hard-wired that it is not easily summoned and articulated. Experts do not repair to first principles and consciously run through a series of logical steps. Rather, Polanyi argues, they rely on their experience and instinct; they have a sense about what seems right and what feels wrong.

Finally, "hunches" are experienced more as an emotion than as an application of reason. They are instinctive responses that are felt to arise from a different part of the brain (or heart) from where we coolly crunch numbers or analyze data. Although we moderns tend to believe that the latter way of thinking is somehow better, political philosophers such as Edmund Burke and James Fitzjames Stephen have insisted on the value of emotional responses. A latter-day exponent of this view is Leon Kass, chair of the Presidential Council of Bioethics, who has argued that, apart from any cost-benefit analysis, we experience feeling of disgust towards certain scientific advances, and that these feelings convey genuine information:

> We are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argu-

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[14] Magnetocephalographic studies of the brains of grandmasters and those of ordinary persons, when playing games against computers, provide hard evidence that the grandmasters really do use a different part of the brain. *Patterns of Focal Bursts in Chess Players*, NATURE, AUGUST 9, 2001, at 603.

[15] *See generally* MICHAEL POLANYI, PERSONAL KNOWLEDGE (1964); MICHAEL POLANYI, TACIT DIMENSION (1966).

> ment, the violation of things that we rightfully hold dear. Repugnance, here as elsewhere, revolts against the excesses of human willfulness, warning us not to transgress against what is unspeakably profound.[16]

On a more prosaic level, each of us has experienced negative feelings toward a person or speaker, and we often assume those feelings are cues that assist us in detecting deception. We have a hunch, based on demeanor evidence—altogether apart from actual content of what the person is saying—that the person is a liar.[17]

In *Blink*, Gladwell offers an anecdote to illustrate "tacit knowledge" and emotional responses triumphing in a battle with articulable and analytical thinking.[18] In 1983, the Getty Museum in California was presented with an opportunity to purchase a marble statue, purportedly dating to the sixth century B.C. The Getty hired a geologist, who spent months conducting various analyses before concluding that the statue was authentic. He even proudly published his findings in *Scientific American*. In the week that the sale was finalized, however, three experts in antiquities viewed the statue and each reacted negatively. Their responses were more emotional than reasoned. They simply said, in various ways, that the statue "didn't look right." The Getty, relying upon the scientists and lawyers who had sifted through the documentary record, went through with the purchase. And the statue was soon revealed as a forgery.

How does the legal system deal with hunches? It depends on whose hunch it is. Judges are inclined to credit their own hunches. However much they may condemn hunches in others, especially police officers, judges have long remarked upon on their intuitive powers—their ability to discern which side has the better argument on the basis of their long experience, their "feel" of a case, or the demeanor of a witness. The legal system is premised, in part, on the idea that the trial judge and jury, who actually see the witness and size him up, enjoy a privileged fact-finding position entitled to substantial deference.

Judges, however, are more skeptical when others claim to act upon the basis of hunches. In this respect, although Gladwell criticizes the Getty Museum's actions with respect to the Greek statue, one must sympathize with its board of directors given the legal regime in which they operate. Imagine that a corporation is given a time-sensitive opportunity to purchase

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[16] Leon Kass, *The Wisdom of Repugnance*, THE ETHICS OF HUMAN CLONING, *quoted in* F.H. Buckley, *Are Emotions Moral?*, THE NEW CRITERION, Jan. 2004, at 28.

[17] Whether we really can, through facial or demeanor evidence, detect deception is hotly debated. The psychologist Paul Ekman is the most distinguished proponent of the view that certain people are capable of detecting deception based on facial cues. *See, e.g.*, Paul Ekman, *A Few Can Catch a Liar*, 10 PSYCHOLOGICAL SCIENCE 263 (1999). For a more skeptical review of the literature on the ability to detect deception from facial cues, see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078-91 (1991).

[18] GLADWELL, *supra* note 8, at 3-8.

a small competitor; the executives sense that the offered price is fair and that the deal will be profitable. Should the board approve the deal? The legal regime of corporate law aspires to ensure that it does not. It encourages the corporation to engage in precisely the kind of systematic and costly due diligence that proved worthless for the Getty Museum.[19] Likewise, should doctors acquire less information, rather than more, when treating a patient? Again, the law penalizes doctors who adopt a "fast and frugal heuristic," while rewarding doctors—in terms of decreased legal exposure—who methodically document reams of marginally relevant or even useless data. All this said, courts recognize that corporate executives and doctors should be afforded a substantial scope for their intuitive expertise, and have crafted various doctrines that accord a fair degree of scope for their hunches.[20]

What about police officers? Surely, one might think, police officers, like corporate executives, doctors, and even judges, get better at what they do with time; part of what we mean by "get better" is to develop a sense of what is right without recourse to first principles. Among themselves and in informal discussions with others, police officers insist that their hunches about criminals are often right and that their "sixth sense" proves invaluable in the field. Nevertheless, when police officers testify during a suppression hearing, a curious thing happens: they almost never use the word "hunch" or any of its variants ("sixth sense," "gut instinct," etc.). The entire language of intuitive thinking is excised from their vocabulary, it seems, the moment they assume their place on the witness stand. They seek to curry favor with judges by speaking in an approved discourse, which emphasizes "objective" criteria certified as relevant and acceptable in past cases. Police officers can hardly be faulted for crafting their testimony in this manner because the judicial system is unrelentingly hostile to their hunches.

Imagine that it is closing time at a bar known to attract some "rough" customers. A police car arrives at the scene and the officers see a man run behind the bar. The officers decide to investigate and they see three men milling about, including the one who fled moments before. One of the officers feels something is wrong with the scene. In an instant, he realizes that the man is holding a beer bottle in his left hand, which is unusual given the

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[19] In Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), for example, the court held that the board of directors had violated its duty of care in arranging for the sale of the company, despite the fact that the board had secured a 45% premium on the current market price, because it had failed to do what the court deemed adequate due diligence (i.e., squander millions in investment banker and legal fees). *See id.* at 895 (McNeilly, J., dissenting) ("These men [on the board of directors] knew Trans Union like the back of their hands and were more than well qualified to make on the spot informed business judgments concerning the affairs of Trans Union including a 100% sale of the corporation.").

[20] For example, the business judgment rule largely insulates boards of directors from judicial scrutiny and courts regularly state that doctors must be able to act based on unwritten guidelines, in accordance with their feel of a patient.

fact that most people are right-handed. The officer testifies about the suspect:

> [H]is whole attitude, although he was calm, he seemed a little bit almost cocky. But he looked at me, we made eye contact, but then he looked away and acted as though I was not there and tried to walk on by. And that caught my attention.[21]

Does the officer have the authority to stop and frisk him?

Such were the facts of *United States v. Michelletti*,[22] and the U.S. Court of Appeals for the Fifth Circuit, sitting *en banc*, split almost exactly down the middle. At a suppression hearing, Officer George Perry did his best to manufacture "objective" justifications for the stop and frisk (the bar, the hour, the beer bottle in the left hand, the direction in which the suspect was walking) but half the judges spotted the case for what it was: a police officer had a hunch that a man had a gun. For all we know, Perry is the most exceptional police officer in Houston and his hunches have proven flawless. (He was right this time.) In the eyes of the judicial system, however, the evidence provided by the officer in the suppression hearing must fall under certain headings—"objective," "particularized," "articulable." Ever since the 1968 Supreme Court decision in *Terry v. Ohio*,[23] police officers have learned the importance of fashioning their testimony in a way that satisfies the judicial insistence upon "reasonable articulable suspicion." At bottom, this system rests on our unwillingness to trust police officers to act upon their hunches because, if we did, they would have boundless discretion: they would always be able to say, "I had a hunch." But there are grounds for the suspicion that the current regime is, in point of fact, little more than what lawyers are apt to call a "pleading requirement": Police regularly stop people on little more than a hunch, but simply shape what they say, months later, when they appear in court . Does *Terry* and the case law it has spawned meaningfully restrict an officer's power to stop and frisk people? And how much, really, do we want to cabin the officer's discretion and thereby, limit his or her field of action? How deferential can and should the judicial system be to police hunches?

Section I of this volume provides a sympathetic account of police hunches. The first article, by Los Angeles police officer Dan Horan, describes the elaborate ballet that a criminal and a police officer play as they spot one another in an airport: the police officer detects nervousness in someone on line; the suspect senses the attention of the police officer; the officer tracks the suspect more closely; the suspect becomes more anxious; and so on until a carefully scripted confrontation and the officer's "request" for consent to search the suspect's bag. Horan is certain that some officers

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21 United States v. Michelletti, 13 F.3d 838, 843 (5th Cir. 1994) (en banc).

22 *Id.*

23 392 U.S. 1 (1968).

can pick drug traffickers out of crowd, and yet he confesses that "[s]ome of these clues may be invisible to others, perhaps even to police officers themselves." Horan argues for a greater candor about the role of hunches in police work: "The proper way for the courts to deal with hunches is, in my view, to acknowledge that some officers are possessed with greater intuitive abilities than others, but then to treat such abilities as an additional factor in an officer's training and experience when weighing the reasonableness of a particular detention."

In the next article, I argue that the current legal regime substitutes palliative euphemisms for useful controls on a police officer's discretion. When a diligent and talented police officer has a hunch that something is wrong, he will take action, long before he has tabulated the reasons in his mind, certified that they are "objective," and satisfied himself that there are not innocent explanations for each of the constituent pieces of evidence mitigating the force of his hunch. He will simply act, in accordance with the dictates of a "fast and frugal heuristic" and hope that he will be able to reverse-engineer the "reasons" after the fact.

Meanwhile, I argue, the case law that has emerged since *Terry v. Ohio* is a hopeless clutter, the inevitable result of an artificial distinction between *reasonable* suspicion, which arises from the cool analysis of objective and particularized evidence, and *mere hunches*, which are subjective, generalized, unreasoned, and therefore unreliable. The distinction breaks down almost immediately. Is the fact that a suspect seems nervous to a police officer an objective piece of evidence or a subjective one? Is the fact that a suspect is found in a high-crime area particularized evidence or general evidence? It should be of little surprise that the cases are all over the map on these and dozens of similar questions. The effectual truth of the current system is that judges exercise what is in effect a pardon power, to be exercised at whim.

In *Section II*, the Judges—Ginsburg, Baer and Rosenbaum—respond. Judge Ginsburg questions the premise that "police hunches are generally accurate," noting that judges are likely only to see the hunches that proved correct in suppression hearings in criminal trials. But we have no idea how many hunches were faulty, because no criminal trial ensues and the victims are unlikely to file a civil suit. In addition, Judge Ginsburg argues that *Terry* usefully forces police officers to articulate, albeit post hoc, what made them stop someone: "In a legal regime without *Terry*, where a police officer's hunch would suffice to legitimate his stopping whom he will, the incentive for the police to adopt advances in the science of criminal identification would be diminished." The *Terry* regime has not proven a difficult one for police officers to negotiate; indeed, courts are already "extremely reluctant to second-guess the decision of an experienced police officer—a repeat player in the game of catching criminals."

Judge Baer also expresses doubts about the accuracy of police hunches. Most officers, he argues, do not possess Columbo-like skill: To

the contrary, when police officers act on their hunches, many will really be tapping into unconscious racial and ethnic biases. Writes Judge Baer: "The hunch is this 'wonderful mechanism' by which corrupt officers are able to substantiate illegal searches and seizures." Judge Baer expresses misgivings with the entire *Terry* enterprise—the willingness to allow police officers to stop suspects when the evidentiary predicate is less than probable cause. Noting Justice Douglas's misgivings with the "reasonable suspicion" standard, expressed decades ago in his dissent in *Terry*, Judge Baer contends that courts have become overly deferential to police, no longer demanding that officers point to "specific, articulable facts" when they have deprived, even temporarily, a citizen of his freedom. "Today," he writes, "courts examine and credit categories of suspicion, including the neighborhood, the time of day of the stop, the physical mannerisms of the suspect, and most troubling, sometimes even race. These generalizations erode reasonable suspicion and produce inconsistent applications of Fourth Amendment protections."

Judge Rosenbaum is more inclined to credit police hunches than his judicial colleagues, and he acknowledges what he views as the schizophrenic nature of the current legal regime: "Courts deny officers the authority to act on hunches. But those same courts empower officers who apprehend the first passengers off an airplane, or the last, or the middle, or those who walks alone, or with another, or stare at them or avert their gaze, or carry American Tourister luggage. It is more than fair to subject such a regime to critical and searching analysis." In the end, however, Judge Rosenbaum maintains that courts can and should remain actively involved in the regulation of police conduct.

In *Section III*, two professors present different reactions to police hunches and the legal regime designed to regulate them. Raising questions about the accuracy of hunches, Professor Albert Alschuler argues that giving credence to hunches would insulate police work from any meaningful scrutiny. Police perjury, already a problem, will become only more rampant: "[F]alse testimony concerning one's mental state is less subject to refutation. An officer who testifies that he had a hunch need not fear that a security camera or his partner will trip him up." Furthermore, given the racial biases that likely inform officers' hunches, crediting them would in effect impose a "racial tax." Alschuler writes, "Rational hunches (or rational calculations) that maximize the number of arrests and give taxpayers the most bangs for the buck can subject innocent blacks to unwanted encounters with the police at a far higher rate than innocent whites. Rational hunches may fill the prisons with guilty blacks while comparable white offenders go free."

In his article, Professor Eli Silverman is more sympathetic to police hunches. He begins by noting that a "sharp division has long existed between the way police hunches are portrayed in the popular media and in the legal world." In movies and television series, police officers regularly—

and triumphantly—rely upon hunches: legal institutions, by contrast, "have traditionally reflected a jaundiced view of hunches or intuition in law enforcement." Professor Silverman argues that hunches are, however, an inevitable part of police work. Rather than denying this fact, and trying to eradicate hunches, institutions should accept that police officers on the street need to make snap judgments. Some officers, through experience and perhaps innate ability, are better than others at spotting criminal activity: "While researching police departments, I repeatedly find that a robust ability to discern signs, signals, evidence and patterns from the environment is confined to a small cadre of officers. In other words, their hunches are generally confirmed by evidence." These individuals should be paired with and tutor other police officers. Professor Silverman notes that many of the most notorious incidents of police misconduct in recent years occurred when police forces multiplied rapidly, and rookie officers were dispatched onto the streets without sufficient mentoring. Unfortunately, Professor Silverman argues, many critics have drawn the wrong conclusions from such incidents; rather than focusing on the need for attracting talented officers and training them well, police forces have become more centralized, legalistic and bureaucratic.

Section IV gathers insights from economics, philosophy, the cognitive sciences and criminology. First is the article by Gerd Gigerenzer and Henry Brighton, whose articles in decision-making have revolutionized the cognitive sciences. The authors begin by noting that, in many environments, simple thought processes will be superior to complicated ones. In a study of serial burglaries in the United Kingdom, for example, a complex strategy to determine the location of the criminal was found inferior to a simpler one. As they explain, "To make good inferences or predictions under uncertainty, *one has to ignore part of the information available.*" The authors pose a challenge to traditional notions of decision-making: "Blind trust in complexity and distrust of informed intuition, however, needs to be replaced by a systematic study of the quality of both . . . . Contrary to the wisdom implicit in most of decision theory, the results we reported indicate that heuristics that base their decision (the hunch) on only one reason are often as accurate as, if not more so than the most sophisticated statistical strategies available today." Critiquing the legal regime regulating police conduct, the authors note a disconnect between the actions of successful police officers on the streets and the explication of their actions afterwards: "[T]he current American legal regime insists that police officers cite legions of 'objective' data in suppression hearing, when the fact is that, in many circumstances, an officer who acted on less information will achieve greater success than an officer who tabulated dozens of factors."

In his article, Professor Blitz notes the practical difficulties faced by police officers: they do not operate in a world of "theoretical certainty." Context can transform the same actions from commonplace to suspicious:

"Shifty-eyed concern displayed by an owner at a horse race or a coach at a tennis match is the innocuous norm, as is the bulge in his pocket because of his fat wallet. But perhaps the race is fixed and the match being thrown? The dependence of much practical knowledge on context causes uncertainty, because context is easy to overlook." And context is extraordinarily difficult to define. "Context . . . often is connected to what happened recently or will happen soon. What, however, counts as recent or soon? In practical affairs, time is not a matter of neutral counting but, rather, the usual or appropriate span in which to achieve something, or the right time to do it." Police officers need to possess "common sense," which "means, first, seeing contexts for what they are, second, seeing events and actions in them for what they are, third, knowing one's way about an activity, and, fourth, having this skill in the usual areas of everyday life."

Finally, Professor Slovic notes that "long before there were probability theory, risk assessment and decision analysis there were intuition, instinct, and gut feeling to tell us whether an animal was safe to approach or the water was safe to drink." The more rational or analytical approach is useful in monitoring "the quality of the intuitive impressions," but the "monitoring is typically rather lax."

Over the past four decades, courts have claimed a roving commission to regulate police conduct on the highways and byways of America. In theory at least, their power arises from a short phrase in the Fourth Amendment of the United States Constitution (and, in the case of state courts, almost identical provisions in the state constitutions). The Constitution provides that the people are to be secure from "unreasonable searches and seizures." Is it unreasonable for police to act upon their "mere hunches?" To answer this question requires us to consider the degree of discretion appropriately invested in police officers. More fundamentally, it necessitates a reflection on the value of hunches and the nature of human cognition. This volume hopes to provide a starting point for an inquiry into these urgent issues.

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A HUNCH, OR THE WHISPERED VOICE OF EXPERIENCE?

Dan Horan[*]

To anyone around me I was just another traveler at Los Angeles International Airport ("LAX"). It was a summer evening in 2000, before the 9/11 terror attacks brought about changes to airport security procedures, and one did not have to be a ticketed passenger to be allowed near the arrival and departure gates. The terminal was crowded with passengers and their parties, and I circulated among them looking for signs of anything unusual. I was wearing shorts and a polo shirt, which I wore untucked to conceal my sidearm, handcuffs, and police radio. To the untrained and unwary eye, there was nothing about me that would have suggested I was a police officer. But the woman I would soon meet was neither untrained nor unwary. She deplaned from a flight from New York's Kennedy Airport trailing a black rolling suitcase behind her. She was no more than twenty feet from the jetway door when our eyes met, and in that instant we each formed our opinions about the other, specifically, about what business had brought us to the airport that night. As it turned out, we both were right.

Her reaction to seeing me surely went unnoticed by anyone else in the terminal. She neither quickened nor slowed her pace, nor did she make any obvious, frantic gestures. To everyone but me she was just another weary traveler arriving on a cross-country flight. But in my eyes, so pronounced was the woman's reaction, so obvious was her consternation at having been spotted by a police officer that I decided to investigate further. I chose not to follow her beyond the escalator that led down to the baggage claim area. Instead, I radioed to my partner, who was waiting outside the terminal, and told him that a "good one" was headed toward him. I was confident that she would be just as obvious to him as she was to me, in fact, I did not bother to give him a description of the woman. "You'll know her when you see her," I said.

Just as I had, my partner spotted her immediately among the hundreds of people streaming through the passageway toward baggage claim. "Black dress?" he asked over the radio. "You got her," I said. Like me, my partner was dressed like anyone else who might have been there to meet an arriving passenger. Still, as the woman passed through the revolving doors into the baggage claim, it took her no more than ten seconds to scan the crowd and recognize him for what he was. My partner was soon joined by two other

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plainclothes detectives, and the three of them took up positions that allowed them to watch the woman as she moved about the terminal.

A member of our team spotted two men sitting in a Ford Explorer parked just outside the baggage claim doors. Though there was not yet any evidence to suggest a connection between these men and the woman, the detective radioed his suspicion that they were there to meet her. Sure enough, one of them got out of the car and approached her inside the terminal. The woman acknowledged him briefly, then turned her back and spoke to him surreptitiously over her shoulder. The man looked around and before long had spotted one of the detectives. He walked outside and returned to the Explorer, which immediately drove off. The woman was thus left to fend for herself in the encounter that she and the two men now surely knew was about to take place.

I had come down from the gate area by this time, and I watched as my partner approached the woman, showed her his police identification, and asked her if she would mind speaking with him for a moment. The woman did her best to conceal her unease—smiling, chatting amiably, and handing over her identification and airline ticket when my partner asked to see them. But her mood darkened when my partner inquired about the contents of her suitcase. She would not consent to a search of her luggage, she said, and she was insulted that he had even asked.

She had every right to refuse consent, of course, but in doing so she was only prolonging the inevitable, because by this time we had absolutely no doubt about what we would find in the suitcase. She was being detained, my partner told her, and she would have to accompany us to our office in the airport while we attempted to secure a search warrant for her luggage. Over her enthusiastic objections, she was handcuffed and taken to our office. Within a few minutes a police dog alerted us to the presence of drugs in her suitcase, after which I wrote a search warrant and presented it to a judge. The judge agreed that probable cause existed for a search of the woman's suitcase, and when we opened it we found almost $200,000 in cash, which the woman admitted was intended for the purchase of a load of marijuana that would have been shipped to New York and sold on the street.

Although subsequent events furnished us with the reasonable suspicion we needed to detain this woman and the probable cause necessary to obtain the search warrant, the case began with nothing more than a hunch, one based on my almost instinctual reaction to the woman when our eyes met for the first time. And just as my hunch about her proved accurate, so did her's about me.

This encounter was typical for the detectives and special agents of the Los Angeles International Airport Narcotics Task Force, a joint operation of the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Drug Enforcement Administration ("DEA"). Although we often received reports on couriers coming and going on specific

flights, most of our cases began with nothing more than a detective or special agent walking through the airport and noticing something about a passenger that invited further investigation. It might have been the passenger's clothing, his luggage, the way he walked, or, as in the case described above, it might have been nothing more than the look of suppressed panic in the eyes of a courier when she realized she was being watched by a cop. These visual clues were surely overlooked by everyone in the airport but us, the police officers who had been trained to see them.

I learned early in my police career that a good cop can spot a crook, just as a good crook can spot a cop. In fact, to be successful in either endeavor, this ability is a must. I had been a police officer for about twelve years, and working other details in narcotics enforcement for five years, when I was first assigned to the LAX Task Force. I was on the 3:00 p.m. to 11:30 p.m. shift, and on my very first night I was working with Detective Jim Gillespie, who, at the time, had more than twenty-five years of experience with the LAPD, nearly all of it in narcotics. We were on the escalator that took us up to the departure level of the American Airlines terminal, and Gillespie was a few steps above me. Before even stepping off the escalator he surveyed the crowd of people checking in with the skycaps in front of the terminal. In the few seconds it took me to reach the top of the escalator Gillespie had already spotted a woman he suspected of being a courier.

"She looks good," he said, indicating someone in the line of people at the skycap stand. I knew the way cocaine dealers stood on street corners in South Central Los Angeles, I knew the ways heroin dealers met up with their customers in Wilmington and San Pedro, but I did not have the first clue about what to look for in an airport narcotics courier. To me, no one in the line looked any more likely to be a courier than anyone else. Yet to Detective Gillespie, with his years of experience, the young woman he was about to contact might as well have been wearing a sign around her neck that said "Please arrest me."

Her name was April; she was in her early twenties, nicely dressed, and had a set of new, matching luggage. We watched her check the luggage with the skycap before heading up to the security checkpoint. While a third detective intercepted the luggage and waited for word from us, Gillespie and I followed April through the terminal. After she passed through security, I stood nearby and watched as Gillespie approached her and identified himself as a police officer. He avoided blocking her path and told her she was free to leave, thus keeping the contact well within the bounds of a constitutionally permissible "consensual encounter."[1] Gillespie asked to see her airline ticket, and as April rummaged through her purse looking for it, he looked at me and made a slashing motion across his throat: she was as good as in jail already, she just did not know it yet.

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[1] *See* Florida v. Bostick, 501 U.S. 429 (1991).

After examining April's ticket and identification, Gillespie moved in for the kill. He was a narcotics detective, he told her, and it was his job to make sure people did not transport drugs on commercial airliners. April listened as calmly as she could, though by this time it was clear even to me that she wanted to run away or simply disappear. Did she have anything in her luggage he should be concerned about? Gillespie asked. Certainly not, April said. Well then, Gillespie said, would you mind if we had a look in your bags?

As happens in more than nine out of ten cases, April granted consent for a search of her luggage. Gillespie thanked her for her time and wished her a pleasant flight. As he did so, I radioed to the third detective on our team, the one who had remained outside with April's luggage, and informed him that we had obtained consent to search the suitcases. He opened them and found about sixty pounds of marijuana packed inside. April was arrested, and later pleaded guilty in Los Angeles Superior Court to transportation of marijuana.

April's arrest was my first at LAX, but Detective Gillespie and I would work together for the next six years, until his retirement and my promotion to sergeant, during which time we had a hand in the seizure of tons of illegal drugs and millions of dollars in drug-related proceeds. Like the two cases described above, the great majority of these seizures originated with nothing more than a hunch about the people we would later find to be transporting drugs or drug money.

But what is a "hunch," exactly? Previously, I had never even stopped to consider the question. But as I have relied on the accuracy of my hunches for almost twenty-four years now, I welcome the opportunity to define them.

A police officer's hunch is nothing more than a mental assemblage of available clues. Some of these clues may be invisible to others, perhaps even to other police officers. So it was on the day of April's arrest. I was a narcotics detective with some experience that day, yet I was unable to see, even on close inspection, what Detective Gillespie had seen at a mere glance. It was under his tutelage that I was able to develop my own powers of observation to a level that allowed me, six years later, to spot the money courier among the two hundred people deplaning from that flight from New York.

I once took a college course in creative writing, and I recall the instructor saying that the best writers were also the best amateur psychologists. The same may be said of the best police officers: just as a writer can reveal a character's motivations or state of mind through a description of his quotidian behavior, so too can the alert and experienced police officer draw inferences—often very accurate ones—from observation of a criminal suspect's ostensibly innocuous conduct.

What Gillespie saw as he looked at April that night in 1994, and what I saw years later in the woman arriving from New York, is difficult if not

impossible to describe. So instantaneous were our reactions to the two women that they defy articulation, yet in those moments there was simply no doubt in either of our minds that the women we had seen were involved in the transportation of drugs. During a period of notable success for the LAX Task Force, the captain of LAPD's Narcotics Division came to the airport to see for himself how we did it. I was standing with the captain outside the departure level of the TWA terminal when a young woman stepped out of a taxi directly in front of us. After seeing her for no more than five seconds, I radioed to Detective Gillespie: "Here we go." The captain was flabbergasted. What did I see, he asked me. I told him I saw a trip to Van Nuys, where the LAPD female jail was located. And less than five minutes later the woman was indeed under arrest for transportation of marijuana, about forty pounds of which we discovered in her suitcase after receiving her consent to search it. Even in recalling the incident today, I cannot say with any precision what made me so certain this woman, or any of the people I arrested at the airport, was transporting drugs. "How did you know?" the captain asked. I just *knew*.

While I worked at LAX, a typical case would unfold as follows: Detective Gillespie and I would circulate on the departure level in a given terminal, dividing our time between the ticket counters and the sidewalk in front. As we did so, we would attempt to inspect each and every passenger who came into view and assess the likelihood that he was a drug courier. Most travelers were easily dismissed after only a cursory evaluation. A few aroused curiosity but were eliminated after further observation. Others were the passengers we were looking for—the ones who raised our level of suspicion the longer we watched them and the more we learned about them.

For example, if we watched a passenger arrive by taxi in front of the terminal, there might be something about the appearance of his luggage or some other small cue that invited further investigation. I would begin, after the passenger was safely away from the cab, by asking the taxi driver where he had picked up the fare, and the answer might serve to increase or decrease my level of suspicion. If I learned that the pickup had been made at one of a number of hotels near the airport, I would continue to follow the passenger. If I then learned he was flying on a one-way ticket, and that the ticket had been purchased with cash at a nearby travel agency, these factors would only further raise my suspicions.

Often the true test was the way the passenger behaved after I made it obvious that I was a police officer and that I was watching him. Once I had focused my attention on a passenger and developed some level of suspicion, I would pass by and look at him repeatedly until it was perfectly clear that I was focused entirely on him. Put yourself in the shoes of a man who has just arrived at the airport with ten kilos of cocaine packed in his suitcase. He knows that to be successful and deliver his cargo he must blend in to the mass of passengers arriving and checking in for their various flights. He

has chosen his attire specifically for this purpose, and he does his best to adopt the mannerisms of an average business traveler or vacationer.

While trying to appear nonchalant, he is keenly aware that if the contents of his suitcase are discovered he will be going to jail for a long time, and this awareness has aroused within him certain responses in his sympathetic nervous system. Epinephrine and norepinephrine are released from the medullae of the adrenal glands, causing an increase in his heart rate and respiration. In short, he is nervous, but it is a nervousness far different from that of, say, one who will soon be boarding an airplane but is afraid to fly. The fearful flier knows that the threat is the flight itself, and though he fears the experience that awaits him he pays no special attention to those around him, least of all to the man walking back and forth near the ticket counter. If he notices the man at all, he assumes the man is just another traveler or lost soul in the airport.

The courier knows that *his* threat, the airport drug cop, might be close at hand. And when he spots that cop, and when he knows the cop has spotted *him*, his fight-or-flight response kicks into a very high gear indeed. But if he wishes to remain inconspicuous he can neither fight nor flee, for either response invites certain detection and arrest. The neurotransmitters now coursing through his body are instead translated into such nervous gestures as tapping his feet, checking his watch, or running his hands repeatedly through his hair, among many others. I have even seen couriers urinate on themselves while standing in line, before any police officer had said so much as a word to them.

Assuming our hypothetical courier has sufficient control of his internal workings to avoid such an indignity, there is still the matter of his nervous gestures, which may go unnoticed by his fellow passengers even as they shriek with significance to an observant police officer. Detective Gillespie and I would take note of these gestures as we watched the suspect check his luggage, either at the ticket counter or with a skycap. We would then decide which of us would remain with the luggage while the other followed the suspect. The exterior of the luggage would be inspected for any tell-tale signs of what we suspected to be inside. Couriers often failed to attach identification tags to their suitcases, or failed to list complete or accurate information to the tags if they did attach them. Sometimes the suitcases gave off the obvious odor of a masking agent, most commonly fabric softener sheets, the purpose of which was to conceal the odor of the drugs from search dogs, but which in reality only served to alert a trained human nose that the suitcase probably contained contraband.

On those occasions when it was Gillespie who remained with the luggage, I would follow the suspect until he had passed through the security checkpoint. I did this for two reasons: First, I wished to see if the suspected courier was being shadowed, as was sometimes the case, by someone whose job it was to shepherd the courier and his cargo onto the designated flight. By observing the suspect for these extra minutes I was sometimes

able to spot him engaged in surreptitious communication with someone we had not yet detected. Second, by allowing the suspect to put some distance between himself and the incriminating contents of his luggage I gave him that much more reason to grant me consent to search it. Sometimes, rather than make our presence known to a courier we would take pains to remain unnoticed until the time came to contact him. Making this contact seem like a random encounter increased the likelihood that the courier would grant us consent to search.

I would approach the suspect in the terminal concourse and display my badge, taking care to avoid any conduct that might later be seen as coercive. Very often this initial contact would immediately tell us if our hunch was correct. When the blood drains from someone's face at the mere sight of a detective's badge, it is a good sign he may have something to hide.

In engaging the suspect in conversation for a minute or so, I was attempting to reach one of two outcomes: to eliminate the passenger as a likely drug courier or, if the conversation raised my level of suspicion about him, to seek the legal means required to conduct a search of his person and/or his luggage. If I decided the traveler was unlikely to possess drugs, he was sent off with a wish for a pleasant flight. If the conversation instead bolstered my initial hunch, I wanted to obtain consent to search the suspect's luggage or, if consent was denied, to develop sufficient reasonable suspicion to detain him.[2] The more lies he told me, the stronger my case against him grew. Couriers would sometimes lie about how long they had been in Los Angeles or about where they had stayed while in town. They sometimes even lied about their destination, despite having already showed us their airline ticket. The criminal's first instinct is to lie even if the truth would serve him better.

As I noted in the discussion of April's arrest, couriers granted permission to search their luggage in more than nine out of ten cases over the six years I worked at LAX. Why did they do so despite their certain knowledge that the luggage contained drugs? Through interviews with hundreds of couriers, we learned that on those occasions when we discreetly watched suspected couriers rather than making ourselves obvious to them, they believed that when they were engaged in a consensual encounter it was done randomly. They also believed that if they remained calm and granted consent they would be deflecting suspicion from themselves, and that by denying consent they would be inviting further scrutiny and eventual detection. Other times, they assumed that by the time they were contacted, their bags would have been sent through the labyrinth of conveyer belts and luggage carts to the belly of an airplane and thus safely out of our reach. They fig-

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[2] *See* United States v. Sokolow, 490 U.S. 1 (1989).

ured that they might as well say yes, assuming that we would never find their bags anyway.[3]

In the rare case in which a courier denied consent to search his luggage, if we had obtained the information available to us—his itinerary, his place of residence, his mode of arrival at the airport—we usually had sufficient reasonable suspicion to detain him long enough for a police dog to do a sniff of his luggage.[4] If the dog alerted us to the luggage, we had probable cause to arrest the passenger, and we would prepare a search warrant for the luggage and present it to a judge.

One such case presented me with a challenge that tested my resourcefulness. I was working with some DEA agents at the US Airways terminal at LAX, and my curiosity was aroused by a man I saw arrive in a taxi. He went to the skycap stand and checked a hard-sided Samsonite suitcase for a flight to Pittsburgh. It was the type of luggage we often saw used to transport cocaine at that time, and I was eager to examine the exterior of the suitcase for any clues that would warrant further investigation. Before I could contact the skycap, however, he had sent the suitcase on its way to the aircraft.

A DEA agent went into the bowels of the terminal to search for the bag while I followed the suspect upstairs and toward the gate. I engaged him in a fairly typical consensual encounter, after which I asked for permission to search his luggage. He refused to grant it. When I asked him why, he said he knew his rights and he did not want me or anyone else looking through his belongings. Fine, I said, and walked away, leaving a second DEA agent to watch the man's movements.

I was absolutely certain he was dirty, but I also knew proving it would require some extraordinary measures. Having learned his name and destination from examining his ticket, I inquired about his itinerary with an airline employee. I learned that he had purchased his one-way ticket that day and that he had paid for it with cash. I also learned the phone number he had provided the airline. When I went to a pay phone and called the number the woman who answered said she had never heard of the man whose name appeared on the ticket. This may have been for one of two reasons, either of which sufficed to enhance my suspicion. The phone number was most likely one he made up when he purchased his ticket, or it may have been a genuine contact number but the name he had used was an alias. Either of these scenarios was strong evidence of his intent to deceive and would surely be evaluated as such by any judge who would later rule on our reasonable suspicion. We detained the man, brought a dog to sniff his suit-

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[3] Sometimes targeted bags did get sent down the conveyer belts, but we were allowed access to all areas of the airport, including the luggage holds of the aircraft themselves. There were many times when I crawled through these cargo holds or rooted through luggage carts before finding the suitcases we sought to search.

[4] *See* United States v. Place, 462 U.S. 696 (1983).

case (which the DEA agent had found before it was loaded aboard the aircraft), and the dog alerted to the presence of what turned out to be four kilos of cocaine packed inside.

Yes, the man knew his rights, but I knew mine, too. Every step I took in developing reasonable suspicion was well within the law, and was actually based on information the courier himself provided me during the initial consensual encounter. Security cameras were everywhere in the airport, and we knew that if an encounter with a courier strayed from the realm of the consensual a resourceful defense attorney would have little trouble retrieving a videotape of the encounter. If even one defendant succeeded in showing us to be less than trustworthy, not only would we lose that particular case, but doubt would be cast on every other case we presented. If I had been unable to develop sufficient reasonable suspicion to detain the man at that time, my other option would have been to make sure that both he and his suitcase made it aboard the flight, then contact a police counterpart in Pittsburgh, who would have a dog waiting to sniff the bag when the flight arrived. Any effort to distance himself from the suitcase after arriving in Pittsburgh would be strong evidence that the man knew the nature of its contents.

The infrequent search warrant cases we developed enhanced our credibility in the courthouse. In cases that rise or fall on a consent search, a defendant's handiest defense is to claim he never gave consent, and turn the proceedings into a contest of credibility. Most drug couriers were people with little or no criminal history, so in the event they took the stand their testimony was not very readily impeached. Some defendants tried to employ the "blind mule" defense, in which they claimed not to know the contents of the suitcases they carried. During the six years I worked at LAX, I was able to refute this tactic every time it was tried.

For a police officer, there is no greater asset in court than a reputation for honesty. It was my good fortune to work with Detective Gillespie for six years, for his reputation in the courthouse was one of honesty and integrity. As his partner, I inherited the same reputation, but I had been cultivating my own since my first appearances as a witness. Nearly all of our cases were heard in the Airport Branch of the Los Angeles County Superior Court, and in any given year these cases were prosecuted by the same group of deputy district attorneys, opposed by the same group of public defenders, and heard by the same handful of judges. These people occupied their separate spheres during the day, but they sometimes socialized with one another at the close of the court's day, and when they did they quite naturally discussed the virtues and vices of the police officers who appeared as bit players in their daily drama. The reputation Detective Gillespie and I enjoyed among these people was invaluable in tilting the balance of credibility in our favor when a defendant tried to claim we had lied about receiving consent to search his luggage.

I recall vividly a time when, as a young patrol officer testifying in a drug case, I was being cross-examined by a public defender. She asked who I was working with on the day of the arrest, and I answered that my partner had been a certain officer whose reputation for honesty did not, to understate the case considerably, rise to the level of Detective Gillespie's. The public defender won a dismissal of the case based on a search-and-seizure issue, because my testimony, though entirely truthful, had been tainted by the fact that I had worked with an officer who was believed to be dishonest. As young and inexperienced as I was, neither the judge, the deputy D.A., nor the public defender knew anything about me, but they seemed to know a great deal about my partner, and what they knew was not good. This was a valuable lesson in the inner workings of the courthouse, and from that day I did my best to avoid working with officers whose reputations were likely to cast a shadow over my own.

This demonstrates the problem inherent in dealing with police officers' hunches in the courts. I have been relying on my hunches and honing my instincts for nearly a quarter-century, and I am quite confident in my ability to spot the criminal among a group of people more innocently disposed. Today, I work as a patrol supervisor in South Central Los Angeles, an area whose reputation for gang violence and general mayhem has been well documented. As I drive the streets in a black-and-white I have no difficulty distinguishing the gang members from their otherwise similar neighbors, even those who might choose to emulate the gangster persona. An ex-con walking down the street might just as well be wearing his prison blues, for the mannerisms adopted in the penitentiary are distinctive and all but impossible to leave behind the prison walls.

Still, no matter how well-honed my instincts, no matter how accurate my hunches, I would never expect a court to endorse a detention based solely on my hunch that a suspect was engaged in crime, no matter how well I articulated my belief that he was a gang member or an ex-con. To do so would be to invite unscrupulous police officers to use a "hunch" as a post hoc justification for an otherwise illegal detention and search. How many "hunches" might such an officer act upon? How many innocent people will he detain and search, before he comes up with a prosecutable case?

In the cases described above, my colleagues and I had the advantage of being able to follow up on our hunches by engaging suspected couriers in consensual encounters. We did not have to resort to some sort of pretextual stop as might be required if we were following a suspected courier in an automobile.[5] Pretextual stops pose enough of a problem in the courts, inviting wordplay in the writing of police reports and the crafting of testimony so as to conform with the latest case law. At least in these circumstances an officer's credibility can be tested on the witness stand, giving the defendant

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[5] *See* Whren v. United States, 517 U.S. 806 (1996).

the chance to examine the reasonableness of the pretext. If, through some future case law, an officer's hunch is given weight approaching that of reasonable articulable suspicion,[6] how will defendants challenge what is by definition inarticulable?

The proper way for the courts to deal with hunches is, in my view, to acknowledge that some officers are possessed with greater intuitive abilities than others, but then to treat such abilities as an additional factor in an officer's training and experience when weighing the reasonableness of a particular detention. Though I welcome and admire the efforts of the scientists who seek to measure the reliability of hunches, I remain skeptical that such research will achieve the accuracy of prediction required in the courts. There will always be a certain mystery in the interplay between cop and criminal. Despite all the advances in law-enforcement technology, police work remains as much art as it is science. May it always be so? I would not want to live in a country where an officer was prohibited from acting on his hunches, but I would be afraid to live in one where he is empowered to act solely on them.

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

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JUDGES POLICING HUNCHES

Craig S. Lerner[*]

In *Terry v. Ohio*,[1] Chief Justice Earl Warren held that police officers could temporarily detain a suspect, provided they relied upon "specific, reasonable inferences," and not simply upon an "inchoate and unparticularized suspicion or 'hunch.'" Since *Terry*, courts have strained to distinguish "reasonable suspicion," which is said to arise from the cool analysis of objective and particularized evidence, from "mere hunches," which are said to be subjective, generalized, unreasoned and therefore unreliable. Yet, as argued below, emotions and intuitions are not obstacles to reason, but indispensable heuristic devices that allow people to process diffuse, complex information about their environment and make sense of the world. The legal rules governing police conduct are thus premised on a mistaken assumption about human cognition.

This Article argues that the legal system can defer, to some extent, to police officers' intuitions without undermining meaningful protections against law enforcement overreaching. As a practical matter, the current legal regime substitutes palliative euphemisms for useful controls on police discretion. This in turn forces police officers to carefully prune what they say at suppression hearings, but may do little to change how officers act on the streets. When an energetic police officer has a hunch that evil is stirring and action is imperative, the officer will simply act. Months will pass before a suppression hearing, and by then it will be a simple matter to reverse-engineer the objective "reasons" for the stop—e.g., "I saw a bulge," or "He made a furtive gesture." The legal system in practice rewards those officers who are able and willing to spin their behavior in a way that satisfies judges, while it penalizes those officers who are less verbally facile or who are transparent about their motivations. It would be preferable if politically accountable authorities joined the courts in monitoring police practices. The focus should be less on what police say after the fact and more on what they do—that is, how successful police officers are in detecting criminals relative to the number of stops they make and how respectful they are of all citizens.

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* Professor, George Mason University School of Law. The author thanks Albert Alschuler, Frank Buckley, Renee Lettow Lerner, Daniel Polsby, and Nancy Tardy for providing helpful comments. Judges Harold Baer, Douglas Ginsburg, and James Rosenbaum were unpersuaded by the Article, but graciously offered criticisms. A longer version of this article appeared as *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006).

[1] Terry v. Ohio, 392 U.S. 1 (1968).

Part I of this Article sketches the development of rules governing police stops and frisks, arguing that the novelty of *Terry v. Ohio* is its depreciation of police hunches and its creation of a distinction between "objective" and "subjective" evidence. Part II, which focuses on a recent and typical *Terry* decision, argues that courts are prone to overstate the value of "objective" factors and understate the value of "subjective" factors. Part III, which notes some costs of the current approach to reasonable suspicion, suggests that in the future courts give some deference to police hunches, especially when the privacy intrusion is negligible and the suspected offense especially grave.

I. *TERRY V. OHIO*[2]

In terms of regulating police conduct on the streets of America, *Terry v. Ohio* is probably the most important Supreme Court decision in modern criminal procedure. Chief Justice Earl Warren's opinion held that a police officer, even without "probable cause," can stop someone and ask him questions. If in the course of doing so, the officer senses possible danger to himself, he can conduct a frisk—something more than a cursory pat-down and more akin to an inspection with "sensitive fingers"[3]—to be sure that the subject is not armed. Frisking, in such circumstances, is not an "arrest" for constitutional purposes and need not be justified by "probable cause." All the officer requires is "reasonable suspicion," which the Court contrasted with "a mere hunch."

This Part begins by considering the *Terry* opinion itself, which suggests, unbeknownst to its author, that the officer who initiated the most famous stop and frisk in our nation's history began his investigation on the basis of nothing more than a mere hunch. Ironically, the major innovation and lasting impact of the *Terry* decision was its disparagement of mere hunches. Although contemporary critics of *Terry* have argued that the decision conferred unprecedented discretion on police officers, the legal regime governing pre-*Terry* policing was, in fact, remarkably lenient. Since *Terry*, however, the Supreme Court has more comprehensively monitored police practices and become ever more watchful of anything that resembles a "hunch." The Court has emphasized the distinction between an approved category of evidence, which is "objective and particularized," and a disapproved category of evidence, which is subjective and generalized.

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2 *Id.*

3 *Id.* at 17 n.13.

A. *Officer McFadden's Hunch*

Martin McFadden may be the only cop ever cast in a heroic role in an Earl Warren opinion.[4] A police officer for nearly four decades, McFadden walked the beat in downtown Cleveland one day in 1963. Amidst the pageant of democracy—the parade of bustling citizens, gawking shoppers, and indolent scoundrels—two individuals caught McFadden's eye. In Earl Warren's words, "He had never seen the two men before, and he was unable to say precisely what first drew his eye to them."[5] Warren unintentionally makes an important point: McFadden was suspicious of these two men *before there was any apparent reason for suspicion.* And he was proven right. Surely, there were other socially useless individuals—a pair of law professors, perhaps—strolling along Euclid Avenue that day. But Terry and Chilton excited McFadden's curiosity. What was it about these two men, as opposed to the two professors, that struck him as suspicious? Warren writes approvingly:

> [McFadden] testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."[6]

Why did McFadden follow these fellows? He was "unable to say"; he simply thought they "didn't look right." Or to put this more directly: McFadden had a hunch.

Fortunately, McFadden acted upon his hunch. He followed these two men, and witnessed them walk back and forth several times along a certain block, pausing to look into the same store, and gather repeatedly in hushed conversation, joined at one point by another individual. McFadden eventually approached the three men and asked their names. After receiving "mumbled" answers, he pushed them into a store and performed the first *Terry* frisk in our nation's history.[7] By the time McFadden actually confronted the three men, anyone could have gathered that something untoward was afoot, a fact not lost on Warren: "It would have been poor police work indeed for an officer of thirty years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."[8]

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4 *Id.* at 5.

5 *Id.* (emphasis added).

6 *Id.*

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

8 *Id.* at 23.

Warren is generous in his praise of McFadden's police work, referring to him throughout the opinion as "Officer McFadden." But the irony is that Warren fails to see the important point lurking in his own recitation of the facts: "There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in."[9] Precisely so, which is why Earl Warren (or I, or you) would likely never have noticed Terry and Chilton in the first place: they would have been lost in the crowd. McFadden, however, watched Terry and Chilton "hover about a street corner for an extended period of time . . . pausing to stare in the same store window roughly 24 times."[10] The impressive aspect of the story is McFadden's suspicions when there was "nothing unusual" about their actions.

Of course, we have no idea how many times McFadden's eyes were drawn to people who "didn't look right" to him but who were in fact innocently shopping. For all we know, the vindication of McFadden's hunch in this case should be seen against a backdrop of Inspector Clouseau-like bumbling. Perhaps the day before McFadden's triumphant arrest, he had trailed a pair of law professors around Cleveland, oblivious to the pickpockets and jewel thieves plying their trade all about him. And this assumes good faith, if incompetence, on McFadden's part. Perhaps he made a practice of following African-Americans for no other reason than their race or bearded young men because of their anti-war patches. But Terry's own attorney, who subsequently went on to become a member of Congress, has acknowledged that McFadden was widely regarded as a good and honest cop.[11] Assume for the moment, subject to revisiting later,[12] that McFadden's hunches served him well, not only that spring day in 1963, but at other times in his thirty-year career as well.

Yet when Warren states the rule of law to emerge from *Terry*, he deprecates hunches—never acknowledging that without McFadden's original hunch, there would likely have been no case at all. Warren writes that an "officer need not be absolutely certain that the individual is armed" in order to stop and frisk him:

> [T]he 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. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate

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9 *Id.* at 22-23.

10 *Id.* at 23.

11 *See* Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 728 (1998) ("He was a real character—a tall, stately guy, and basically a good policeman. 'Mac,' as we called him, was really a guy that we really liked. He was straight. One thing about him—as a police officer, he came straight down the line. You did not have to worry about him misrepresenting what the facts were.").

12 *See infra* Part III.D.

and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.[13]

B. *The Disparagement of Hunches*

Chief Justice Warren's decision to place the word "hunch" in quotation marks—a stylistic choice that has since become common practice in judicial opinions[14]—can be interpreted in two ways. First, Warren may have doubted that hunches provide any meaningful information and are therefore worthless data; in this respect, Warren may have adopted the modern view that if you cannot articulate an opinion and reason it out from objective principles, it is simply unreliable. Second, Warren may have accepted the premise that hunches are not wholly unreliable, but he may have doubted that the legal system could be fashioned in a way that would give any credence to a police officer's "inchoate and unparticularized suspicion." My sense is that Warren's decision to place "hunch" in quotation marks suggests he is inclined to the first view—that hunches are not really probative "evidence" at all.

Prior to *Terry*, courts were receptive to the idea that police officers, through time and experience, might develop a heightened ability to detect criminal wrongdoing and that some degree of judicial deference might be owed due to these abilities. For example, a 1963 California state court opinion observed that "[e]xperienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens."[15] Since *Terry*, however, Fourth Amendment opinions follow a predictable pattern. An opinion that begins by highlighting how "experienced" the police officer is will likely culminate in the denial of a motion to suppress and a defendant dispatched to prison. By contrast, an opinion that employs the adjective "subjective" when describing the evidence to justify a stop spells trouble for the state; and if ever the word "hunch" should grace the pages of the "statement of facts," that likely means one happy criminal defendant. "Hunch"[16] (and its cousins "instinct," "gut feeling,"[17] and "sixth sense"[18]) generally portend the collapse of the prosecution's case.

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13 *Terry*, 392 U.S. at 27 (emphasis added).

14 *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 274 (2002) ("[A]n officer's reliance on a mere 'hunch' is insufficient to justify a stop." (citing *Terry*, 329 U.S. at 27)).

15 People v. Cowman, 223 Cal. App. 2d 109, 117 (Cal. Ct. App. 1963).

16 *See, e.g.*, People v. Croft, 805 N.E.2d 1233, 1240 (Ill. App. Ct. 2004) ("In short, Officer Row had merely a hunch, not the reasonable suspicion necessary to effect a *Terry* stop."); United States v. Farias, 43 F. Supp. 2d 1276, 1284 (D. Utah 1999) ("Mangelson's detention of defendants was based upon merely a 'hunch' that criminal activity was afoot."); United States v. Roggeman, No. CR00-3046, 2001 WL 34008491, at *7 (N.D. Iowa Feb. 28, 2001) ("Trooper Moore was acting on nothing but a 'hunch' or subjective belief unsupported by objective facts."), *rev'd*, 279 F.3d 573 (8th Cir. 2002);

One can sympathize with police officers lured by defense attorneys into an admission that they acted on a "hunch." Officer Heath's fate in *State v. Emilo*[19] can serve as a cautionary tale for naïve police officers preparing to endure the perils of cross-examination. While driving home at 3:00 a.m. on a gravel road in a sparsely populated residential neighborhood, Officer Heath, who had lived in this area for ten years, saw a Saab automobile that he did not recognize as belonging to anyone in the neighborhood.[20] Lacking a front license plate, the car piqued his curiosity, and Officer Heath pulled it over.[21] Alas, the officer's premonition that something was amiss turned out to be correct; the car thieves tried, albeit unsuccessfully, to flee on foot as soon as the car stopped.[22] Here, however, was the cross-examination at the suppression hearing:

> Q. [I]t was basically your belief that no cars should be on Route 66 at that time in the morning that prompted the stop; is that correct?
>
> A. I felt it was very . . . unusual . . . .
>
> Q. But there is nothing in particular about that unusualness that would tie . . . this particular car to any particular crime?
>
> A. No . . . .
>
> Q. So, more or less, it was just a hunch that you had?

Bowen v. State, 685 So. 2d 942, 944 (Fla. Dist. Ct. App. 1996) ("Crose's testimony amounts to merely a hunch, which is insufficient to justify an investigatory search."); United States v. Morris, 910 F. Supp. 1428, 1446 (N.D. Iowa 1995) ("[T]he court concludes instead that Trooper Hindman was acting on nothing but a 'hunch' or subjective belief unsupported by objective facts."); Rogers v. State, 426 S.E.2d 209, 213 (Ga. Ct. App. 1992) ("That [Officer Bunn's] 'hunch' about [appellant] proved correct is perhaps a tribute to his policeman's intuition, but it is not sufficient to justify, ex post facto, a seizure that was not objectively reasonable at its inception. Because (the record contains no evidence that [Bunn] had) a reasonable suspicion that [appellant was] hauling drugs [or weapons], the stop cannot be upheld on that ground." (quoting Tarwid v. State, 363 S.E.2d 63, 66 (Ga. Ct. App. 1987))).

17 *See, e.g.*, United States v. Hyde, No. 1993-65, 1993 WL 733094, at *2 (D.V.I. Oct. 21, 1993) ("Lambert herself articulated that she acted as much on a 'gut feeling' that something was amiss as on any or all of the factors she recited."), *rev'd*, 37 F.3d 116 (3d Cir. 1994).

18 *See, e.g.*, State v. Costa, 742 A.2d 599, 603 (N.J. Super. Ct. App. Div. 1999) ("[The officer] stated that the manner in which defendant and Priate exited their car set off his 'sixth sense' . . . . We conclude that a non-specific 'sixth sense' does not equate with a '*reasonable suspicion that criminal activity is afoot.*'" (quoting State v. Branch, 693 A.2d 1272, 1278 (N.J. Super. Ct. App. Div. 1997))); United States v. Fernandez, 18 F.3d 874, 880 (10th Cir. 1994) ("[Trooper] Bushnell's testimony regarding his 'sixth sense,' his detection of a 'tension in the air,' and his belief that something was 'afoot,' strongly suggests he was acting more on an unparticularized hunch than on reasonable and objective suspicion."); City of Columbus v. Holland, 601 N.E.2d 190, 192-93 (Ohio Ct. App. 1991) (stating that the "sixth sense" of the arresting officer did not constitute reasonable suspicion).

19 479 A.2d 169 (Vt. 1984).

20 *Id.* at 170.

21 *Id.*

22 *Id.*

A. Well, if that's the way you want to put it, yes.[23]

The court, of course, set the defendant free, but not before a mocking reference to "Officer Heath's 'suspicion.'"[24] One wonders if the prosecutor took Officer Heath aside after the hearing and gave him a quick lesson in Testifying 101: never allow a defense attorney to put words in your mouth. Never admit to pulling someone over on just a hunch. The correct answer, of course, was:

A. Hunch? No, I wouldn't call it that, sir. I would say there were a number of objective factors which, viewed in their totality through my experienced eyes, rose to the level of reasonable suspicion.

Likewise, in *State v. Thompson*,[25] the officer's failure to couch his testimony in appropriate language (that is, excising any reference to "hunches") doomed the case. There, a radio dispatcher notified State Patrol Trooper Jacobson that an occupant of a car traveling along Interstate 5 had been waving a handgun.[26] A description of the car and its license plate were reported; moments later, Officer Jacobson must have felt the stars were aligned when he saw that very car whiz by.[27] He followed the car into a parking lot and watched as it "meandered" through the lot before stopping near a lone parked car in a deserted part of the lot.[28] He approached the two cars, ordered the occupants to step out, and observed the driver of the parked car emerge and begin walking quickly away.[29] The officer stopped him, radioed back for information about the parked car, and learned within a brief period-of-time that there was an outstanding traffic violation.[30] The driver was arrested and searched, and drugs were found on his person and in the car.[31] Of course, given the peculiarities of modern American criminal procedure, the decisive event was the brief stop while the police officer radioed for information. If that stop was illegal, then all the subsequently discovered evidence was the poisonous fruit of an improper stop, and therefore suppressible. On this point, Officer Jacobson disastrously testified:

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23 *Id.* at 171.

24 *Id.* ("Here, Officer Heath's 'suspicion' that the Saab did not belong in the particular area in the early morning hours, without more, clearly falls outside of an 'articulable and reasonable' suspicion of some criminal wrongdoing.").

25 601 P.2d 1284 (Wash. Ct. App. 1979), *rev'd*, 613 P.2d 525 (Wash. 1980) (en banc).

26 *Id.* at 1285-86.

27 *Id.* at 1286.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Thompson*, 601 P.2d at 1286.

> I had a suspicious circumstance. Call it instinct or whatever. Something told me that I should keep this gentleman long enough to I.D. him. Call it instinct, intuition, hunch, sixth sense, or whatever, there was reason for a trained police officer to believe that something untoward was afoot.[32]

The trial court and the appellate court labored to rescue Officer Jacobson from his own honesty, emphasizing that it was not any "sixth sense" on his part, but "objective criteria" amounting to reasonable suspicion justifying the stop.[33] Such a conclusion was quite defensible. There was probable cause to believe that one car, which the officer had seen on the highway, contained a person who had been waving a handgun. When that car stopped immediately next to a parked car in a nearly empty lot, it surely hinted at a collaborative undertaking. The Supreme Court of Washington nonetheless reversed, stating: "This 'inarticulate hunch' is precisely the type of subjective basis which is constitutionally insufficient, because it creates a risk that a person may be detained 'solely at the unfettered discretion of officers in the field.'"[34]

C. Terry's *Civil Libertarian Critics*

When it was decided, *Terry* was celebrated in the academic community as a compromise position—a happy mean between the claim (urged by the State of Ohio) that a frisk is not a "search" at all and therefore outside the Fourth Amendment and the competing claim (embraced by a dissenting Justice Douglas) that a frisk is a full-fledged constitutional event, governed by the Fourth Amendment's probable cause requirement. Chief Justice Earl Warren, it was said, struck a Solomonic note, holding a frisk, even if minimally intrusive, to be a "search," but adding that police need not have probable cause to conduct a frisk; merely reasonable suspicion is sufficient.[35]

In recent years, however, a growing number of scholars have had second thoughts about the legal regime supposedly erected by *Terry*. Misguided ideas about a civil libertarian pre-*Terry* time spurred on such criticisms and seized the imagination of some in the academy. However, like many golden ages, this belongs more in the realm of mythology than actual history. According to this account, "[N]ever before in the criminal context had the Court recognized an exception to the probable cause requirement."[36]

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32 *Id.*

33 *Id.* at 1286-87.

34 State v. Thompson, 613 P.2d 525, 527 (Wash. 1980) (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968); Brown v. Texas, 443 U.S. 47, 51 (1979)).

35 *Terry*, at 16-27.

36 Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1439 (2004). *See also* Frank Rudy Cooper, *Cultural Context Matters:* Terry's *"Seesaw Effect,"* 56 OKLA. L. REV. 833, 852 (2003) ("Prior

It is claimed that allowing police to detain and frisk suspects with less than probable cause brought about a dramatic reduction of civil liberties: "Prior to *Terry*, the Court's Fourth Amendment jurisprudence championed the rights of the individual in encounters between civilians and the police."[37]

It is slightly more complicated than that, but the scholars now marketing this theory may be forgiven; after all, the Supreme Court itself led them astray. In *Dunaway v. New York*, the Court wrote that "*Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause."[38] According to the *Dunaway* court:

> *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.[39]

There is a great deal of error here. It is inaccurate to portray the probable cause standard as inflexible and timeless. Probable cause has in fact fluctuated over time. In the early years of the American republic, probable cause was a remarkably undemanding (and therefore pro-government) evidentiary standard.[40] It became somewhat stricter (and therefore more civil libertarian) in the early nineteenth-century,[41] only to loosen again in the

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to *Terry*, the Fourth Amendment required probable cause for a criminally-oriented search or seizure to be deemed constitutionally permissible."); Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1308 (1998) ("A search based on police suspicion may be expedient, but it is an intrusion that, prior to *Terry*, the Court had declared the Constitution does not permit."). *But see* Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1095 (1998) ("Police were conducting preventive stops and frisks long before that decision. Most of the special needs searches and seizures that have been approved using *Terry's* balancing formula were already routine prior to *Terry*. *Terry* didn't alter law enforcement practices; it just provided, in the hands of the post-Warren Court, a rationale for the status quo.").

37 Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 181 (2003).

38 442 U.S. 200, 208-09 (1979).

39 *Id.* at 209-10.

40 Locke v. United States, 11 U.S. 339, 348 (1813) ("It is contended, that probable cause means *prima facie* evidence, or in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.... [However,] the term 'probable cause,' according to its usual acceptation, *means less than evidence which would justify condemnation*; and, in all cases of seizure, has a fixed and well known meaning. *It imports a seizure made under circumstances which warrant suspicion.*") (emphasis added).

41 The Apollon, 22 U.S. 362, 374 (1824) ("[T]he question, whether the Apollon designed to engage in this unlawful traffic, must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources.").

Prohibition era.[42] The stringent standard articulated by the Warren Court[43] was relaxed in the early years of the Rehnquist Court.[44] More recently, at least prior to the September 11, 2001 terrorist attacks, the evidentiary standard moved yet again in a civil libertarian direction.[45] Furthermore, the *Dunaway* Court, and a variety of academics, work under the fallacy that, prior to *Terry*, police lacked the authority to detain suspects for investigative reasons unless they had an evidentiary predicate (often called probable cause) that would suffice to conduct a full-blown arrest. This is incorrect as a matter of English common law and of American constitutional law.

In medieval times, various statutes authorized town guards to detain "any Stranger" walking the roads at night,[46] and anyone, during the day or night, who displayed an "evil suspicion" of having committed a felony.[47] The constable was commanded to bring the suspect to a magistrate, who conducted further inquiries to determine if the suspect had in fact committed a crime. Although the constable's detention powers waned over the next few centuries,[48] the pendulum swung back in the seventeenth-century, according to Hale, "in these times, where felonies and robberies are so frequent."[49] By the nineteenth-century, English common law made clear that police had a power of detention altogether separate from a technical power of arrest. In one 1810 case, the court dismissed a false imprisonment claim by a person stopped by a constable when the only apparent ground for suspicion was that he was carrying a bundle at night. The court intoned:

> In the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise.[50]

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42 Carroll v. United States, 267 U.S. 132, 161 (1925) (defining probable cause as merely "a reasonable ground for belief").

43 *See* Spinelli v. United States, 393 U.S. 410 (1969) (developing a higher standard for probable cause).

44 *See* Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (finding that probable cause should be determined by a totality-of-the-circumstances analysis).

45 *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 994-95 (2003) (discussing the use of a more stringent probable cause standard).

46 Statute of Winchester, 1285, 13 Edw. 1, c. 4 (Eng.).

47 Statute of Winchester, 1331, 5 Edw. 3, c. 14 (Eng.).

48 *See* JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 189 n.2 (Macmillan 1883) ("[Although] [t]he Statute of Winchester was not repealed till 1828, it had for centuries before that time been greatly neglected.").

49 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 149 (Professional Books Ltd. 1971) (1736).

50 Lawrence v. Hedger, 128 Eng. Rep. 6 (1810), *quoted in* John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211, 214 (1964). Furthermore, the

Crossing the Atlantic, we find that the law here never unequivocally "championed the rights of the individual in encounters between civilians and the police."[51] As previously noted, for various periods in American history, courts took a relatively lenient attitude towards claims by government agents that probable cause of criminal activity had justified a full-blown arrest or property seizure. At certain times officials seem to have had the authority to arrest suspects when, were the same facts present today, it is doubtful that courts would allow even a temporary stop or a frisk. For example, in the 1925 case *Carroll v. United States*, the Supreme Court upheld an arrest for violation of the Volstead Act on the flimsiest of evidence.[52] There, a pair of federal officers, disguised as undercover agents, approached Carroll about purchasing alcohol.[53] Carroll expressed interest in the offer, went off to find his source but returned empty-handed and the deal fell through.[54] Two months later, the same officers happened to see Carroll and two others driving in an Oldsmobile not far from the Canadian border, allegedly a source of illegal alcohol.[55] On these bare facts, the agents stopped the car, searched it, and found alcohol "behind the upholstering of the seats."[56] Chief Justice Taft, defining probable cause as simply a "reasonable ground for belief of guilt,"[57] concluded that probable cause was present because the area between Detroit and Grand Rapids was "one of the most active centers for introducing illegally into this country spirituous liquors" and that Carroll and the other defendants had offered to sell liquor two and a half months before the search.[58]

There is little doubt that *Carroll* is no longer an accurate reflection of the detention powers of American police officers. Consider the following hypothetical: A person agrees to sell drugs to undercover agents, leaves to find his source, and then returns empty-handed. Two months later, the agents see the same person driving near a source-city for cocaine, arrest him, and search his car. On these facts, any court would invalidate the arrest and the search. Probable cause, at least as it is now understood, would

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Metropolitan Police Act of 1839 permitted London police "to search vessels and carriages on reasonable suspicion that they were being used to convey stolen goods, and also to search persons who may be reasonably suspected of such possession." *Id.*

51 Herbert, *supra* note 37, at 181.

52 267 U.S. 132, 162 (1925).

53 *Id.* at 134-35.

54 *Id.* at 135.

55 *Id.*

56 *Id.* at 136.

57 *Id.* at 161.

58 *Carroll*, 267 U.S. at 160 ("They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.").

not have been present. Indeed, it is likely that such facts would fail even to rise to the level of reasonable suspicion sufficient to justify a *Terry* stop.

There are also cases from the early part of the twentieth-century that are consonant with contemporary notions of "reasonable suspicion" and the evidentiary predicate needed to justify an intrusion on a citizen's liberty. For example, the 1923 Michigan Supreme Court case of *People v. Guertins*[59] closely resembles the 2000 United States Supreme Court case of *Florida v. J.L.*[60] In both cases, police received an anonymous tip that someone was up to no good (which in the 1920s meant dealing in alcohol, and later included narcotics). The *Guertins* Court, like the *J.L.* Court, held that an anonymous tip, taken alone and "without the discloser of the informant and the source of his information" was insufficient to authorize the police to make an arrest.[61]

Notwithstanding *Guertins*, however, the case law in the early part of the twentieth-century in general accorded far greater weight to anonymous tips that were even slightly corroborated than the case law today. Courts in the early twentieth-century, although reluctant to authorize full-blown arrests based on anonymous tips, often deemed it reasonable for police officers to forcibly detain suspects based on anonymous tips and to demand an explanation of their whereabouts.[62] In one such case, *People v. Ward*,[63] the Michigan Supreme Court posed an elaborate hypothetical demonstrating this point. I quote from the *Ward* opinion at length because it seems so dramatically different from modern case law, not only in substance but also in spirit:

> Supposing that the officer had been informed by telephone that Harry Ward had robbed a bank at Spring Lake, had taken a car going in the direction of Grand Haven, and had the proceeds of the robbery in a suit case; that on the arrival of the car at Grand Haven he saw the defendant with the suit case in his possession—would not the officer have been derelict in his duty had he not accosted Ward, asked to see the contents of the suit case, and, on refusal, placed him under arrest and examined its contents? While the rights of individuals to be protected from unwarranted arrests must be carefully guarded, the rights of the public must also

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59 194 N.W. 561 (Mich. 1923).

60 529 U.S. 266 (2000). The facts in *J.L.* were as follows: An anonymous caller reported to Miami police that at a particular bus stop a young black man wearing a plaid shirt was carrying a gun. *Id.* at 266. Police officers arrived at the bus stop and saw three black males "just hanging out," one of whom was wearing a plaid shirt. *Id.* Other than the anonymous tip, there was no reason to suspect the three young men of criminal activity, but police officers approached and frisked them, and lo and behold the one in a plaid shirt—"ten days shy of his 16th birthday" and thus immortalized through his initials—was carrying a gun. *Id.* As Justice Ginsburg noted in a unanimous opinion reversing the Florida Supreme Court, "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id.* at 271.

61 *Guertins*, 194 N.W. at 562.

62 *See* State v. Kittle, 241 P. 962 (Wash. 1926); Cortes v. State, 185 So. 323 (Fla. 1938). *See also* Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940).

63 196 N.W. 971 (Mich. 1924).

> be considered. Robberies and holdups are now so frequent, and the opportunity to get away quickly so convenient that, unless officers may act promptly on information apparently reliable and circumstances reasonably convincing, there is but little hope of apprehending the guilty parties. If the officer must delay to ascertain that the information received comes from a responsible person, in many cases the opportunity to arrest will have passed. That officers do make arrests on such information, and that they are complimented on their promptness in doing so, is a matter of common knowledge.[64]

Although robberies and holdups are even more frequent now than in the 1920s, courts confronting the facts presented in *Ward* would be far more likely to emphasize their role as protectors of civil liberties. Indeed, on the facts presented in the *Ward* hypothetical, a modern American court would likely reach the opposite conclusion and suppress any evidence. Imagine that police today received an anonymous tip that an individual had robbed a bank and hidden the proceeds in a suitcase. If police had seen the suspect arrive home and remove a suitcase from a car trunk, courts would be unlikely to find that the police were authorized to order him to open the suitcase.[65]

The *Dunaway* Court's statement—that *Terry* amounted to a radical break in Fourth Amendment law by bestowing an unprecedented power on police to stop and search suspects when less than probable cause was present—is inconsistent with the documentary record. Many statutes from the first half of the twentieth-century appear to confer more discretion on police to stop people, at least at night, when they suspect the person is up to no good; and those same statutes provide that when the suspect fails to give an

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64 *Id.* at 972.

65 Consider, for example, State v. Smith, 839 N.E.2d. 451 (Ohio Ct. App. 2005). The police received an anonymous tip that one Dwayne Smith lived at 3025 Theresa Street, drove a black Cadillac, and dealt in cocaine. The informant reported that Smith carried a gun in his car and hid the cocaine in a Dr. Pepper can. *Id.* at 452. The police investigated Smith, corroborated that he owned a black Cadillac and lived on Theresa Street, and further discovered he had been convicted of involuntary manslaughter a decade earlier. *Id.* at 452-53. The police opened a 32-day investigation of Smith, at one point overhearing a cellular telephone conversation suggesting a drug buy. Police eventually stopped Smith, who refused to consent to search his car. *Id.* at 453. A drug-sniffing dog was hustled to the car (the detention of Mr. Smith amounted to 15 minutes), and the dog alerted at the passenger side of the car. *Id.* at 453-54. A Dr. Pepper can stuffed with crack cocaine was found in the glove compartment. *Id.* According to the trial judge, "[c]ourts must be wary of anonymous tips. They could easily result from ulterior motives." *Id.* at 452. The judge proceeded to criticize the police officers' testimony at the suppression hearing:

> Officer Reynolds testified only that he listened in while the informant set up the drug buy [during the cellular telephone conversation]. No details were ever produced as to how Officer Reynolds knew that the informant was talking to Smith, what the exact date, time, and location of the drug deal would be, or what drugs were to be involved. The one detail Officer Reynolds provided to the court—that the drug deal was at a Ferguson Road location—was vague. Officer Reynolds did not even specify where on Ferguson Road the buy was to take place. And the police stopped Smith before they could corroborate that he was en route to that location.

Id. at 456.

adequate explanation of his whereabouts, police officers can detain him, possibly overnight. For example:

> N.H. Pub. Laws (1926) c.363, § 12: Every watchman may arrest any person whom he shall find committing any disorder, disturbance, crime or offense, or such as are strolling about the streets at unreasonable hours, who refuse to give an account, or are reasonably suspected of giving a false account, of their business or design, or who can give no account of the occasion of their being abroad.[66]
>
> Mass. Gen. Laws (1932) c.41, § 98: During the night time [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going. . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested.[67]
>
> Rules and Regulations of the Police Department of Chicago (1933) Rule 465(6) provides: A person shall be arrested who is found prowling around at night, who is unable or refuses to give a satisfactory explanation of his conduct under such circumstances, or who has in his possession dangerous weapons or instruments ordinarily used by housebreakers.[68]

Section 2 of the Uniform Arrest Act of 1942 provides:

> A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
>
> Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
>
> The total period of detention provided for by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.[69]

These laws very much resemble the medieval English night watchmen statutes, which allowed constables to stop and detain persons even when they lacked probable cause to make an arrest. The suspect would be taken back to the police station, possibly detained overnight, and then brought before a magistrate for a determination of whether there was probable cause to make a full-blown arrest. If anything, the *Dunaway* Court's statement that *Terry* conferred more discretion on police officers than had existed earlier in the century gets it exactly backwards. Before *Terry*, when police made a stop based on reasonable suspicion, they could demand that the person answer questions or consent to a search, and if he were to refuse, they could simply arrest him. Modern American courts have held that persons detained during a *Terry* stop are free to refuse an officer's request for

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66 Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 319-20 n.15 (1942).

67 *Id.* at 319.

68 *Id.* at 319-20 n.15.

69 *Id.* at 321.

consent to search his belongings and to refuse to answer questions (other than the suspect's name). Furthermore, such refusals cannot themselves be cited by police as evidence that there was probable cause to make an arrest.[70]

D. Terry's *Legacy*

Despite the breadth of its legacy, the *Terry* decision was actually a limited one. The sole issue under review was whether, having struck up a conversation with the three suspects and having received mumbled answers, McFadden was justified in frisking the men for weapons. Chief Justice Warren offered no opinion as to what McFadden could have done had the three men calmly announced that they were looking for gifts for their wives and then walked away. Could the officer have forcibly detained them, and if so, for how long?[71] Could he have compelled them to answer questions or to produce identification?[72]

Narrowly read, *Terry* simply stands for the proposition that cops can frisk a suspect whom they are questioning when there is reasonable suspicion to fear for his or her own safety. Given that the focus of the *Terry* decision was the safety of police officers, it is remarkable how quickly the Court expanded the application of the "reasonable suspicion" evidentiary standard. Over the past thirty-five years, the Supreme Court has considered the constitutionality of countless police practices, and repeatedly, the Court has framed the issue as whether "reasonable suspicion" justified the police actions. Thus, citing *Terry*, the Court has upheld the detention of property when there was reasonable suspicion that contraband is inside;[73] "protective sweeps" of a house when there was reasonable suspicion that the suspect's armed associates might be present;[74] searches of a car when there was reasonable suspicion that weapons were present;[75] and searches of a probationer's home on the basis of reasonable suspicion.[76]

Some critics have lamented the imperialistic nature of the "reasonable suspicion" standard.[77] Meanwhile, probable cause, the competing eviden-

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70 Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 185-88 (2004).

71 *See* United States v. Sharpe, 470 U.S. 675, 683 (1985) (upholding a *Terry* stop of twenty minutes' duration); United States v. Place, 462 U.S. 696, 709-10 (1983) (rejecting detention of ninety minutes).

72 *Hiibel*, 542 U.S. at 185-88.

73 United States v. Van Leeuwen, 397 U.S. 249, 252 (1970) (upholding detention of mail when there was a reasonable suspicion that it contained drugs).

74 Maryland v. Buie, 494 U.S. 325, 334 (1990).

75 Michigan v. Long, 463 U.S. 1032, 1049-50 (1983).

76 United States v. Knights, 534 U.S. 112, 121 (2001).

77 *See, e.g.*, E. Martin Estrada, *Criminalizing Silence:* Hiibel *and the Continuing Expansion of the* Terry *Doctrine*, 49 ST. LOUIS U. L.J. 279, 287 (2005) ("[I]t is clear that the reasonable suspicion stan-

tiary standard that once served as the North Star of Fourth Amendment jurisprudence, has lost much of its luster. Courts now regularly look to the reasonable suspicion standard for guidance. It is my contention, argued at length in another article,[78] that this development is the predictable consequence of the Court's decision to cast probable cause as a high and inflexible standard,[79] that is inapplicable to the wide range of actions expected of police. Courts have rigorously applied the probable cause standard to full custodial arrests and house searches, but plainly, a lesser and more nuanced evidentiary standard is appropriate in other contexts, such as investigatory stops.

How much suspicion is needed to qualify as "reasonable suspicion"? In *United States v. Cortez*,[80] the Court ruminated on that question, saying that such a term "fall[s] short of providing clear guidance dispositive of the myriad factual situations that arise."[81] "But," the Court quickly added, "the essence of all that has been written is that *the totality of the circumstances*—the whole picture—must be taken into account."[82] One wonders what this adds to our understanding. Was someone suggesting that reasonable suspicion should be based on only a sliver of the circumstances, a shorn picture? If so, the Court squarely rejects such a view.[83]

Perhaps sensing that the illumination provided is at best diffuse, the Court proceeded: "Based upon that whole picture the detaining officers must have a *particularized* and *objective* basis for suspecting the particular person stopped of criminal activity."[84] Presumably, "particularized" and "objective" are to be distinguished from "generalized" and "subjective," but what separates these two categories of evidence (the one legitimate, the

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dard lends itself to broad applicability. What we are left with, then, is a haphazard, yet one-directional, broadening of police authority during a *Terry* stop."); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 402 (1988) ("Instead of carving out a narrow exception to probable cause, reasonable suspicion became a valid compromise standard that comports with the [F]ourth [A]mendment if the Court decides that, after balancing the interests, it is reasonable. The government no longer argues against a presumed starting point of probable cause but rather argues for reasonable suspicion as a reasonable accommodation of competing interests. Probable cause becomes merely one point on a continuum of reasonableness."); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1136 (1998) ("A broadly defined reasonableness balancing test ... largely places the citizen's Fourth Amendment fate in the hands of others.").

78 *See generally* Lerner, *supra* note 45.

79 *See* Dunaway v. New York, 442 U.S. 200, 207-11 (1979) (discussing the standard for probable cause).

80 449 U.S. 411 (1981). The discussion of the meaning of reasonable suspicion in *Cortez* is still the basis of Supreme Court decisions interpreting reasonable suspicion. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273-74 (2002) (quoting and discussing *Cortez*).

81 *Cortez*, 449 U.S. at 417.

82 *Id.* (emphasis added).

83 *Id.*

84 *Id.* at 417-18 (emphasis added).

other not)? Is the fact that a police officer detects anxiety and nervousness in a suspect objective or subjective evidence? Is the fact that a suspect is loitering in a "high-crime area" particularized or generalized evidence? As we explore in the next Part, the case law applying *Terry* provides a muddled answer to questions such as these.

II. THE UNREASONABLE "REASONABLE SUSPICION" STANDARD

Whether a police officer's suspicions authorize a stop and frisk depends on whether his suspicions were "reasonable"; that, in turn, depends on the nature of the evidence adduced by the officer at a suppression hearing. Reasonableness is equated with objective and particularized evidence, which is distinguished from subjective and generalized evidence. Driving the judicial skepticism about the latter category of evidence is the determination to root out police hunches: cops can interfere with a citizen's liberty only when the evidence is somehow objective, and not the product of a subjective sense, feeling, or instinct. This Part considers the current case law applying *Terry v. Ohio* and argues that courts are often too dismissive of subjective criteria and too impressed with objective criteria. I compare the probative value assigned to a piece of subjective evidence (that a suspect was nervous) and a piece of objective evidence (that a car has an air freshener, which is supposedly linked to drug dealing), and speculate that, contrary to the reception accorded such evidence in the courts, it is the former, not the latter evidence, that more highly correlates with criminal activity. The dismissal of subjective evidence and focus on objective evidence thus renders the reasonable suspicion standard an unreasonable one in some circumstances. And when one compares the judicial reception of police hunches to the hunches of other actors in the judicial system, such as judges, prosecutors, and juries, one discovers that courts are not skeptical of hunches *per se*; they are simply skeptical of cops.

A. *Nervousness, "Subjective" Evidence, and "Mere Hunches"*

Imagine that a pair of cops are cruising an area with a high-crime rate. The police officers see a car blocking an intersection; the driver "looks startled" when he realizes that police have arrived at the scene. The driver, looking anxious, averts his gaze from the police officers. He reaches over to the console and grabs something. The police officers decide to investigate, and as they approach, the driver reaches for something else out of view. One of the officers, fearing for his safety, orders the driver out of the car and frisks him. During the frisk, the officer discovers an illegal substance.

Such were the essential facts of *United States v. McKoy*[85] and, in broad strokes, countless other arrests over the past decades. In essentials, the government defended the frisk on three grounds: the suspect's nervousness, his furtive gestures, and the high-crime area in which the stop occurred. I consider below the *McKoy* opinion in some detail not because it is an especially important decision but quite the opposite: its ordinariness affords us some insight into the typical difficulties confronted in a reasonable suspicion decision.

Nervousness. First, Judge Woodlock considered the police officer's testimony that the suspect "looked away" when the police made eye contact and "began to act a little nervous."[86] After acknowledging that "nervousness is a factor the police may consider," the judge proceeded to discount the officer's observation.[87] He wrote that nervousness "alone is not sufficient."[88] Yet the government was not arguing that nervousness alone justified the stop. The issue was whether, taken together with furtive gestures in a high-crime area, the police officer's observation of unusual nervousness contributed in any way to a finding of reasonable suspicion. Judge Woodlock added, "[n]ervousness is a natural reaction to police presence,"[89] an observation generally offered in opinions that culminate in disregarding the officer's testimony on this score.

According to Judge Woodlock, "[n]ervousness may warrant even less weight when it is manifested in particular contexts."[90] In something of a detour, he then quotes a lengthy passage from Justice Stevens's dissenting[91] opinion in *Illinois v. Wardlow*,[92] where the question was whether a suspect's headlong flight when a dozen police cars converged provided reasonable suspicion for a stop and frisk:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal ac-

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85 402 F. Supp. 2d 311 (D. Mass. 2004), *aff'd*, 428 F.3d 38 (1st Cir. 2005).

86 *Id.* at 312.

87 *Id.* at 317.

88 *Id.*

89 *Id.*

90 *Id.*

91 Judge Woodlock identifies Stevens' opinion as "concurring in part and dissenting in part," which is technically true. *Id.* at 317-18. Stevens concurred insofar as he rejected the suspect's argument that flight could *never* contribute to a finding a reasonable suspicion. But while Stevens rejected a *per se* rule, he agreed with the defendant that, on the facts present, flight did not lead to a finding of reasonable suspicion. In this respect, Stevens *dissented* from the majority, which held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion." Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (Stevens, J., dissenting).

92 *Wardlow*, 528 U.S. at 126 (Stevens, J., dissenting).

> tivity associated with the officer's sudden presence.... [U]nprovoked flight can occur for other, innocent reasons.[93]

Immediately after quoting Stevens's dissenting opinion, Judge Woodlock ambiguously notes, "much the same could be said about nervousness in the presence of police officers."[94]

There was, however, a significant difference between the facts of *Wardlow* and *McKoy*. In the former, four police cars converged, sirens blaring. In such a circumstance, a wholly innocent person may well be startled into headlong flight. And yet, even on these facts, it is worth recalling, a *majority* of the Supreme Court Justices found that "headlong flight" is still the "consummate act of evasion."[95] The suspect in *McKoy* was sitting in a car at an intersection one afternoon when a single police car pulled up. Surely, such a situation is less startling and less likely, in and of itself, to generate feelings of anxiety on the part of an innocent person.

Stevens's observation that "particularly minorities and those residing in high crime areas"[96] may be more likely to innocently flee from the police is repetitively cited in lower court opinions,[97] but one might pause to consider its accuracy. The suggestion seems to be that nervousness among minorities and inner city residents is less probative of criminality than nervousness in non-minorities and suburbanites. But how do we (or Justice Stevens) know that? When lower courts suggest the heightened nervousness of inner city minorities, the proof consists of a citation to Stevens' dissenting opinion from *Wardlow*, bolstered perhaps by a law review article or two. However, without first-hand knowledge of the reaction by inner city minorities to police contact, it is doubtful that law professors or judges can rely on Stevens' observation. True, there are empirical studies that indicate minorities have somewhat more negative feelings towards the police than non-minorities,[98] but this may suggest that minorities are more

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93 *McKoy*, 402 F. Supp. 2d at 317 (quoting *Wardlow*, 528 U.S. at 132-33 (Stevens, J., dissenting)).

94 *Id.* at 318.

95 *Wardlow*, 528 U.S. at 124.

96 *Id.* at 132.

97 *See, e.g.*, State v. Nicholson, No. M2004-00111-CCA-R3CD, 2005 WL 434646, at *6, *9 (Tenn. Crim. App. May 23, 2005); State v. Jordan, 817 N.E.2d 864, 877, 879 (Ohio 2004); State v. Kelly, 119 S.W.3d 587, 594-95 (Mo. Ct. App. 2003).

98 *See, e.g.*, Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 148 n.48 (2003) (noting that "[f]ifty-eight percent of Blacks, compared to 20% of whites, believe that police do not treat all races fairly" (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 119 (2001))). *But cf.* James Forman, Jr., *Community Policing and Youth As Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 6 (2004) ("[T]he strength of ghetto feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection." (quoting NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 307 (1968))); George L. Kelling, *Acquiring A Taste for Order: The Community and Police*, 33 CRIME & DELINQ. 90, 94 (1987) ("Despite the contrary belief of some citizens and police that minority

hostile (perhaps legitimately) when police arrive on a scene, not that they are necessarily more *nervous*.

In any event, skepticism about the probative value of a police officer's testimony that a suspect is "nervous"[99] underlies the *McKoy* opinion, and numerous others. Virtually any behavior has been deemed "suspiciously nervous" by police officers.[100] In some cases, officers testify that nervousness is evidenced when a suspect avoids eye contact.[101] In other cases, nervousness is discerned when suspects repeatedly stare at police officers.[102] Some suspects display their nervousness by being "jittery";[103] others by being too calm.[104] As one judge complained:

> This court has heard every imaginable basis for searching so-called "suspicious" luggage: it is old, it is new; it had a handwritten identification tag or it did not; it is a soft bag, a garment bag, a duffel bag; the possessor is too nervous, too self-assured, too calm, too jittery; the bags are overstuffed or they are underpacked.[105]

Although police officers will informally explain that they can somehow distinguish between ordinary nervousness and suspicious nervousness, one may wonder whether they are deluding themselves about their powers of observation. A panel of the Tenth Circuit suggested as much in one case:

> Nothing in the record indicates whether Agent Ochoa had any prior knowledge of Defendant, so we do not understand how Agent Ochoa would know whether Defendant was acting nervous and excited or whether he was merely acting in his normal manner. Rather, Defendant's appearance to Agent Ochoa is nothing more than an "inchoate suspicion or hunch."[106]

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residents do not respect police, the great majority do.... They believe that police have not been a tangible presence, engaged with citizens to develop neighborhood peace and security.").

99 *United States v. McKoy*, 402 F. Supp. 2d 311, 317-18 (D. Mass. 2004), *aff'd*, 428 F.3d 38 (1st Cir. 2005).

100 *Cf.* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (referring to a drug profile's "chameleon-like way of adapting to any particular set of observations" (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987))).

101 *See, e.g.*, State v. Jackson, 892 So.2d 71, 76 (La. Ct. App. 2004) (stating that the "defendant appeared extremely nervous and fidgety, [and] refused to make eye contact").

102 *See, e.g.*, United States v. West, No. 03-3700, 2004 WL 1465690, at *2 (3rd Cir. June 30, 2004) (stating that "the totality of the circumstances supports a finding of reasonable suspicion" because the defendants "appeared hesitant to exit their car, repeatedly stared at the agents when entering the store, and even tripped over each other while walking back to the car").

103 *See, e.g.*, Adams v. State, 103 P.3d 908, 909 (Alaska Ct. App. 2004) (stating that the defendant appeared "jittery" because he was "placing his hands in his pockets, removing them, putting them back in his pockets").

104 *See, e.g.*, United States v. Cardona, 955 F.2d 976, 982 (5th Cir. 1992) (stating that "Cardona appeared 'too calm'").

105 United States v. Va Lerie, No. 8:03CR23, 2003 WL 21956437, at *5 (D. Neb. Aug. 14, 2003).

106 United States v. Bloom, 975 F.2d 1447, 1458 (10th Cir. 1992) (internal citations omitted).

An officer's testimony that a suspect was nervous is occasionally credited,[107] but many courts have doubted how the officer could reasonably make such a judgment and therefore minimize its significance in a reasonable suspicion determination.[108] As a Minnesota state court recently explained, "[T]he officer must demonstrate *objective* facts to justify that suspicion and may not base it upon a mere hunch. Nervousness alone is not an objective fact, but a *subjective* assessment derived from the officer's perceptions."[109] When a police officer reports his sense that a suspect was unusually nervous, even if he is being wholly honest, in the judge's eyes, he is merely confessing his subjective impression—a mere hunch.

High-crime area. The next factor Judge Woodlock considered was that the encounter occurred in a high-crime area. There are literally hundreds of opinions in which courts have struggled with the relevance of this factor in reasonable suspicion determinations.[110] As Judge Woodlock notes, the police are permitted to cite this factor, but "alone [it] is not a sufficient basis to support a frisk or even, for that matter, a stop."[111] (Again, no one suggested as much; the issue was the relevance of the prevalence of crime in the area taken together with other factors.) To be sure, the facts in *McKoy* were compelling on this score. In the week prior to the stop there had been two shootings at security vehicles reported in the area. One might think that it was objectively reasonable for the police officers to be wary as they approached the car. Judge Woodlock escapes this conclusion as follows:

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107 *See* State v. Bergmann, 633 N.W.2d 328, 337-38 (Iowa 2001) (finding that defendant's nervousness near the trunk of the vehicle created reasonable suspicion to call for drug dog). *See also* United States v. Hunnicutt, 135 F.3d 1345, 1350 (10th Cir. 1998) (finding that "no individualized reasonable suspicion of criminal activity was required to call the canine unit" because the defendants did not have authority to drive the car, but that alternatively, there was reasonable suspicion to wait for the drug dog based on defendant's "extreme nervousness" and "inconsistent statements"); United States v. Bloomfield, 40 F.3d 910, 912-13, 918-19 (8th Cir. 1994) (concluding that the wait for the drug dog was justified by defendant's nervousness, evasive answers, and refusal to consent to search).

108 State v. Gibson, 108 P.3d 424, 432-33 (Idaho Ct. App. 2005) ("[A] person's nervous demeanor during such an encounter is of limited significance in establishing the presence of reasonable suspicion."). *Accord* Brent v. Ashley, 247 F.3d 1294, 1302 (11th Cir. 2001); United States v. Beck, 140 F.3d 1129, 1139 (8th Cir. 1998); United States v. Fernandez, 18 F.3d 874, 879 (10th Cir. 1994); Laime v. State, 60 S.W.3d 464, 475 (Ark. 2001).

109 State v. Rahkola, Nos. A03-1614, A03-1615, 2004 WL 1327339, at *6 (Minn. Ct. App. June 15, 2004) (emphasis added).

110 *Compare* State v. Wilson, No. 84117, 2005 WL 273050, at *4 (Ohio Ct. App. Feb. 3, 2005) (Karpinski, J., dissenting) ("Even in high crime areas, a citizen is entitled to the presumption that he obeys the law." (citing City of Cleveland v. Fields, No. 82070, 2003 WL 1901337, at *3 (Ohio App. 8 Dist. April 17, 2003) (quoting State v. Clark, 743 N.E.2d 451, 455 (Ohio App. 8 Dist. 2000)))), *with* D.T.B. v. State, 892 So.2d 522, 524 (Fla. Dist. Ct. App. 2004) ("[W]hether the stop occurs in a high crime area is a relevant factor to be considered in a *Terry* analysis." (citing Terry v. Ohio, 392 U.S. 1, 1 (1968))).

111 United States v. McKoy, 402 F. Supp. 2d 311, 318 (D. Mass. 2004).

> [W]hile a factor, the neighborhood is one with limited significance in this case, particularly where no connection was made by the government between the nature of the crimes committed in the neighborhood and the violation suspected here . . . [t]his is not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected. The only reason for the stop was a traffic violation. No assumption about weapons can be drawn from Mr. McKoy's traffic violation. . . . Nor is there any indication that they suspected Mr. McKoy was involved in the two recent nighttime shootings of security car windows.[112]

Judge Woodlock's point in *McKoy* seems to be that although there was an objective basis for suspicion as they patrolled the area near the intersection of Maple and Cheney Streets, the suspicion was not particularized to the suspect McKoy:

> It is not enough to say that such events occur in the area or even that two specific events occurred recently in the neighborhood, for then everybody stopped for a traffic violation that week would be subject to the presumption regardless of whether their conduct could fairly be interpreted as dangerous.[113]

The district judge seems to have distorted the government's claim, which was not that *everyone* stopped for a traffic violation near the intersection of Maple and Cheney Streets could be frisked, but that this particular suspect could be frisked, given his nervousness and furtive gestures.

The nub of the problem under the current case law is drawing an intelligible distinction between particularized and generalized evidence. The Supreme Court in *United States v. Cortez* emphasized that "particularized" evidence could contribute to a reasonable suspicion finding, and in so doing, it implicitly excluded generalized evidence.[114] In what category does "high-crime area" fall? In *United States v. Arvizu*, the Court included several factors as contributing to a finding of reasonable suspicion, one of them that the van was "registered to an address . . . that was four blocks north of the border in an area notorious for alien and narcotics smuggling."[115] Such evidence seems "generalized," just like the *McKoy* defendant's presence in a high-crime area, but the Supreme Court in *Arvizu* nonetheless deemed it relevant, at least when added to other pieces of evidence more directly linked to the suspect.[116]

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112 *Id.* at 318-19 (quoting United States v. Gilliard, 847 F.2d 21, 25 (Mass. App. Ct. 1988)).

113 *Id.* at 319 n.11 (citing Margaret Raymond, *Down the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100-01 (1999)).

114 449 U.S. 411, 417-18 (1981).

115 534 U.S. 266, 271 (2002).

116 *Id.* at 271, 277 (noting that the stop occurred "in an area notorious for alien and narcotics smuggling," the Court found that "[i]t was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint.").

That said, the regularity with which police officers cite the "high-crime area" in which a stop occurred does give one pause. Concurring in the Ninth Circuit's *en banc* decision in *United States v. Montero-Camargo*,[117] Judge Kozinski complained about the use of this factor in reasonable suspicion decisions:

> Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop's repertoire of war stories to determine what is a "high crime area"—and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion—strikes me as an invitation to trouble.[118]

Granted, the facts regarding the "high-crime area" in *McKoy* were quite compelling—there had been two shootings at security vehicles in the past week—but what if there had been only one shooting, and what if it had been a month ago? At what point does a neighborhood qualify as "high-crime" for *Terry* purposes?[119] In a recent case, a suspect asked the Seventh Circuit to require the police to provide "specific data" confirming their claim that a stop occurred in a high-crime area, but the court rejected the invitation.[120]

It is not surprising that most criminals are stopped in neighborhoods where most crimes occur (also known as "high-crime areas"); what is surprising is that some courts seem to find it preferable to defer to a police officer's testimony that a stop occurred in a "high-crime area" than an officer's testimony about a suspect's nervousness. Surely, the former gives the officer nearly as much carte blanche as the latter. Given the courts' preference for certain kinds of testimony, however, one would predict police officers to craft their testimony accordingly; and one indeed finds officers reciting "high-crime area" like a mantra in suppression hearings. *Montero-Camargo* is an illustrative case, in which police officers stopped a car that made a U-turn just before it was to have been stopped at a checkpoint.[121] Ninth Circuit case law bafflingly prohibited police officers from citing this piece of evidence, since apparently, innocent drivers regularly make U-

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117 208 F.3d 1122 (9th Cir. 2000) (en banc).

118 *Id.* at 1143 (Kozinski, J., concurring) (internal citations omitted).

119 *Compare* United States v. Thornton, 197 F.3d 241, 248 (7th Cir. 1999) ("In less than one year there had been some 2,500 drug arrests in the five-block-by-five-block area where the incident occurred."), *with* United States v. Morales, 191 F.3d 602, 604 (5th Cir. 1999) ("In the past year alone, the Agent had detained approximately 600 illegal aliens on this stretch of the highway.").

120 United States v. Baskin, 401 F.3d 788, 793 (7th Cir. 2005). *But see* United States v. Diaz-Juarez, 299 F.3d 1138, 1145 (9th Cir. 2002) ("Specific data, not 'mere war stories,' are required to establish that an area deserves to be termed a 'high crime area.'" (quoting United States v. Montero-Camargo, 208 F.3d 1122, 1139 n.32 (9th Cir. 2000))).

121 *Montero-Camargo*, 208 F.3d at 1126-28.

turns as they approach checkpoints.[122] Consequently, the police officers in *Montero-Camargo* loaded up their testimony with as many acceptable "objective" pieces of evidence as possible.[123] By denying the relevance of the U-turn, Ninth Circuit case law implicitly demanded that police officers say different things. Judge Kozinski wrote:

> It also creates an incentive for officers to exaggerate or invent factors, just to make sure that the judges who review the case will approve their balancing act. I understand that it's not always possible to eliminate uncertainty, and that weighing and balancing is the stuff of many legal doctrines. But what excuse is there for resorting to a totality-of-the-circumstances approach when a single factor—the turnaround right before the checkpoint—alone justifies the search?[124]

As Judge Kozinski notes, courts seem to forget that police officers, just like criminals, respond to judicial decisions; and if courts signal their skepticism about "nervousness" testimony, police officers will simply alter what they say. Whether police officers will meaningfully alter their behavior is another question altogether.

Furtive gestures. Finally we come to the suspect's furtive gestures in *McKoy*, yet another factor that appears in countless *Terry* opinions, some courts according it weight,[125] others not.[126] Of course, there are movements, but then there are *furtive* movements. One cannot necessarily assume that any deviation from immobility gives rise to suspicion. After all, unnatural stiffness may also be cited as a factor contributing to reasonable suspicion, as was the case in *Arvizu*. Judge Woodlock writes, "The movement must be interpreted in context to determine if it is actually furtive, if it in fact gives rise to a reasonable belief that the suspect is armed and dangerous."[127]

The government in *McKoy* argued that the gestures cited by the police officers as suspicious were similar to movements deemed furtive in other cases.[128] However, Judge Woodlock sifted through the facts of the cases

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122 *See* United States v. Ogilvie, 527 F.2d 330, 332 (9th Cir. 1975) (finding that "turning off the highway and turning around [are] not in themselves suspicious . . . ." (quoted in *Montero-Camargo*, 208 F.3d at 1137)).

123 *Montero-Camargo*, 208 F.3d at 1131-32.

124 *Id.* at 1142 (Kozinski, J., concurring).

125 State v. T.N.T., No. 47166-0-I, 2001 WL 537884, at *2 (Wash. Ct. App. May 21, 2001) ("Factors relevant to a reasonable safety concern include . . . furtive gestures.").

126 *See, e.g.*, Joshua v. DeWitt, 341 F.3d 430, 443 (6th Cir. 2003) ("The Ohio Court of Appeals' use of the phrase 'furtive gestures' is a characterization, not an independent fact. From our review, there is no objective evidence in this record that would support the trooper's opinion upon which the Ohio Court of Appeals relied for its characterizations that Petitioner and his companion exhibited furtive gestures.").

127 United States v. McKoy, 402 F. Supp. 2d 311, 320 (D. Mass. 2004) *aff'd*, 428 F.3d 38 (1st Cir. 2005).

128 *Id.* at 319-22.

cited and concluded otherwise.[129] Although in one case, he conceded, the facts were similar, but he criticized the decision as "too broad."[130] For example, Judge Woodlock distinguished *United States v. Nash*,[131] where an Illinois state trooper stopped a car in Gullport, Illinois, in the early morning. As the trooper approached, he saw the driver reach toward the floor of the car.[132] The driver's face was unshaven and puffy and his breath smelled of alcohol.[133] In addition, a jacket was tucked under the driver's lap and stretched onto the floor.[134] The Seventh Circuit upheld the officer's decision to frisk the suspect.[135] Judge Woodlock cabined the implications of the case to miniscule dimensions stating:

> The proposition for which *Nash* stands is that a sole officer, approaching a car driven by someone who appears disheveled and drunk and having witnessed movement toward an area of the car where he later sees something that could obscure a weapon, may conduct a limited search for weapons.[136]

Judge Woodlock is surely right that there are factual differences between *McKoy* and *Nash*, but there were similarities as well. Judge Woodlock noted that in both cases, suspects during traffic stop violations made "volitional movements" that sparked concern on the part of police officers. While in *Nash* the suspect appeared to have been inebriated, under Judge Woodlock's reasoning, it is not clear why this provides grounds for a frisk as there is "no connection" between the consumption of alcohol and the possession of a firearm. Further, it is true that in *Nash* a single officer approached the car, whereas in *McKoy* a pair of officers approached, but one would need to explain how the threat to Officer Joyce, as he approached the driver's side of the car, was so substantially diminished by the fact that his partner was trailing him and approaching the passenger side. The most significant distinction between *Nash* and *McKoy* is the presence of the coat on the suspect's lap in *Nash*, but surely this is susceptible to an innocent explanation—the stop occurred on an early morning in November. Meanwhile, there were factors present in *McKoy* that were not present in *Nash*. In *McKoy*, the suspect was nervous and, more importantly, in the very area where the stop occurred, less than a week earlier, two shootings at security vehicles had occurred.

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129 *Id.* at 322.

130 *Id.*

131 876 F.2d 1359 (7th Cir. 1989).

132 *Id.* at 1360.

133 *Id.*

134 *Id.*

135 *Id.* at 1360-61.

136 United States v. McKoy, 402 F. Supp. 2d 311, 320 (D. Mass. 2004), *aff'd*, 428 F.3d 38 (1st Cir. 2005).

In which of the two scenarios would it be more objectively reasonable for a police officer to fear for his safety? It is difficult for me to say, as I would be terrified in either scenario. Judge Woodlock, however, drew a clear distinction between the two cases:

> The only indications in this case that Mr. McKoy was dangerous were (a) generalized notions regarding the neighborhood, not inferences drawn from his suspected crime, and (b) movements and nervousness in the presence of police, not physical reactions in contravention of an order to stop moving or apparent efforts at concealment. To admit the evidence would be a legal determination that if one commits a traffic violation in a high-crime neighborhood he will be subject to a frisk whenever he appears nervous and moves. The case law does not support such a simplistic and far-reaching conclusion and I decline to adopt it.[137]

According to the district court, denying the defendant's motion to suppress in this case would be tantamount to conferring unlimited discretion on police officers in high-crime areas. After all, police officers will always be able to claim that the suspect was nervous and furtive, and therefore they will be able to stop and frisk every suspect. Earlier in the opinion, Judge Woodlock quoted approvingly from a law review article that complained that "[o]bservations of minimal significance are sometimes elevated to reasonable suspicion based on the character of the neighborhood in which the suspect is found."[138] But surely "observations of minimal significance" could become significant in context, a point to which I will return later in this Article.[139]

B. *Air Fresheners, Objective Evidence, and the Base Rate Fallacy*

We turn now to more concrete and objective evidence. Courts are more receptive when police officers announce that they saw a "bulge" in a suspect's pocket,[140] that the suspect carried a pager,[141] or that the suspect's origin was one of the countless source-cities of illegal narcotics.[142] This evidence, the thinking goes, is not a "mere hunch" or subjective impression, but something objective, and therefore worthy of more serious attention.

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137 *Id.* at 322.

138 *Id.* at 319 n.11 (quoting Margaret Raymond, *Down the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100-01 (1999)).

139 *See infra* text accompanying notes 193-194.

140 *See, e.g.*, State v. Cothran, 115 S.W.3d 513, 523 (Tenn. Crim. App. 2003) (approving frisk when police reported a "characteristic bulge in the suspect's clothing").

141 *See, e.g.*, United States v. Kirkpatrick, 5 F. Supp. 2d 1045, 1057-58 (D. Neb. 1998) (determining that one of the factors supporting reasonable suspicion was that the suspect was carrying a pager).

142 *See, e.g.*, United States v. Wisniewski, 358 F. Supp. 2d 1074, 1089 (D. Utah 2005).

A curious example of objective evidence, which has spawned a surprisingly substantial body of case law, is the presence of one or more air fresheners in a suspect's car. In dozens of cases, police officers or highway troopers cite this piece of evidence as a factor contributing to reasonable suspicion. As police repeatedly tell judges at suppression motions, drug traffickers frequently use such devices in the belief that they mask the odor of drugs. In general, courts give credence to this testimony,[143] which suggests the following puzzle: Why are judges, who are so wary of police officers when they announce that a suspect was "nervous," comparatively deferential when police officers testify as to the significance of air fresheners in signaling the presence of drugs?

A moment's reflection should make one realize that the existence of a car deodorizer is of very little significance in deciding whether a car contains drugs, *even if*, as the police regularly maintain that many drug traffickers use such devices. We have no empirical studies as to what percentage of drug traffickers use air fresheners, but let us assume that the overwhelming majority, say 80 percent, do. Of course, since some innocent people also like to use air fresheners in their cars, let us assume that 5 percent of innocent people use air fresheners in their cars. Courts (and possibly also the police) seem to be duped into thinking, apparently on the basis of such "evidence," that an air freshener can give rise to reasonable suspicion.

But such thinking is flawed because it is premised on a base rate fallacy,[144] that is, a failure to consider the natural frequency in which drug traffickers prowl our nation's highways. Let us assume that a mere 0.1 percent (or 1 in a 1,000) of the nation's drivers are transporting drugs at any randomly chosen point along the nation's highways and byways. In any random sampling of 10,000 drivers, then, there will be 10 drug traffickers and 9,990 innocent drivers. Of the 10 drug traffickers, 80 percent (or 8 in 10) will have air fresheners in their cars. Of the 9,990 innocents, 5 percent, (or 500 in 10,000) will have air fresheners in their cars. Thus, in any group of 10,000 drivers, a total of 508 will have air fresheners. The upshot: the

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143 *See, e.g.*, United States v. Foreman, 369 F.3d 776, 786 n.9 (4th Cir. 2004); State v. O'Meara, 9 P.3d 325, 327 (Ariz. 2000); State v. Taylor, No. 990753-CA, 2000 WL 33250186, at *1 (Utah Ct. App. May 4, 2000) (noting that "the scent of air freshener, without 'other indicia of criminal activity' is not enough to create a reasonable suspicion" (quoting United States v. Alvarez, 68 F.3d 1242, 1246 (10th Cir. 1995) (McKay, J., concurring))); United States v. Bloomfield, 40 F.3d 910, 919 (8th Cir. 1994) (en banc); State v. Guzman, 879 P.2d 114, 116 (N.M. Ct. App. 1994); United States v. Sanchez-Valderuten, 11 F.3d 985, 989 (10th Cir. 1993); United States v. Solis-Serrano, No. 92-2095, 1992 WL 372405, at *4 (10th Cir. 1992); State v. Alonzo, 587 So.2d 136, 140 (2nd Cir. 1991); United States v. Reyna, 546 F.2d 103, 103-04 (5th Cir. 1977); United States v. Medina, 543 F.2d 553, 553 (5th Cir. 1976); United States v. Gutierrez-Espinosa, 516 F.2d 249, 250 (9th Cir. 1975); United States v. Alvarado, 519 F.2d 1133, 1135 (5th Cir. 1975).

144 *Cf.* GERD GIGERENZER & PETER TODD, SIMPLE HEURISTICS THAT MAKE US SMART 28 (1999).

percentage of drivers with air fresheners in their cars who are drug traffickers is 8 in 508 or just 1.57 percent.

Some federal judges, writing in dissent, have alluded to this point, albeit without resort to numbers or pretentious citations to the "base rate fallacy."[145] As Judge McMillian, dissenting in an *en banc* decision of the Eighth Circuit, wrote, "the 'masking odor' factor could apply to millions of motorists who use car deodorizers."[146] Although true, one should not minimize the significance of air fresheners in cars. Assuming my arbitrary numbers bear some relation to reality, a car with an air freshener is 157 times (0.0157 in 0.0001) more likely than a car without one to be used by a drug trafficker. Nonetheless, in and of itself, the air freshener's presence is not nearly as significant as courts (and perhaps troopers) seem to think, for only 1-2 percent of the cars with air fresheners are carrying drugs.

This raises the question which piece of evidence, taken alone, is more probative of criminal activity: (a) the objective presence of an air freshener in a car or (b) a police officer's subjective impression that a suspect is unusually nervous? Alternatively put, if the *only* piece of evidence one knew was either that (a) a car had an air freshener or (b) an experienced police officer had a "mere hunch," which factor—the objective or the subjective one—better predicts the presence of drugs? We have, of course, no hard data with which to answer the question, but it seems entirely possible, or even probable, that a "mere hunch" is more probative.

Consider *City of Indianapolis v. Edmond*,[147] in which the Indianapolis Police Department set up six roadblocks at selected locations and conducted random stops. Of the 1,161 cars stopped over a three month period, an astonishing 104 arrests were made. (55 arrests were made for drug-related crimes and another 49 were for offenses unrelated to drugs.)[148] The resulting hit rate was nearly 9 percent. It is possible, then, that simply by using their knowledge of Indianapolis and the preferred routes of drug traffickers, police were able to attain a far higher success rate than would have been obtained had they stopped every car with an air freshener.[149]

But let us assume that police are relatively inept in their hunches, and only 1 percent of their subjective and inchoate impressions prove accurate. It is still worth noting that when police have a hunch about someone *and*

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145 *See Foreman*, 369 F.3d at 796 (Gregory, J., dissenting) ("The prevalence of [air fresheners] in American automobiles does little to eliminate innocent people within the context of reasonable articulable suspicion."); *Bloomfield*, 40 F.3d at 924 (McMillian, J., dissenting).

146 *Bloomfield*, 40 F.3d at 924 (McMillian, J., dissenting).

147 531 U.S. 32 (2000).

148 *Id.* at 34-35.

149 The Supreme Court overturned the random checkpoints in *Edmond* because their purpose was a "general interest in crime" and not a non-law enforcement purpose that would qualify the program for treatment under the more deferential "special needs" jurisprudence. Thus, police have more leeway when searching for drunk drivers than for drug dealers—a result that defies easy explanation. *Id.* at 46-48.

that person has an air freshener in his car, the odds that the person is a drug trafficker may become relatively substantial (assuming that it is not because of the presence of the air freshener in the car that the officer develops a hunch.) Suppose that of any 10,000 people stopped by police due to a "mere hunch" only 1 percent, or 100 will be drug traffickers, and 9,900 will be innocent. Of the 100 drug traffickers, 80 will have air fresheners in their cars and of the 9,900 innocent drivers, 495 will too. So, of the sample of 575 cars with air fresheners, 80 in 575 or 16 percent will be indicative of drug traffickers. If we assume that police are somewhat better, but still quite inept, in developing hunches and that they generate true positives 5 percent of the time, the numbers become even more compelling. Then, if a police officer has a hunch and the person has an air freshener in the car, the suspect will be a drug trafficker 46 percent of the time.[150] The upshot is that an "objective" piece of evidence, such as the presence of an air freshener, only becomes statistically meaningful when it exists in tandem with another, often subjective, piece of evidence, such as an impression of anxiety or even a "mere hunch." Yet, following Justice Warren's opinion in *Terry*, courts persist in deprecating "mere hunches."

C. *Hunches and Demeanor Evidence in the Judicial System*

But a caveat is now in order. Courts are not disparaging of all hunches. It is often assumed that prosecutors, jurors, and judges gather genuine information on the basis of nonverbal cues, and the judicial system, far from discounting this information, treats these evaluations as valuable and worthy of deference.

1. Prosecutors

Imagine that at a suppression hearing a police officer conceded, "I [didn't] like the way he look[ed], with the way the hair [was] cut. . . . And the mustache and the beard look[ed] suspicious to me." If on the basis of this *hunch*, for lack of a better word, a police officer stopped a person, there is not even the slightest doubt that any evidence eventually obtained would be suppressed as the product of an illegal stop. Surely the officer's impression of how someone "looked," as well as the cut of his mustache and beard, does not qualify as *reasonable* suspicion. However, in the case

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[150] Of the 10,000 people stopped and as to whom the police have a hunch, 500 will be drug traffickers and 9,500 will be innocent. Of the former, 80 percent, or 400 will have air fresheners; of the latter, 5 percent or 475 will have air fresheners. Therefore, air fresheners in cars indicate drug traffickers, 400 in 875, or 46 percent of the time.

Purkett v. Elem,[151] such an admission was made, but no illegality was found. The author of the statement was not a police officer, however, but a prosecutor, who was justifying his use of a peremptory strike against a potential juror.[152] The Missouri Court of Appeals affirmed the conviction, finding that the "state's explanation constituted a legitimate 'hunch,'"[153] and the United States Supreme Court agreed.

Courts regularly condone prosecutorial hunches in the context of equal protection (or *Batson*) challenges to peremptory strikes of prospective jurors. The typical sequence of events begins with a defendant claiming that a prosecutor used his peremptory challenges to systematically remove minorities from the jury panel. A *Batson* motion is made, followed by the prosecutor mumbling something about the juror's hair[154] or "body language"[155] or jewelry[156] or youth[157] or apparent intelligence.[158] Then, to complete the protocol, a trial judge holds (on the basis of his observation of the prosecutor) that the proffered reasons were "race-neutral," and therefore legitimate. At the risk of belaboring the point, if a police officer offered such "reasons" as the justification for a three-minute *Terry* stop, the court would ridicule him, but in stark contrast, when a prosecutor, for the very same reasons, strikes a prospective juror, courts generally defer,[159] exalting the prosecutor's ability to act on a mere "hunch."[160] In her concurring opin-

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151 514 U.S. 765 (1995) (per curiam).

152 *Id.* at 766.

153 State v. Elem, 747 S.W.2d 772, 776 (Mo. Ct. App. 1988).

154 State v. Jones, 729 So. 2d 57, 61 (La. Ct. App. 1999) (purple-haired juror struck).

155 State v. Brown, No. 19236, 2003 WL 21210456, at *5 (Ohio Ct. App. May 23, 2003) (struck juror's "body language" suggested he was impressed by defense counsel); State v. McRae, 494 N.W.2d 252, 257 (Minn. 1992) (stating that "the demeanor of the juror, the tone used in responding, and other similar factors certainly are factors that a trial court may consider in reviewing the prosecutor's exercise of a peremptory challenge"); United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987) (holding peremptory strike based on body language are acceptable).

156 State v. Banks, 694 So. 2d 401, 408 (La. Ct. App. 1997) (juror wore gold jewelry and a T-shirt and alleged he was disabled).

157 State v. Perrilloux, 864 So. 2d 843, 849-50 (La. Ct. App. 2003) (juror was too young and wearing a gold and diamond earring).

158 State v. Herring, 762 N.E.2d 940, 953 (Ohio 2002) (prosecutor regarded juror as "not too bright" given that "[h]er hobbies [listed on a questionnaire] are eating, doing hair and watching Oprah").

159 The phenomenon has its critics. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1019 (1983) (criticizing the Court for permitting preemptory strikes against blacks in the absence of a compelling state reason and "on the basis of a prosecutor's whim or hunch").

160 *See, e.g.*, United States v. Bauer, 84 F.3d 1549, 1555 (9th Cir. 1996) ("Peremptory challenges are based upon professional judgment and educated hunches rather than research."); Straughter v. State, 801 S.W.2d 607, 614 (Tex. App. 1990) ("A challenge to a juror may be based upon the manner in which the juror reacts to defense counsel, as well as upon the juror's verbal statements in the record. The State may also base its peremptory strikes on the prosecutor's legitimate 'hunches' and past experience, as long as such strikes are not racially motivated."). *But see* United States v. Horsley, 864 F.2d 1543, 1546

ion in *J.E.B. v. Alabama ex rel. T.B.*,[161] Justice O'Connor defended the institution of the peremptory challenge, noting:

> [Its] essential nature is that it is exercised without a reason stated, without inquiry and without being subject to the court's control. Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's "bare looks and gestures."[162]

Contrary to the implicit rationale of *Terry*, Justice O'Connor here concedes that not all reasonable suspicions are articulable.[163] After citing secondary literature stating, "nonverbal cues can be better than verbal responses at revealing a juror's disposition," she concluded, "experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, *and our understanding that the lawyer will often be unable to explain the intuition*, [is] the very reason we cherish the peremptory challenge."[164]

Judicial deference to prosecutors is not confined to the *Batson* context. The criminal justice system also tolerates the intuitions and hunches of prosecutors. As Professors Bibas and Biershbach write, "Contrition and apologies influence prosecutors' decisions, including decisions not to charge, to accept proposed pleas, to enter into cooperation agreements, and to recommend favorable sentences."[165] In effect, the judicial system implicitly recognizes that a prosecutor has the ability to distinguish between the truly penitent and those merely scheming to obtain an advantage.

(11th Cir. 1989) (holding that the prosecutor failed to satisfy his burden of production when he stated that he struck a black juror because he "just got a feeling about him").

161 511 U.S. 127, 146-51 (1994) (O'Connor, J., concurring).

162 *Id.* at 147-48 (O'Connor, J., concurring) (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965) (emphasis added)).

163 *Id.* ("often a reason for it cannot be stated").

164 *Id.* (emphasis added) (citation omitted). Judge Richard P. Matsch, chief judge of the U.S. District Court for the District of Colorado, was asked: "Do you believe peremptory challenges still serve any purpose other than allowing a lawyer's whimsy and hunch to play into jury selection?" He answered, "I believe that intuition is an important and legitimate reason for excluding persons from jury service in every case. Peremptory challenges serve that purpose." Sandra I. Rothenberg, *Question and Answer with Judge Richard P. Matsch*, 14-SPG CRIM. JUST. 26, 27 (1999). An anonymous critic of this Article argues that I misunderstand the dynamics of a peremptory challenge under *Batson*. He notes that "[t]he prosecutor does not offer the hunch to show that the claimed fact is true ('younger people are more tolerant of drug use than older people'); instead she reveals the hunch to the court simply to show that her reason for a peremptory strike is unrelated to race or gender." There may be merit to this criticism, but the language quoted above from Judge Matsch, like the passage in Justice O'Connor's concurring opinion in *J.E.B. v. Alabama*, suggests that there is a prevalent belief that the prosecutor's intuition reflects some real insight into the nature of things. If it did not reflect such genuine insight, why would judges be willing to credit it as anything other than a coded way of masking their irrational racial prejudices?

165 Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse And Apology Into Criminal Procedure*, 114 YALE L.J. 85, 94 (2005).

2. Judges

Whatever misgivings judges might have about police officers acting intuitively, they seem to credit their own hunches. At the turn of the twentieth-century, judges at least had misgivings about candidly admitting this belief. When asked whether he would consider publishing a series of lectures at Yale Law School describing the judicial decision-making process, Benjamin Cardozo remarked, "If it were published, I would be impeached."[166] His hesitation apparently arose from concern that his frank praise for the "trained intuition"[167] of the judge would upset legal formalist notions of the judge as scientist, coldly and impersonally bringing detached reason to bear on any problem. To the contrary, Cardozo wrote, "The doctrine of the hunch, if viewed as an attempt at psychological analysis, embodies an important truth: it is a vivid and arresting description of one of the stages in the art of thought."[168]

This view would soon be elaborated upon by Judge Joseph Hutcheson, a self-professed convert from legal formalism to a more intuitive approach to judging. Hutcheson explained:

> [W]hen the case is difficult or involved . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[169]

A few years later, Jerome Frank, a Chicago attorney destined for the bench, wrote *Law and the Modern Mind.* For Frank:

> [t]he process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judgment begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it.[170]

When Frank, a decade later, ascended to the U.S. Court of Appeals for the Second Circuit, he used his bully pulpit to mock the "cloistered schol-

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166 Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 198 (1961).

167 BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 93 (1924), *quoted in* Richard H. Weisberg, *A Response On Cardozo To Professors Kaufman And Schwartz*, 50 DEPAUL L. REV. 535, 536 (2000).

168 BENJAMIN N. CARDOZO, *Jurisprudence*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, 27-28 (Margaret E. Hall ed., 1947), *quoted in* Dan Simon, *A Psychological Mode of Judicial Decision Making*, 30 RUTGERS L.J. 1, 120 (1998).

169 Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

170 JEROME FRANK, LAW AND THE MODERN MIND 108 (1930), *quoted in* Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 OKLA. L. REV. 219, 222-23 (1993).

ars"[171] who persisted in the view of the law as a coldly rational enterprise. Springing forward to the late twentieth-century, the "legal realism" that was once outré is now passé. Such varied jurists as William Brennan,[172] Richard Posner,[173] Patricia Wald,[174] and Judith Kaye[175] have all embraced the view that intuitive thinking is part of a judge's job description. Academics are also relatively accepting of judicial hunches.[176]

Significant aspects of the American judicial system are premised on a trial judge's capacity to make all kinds of judgments not reducible to hard logic. Courts regularly speak of a judge's ability to evaluate a witness's credibility through observation of his testimony and demeanor, and it is allegedly for this reason that appellate courts are so deferential on witness veracity issues.[177] A widespread belief exists among judges that "the trial judge is more likely than an appellate court to be correct in his judgments about which witnesses are telling the truth."[178] This belief in the trial judge's ability to size up a person's heart and mind by actual observation threads through the case law in various contexts. For example, the Supreme Court has approved a trial judge's authority to enhance a defendant's sentence for lying under oath, emphasizing the judge's ability to see the witness with her own eyes. According to the Court, the "opportunity to observe the defendant, particularly if he chose[s] to take the stand in his defense, can often provide useful insights into an appropriate disposition," and "the defendant's readiness to lie under oath . . . is among the more precise and concrete of the available indicia" to be used by a judge when sentencing a defendant.[179] Likewise, the Court has advised appellate courts to defer to trial courts in a *Batson* challenge to a prosecutor's use of peremptory

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171 Zell v. Am. Seating Co., 138 F.2d 641, 645 n.16 (2d Cir. 1943).

172 William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 3 (1988).

173 Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1656 (1990).

174 Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 12 (1984) (discussing judicial decision-making process).

175 Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1005, 1009-10, 1015 (1988).

176 *See, e.g.*, Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 52-53 (1988); Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 58 (2001); Saunders, *supra* note 170, at 221-22; Simon, *supra* note 168, at 19; Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 234-35 (1990).

177 *See* Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

178 STEPHEN C. YEAZELL, CIVIL PROCEDURE 790 (5th ed. 2000).

179 United States v. Grayson, 438 U.S. 41, 50-51 (1978); *see also* Jeremy A. Blumenthal, *A Wipe Of The Hands, A Lick Of The Lips: The Validity Of Demeanor Evidence In Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1167-69 (1993).

strikes, again emphasizing the trial judge's ability to assess the prosecutor's motives with her own eyes. As the Court explained, "the decisive question will be whether [the prosecutor's proffered] race-neutral explanation . . . should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[180]

Deference to trial judges, however, extends beyond a supposed ability to evaluate a witness's or prosecutor's credibility. In the bail context, judges claim to draw conclusions based on their face-to-face study of the defendant's "demeanor."[181] And in the sentencing context, deference to trial judges is premised on, among other factors, a judge's supposed ability to probe a defendant's soul and determine whether he is genuinely sorry for the crimes he committed.[182] Again, one cannot but be impressed by the powers claimed by judges in assessing, through verbal *and nonverbal cues*, what occurs inside a defendant's mind and soul.

3. Jury

The institution of the American jury unfailingly excites panegyrics on the intuitive wisdom of the common man. In a recent book, Randolph Jonakait observes that, "[j]urors who are not smart or educated and can't understand complex issues are able to bring their life experiences to the task, which often gives them more valuable knowledge than any judge could have."[183] The great thing about typical jurors, it is said, is precisely that they are not burdened with postgraduate degrees in logic and that they are free to exercise a deeper wisdom than that possessed by any philosopher. To be sure, in theory, jurors follow the law and not their instincts. Judges and lawyers devote hours to the precise formulation of jury instructions, the implicit rationale being that jurors should be meticulously guided by the law, as if they were students of Euclid engaged in the most rigid of geometric proofs. Minute errors, sometimes amounting to a single word,[184]

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180 Hernandez v. New York, 500 U.S. 352, 365 (1991).

181 Memorandum from the Federal Public Defender, Southern District of Texas to the Honorable Judge George P. Kazen, United States District Judge, Southern District of Texas 3 (June 1, 1992), *quoted in* Ronnie Thaxton, *Injustice Telecast: The Illegal Use Of Closed-Circuit Television Arraignments And Bail Bond Hearings In Federal Court*, 79 IOWA L. REV 175, 201 n.220 (2004).

182 *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 115-18 (1988) (recounting interviews with several federal judges who indicated the importance of remorse and contrition as a sentencing consideration, and not only in white-collar cases).

183 RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM xv (2003). Although Jonakait concludes that American juries perform "very well," he proposes some sensible reforms. *Id.* at 279-94.

184 *See* United States v. Lacy, Nos. 96-4859, 96-4964, 97-4053, 1997 WL 768562, at *1 (4th Cir. Dec. 15, 1997) (overturning conviction after a four-day trial because the trial judge omitted one word requested by defense from the jury instructions).

can provide grounds for reversal, the pretense being that jurors, though likely less educated than the typical citizen and often unable even to take notes, are following complex jury instructions to the letter and applying them with the utmost rigor. In reality, jurors are to a great degree free to indulge "intuitive notions of right and wrong." Jury trials "tolerate" and even encourage decisions made not through the application of logic but through the use of common folk wisdom.[185]

In modern times, trial judges are loath even to provide minimal guidance to juries. Hence, the once-common practice of judges commenting on the evidence has fallen out of favor.[186] And of course, on appeal, jury verdicts enjoy the greatest deference, insulated from assault like impregnable citadels. Along with the trial judge, the jury is "the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court."[187] The Supreme Court, in a faulty historical reading,[188] has infused policy considerations with constitutional pretensions, announcing that the Confrontation Clause of the Sixth Amendment mandates "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[189] Through cross-examination, famously touted as the "greatest legal engine ever invented for

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185 Paul Bergman, *The War Between the States (of Mind): Oral Versus Textual Reasoning*, 40 ARK. L. REV. 505, 509 (1987).

186 Renee Lettow Lerner, *The Transformation Of The American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 199 (2000) (lamenting this development).

187 Bolin v. State, 405 S.W.2d 768, 771 (1966).

188 In Coy v. Iowa, 487 U.S. 1012 (1988), Justice Scalia scours English history and literature to find support for his claim that underlying the Confrontation Clause of the Sixth Amendment is the belief that there is informational value in the demeanor of a witness. He cites, for example, Shakespeare's *Richard II*, in which Richard demands that two feuding noblemen be summoned "to our presence—face to face and frowning brow to brow, ourselves will hear the accuser and accused freely speak." *Coy*, 487 U.S. at 1017 (quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1). But it does not appear that Shakespeare's account was a fair depiction of any jurisprudential principles in King Richard's time. Blumenthal, *supra* note 179, at 1184 n.167. Even more problematic for Scalia's use of the play to support his argument, by the end of the scene, after the two noblemen have personally presented themselves, the King is nonetheless unable to resolve the dispute, and he orders the two to settle their differences by trial by battle. So much, it would seem, for the value of demeanor evidence in resolving disputes. *Id.* Professor Wellborn notes that Scalia could have cited the example of Sir Walter Raleigh's demand, during his prosecution for treason, that a witness against him, Lord Cobham, personally present himself. Yet Raleigh's purpose in demanding that Cobham present himself was not that he believed that his accuser's demeanor would betray his false testimony, but rather that Cobham would not give his false testimony if he were forced to do so under oath. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1093 (1991).

189 Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (citation omitted).

the discovery of truth,"[190] jurors get to study the nonverbal performance of a witness—that is, "[w]hether the witness fidgets, gesticulates, averts her gaze, whether her voice cracks, stutters, or rises in pitch, how frequently she pauses and for how long—all these are demeanor cues."[191] And supposedly, such "demeanor evidence" supplies valuable information in evaluating a witness's credibility: "The Anglo-American trial mode assumes that accuracy is optimized by having the court or jury hear live testimony by every witness."[192]

In sum, prosecutors, judges, and juries act upon hunches all the time, and rather than mocking such hunches as irrational and capricious, observers traditionally celebrate them as a sort of better guide than reason. Juries and judges, we are assured, can assess a witness's credibility from his demeanor—whether he averts his eyes, rakes his hair, scratches his nose, coughs, stutters, laughs, giggles, hiccups, blinks, etc. Police officers who mentioned such actions in a *Terry* suppression hearing to support a stop would likely receive an ill-tempered judicial lecture on the difference between rational and articulable suspicion and the dreaded "mere hunch." But much of the fact-finding in the American judicial system is predicated, rightly or wrongly, on reliance on demeanor evidence. One should, thus, unpack judicial skepticism about a police officer's "mere hunches." It is not that courts distrust hunches: they just distrust cops.

III. TOWARDS A REASONABLE "REASONABLE SUSPICION" STANDARD

Judicial hostility to police hunches unquestionably alters the behavior of police officers in the courtrooms of America, but the extent to which it meaningfully or beneficially alters their conduct on the streets of America is another matter. As argued below, the judicial disparagement of police hunches—although justified as a means of constraining police—may entail a number of costs. This Part offers some suggestions as to how the reasonable suspicion judicial standard might be rendered more reasonable. For starters, courts could acknowledge that the evidentiary standard must be calibrated to the particular circumstance confronted by the police—that is, they should take into account the gravity of the crime under investigation and the intrusiveness of the proposed search or seizure. Where police are searching for a radiological bomb, it would be unreasonable to expect an identical evidentiary predicate for a stop and frisk as when they are searching for a gram of cocaine. Likewise, when police haul someone off the

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190 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (James H. Chadbourn rev. 1974).

191 Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 310 (2004) (citation omitted).

192 Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485, 485 (1999).

street, detain him for twenty minutes, and perform a full-body frisk, they must have a more substantial evidentiary predicate to justify their actions than when, after pulling a car over for perfectly legitimate reasons, they detain the driver for an additional ten seconds while they have a drug-sniffing dog circle the car. Furthermore, the reasonable suspicion standard would be more reasonable if courts expended less energy in the hopeless task of distinguishing subjective from objective evidence and more holistically considered the reasonableness of the entirety of the police officer's actions, meaning not only the nature of the suspicions that spurred the police officer to act in the first place, but also the officer's treatment of the suspect throughout the encounter. If courts reacted with less instinctive repugnance to a hunch, or anything that seemed to hint at a hunch, police officers might be more candid about what they did and why they did it.

A. *The Costs of Excluding Police Hunches*

Law has an educative and a morality function; it is neither simply a set of incentives nor a catalog of prices attached to various kinds of conduct. Law sends messages, and the message sent by judicial hostility to police hunches specifically, and the reasonable suspicion case law generally, is that police officers do *not* have boundless discretion, nor should they think of themselves as having it. We equip them with badges and armor and pistols, and then we quite sensibly try to drill into their heads that they are not gods, but public servants.

How well does this strategy work? Let us consider again the *McKoy* case, in which the district court found that the officer's impressions that the suspect was anxious and had made furtive gestures did not warrant a frisk, even in a high-crime area. As the judge wrote, quoting a law review article, "[o]bservations of minimal significance are sometimes elevated to reasonable suspicion based on the character of the neighborhood in which the suspect is found."[193] The author of that article would presumably agree that a police officer is entitled to be warier as he approaches a parked car at the intersection of Maple and Cheney Streets (in downscale Boston) than at the intersection of Brattle and Sparks Street (in upscale Cambridge).[194] So it is the case that observations that might not constitute reasonable suspicion in the latter location could be sufficient in the former.

The district court concluded, however, that the officer's observations in *McKoy* were so "minimal" in their probative value that even in a location where there had been two shootings at security guards earlier that week, the

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193 United States v. McKoy, 402 F. Supp. 2d 311, 319 n.11 (D. Mass. 2004) (citations omitted).

194 *Cf.* Raymond, *supra* note 138, at 125 (1999) ("[I]n a purely probabilistic sense, the character of the neighborhood for criminality may increase the probability that an actor in that neighborhood is engaged in criminal activity.").

evidence did not rise to "reasonable suspicion." If so, what would we want the officers to have done that afternoon when they saw an illegally parked car and the driver looked around nervously when he spied the police? Three options present themselves: (a) stay in the car; (b) call for backup; or (c) approach the suspect but not frisk him. Option (b) is a non-starter (though a favorite of law students whenever I pose similar hypotheticals): any police officer who called in backup when he saw a double-parked car would be the object of ridicule. Option (c) is problematic. Let's look at this from the police officer's point of view: "I'm supposed to approach the car, though the guy looks fishy and seems to be reaching for something, but I can't frisk him, even though there were two shootings here a few days ago. If you want me to investigate this guy, I get to frisk him; otherwise, I stay in the car."

What do we tell this officer? Should he have stayed in his car or should he have investigated but not frisked? The latter answer is unrealistic. The police officer is a civil servant, and it is no more sensible to expect selfless courage from him than it is to expect it of a city councilman, a judge, or a law professor. If one's answer is that the officer should have stayed in the car, then perhaps the rule articulated by Judge Woodlock in *McKoy* will, on the margin, contribute to that result: Police officers who were on the fence about doing nothing or doing something will, with fewer misgivings, just roll on by, finishing out their shift without breaking a sweat. The question arises whether this is a victory for civil liberties or a defeat for effective policing. In any event, most of those police officers who were inclined to investigate before *McKoy* will frisk anyhow. Cases such as *McKoy* simply ensure that they prepare more diligently for the suppression hearing, formulating more objective pieces of evidence and adding details to their "nervousness" and "furtive movements" testimony in the hopes of satisfying the judge.

Consider the matter from the energetic police officer's perspective. He sees the double-parked car; he sees the driver's anxiety and arm movement. The officer decides to investigate. What has gone through his mind at this point? Probably nothing more than, "this guy looks fishy." He is more courageous than the typical law professor or judge, but he is not a fool. He has every intention of frisking the suspect. It is unlikely that he is worried about case law such as *McKoy*. If one could freeze the moment and inquire, he would assure you that, in the event of a suppression hearing months from now, there is a capacious menu of "objective" factors from which to choose. Will they persuade the judge? "Probably," he thinks, "and in any event, that will be the prosecutor's problem, not mine. The worst case scenario is the guy goes free. That would be bad, but in the end, it's not my concern: I live in the suburbs and the kids this guy is peddling drugs to are no relation to mine." The reality is that cops in the field have vast discretion—to do something or nothing—and judicial supervision is so tenuous and temporally distant that it is unlikely to affect most police offi-

cers. The judicial insistence that only "objective" criteria can form the basis for a *Terry* stop in practice simply rewards those officers who are able and willing to spin their behavior in a way that satisfies judges. It rewards articulate officers and penalizes those who are less verbally facile or who are transparent about their motivations.

Assuming that some segment of police officers behaves differently as the result of decisions such as *McKoy*, preferring to coast through their shift rather than rousting a suspected criminal, the question remains whether this is a desirable result. Less rousting means fewer encroachments on civil liberties to be sure but also means more crime. More rousting means more constitutional encroachments on civil liberties and less crime.[195] To state the obvious: There is a balance that needs to be struck, and it is not entirely clear why courts, and not elected authorities, should take the lead in so doing. Some have argued that the political process is so deficient, so institutionally rigged against certain disfavored communities, that judicial activism is needed.[196]

Boston would seem to be a perfect candidate for such a view; its African-American community is relatively small (25.3 percent of the city's population) compared to other major American cities.[197] Yet, experience does not fulfill the predictions of the "political process" school of thought. In the late 1980s, Boston experienced a sharp increase in violent crime, and police adopted an aggressive stop-and-frisk policy. The policy was referred to within the police department as "tipping kids upside down" and, arguably, in practice meant the indiscriminate stopping and frisking of African-

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[195] The experience in Los Angeles in the late 1990s is illustrative. In the wake of the Ramparts investigation of the Los Angeles Police Department in the mid-1990s, the LAPD brass, bowing to political pressure, created multiple layers of bureaucratic oversight and massively increased penalties for police officers charged with civil rights violations. The number of citizens' complaints skyrocketed and police altered their behavior, although not in the way that had been hoped. According to a study by a University of Chicago Business School professor:

> Officers used to drive into low-income black and Hispanic neighborhoods and confront suspects, but now there is a danger that they will face an investigation. The new strategy of LAPD officers seems to be "drive and wave," whereby officers drive through low-income black and Hispanic neighborhoods, and instead of getting out of their car, they keep driving, essentially avoiding doing their jobs . . . . After many years of decline, gang-related violence in Los Angeles increased significantly between 1999 and 2001.

Canice Prendergast, *Inefficiency is a Matter of Perspective: The Limits of Bureaucracy*, CHICAGO GSB, Feb. 2005, http://www.chicagogsb.edu/capideas/feb05/inefficiency.html (last visited Feb. 21, 2008). I offer this anecdote not to defend the LAPD's abusive practices in the mid-1990s, but simply to point out the rousting/crime trade-off.

[196] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). *See also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991) ("Because the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political process theory demands judicial superintendence.").

[197] BOSTON POPULATION AND DEMOGRAPHICS, http://factfinder.census.gov/ (follow "Fact Sheet" hyperlink; then search for "Boston" and select Massachusetts; then follow "2000" hyperlink) (last visited Feb. 21, 2008).

American youths.[198] Within two years, homicide rates dropped nearly fifty percent,[199] and some members of the African-American community applauded the police for finally taking an interest in minority neighborhoods. However, many others were critical of the police, and undoubtedly, there were a number of "bad seed" police officers who abused their powers. As a result of political pressure, the police department abandoned its "tipping kids upside down" policy and forged instead a "broad alliance between police, social service agencies, and leaders of churches, schools, and community groups."[200] What is noteworthy about the developments in Boston is that the political process, not the courts, was responsible for an evolving understanding of reasonable suspicion, gauged to public perceptions of an appropriate balancing of the interests at stake. If such developments could occur in Boston, with a relatively small minority population, they are equally or even more likely to occur in communities where minorities have substantial political power.[201]

Let us stipulate, however, that at times the political process will fail, and let us further stipulate that as the result of opinions such as *McKoy* some police officers will behave differently—by which I mean more respectfully of civil liberties. Surely, one would also have to concede that the approach to reasonable suspicion articulated in such an opinion has costs. First, it may make cops more cynical—about their own jobs, judges, and the law. They learn that the public wants them to catch criminals while being sly when they appear in court.[202] Furthermore, a view of reasonable

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198 *See* Christopher Winship & Jenny Berrien, *Boston cops and black churches - New Approaches to Fighting Crime*, 136 PUB. INT. 52, 56 (1999), *available at* http://findarticles.com/p/articles/mi_m0377/is_136/ai_55174703 (last visited Feb. 21, 2008).

199 *Id.*

200 Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1347 (2001).

201 *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173 (1998) ("[I]nstead of subjecting all law-enforcement techniques to searching scrutiny, courts should now ask whether the community itself is sharing in the burden that a particular law imposes on individual freedom. If it is, the court should presume that the law does not violate individual rights."); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 660-61 (1997) ("By openly discussing the formulation of guidelines, police effectively announce in advance the approach to a problem that the department has tentatively decided to take. Police can obtain information from neighborhood residents or from advisory councils and the larger community about the acceptability of the planned approach."). *See also* Randall Kennedy, *The State, Criminal Law and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255 (1994) ("Like many social ills, crime afflicts African-Americans with a special vengeance . . . . Many of those who seek to champion the interests of African-Americans, however, wrongly retard efforts to control criminality."); RANDALL KENNEDY, RACE CRIME AND LAW 19 (1997) ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not over-enforcement but under-enforcement of the laws.").

202 As David Simon has written about the *Miranda* decision:

> [I]t's lawyers, the Great Compromisers of our age, who have struck this bargain, who still manage to keep cuffs clean in the public courts, where rights and process are worshipped

suspicion that depreciates the value of hunches increases the costs of policing. To the extent that some police officers meaningfully change their behavior in obedience to decisions such as *McKoy*, catching criminals becomes relatively more difficult. As the evidentiary predicate required to stop suspects increases, police officers need to devote additional resources to catch any one particular criminal. Perhaps it comes as little surprise that as judicial interpretations of "reasonable suspicion" become more stringent, public funding for police departments soars.

Professor William Stuntz has observed that often legislatures have actively undercut the effectiveness of judicially created procedural protections by under-funding criminal defense counsel, increasing sentences for numerous offenses, and expanding substantive criminal liability.[203] As Stuntz has argued, judicially-created criminal procedure rules have thus driven an ill-advised expansion of the substantive law, which in turn makes courts more protective of the rights of suspects, and so on in a vicious cycle.[204] One might pursue this line of reasoning another step: as courts ramp up judicial protections through ever more stringent interpretations of reasonable suspicion, the politically accountable branches counter by hiring more police. The number of police officers across America rose dramatically in the 1980s and 1990s, and as one might expect, the quality of recruits fell.[205] Ironically, if the purpose of stringent "reasonable suspicion" case law was to rein in police, the case law may have contributed to the perceived need to expand police forces, diluting quality, and thereby increasing the rate of police abuses.

B. *A Broader View of "Reasonable Suspicion"*

To the extent that the Supreme Court has attempted to clarify the meaning of "reasonable suspicion," it has done so without recourse to irksome numbers, relying instead on, as Hamlet said in disgust, "words, words, words."[206] Perhaps, however, it would be helpful to think about the problem in quantitative terms. In the context of the typical investigatory

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> faithfully . . . . Trapped in that contradiction, a [police officer] does his job in the only possible way. He follows the requirements of the law to the letter—or close enough so as not to jeopardize his case. Just as faithfully, he ignores the law's spirit and intent. He becomes a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding.

DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 200-01 (1991).

203 William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7-12, 55-59 (1997).

204 *Id.*

205 Dave Kopel & Mike Krause, *Officer Politics*, AMERICAN OUTLOOK, May-June 2001, *available at* http://www.americanoutlook.org/index.cfm?fuseaction=article_detail&id=1120 (last visited Feb. 21, 2008).

206 WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

stop, how much suspicion is needed to qualify as "reasonable"? If we imagine a spectrum of probability, from a zero percent likelihood of criminal activity to a one hundred percent certainty, where along the line does reasonable suspicion fall? Courts have clarified that "probable cause" is less than the "more probable than not" or "preponderance of the evidence" standards,[207] which have sensibly been put at roughly fifty percent.[208] Reasonable suspicion is itself a "less demanding standard than probable cause."[209] Indeed, "the likelihood of criminal activity" that would constitute reasonable suspicion for a *Terry* stop "falls considerably short of satisfying a preponderance of the evidence standard."[210] Thus, a likelihood of criminal activity perhaps far less than fifty percent would amount to reasonable suspicion.

However, this chain of comparisons is not very helpful because reasonable suspicion cannot plausibly be a fixed standard. If reasonable suspicion is truly to be reasonable, it must be calibrated to each specific circumstance. Events during the fall of 2002 in the Washington, D.C. metropolitan area confirm this view. For several weeks, the area was paralyzed by a series of sniper attacks.[211] One or two witnesses reported a white van near a few of the shootings.[212] After one murder, police stopped traffic on a major interstate and, with guns drawn, searched "hundreds of white vans."[213] Obviously, the likelihood that any single one of the thousands of vans harbored the sniper was infinitesimal, but the compelling social interest was deemed to justify casting a broad net.[214]

For the time being, let us set aside snipers and bombs and confine ourselves to the more typical case: police officers searching for drugs or guns. When conducting an investigatory stop or frisk in such a context, how certain must they be that illegal activity is afoot? If a police officer stops ten people on a given day and in one instance his suspicion is borne out—that is, evidence of drugs or an illegally concealed gun is discovered—would we say that, *ex ante*, his actions were reasonable in all ten instances? What if his suspicion is borne out in two instances or three? Courts have eschewed this sort of analysis, inquiring not about a police officer's overall success rate but about the metaphysical nature of the evidence cited in any individual case to support a stop or frisk: objective evidence is acceptable, but sub-

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207 *See, e.g.*, United States v. Limares, 269 F.3d 794, 798 (7th Cir. 2001) ("'[P]robable cause' is something less than a preponderance.").

208 *See, e.g.*, United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (surveying ten district judges who placed the "preponderance of the evidence" standard at a 50-51% certainty).

209 Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

210 United States v. Arvizu, 534 U.S. 266, 274 (2002).

211 Carol Morello & Josh White, *8th Killing Intensifies Search For Sniper; Pa. Father of 6 Slain at Spotsylvania Pump*, WASH. POST, Oct. 13, 2002, at A1.

212 *Id.*

213 *Id.*

214 *Id.*

jective evidence is not.[215] As I have already argued, even if one could sort evidence in that way, which is doubtful,[216] it is unclear that objective evidence is necessarily more indicative of criminal activity.[217]

The weighing of some evidence and the disregarding of other ultimately rests, at least in part, upon empirical judgments about the probative value of the evidence. In *Florida v. J.L.*,[218] the police received an anonymous tip that at a bus station a black youth wearing a plaid shirt was carrying a gun.[219] The police found such a youth at a bus station and, upon searching him, found a gun.[220] The Supreme Court was dismissive of the anonymous tip,[221] but why? The opinion reflected a distaste for anonymous tips, which evoke concerns about citizens falsely ratting out their enemies simply to harass them. Yet, the legal system credits anonymous tips if they are richly detailed or satisfactorily corroborated.[222] The question in *J.L.* was what probative value to assign to an anonymous tip that was corroborated in one sense—accurate description of present activity—but not another—a prediction of future activity that came to fruition.[223]

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215 In isolated contexts, courts have judged law enforcement in part by its *ex post* success. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1980) (upholding drunk driving checkpoints that had a 1.6% hit rate); United States v. Martinez-Fuente, 428 U.S. 543, 554 (1976) (noting the "effectiveness" of a border stop, where 171 of 820 stopped vehicles contained illegal aliens). *But see* City of Indianapolis v. Edmond, 531 U.S. 32, 35-36 (2000) (holding unconstitutional a roadblock which had a hit rate of 9%). In the *Terry* context, however, the judicial analysis is focused on the nature of the *ex ante* nature (objective and particularized, or subjective and generalized) of the evidence. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981) ("[T]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

216 *See supra* Part III.A (noting the difficulty in characterizing certain evidence as "objective" or "subjective").

217 *See supra* Part III.B (arguing subjective hunches may be more probative than certain pieces of "objective" evidence).

218 529 U.S. 266 (2000).

219 *Id.* at 268.

220 *Id.*

221 *Id.* at 272.

222 *See, e.g.*, United States v. Bold, 19 F.3d 99, 102-04 (2d Cir. 1994) (discussing the ways in which reliance on anonymous tips is appropriate).

223 In other words, courts are more likely to credit anonymous tips that correctly predict future activity (e.g., that someone will get on a plane tomorrow) than anonymous tips that accurately describe some current activity (e.g., that a person of a particular description is loitering in a bus station). *Compare J.L.*, 529 U.S. at 272 ("An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity."), *with* Illinois v. Gates, 462 U.S. 213, 245 (1983) ("[T]he anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans.").

A police officer who receives a tip over the telephone presumably makes an initial judgment about the information. Some tipsters, whose voices reveal them as children, perhaps playing a prank, are discounted immediately; other tipsters sound credible enough to pass on. Of the latter tips, some are quickly revealed as faulty (e.g., there are no black youths in a bus station where a tipster reported they would be). So the question is: How reliable are anonymous tips that pass through some crude filtering? One of the curious features of American criminal procedure is that judges—especially Supreme Court Justices, who generally have no practical experience in policing—are regularly called upon to make *empirical* judgments for which their own life experiences leave them unprepared. It would not be implausible to speculate that one in twenty anonymous tips, or at least those that pass through some initial screening for plausibility, are reliable. So one might restate the problem posed by the *J.L.* case as whether a five percent likelihood of criminal activity is sufficient reasonable suspicion to merit a stop and frisk. This result in *J.L.* is perhaps sensible, given that the suspected offense was merely possession of a firearm—possibly a serious offense, but not one of special gravity. But what if a police department receives an anonymous tip that a particular person, of a specific description, is carrying a bomb aboard a plane? As the Court itself noted in *J.L.*, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[224]

To state the obvious, reasonable suspicion must be reasonable. As I have previously argued,[225] in trying to imbue some reasonableness into the law of criminal investigations, one might draw upon Judge Learned Hand's celebrated formula for evaluating claims of negligence.[226] A particular stop and frisk would be deemed reasonable whenever the expected social benefit exceeds the social cost. Reasonableness would thus be cast roughly as follows:

$$P(s) \times B > C$$

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224 *J.L.*, 529 U.S. at 273-74. As Professor Wayne LaFave has written, "No one would seriously question the authority of the police to detain for investigation an individual who was reported by an anonymous informant to be planning to bomb an airplane, and who appears at the airport carrying a suitcase." Wayne R. LaFave, *"Street Encounters" and the Constitution*: Terry, Sibron, Peters & *Beyond*, 67 MICH. L. REV. 40, 78 (1968). *See also* Schroeder v. Lufthansa, 875 F.2d 613, 621-22 (7th Cir. 1989) (holding that an airline had sufficient reason to detain a passenger mid-flight after receiving an anonymous tip that she possessed a bomb).

225 Lerner, *supra* note 45, at 1019-21.

226 Hand's formula provides that a party's duty to take precautions to prevent accidents turns on three variables: (1) the probability of the occurrence of an accident (P); (2) the social loss caused by the accident (L); and (3) the burden of taking precautions to prevent an accident (B). When $B < P \times L$, a party is negligent if she fails to take precautions and an accident occurs. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

where P(s) is the probability of a successful search, B is the social benefit associated with the prevention or detection of a particular crime, and C is the social cost (or privacy intrusion) resulting from a particular kind of search. Of course, not all criminals pose identical threats to the social order. Accordingly, the evidentiary predicate needed to stop a suspected serial murderer is far less than what would be needed to stop a suspected drug mule. Just as all crimes are not equal, neither are all searches; some involve far more substantial privacy intrusions than others. Stopping a car at a random checkpoint for one minute while police ask the driver for identification and a drug-sniffing dog circles the car is a far lesser privacy intrusion than pulling a particular car over on the highway and delaying the driver for twenty minutes. When courts consider whether police had reasonable suspicion to make a temporary stop, they should be sensitive to the gravity of the crime under investigation and the privacy intrusion resulting from the police activity.

Consider the case of *United States v. Davis*.[227] The victim was selling athletic jerseys when he was robbed at gunpoint by six young African-American men who had jumped out of a car.[228] A few minutes later police pulled over a car within two blocks of the robbery that met the description given by the victim.[229] Two police officers rushed to the area to investigate whether any suspects were on foot.[230] The officers saw two young African-American men in athletic jerseys. Detective Favor testified:

> [W]hen I came up on Jackson [Street], I could see where Sergeant Loria had the vehicle stopped. When I made the left [turn] and started down High Street, I could see these two gentlemen walking right in front of the Chevron station. That's why I stopped them. They were in the area. They were two black males fitting the description wearing jerseys, and I was simply checking them out. I didn't—there's no need—I wasn't jumping out, throwing them on the car and arresting them or anything like that. It was simple—I just—you know, it would be—it would be dereliction of my duty if I did not stop them and see if these were possibly suspects. I was polite to them, they were polite to us, and everything went well.[231]

When asked why he had suspected the pair might have been involved in the robbery, Detective Favor responded:

> Only my prior experience with pulling over vehicles, prior experience with—I had six subjects rob somebody. We had a suspect vehicle parked. One person is in that vehicle. Other people went somewhere if that is in fact the correct vehicle. I don't—it's a time frame here where you don't have time to wait [sic]. You know, five, ten minutes, 20 minutes for all that information to get out on the radio. The problem is, at this point, they've got a suspect vehicle stopped; I've got young men fitting the physical description wearing jerseys; jerseys were stolen. I stopped those young men to find out whether or not they had any involvement in it.

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227 354 F. Supp. 2d 1271 (M.D. Ala. 2005).

228 *Id.* at 1272.

229 *Id.*

230 *Id.*

231 *Id.* at 1273.

> Like I say, everybody was polite. They went back with us afterwards, and I turned the younger one over to his mother.[232]

It is worth emphasizing how candid Detective Favor was in describing the encounter, never gilding the lily with observations of suspicious behavior, "furtive" movements, or "bulges." Rather, he commended a suspect for behaving "very well."[233] It turned out neither suspect had anything to do with the reported robbery, but a frisk of one of the young men uncovered a gun and drugs.[234] Charged with illegal possession, his lawyer moved to suppress the evidence as the fruit of an illegal stop.[235] In granting the motion, the district court emphasized how little evidence there was to support the stop; the neighborhood was predominantly African-American so there was nothing unusual about African-American men walking in the neighborhood.[236] There was no evidence that the criminals had put on the jerseys.[237] Furthermore, the officer did not testify that the suspects were loitering, walking quickly, or in any way acting out of the ordinary.[238] The court wrote, "While this court can appreciate this officer's experience in detecting criminal activity and his usual investigative practice, it remains mindful that 'if undue reliance is placed upon an agent's "perception" or "interpretation" of observed conduct, then the requirement of specific, objective facts may be easily circumvented.'"[239] Nowhere did the court acknowledge that police were investigating a serious crime (armed robbery) or that the police had conducted the most minimally intrusive search to determine whether the suspects were involved in the robbery.

The judicial power to regulate the police arises for the most part from a phrase in the Fourth Amendment of the U.S. Constitution (and, in the case of state courts, almost identical provisions in state constitutions). In relevant respect, the Constitution provides that the people are to be secure from "unreasonable searches and seizures."[240] One might think that in judging whether a search or seizure is reasonable, there are many things to be considered: What made the police suspicious in the first place? What time constraints did the police face? How serious was the crime under investigation? How intrusive was the search or seizure? How did the police behave during the encounter? How did the police behave after the encounter?

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232 *Davis*, 354 F. Supp. 2d at 1275.

233 *Id.* at 1273.

234 *Id.*

235 *Id.* at 1274.

236 *Id.* at 1275-77.

237 *Id.* at 1276.

238 *Davis*, 354 F. Supp. 2d at 1276.

239 *Id.*

240 Of course, the Fourth Amendment also provides that "no warrants shall issue but only upon probable cause," but we are here discussing contexts in which police can act without first obtaining a warrant. U.S. CONST. amend. IV.

As we see in *Davis*, courts often focus exclusively on what police *knew* (or said they knew) before the stop. And with respect to such evidence, they narrow their gaze to those "objective" facts the police officer can manufacture months after the incident in a suppression hearing. Let us consider all the facts deemed irrelevant and not given any weight at all: (1) the fact that police were investigating a serious crime—armed robbery; (2) the fact that police needed to act quickly if they were going to solve the crime; (3) the fact that police adopted the least intrusive means to determine whether the suspects were involved in the crime; (4) the fact that the police acted politely during the search; (5) the fact that the police acted in commendable fashion after the search (returning one youth to his mother). Detective Favor, who thought it would be a "dereliction of [his] duty" if he had not stopped the two men, was informed by the district court that he could not be more wrong about what his duties entail. Far from having a duty to stop the two suspects, he had a constitutional duty *not* to stop them, a duty that he had violated, and which at least in theory could form the basis of a civil suit against him. In the future, we may assume that Detective Favor will either not bother stopping suspects in similar circumstances, or he will embellish his testimony with the sort of objective details that the district court lamented were lacking.

C. *Taking Hunches Seriously*

Another important way that courts could enhance the reasonableness of reasonable suspicion is by abandoning the distinction between "objective" and "subjective" evidence and by giving police hunches their due. Especially in light of recent advances in the cognitive sciences, Chief Justice Warren's disparaging remarks in *Terry* about "inchoate" and "inarticulable" evidence are ripe for reconsideration.[241] If a police officer fails to frame his words in the approved language of the courts, or is unable to express himself with the glibness of a skilled litigator, it does not mean that he acted unreasonably for the situation he faced. When an experienced police officer has a mere hunch that a person boarding a plane is carrying a bomb, his hunch might warrant detaining the person for a minute or so to make inquiries. Likewise, if the officer suspects the person is about to reach for a gun, it may be reasonable for the officer to order the suspect to remove his hands slowly from his pockets. After all, the intrusion is small and the social harm that would result from a failure to stop the particular crime is great.

The lingering and unanswered question is the accuracy of all those hunches police officers claim to have. There are some cases in which erroneous hunches form the basis of a civil suit against an officer, but, far more

241 Terry v. Ohio, 392 U.S. 1, 22, 27 (1968).

commonly, police hunches arise during suppression motions in a criminal trial in which the police officer's hunch has been borne out. Of course, a selection problem confounds the issues: Courts never learn of most erroneous police hunches because the victims do not bother to file suit. The question, then, when reading in a judicial opinion about a successful police hunch is whether the case is typical or atypical for the officer. Consider *United States v. Foreman*,[242] in which an officer parked on a road allegedly renowned as a drug trafficker's corridor and noticed a suspicious-looking driver. What was it about the driver? At the suppression hearing, Officer Wade noted the suspect's "tense posture" and the fact that he was "staring straight ahead."[243] Wade pulled the driver over on the pretext that he was speeding and while issuing a citation, peppered him with questions. The suspect gave inconsistent answers and perspired during the interaction.[244] After issuing the citation, the officer detained the suspect for an additional minute while a drug-sniffing dog circled the car and detected the presence of drugs.[245] A split panel of the Fourth Circuit reversed the trial court's decision to suppress the evidence, laboring to sum up the objective evidence (which included an air freshener!).[246] This brief account is naturally susceptible to two hypotheses—first, that Officer Wade is a marvel at detecting criminals and second, that he pulled over all the African-American males he encountered that morning and happened to hit pay dirt with Mr. Foreman. We might resolve this by examining Trooper Wade's incident reports for that week, which could be confirmed by his cruiser's on-board video camera. If it indicated that he had pulled over ten people and eight of the ten proved to be drug traffickers, surely this would shed light on the question of whether he acted reasonably.[247]

In *United States v. Cortez*, the Supreme Court suggested that courts be somewhat deferential to the police officer:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as fact finders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and

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242 369 F.3d 776 (4th Cir. 2004).

243 *Id.* at 778.

244 *Id.* at 778-79.

245 *Id.* at 778-80.

246 *Id.* at 778.

247 In theory, at least, Wade might be both a detecting marvel *and* a racist, in the sense that he saw thirty persons he knew to be drug traffickers, twenty white and ten African-American, but he let the white ones pass and stopped only the African-Americans. I postpone the question of racial profiling to the conclusion of this Article.

> weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.[248]

In the final sentence quoted above, the Court acknowledges that scholars (and presumably judges, too) may "see and weigh" evidence differently than police officers. In some cases, the Court made this point to denigrate the perspective of the police officer, who, "engaged in the often competitive enterprise of ferreting out crime," sees the world through glasses clouded by zeal, and requires oversight by a "neutral and detached magistrate."[249] In *Cortez*, however, the Court suggests a deficiency in the scholar's and magistrate's viewpoint. "Those versed in the field of law enforcement" apparently have access to information denied to those of us (scholars, judges) in cloistered libraries.[250]

In practice, this means shying away from the second-by-second analyses of police actions that are commonplace in judicial opinions. Should we care whether a police officer sees a furtive gesture five seconds before or five seconds after ordering a suspect out of a car?[251] Does it matter if a police officer questioned one passenger during a car stop at 4:17 p.m. and another at 4:20 p.m.?[252] More fundamentally, we should be asking: Did he treat the suspect with respect throughout the encounter? Given the officer's stated reasons for stopping or frisking the suspect, was the intrusion upon the suspect reasonable? Did the officer expeditiously determine whether there were sufficient grounds to further detain the suspect? It is at this relatively higher level of supervision that courts would be well-advised to remain.

Furthermore, courts should not forget that police officers act in a world where threats are often real. Consider *Upshur v. United States*,[253] in which two police officers in a high-crime area witnessed a hand-to-hand transaction between two men, one of whom sped off in a car, nearly hitting the police officers.[254] As the officers approached the remaining man, he balled up his hands into fists.[255] One of the officers grabbed his hands,

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248 449 U.S. 411, 418 (1981).

249 *See* Johnson v. United States, 333 U.S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

250 *Cortez*, 449 U.S. at 418.

251 *See, e.g.*, United States v. McKoy, 402 F. Supp. 2d 311, 312 n.1, 313 n.2 (D. Mass. 2004).

252 In United States v. Brigham, 343 F.3d 490, 494-97 (5th Cir. 2003), a panel of the Fifth Circuit created a minute-by-minute timeline, from 4:13 to 4:43, in an opinion suppressing evidence obtained during a car stop. The Fifth Circuit reheard the case en banc and reversed the panel. United States v. Brigham, 382 F.3d 500 (5th Cir. 2004) (en banc).

253 716 A.2d 981 (D.C. 1998).

254 *Id.* at 982; *id.* at 985-86 (Farrell, J., dissenting).

255 *Id.* at 982 (majority opinion).

forcibly opened them, and drugs fell out.[256] The court suppressed the drug evidence, finding that the police lacked reasonable suspicion to order the suspect to open his hands.[257] The court failed to acknowledge the trivial nature of the privacy intrusion. Even more remarkably, the court never contemplated that *a fist itself is a weapon.*

Abandoning the impracticable distinction between objective and subjective evidence would have at least one certain benefit; promoting police candor. When asked why he frisked someone, the officer might respond:

> Things didn't look right to me. He seemed to be reaching for something and there had been a lot of crimes in the area during the past month. It was dark and frankly I was scared. I was concerned the guy might have a gun. I was polite the whole time; I didn't throw him to the ground; I tried to check the information as quickly as I could. I want to do my job and I want to be a good citizen. Check my record—I do a good job in catching criminals.

Instead we hear:

> I saw an illegally double-parked car in a high-crime area. The fellow made a furtive gesture as I approached. I noticed a air freshener in the car. There was a pager in the car. The car was registered to a person who lives in a neighborhood known for drug trafficking. The suspect seemed very nervous.

The police officer could use either statement at a suppression hearing. The question is: Which statement makes us feel better about ourselves as a society? As David Simon suggests with respect to the *Miranda* decision, certain criminal procedure rules are mostly about a society's self-image and only incidentally about checking police abuses.[258] Why it pleases some to have police officers parrot back slogans from previous judicial opinions is not entirely clear to me. Those who enthusiastically support the current regime would need to acknowledge its costs, already summarized above, doubtlessly including the breeding of cynicism in the police force.

There will always be rotten cops, who, unlike rotten law professors, can do a great deal of harm.[259] Of course, there are also dozens of bad judges in America,[260] which is neither an argument for abolishing the judiciary nor for the creation of an entirely new institution devoted to the regulation of the courts. The best solution to the problem of bad judges, as with bad cops, is transparency and meaningful self-regulation. Should police be able act upon their mere hunches, insofar as those hunches reflect the accumulated wisdom of years of policing? To some degree, my suggestion is yes. If the privacy intrusion is negligible or the gravity of the suspected

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256 *Id.*

257 *Id.* at 984-85.

258 SIMON, *supra* note 202, at 193-203.

259 This fact gives me great comfort.

260 *See generally* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004).

offense very high, perhaps a mere hunch alone might justify action. More importantly, if the officer had a hunch and there was other evidence consistent with criminal activity, perhaps it would be reasonable to allow the police to take some action. Such a rule does not mean giving police carte blanche to do as they wish. Transparency and internal accountability, rather than judicial supervision should provide the most meaningful assurances against police overreaching. With respect to transparency, one of the most notable developments in policing over the past decade has been the increasingly routine use of video cameras in police cruisers.[261] Although not without their limitations (stationary cameras have a limited viewing area) and drawbacks (some officers complain that they are a distraction), these cameras can have salutary effects.[262] Aware that their actions are being recorded, police officers are more likely to be on their best behavior.[263] The enhanced "visibility" of police actions in turn enables the public to place more trust in the police force.[264]

D. *Racial Profiling*

I need to address a problem skirted at various points during this Article: racial profiling. In my description of the fact pattern in the *Terry* case, I assumed that McFadden, the officer who nabbed Terry and his two criminal associates, was a good cop.[265] But what if he had made a practice of following and harassing African-Americans? Likewise, I provisionally applauded Officer Wade in *Foreman* for having a hunch about a drug dealer that proved accurate.[266] But perhaps Wade pulled over any young African-American man who struck his fancy. If one urges judicial deference to police officers' hunches, in practice will this condone racial discrimination in policing? Whereas racism and stereotyping are often penalized in a market setting,[267] state actors may indulge in racial prejudices and remain largely insulated from the consequences of their errors. As Professor Nelson Lund writes, "When governments discriminate . . . the costs and benefits are entirely political—not economic. Governments do not go out of business, no matter how inefficient they are, and they do not respond to economic incen-

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261 Lonnie J. Westphal, *The in-car camera: Value and Impact*, POLICEONE.COM, Nov. 10, 2004, http://www.policeone.com/police-products/vehicle-equipment/in-car-video/articles/93475/ (last visited Feb. 21, 2008).

262 *Id.*

263 *Id.*

264 *Id.*

265 *See supra* text accompanying notes 3-9.

266 *See supra* text accompanying note 247.

267 *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (describing how the free market penalizes discrimination in the workplace).

tives except when economic forces and political forces are aligned in the same direction."[268]

The search for the snipers in the Washington, D.C., area during the fall of 2002 illustrates governmental ineptitude in racial profiling. For reasons that were never clear—although incompetent processing of witness statements and flawed psychological profiles[269] were likely candidates—the police forces in the area were convinced that the suspect was a "lone white male."[270] Vast energies were focused in this direction, and then it turned out that the crimes had been committed by a pair of African-American men.[271] This is not the first time the government has rounded up suspects based on dubious racial stereotypes (consider the internment of Japanese Americans during World War II) and it will likely not be the last.[272] The $64,000 question is: What should be done to prevent government employees from engaging in improper racial profiling? Like Lund, I confess that I am not sure of the answer.[273] The nub of the problem is that individuals prejudge people according to age, sex, and race, and it is not clear that society benefits when police officers ignore such data, even if we could effectively monitor and punish such behavior.

Consider a police officer driving down a street with two seconds of eyeball time to allocate. On one side of the street are three elderly women; on the other side are three young men. What should he do? Should the police officer glance at each side of the street, devoting equal time (i.e., one second) to both parties? Should he mentally flip a coin and then accord either side his full attention? Or should he look straight ahead, ensuring that there cannot be the slightest accusation of sex and age discrimination? In all likelihood, the young men are doing nothing wrong. The key issue is the differential likelihood of criminal activity. However, police officers may also overstate the significance of gender, age, ethnic, and racial data; but, unlike private actors, there is no possibility of market correction. For example, an employer who irrationally discriminates against African-Americans decreases the available labor pool and increases labor costs. In contrast, a police officer who devotes all or most of his attention to African-American men may be ineffectual at his job (as measured by number of

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268 Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 335 (2003).

269 I remember one of the "experts" peddling this theory on all the television shows at the time was a retired FBI profiler whose claim to fame, breathlessly repeated whenever he was introduced, was that he had been the lead investigator for the Unabomber for twenty years. Needless to say, the Unabomber was only captured after he was identified by his brother—that is, without any assistance from the government "expert."

270 Lund, *supra* note 268, at 340-41.

271 *Id.*

272 *Id.* at 341.

273 *Id.* at 342.

arrests), but it is unclear whether he will pay any price, and it is certain that the police force is in no danger of going out of business.

There is some,[274] albeit challenged,[275] evidence that police forces have been guilty of improper racial profiling. Assuming that there really is improper racial profiling and one's only goal were to abolish it, one could implement police guidelines requiring officers to tabulate racial data on every person whom they investigated, followed, stopped, and frisked. Then, one could require comparisons of these data to the racial breakdown in the population-at-large. In the event of any significant variation, the individual officer would bear the burden of proving to his superior that he did not behave improperly, or otherwise face demotion, suspension, or discharge. The superior would then have the burden of proving to a court that the officer did not behave improperly or face personal and institutional liability. This new protocol would presumably diminish improper racial profiling. Yet it would also certainly result in decreased policing effectiveness. Thousands of police officers would become bureaucrats, and those poor souls left behind on the streets would spend more of their energies trying to avoid the wrath of the racial bean counters, instead of catching criminals.

IV. CONCLUSION

Police officers are, or should be, in the business of policing. To do this difficult job well, police officers, just like judges and prosecutors, need some freedom to act. To some degree, this means a freedom to act upon their hunches. Police officers, even more than judges and prosecutors, must be able to act quickly, without access to all relevant information, and frequently they must tap into an experiential wisdom that may not be conveyable in terms that satisfy a learned jurist. But, *contra* Chief Justice Warren, the fact that a police officer cannot glibly articulate his suspicions does not mean that these suspicions are not reasonable.

We all agree that the police should track down criminals while respecting the rights of the innocent. Making this happen depends on countless variables, such as the quality of police recruits, the nature of their training, the competence of the police command structure, the supervision of the police by politically accountable authorities, and judicial supervision of the police. Legal elites are prone to focus on the last margin almost to the exclusion of all others, although it is probable that it is among the least sig-

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274 *See, e.g.*, David Cole, The Color of Justice: Courts are Protecting, Rather than Helping to End, Racial Profiling by Police, THE NATION, Oct. 11, 1999; DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAY (1999), http://www.aclu.org/racialjustice/racialprofiling/15912pub19990607.html (last visited Feb. 21, 2008).

275 *See* Heather Macdonald, *The Myth of Racial Profiling*, 11 CITY J. 14, 14 (2001), *available at* http://www.city-journal.org/html/11_2_the_myth.html (last visited Feb. 21, 2008).

nificant factors in the mix. Thanks to the incorporation of the Bill of Rights' criminal procedure protections,[276] police forces around the country are governed by almost identical legal rules, but some thrive and others flounder. Perhaps a portion of the vast resources (mental and monetary) frittered away constructing perfect models of judicial supervision of the police might be better invested in attracting top-notch recruits and promoting the most promising among those to positions of authority.[277]

The basic argument for stringent judicial supervision is that no police officer—and really no one—can be trusted. This is an excellent political principle, but the problem is that some people have to be trusted to some degree, and a few must even be trusted to a great degree to have a free country. In this respect, education in the use of power is needed, rather than quixotic attempts to eliminate all risks attendant to the bestowal of power. What this means is simple: be selective about who becomes police officers; train them well; install diligent supervisors; make the supervisors accountable to politicians; and compel the politicians to answer to the people. The American criminal justice system is bizarrely more focused on the regulation of police conduct (during searches and seizures and in the interrogation room) than it is on the accurate sorting of innocent and the guilty. One would think it is in the latter role that courts would have a comparative advantage, rather than as meta-supervisors of the police forces of America.

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276 A development lamented notably by Professor Donald Dripps, in part because it has removed any jurisdictional competition between state and federal law enforcement authorities. Donald A Dripps, *On the Costs of Uniformity and the Prospects of Dualism in Constitutional Criminal Procedure*, 45 ST. LOUIS U. L.J. 433, 437-38 (2001).

277 In Kopel & Krause, *supra* note 205, the authors discuss the scandals in several police departments in the 1990s. The authors suggest that part of the blame may be placed on the 1994 federal crime law, which allowed and even required localities to hire many more police officers. *See id.* ("President Clinton's 1994 legislation . . . [to] put a hundred thousand more police officers on the street could accurately be described as a plan to give deadly weapons and life-or-death power to a hundred thousand people who did not meet the standards to be hired as police officers in 1993.").

OF HUNCHES AND MERE HUNCHES: TWO CHEERS FOR *TERRY*

The Honorable Douglas H. Ginsburg[*]

Hunching has long had an uncertain relationship with the law. On the one hand, there is Judge Hutcheson's article celebrating the virtues of the judicial hunch—"that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for judicial feet, sheds its light along the way."[1] On the other hand, there is the policeman's hunch, which is the subject of this volume and of the Supreme Court's decision in *Terry v. Ohio* decrying the police practice of stopping someone for questioning based solely upon a hunch.[2]

Terry has been criticized both by those who think it undermines civil liberties[3] and, as this volume demonstrates, by those who contend it needlessly compromises law enforcement. That *Terry* has been criticized from both angles is not surprising when one considers that it reflected a compromise between delegitimizing every police stop that does not meet the rigorous standard of "probable cause" and holding that an investigative stop is not a "seizure," and hence not limited at all by the constitutional prohibition of "unreasonable searches and seizures."[4]

Rather than enter the lists on either side of the debate over *Terry*, which often occurs at too high a level of abstraction for my taste, I propose to consider *Terry* in practice, that is, to understand how courts have applied the requirement that each "particular intrusion . . . [be justified by] specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[5] Whether *Terry* strikes the optimal balance between the right of the individual citizen to proceed unmolested and the needs of the community for effective law enforcement, and whether it is constitutionally required, are not questions I address.

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1 Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

2 392 U.S. 1 (1968).

3 *See, e.g.*, Adina Schwartz, *Just Take Away Their Guns: The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 331 (1996) (arguing that "*Terry* weakened the rights of all criminal defendants by broadening the admissibility of evidence that could be used against them.").

4 *See Terry*, 392 U.S. at 9-11.

5 *Id.* at 21.

Rather, I will use cases applying *Terry* to show that critics of the decision, including some contributors to this volume, have overlooked the ways in which *Terry* can, and seemingly does, accommodate the necessities of law enforcement. But first a word about the origin of that decision.

I.

The Fourth Amendment to the Constitution of the United States provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." In *Terry* the Court held an investigative stop by a police officer is a "seizure" within the meaning of the Fourth Amendment, but the reasonableness of that seizure turns not upon the officer's having "probable cause" to believe a crime was being or had been committed, but rather upon the officer's having a "reasonable suspicion" that criminal activity is afoot.[6] Evidence discovered as a result of a stop for which the officer did not have the requisite foundation may not be used in court, per the exclusionary rule of *Mapp v. Ohio*.[7] Thus, the major cost *Terry* arguably imposes upon law enforcement arises from the exclusionary rule and not from anything in *Terry* itself. In other words, if a violation of the Fourth Amendment were remedied in some way other than through the exclusion of reliable evidence, as was the case in many states before 1961,[8] then any costs *Terry* imposes upon law enforcement would be substantially lessened.

II.

Professor Lerner's critique of *Terry* is the polestar for this volume, and for this essay as well. He proposes that the Supreme Court abandon *Terry's* key requirement that the police officer have a reasonable suspicion in order to stop, and possibly frisk, a person, which must be based upon more than a mere hunch. Instead, Lerner argues, courts should defer—unquestioningly, it appears—to a police officer who says only that a hunch led him to stop the defendant and to discover evidence of a crime. There are, in my view, several problems with that proposal.

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[6] *See* Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 185 (2004) ("a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.").

[7] 367 U.S. 643 (1961).

[8] *See* People v. Defore, 150 N.E. 585, 586-87 (N.Y. 1926) (Cardozo, J.) (noting 31 states rejected the exclusionary rule the Supreme Court adopted for federal cases in Weeks v. United States, 232 U.S. 383 (1914), and relied upon other means to remedy violations of the Fourth Amendment: "The [offending] officer might have been resisted, or sued for damages, or even prosecuted for oppression [and he] was subject to removal or other discipline at the hands of his superiors.").

First, there is no empirical evidence supporting Professor Lerner's implicit premise that police hunches are generally accurate—without which his proposal is simply to let the police stop whomever they want, with or without any basis for doing so. In order to understand the empirical problem, consider the following table, which documents the four possible outcomes of a *Terry* stop.

Possible Outcomes Of A *Terry* Stop		
	Lawful Search	*Unlawful Search*
Productive Search	Evidence admitted	Evidence excluded; criminal likely goes free
Unproductive Search	Suspicious person stopped for questioning	Person stopped for questioning, for no stated reason

Table 1

The key point here is that when an unlawful search is conducted but no evidence is uncovered, the citizen's Fourth Amendment right will have been violated. Yet, there being no criminal prosecution and therefore no occasion for him to claim the benefit of the exclusionary rule, the encounter leaves no trace unless the citizen seeks redress, which is rare indeed. The only circumstance in which there is a reported proceeding and the exclusionary rule becomes relevant is that in which the police officer's suspicion is validated by the discovery of evidence. Accordingly, Lerner's impression that police officers are generally correct in their hunches, based as it is upon his survey of cases, is unconvincing owing to the extreme bias in the selection of cases: only those cases in which the officer acts upon an accurate hunch find their way into court. We do not know the percentage of stops that are unproductive, and hence we have no idea whether police hunches are generally right, as he infers from the reported cases, or, on the contrary, generally wrong.

Although, in theory, an action brought under 42 U.S.C. § 1983 enables a citizen to challenge an unlawful stop that yielded no evidence, in practice such cases are vanishingly rare. My research did turn up several cases in which a party brought suit under § 1983 alleging, among other more consequential things, that a police officer lacked reasonable suspicion for a *Terry* stop.[9] I found not a single case, however, in which the plaintiff complained

[9] *See, e.g.*, Haynie v. County of Los Angeles, 339 F.3d 1071 (9th Cir. 2003) (challenging *Terry* traffic stop, as well as subsequent search and detention).

solely that he was stopped (and perhaps frisked) without reasonable suspicion, in violation of the Fourth Amendment. Regardless of whether a data set composed of § 1983 cases would allow an accurate assessment of failed hunches, the point is that, in any event, such a data set has not been created.

Whether empirical data could ever be produced to show how accurate police officers' hunches really are, turns largely upon what one means by a "hunch." Lerner briefly canvasses a few mental processes potentially involved in hunches, but they do not provide a good understanding of what constitutes a hunch, as Lerner seemingly acknowledges.[10] The so-called "fast and frugal heuristic" he borrows from psychologist Gerd Gigerenzer, for example, seems very different from what might ordinarily be styled a hunch.[11] Assume an officer makes a prompt yet correct judgment about a person by stripping away unnecessary facts and instead basing his decision upon obvious characteristics, such as the person's appearance or the time and place of their encounter. Lerner offers us no account of why the officer would not be able to defend that judgment in court.[12]

Lerner's description of a hunch as "a manner of thinking that may not be easily, or persuasively, conveyed in words"[13] is also unhelpful. The example he cites, that of an expert chess player not retreating to first principles when moving a piece on the chessboard, does not support the view that a rational decision may arise from an inarticulable cognitive process; rather, it suggests only that an expert may develop quick and accurate mechanisms for making decisions. Perhaps police officers, or more likely some police officers, are experts in that sense. Or perhaps few, if any, are. Until it is established experimentally that police officers frequently act upon the basis of factors they cannot recount or describe—and are significantly more often right than wrong—the claim that the requirement of a reasonable suspicion is unduly constraining will remain unconvincing.

That is not to say that hunching is necessarily unprofitable; it may provide an efficient aid in allocating one's logical resources.[14] In discussing

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[10] *See* Craig Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 410 (2006) (noting the aspects of hunching he describes are "related and somewhat contradictory").

[11] *See id.* at 50-53. *See also* Gerd Gigerenzer & Henry Brighton, *Can Hunches Be Rational?*, 4 J.L. ECON. & POL'Y 155, 169 (2007) (stating that "a heuristic that ignores information can achieve higher predictive accuracy than complex strategies that take much more information into account.").

[12] Lerner also maintains that hunches are experienced more as emotion than reason. Lerner, *supra* note 10, at 411. It is not clear, however, in what way that description differs from those discussed in the text.

[13] *Id.* at 2.

[14] Jerome Frank long ago observed: "Logic need not be the enemy of hunching. Most of the conclusions men reach in their daily lives are similarly hunch-products, originally arrived at in non-logical ways; yet we do not deny that frequently the correctness of many of these conclusions can profitably be tested by logical analysis. That a conclusion is prior in time to the reasoning which logically justifies it may make that reasoning seem artificial, but does not necessarily make that reasoning falla-

hunches, however, and in considering whether to accept them in lieu of an articulable suspicion, we must be entirely clear about what constitutes a hunch. If a hunch is no more than a visceral or emotional reaction to a person and resists even an *ex post* rationalization, it is hard to fathom how it could serve as the basis for a constitutional search—without, that is, surrendering our mobility entirely to the police. Alternatively, if a hunch is a snap judgment based upon observable facts that may be described to a court after the fact, then a hunch can indeed support an articulable suspicion.

The second problem with Professor Lerner's proposal is that he disregards the incentive that the rule in *Terry* gives for police officers, and police departments, to render articulable the formerly inarticulable (or at least unarticulated), and thereby to advance criminology. For example, Professor Mark Frank, a contributor to this volume, has studied facial cues that purportedly signal whether a person is lying but that might not be picked up by the untrained eye. He has trained police interrogation departments in the use of these cues.[15] Although lie detection differs from identifying suspicious behavior, the point for our purposes is the same: In a legal regime without *Terry*, where a police officer's hunch would suffice to legitimate his stopping whom he will, the incentive for the police to adopt advances in the science of criminal identification would be diminished. That would be unfortunate; by advancing our knowledge of criminal behavior, such studies may elevate hunching from an undocumented art to a demonstrable skill of benefit to law enforcement and hence to society as a whole.

Third, Professor Lerner fails to note that a court's inquiry under *Terry* is an objective one, namely, whether a hypothetical "reasonable officer" would have had a reasonable suspicion that criminal activity was afoot.[16] Any effort to replace the focus upon objective factors with attention to subjective factors, such as a police officer's hunch or other "state of mind" evidence, might well add to, rather than lessen, the burden judicial review imposes upon law enforcement. Under *Terry*, the observations attributable to a reasonable officer, rather than the motives of the actual officer, are the nub of the judicial inquiry. Additionally, because objectivity may either legitimize or delegitimize a search, it is not clear that a subjective inquiry

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cious or useless." JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 183-84 (Princeton University Press 1949).

[15] *See generally* News Release, University at Buffalo, Lying Is Exposed By Micro-Expressions We Can't Control (May 5, 2006), *available at* http://www.buffalo.edu/news/fast-execute.cgi/article-page.html?article=79300009 (last visited Feb. 21, 2008) (discussing how law enforcement personnel use the research of social psychologist Mark Frank into how facial expressions mirror emotions to identify suspects and potential terrorists). *See also* Rachel Adelson, *Detecting Deception*, 35 MONITOR ON PSYCHOL. 70 (2004) (describing other psychologists' training of law enforcement officials to detect lies), *available at* http://www.apa.org/monitor/julaug04/detecting.html (last visited Feb. 21, 2008).

[16] *Terry*, 392 U.S. at 21-22 (1968). *See also* United States v. Brown, 334 F.3d 1161, 1166 (D.C. Cir. 2003) (the "officers' actual motives do not bear on our objective assessment of reasonable suspicion.").

would advance the aims of law enforcement. Consider *McClendon v. Story County Sheriff's Office*.[17] In this case, the court, invoking the principle that an "officer's subjective intent is never relevant under a Fourth Amendment analysis," rejected as irrelevant the defendant's allegation that the officer's seizure was retaliatory.[18]

Finally, we do well to recall that the Court, in announcing a rule for law enforcement, including the rule in *Terry*, is interpreting and applying the Constitution, the Fourth Amendment to which expressly precludes unreasonable seizures. Once a stop has been deemed a seizure, stopping someone for no reason can hardly be thought reasonable. Therefore, the proposition that a correct hunch is a constitutional hunch is not clearly tenable. Unless and until it is shown that police hunches are generally informed by experience, and are not merely guesses that randomly produce evidence of a crime, claims to have "just had a hunch" will remain constitutionally suspect in a court of law.

III.

With the foregoing considerations in mind, it seems anyone calling for the Supreme Court to overrule *Terry* bears a heavy burden of showing both that the costs imposed by *Terry* are high and that they cannot otherwise be significantly reduced. Evidence sufficient to carry those burdens has yet to be adduced. Indeed, the case law demonstrates that *Terry*, as applied, seems adequately—albeit perhaps not optimally—to balance the competing interests at stake, namely, the individual citizen's interest in being free from arbitrary police stops and all citizens' interest in catching criminals.

Under *Terry*, the test for determining whether a police officer had a reasonable suspicion takes account of the "totality of the circumstances," which leads courts to review police practices deferentially.[19] As a result, close calls go to the police. When a judge in a particular case must choose between, on the one hand, excluding reliable evidence of a crime and, on the other, fidelity to a necessarily somewhat abstract constitutional norm, he or she is likely open to any plausible reason the prosecutor can give for holding the officer had an articulable suspicion that justified stopping the defendant.[20] In addition, the Supreme Court has instructed that considera-

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17 403 F.3d 510, 515-16 (8th Cir. 2005).

18 *See also* Bolton v. Taylor, 367 F.3d 5, 8 (1st Cir. 2004) (finding it was "doubtful" arresting officer had a "reasonable suspicion" of criminal activity but "the decisive question is whether an objective observer could have had a reasonable suspicion").

19 *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 274 (2002) (applying "totality of circumstances" approach).

20 *See, e.g.*, United States v. Dennison, 410 F.3d 1203, 1208-09 (10th Cir. 2005) (upholding stop that uncovered two machine guns in defendant's truck, based in part upon officer's suspicion "something wasn't right" and in part upon the time of day and location of defendant's truck). Indeed, the

tion of the totality of circumstances "precludes . . . divide-and-conquer analysis,"[21] lest a court assess each basis for an officer's suspicion separately rather than cumulatively.

The case law is consistent with the hypothesis that, under the totality of circumstances approach, courts regularly side with the police. In the Seventh Circuit, the federal court of appeals with the most reported *Terry*-type decisions,[22] a defendant successfully challenged the basis for his stop in only two of nineteen cases (11%). In the D.C. Circuit, with fourteen reported *Terry*-type cases,[23] only one defendant (7%) successfully challenged his stop.[24]

The federal courts of appeals regularly have invoked the experience of the arresting officer in *Terry*-type cases. Indeed, they considered the experience of the police officer, the training of the police officer, or both in fully seventy-three of the 120 cases (61%).[25] This strongly suggests Lerner's concern about the courts' disregard of subjective evidence is unwarranted. A police officer's justification that "the suspect was nervous" might in other circumstances be deemed a subjective, and non-verifiable, impression; when proffered in a *Terry*-type case, however, it may be credited by a court as objective evidence in light of the police officer's experience, notwithstanding the complete lack of empirical evidence that experience in policing is a good proxy for accuracy in hunching. Consider *United States v. McCarthur*, in which the Seventh Circuit upheld a *Terry* stop based in part upon the suspects' nervousness, viewed "in light of [the officers'] extensive experience in narcotics interdiction."[26]

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totality of the circumstances approach enables judicial consideration of factors Lerner himself apparently deems relevant to the reasonableness of a stop. *See* Johnson v. Campbell, 332 F.3d 199, 206 (3d Cir. 2003) (test may include suspect's "location, a history of crime in the area, [suspect's] nervous behavior and evasiveness, and [police officers'] commonsense judgments and inferences about human behavior."). *See also* United States v. Edmonds, 240 F.3d 55, 59-60 (D.C. Cir. 2001) (totality of circumstances approach should be assessed "through the eyes of an experienced officer").

21 *Arvizu*, 534 U.S. at 274.

22 Based upon the following Westlaw search of the database for each circuit: 'he(terry w/p stop) and hunch.' The Seventh Circuit had 21 such cases, 2 of which are not on point.

23 This sample was compiled by looking at any case in the D.C. Circuit containing the terms "Terry" and "hunch."

24 *See* United States v. Montgomery, 561 F.2d 875, 879 (D.C. Cir. 1977) (officers lacked reasonable suspicion to stop defendant when they "saw defendant some four or five minutes after they originally noticed him, concluded that he had driven around the block, pulled their marked police car behind him and noted that defendant watched them in his rear view mirror and looked around . . . . [A]wareness of the unusual, and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct.").

25 Based upon the search described, *supra* note 22.

26 6 F.3d 1270, 1278 (1993). *See generally Arvizu*, 534 U.S. at 273 (officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them"); Johnson v. Campbell, 332 F.3d 199, 207 (3d Cir. 2003) ("entirely legal acts . . . when viewed through the lens of a police officer's experience" can support reasonable suspi-

The First Circuit's decision in *Bolton v. Taylor*, is also instructive.[27] There the Court of Appeals unanimously overturned a jury finding that an officer lacked reasonable suspicion for a *Terry* stop. The court, remarking that "the evidence available to [the officer] was thin but not non-existent," held the following facts constituted reasonable suspicion that the defendant had solicited prostitution: a known prostitute got out of the suspect's car near her regular haunt; the officer described the suspect and the prostitute as "faintly suspicious;" and upon seeing the officer, the suspect quickly left the scene.[28] After rehearsing those facts the court observed that "the required level of suspicion for a *Terry* stop . . . is fairly low" and, more to the point here: "[T]he law imputes to a trained policeman a measure of expertise . . . and an explainable suspicion can be based on an assemblage of clues viewed through the lens of the policeman's training and experience."[29]

Having considered the experience of the officer and several facts, each of which was individually innocuous, the court—despite evidence the officer had an improper motive for making the stop, namely, to harass the prostitute's clients for "humor or malice"—concluded the officer had an articulable suspicion.[30]

In view of these decisions it seems the totality of the circumstances approach, in combination with deference to police officers' experience, enables a court to avoid disturbing the officer's judgment in any case that is close to the line drawn in *Terry*.[31] Note also that judicial deference to an officer's experience seemingly cuts in one direction only; I have uncovered no case in which a federal court engaged in a more searching review of a *Terry* stop because of a rookie officer's lack of experience.

In sum, a court should be, as several authors in this volume contend, and courts are, as my reading of the cases shows, extremely reluctant to second-guess the decision of an experienced police officer—a repeat player in the game of catching criminals. That reluctance, however, is readily expressed within the analytic framework erected in *Terry*.

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cion); United States v. Powell, 137 Fed. Appx. 701, 707 (5th Cir. 2005) (window that was not rolled down when coupled with "almost three decades of experience" supported suspicion "illegal narcotics were hidden in the compartment of vehicle's door. . . ."). *But see* United States v. Fernandez, 18 F.3d 874, 880-81, 881 n.5 (10th Cir. 1994) (not accepting as an objective basis officer's observation that suspect was nervous).

27 367 F.3d 5 (2005).

28 *Bolton*, 367 F.3d at 9.

29 *Id.* (citations omitted).

30 *Id.*

31 *See* United States v. Benitez-Macedo, 129 Fed. Appx. 506, 511 (11th Cir. 2005) ("In reviewing the totality of the circumstances facing an officer at the time of the stop, we give due weight to the officer's experience."); *Powell*, 137 Fed. Appx. at 707 ("courts should err on the side of deferring to the knowledge and experiences of a trained law enforcement officer's ability to distinguish between innocent and suspicious activities."). *But cf. Johnson*, 332 F.3d at 208 ("There are limits . . . to how far police training and experience can go toward finding latent criminality in innocent acts.").

In tallying the costs of *Terry*, one should also recall that the strictures of the Fourth Amendment are triggered by a seizure, and "[a] seizure does not occur every time a police officer approaches someone to ask a few questions."[32] A police officer with a hunch that criminal activity is afoot is not at all inhibited by *Terry* from asking questions of a suspicious individual.[33]

Before moving on, I offer a word regarding Lerner's comparisons of police hunches with those of judges, juries, and prosecutors.[34] In my view the comparisons are not informative. Judges and juries, even when acting upon the basis of a hunch,[35] are neutral observers, whereas a police officer has an interest in the prosecution: he is employed to apprehend and testify against criminals. A prosecutor, of course, is also an interested party, but the consequence of his exercise of discretion—the exclusion of a would-be juror—ordinarily does not violate anyone's constitutional right,[36] whereas a police officer's exercise of discretion may effect a seizure that is expressly prohibited by the Fourth Amendment.

IV.

That a wholesale abandonment of *Terry* would come at some cost to Fourth Amendment rights does not mean *Terry* represents the optimal balance between the individual citizen and the needs of the police. Still, any campaign for greater judicial deference to police hunches will not succeed until there is good evidence their hunches are reliable. When and if there is such evidence, the crucial question will be how the legal system can be structured to afford greater deference to hunches without compromising the Fourth Amendment. Or, as Professor Lerner succinctly puts the matter, any

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32 *Johnson*, 332 F.3d at 205.

33 *See* Florida v. Bostick, 501 U.S. 429, 434 (1999). *See also Johnson*, 332 F.3d at 205 ("consensual encounters . . . need not be based on any suspicion of wrongdoing."); United States v. Hudson, 405 F.3d 425, 439 n.10 (6th Cir. 2005) ("[C]onsensual encounters, which need not be supported by any suspicion whatever, will often prove fruitful for the police. . . .").

34 Lerner, *supra* note 10, at 446-454.

35 *See* FRANK, *supra* note 14, at 170-71 (discussing the role gestalt analysis plays in the decision making of a trial court). The Supreme Court is not unaware that police officers must make common sense judgments:

> The process [of coming to a reasonable suspicion] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same—and so are law enforcement officers.

United States v. Cortez, 449 U.S. 411, 418 (1981).

36 There is a narrow exception; a prosecutor violates the defendant's constitutional right when he excludes a prospective juror upon the basis of that person's race, Batson v. Kentucky, 476 U.S. 79 (1986), or sex, J.E.B. v. Alabama, 511 U.S. 127 (1994).

satisfactory alternative to *Terry* must be something of a "statistical, quality control regime."[37]

First, such a regime must advance our understanding of hunching, with the ultimate aim of rendering the basis for all hunches articulable.[38] If police officers do, with experience, develop a keen sense of when criminal behavior is afoot, we would all be better off knowing how that happens. Identifying and cataloguing the indicia of criminal behavior typically relied upon by police officers (even if unwittingly) will not only enable them to do their job more effectively; it will also create a reservoir of data from which officers may draw in order to articulate more clearly what they might now describe as a hunch.[39]

Second, individual police officers could be "certified hunchers." With progress in the science of hunches, police departments (or other relevant agencies) could train police officers and then test their ability to identify persons engaged in criminal behavior.[40] This approach would enable a court to defer to the hunch of a qualified police officer even when the officer cannot articulate the basis for his suspicion.

By relation, any legal regime in which courts defer more to police hunches would need to include a system of periodic performance review. By tracking over time an officer's successes and failures in hunching, not only would police departments be better able to identify what makes for successful hunching, but they could also ensure that an officer abusing his certification is disciplined. Although tracking a police officer's hunches in the field might prove difficult—it might, for instance, require videotaping every police stop—some means of identifying failed hunches would be extremely valuable. It would, at least, provide courts with confidence that an individual officer's hunches are reliable.

CODA: TERRY *AND TERRORISM*

Before concluding, it is worth considering—at a somewhat higher level of abstraction than the preceding text—how the threat posed by terrorism will affect the Fourth Amendment generally and the viability of *Terry* in particular. It seems inevitable that terrorism will influence judicial inter-

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37 Lerner, *supra* note 10, at 416.

38 *See generally* Carrie Lock, *Detecting Deception*, SCIENCE NEWS ONLINE (July 31, 2004) (describing conflicting studies of whether people can be trained to detect lying), *available at* http://www.sciencenews.org/articles/20040731/bob8.asp (last visited Feb. 21, 2008).

39 *See* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 117 (2007) ("The ability to sense patterns unconsciously can be developed through experience and often can be aided by a teacher.").

40 *Cf.* Gigerenzer & Brighton, *supra* note 11, at 171 ("The way to go, in our view, is to systematically perform research on heuristics for the problem at hand, and to train experts in using, checking, and updating these.").

pretation of the Fourth Amendment. As William Stuntz has observed, "[c]rack dealers were the most salient crime problem a dozen years ago; now, terrorists occupy that place."[41]

The most obvious way in which terrorism will affect our understanding of the Fourth Amendment is by altering our notions about what counts as an "unreasonable" search or seizure. That inquiry is, and necessarily always has been, contextual.[42] As courts grapple with the reasonableness of searches and seizures in circumstances pertaining to terrorism—cases in which the stakes are much higher and the Government's interest much greater than in an ordinary criminal case—they will understandably be even more hesitant to second-guess law enforcement officials. Whether the shift in courts' understanding of reasonableness in cases relating to terrorism will also affect cases not involving terrorism, as Professor Stuntz predicts, remains to be seen.[43]

Terrorism will most likely affect *Terry* not when the reasonableness of a stop implicates the governmental interest in preventing or punishing terrorism—for example, when an FBI agent is searching for a terrorism suspect—but rather when a policeman acting on "just a hunch that something was wrong" stops someone he thinks might have drugs or a gun only to discover evidence of a terrorist crime. In that circumstance a court will not logically be able to invoke the weighty governmental interest in combating terrorism because of the requirement that a search have been "justified at its inception."[44] Instead, it will face the stark choice between excluding reliable evidence, and thereby allowing a likely, if not certain, terrorist to go free, or departing from the established Fourth Amendment analysis.

I find it difficult to imagine a court could be so dogmatic as to suppress under *Terry* the evidence needed to convict a terrorist. As Justice Holmes observed, "the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism." Courts, therefore, will likely heed the sagacious words of Justice Jackson:

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41 William Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2140, 2140-41 (2002).

42 Go-Bart Importing Co. v. United States, 282 U.S. 344, 356 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."). *See also* Terry v. Ohio, 392 U.S. 1, 9 (1968) ("specific content and incidents of this [Fourth Amendment] right must be shaped by the context in which it is asserted."); Johnson v. Campbell, 332 F.3d 199, 205 (3d Cir. 2003) ("What is constitutionally 'unreasonable' varies with the circumstances, and requires a balancing of the 'nature and extent of the governmental interests' that justify the seizure against the 'nature and quality of the intrusion' . . . .").

43 Stuntz, *supra* note 41, at 2141 (Fourth Amendment "law is likely to move toward greater authority for the police—not just for the FBI, and not just when fighting terrorists").

44 *Terry*, 392 U.S. at 20.

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[45]

Terrorism will likely test not only the limits of our commitment to *Terry* but even more the Supreme Court's commitment to the practice of enforcing *Terry* through an unexceptioned exclusionary rule.

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[45] Terminiello v. City of Chicago, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

GOT A BAD FEELING? IS THAT ENOUGH? THE IRRATIONALITY OF POLICE HUNCHES

The Honorable Harold Baer, Jr.[*]

> Police officers stopped a sight-seeing bus in Times Square on Sunday morning, and not because they suddenly desired to see the South Street Seaport. Urgent word had come to them of suspicious men on board, acting suspiciously in these suspicious times.
>
> Within seconds, the tourists on the double-decker bus had their hands raised high, in pantomime of thrill-seekers riding the Cyclone. And within minutes, five of those tourists, all dark-skinned men, had their hands in cuffs and their knees on city pavement . . . . [They] were just British citizens on holiday, with vacation snapshots that now will include newspaper photos of their public humiliation.[1]

I. INTRODUCTION

Television over-simplifies detective stories more than any other genre. Consider the 1980s crime-series, *Columbo*. The show centers on a seemingly dim-witted police officer, who typically arrives at the scene of a crime just after its completion. Proceeding primarily on hunches, Columbo is able to dissect the crime and expose the culprit. With no apparent objective justification, he begins to investigate an individual, without ever revealing to the person that he or she is a suspect. His *modus operandi* is to walk away from the suspect as if ready to absolve them and pursue another lead, but then to suddenly turn and inquire, "Oh, Mr. Smith, just one more question. I can't seem to understand . . . ." The subsequent few minutes of consensual, hunch-based inquiry quickly result in the criminal being unmasked, the crime being reenacted, and the perpetrator hauled off to jail all in a forty-five minute episode.

The real world is different. Police often use hunches, but only rarely do they reap the success of Columbo. That raises the question this Article examines: Should law enforcement be encouraged or even permitted to use hunches to effect an arrest or search and seizure? Hunches may include memories, experiences, and biases unique to each individual.[2] Even the most well-intentioned police officer approaches his job, as we all do, with conscious and unconscious biases and prejudices. Rather than recognizing that hunches are invariably infused with such prejudices, and that intuition

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[*] Hon. Harold Baer, Jr. is a Federal Judge for the Southern District of New York. He is indebted to Rebecca Mancuso, a J.D. candidate in the class of 2007, Cornell Law School, for her help in this endeavor.

[1] Dan Barry, *What Does 'Suspicious' Look Like?*, N.Y. TIMES, July 27, 2005, at B4.

[2] *See* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115 (2007).

may be inaccurate, police culture often condones hunch-based investigative approaches. Thus while hunches may be useful in other limited settings, they raise cause for concern in the dynamic and dangerous field of law enforcement, where the liberty we value so highly is an ingredient to be considered in most police activity.

With this in mind, "let's go to the videotape." In *Terry v. Ohio*,[3] the Warren Court for the first time approved in substance the use of hunches by the police as a tool for law enforcement. The Court attempted to strike a balance between the right of private citizens to be free from undocumented interference by the police and the furtherance of legitimate police activities.[4] When the Court concluded that acting on a hunch fell on the acceptable procedure side of the scale, it effectively reversed over a century of Fourth Amendment jurisprudence. The decision also provided the rationale future decisions would use to chip away at probable cause and further weaken the Fourth Amendment's protections.[5]

The likelihood of bad hunches in light of these relaxed Fourth Amendment standards creates a challenge for judges charged with deciding motions to suppress evidence. My experience in *United States v. Bayless*[6] provides a good example. There, the government produced a single police officer to explain to the Court why probable cause existed to search the defendant's car, which was parked in a bad neighborhood and ended up containing large quantities of narcotics. The sergeant-recorder who supposedly observed the incident was never called as a witness at the suppres-

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[3] 392 U.S. 1 (1968).

[4] *See* Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387 (2003) ("The *Terry* Court . . . explicitly created reasonableness as the paradigm for evaluating the constitutionality of an officer's stopping and frisking suspects . . . [and] structured [this] . . . doctrine by invoking a balancing scale. In the balancing scale constructed by the Court, one side weighed the government's need to conduct a search or seizure, and the other side weighed 'the intrusion' of the individual's interest.") (citing Terry v. Ohio, 392, U.S. 1, 21-22 (1968)).

[5] *See* Urbonya, *supra* note 4, at 1395 ("In describing the balancing process for the investigatory stop, the Court characterized the government as having a 'general interest' in crime prevention and detection. . . . Although the Court did not proceed to discuss the individual's privacy interest, it did identify some of the interests protected by the Fourth Amendment . . . . When balancing the interests, the government's side won out, allowing officers to conduct investigatory stops."); Louis D. Bilionis, *Conservative Reformation, Popularization, and The Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979 (2005); *see also* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174-77 (1988) (arguing that the Rehnquist Court has "steadily reduced the scope of the privacy and liberty rights" protected by the Fourth Amendment); Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 243-48 (1999) (arguing that through its reversals of precedent the Rehnquist Court has successfully narrowed the scope of civil rights of criminal defendants).

[6] 921 F. Supp. 211 (S.D.N.Y. 1996), *vacating as moot* 913 F. Supp. 232.

sion hearing. The government almost exclusively relied on the police officer's testimony, which revealed that the initial suspicion and subsequent search were based, in large measure, on a hunch. In such cases, a judge has two options: he may extrapolate the proffered testimony and settle for what may not meet even the relaxed standard of reasonable suspicion. Alternatively, he may uphold Fourth Amendment standards and suppress the evidence, only later to arrive at home, as I did, to find a picket-line in front of my door, and an impeachment petition circulating in Congress.

This Article suggests that the use of hunches by the police, seemingly acceptable under current Fourth Amendment standards, may impair a court's ability to properly assess and consider the evidence in a criminal trial. I begin by outlining the evolution of the Fourth Amendment's protection, from the birth of the earlier probable cause test enunciated by Justice Story, to the Warren Court's creation of what I have referred to as the relaxed test, i.e., reasonable suspicion in *Terry*. I go on to demonstrate that although the Warren Court attempted to protect the probable cause concept, the jurisprudence following *Terry* has ultimately eliminated the standard. In addition, I will suggest—based on a brief scientific background of hunches, including their source, and the biases, morals, and prejudices that accompany them—that by their very nature, hunches cannot conform to *Terry*. Finally, I propose that if we are to sanction hunches, then we must do what we can to ensure their accuracy. Through constant mentoring and enhanced community policing, we may in time be able to provide a safer platform from which the police may utilize their intuition.

II. *TERRY V. OHIO* AND THE *DEMISE* OF PROBABLE CAUSE

Justice Story established a strict concept of probable cause in his 1824 opinion, *The Apollon*.[7] The facts of this case parallel those in *Bayless*, almost two centuries later. The plaintiff, an importer of raw goods, attempted to bring his cargo into U.S. waters.[8] When U.S. Customs officials detained and searched the ship, they discovered illegal material and hidden cargo.[9] The plaintiff moved to suppress the evidence, arguing that the customs officials violated his Fourth Amendment rights by searching his ship without probable cause.[10] The government argued, as it did in *Bayless*, that since the plaintiff traveled via a route "infested, at different periods, by smugglers," analogous to the drug infested streets of Washington Heights, that its officers had probable cause for the search and seizure.[11] Writing for a

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7 22 U.S. 362, 9 Wheat. 362 (1824).

8 *Id.* at 364-65.

9 *Id.*

10 *Id.*

11 *Id.* at 372-74.

unanimous court, Justice Story rejected the government's argument and held that what was little more than a rumor, similar to a hunch, was insufficient to establish probable cause. Probable cause could only be established, Justice Story held, from the "evidence in th[e] record, and not by mere general suspicions."[12]

The courts throughout the 19th and early 20th centuries continued to uphold Justice Story's strict perception of Fourth Amendment protection by insisting on hard evidence sufficient to create probable cause.[13] The Supreme Court in *Olmstead v. United States*[14] warned of the dangers of loosening the probable cause test. There the Court wrote that to allow the police to search and seize without probable cause would be to "place the liberty of every man in the hands of every petty officer."[15] As Madison cautioned almost two centuries earlier, there was a recognized need to protect the private citizen, particularly the minority citizen, from the will of the majority.[16]

Until 1960, courts continued to maintain a strict approach to probable cause and the Fourth Amendment.[17] Only where "the facts and circumstances . . . [are] sufficient to warrant a man of reasonable caution in the belief that an offense has been committed,"[18] or where there is a "fair probability that contraband or evidence of a crime will be found,"[19] can the police intrude into the private sphere. Indeed, the majority of the Warren Court's Fourth Amendment opinions upheld this narrow interpretation of probable cause.

The sea change occurred in 1968 when the Supreme Court decided *Terry v. Ohio*.[20] Contrary to the Warren Court's previous holdings, *Terry*

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12 The Apollon, 22 U.S. 362, 374 (1824).

13 *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 484-87 (1994) (outlining the historical context of the Fourth Amendment's prohibition of unreasonable searches and seizures). *But see* Thomas Y. Davies, *The Fictional Character of Law and Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 250-58 (2002) (arguing that history reveals that the Framers meant to prohibit the conferral of a discretionary search authority on law enforcement officials).

14 277 U.S. 438 (1824).

15 *Id.* at 474.

16 *See* James Madison, The Federalist Papers, LXXVIII, (Isaac Kramnick ed., Penguin Books 1987) (noting that the "independence of the judges is equally requisite to guard the Constitution" and against "serious oppressions of the minor party in the community").

17 *See, e.g.*, United States v. Cervantes, 174 F. Supp. 398 (S.D. Cal. 1959); People v. Estrialgo, 233 N.Y.S. 2d 558 (1962), *rev'd*, 245 N.Y.S. 2d 850 (1963).

18 *Cervantes*, 174 F. Supp. at 402.

19 Illinois v. Gates, 462 U.S. 213, 238 (1983).

20 392 U.S. 1 (1968).

created a "reasonable suspicion" exception to the probable cause standard.[21] Still technically the law today, *Terry* holds that an officer may stop and briefly detain a person for investigative purposes, if he has a reasonable suspicion that criminal activity "may be afoot," even if the officer lacks probable cause.[22] Thus, while before *Terry* a police officer needed hard evidence sufficient to meet the probable cause standard to stop and detain, *Terry* changed all that.[23]

Chief Justice Warren, while in essence holding a hunch to be sufficient, attempted to put boundaries around a police officer's power.[24] He insisted that the police be able to "point to specific and articulable facts" to validate their intuition, and that the police not rely on "inchoate" hunches.[25] "This demand for specificity," Warren wrote, "is the central teaching of this Court's Fourth Amendment jurisprudence."[26] Warren also discussed at length the importance and continued vitality of the exclusionary rule. Its main functions, he wrote, are to "discourage lawless police conduct" and to preserve "judicial integrity."[27] Thus, "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."[28] We have traveled a fair distance since Chief Justice Warren framed these words, and I have a hunch we have traveled in the wrong direction.

Justice Douglas dissented.[29] He reminded the Court that the concept of probable cause has roots deep in this country's history,[30] and recognized the consequences of the proposed limitations. "It is a mystery," he wrote, "how that 'search' and that 'seizure' [of *Terry*] can be constitutional by Fourth Amendment standards, unless there was 'probable cause.'"[31] In addition, Douglas cautioned the Court that it had in the past "always used the lan-

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21 *See* Ybarra v. Illinois, 44 U.S. 85, 93-94 (1979); *see also* David A. Harris, *Terry and the Fourth Amendment: Marvel or Mischief? Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric versus Lower Court Reality under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975 (1998).

22 392 U.S. 1 (1968), *see, e.g.*, Illinois v. Caballes, 543 U.S. 405 (2005); United States v. Marxen, 410 F.3d 326 (6th Cir. 2005); United States v. Dennison, 410 F.3d 1203 (10th Cir. 2005).

23 *See* Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383 (2001) (arguing that the Court's decision in *Terry* introduced a new era of police power that allowed the broad exercise of discretion in stopping and detaining suspects); *see also* Adina Schwartz, *"Just Take Away Their Guns:" The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1997) (discussing the relaxed standards of Fourth Amendment protection catalyzed by Terry v. Ohio).

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

25 *Id.* at 21.

26 *Id.* at 23.

27 *Id.*

28 *Id.*

29 *See id.* at 35 (Douglas, J., dissenting).

30 *Terry*, 392 U.S. at 37.

31 *Id.* at 35.

guage of 'probable cause' in determining the constitutionality of an arrest without a warrant." To provide the police more power to seize a person, on grounds less than probable cause, would be to hand the police "*more* authority than could be exercised by a magistrate in issuing a warrant."[32] This, Douglas warned, "is to take a long step down the totalitarian path."[33] While such a step may be necessary to cope with modern-day lawlessness, he conceded, it is a choice for the people to make by constitutional amendment. Douglas concluded by highlighting the importance of Fourth Amendment safeguards, and warned that the *Terry* decision would erode these protections.[34]

III. *TERRY'S* UNINTENDED PROGENY

> Oh What a Tangled Web We Weave, When First We Practice To Deceive.
>
> — Sir Walter Scott, *Marmion*, Canto vi

Unfortunately, Douglas was prescient. Slowly and quietly, the lower courts moved away from an insistence on "specific, articulable facts," and towards a broad "categorical jurisprudence."[35] While some courts pretended to maintain *Terry's* requirements, other courts abandoned them altogether. Today, courts examine and credit categories of suspicion, including the neighborhood, the time of day of the stop, the physical mannerisms of the suspect, and most troubling, sometimes even race. These generalizations erode reasonable suspicion and produce inconsistent applications of Fourth Amendment protections.[36] For example, in *United States v. Thomas*, one Connecticut court found that officers had reasonable suspicion to stop and frisk passengers in a van based on loud music and the fact that one passenger repeatedly moved his hands, looked behind him, and generally acted "suspiciously."[37] While in *United States v. Elmore*, another Connecticut Court found a lack of reasonable suspicion where the police effected an

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32 *Id.* at 36, n.3.

33 *Id.* at 38. *See also* Andrew E. Taslitz, *Criminal Law: Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003); *see also* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

34 *Terry*, 392 U.S. at 37 (Douglas, J., dissenting).

35 Harris, *supra* note 21, at 987.

36 *See* Tovah Renee Calderon, *Race-Based Policing from* Terry *to* Wardlow*: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 98 (2000) ("The NAACP LDF warned the *Terry* Court in 1968 that such stereotypes would lead to disparate treatment of blacks and whites under the stop-and-frisk doctrine: 'Because of the police officer's conception of the Negro male, he frequently feels that most Negroes are dangerous and need to be dealt with as an enemy even in the absence of visible criminal behavior . . . .'").

37 363 F. Supp. 2d 84 (D. Conn. 2005).

arrest after receiving information from a single informant that the defendant had been involved in an earlier shooting.[38]

The most alarming inroads on probable cause, however, have occurred more recently.[39] It is not surprising that the liberal mores of the Warren Court elicited strong criticism in politically conservative circles,[40] and as the pendulum swung back, it did not stop in the middle.[41]

The Rehnquist Court has undermined the Warren Court's precedent through its minimalist philosophy.[42] In *United States v. Wade*,[43] for example, the Warren Court held that a defendant has a right to counsel during the critical post-indictment lineup stage, concluding that such a requirement would enhance meaningful confrontation testimony at trial. Five years later, the Rehnquist Court held that *Wade* applies only to procedures that begin at trial, ignoring any assistance that the defendant would gain from the presence of counsel earlier in the proceedings. Thus, as Professor Bilionis recognizes, a claim "which could be characterized as . . . an extension of the right laid down by a Warren Court decision," may indeed have been rejected as an "inappropriate excursion beyond the core."[44] A nibble perhaps, but soon the Rehnquist Court had swallowed most, if not all, of the reasonable suspicion enchilada.

In *Wade*, the Court went on to give only lip service to the requirement of specific, articulable facts as spelled out in *Terry*, and instead constructed the "totality of the circumstances" test.[45] In *Illinois v. Wardlow*, for example, the Chief Justice starts out with a bow to *Terry*: "While 'reasonable suspicion' is a less demanding standard than probable cause . . . the Fourth Amendment requires at least a minimal level of objective justification for making the stop,"[46] but then goes on to conclude that "objective justification" is satisfied based on the defendant's presence in an area of heavy narcotics trafficking and his unprovoked flight upon noticing the police. Similarly in *United States v. Sokolow*, after a nod to *Terry* and its requirements, the Court held that the police had acted reasonably when they stopped and searched the defendant based on the fact that he had traveled to Miami, an area known for drug trafficking, and that he had paid for his plane ticket

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38 359 F. Supp. 2d 105 (D. Conn. 2005), *rev'd in part*, 482 F.3d 172 (2d Cir. 2007).

39 *See* Banks, *supra* note 5, at 233; *see also* Bilionis, *supra* note 5, at 993-94.

40 *See generally* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (Random House, 1996).

41 Bilionis, *supra* note 5, at 1049-50.

42 *See, e.g.*, Maryland v. Wilson, 519 U.S. 408 (1997); Whren v. United States, 517 U.S. 806 (1996); *see also* Bilionis, *supra* note 5.

43 388 U.S. 218 (1967); *see also* Bilionis, *supra* note 5, at 994 n.44 (citing *Wade*, 388 U.S. at 237-39, and Kirby v. Illinois, 406 U.S. 682, 688 (1972)).

44 *Id.* at 994.

45 *See* United States v. Sokolow, 490 U.S. 1 (1989); Illinois v. Wardlow, 528 U.S. 119 (2000).

46 528 U.S. 119, 123 (2000).

with cash.[47] That these factors are consistent with the DEA's "drug courier profiles," the Court noted, "do[es] not detract from their evidentiary significance."[48] In less than forty years, the Supreme Court has pretty much obliterated *Terry's* requirements of articulable reasonable suspicion.[49]

IV. THE INHERENT PROBLEM OF POLICE HUNCHES

> In the condition of mere nature . . . all men are equal. The inequality that now is, has been introduced by the laws civil.
>
> — Thomas Hobbes, *Leviathan I*, 15

The very nature of hunches suggests a barrier to *Terry's* requirements. Hunches are intuitive judgments that rise to our consciousness without explanation.[50] Formed in a part of the brain known as the "adaptive unconscious," hunches derive from an individual's pattern recognition, memories, and experience. Since hunches are heuristic, rather than analytical, in nature,[51] they are based on all of our experiences, not only those learned and practiced. As such, hunches may be biased by experiences and personal morals, which inevitably affect their accuracy.

One such bias derives from the "availability heuristic."[52] This common brain function is the tendency to overestimate the likelihood of unpleasant or dramatic events.[53] Thus if, for example, a person has witnessed a robbery, the availability heuristic suggests that she will more easily interpret future similar but possibly innocent fact patterns as a robbery than would a person who has never before experienced a robbery. Since the brain is generally unable to erase such an experience from its memory, a hunch cannot help but include bits and pieces of this bias.[54]

Implicit Association Tests (IATs) offer a profound glimpse into a common yet disturbing bias: racial bias. Outlined by Martin Gladwell in

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47 490 U.S. 1 (1989).

48 *Id.* at 10.

49 There are, of course, many suggested reasons behind the Rehnquist Court's decision to give the police enhanced freedom and power. *See* Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 158 (1994) ("Despite . . . incidents of police brutality and extreme misconduct, the Supreme Court has adopted and inscribed into Fourth Amendment jurisprudence a 'good cop paradigm' . . . . The good cop paradigm is defined by a false myth of the police officer as a law-abiding citizen who is chiefly, if not totally, motivated by law enforcement interests when appropriate and who can be trusted to behave within constitutional parameters.").

50 Gerd Gigerenzer & Henry Brighton, *Can Hunches Be Rational?*, 4 J.L. ECON. & POL'Y 155 (2007).

51 *Id.* at 156.

52 Alschuler, *supra* note 2, at 121.

53 *See id.*

54 *See id.* (citing STEVEN PINKER, HOW THE MIND WORKS, 131-38 (The Penguin Press, 1998).

Blink,[55] a typical IAT consists of a series of fast-trigger exercises in which subjects associate words (such as "good," "bad," "fun," or "dirty") with different races and sexes (identified by photographs of anonymous persons, such as a Caucasian female, an African-American male, etc.).[56] The IAT statistics overwhelmingly show that the subjects' explicitly-stated values are inconsistent, if not opposed to, their unconscious beliefs. Despite education and training, the subjects often cannot overcome their pre-conceived notions. Thus, even the most well-intentioned police officer has unconscious biases, which adversely affect her ability to form accurate hunches.

In *Blink*, Gladwell suggests that hunches may be substituted for rational deliberation,[57] and while the example makes good reading, the milieu is far from analogous to police work. As an introductory example, Gladwell highlights the Getty Museum's purchase of a Greek *kouros* statue, purported to be over two thousand years old.[58] Despite favorable reports from geologists and archeologists substantiating the statue's authenticity, the Getty solicited opinions from the likes of Thomas Hoving, the former Director of the Metropolitan Museum of Art. Mr. Hoving met the *kouros* deep in the Getty's basement, and within seconds of its unveiling Hoving claims that the word "fresh" flashed across his mind.[59] While unable to articulate how or why he believed that the statue was a recent fabrication, he was adamant about his conclusion. Three more experts also announced that it was a reproduction. Finally, after paying the purported ten million dollar purchase price, the museum convened a symposium in Greece to solicit views on the statue's authenticity. The Getty quickly heard that the *kouros* was almost certainly a reproduction, and a poor one at that.

As noted, Mr. Hoving could afford to offer a hunch with relatively benign consequences. In the dangerous reality of law enforcement, hunches may result in different and far more serious consequences, both for the citizen and for the police officer.

V. HUNCHES: POLICE BIAS AND ASSOCIATED DANGERS

> Everyone Is Entitled to Their Own Opinion, But Not Their Own Facts.
>
> — Sen. Daniel Patrick Moynihan, *Family and Nation* (1986)

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55 MARTIN GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 77-87 (Little, Brown and Company, New York 2005).

56 The IAT was designed by Anthony G. Greenwald, Mahzarin Banaji, and Brian Nosek. For more on the IAT, visit https://implicit.harvard.edu/implicit (follow "Demonstration" hyperlink) (last visited Feb. 21, 2008).

57 *See* GLADWELL, *supra* note 55.

58 *Id.* at 3-11.

59 *Id.* at 5.

Like private citizens, police officers cannot help but carry with them the personal experiences, memories, and values of a lifetime, all of which likely skew the accuracy of their hunches. Unlike the ordinary citizen, police officers face hostile and frightening situations daily and consequently fall easy victim to unconscious feelings of bias, prejudice, and the availability heuristic. Police officers, then, are likely to come to work with more "baggage" than the private citizen.[60]

We see some of this bias in the findings of the Christopher Commission, established by Mayor Tom Bradley following the Rodney King beating.[61] The Commission focused primarily on the modus operandi of the Los Angeles Police Department ("LAPD") and the genesis of its failure to control even isolated incidents of police brutality.[62] In the course of its study, the Commission found a pervasive racial and ethnic bias,[63] which the police officers brought to the force, and which colored their actions, and by definition their hunches.

The Commission did not reveal how or why the officers displayed racial, ethnic, and religious bias. Some of the problem may be attributed to the vastly different racial and religious backgrounds of the officers as compared with the men and women in the precincts they patrol. As noted, even with training and education, prejudices are hard to overcome. The presence of the availability heuristic makes it even harder. Education, too, plays a role—most LAPD officers have only a high school education, making change even more difficult.

Of course, the tendency of police officers to target African-Americans and other racial minorities is not new and not restricted to Los Angeles.[64] Young, minority men who live in high-crime areas frequently complain of being targeted for frisks by police officers patrolling the area. As the initial

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60 This psychological and emotional "baggage" often translates into unequal treatment of private citizens. Police officers frequently consider race in deciding whether to stop, detain, or frisk a suspect. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214-57 (1983) (examining the varied ways that race informs the probable cause and reasonable suspicion discourses and criticizing these findings); *See also* Angela J. Davis, *Crime and Punishment: Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1675-84 (1996) (arguing that the disposition of criminal offenses by race at the arrest, prosecution, and sentencing stages reflects the extent of racial bias in the entire criminal justice system).

61 L.A. POLICE DEP'T REP. OF THE INDEP. COMM'N xi-xii, at 31-65 (1991) [hereinafter *Christopher Commission*].

62 *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493-521 (2004) (arguing that police violence is better attributed to police culture than to personality traits of individual officers).

63 *See id.* at 497-98.

64 *See* Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332-49 (1994) (outlining the legal standards that allow police officers to consider race in their decisions to stop and detain a suspect). *See generally* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (discussing the history of racial discrimination among police officers in crime prevention and detection, and noting concern for this "bias").

Executive Director of the Civilian Complaint Review Board,[65] I had the opportunity to examine hundreds of allegations of discriminatory conduct by New York City police officers. Those reports revealed too often a prejudice learned by law enforcement officers early in their training. Years later, an investigation by New York's Daily News showed that eighty-one of one hundred young, black and Latino men interviewed by the newspaper had been stopped by a police officer at least once.[66] Malik McFarlane, then a college sophomore in Queens, was apparently stopped because he was on the street after dark. "'We just left the gym after playing basketball when the cops pulled (sic) over,' he said. 'They asked us where we were going and patted us down, searched our gym bags, tossed our items on the floor.'"[67] In another study by the New York State Attorney General, of the 175,000 people stopped by New York City police between January 1998 and March 1999, eighty-four percent were black or Hispanic.[68] During this time period, however, blacks and Hispanics combined comprised barely over half of the city's population.[69]

It seems, therefore, that heuristics may be what it is all about. The police officer brings with her to work the same unconscious racial, ethnic, and religious bias as ordinary citizens, but because the officer is routinely exposed to dangerous and dramatic events, she may carry an increased availability heuristic over that of a private citizen. As a consequence, the dangers that come with the job may increase the dangers of reliance on hunches.

VI. THE HUNCH AND POLICE CORRUPTION

> To Justify Himself, Each Relies on the Other's Crime.
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> — Albert Camus, *Actuelles III*

In 1992, Mayor David Dinkins established by executive order a temporary commission to investigate issues of police corruption in New York

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65 The Civilian Complaint Review Board was organized by Mayor John Lindsay in 1967 and was originally civilian dominated. In 1968 a referendum rejected civilian control and the Board was reconstructed, as it is today, with a majority of police members.

66 Leslie Casimir, Austin Fenner & Patrice O'Shaughnessy, *Minority Men: We Are Frisk Targets*, DAILY NEWS (N.Y.), March 26, 1999, at 34.

67 *Id.*

68 ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), *available at* http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html (last visited Feb. 21, 2008).

69 Michael A. Fletcher, *Criminal Justice Disparities Cited*, WASH. POST, May 4, 2000, at A2.

City.[70] Commonly referred to as the Mollen Commission after its Chair, Judge Milton Mollen,[71] the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department had as its mandate three areas of public concern: (1) the extent and nature of the corruption within the New York Police Department ("NYPD"); (2) the NYPD's policies and procedures for corruption control; and (3) improvements and reform for the detection and prevention of corruption within the NYPD.[72] Twenty-five years after my Review Board experience, as one of the five Commissioners on the Mollen Commission, I learned about the historical, political, and departmental intricacies of policing New York all over again.[73] The Commission's work is worth mentioning here because the hunch, buttressed by the current state of the law, combined to give some insights into the corruption the Commission uncovered and which intruded on what for the most part was a well-run organization. The hunch was this "wonderful mechanism" by which corrupt officers were able to substantiate illegal searches and seizures. When courts accepted uncorroborated hunches, officers could, and did, claim that they used a hunch to stop and search a suspect, when in fact the officer was engaged in an illegal gambit of his own. Since the "blue wall of silence" is a protective shawl around the shoulders of each officer, it sometimes encourages wayward police officers to claim a simple hunch to justify their illegal activity.[74]

The Commission also learned that even the presumably faithful officer may falsify police records and commit perjury, further devaluing the reliance on hunches. Understandably, officers are frustrated by what they perceive to be unrealistic rules of law that hamper their ability to curtail crime in their precincts through legal means. Thus, officers on the street may search a vehicle or conduct a frisk intending to enhance street safety, yet their activities may nonetheless be illegal. By claiming that they did so on

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70 N.Y. Exec. Order No. 42 (Oct. 14, 1970). *See also* Hon. Harold Baer, Jr. & Joseph Armao, *The Mollen Commission Report*, 40 N.Y.L. REV. 73, 74-75 (1995).

71 N.Y. CITY COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROC. OF THE POLICE DEP'T (July 7, 1994) [hereinafter MOLLEN COMM'N REP.].

72 Baer, Jr. & Armao, *supra* note 70, at 74.

73 In addition to myself, the Commission included Herbert Evans, Roderick C. Lankler, Harold Tyler, and Milton Mollen.

74 The Mollen Commission found pervasive law enforcement codes and loyalties that prevent the exposure of police corruption and which protect officer misconduct. In particular, the Commission learned of the "blue wall of silence," which is a strict code of silence that officers tacitly agree to uphold, which forbids them from reporting incriminating evidence about their fellow officers. This code runs between patrol officers, detectives, supervisors, and even the Department of Internal Affairs, which has been charged to expose and reduce police corruption. If an officer disavows this "wall," and works in a supervisory capacity, the repercussions can be severe. According to a police captain who had spent thirteen years as a supervisor, his reputation as a "rat" preceded him in almost all of the thirty-eight different commands to which he was assigned. At one command, his locker was burned, his tires were slashed and he received threats of physical harm all on the first day on the job. This leaves little incentive for officers to play by the rules. *See* MOLLEN COMM'N REP., *supra* note 71, at 54.

a hunch, these officers may avoid suppression of the evidence seized—to say nothing of their own exposure to charges of misconduct. One is reminded of Orwell's words, "In a time of universal deceit, telling the truth becomes a revolutionary act."[75]

Many police officers have learned that the law of search and seizure has eroded over the years, and now it is easier to conform their testimony to the gossamer-like requirements. Indeed, one Chicago-area study suggests just this.[76] The study, which included nine narcotics cases and their related suppression hearings, examined the testimony of the arresting police officers. In all of the cases, the officers clearly understood the law of search and seizure, and appeared to have conformed their stories to their understanding of the law. In a few of the cases, for example, officers on the stand used terms such as "in plain view," or "exigent circumstances," to describe to the judges how and why they seized the narcotics. While the study does not suggest that the officers maliciously conducted *Terry*-stops, its findings highlight the officers' keen awareness of the need to make their stories palatable to the court and reduce reliance on hunches.

VII. REFORM FROM WITHIN—MENTORING AND COMMUNITY POLICING

> Am I Not Destroying My Enemies When I Make Friends of Them?
>
> — Abraham Lincoln[77]

Until law enforcement agencies spend more time and money addressing the problems that arise from their culture, training and, in some locales, education, the hunch will remain problematical and occasionally unjust. Police departments must be urged to rely less on hunches through enhanced mentoring programs and greater community policing. As the recent findings by the Manhattan Center for Civic Innovation suggest, local and state law enforcement agencies should be trained and equipped according to three basic tenets.[78] First, police officers should be taught to implement general "problem-solving techniques." Second, police should partner locally with the private sector. Third, police should use effective intelligence-sharing technology so that information can be brought to bear in a

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[75] GEORGE ORWELL, MY COUNTRY, RIGHT OR LEFT, THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, Vol. II (Sonia Orwell & Ian Angus eds., Nonpareil Books 2000).

[76] *See* Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1030 (1987).

[77] Abraham Lincoln, Pres., U.S., Speech Given Shortly After He Was Elected President (1861). *See generally* THE SPEECHES OF ABRAHAM LINCOLN (Arthur Brooks Lapsley ed. 1905).

[78] *See generally* Manhattan Institute, *Safe Cities Initiative*, *available at* http://www.manhattan-institute.org/html/safe_cities.htm (last visited Feb. 21, 2008).

timely manner. With strides in these areas, both the public and the courts will be more comfortable in relying on police testimony.

A. *Mentoring Programs*

Little scholarship reviews and comments on the concept of police mentoring, perhaps because few law enforcement agencies employ formal mentoring programs or realize its potential. Yet because police mentoring is based on the same concepts of loyalty, respect, and camaraderie as police culture, it seems particularly suited to law enforcement agencies. At its best, police mentoring may effectively improve officer credibility and enhance officer accountability. At the very least, it offers more sensitivity training and education than officers currently receive at their precincts.

Traditional mentoring programs aim to benefit the mentee, usually a police cadet or rookie officer.[79] Through a series of formal and informal meetings with a veteran police officer, the mentee learns from her mentor and develops a relationship of trust with him. As Professor McClurg suggests, the traditional police mentoring program is very similar to the sponsorship tradition of Alcoholics Anonymous.[80] Just as the A.A. sponsor makes himself available twenty-four hours per day, to listen and offer advice to the recovering alcoholic, the police veteran will maintain open communication with the rookie officer, so that she may discuss the temptations presented by life on the force. While the primary goal of police mentoring programs is to maintain the integrity and accountability of rookie officers, the veteran sometimes gains more from the relationship than the rookie. As the veteran officer guides his mentee, he will begin to feel hypocrisy and guilt if he does not practice what he preaches.[81] The mentoring program can therefore benefit both seasoned and new officers.

Professor McClurg offers another mentoring model to maximize benefits for both the police cadet and the rookie. Contrary to the conventional mentoring model, he proposes a program that focuses on younger mentors, and minimizes the exposure of cadets and rookies to veteran officers.[82] Under this program, which relies on the Cognitive Dissonance theory,[83] newly-graduated rookie officers would mentor cadets still at the Police Academy. As the rookies face newfound difficulties previously unaddressed in the Academy, they relay these issues to their younger, less ex-

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79 *See* Eliot Aronson, *Back to the Future: Retrospective Analysis of Leon Festings' Theory of Cognitive Dissonance*, 110 AM. J. PSYCHOL. 127 (1999); *see generally* Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389 (1999).

80 *See* McClurg, *supra* note 79, at 443.

81 *Id.* at 451.

82 *Id.* at 442.

83 *See id.*; *see generally* Eliot Aronson, THE SOCIAL ANIMAL (7th ed. 1995).

perienced mentees. When the cadets graduate, they continue to rely on their mentors, until the cycle repeats itself and they take on cadet-mentees of their own. Thus, no young cadet or rookie is exposed to the potentially corrupt veteran officers, and over time, the population of the police becomes increasingly self-aware and presumably, honest. Both proposals provide cadets and rookies the opportunity to gain self-respect, self-awareness, and integrity, and will, hopefully, improve officer accountability, adherence to the law, and equal treatment of all citizens.

B. *Community Policing*

Community policing is a term of art that describes a cooperative dynamic between private citizens and the police, and carries the additional bonus of improving mutual respect between these two parties.[84] Specifically, it aims to reduce the distrust, fear, and even contempt that certain communities and precincts harbor for each other. The most common (and most basic) community policing efforts include exchanging officer vehicle patrols for foot patrols.[85] This brings the police officer in contact with the precinct's residents and provides the officer with a better opportunity to familiarize himself with his precinct, block by block. More ambitious projects include recruiting police officers from the precinct itself, and hosting outreach programs between the community and the police.[86] The knowledge that comes from these opportunities, combined with experience, may someday make the hunch a reliable law enforcement tool.

Interaction between the public and the police tends to lessen fear and lead to more trust and understanding between the two communities. As officers familiarize themselves with the neighborhood and its culture, both the police and the citizens will benefit. Where the police officer is of a different race than most of the citizens of their precincts (as is often the case), more time spent in the community and with its leaders will increase comfort and understanding, or at least, tolerance. In addition, officers may rely on residents they know to aid in law enforcement efforts, through community watches, phone tips, or other mutually supportive practices.

Unfortunately, community policing, like mentoring programs, remain in their infancy. The largest community police organization, the Office of Community Oriented Policing Services (COPS),[87] is a not-for-profit organi-

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[84] *See* PUBLIC SAFETY AND COMMUNITY POLICING, "COPS ON THE BEAT," H.R. REP. NO. 103-324, at 2 (1993), reprinted in 1994 U.S.C.C.A.N. 1801-02; *see generally* Linda S. Miller & Karen M. Hess, THE POLICE IN THE COMMUNITY: STRATEGIES FOR THE 21ST CENTURY (2d ed. 1993).

[85] James Stribopoulos, *A Failed Experiment? Investigative Detention: Ten Years Later*, 41 ALBERTA L. REV. 355, 341 (2003).

[86] *See generally* COMMUNITY POLICING: RHETORIC OR REALITY?, (Jack R. Green & Stephen D. Matrofsi, eds., 1988).

[87] *See* http://www.cops.usdoj.gov/ for more information on COPS (last visited Feb. 21, 2008).

zation that relies on public funding to support its work. While COPS' efforts to increase police integrity, community-based policing, and develop peacemaking programs are laudable, more than eighty-two percent of COPS grants serve populations of 50,000 or less.[88] COPS, not individual police departments, initiates and carries on the community police effort. There is still much work to do to expand mentoring programs into heavily-populated areas, and to encourage police departments to implement such training.

VIII. CONCLUSION

Hunches—manifestations of our subconscious intuition—constitute a dangerous, if occasionally valuable, heuristic when used by police as justification for *Terry* stops and search and seizures. Regardless of an officer's intent to remain objective, extant biases and prejudices may weave themselves into his adaptive unconscious and sully his good intentions. A half century of erosion of the Fourth Amendment's protections of personal liberty from illegal searches has compounded the potential magnitude of such biases, because the courts—formerly a crucial check on biases and a guardian of neutrality—are becoming less willing to challenge conclusions based on officers' intuition. Thus, a paradigm shift is necessary in the courts to ensure that hunches are properly characterized as what they are: useful, but potentially flawed, crime-prevention tactics—due a proper amount of skepticism.

We have seen that hunches have promise, but significant potential for misuse. Thus, if we are to allow our police to use hunches at all, we are obligated to institutionalize them in order to ensure their accuracy and that they are appropriately—and constitutionally—exercised. Law enforcement agencies should require higher standards and better education of cadets, and continuing guidance for nascent and mature police officers once on the force. Also, organizational methodologies may go a long way toward minimizing the risk of hunch-abuse, including mentoring and community policing. Without such efforts the likelihood of further erosion of the Fourth Amendment, in part through reliance by the courts on police hunches, poses a "clear and present danger."

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[88] *Id.*

HUNCHES: TOO MUCH DISCRETION, NOT ENOUGH CONTROL

The Honorable James M. Rosenbaum[*]

> Roper: So now you'd give the Devil the benefit of the law!
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> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> More (roused and excited): Oh, and when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of law, for my own safety's sake.
>
> — Robert Bolt, *A Man For All Seasons*

Years ago, I prosecuted misdemeanors in St. Louis Park, Minnesota. The cases ranged from wild parties and shoplifting to minor assaults and drunk driving offenses. Among the most interesting aspects of that job was the chance to work with the suburb's police department and Sergeant John ("Fitz") Fitzgerald in particular.

"Fitz" was a wonder; he was known for catching more than a few drunk drivers. He would regularly catch more than 150 of them per year. He was Minnesota's most prodigious DWI-catcher, outdistancing his law enforcement colleagues by twenty or more. Fitz had a gift.

I rode with Sergeant Fitzgerald one night. We drove past the King's Inn, Bunny's, Al's, and a VFW post. As we drove past the VFW, the Sergeant pointed to a fellow walking out. He said, "See that guy? He's drunk." All I saw was a fairly well-dressed man striding from the building. Sergeant Fitzgerald parked the squad car about a block away. I watched as the man moved to his car, put his key in the lock, and then started his car and drove onto the street. Not that it matters, but he looked just fine to me.

We followed the chap for a block or two until the car's left side wheels brushed the center line. Fitz pulled him over, administered a breathalyzer test, and ran him through the customary heel-to-toe exam. Of course, he was drunk. What did Fitz see, or know? Did he have a hunch? How did he do it? What happened that night, long ago?

On later reflection, I came to realize that I had watched the work of a man who did not operate by hunch. Fitz, instead, had the gift of a heightened ability to perceive people operating cars while under the influence. Over many years of service he had developed the skill to notice things a

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[*] District Judge, United States District Court, District of Minnesota.

lay-person would not see. However, even appreciating Sergeant Fitzgerald's perceptive skill, I cannot agree that he should be granted authority to arrest citizens based only on this heightened subjective ability. I want some form of objective proof before allowing Sergeant Fitzgerald to exercise the State's arrest power.

Why? While John Fitzgerald is a fine human being and a talented officer, he, along with all of us, is subject to other influences which can afflict our species. That evening he apprehended a Caucasian, but this Nation's history is replete with examples of people who have been subjected to less than even-handed justice.

Let us take prejudice out of the equation for a moment and posit the existence of a totally unprejudiced crime fighter. Let us imagine a crime fighter whose heightened perceptions are never based on preconceived notions about one person or another. Remarkably, a fair-minded law enforcement official such as this actually exists: the drug-sniffing canine.

We use sniff dogs for their unquestionably heightened perceptive abilities. Dogs can smell several thousand times better than humans and can be trained to detect drugs of all kinds. They perform their law enforcement service every day, and do so without regard for race, gender, religion, age or national origin. For our purposes, they are without prejudice.

But even though dogs are talented, trained, and even-handed, we do not allow just any mutt to supply the probable cause needed to support a search warrant. Law enforcement canines must be certified and their certification must be periodically renewed. They are regularly tested using verifiable, replicable standards to assure their "alerts" can be trusted. Absent this certification, a court will decline to exercise its power simply based on the animal's behavior alone.

Under the law, even the dog's unbiased alert is not enough. The law requires the separate validation of an exhaustive certification. Similarly, when the law requires Sergeant Fitzgerald to find and accurately report an objective event, it validates his heightened perception. The objective event serves as the functional equivalent of a certification.

Professor Lerner's hunch article makes much of *Terry v. Ohio*.[1] In particular, he notes the Supreme Court's extensive review of the case's factual nexus. However, *Terry* glosses over other important details. Not the least of these is the fact that Officer McFadden was right: Mr. Terry was actually carrying a gun. This, of course, is the only reason the case got to the Supreme Court. Had Officer McFadden walked up to Mr. Terry, patted him down and found nothing, *Terry v. Ohio* would have disappeared.

This raises an interesting question: How many times had Officer McFadden patted down other individuals walking back and forth on the streets of Cleveland, Ohio? Did he do so frequently? Were his non-hits

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[1] 392 U.S. 1 (1968).

mostly of one gender, race, age, or religion? Chief Justice Warren commends Officer McFadden's work in the *Terry* opinion without addressing this critical inquiry.

In his article, Professor Lerner suggests that if the law bars Officer McFadden from acting on his hunches, it may diminish his zeal for aggressive law enforcement. He offers this thought for two reasons: first, judicial hamstringing might make the officer reluctant to follow his hunches, and second, Officer McFadden might fear a lawsuit if he could not be assured of judicial deference. Neither argument seems persuasive.

The first proposition—that a good officer might be deterred by fear of a judge's opprobrium or suppression—fails of its own weight. Officer McFadden's "right" to make the *Terry* stop was not established until after he apprehended Mr. Terry. Thus, the courts' prior failure to articulate this right did not stop McFadden, and it does not seem he would be automatically deterred today. The second reason—a suggested fear of a retaliatory lawsuit—seems greatly overstated. I can only offer anecdotal evidence, but based on nearly twenty years of federal trial experience, there are precious few successful cases of damages for overzealous investigation. Absent truly egregious behavior, the doctrine of qualified immunity and citizen juries operating under its rules protect the police with great solicitude. Jurors, in particular, seem to realize that police have hard jobs. Officers make split-second decisions, often at great peril. They wade into places and situations which almost everyone else would avoid at all costs. A hard working, honest cop has very little to fear from a court or jury.

In contrast, it seems that freeing officers to follow nothing more than their hunches cuts far too wide a swath. The simplest reason why hunches are dangerous is that they are a game anyone can play. While Sergeant Fitzgerald and Officer McFadden may be greatly experienced and highly perceptive, how do we know their colleagues share their insights? Everyone has hunches, saints and sinners alike. Accordingly, it seems fair to consider that the targets of hunches may not be evenly distributed amongst the population. It is not at all inconceivable that biases can slide into the mix.

Furthermore, judicial reluctance to embrace a hunch-based investigative regime does not seem to have left law enforcement without the means to search for evil. Consider airport investigations seeking to interdict drug shipments. When officers have stopped suspected drug couriers, courts have found articulable suspicion after reports that the suspect deplaned first, deplaned last, or came from the aircraft in the middle of the crowd; the tickets purchased were either one-way or round-trip; the flight was either nonstop or involved a change of planes; the suspect had no luggage, a carry-on bag, new suitcases, or even that the suspect was using American

Tourister luggage; the suspect was traveling alone or with a companion; or when the suspect acted either nervously or too calmly.[2]

Similarly, travel from "source" areas is often another area of interest. Courts have found source areas include, among other places, Florida, Texas, the Southwest, Los Angeles, the entire western part of the United States, New York, and Chicago. Travel through these areas has also been found suspicious, both for those who use the highways and those who avoid them.[3] This hardly seems the product of an overzealous judicial effort to hamstring police.

Viewing hunches over time suggests other problems. The United States interned the Nisei Japanese during World War II without any proof that this vast population presented a risk to the Nation. America's leaders must have harbored a hunch that these citizens' allegiance to the United States was in doubt. I set aside the irony that the Attorney General of California, who imposed internment, became the Chief Justice who required Officer McFadden to have articulable suspicion before allowing him to pat down Mr. Terry.

It is difficult to support law enforcement hunches in a Nation where 25% of African-American males are, or have been, under police or court control at any given time. Minority incarceration rates remain high, even in the face of evidence suggesting that drug quantities seized from Caucasians are larger than those seized from minorities. Bare hunches—hunches absent regulation or objectivity—remain susceptible to abuse. Such abuses ought to be contained.

Professor Lerner alludes to dangers facing this country, ranging from rising crime to threats of incipient terrorism, as further reasons to empower law enforcement officers by unleashing their power to rely on hunches. This argument lacks substance. In World War II we faced enemies who controlled virtually all of Western Europe on one side, and a substantial part of Asia and the Pacific on the other. These were not groups of terrorist irregulars. Those enemies had developed systems of intelligence operatives within this country and elsewhere. But the Constitution held. Even though we interned our own citizens, the Fourth Amendment remained in effect.

The real problem is that there is never a time when a great nation does not face exigent circumstances. There is always a justification for more aggressive policing. Professor Lerner quotes Justice Sharpe in *People v. Ward*, saying:

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[2] *E.g.*, United States v. Sokolow, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting and collecting cases); United States v. Mendenhall, 446 U.S. 544, 572-73 (1980); Florida v. Royer, 460 U.S. 491, 493-94 (1983); United States v. Delaney, 52 F.3d 182, 187 (8th Cir. 1995).

[3] *E.g.*, Ornelas v. United States, 517 U.S. 690, 691-92 (1990); United States v. Arvizu, 534 U.S. 266, 277 (2002); United States v. Neufeld-Neufeld, 338 F.3d 374, 380-81 (5th Cir. 2003).

> *Robberies and holdups are now so frequent* and the opportunity to get away quickly so convenient that, unless officers may act promptly on information apparently reliable and circumstances reasonably convincing, there is but little hope of apprehending the guilty parties (emphasis supplied).[4]

The words may vary, but the sentiment is all the same. Dangerous times never go away. If dangerous times alone justify an erosion of the Constitution, it is a fragile document indeed.

Even the *McKoy*[5] case should be examined with care. Much is made of two murders occurring in the same area within a two week period. Does that make it a high crime area? Does a high crime area exist when a jealous executive kills his wife and her paramour during a contested divorce? Is that the same as bank robbers killing a guard and a bank officer? When two *Cosa Nostra* members are killed during a mafia war, do their deaths create a high crime area? Or are high crime areas usually found when there are drive-by shootings or drug turf wars? Terms can be flexible in these areas. The words "high crime area" can too easily be used to mask other fears or prejudices.

Shifting from the facts of *McKoy*, Professor Lerner's hunch advocacy seems to mix apples and oranges. He suggests that while police hunches are viewed with suspicion, hunches are used, even respected, in the courtroom. But the differences between on-street hunches and hunches found in courtrooms weaken, rather than support, his argument. A lawyer selecting a jury can base peremptory strikes on hunches, but that exercise is not at all unrestrained. Where a cop on the beat is all alone and free to use unfettered discretion, if hunches superseded articulable suspicion, the lawyer in the courtroom is under considerable control.

Peremptory strikes are subject to direct judicial control. If there is a suspicion of race or protected status as a basis for the strike, the challenge is subject to an on the record *Batson* review. In 2005, the Supreme Court intensified this inquiry by throwing out a murder conviction when the *Batson* inquiry was not sufficiently searching.[6]

Professor Lerner similarly argues that judicial hunches impose themselves during sentencing and credibility inquiries. But again, these decisions—these hunches—do not take place in darkened streets, where adrenaline is rushing. They are made on the record and subject to appellate review. Clearly, judges make assumptions, and their decisions are based, at least in part, on impressions—hunches. But every word the judge utters, as well as the words of the parties and counsel, is on the record, which works a powerful and appropriate restraint.

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[4] 226 Mich. 45, 51 (1924).

[5] 402 F. Supp. 2d 311 (D. Mass. 2004), *aff'd*, 428 F.3d 38 (1st Cir. 2005) (holding evidence that the defendant possessed marijuana at the time of arrest inadmissible because the fact that the defendant committed two traffic violations in a high crime area was insufficient to warrant probable cause).

[6] Johnson v. California, 545 U.S. 162 (2005).

Almost every criminal defendant expresses regret (and, not at all infrequently, a religious awakening) at the time of sentencing. Judges look at defendants' records and past behaviors. A judge's view of salvation is certainly subject to error, but it is all on the record and subject to review.

Judges do engage in fact-finding, most commonly in a bench trial. At those times, judges are like everyone else. They are as susceptible to mistake, confusion, error, and prejudice as most others. Here again, however, the legal system's orderly processes provide the greatest protection for the accused. While courtroom protections are perhaps not perfect, these protections are wholly absent in the hurley-burley, second-to-second decisions officers make on the street.

It cannot be denied that there is one area where a judge's ruling is almost never subject to either review or dispute. This occurs when a judge makes a finding that "the witness is not credible under oath." This, of course, goes far beyond garden-variety variance in testimony. Almost any contested proceeding has some differing testimony concerning the same event. Such a declaration, very seldom made, means the judge considers the party a liar and unworthy of belief. When a judge makes this declaration, appellate courts almost always defer to the trial judge, and they probably should.

But still, protections exist. Judges try cases for a living; watching people testify and tell varying versions of the facts is part and parcel of the judge's life. Judges, hopefully, are people of some experience and discernment, and they are, after all, the person on the spot, seeing and hearing the witness. Most judges would not make this ruling without reciting the statements made by the witness and the evidence arrayed against it, leaving a roadmap by which the appellate court can review the decision.

Is this decision—that a person is a liar and unworthy of belief—a hunch? It may be, but it is regulated. The factual record underlying the declaration is written out for all to see. The declaration is not a split-second event without review. Finally, the factual recitation underlying the conclusion becomes the analogue of the objective evidence required before an officer can affect an investigative stop.

Jurors also make credibility determinations when they ultimately decide which testimony to accept and which to reject. While I have never been in a room with a deliberating jury, they likely use these decisions to reach a final verdict. Their determinations may similarly be hunches, but they remain subject to procedures and protections even though they occur within the secrecy of the jury deliberation room.

On the most elemental level, juries consist of at least six, and as many as twelve, decision makers. While their work is conducted in secret, blocked from the public gaze, the work is done by all the jurors meeting together. In that sense, their labors are transparent to the other jurors. Moreover, the jury's collective judgment is reached based on information developed in public courtrooms, on the record, and in accord with the

court's rules. Each competing side has the opportunity to be present and have their arguments heard. Finally, and importantly, the jurors' decisions are guided and bound by a judge's instructions.

Is the jury's decision based on a hunch? Perhaps. But it is a hunch surrounded by elaborate procedures and protections, as well as shielded by being part of a collective process. Any analogy between these determinations and an on-the-beat officer's split-second hunch are strained.

Another factor must be inserted into the hunch matrix: the reality that excesses creep into the real police world. While Sergeant Fitzgerald was a person of honor whose perceptions may have been heightened by years of experience, there are other officers who take shortcuts.

Beyond the groves of academia, away from the Supreme Court's rarefied air, real cops work gritty streets. Certainly, many are good cops who really know who the bad guys are, but sometimes the bad guys are good at being bad. It is, after all, *unsuccessful* criminals who are caught and prosecuted; successful criminals, by definition, are the ones who avoid apprehension, prosecution and imprisonment—thus avoiding their trade's transactional costs. Police frequently know who these skillful lawbreakers are, but they just cannot catch them.

At the inception of a criminal case, long before the matter comes into a court, other non-judicial controls also influence investigative behavior. There are few data on police-beat and station house reviews, but they are very real. They begin with the individual cop. After all, an officer does not want to waste time and effort on a "pinch" and successive case which is simply tossed out of court. So the officer tries to make a good case—one based on something more than a hunch. The nascent case is written up and presented to the supervising officer who also reviews it for investigative quality. Many, many cases, long prior to any judicial review, end right here, with a putative defendant's quick release from apprehension or custody.

The incipient case next goes to the prosecuting attorney who, again, reviews it for procedural propriety before charging it out. The prosecutor, too, does not want the case summarily thrown out. These events fly below the courtroom's radar. Precinct and prosecutorial "declines" are almost never reviewed and are virtually unexamined. Yet, they exert a powerful influence on the quality of police work and prosecution.

If a hunch alone, even a perceptive hunch, were sufficient to make a case, it would eliminate a powerful brake on unfettered discretion and the potential abuse of that same discretion. Society still needs that brake. Abuses occur. For example, the LAPD's Rampart CRASH anti-gang unit operated for years in Los Angeles. When its abuses and excesses were discovered and arrayed before the public in the late 1990s, the country recoiled in horror.

Other stories of excessive or rogue police behavior emerge from time to time. Rampart-style policing has not, unfortunately, disappeared. Re-

markably, this kind of thing does not simply arise from bad cops. The sickness often arises when good ones, who cannot quite pull together all of a case's loose ends, try to cut a corner. Many thin cases are weeded out in the "decline" process described above, but in a hunch environment, protective barriers can be lowered. My fear is that they may be lowered to a pernicious level.

Having made these observations, and after suggesting flaws in Professor Lerner's proposal, it is fair to commend many of his ideas. His core proposal recognizes that talented and dedicated officers in the field ought to be afforded the power and authority to do the work for which they have been hired. Extending that idea, Professor Lerner fairly criticizes courts for both their inconsistency and failure to clearly articulate the guidance they give those officers.

Courts deny officers the authority to act on hunches. However, those same courts empower officers who apprehend the first passengers off an airplane, or the last, or the middle, or those who walk alone or with another, or stare at them or avert their gaze, or carry American Tourister luggage. It is more than fair to subject such a regime to critical and searching analysis.

The question, however, remains: How does a free country regulate its police power under a system in which the citizen is sovereign? We operate under a system in which the police power and legalized deadly force is virtually always in the hands of the government. The ultimate supervision and regulation of that force falls within the purview of the courts.

Our system necessarily regulates the discretion of those who exercise its powers. One such regulation is the requirement of an objective fact before the State's power can be invoked. That requirement is a powerful restraint on unbridled, unfettered, and abused discretion. Nations which have failed to properly regulate their government's abuses have suffered greatly. The requirement of objective facts—as opposed to even the most refined hunches—is a protection which ought not to be discarded.

THE UPSIDE AND DOWNSIDE OF POLICE HUNCHES AND EXPERTISE

Albert W. Alschuler[*]

I. UNCONSCIOUS PATTERN RECOGNITION

Howard Margolis captured the essence of epistemology, the study of knowledge, when he wrote, "[W]e recognize patterns in making sense of the world; we . . . use patterns to guide activity in the world."[1] Every word, every concept, every statement of fact, every paradigm, and every theory reflects a tentative perception of a pattern in experience or imagination. In the words of Thomas Kuhn, a pattern may be "constituted by a network of overlapping and crisscross resemblances."[2]

I illustrate with a description of how children learn language:

> Children seem to learn, as if they followed a program of their own, looking for regularities in language. Take, for example, the child who understood that possessive pronouns (*its*, *his*, *ours*, *yours*, etc.) all ended in *s*, including *mines*. "Dis is mines," she said to an older playmate one day, "dat's yours." "That's mine," he agreed. Whereupon, aware of a difficulty, she said, "Dis is mine," and a few moments later, "I keep stealing all your." It had suddenly occurred to her that something was wrong with the old rule.[3]

This description of youthful self-education does not reveal the language-learner's name. I will call her Grace.

Grace used the same process to understand the English language that scientists use to understand the physical universe. She sought patterns and attempted to generalize her experiences. After hearing words like *his*, *hers*, *theirs*, and *its*, she formulated a hypothesis or rule: All possessive pronouns end in *s*. Further experience contradicted her hypothesis, and like Copernicus, she conceived a scientific revolution: *No* possessive pronouns end in *s*. This hypothesis will work worse than the last, and before long, Grace will abandon her effort to discover a unifying, all-encompassing rule.

Grace, however, has the process just right. She sought the highest level of generalization that her experience would support and then tested each generalization against further experience. God, her genes, or a univer-

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[1] HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 73 (1987).

[2] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 45 (2d ed. 1970).

[3] John de Cuevas, *No, She Holded Them Loosely*, HARV. MAG., Sept.-Oct., 1990, at 61-62.

sity professor must have told her of Einstein's admonition: "Everything should be made as simple as possible, but not more so."[4] Grace not only produced a scientific revolution in an instant; she did it all unconsciously. She did not articulate or recognize explicitly the hypothesis that all possessive pronouns end in *s*, but she managed to formulate and test that hypothesis anyway.

Grace sought the most elegant, most useful, and simplest kind of pattern—a rule: *All* possessive pronouns end in *s*. As she discovered, however, patterns are often messier. They may consist of imperfect correlations, associations, and probabilities. Charles Darwin conducted some experiments and concluded that cross-pollinated plants grew taller on average than self-pollinated plants.[5] He did not identify an invariable consequence of cross-pollination and did not specify every determinant of the height of plants. His experiments left much to explain, but they added to the sum of human knowledge and led to his insights about the evolutionary advantages of sexual reproduction in animals.[6] The physicist Leo Kadanoff said of the developing study of complexity in physical systems, "No universally applicable laws . . . have emerged. Instead, the systems we study have taught us lessons rather like the lessons for life our grandmothers taught us. They are general ideas which apply broadly, but they must be applied with care and good judgment."[7] When Grace realizes that *most* possessive pronouns end in *s*, she will have learned something of value.

As Grace seeks order in her experience, association and analogy become induction, and induction becomes deduction. The pattern Grace senses then may be disrupted by new experience (real or hypothetical), and this new experience may lead to new analogy, new induction, and new deduction. Pattern recognition is a continuous, spiraling process. It employs every mental tool in our kit. People may sense rules, correlations, associations, and probabilities consciously or unconsciously, and patterns sensed unconsciously sometimes can be brought to the surface and articulated. When experimental subjects play card games in which they must infer the winning strategy from experience, most of them begin to employ the winning strategy before they can articulate it. Some learn to play successfully without ever being able to explain how they do it.[8]

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[4] Einstein is quoted in BURTON G. MALKIEL, A RANDOM WALK DOWN MAIN STREET 210 (4th ed. 1985).

[5] *See, e.g.*, CHARLES DARWIN, THE EFFECTS OF CROSS AND SELF FERTILISATION IN THE VEGETABLE KINGDOM (1876).

[6] Note how far Darwin's inductive analysis was from the perception of the scientific method dominant in popular writing, that of one-shot experimental "falsification" of a scientific hypothesis.

[7] Leo P. Kadanoff, *The 2000 Nora and Edward Ryerson Lecture: "Making a Splash, Breaking a Neck: The Development of Complexity in Physical Systems,"* 35 U. CHI. REC. 2 (2001).

[8] *See* Antoine Bechara et al., *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 SCI. 1293 (1997).

Although some initially unconscious perceptions can be verbalized, others remain beyond articulation. When you see a photograph of Abraham Lincoln, you recognize it instantly. You cannot stop yourself from recognizing it, and you cannot explain to someone else how you did it. Witnesses who provide verbal descriptions of a face in fact diminish their ability to identify this face in a lineup because they start to match faces to their descriptions rather than to the nonverbal images in their minds.[9]

The ability to sense patterns unconsciously can be developed through experience and often can be aided by a teacher. Grace may learn to ride a bicycle. No one will tell her how to do it, but a teacher may give her helpful cues. Her own trial and error will provide an understanding that she will be unable to convey to others. If Grace attends medical school, she will learn to read X-rays in much the same way that she learned to speak English and ride a bicycle:

> [The medical student] watches in a darkened room shadowy traces on a fluorescent screen placed against a patient's chest, and hears the radiologist commenting to his assistants, in technical language, on the significant features of these shadows. At first he is completely puzzled, for he can see in the X-ray picture of the chest only the shadows of the heart and ribs, with a few spidery blotches between them. The experts seem to be romancing about figments of their imagination; he can see nothing that they are talking about. Then, as he goes on listening for a few weeks, looking carefully at ever new pictures of different cases, a tentative understanding will dawn on him; he will gradually forget about the ribs and see the lungs. And eventually, if he perseveres intelligently, a rich panorama of significant details will be revealed to him . . . . [H]e has entered a new world.[10]

Psychologists and philosophers have taken note of the professionals who assess the gender of recently hatched chicks—chick sexers.[11] In the poultry business, 250 million male chicks are destroyed each year because they cannot lay eggs, are likely to grow up foul-tempered, and do not taste

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[9] *See* Kevin Brooks, Stellan Ohlsson & Jonathan W. Schooler, *Thoughts Beyond Words: When Language Overshadows Insight*, 122 J. EXPERIMENTAL PSYCH. 166 (1993) (described in MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 119 (2005)).

When an experienced police sketch artist prepares a written description of a face, another artist can sketch it, but not very well. When the first artist offers verbal suggestions for improving the sketch ("The hair should be brushier at the temples"), the sketch improves rapidly. The best sketch an artist can produce from another's verbal cues, however, is not close to the likeness the artist can produce when working from a photograph. *See* Leon D. Harmon, *The Recognition of Faces*, 229 SCI. AM. 70, 70-71 (1973).

[10] MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 101 (1958).

[11] *See* Richard Horsey, *The Art of Chicken Sexing* 109 (UCL Working Papers in Linguistics, Paper No. 14 (2002) (citing R. B. Brandon, *Insights and Blind Spots of Reliabilism*, 81 MONIST 371 (1998), and S. Harnad, *Experimental Analysis of Naming Behavior Cannot Explain Naming Capacity*, 65 J. EXPERIMENTAL ANALYSIS OF BEHAV. 262 (1996)). *See also* John Lunn, *Chick Sexing*, 36 AM. SCIENTIST 280 (1947) (a basic source on chick sexing with photographs demonstrating the extreme difficulty of determining the gender of chicks on the basis of their genital eminences).

as good as females. Before chick sexers appeared in the 1920s, separating cockerels from pullets required the emergence of adult feathers at five or six weeks. A chick sexer, however, can do the job on the basis of subtle cues even when the chick is one day old. The sexer can, in fact, evaluate 1,000 chicks per hour with nearly perfect accuracy.

Like medical doctors, chick sexers learn their trade. The best are reportedly graduates of a two-year program at the Zen-Nippon Chick Sexing School,[12] but an amateur can achieve limited success (identifying perhaps thirty cockerels out of fifty) with a do-it-yourself book.[13] By viewing one photograph after another and one chick after another, a chick sexer in training learns to make accurate judgments about the everted cloacae of chicks. Fully-trained experts report, however, that as they work at high speed, they often have no idea how they make their decisions. They have developed a sense of poultry gender somewhat analogous to the "situation sense" that Karl Llewellyn said lawyers can develop through legal training and experience.[14]

If Grace grows up to become a lawyer, a doctor, or a chick sexer, she will develop the ability to sense patterns in experience that people outside her field will not see. She will not always be able to explain the basis for her hunches. If she becomes a police officer, she will undoubtedly develop similar capacities. She may learn to detect dangerous situations and unlawful behavior on the basis of cues that elude the rest of us, and she may be unable fully to explain the reasons for her judgments.

Nevertheless, the Supreme Court held in 1968 in *Terry v. Ohio*[15] that a police officer's decision to detain a suspect must rest on "specific and articulable facts"[16] rather than an "inchoate and unparticularized suspicion or 'hunch.'"[17] Nine subsequent majority opinions in the Supreme Court[18] and eleven dissenting opinions[19] have similarly insisted that a hunch is not enough.[20]

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12 *See* Horsey, *supra* note 11, at 107-08.

13 R. D. MARTIN, THE SPECIALIST CHICK SEXER (Bernal Publishing 1994).

14 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 426 (1960).

15 392 U.S. 1 (1968).

16 *Id.* at 21.

17 *Id.* at 27.

18 *See* United States v. Arvizu, 534 U.S. 226 (2002); Illinois v. Wardlow, 528 U.S. 119 (2000); Maryland v. Buie, 494 U.S. 325 (1990); United States v. Sokolow, 490 U.S. 1, 7 (1989); New Jersey v. TLO, 469 U.S. 325, 345 (1985); United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985); Massachusetts v. Upton, 466 U.S. 727, 734 (1984); Reid v. Georgia, 448 U.S. 438, 441 (1980); Delaware v. Prouse, 440 U.S. 648, 661 (1979).

19 *See* Illinois v. Caballes, 543 U.S. 405, 419-21 (2005) (Ginsburg, J., dissenting); Hunter v. Bryant, 502 U.S. 224, 229-32 (1991) (Stevens, J., dissenting); Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting); United States v. Sokolow, 490 U.S. 1, 15 (1989) (Marshall, J., dissenting); Griffin v. Wisconsin, 483 U.S. 868, 888 (1987) (Blackmun, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 384 (1985) (Steven, J., concurring and dissenting); United States v. Villamonte-Marquez, 462 U.S. 579, 604 (1983) (Brennan, J., dissenting); United States v. Mendenhall, 446 U.S. 544, 572-73

However remarkable a police officer's ability to discern patterns unconsciously, I believe that the courts are correct not only to refuse to permit officers to detain suspects on the basis of their hunches but also to give no weight to these hunches. I offer five arguments in support of the requirement of specific and articulable facts: First, inarticulate hunches are likely to be wrong, and one cannot tell *ex ante* the good ones from the bad ones. Second, hunches about criminal activity are likely to be shaped by inaccurate racial stereotypes. Third, even accurate police hunches based in part on race distribute law enforcement burdens unfairly. Fourth, police officers lie. And fifth, hunches are unreviewable.

II. FIVE DANGERS

A. *Unreliability*

Malcolm Gladwell's number one bestseller *Blink: The Power of Thinking Without Thinking* begins with the account of a nearly seven-foot statue of a youth said to date from the sixth century BC.[21] An art dealer offered to sell this statue to the J. Paul Getty Museum for just under $10 million. After a fourteen-month investigation of the figure's authenticity, the museum purchased it. A geologist using an electron microscope, electron microprobe, mass spectrometry, X-ray diffraction, and X-ray fluorescence determined that the statue's dolomite marble came from an ancient quarry on the island of Tasos. Moreover, the statue was covered with a layer of calcite, and dolomite marble turns to calcite only over hundreds of years. The style of the figure was correct, and although its origin was unknown, the documentation of its recent provenance was impressive.

Three respected experts, however, sensed something wrong at first glance. The museum's curator declared as he uncovered the statue for one of the experts, "It isn't ours yet, but it will be in a couple of weeks." The expert, one of the world's foremost authorities on Greek sculpture, replied, "I'm sorry to hear that." Another expert, a former director of the Metropolitan Museum of Art, took a look and asked, "Have you paid for this? If you have, try to get your money back." The third, a noted art historian, was uncomfortable about the appearance of the statue's fingernails. None of

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(1980) (White, J., dissenting); Rakas v. Illinois, 439 U.S. 128, 168-69 (1978) (White, J., dissenting); United States v. Martinez-Fuerte, 428 U.S. 543, 569-70 (1976) (Brennan, J., dissenting); Adams v. Williams, 407 U.S. 143, 158 (1972) (Marshall, J., dissenting).

[20] In majority opinions since 1984, most references to hunches have consisted simply of a declaration that a particular stop or arrest was supported by more than a suspicion or hunch. Not a great deal more seems to be required. *See Wardlow*, 528 U.S. at 123-24; *Sokolow*, 490 U.S. at 7; *Montoya de Hernandez*, 473 U.S. at 542; *T.L.O.*, 469 U.S. at 345; *Upton*, 466 U.S. at 734.

[21] GLADWELL, *supra* note 9, at 3-8.

these authorities could articulate the reasons for his or her doubts, but further investigation indicated that the statue was a forgery, dating perhaps from the 1980s.

Commenting on scenarios like this one, Malcolm Gladwell declares that "there can be as much value in the blink of an eye as in months of rational thought."[22] He maintains that deliberation is not all it is cracked up to be. Thinking can get in the way, adding more noise than insight.

Among those who embrace the *Blink* thesis with enthusiasm are many Las Vegas gamblers. They often have strong hunches concerning the identity of the next card or roulette number. Casino operators, however, usually get their money. Some hunches may be rational and even inspired, but many rest on nothing. In fact, Gladwell champions blinking without thinking only in some situations. He fails to tell readers when to blink and when not to.[23]

Although *Blink* begins with a story of three art experts whose hunches were vindicated, it ends with a story of four police officers whose hunches were deadly. A chapter titled "Seven Seconds in the Bronx" describes the misapprehensions of the officers who shot and killed Amadou Diallo, a 22-year-old black immigrant who was taking his wallet from his pocket when he died. The first of the officers to open fire later testified, "My prior experience and training, my prior arrests, dictated to me that this person was pulling a gun."[24]

Hunches not only can be baseless but also can be infected by bias. Gladwell provides several illustrations. According to a study that he conducted, 58 percent of the CEOs of Fortune 500 corporations are six feet tall or taller. Only 14.5 percent of all American men are this tall. Fully one-third of the CEOs are six foot two or taller, a considerably higher propor-

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22 *Id.* at 17.

23 Gladwell tells great stories and describes fascinating experiments, but his effort to force them under one umbrella leaves the reader confused and wondering what his book is about. His conflation of two distinct processes—intuitive pattern recognition and "thin slicing"—is particularly unsettling.

"Thin slicing" refers to the process of forming judgments on the basis of a few salient characteristics without taking all potentially relevant evidence into account. This process can work well, but only if one makes the right slice. As Gladwell repeatedly shows, intuitive decision-makers often make the wrong slice. Finding the right slice may require sustained cognitive effort.

For example, Gladwell describes the algorithm used by the Cook County Hospital to determine whether patients reporting chest pains are experiencing heart attacks. This algorithm takes into account only three symptoms in addition to the patient's ECG: the presence of unstable angina, fluid in the patient's lungs, and systolic blood pressure below 100. The algorithm has been shown to outperform experienced physicians who make holistic judgments on the basis of much more information. Development and validation of the algorithm required years of computer-aided research. This technique may show the power of thin slicing, but it does not show "the power of thinking without thinking." The algorithm seems in fact to suggest the superiority of rigorous analysis to the holistic judgments of experts, a theme developed at length in DAVID G. MYERS, INTUITION: ITS POWERS AND PERILS (2000).

24 GLADWELL, *supra* note 9, at 192.

tion than the 3.9 percent of adult men who have attained this height.[25] Apparently many CEOs became CEOs in part because they looked the part. A study of thousands of people from birth to adulthood concluded that every inch of height is worth $789 per year in salary.[26] The people who select CEOs rarely articulate the thought, "He's too short," but they tilt toward the towering.[27]

In recent years, psychologists and behavioral economists have identified some of the heuristics and biases that systematically distort choice and judgment—the availability heuristic (the tendency to overestimate the likelihood of dramatic, easily remembered events), hindsight bias (the tendency to overestimate the *ex ante* forseeability of events once they have occurred), hyperbolic discounting (the tendency to devalue the long term or disregard it altogether), over-optimism, self-serving bias, omission bias, and more.[28] These mental shortcuts mislead us unconsciously. Their correction requires the active deployment of our frontal lobes.

The division of labor between conscious and unconscious mental processes remains a mystery to neurobiologists and cognitive scientists. They have no idea what consciousness is for or how it happens. Our autonomic nervous system has no need for consciousness to keep our hearts pumping, and our minds can recognize many patterns in experience without our awareness. If some information processing and control of our muscular contractions can occur without awareness, why not everything? Consciousness, with its presumed energetic costs, would seem to hamper rather than aid an organism in the struggle for survival. One experimental psychologist opines that the principal function of consciousness may be "to eliminate the need for itself in the future by making learned skills as automatic as possible."[29] Steven Pinker writes, "As far as scientific explanation [of sentience] goes, it might as well not exist."[30]

Intuition led Johannes Kepler to see the sun at the center of the universe.[31] He declared, "[I]n the sun there dwells an intellect simple . . . the

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25 *Id.* at 87.

26 *Id.* at 88 (describing Daniel M. Cable & Timothy A. Judge, *The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model*, 89 J. APPLIED PSYCH. 428 (2004)).

27 The people who select CEOs may be free of personal bias and may be catering to the biases of others. Tall leaders may be more effective than short ones because people look up to them (so to speak). Board members also may value the self-confidence and other personal characteristics that the beneficiaries of social bias are likely to exhibit. Gladwell's numbers, however, suggest something beyond rational discrimination.

28 *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000).

29 John A. Bargh, BYPASSING THE WILL: TOWARD DEMYSTIFYING THE NONCONSCIOUS CONTROL OF SOCIAL BEHAVIOR, *in* THE NEW UNCONSCIOUS 37, 53 (Ran R. Hassin et al., eds, 2005).

30 STEVEN PINKER, HOW THE MIND WORKS 147 (1997).

31 *See* KUHN, *supra* note 2, at 152-53; POLANYI, *supra* note 10, at 7, 142-45.

fountain of all harmony."[32] Then Kepler did the math—probably a greater quantum of math than any human being had done before him. With his calculations complete, he proclaimed:

> What I prophesied two-and-twenty year ago, as soon as I discovered the five solids among the heavenly orbits—what I firmly believed long before I had seen Ptolemy's Harmonics—what I had promised my friends in the title of this fifth book, which I named before I was sure of my discovery—what sixteen years ago I urged to be sought—that for which I have devoted the best part of my life to astronomical contemplation . . . at last I have brought it to light, and recognized its truth beyond all my hopes.[33]

Only Kepler's math caused people to take his heliocentric views seriously, and only his math entitled these views to serious consideration. Decades of labor had, in the words of *Terry v. Ohio*, transformed his "inchoate and unparticularized suspicion or 'hunch'" to "specific and articulable facts." Michael Polanyi observes:

> The manner in which the mathematician works his way towards discovery, by shifting his confidence from intuition to computation and back again from computation to intuition, while never releasing his hold on either of the two, represents in miniature the whole range of operations by which articulation disciplines and expands the reasoning powers of man.[34]

One cannot tell good hunches from bad hunches *ex ante*. Articulation, the step that *Terry* requires, is a crucial step toward validation by someone who senses a hunch. Moreover, articulation is necessary to make this person's decisions reviewable by others.

I confess to being baffled by Craig Lerner's rejection of *Terry's* conclusion that inarticulate hunches are insufficient.[35] Would Lerner allow an officer to justify a search, seizure, stop, or arrest by saying no more than, "I had a hunch?" If so, he would contradict the clear understanding of the framers of the Constitution. Lord Chief Justice Pratt declared in 1763 that the "discretionary power" of law enforcement officers to act "wherever their suspicions may chance to fall" was "totally subversive of the liberty of the suspect."[36] Wilkes had written a year earlier, "To take any man into custody . . . without having some seeming foundation at least, on which to justify such a step, is inconsistent with wisdom and sound policy."[37] The Virginia Declaration of Rights, adopted on June 12, 1776, proclaimed that "general warrants, whereby any officer or messenger may be commanded

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32 JOHANNES KEPLER, HARMONICES MUNDI, Book V, ch. 10 (1619).

33 *Id.*

34 POLANYI, *supra* note 10, at 131.

35 *See* Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25 (2007).

36 Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (1763).

37 JOHN WILKES, THE LIFE AND POLITICAL WRITINGS OF JOHN WILKES 372 (1773).

to search suspected places without evidence of a fact committed . . . are grievous and oppressive, and ought not to be granted."[38]

Lerner might not approve every detention simply because it seemed like a good idea at the time, but requiring even a declaration that "I saw a furtive movement" would go beyond an "inchoate and unparticularized suspicion or 'hunch.'" Demanding that the officer reveal what furtive movement he saw would require him to present "specific and articulable facts." The issue then would become how much articulation is necessary. Lerner might disagree with Chief Justice Earl Warren about the quantum of evidence needed to justify searches and detentions and about what weight, if any, to give an officer's professional expertise. This disagreement would not call *Terry's* statement about the inadequacy of inchoate hunches into question.[39]

Terry in fact gave with one hand and took with the other. While declaring inchoate hunches insufficient, it described the issue as whether an officer could reasonably "conclude *in light of his experience* that criminal activity may be afoot."[40] The Supreme Court later wrote that officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'" and that "a reviewing court must give 'due weight' to factual inferences drawn by . . . local law enforcement officers."[41] One federal court of appeals now accords "great deference to the officer's knowledge of the nature and the nuances of the type of criminal activity that he ha[s] observed in his experience, almost to the point of permitting it to be the focal point of the analysis."[42]

Unlike expert witnesses at trial, police officers need not demonstrate their expertise to be treated as experts at suppression hearings. The requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[43] which are designed to block "junk science" from federal trials, rest on a construction of Rule 702 of the Federal Rules of Evidence, and the Rules of Evidence do not apply at suppression hearings.[44] Presuming an officer's expertise with-

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38 VA. CONST. *in* 7 F. THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3814 (1909).

39 When *Terry* was decided, it was regarded as a strongly pro-law-enforcement decision. Chief Justice Warren's opinion praised the officer who had stopped and frisked the defendant, and it rejected the argument that every seizure of the person requires probable cause. No one had argued in *Terry* that a hunch should be enough. But the times have changed.

40 *Terry*, 392 U.S. at 30 (emphasis added).

41 United States v. Arvizu, 534 U.S. 266, 273-74 (2002).

42 United States v. Nelson, 284 F.3d 472, 482 (3d Cir. 2002); United States v. Givan, 320 F.3d 452 (2003).

43 509 U.S. 579 (1993).

44 *See* FED. R. EVID. 104(a). *But see* United States v. Newman, 265 F. Supp. 2d 1100 (D. Ariz. 2003) (applying a "relaxed" *Daubert* standard at a suppression hearing and finding an officer's expert

out proof, however, poses the dangers that *Daubert* sought to minimize. There is much witchcraft in policing, and deferring to an officer's unproven expertise has much in common with deferring to his hunches. Both practices frustrate the independent review of searches and seizures that the Fourth Amendment demands.

B. *Racial Bias*

Biases of all sorts shape our hunches, but in seeking legal limits for the police, one sort of bias is of greater concern than all others. Policing in America occurs against a backdrop of slave patrols, lynch mobs, Klan terrorism, all-white juries, discriminatory administration of the death penalty, disenfranchisement, school segregation, the third degree, Los Angeles choke holds, Birmingham water hoses, the beating of Rodney King, the 1-to-100 crack-powder ratio, and driving while black.

Researchers have documented the persistence of racial bias into the twenty-first century. In one study, researchers responded to help-wanted ads by sending otherwise identical resumes on which only the applicants' names were altered. Some purported to come from applicants with names like Emily Walsh and Greg Baker and others from people with names like Lakisha Washington and Jamal Jones. Some critics of affirmative action complain that blacks have gained an unfair edge in the job market, but the applicants with the white-sounding names received fifty percent more calls. Having a white-sounding name was worth as much as eight additional years of employment experience.[45]

When experimental subjects are pressed for time, they are more likely to identify a harmless object as a gun if it is depicted in the hands of some-

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testimony reliable simply because he had five years experience). No other federal decision seems to have treated *Daubert* as even relevant to the conduct of suppression hearings.

[45] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991, 992 (2004).

Roland Fryer and Steven Levitt note that the employers who were reluctant to interview applicants with black names might not have objected to black names per se. These employers might have regarded black names as markers of lower class background rather than race, and Fryer and Levitt maintain that disfavoring applicants with lower class backgrounds may be rational. *See* Roland G. Fryer, Jr. and Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767, 771 (2004). The authors apparently believe that these observations discredit studies like Bertrand and Mullainathan's.

I would not, however, advise an employer charged with racial discrimination to defend himself by saying that he meant to discriminate on the basis of class, not race, and that, unfortunately, only black applicants provided cues of their lower class backgrounds. That position would come close to defending racial discrimination itself on the ground that race may be an indicator of class. Moreover, the weight that employers evidently give black names is difficult to reconcile with a "rational discrimination" hypothesis.

one black than if it is shown in the hands of someone white.[46] In video game simulations, subjects shoot unarmed blacks more often than unarmed whites.[47]

Implicit association tests, or IATs, reveal a great deal about our hunches.[48] A subject may be asked to press one button when he sees either a black face or a word indicating something bad (agony, hurt, evil) and another button when he sees either a white face or a word indicating something good (joy, love, wonderful). Then these associations are reversed: the subject is asked to use one button to indicate either a white face or something bad and another to indicate either a black face or something good. Most subjects (more than eighty percent) take significantly longer to link good things with black faces than the other way around. These results are unaffected by the order in which the pairings are presented.[49]

This sort of research has shown that people's unconscious associations are often incompatible with their stated values.[50] The subjects whose implicit biases favor whites include both people who express a strong commitment to equal treatment and blacks who express an explicit preference for other blacks. The power of implicit association and racial prompting is indicated by a study in which black college students took a short test drawn from the Graduate Record Examination. When they were asked to identify

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[46] *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 188 (2001); B. Keith Payne et al, *Best-Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCH. 383, 384-85 (2002); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399, 404 (2003); Alan J. Lambert et al., *Stereotypes as Dominant Responses: On the "Social Facilitation" of Prejudice in Anticipated Public Contexts*, 84 J. PERSONALITY & SOC. PSYCH. 277, 291 (2004); Anthony Greenwald, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399 (2003).

[47] *See* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potential Threatening Individuals*, 83 J. PERS. & SOC. PSYCH. 1314 (2002). Police training and experience do appear, however, to reduce the influence of bias. A recent study found that police officers who volunteered for videogame testing exhibited substantially less bias than members of the communities they served. Moreover, the study found that racial stereotypes affected only the speed with which the officers fired, not the targets they selected. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1020 (2007).

[48] You can see what a number of these tests reveal about your biases and hunches at PROJECT IMPLICIT, www.implicit.harvard.edu (last visited Feb. 21, 2008).

[49] *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1478 (1998); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101, 111 (2002); GLADWELL, *supra* note 9, at 77-88.

[50] *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 12 (1989) (noting that people who consciously reject negative stereotypes may, in situations requiring rapid action, behave in ways consistent with these stereotypes).

their race on a pretest questionnaire, the number of questions they answered correctly dropped by half.[51]

Subjects who more easily associate good things with white faces than with black faces cannot change their IAT scores appreciably by taking the test repeatedly. Exposing these subjects to positive images of blacks, however, reduces their implicit bias.[52] The unconscious often appears to be a dumb aggregator of associations, pouring out whatever has poured in without extensive processing.[53] Conscious deliberation may digest information and shape it into more stable and accurate beliefs and convictions.

Police officers seem no less biased than the rest of us. They may be more biased. Investigators report that many harbor contempt for blacks and other minorities.[54] Data on the frequency with which the police find drugs when they search vehicles during traffic stops indicate the misdirection of their hunches. In a few jurisdictions, the officers' hit rates are the same for blacks and whites, but in most, they are lower for blacks. Nowhere do the police find drugs in the vehicles of blacks more often than in the vehicles of whites.[55] In the war on drugs, many police officers demonstrably over predict on the basis of race. Their hunches are inaccurate and discriminatory.[56]

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[51] Claude Steele & Joshua Aronson, *Stereotype Threat and Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995) (described in GLADWELL, *supra* note 9, at 56).

[52] *See* GLADWELL, *supra* note 9, at 96-97; Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 805 (2001); Irene V. Blair et al., *Imaging Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCH. 828 (2001); Brian S. Lowery & Curtis D. Hardin, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCH. 842 (2001).

[53] "Priming" studies support the "dumb aggregator" hypothesis. David Arkush writes:

> In a typical study, people subliminally exposed to a smiling face evaluate objects more positively than people shown nothing, who in turn evaluate objects more positively than people shown a frowning face. This manipulation can result from priming stimuli that have nothing whatsoever to do with the objects being judged and . . . can occur entirely outside of conscious awareness.

David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Process for the Law* 34 (draft 2007), *available at* http://ssrn.com/abstact=1003562 (last visited Feb. 21, 2008). Arkush describes many priming studies at pages 34-38.

[54] *See* RANDALL KENNEDY, RACE, CRIME AND THE LAW 120 (1997) (describing the findings of the Christopher Commission in Los Angeles). For additional evidence that police racism is not a thing of the past, see Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 223-25. Although implicit associations often diverge from conscious attitudes, the correlation between implicit and explicit attitudes is positive. *See* Nosek et al., *supra* note 49, at 105-06.

[55] *See* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY PROFILING CANNOT WORK 73-90 (2002).

[56] Jeffrey Fagan and Garth Davies report that New York City officers made arrests less frequently following their street stops of blacks and Latinos than following their street stops of whites. This evidence indicates that the officers' standards of reasonable suspicion were lower for blacks and Latinos.

C. *Racial Taxation*

Orwellian measures like bombarding police officers with positive images of blacks might correct some police biases. Young black men, however, do commit street crimes at a higher rate than their white counterparts.[57] Predictions based partly on race can be accurate. Reprogramming the unconscious to purge it of inaccurate associations might be possible, but programming it to ignore the accurate associations of life on the street is probably hopeless—or at least I hope so. Giving weight to police hunches guarantees decisions based partly on race, and the race-based hunches of police officers can be rational.

Familiar constitutional doctrine declares, however, that a rational basis is insufficient to justify a race-based governmental action. The Supreme Court said in *Adarand Constructors v. Pena*[58]:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[59]

Imagine that almost every motorist on a highway is speeding, so that a highway patrol officer has an unlimited number of motorists he can lawfully stop, and imagine that this officer is interested in using his stops to find drugs. Suppose the officer understands that stopping one hundred blacks will, on average, yield six arrests for drug offenses while stopping one hundred whites will, on average, yield only five. If race were this officer's only predictor of drug activity, he would maximize his drug arrests by stopping *only* blacks. A six percent rate of return is better than a five percent rate. The rational basis for this officer's classification would not justify it.

I have noted elsewhere:

> The economics of proactive policing often encourage the police to "pile on." A small perceived disparity in the rate of offending of two groups can make it economically rational to concentrate enforcement resources on the group whose investigation appears to yield the

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Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 478 (2000).

57 *See* KENNEDY, *supra* note 54, at 137 ("[B]lacks, particularly young black men, commit a percentage of the nation's street crime that is strikingly disproportionate to their percentage in the nation's population"); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 49-80 (1995).

58 515 U.S. 200 (1995).

59 *Id.* at 227.

greater payoff in arrests and convictions. The result may be a "multiplier effect," a "cop cascade," or a "race to the black or brown race."[60]

Rational hunches that maximize the number of arrests and give taxpayers the most bang for the buck can subject innocent blacks to unwanted encounters with the police at a far higher rate than innocent whites.[61] Rational hunches may fill the prisons with guilty blacks while comparable white offenders go free. These hunches can reinforce through lopsided numbers the perception of the police and others that minorities are crime-prone. If appropriate policy requires limiting the influence of race even when race can aid in identifying criminals, courts must direct police officers to provide neutral reasons for their actions.[62]

D. *Perjury*

A New York City commission on police corruption reported a dozen years ago: "Several officers . . . told us that the practice of police falsification in connection with . . . arrests is so common in certain precincts that it has spawned its own word: 'testilying.'"[63] Officers told the commission of "a litany of manufactured tales" concerning bulges in pockets, suspicious items in plain view, traffic violations, money changing hands, and reliable informants.[64] In one survey, ten of twenty-one Chicago narcotics officers said that judges were "frequently" correct to disbelieve police testimony. Sixteen of the twenty-one agreed that the police "shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact."[65] Defense attorneys, former prosecutors, and other observers assert that police perjury is endemic.[66]

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60 Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 216.

61 Randall Kennedy observes that a Latino stopped at an immigration checkpoint is made to pay a type of racial tax for the campaign against illegal immigration that whites, blacks, and Asians escape. Similarly, a young black man selected for questioning by the police as he alights from an airplane or drives a car is being made to pay a type of racial tax for the war against drugs that whites and other groups escape. KENNEDY, *supra* note 54, at 159.

62 Demanding racially neutral reasons requires police officers neither to purge racial associations from their minds nor to prevent these associations from influencing their conduct. It merely tends to ensure that adequate reasons exist for the officers' actions apart from their race-influenced predictions.

63 COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, CITY OF NEW YORK, COMMISSION REPORT 36 (1994) (commonly called the Mollen Report).

64 *Id.* at 38.

65 Myron Orfield, Commentary, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987).

66 Christopher Slobogin, *Testilying: Police Perjury and What to do About It*, 67 U. COLO. L. REV. 1037, 1041-46 (1996) (collecting many sources).

When police officers are willing to perjure themselves and able to get away with it, they can effectively overrule every Fourth Amendment decision purporting to limit their conduct. On the assumption that the police are both incorrigible and invulnerable, whether they lie about their hunches or something else may not matter.

A police officer's testimony concerning his hunches differs, however, from his testimony concerning more objective circumstances in three respects. First, this testimony is more likely to be colored by wishful thinking and hindsight bias. When drugs have turned up in the suspect's pocket, the officer may easily convince himself that he had a hunch. Second, it is easier to view false testimony concerning one's mental state as "just shading." The officer may not regard his statement as a lie. Finally, false testimony concerning one's mental state is less subject to refutation. An officer who testifies that he had a hunch need not fear that a security camera or his partner will trip him up. If the courts were to give weight to police hunches, they might hear about hunches in every case.

E. *Unreviewability*

Although Grace uses the same process to learn the English language that scientists use to conceptualize the universe, her rapid acquisition of language is the product of a specific phase of brain development and of a "language instinct" unique to human beings.[67] Every human culture, however simple, has developed a language with a complex syntax permitting the expression of an almost limitless range of thought. Other species communicate with roars, warning cries, whimpers, gestures, facial expressions and more, but none of them (except perhaps dolphins) uses a language with syntax. Although, as this paper has noted, human beings do not think exclusively in language, language increases their range of thought and expands exponentially their ability to share information and insights with others. As Steven Pinker observes, our distinctive ability to use language is one of the reasons we control the fate of tigers rather than the other way around. He calls it the revenge of the nerds.[68] Insights that cannot be articulated cannot be shared. Deference to these instincts means exemption from review by others.[69]

Our legal system occasionally has had sufficient faith in hunches to leave them unreviewed, but the experience has not been encouraging. No-

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67 *See* STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (1994).

68 PINKER, *supra* note 30, at 187.

69 One theoretical qualification of this statement seems necessary. A police officer's hunches might consistently prove accurate. Once this officer had established a sufficient track record, people might credit his hunches even if he could not explain them. For everyone else, articulation seems essential.

tably, jurors are unreviewed when they judge the credibility of witnesses despite a wealth of evidence showing that the flip of a coin would do almost as well. Other evidence indicates that assessments by police officers are only slightly better:

> [S]tudies have shown that people perform at no better than chance levels when attempting to detect deception . . ., that training programs produce only small and inconsistent improvements in performance compared with a control condition . . ., and that police investigators and others with relevant on-the-job experience perform only slightly better than chance, if at all . . . .[70]

I have opposed the exemption of credibility assessments from review, noting that these assessments "[depend] less on the ability of jurors to stare deeply into a witness's eyes than . . . on the jurors' ability to judge the internal coherency of the witness's story, its consistency with known external circumstances, and the witness's past conduct, statements and character."[71]

For centuries, lawyers and litigants were exempted from review when they exercised peremptory challenges in selecting juries. The peremptory challenge was, in Blackstone's words, an "arbitrary and capricious" right, which was to be exercised on the basis of "the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."[72] The ability of lawyers to challenge jurors peremptorily has allowed them to discriminate on invidious grounds without notably advancing any public purpose. Indeed, their hunches apparently have failed to advance even their own partisan goals significantly.[73] The use of per-

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[70] Saul M. Kassin & Christian A. Meissner, *"You're Guilty, So Just Confess!": Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 90 (G. Daniel Lester ed., 2004). The authors add:

> One might argue that judgment accuracy in laboratory experiments is low because the investigators who participate are being asked to detect truths and lies that were given in low-involvement, low-stakes situations. However, Vrij and Mann . . . showed police officers videotaped press conferences of family members pleading for help in finding their missing relatives. Some of these family members had killed their own relatives, yet even in this high-stakes situation the investigators did not exceed chance level performance in detecting deception. One might also argue that investigators would make more accurate judgments of truth and deception when they conduct the interviews as opposed to when they merely observe sessions conducted by others. In fact, however, research does not support this notion.

Id. (citing S. Mann & A. Vrij, *Who Killed My Relative? Police Officers' Ability to Detect Real-Life High-Stakes Lies*, 7 PSYCH., CRIME & L. 119 (2001)). *See also* Carrie Locke, *Deception Detection*, SCIENCE NEWS, July 31, 2004, at 72. Training people to recognize "micro expressions" may substantially enhance their ability to detect deception. *See* GLADWELL, *supra* note 9, at 197-214 (describing the work of Silvan Tomkins and Paul Ekman).

[71] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 217 (1989).

[72] WILLIAM BLACKSTONE, 4 COMMENTARIES *353 (1769).

[73] *See* Alschuler, *supra* note 71, at 203.

emptory challenges to exclude blacks from juries led eighteen years ago to some restriction,[74] but the restriction remains ineffective and inadequate.[75]

Whatever the merits of exempting some hunches of jurors and lawyers from review, courts should not exempt the hunches of the officials who hold a near monopoly on the lawful use of force. In *Terry*, the Supreme Court explained why a police officer's hunch could not justify even a brief street-corner stop: "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."[76]

III. CONCLUSION

The remarkable ability of human beings to discern patterns unconsciously should not obscure the fact that many hunches are based on wishful thinking. At the moment they occur, the good ones and the bad ones look a lot alike. Many hunches also are shaped by prejudice, especially racial prejudice. Moreover, an appropriate distribution of law enforcement burdens may require courts to forbid action on the basis of even "rational hunches" based partly on race. The requirement that all forcible deprivations of liberty rest on "specific and articulable facts" makes possible the judicial review of police conduct, and the judicial review of police conduct is required by our Constitution. The power of the courts to restrain police searches, seizures, stops, and arrests is a foundation of our freedom.

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[74] *See* Batson v. Kentucky, 476 U.S. 79 (1989).

[75] *See* Miller-El v. Dretke, 545 U.S. 231, 266-73 (2005) (Breyer, J., concurring); Rice v. Collins, 546 U.S. 333, 342 (2006) (Breyer, J., concurring).

[76] Terry v. Ohio, 392 U.S. 1, 21 (1968).

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WITH A HUNCH AND A PUNCH

*Eli B. Silverman**

I. INTRODUCTION

A sharp division has long existed between the way police hunches are portrayed in the popular media and in the legal world. On the one hand, popular culture is replete with stunning displays of the vigorous exercise of hunches in law enforcement. From 1967 until 1975, for example, each episode of the widely admired television program "Mannix" was introduced with the adage "he led with a hunch and a punch." And so, television viewers were privy to eight years of a Los Angeles private detective's uncanny intuition that not only solved cases but also, to most viewers, appeared quite reasonable and unassailable. In 1971, movie viewers flocked to see Clint Eastwood as the uncompromising, street-wise, tough police inspector "Dirty" Harry Callahan and his assault on urban crime, epitomizing law enforcement's new unyielding response to criminal deviance. The public promotion for detective Harry Callahan read: "You don't assign him to murder cases, you just turn him loose." Dirty Harry's swift, decisive actions garnered a wide audience not only for this film but also for several fast-paced, commercially successful sequels including *Magnum Force* (1973), *The Enforcer* (1976), *Sudden Impact* (1983), and *The Dead Pool* (1988).

Yet at the same time, legal institutions have traditionally reflected a jaundiced view of hunches or intuition in law enforcement. Many legal analysts, scholars, and court decisions stress the importance of a police officer's ability to observe and express reasonable articulated suspicion in cases of searches, arrests and interrogations (see, for example, Terry v. Ohio, 1968).

These so-called judicial safeguards are frequently reflected in attorneys' advice to clients accused of wrongdoing. For instance a lawyer's Internet advice addresses the question of "what is probable cause?"

> This is a difficult one. There is not a bright-line rule establishing precisely what is and what isn't probable cause. However, what has become apparent is that a finding of probable cause requires objective facts indicating a likelihood of criminal activity. A police officers [sic] hunch, with nothing more, will not satisfy the requirement (Morin 2005).

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A Virginia attorney provides an Internet "Special Report: Mistakes the police make and how they can help you." One of the mistakes:

> Stopping a vehicle without an articulable reasonable suspicion. A Virginia police officer can not stop you on a hunch or just because he thinks you are suspicious. The officer must be able to articulate specific facts which lead to the reasonable suspicion that you are driving under the influence or violating some other law or ordinance (Wilson 2005).

Despite these warnings, it is important to recognize that police hunches, as integral ingredients of police discretion, are historically ingrained in the very nature of police work. Conclusions emerging from scholarly research have provoked a wide discussion of the role of reasonable hunches and their appropriate interface with criminal law procedures. How should criminal law embrace "reasonable" hunches and still protect individual civil liberties whether the issue is domestic crime or international terrorism?

Exploration of these issues is better informed by an inquiry into the inevitability of police hunches coupled with a discussion of a disturbing trend in law enforcement restrictions on officers' opportunities to employ hunches. And so while this compilation is emblematic of the legal community's willingness to explore police hunches, current trends in policing may obstruct this progress.

In order to explore these issues, this Article first addresses the conditions and circumstances under which hunches play a role in police decision-making and actions. These factors impinge on an officer's ability and opportunity to draw upon hunches.

II. INEVITABILITY AND COMPLEXITY OF POLICE HUNCHES

There are a number of reasons for the inevitability of police hunches. Police work involves a complex set of situations and problems encountered in daily contacts. Police responses to these engagements embrace a wide range of multifaceted possibilities. These diverse situations and responses have been extensively reported in scholarly analyses. In 1942, the sociologist William Whyte observed different police behaviors, today known as discretionary choices, in different neighborhoods. The same citizen behavior which warranted arrest and punishment in one neighborhood received a pass in another neighborhood (Whyte 1942).

Police choices and hunches were analyzed in greater detail in the 1960s. The path-finding analytical works of Goldstein (1960) and LaFave (1962) first investigated and described such police discretionary decisions as whether or not to enforce the law in particular circumstances. However, other authors of the 1960s generally viewed hunch-based choices as undesirable, irrational snap judgments founded on weak bases such as race (Kadish 1962) or a juvenile suspect's demeanor (Piliavin and Briar 1964),

or merely as representative of obligatory policing in lower class neighborhoods (Banton 1964).

It was primarily through the work of Egon Bittner that scholars were exposed to the difficulty of the police's daily decisions and the merit of their discretionary choices in the proper circumstances. Beginning in 1967, Bittner portrayed the complexities in policing "skid-row" areas with high levels of "non-normal" behavior and varying citizen expectations regarding the proper role of the police. Discretion, he maintained, was not only essential but permitted the police to function effectively in many types of neighborhoods (Bittner 1967, 1970).

As Bittner noted in his seminal work, the social and human problems which police encounter daily are exceedingly serious and complex, requiring a wide range of judgment, knowledge and skill (Bittner 1990). If there is one uncontestable finding in scholarly studies of police work, it is that police must take a vast range of factors into account. These include: the demeanor of youths (Piliavin and Briar 1964); the wishes of the complainant (Black and Reiss 1970); evidence of a criminal act; relationship between the complainant and the suspect; and complainant intoxication (Mastrofski et. al. 2000).

Scholars have also categorized the range and distribution of police choices in terms of departmental orientation and management systems. Thus, there is a significant body of literature which classifies policing according to different "styles." In his classic work, *Varieties of Police Behavior* (1968), James Q. Wilson found that police departments faced two general categories of problems: law enforcement and order maintenance. Law enforcement problems are characterized by most felonies, major misdemeanors and traffic violations considered serious enough to warrant a citation or arrest. On the other hand, order maintenance problems (which today are frequently called quality of life issues) involve less serious violations that police typically handle without issuing citations or making arrests.

Wilson observed that departments differ in their discretionary policing styles on the basis of how they handled order-maintenance problems, such as teenagers drinking beer in a public park. Under the first of three city approaches, the watchman style, officers have considerable latitude in handling quality of life issues with few, if any, departmental policies guiding their behavior. The officer could issue a summons, take the beer and send the teenagers home if they were sober, lecture them, or do nothing at all. Officers, then, have a great deal of discretion, and thus many different situations in which to utilize hunches. For example, the officer, based on his experience, may have a hunch that a particular teenager is likely to have engaged in more serious offences and therefore the officer may select an enforcement option.

In a service department, the second style, many order-maintenance problems are considered significant enough for that department to train officers in what to do and how to do it. Although most of the solutions are

not enforcement-oriented, the pathways are determined by the department, not the officer. In such a system, the officer can refer the teenager to an alcohol prevention program, call the parents or pursue other avenues. The officer can still decide what to do, but his choices are limited.

In the third style, a legalistic department, officers possess even fewer discretionary options, as their departments generally mandate arrests or citations for virtually all order maintenance violations. For example, in the teenage drinking case, the officer's enforcement behavior would be stipulated in department regulations. When a policing mode is primarily legalistic, the police make many arrests and issue many summons, as if there is one community standard as to what is expected of the police. With less individual discretion, police hunches also become increasingly irrelevant.

On a neighborhood level, Smith concluded that police behavior varied depending on the type of neighborhood, although they treated whites and blacks equally within the same neighborhood (Smith 1986). Klinger also found equal treatment within the same area and also that arrest was more likely in neighborhoods with low socioeconomic status, but also found that the socioeconomic characteristics of the police district in which officers worked was a key variable. Klinger focused on the importance of officer cynicism, police workload, the definition of "normal" crime, and the extent to which officers consider victims responsible for their own troubles (Klinger 1997). The significance of the supervisor with regard to the nature and direction of an officer's discretion has been observed by Engel et. al. (2000).

Despite these multiple factors, even the same citizen behavior can take on numerous meanings to the public and to the police depending on the context of the behavior. The location, time of event, number of events, aggregation of events, and condition of the victim/observer relative to the perpetrator and the previous activity/reputation of the perpetrator/actor often influence the extent to which events are viewed as threatening and offensive, (Kelling 1999, 35). Panhandlers and prostitutes, for example, may be perceived by residents as threats when on one's doorstep, but merely as a nuisance when located in a restricted area of the town. These varying interpretations frequently subject the police to contradictory public expectations thereby heightening discretionary choices.

Within this wide variety of police activities, ranging from peacekeeping to law enforcement, there are numerous decisional points in the course of each encounter. For example, when Bayley and Bittner examined police handling of domestic disputes and self-initiated traffics stops, they found that police officers face abundant choices during each of three stages of public engagement: contact, processing and exit. Frequently, the officer must quickly make a decision from the many options available during each of the three stages (Bayley and Bittner 1984; Bayley 1986). To quickly respond, officers must sometimes rely on hunches. One literature review summarizes the role of police hunches:

> The benefit of increasing intuitive policing applied to the prevention of criminal conduct and for the self defense of police officers on duty, has been broadly documented through studies in this field (Pinizzotto, Davis, and Miller 2004, 4).

Kelling describes how hunches shape the officer's response to a situation:

> Each tactical choice by the police, each citizen's response, counterresponses by each, and changes in other variables in the context (for instance, intervention of strangers) create a fluid, ever-changing encounter (Kelling 1999, 35).

The ever-changing combination of daily situations, therefore, presents numerous opportunities for the exercise of discretionary hunch-based behavior.

Despite these multiple opportunities, officers have not generally been taught how to articulate their decision-making processes which may indeed be based on intuitive scanning and diagnostic thinking. Therefore, few police officers can describe their handling of events, other than noting that they relied on common sense. Many are unable to concretely express the distinctiveness of the event, explain what led them to act in the way they did, or why they took a particular action.

III. POLICE AND LEARNING

Inability to articulate thinking processes, however, does not necessarily mean that decisions are ill-informed and lack *bona fide* learning. Learning theorists stipulate that occupational environments generally contribute to participant learning in one of three predominant ways. The first is verbal, the second is visual and the third is hands-on (which consists of hearing, saying, seeing and doing). Patrol activity, the backbone of police work, falls squarely within the hands-on realm. This is particularly significant because, according to learning theorists, individuals retain ninety percent of what they learn from hands-on activity. This compares to a fifty percent retention rate from hearing and seventy percent from seeing. If the statistics are correct, then the bulk of police officer learning occurs in a predominantly preconscious state (Stadler and French 1997; Katkin, Wiens, and Ohman 2001; Winkielman and Berridge 2004). These findings also suggest that hunches may be based on a significant amount of learning.

Recent analyses has documented, and in some ways legitimized, popular versions of police work that emphasize the value of hunches, drawing upon the work of such authors as LeDoux (1986, 1993, and 1998), Goleman (1993) and De Becker (1997). Writing in the FBI Law Enforcement Bulletin in 2004, three FBI members explain how enforcement officers can observe suspects and immediately "know" that they possess a weapon or narcotics. Given such instances, the authors ask:

> [W]hy are these officers unable to articulate their accurate reactions that may represent building blocks to reasonable suspicion or probable cause indicators? Equally important, why can they not explain their reasons for reacting in such appropriate ways that actually saved their lives or prevented an offender from assaulting them? (Pinizzotto, Davis, and Miller 2004, 2).

The FBI authors also studied how individuals can perceive signals and respond before they are consciously aware of these signals. Operating below the surface of consciousness usually yields quick analysis before full conscious thinking occurs. The cognitive psychologist Gerd Gigerenzer calls it "fast and frugal" (Gigerenzer 2000). This preconscious recognition explains a rapid decision-making process which includes sophisticated analysis of pattern recognition that is often inexplicable to outsiders (Wilson 2004). This approach has recently been popularized by Malcolm Gladwell in his book *Blink* (2005).

Studies of brain anatomy and emotions have found that signals from the eye and ear travel first to the amygdala—the portion of the brain that acts as an emotional sentinel—before a second signal reaches the neocortex, or the thinking brain. This high speed sequence of events bestows the ability to initiate a response to danger signals before one becomes fully conscious of them. In the words of pioneering researcher, Joseph LeDoux, "You don't need to know exactly what something is to know that it may be dangerous" (LeDoux 1993, 887). Klein describes this type of intuitive awareness as "thoughts and preferences that come to mind quickly and without much reflection" or "gut responses" (Klein 1998, 62).

Goleman explores the evolutionary origins of this rapid thinking:

> The emotional mind is far quicker than the rational mind, springing into action without pausing even a moment to consider what it is doing. Its quickness precludes the deliberate, analytic reflection that is the hallmark of the thinking mind. In evolution this quickness most likely revolved around the most basic decision, what to pay attention to, and, once vigilant while, say, confronting another animal, making spilt-second decisions like: "Do I eat this or does it eat me?" Those organisms that had to pause too long to reflect on these answers were unlikely to have many progeny to pass on their slower-acting genes (Goleman 1993, 291).

In his work on danger and stress situations, De Becker (1997) describes intuition as "connect[ing] us to the natural world and to our nature" (13). "Intuition is always learning, and though it may occasionally send a signal that turns out to be less than urgent, everything it communicates to you is meaningful" (De Becker 1997, 70). Hunches, De Becker adds, are one of the "messengers of intuition" (73) and "suspicion is a signal of intuition" (De Becker 1997, 145).

Police hunches, then, may represent far more than mere hunches. This type of awareness is based on a "mental model" of situations and people (Endsley and Kiris 1995). These hunches are anchored to knowledge. Even if that knowledge cannot be verbalized; it is no less systematic and no less real (Katkin, Wiens, and Oman 2001).

IV. POLICE OBSTACLES TO HUNCHES

Would it not be better for everyone, therefore—plaintiffs, defendants, attorneys, police and the courts—if the police could employ hunches and express their reasons more clearly? No doubt. Although legal and judicial constraints on police hunches have attracted increased attention, ironically, there has been scant consideration of the restrictions imposed by police organizations themselves on their members' use and articulation of hunches. At first glance, this may be surprising. Who, one might ask, should be more supportive of the legitimacy of police hunches than police organizations themselves? An exploration of the nature of police work and the characteristics of police organizations, however, provides a contrasting portrayal.

A. *Nature of police work*

To begin with, the bulk of police work (with the exception of some special units) has traditionally been conducted by an officer either working alone or with a partner. Most police are far removed from headquarters' directives. In these cases, decisions and actions are often taken in the absence of direct supervision, and the officer may rely on previous information and knowledge as the basis of his hunches. Therefore, many police officer decisions are known only to a few individuals—suspect, victim, and fellow police officer. This, in effect, means that many officer decisions have "low visibility" (Goldstein 1960; Ohlin and Remington 1993).

Historically, few police departments have developed rules or guidelines that specifically grapple with officers' low visibility and multiple options. In most cities, police generally lack any official guidelines regarding the procedures for handling problems such as disorderly behavior in daily peacekeeping responsibilities, or specific criminal investigation and arrest decisions.

Instead, rules and regulations that do exist simply contain prohibitions as to what should not be done. Little systematic effort, therefore, has gone into providing officers with the wisdom gained from the practices exemplified by officers with proven track records of smart, intuitive hunches. In addition, since most of these police contacts are part of daily peacekeeping and order maintenance responsibilities, which consume the bulk of their time, they are rarely reflected in official department forms and records, with the possible exception of personal notations. Bereft of useful departmental guidelines, this void is often filled by the judiciary's interpretation of criminal procedure (Lerner 2003), which often ignores the situational context. To complicate matters further, as police are subject to numerous reviews ranging from supervisory and judicial decisions, they may be hesitant to

make decisions or choices that deviate from officialdom's prohibitive guidelines.

B. *Uneven distribution of ability*

The situation is further compounded by the frequent failure of police organizations to recognize and build upon the uneven abilities of their own officers to render informed hunches. Like other individuals within the same occupation, police vary in their ability to make intelligent, intuitive choices. Just as it varies among the general population, some police are better than others in detecting patterns from experience. Research and empirical observation amply demonstrates that there is a wide range in the ability of police officers to successfully deploy reasonable hunches in their work. Some officers, for example, are far better at spotting a hidden gun on a suspect than are others. They also differ in their fine-tuned abilities to almost instantaneously decide the right moment to pull or hold the trigger when faced with unexpected, dangerous, rapidly unfolding situations. "The line separating close calls from shootings is razor thin" (Klinger 2004, 83).

"Intuition," Klein (1998) maintains, "grows out of experience" (33). This experience enables seasoned workers to:

> [S]ee [many things] that are invisible to everyone else: patterns that novices do not notice; anomalies—events that did not happen and other violations of expectancies; the big picture (situation awareness); the way things work; opportunities and improvisations; events that either already happened (the past) or are going to happen (the future); differences that are too small for novices to detect; [and] their own limitations (Klein 1998, 148-49).

Research has also demonstrated that proper experience and training can contribute to more refined instincts and an ability to exercise hunches in police work. "The part of intuition that involves pattern matching and recognition of familiar and typical cases can be trained. If you want people to size up situations quickly and accurately, you need to expand their experience base" (Klein 1998, 42). This helps explain some of the disparate abilities of police. "Experienced, well-trained police officers, often avoid shooting suspects, even in the toughest of circumstances" (Klinger 2004, 68, 116). Klinger quotes an officer who did not shoot even though he had ample provocation:

> I sure perceived the threat of that gun. I could see it clearly, that it was chrome and that it had pearl grips on it. But I knew that I had the drop on him, and I wanted to give him just a little more benefit of a doubt because he was so young looking. I *think the fact that I was an experienced officer had a lot to do with my decision. I could see a lot of fear in his face, which I also perceived in other situations*, and that led me to believe that if I would just give him just a little bit more time that he might give me an option to not shoot him (Klinger 2004, 62, emphasis added).

Klinger describes two police officers encountering a man with a gun threatening another man after the officers already heard one round go off. There was certainly reason to shoot the threatening man, except one officer noticed "something shiny on the belt of the guy with the gun." The officer rightly surmised that the threatening man was an off duty officer (who it turned out was resisting being robbed by the other man). So the on-duty officer held off firing. In the words of this officer: "Because of that, I wanted to give it an extra second before shooting. *You know, he could have shot the other guy and I'd have been wrong, but sometimes you just have to go with your instincts. And that's what I did*" (Klinger 2004, 66, 67, emphasis added).

Therefore, it should be no surprise that the ability to utilize hunches does not begin with a clean slate. Cops clearly recognize this unequal distribution of talent and experience. The problem, however, is that police organizations have an inconsistent record in identifying and acting on these disparate abilities. When proper supervisory and managerial recognition and assessment of differential abilities does exist, it is reflected, for example, in the recruitment and assignment of street savvy uniformed patrol officers to non-uniform, undercover and anti-crime units. Since undercover responsibilities are far less reactive to service calls compared to the functions of uniformed patrol, they have more opportunities to proactively employ their hunches as they exercise a wider range of discretionary choices.

V. DISTURBING LAW ENFORCEMENT TRENDS

On the other hand, there are numerous examples where this type of recognition does not take place, with devastating results. When four unseasoned New York City Police Department (NYPD) Street Crime Unit (SCU) officers fired forty-one shots at unarmed Amadou Diallo in February 1999, the SCU became embroiled in controversy. The public was outraged by the apparently unwarranted response to an innocent man's "suspicious behavior." Nineteen bullets struck and killed the hapless African immigrant who was standing near the entrance to an apartment building in the Bronx and had pulled out his wallet—not a gun—when approached by the plainclothes men. The officers had very limited time to consider all alternatives. Occupations that call for decisions under pressure do not have time to systematically weigh and compare all alternatives. They must rely on their knowledge base and training to make quick decisions (Klein 1998). Unfortunately, these four police officers lacked solid knowledge bases for savvy hunches. The officers had been in SCU less than a year and had not worked together.

Shortly after the Diallo shooting, it was also revealed that two of the officers had "troubling civilian complaint records." One officer was the recipient of unsubstantiated complaints of punching, kicking, beating, and pepper-spraying suspects. Complaints had also been lodged against the

other officer for use of excessive force and racial slurs. Two months later a newspaper investigation revealed that almost eighteen percent of the SCU officers "accumulated so many civilian complaints that they exceeded warning levels set by department programs that monitor abusive officers." As O'Shaughnessy quoted one law enforcement official as saying: "Three complaints in one year is a red flag, no matter what" (*Daily News*, February 13, 1999, 6).

When the Mayor and Police Commissioner closed ranks in defense of the four officers, describing the incident as an "unfortunate accident," minorities' long-standing suspicions regarding NYPD insensitivity were brought to a boiling point. Demonstrations ensued.

The Police Commissioner made a succession of superficial adjustments that did everything but address the manner in which officers were assigned to positions that require the ability to make smart decisions based on hunches, and mentored in those positions. In response to the public outcry, the Commissioner ordered SCU officers to patrol the streets in full uniform rather than in plainclothes to increase their accountability and lessen the chance of confusion on the part of the public. To address the lopsided numbers of an overwhelmingly white SCU, the Commissioner announced the addition of fifty minority officers and the reassignment of fifty white officers to precinct robbery units. Within a few months, however, the conversion of SCU officers to uniform was diluted when two members of each four- or six-person SCU team were ordered to be in plainclothes to work undercover, with the rest in uniform to make the arrests. In September 1999, the rules changed yet again—supervisors of each team could decide on their own mix of uniform and plainclothes officers. Soon, virtually all SCU personnel were shifted to plainclothes, provided a uniformed SCU cop was present at the scene of an arrest to avoid confusion about the identity of the undercover cops.

The following month, in October 1999, the SCU was, in the view of many, dismantled: the SCU central command and headquarters closed down, and its SCU units were reorganized and assigned to the NYPD's eight patrol boroughs as a means of "decentralization." A white flag was raised outside the unit's newly defunct headquarters after the changes were announced. On the public front, in February 2000, a year after Diallo's death, the four accused SCU officers were acquitted of all charges in a case in which venue had been changed to Albany due to claims that a New York City jury would be prejudicial to the officers. These helter-skelter SCU adjustments to mollify public opinion epitomize managerial fixes that are short-term and cosmetic. Remedies resemble mechanical reorganizations rather than assessments of officers' abilities and training.

At the core, such shifting adjustments were fatally flawed; the conversion to a uniformed unit conflicted with the SCU's basic rationale. The Mayor's and Commissioner's *Strategy 97* document praised the "simple concept behind the Street Crime Unit: highly motivated and *experienced*

officers—not assigned to the local precinct, patrolling in plainclothes in unmarked vehicles and not known to local criminals" (Giuliani and Safir 1996, emphasis added).

At the same time, the 1997 rapid expansion of the SCU from 138 to 438 officers was unwisely hurried. Such centralized, less-selective growth of the SCU and other specialized units ultimately diminishes quality. In 1994, for example, when twenty well-mentored officers were added to the small veteran-dominated SCU, the arrests per officer tripled. But after the 1997 hurried tripling in size (against the advice of the commanding officer), arrests per officer declined. Many of the new officers were less experienced in tactics and verbal skills. Previously, when a new officer entered the original unit, he was paired with an older officer who would act as mentor, guiding him on proper tactics and verbal persuasion skills supported by educated hunches fortified by experience. The ability to develop informed hunches was nurtured. Over-reliance on organizational reshuffling downplays the development and mentoring of intuitive policing and can impair its effectiveness.

More recent examples of simplistic officer selection also illustrate this organizational imbalance. On May 22, 2003, NYPD Officer Bryan Conroy, disguised as a postal worker, shot and killed Ousame Zongo, an unarmed West African artisan, during a confrontation in a Chelsea warehouse following a raid for counterfeit CDs and DVDs. Conroy was charged with manslaughter. A trial in March 2005 ended in a hung jury. In October 2005, a judge convicted Conroy of criminally negligent homicide.

In April 2005, it was revealed that almost a year before the shooting, one of Conroy's supervisors at the Staten Island Task force wrote that he lacked "maturity" and "experience" and should not be given undercover assignments. The supervisor wrote that the then 23-year-old cop should be "assigned to patrol in uniform with senior officers, kept away from all plainclothes work and not even ride in unmarked cars" (*New York Post*, April 27, 2005, 3). This assessment was not heeded. Conroy, in fact, had joined the NYPD only twenty months before the shooting. This proved to be another case of failure to match assignments with policing skills, including the ability to make informed judgments and hunches.

These prominent cases of organizational failure are symptomatic of law enforcement's contemporary emphasis on crime control performance management. While this orientation contains several positive facets, they unfortunately bode poorly for the support and development of sound hunches in police work. This final section of this Article, therefore, outlines some of performance management's major features and their regrettable impacts on police work.

VI. POLICE PERFORMANCE MANAGEMENT AND HUNCHES

Historically, this managerial culture arose in the context of dissatisfaction with inadequate public service delivery. It focused on achieving results though a shift from throwing money or "inputs" at social problems to the measurement of public sector production in terms of "outputs." Establishing explicit targets with quantifiable, performance indicators, it maintains, facilitates the auditing of efficiency and effectiveness.

By the 1990s, the full force of the new "managerialism" was applied to policing in many countries. Socio-economic phenomena were no longer considered sufficient explanations for crime. Police accountability and business-based managerial solutions were offered to combat troubling crime rates. The "new" managerial philosophy as embraced in American policing is epitomized by the managerial crime accountability system known as Compstat. (For a fuller development see Long and Silverman 2005).

A. *Compstat*

Compstat was introduced in 1994 in the New York City Police Department. Compstat is most frequently understood by its most visible elements today, including up-to-date computerized crime data, crime analysis, and advanced crime mapping as the bases for regularized, interactive crime strategy meetings which hold police managers accountable for specific crime strategies and solutions in their areas.

Although scholars disagree as to Compstat's impact on crime reduction (Silverman 1999, 2001; Karmen 2000; Eck and Maguire 2000; Rosenfeld, et al. 2005), tributes are extensive. Compstat has been described as "perhaps the single most important organizational/administrative innovation in policing during the latter half of the 20th century" (Kelling and Sousa 2001, 2). A *Criminology and Public Policy* Journal editor recently termed Compstat "arguably one of the most significant strategic innovations in policing in the last couple of decades" (Criminology and Public Policy 2003, 419). The authors of a major study note that Compstat "has already been recognized as a major innovation in American policing" (Weisburd et al. 2003, 422). In 1996, Compstat was awarded the prestigious *Innovations in American Government Award* from the Ford Foundation and the John F. Kennedy School of Government at Harvard University. Former New York City Mayor Giuliani proclaims Compstat as his administration's "crown jewel" (Giuliani 2002, 7).

Since Compstat was first unveiled by the New York City Police Department (NYPD) in 1994, a Police Foundation's 1999 survey for the National Institute of Justice (NIJ) revealed that a third of the nation's 515 largest police departments had implemented a Compstat-like program by 2001

and twenty percent were planning to do so. The same survey found that about seventy percent of police departments with Compstat programs reported attending a NYPD Compstat meeting (Weisburd et al. 2001). This process is continuing. Gootman reported that 219 police agency representatives visited NYPD Compstat meetings in 1998, 221 in 1999 and 235 in the first ten months of 2000 (*New York Times*, October 24, 2000, B1).

The worldwide influence of Compstat and its emphasis on measurable crime reduction unfortunately restricts the role of hunches. Prior to Compstat's introduction, the NYPD's priority was prevention of police corruption and the retention of favorable community relations. Two years after Compstat's introduction, very heavy emphasis was placed on arrests, summons and citations so that police activity is shown to be increasing. Officers' selective discretionary choices and lower-level judgments and hunches were reined in while activity numbers were reified. Numbers, sometimes any numbers, rule the day. This system, in the words of one participant, is "wound up too tight." A white Brooklyn detective, a twenty-year veteran, put it this way, "Compstat is everything. People are tired of being harassed, searched and frisked, and run off the streets. People are fed up; the cops are, too" (Silverman 2001, 212). This decline in street cop autonomy is quite ironic since Compstat was touted as a path to, and initially resulted in, greater discretion for street officers and mid-level police managers. Compstat supporters label this as "empowerment," whereby organizational power is devolved from the top to lower levels. This centered on precinct autonomy whereby the long-sought goal of giving precinct commanders greater control over their personnel was attained. Strategies to reduce crime and disorder flowed from the precincts, whose commanders were held accountable through Compstat.

In addition, precinct and borough commands were provided with resources that formerly were the exclusive province of headquarters. For example, precinct commanders could have their crime units perform decoy operations, a function previously reserved for the citywide street crime unit requiring commanders to request help from specialty units to combat specific conditions. These reforms moved the NYPD away from using headquarters as the nerve center that conceived tactics on a citywide basis, often with little input from field commands. The department realized that citywide crime fighting decisions were not as effective as strategies tailored for particular communities.

Since early 1996, however, these reforms have been blunted. The greatest buildup in personnel has occurred in units that (a) do not report to precinct commanders, and (b) are directed by headquarters or the boroughs. The rapid, less-selective swelling of the SCU and other specialized units drains precincts, which are still held accountable for crime reduction—but have diminished resources and decisional opportunities. Demands to produce numbers have triggered the expansion of NYPD procedures that work,

but without maintaining an eye on the structural health of the organization and the vital decisional needs of its membership.

In effect, then, a centralized thrust has been superimposed on decentralized reforms. But centralization now has a powerful weapon in its arsenal—Compstat. Compstat, in many senses, has been turned on its head. Instead of a tool to encourage cops to reevaluate objectives and tactics and scan locations for future trends, the information from computer-generated comparative statistics is becoming known for only its most visible aspects—crime mapping and deployment activity. Greater information is now used to allow top levels to bear down on the management of many street operations. A much narrower range of options is available to line officers in the exercise of their responsibilities. Hunches have become increasingly restricted.

Prior to Compstat, the NYPD had adopted a service style. The emphasis was on "service and the beat cop"—known as community policing—in which police are considered generalist officers responsible for a wide range of duties in specific areas, enabling them to work closely with residents. After Compstat, the number of community police officers was greatly reduced as the police's focus shifted to formal sanctions—arrests and summons statistics to be reflected in the Compstat meetings, enabling commanding officers to defend themselves. This legalistic approach, with the most restrictive choices, (see *supra*, page 136) is the one most similar to the Compstat model that NYPD adopted to fight crime. That is, NYPD enforced the law as if there was one community standard. This was a drastic change for NYPD—from "service and the beat cop" to "crime and commanding officers" (Eterno 2003). A review of Compstat programs throughout the United States yielded similar results:

> Compstat departments are more reluctant to relinquish power that would decentralize some key elements of decision making geographically . . . *enhance flexibility, and risk going outside of the standard tool kit of police tactics and strategies.* The combined effect overall, whether or not intended, is to reinforce a traditional bureaucratic model of command and control (Weisburd et al. 2003, 448, emphasis added).

B. *Conclusion*

The micromanagement of police activities continues to attract attention since much of the past decade's crime decline has, at least partially, been attributed to this mechanization of police work. Departments are increasingly buttressing their command structures, centrally mapping and managing officer deployment, tactics, and performance results (and often quotas) while simultaneously curbing street-level autonomy. These trends are reinforced by a parallel diminution in the number of generalist community police officers (CPOs)—officers with wide ranging responsibilities—assigned to, familiar with, and accountable to specific areas and their resi-

dents. As their responsibilities increasingly shift toward enforcement and their numbers dwindle, CPOs are now assigned to larger areas, which leaves them with less community knowledge and fewer opportunities to employ discretionary hunches.

Yet these much-imitated centralization trends are not endowed with inevitability. There are indications of a counter movement supportive of police hunches. These contradictory developments rest on three premises that are central to this article. First, hunches, to varying degrees, have historically been an integral and necessary ingredient in police work. Second, some officers are better at exercising rational hunches than are others. For example, when a high ranking Detroit police chief was challenged on his department's promotion policing, he replied that "promotions are based on job performance, *intuitiveness* and commitment to community" (*Detroit News*, October 25, 2005, emphasis added). Our third premise, therefore, posits that the central question for the legal profession should not be whether or not hunches are present in particular police actions. Rather the pertinent issue is the extent to which hunches should be rationally informed and properly articulated.

VII. TUTORING HUNCHES

Raising the level of a police department's intuitive abilities begins with recognition that some officers undoubtedly possess greater natural abilities than others. While researching police departments, I repeatedly find that a robust ability to discern signs, signals, evidence and patterns from the environment is confined to a small cadre of officers. In other words, their hunches are generally confirmed by evidence. This same limited group of officers, for example, is usually responsible for a disproportionate level of successful detection, interdiction and harvesting of drugs and weapons from individuals and vehicles.

The fact that less savvy officers profit from exposure to more highly-skilled and intuitive officers underlines the importance of mentoring which occurs in many facets of police work. Recruits are initially exposed to mentoring in training academy classes and later when they are placed in field assignments with field training officers before retuning to the academy to complete their training. Upon graduation, rookies are generally assigned to experienced officers whose skills vary. Mentoring also occurs in specialized units (see previous discussion of the Street Crime Unit on pages 141-43) when younger, less experienced officers are paired with more highly skilled, hunch-smart officers. In addition, in-service training often builds upon this approach.

Many law enforcement agencies, therefore, seek to highlight observation and perception skills in their training. The Traffic Law Enforcement Division of the National Highway Traffic Safety Administration, for example, has developed a training curriculum for the Department of Justice's

Community Oriented for Police Service (COPS) office entitled "Conducting Complete Traffic Stops: A Community Crash and Crime Reduction Effort" for both recruits and in-service law enforcement. This training program has been adopted by numerous state and local law enforcement agencies. Among its objectives are to "learn specific techniques to detect criminal activity" and to instruct officers on how to articulate objective reasons for escalating stops and searches rather than attributing their actions to mere intuition or preconceptions (United States Department of Transportation 2000, 1-3).

The training's second module, "Indicators and Detection Methods," is devoted to 115 possible indicators of criminal activity which fall under the headings of "before stop, vehicle exterior, vehicle interior, drunk, driver/occupants, and children." The module notes that: "The singular presence of an indicator does not establish probable cause or justify an unwarranted extension of the initial enforcement action. However, these issues help substantiate and piece together facts about the stop" (United States Department of Transportation 2000, 2-3).

These presentations are enhanced when they are offered by highly skilled, hunch-savvy investigators. In the Maryland State Police, for example, the "Indicators and Detection Methods" module is taught by a state trooper with a nationally recognized record of smart intuitive policing. Due to this Sergeant's track record, the Superintendent of the State Police assigned him a key role in training other troopers in a newly expanded team of specially trained State troopers focusing on criminals in transit throughout Maryland. In the first two months of its existence, the newly formed unit arrested thirty-three criminals—six of whom were fugitives—and recovered 191 pounds of marijuana, thirty-eight pounds of cocaine, and three guns during traffic stops on state highways. The troopers also took custody of nine vehicles used to smuggle drugs. Four of these vehicles had built-in fake compartments that were used to conceal drugs, guns, or other contraband (Maryland State Police 2005, 3, 11). As one of the trainees recalls about his experience in this mentoring, "if that guy can't motivate you, nobody can. He teaches the spirit" (Interview 2004).

The same individual also conducts training for other law enforcement agencies. For, example, on June 23, 2005, the Raleigh *News & Observer* reported the conclusion of a saga that began on the night of October 11, 2004, when two men were found shot to death in Durham County outside their Volkswagen Passat. Investigators suspected the men had been involved in a drug deal but lacked clues or witnesses, and never found any narcotics. A police dog detected drugs near the back seat of the victims' car, but investigators assumed the dog smelled remnant odors, so the Passat sat for months in a police storage parking lot. Months later, after attending a law enforcement class about hidden compartments in automobiles, Sheriff's Detective Barnes invited the course instructor to search the car as a demonstration of his techniques. The teacher, Sgt. Mike Lewis of the

Maryland State Police, pored over the car. Before long, he had found a metal box welded to the car's body behind a kick panel of the car's back seat; the box contained 4 kilograms of cocaine wrapped in plastic and covered in used motor oil to obscure its scent (*News & Observer*, June 23, 2005). The teacher's mentoring was the key to cracking the case that may otherwise have remained unsolved.

The mentoring of police hunches can also occur in non-traditional settings. The NYPD's training academy, for example, conducts an executive development program for mid- and high-level police executives. One of the offerings in this program is entitled "Observation Skills Enhancement for Law Enforcement, the Frick Collection." In this offering, police executives visit New York's famous Frick Collection where the museum director exposes the executives to one of the world's premier art collections. "This course challenges the perceptions and articulation skills of the Executive Corps members. Participants view and discuss paintings in the Collection and then apply their observation skills to individual, street scenes, and Department related photos" (New York City Police Department 2005). Participants in the program believe their ability to more accurately and rapidly sense, perceive, and extract pertinent information from the environment was improved. In other words, their ability to form hunches was enhanced.

VIII. THE NEXT STEP

Where do we go from here? If law enforcement is to be successful in having the legal profession recognize the legitimacy of smart hunches, then police organizations must focus on two areas. The first is to expand their mentoring programs and curb countervailing centralizing restrictions on officer autonomy and discretionary hunches. The second is to develop yardsticks and measures of successful use of hunches.

Since Compstat programs measure a wide range of information including crime, citizen complaints, domestic violence, confidential informants, individual officer and precinct arrest, citation, and summons activity, there is every reason to believe that they can also include an officer's hunch performance. Police need not be apologetic regarding their use of hunches. Hunches should not be dismissed; they should be enlightened. Rational hunches should be elevated to their rightful place as key ingredients in the complexity of police work. Officers are evaluated by many dimensions; their records of rational hunch decisions should be included. This record could be available to courts when they are reviewing specific cases.

Courts may wish to consider a new approach comparable to the shift in policing which has moved from reacting to specific crime incidents to the prevention of crime based on patterns. Similarly, if the courts really wish to latch on to the most effective way to ensure the proper use of hunches, they should not scrutinize the presence or absence of hunches and, by doing so, compel officers to concoct the proper verbiage. Instead, a far more real-

istic and effective preventative approach would be to assess departmental policy guidelines, supervision, training programs and hunch performance when considering cases. Judges, rather than scorning hunches, should review hunch scorecards.

REFERENCES

American Society of Criminology, eds. 2003. *Criminology and Public Policy* 2 (3): 419-20.

Banton, M. 1964. *The policeman in the community.* New York: Basic Books.

Barinaga, M. 1992. How scary things get that way. *Science* Nov. 6: 887-88.

Bayley, D. H. 1986. The tactical choices of patrol officers. *Journal of Criminal Justice* 14 (4): 329-48.

Bayley, D. H., and E. Bittner. 1984. Learning the skills of policing. *Law and Contemporary Problems* 47 (4): 35-59.

Bittner, E. 1967. The police on skid row. *American Sociological Review* 32 (5): 699-715.

—— 1990. *Aspects of police work.* Boston: Northeastern University Press.

Black, D. J., and A. J. Reiss, Jr. 1970. Police control of juveniles. *American Sociological Review* 35 (1): 63-77.

De Becker, G. 1997. *The gift of fear: Survival Signals that protect us from violence.* Boston: Little Brown.

Eck, J. E., and E. R. Maguire. 2000. *Have changes in policing reduced violent crime? An assessment of the evidence.* In *The Crime Drop in America*, ed. A. Blumstein and J. Wallman. Cambridge, United Kingdom: Cambridge University Press.

Endsley, M. R., and E. O. Kiris. 1995. The out of the loop performance problem and level of control in automation. *Human Factors* 37 (2): 381-94.

Engel, R. S., J. J. Sobol, and R. E. Worden. 2000. Further exploration of the demeanor hypothesis: the interaction effects of suspects' characteristics and demeanor on police behavior. *Justice Quarterly* 17 (2): 235-58.

Eterno, J. 2003. *Policing within the law: a case study of the New York City Police Department.* Westport, Connecticut: Praeger.

Eterno, J., and E. B. Silverman. 2006. The New York City police department's Compstat: dream or nightmare? *International Journal of Police Science and Management* 8 (3): 218-31.

Gigerenzer, G. 2000. *Adaptive thinking: rationality in the real world.* New York: Oxford University Press.

Giuliani, R. W. 2002. *Leadership.* New York: Hyperion.

Giuliani, R. W., and H. Safir. 1996. *New York City Police Department strategy.* New York.

Gladwell, M. 2005. *Blink: the power of thinking without thinking.* New York: Little Brown.

Goldstein, J. 1960. Police discretion not to invoke the criminal process: low-visibility decisions in the administration of justice. *Yale Law Journal* 69 (4): 543-94.

Goleman, D. 1993. *Emotional intelligence: why it can matter more than IQ*. New York: Bantam Books.

Kadish, S. H. 1962. Legal norms and discretion in the police and sentencing processes. *Harvard Law Review* 75 (5): 904-31.

Karmen, A. 2000. *New York murder mystery*. New York: New York University Press.

Katkin, E. S., S. Wiens, and A. Ohman. 2001. Nonconscious fear conditioning: visceral perception and the development of gut feelings. *Psychological Science* 12 (5): 366-70.

Kelling, G. L. 1999. *"Broken windows" and police discretion*. Washington, D.C.: National Institute of Justice.

Kelling, G. L., and W. H. Sousa, Jr. 2001. *Do police matter? An analysis of the impact of New York City's police reforms*. Civic Report No. 22. New York: Manhattan Institute.

Klein, G. 1998. *Sources of power: how people make decisions*. Cambridge, Massachusetts: MIT Press.

Klinger, D. A. 1997. Negotiating order in patrol work: an ecological theory of police response to deviance. *Criminology* 35 (2): 276-306.

—— 2004. *Into the kill zone*. San Francisco: Jossey-Bass.

LaFave, W. R. 1962. The Police and nonenforcement of the law—Part I. *Wisconsin Law Review* January: 104-37.

LeDoux, J. E. 1986. Sensory systems and emotions. *Integrative Psychiatry* 4: 237-48.

—— 1993. Emotional memory systems in the brain. *Behavioral brain research* 58: 69-79.

—— 1998. *The emotional brain: the mysterious underpinnings of emotional life*. New York: Simon and Schuster.

Lerner, C. S. 2003. The reasonableness of probable cause. *Texas Law Review* 81: 951.

Long, M., and E. B. Silverman. 2005. The Anglo-American measurement of police performance: Compstat and best value. *British Journal of Community Justice* 3 (3): 45-60.

Manning, P. K. 2001. Theorizing policing: the drama and myth of crime control in the NYPD. *Theoretical Criminology* 5 (3): 315-44.

Maryland State Police. 2005. *The Maryland Trooper* 121 (1).

Maryland State Trooper. 2004. Interview by E. B. Silverman (May 14). Waterloo, Maryland.

Mastrofski, S. D., J. B. Snipes, R. B. Parks, and C. D. Maxwell. 2000. The helping hand of the law: police control of citizens on request. *Criminology* 38 (3): 307-42.

Morin, P. J. 2005. Criminal facts and questions. http://www.pjmorinlaw.com/criminal-defense-faq.html (last visited Feb. 21, 2008).

National Institute of Mental Health: Center for Studies of Crime and Delinquency. 1970. *The functions of the police in modern society: a review of background factors, current practices, and possible role models.* Rockville, Maryland: Center for Studies of Crime and Delinquency.

New York City Police Department. 2005. *Executive development program.* New York.

Ohlin, L. E., and F. J. Remington, eds. 1993. *Discretion in criminal justice: the tension between individualization and uniformity.* Albany, New York: State University of New York Press.

Piliavin, I., and S. Briar. 1964. Police encounters with juveniles. *American Journal of Sociology* 70: 206-14.

Pinizzotto, A. J., E. F. Davis, and C. E. Miller, III. 2004. Intuitive policing: emotional/rational decision making in law enforcement. *FBI Law Enforcement Bulletin* February.

Rosenfeld, R., R. Fornango, and E. Baumer. 2005. Did ceasefire, Compstat, and exile reduce homicide? *Criminology and Public Policy* 4 (3): 419-49.

Silverman, E. B. 1999. *NYPD battles crime: innovative strategies in policing.* Boston: Northeastern University Press.

—— 2001. Epilogue. In *NYPD battles crime: innovative strategies in policing.* Boston: Northeastern University Press.

Smith, D. A. 1986. *The neighborhood context of police behavior.* In *Communities and Crime,* ed. A. J. Reiss, Jr., M. Tonry, and N. Morris. 313-42. Chicago: University of Chicago Press.

Stadler, M. A., and P. A. Frensch, eds. 1997. *Handbook of Implicit Learning.* New York: Sage Publications.

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

United States Department of Transportation: National Highway Traffic Safety Administration. 2000. *Conducting complete traffic stops: a community crash and crime reduction effort.* Washington, D.C.

Weisburd, D., S. D. Mastrofski, A. M. McNally, and R. Greenspan. 2001. *Compstat and organizational change: findings from a national survey.* Report to the National Institute of Justice.

Weisburd, D., S. D. Mastrofski, A. M. McNally, R. Greenspan, and J. J. Willis. 2003. Reforming to preserve: Compstat and strategic problem solving in American policing. *Criminology and Public Policy* 2 (3): 421-56.

Wilson, J. Q. 1968. *Varieties of police behavior: the management of law and order in eight communities.* Cambridge, Massachusetts: Harvard University Press.

Wilson, T. D. 2004. *Strangers to ourselves: discovering the adaptive unconscious.* Cambridge, Massachusetts: Belknap Press.

Wilson, T. K. 2007. Special report: Mistakes the police make . . . and how they can help you. http://virginia-dui-lawyer.com/police.html (last visited Feb. 21, 2008).

Whyte, W. F. 1943. *Street corner society: the social structure of an Italian slum.* Chicago: University of Chicago Press.

Winkielman, P., and K. C. Berridge. 2004. Unconscious emotion. *Current Directions in Psychological Sciences* 13 (3): 120-23.

CAN HUNCHES BE RATIONAL?

Gerd Gigerenzer and Henry Brighton***

I. INTRODUCTION

Open any book on judgment and decision making and you will likely encounter two contrasting categories: rational and intuitive judgment. Rational judgment is defined by logical principles, such as the maximization of expected utility, Bayes' rule, or complex statistical prediction techniques. Despite the prevalence of such theories, people fail to adhere to these logical standards and instead rely on intuitive hunches, habits, and heuristics.

Books on the subject claim that short-cuts spring from our limited cognitive capacities and knowledge, which results in flawed reasoning and logical blunders. According to this view, mere hunches are inferior to logic and should be avoided unless time constraints and information costs leave no other choice. More information and more computational power, we are told, are always better. These conclusions tend to be presented as self-evident and obvious.

One glance at the world outside the confines of textbooks indicates that logical, reasoned decision making is not always superior to psychological intuition. Laypeople relying on mere hunches have outwitted financial analysts in predicting the stock market; simple heuristics have outperformed mutual funds and predicted the outcomes of 2003 Wimbledon tennis matches better than the official ATP expert rankings did (Borges et al. 1999; Serwe and Frings 2004; Törngren and Montgomery 2004). Zero-intelligence traders made as much profit as intelligent people did in experimental markets (Gode and Sunder 1993). Skilled athletes make better decisions when they have less time and information (Johnson and Raab 2003), and rely on heuristics for catching balls that require minimal information and ignore all variables relevant for computing the ball's trajectory (Shaffer and McBeath 2002). Limited memory capacities enable language learning, whereas larger capacities can prevent language acquisition in children as well as in neural networks (e.g., Elman 1993). Last but not least, *satisficers*, that is, people who search only for limited information and accept what is "good enough," report that they are more optimistic, self-confident and satisfied with their lives. In contrast, *maximizers*, people who opt for exhaustive search in order to find the absolutely best option, report depres-

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sion, perfectionism, regret, and self-blame (Schwartz et al. 2002). These observations suffice to indicate a tension between the logical ideal that more information is always better and the psychological reality of intelligent hunches and heuristics.

This article draws on the research of the *adaptive toolbox* (Gigerenzer, Todd, and the ABC Research Group 1999; Gigerenzer and Selten 2001) to arrive at a better understanding of the nature and quality of hunches. A hunch is an intuitive judgment that appears quickly in our consciousness, and whose underlying reasons we are typically not aware of but nevertheless feel strongly enough to act upon (Gigerenzer 2007). This paper covers the following issues: First, many hunches are based on fast and frugal heuristics. That is, a hunch is the conscious product of an underlying, mostly unconscious process that is of heuristic (rather than analytic) nature. Second, we will show that simple heuristics that ignore information can be better—faster, more frugal, and more accurate—than complex strategies that use all available information. Third, we will clarify that heuristics are neither good nor bad, rational nor irrational, *per se*. Their performance depends on the structure of the environment. In order to understand when and why a simple heuristic works, one has to define the environmental structures it can exploit. The result of this program is a different conception of rationality, one that is not logical but ecological in nature. The concept of *ecological rationality* was independently developed by Gigerenzer et al. (1999) and Smith (2003). Hunches can be rational, but in a different and more efficient way than that suggested by logical rationality. Geographic profiling provides an illustrative example:

Seven armed robber locations in Victoria, Australia which were linked to the same offender. Where does the robber live?

Figure 1

II. GEOGRAPHICAL PROFILING

A number of murders have been linked and the evidence points towards a serial killer (Figure 1). How can information about these crimes be used to focus police resources? Among several possible strategies, geographical profiling is one option. The locations of the crime scenes are used to predict the most likely location of the home of the offender. Geographical profiling can help locate perpetrators of serial crimes such as murder, burglary, arson, and armed robbery. By analyzing the relative locations of the crime scenes, resources can be put to their most efficient use by, for example, questioning known offenders residing within the locality predicted by the profiling strategy.

Given only the list of crime locations, we will consider two detectives with contrasting approaches: Detective *Satisficer* and Detective *Maximizer.* Satisficer uses a hunch to decide where the offender is most likely to live. Maximizer, on the other hand, turns to a state-of-the-art geographical profiling system. Unlike Satisficer, Maximizer will have received detailed and costly training in how to use the profiling software. Satisficer, who opts for the mental shortcut, is more likely to draw on past experience. Which detective will most effectively deploy police resources? Consider Figure 1, which depicts seven armed robbery locations in Victoria, Australia. Figure 2 illustrates the prediction of a commercial profiling system, CrimeStat (Levine 2000).

The predicted area of offender residence using CrimeStat.
The true location of the offender is shown by the arrow.

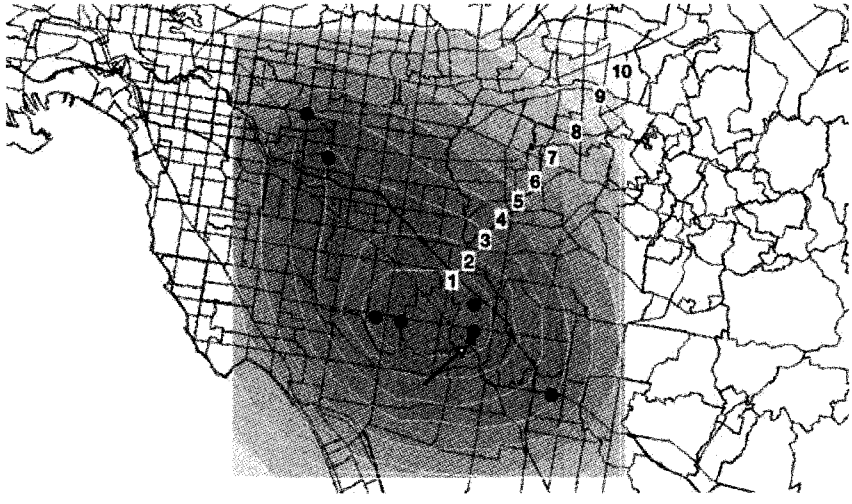

Figure 2

To make a prediction, CrimeStat performs a two-stage calculation. First, a distance decay function is applied to each crime location. This function assigns, for a single crime site, a likelihood score to every grid cell. Maximizer must choose the granularity of the grid, whereas the crime locations are real. For the second stage of the calculation, CrimeStat sums these individual likelihood scores to yield a final likelihood score for each grid cell. In particular, the first stage is carried out using the following function:

$$f(d_{ij}) = a \cdot e^{-c \cdot d_{ij}}$$

This function, where i represents the grid location of the crime location and j is an index over all other grid locations, maps the Euclidean distance between these locations, d_{ij}, to an offender residence likelihood score $f(d_{ij})$. The further from the crime location, the less likely that it is the offender's residence. Notice that the offender residence likelihood decreases exponentially with distance. The constants c and a are additional model parameters that alter the gradient of the exponential decay and the confidence of the likelihood scores, respectively. Given n crime locations, the second stage of the CrimeStat calculation sums the n likelihood scores that have been calculated for each grid cell. The result of this computation is a probability distribution covering the whole grid. The most likely offender residence is then predicted to be the locality with the highest likelihood score. The innermost region labelled "1" in Figure 2 is the predicted target area. This, in our example, represents the prediction of Maximizer. The actual residential location of the offender is shown by the arrow, and this location lies within the target region predicted by CrimeStat.

Now let us assume that Satisficer, who always acts on a hunch, uses a simple heuristic called the *circle heuristic*: take the two crime locations that are furthest apart, and then draw a circle passing through these two points. The circle heuristic predicts that the most likely offender location is at the centre of this circle. Figure 3 details the prediction of Satisficer. In this example, Satisficer's prediction is slightly outside the target area predicted by CrimeStat.

The predicted offender residence location predicted by the circle heuristic is marked by a square. The true offender residence is shown by an arrow.

Figure 3

There are key differences between these two approaches. First, the computational costs of applying each strategy differ substantially. Second, Satisficer's prediction was only calculated on the basis of two of the crime locations (the two furthest from each other), whereas Maximizer's calculation used all the crime locations. In short, Maximizer's prediction required performing a complex computation taking into account all information. Satisficer's prediction drew on a fraction of the information and combined this information using a simple computation. Given the potential importance of an accurate prediction, the obvious answer is the most accurate. On the basis of the single example shown in Figures 1-3, one might conclude that a complex profiling system is more accurate on average than the circle heuristic. But is this true? When compared to complex and information hungry strategies, simple strategies that ignore information can perform just as well, or better, in predictive accuracy.

For example, Snook et al. (2005) compared the predictive accuracy of eleven geographical profiling strategies ranging from simple methods such as the circle heuristic to complex methods such as the probability distance strategy discussed above. The offenders considered were UK burglars who had committed a total of ten or more burglaries and, while resident at a single address, had committed between five and ten crimes. Snook et al. investigated the relationship between the number of crimes committed (while at a single address), strategy complexity (the computational cost of applying the strategy), and predictive accuracy (how far the prediction of the strategy deviates from the true residence of the offender). They discovered

that in four out of six cases, a simple strategy (the circle heuristic) was the most accurate with a mean error distance of 8 km. The circle heuristic beat the best performing complex strategy by, on average, 1.25 km. In the two cases where the circle heuristic did not come out first, which where those with the largest number of crimes (nine and ten) committed, the most superior strategy was only 0.25 km more accurate than the simplest strategy. Snook et al. argued that the common assumption that strategy complexity is positively correlated with predictive accuracy is unfounded: the best average case accuracy was achieved by the circle heuristic. Only with an increasing number of crimes do the complex strategies begin to look worthy, but any advantage they achieve, Snook et al. argued, is insignificant: all strategies become more accurate when the number of crimes increases.

Demonstrating the accuracy of simple computational strategies over complex computational strategies is one thing, but how plausible is the claim that a real detective could use such a strategy? Can humans employ mental shortcuts similar to the circle heuristic? In another study, Snook, Taylor, and Bennett (2004) tested how well human subjects performed at predicting offender residences in comparison to CrimeStat. Three different subject groups were used. Two of these subject groups were exposed to one of two heuristics: the first group was shown the circle heuristic introduced above; the second group was introduced to the decay heuristic, which simply states that many offenders live near the location of their crimes. The third subject group, the control group, received no guidance on how to arrive at a prediction. Snook et al. found that, once again, the complex strategy did not perform significantly better than the two simple heuristics did. Subjects introduced to these heuristics rivaled the predictive accuracy of CrimeStat. Furthermore, they found that around half of human subjects in the control group, when asked, reported using a mental heuristic similar to those introduced: i.e., the subjects were basing their decisions on a hunch. Importantly, a significant proportion of subjects introduced to the heuristics improved their predictive accuracy as a result. The conclusion of Snook et al. (2004) was that people indeed employ simple and accurate heuristics, both with and without guidance.

Snook et al.'s work demonstrates that in spite of ignoring information, mental heuristics prove to be equally and sometimes more accurate than the complex and information hungry profiling strategy. This evidence suggests that Satisficer is, on average, likely to be at least as accurate as Maximizer.

III. ONE-REASON DECISION MAKING

The quality of hunches is examined in more detail in the following examples. The geographical profiling problem is all about finding the most probable location of an offender. Consider now a paired comparison task, such as which of two suspects committed a crime, which sport team will win the game, which of two schools will have a higher drop-out rake, or

which of two stocks will yield a higher return. How does one construct a fast and frugal heuristic for a paired comparison task? One can use the same building blocks used in the fast and frugal geographical profiling heuristic: a search rule (consider the outermost crimes first), a stopping rule (stop when you have found two crimes), and a decision rule (predict the offender location to be the center of the circle passing through the two outermost crimes) (see Gigerenzer et al. 1999).

The "Take The Best" heuristic is designed for paired comparisons and uses these building blocks. It searches through cues, one by one. A search is terminated by a fast stopping rule: Stop when the first cue discriminates between the two alternatives. Finally, it uses a one-reason decision making rule: Only the cue that stops search determines the decision. The heuristic is called Take The Best because it relies on the best cue that discriminates and ignores the rest (Gigerenzer and Goldstein 1999). In general terms, the task is to predict which object, *a* or *b*, has the higher value on a criterion. There is a set of *N* objects and a set of *M* cues (1, 2, . . ., *i*, . . ., *M*). In the case of binary cues, cue values "1" and "0" indicate higher and lower criterion values, respectively. Take The Best can be characterized by the following building blocks:

(1) *Search rule*: Choose the cue with the highest validity and look up the cue values of the two objects.

(2) *Stopping rule*: If one object has a cue value of one ("1") and the other does not (i.e., "0" or unknown), then stop search and go on to Step 3. Otherwise exclude this cue and go back to Step 1. If no cues are left, guess.

(3) *Decision rule*: Predict that the object with the cue value of one ("1") has the higher value on the criterion.

The validity v_i of a cue i (Step 1) is defined as

$$v_i = \frac{R_i}{R_i + W_i}$$

where R_i is the number of correct inferences, and W_i is the number of incorrect inferences based on cue i alone. $R_i + W_i$ equals the number of cases where one object has the value "1" and the other does not.

The "Minimalist" heuristic is a close relative of Take The Best, and differs only in the search rule. This heuristic simply picks cues in random order:

(1) *Search rule*: Draw a cue randomly (without replacement) and look up the cue values of the two objects.

Each of the three building blocks of Take The Best (and even more, in the Minimalist heuristic) bets on the power of simplicity. The search rule looks up cues in the order of their validities. To order cues according to v_i is fast and frugal but not "optimal," because this order ignores dependencies between cues. Like the search rule, the stopping rule does not employ optimization calculations either. No attempt is made to calculate the point where the costs of further search will exceed its benefits. The decision rule violates the ideal of compensation embodied in all standard theories of rational choice: to arrive at a decision by weighing and adding. The decision rule bases the prediction only on the best cue that differentiates between the two alternatives, that is, it uses one-reason decision making.

The two heuristics belong to a class of heuristics that employ *one-reason decision making* (Gigerenzer 2004). The term refers to the fact that the decision is based on only one cue (the decision rule), while search can go through several cues (the search rule). Empirical evidence shows that intuitive judgments are often based on one reason only, both in experimental situations with low stakes (Bröder and Schiffer 2003; Rieskamp and Hoffrage 1999; Shepard 1964), and in situations with high stakes, such as when parents choose primary health care for their sick child during nighttime (Scott 2002). One-reason decision making seems to be mostly unconscious, and is a possible candidate for the process underlying some forms of hunches.

Because rational judgment is often defined by logical principles, intuitions that are based on one reason are considered a form of human irrationality, a regrettable byproduct of our "cognitive limitations." This interpretation is still characteristic for behavioral economics, and can be found in the behavioral law and economics literature as well. This normative claim is made on logical grounds, but, as far as we know, has never been tested. The following tests the validity of one-reason decision making in the form of Take The Best method when faced with complex real-world problems rather than logical textbook problems.

A description of the twenty prediction problems used in the competition.

All data sources are listed in Czerlinski et al. (1999). For each problem, we specify the criterion and give a sample of the cues for predicting the criterion. The cues are either binary or were dichotomized by a median split. The raw data is available via world wide web at http://www.mpib-berlin.mpg.de/abc/.

Psychology	*Attractiveness of men*	Predict average attractiveness ratings of thirty-two famous men based on the average likeability ratings of each man, the percent of subjects who recognized the man's name (subjects saw only the name, no photos), and whether the man was American. Based on data from 115 male and 131 female Germans, aged 17-66 years.
	Attractiveness of women	Predict average attractiveness ratings of thirty famous women based on the subjects' average likeability ratings of each woman, the percent of subjects who recognized the woman's name (subjects saw only the name, no photos), and whether the woman was American. Based on data from 115 male and 131 female Germans, aged 17-66 years.
Sociology	*High school dropout rate*	Predict drop-out rate of the fifty-seven Chicago public high schools, given the percentage of low-income students, percentage of non-White students, average SAT scores, etc.
	Homelessness	Predict the rate of homelessness in fifty U.S. cities given the average temperature, unemployment rate, percent of inhabitants with incomes below the poverty line, the vacancy rate, whether the city has rent control, and the percent public housing.
Demography	*Mortality*	Predict the mortality rate in twenty U.S. cities given the average January temperature, HC pollution level, the percentage of non-White residents, etc.
	City population	Predict populations of the eighty-three German cities with at least 100,000 inhabitants based on whether each city has a soccer team, university, intercity train line, exposition site, etc.
Economics	*House price*	Predict the selling price of twenty-two houses in Erie, PA, based on current property taxes, number of bathrooms, number of bedrooms, lot size, total living space, garage space, age of house, etc.
	Land rent	Predict the rent per acre paid in fifty-eight counties in Minnesota (in 1977 for agricultural land planted in alfalfa) based on the average rent for all tillable land, density of dairy cows, proportion of pasture land, and whether liming is required to grow alfalfa on the land. (Alfalfa is often fed to dairy cows.)
	Professors' salaries	Predict the salaries of fifty-one professors at a Midwestern college given gender, rank, number of years in current rank, the highest degree earned, and number of years since highest degree earned.
Transportation	*Car accidents*	Predict the accident rate per million vehicle miles for thirty-seven segments of highway, using the segment's length, average traffic count, percent of truck volume, speed limit, number of lanes, lane width, shoulder width, number of intersections, etc. for Minnesota in 1973.
	Fuel consumption	Predict the average motor fuel consumption per person for each of the forty-eight contiguous United States using the population of the state, number of licensed drivers, fuel tax, per capita income, miles of primary highways, etc.
Health	*Obesity at age 18*	Predict body fat percentages at age 18 of forty-six children based on measurements from ages 2 to 18. The body measurements include height, weight, leg circumference, and strength. (Based on the longitudinal monitoring of the Berkeley Guidance Study.)
	Body fat	Predict percentage of body fat determined by underwater weighing (a more accurate measure of body fat) using various body circumference measurements (which are more often used because they are more convenient measures than underwater weighing) for 218 men.
Biology	*Fish fertility*	Predict the number of eggs in 395 female Arctic charr based on the fish's weight, its age, and the average weight of its eggs.
	Mammals' sleep	Predict the average amount of time thirty-five species of mammals sleep, based on brain weight, body weight, life span, gestation time, and predation and danger indices.
	Cow manure	Predict the amount of oxygen absorbed by dairy wastes given the biological oxygen demand, chemical oxygen demand, total Kjedahl nitrogen, total solids, and total volatile solids for fourteen trials.
Environmental Science	*Biodiversity*	Predict the number of species on twenty-six Galapagos islands, given the area, elevation, distance to the nearest island, area of the nearest island, distance from the coast, etc.
	Rainfall from cloud seeding	Predict the amount of rainfall on twenty-four days in Coral Gables, Florida, given the types of clouds, the percent of cloud cover, whether the clouds were seeded, number of days since the first day of the experiment, etc.
	Oxidant in Los Angeles	Predict the amount of oxidant in Los Angeles for seventeen days given the day's windspeed, temperature, humidity, and insolation (a measure of the amount of sunlight). Data provided by the Los Angeles Pollution Control District.
	Ozone in San Francisco	Predict the amount of ozone in San Francisco on eleven occasions based on the year, average winter precipitation for the last two years, and ozone level in San Jose, at the southern end of the Bay.

Table 1

A. *First Competition*

Table 1 lists twenty demographic, economic, psychological, biological, and environmental prediction problems studied by Czerlinski, Gigerenzer, and Goldstein (1999). The number of cues (predictors) varied between three and nineteen, and these were binary or dichotomized at the median. In each case, the task was to predict which of two objects scores higher on a criterion. For instance, one task was to predict which of Chicago public high schools *a* and *b* has the higher dropout rate. The cues included attendance rates of the students, socio-economic and ethnic compositions of the student bodies, sizes of the classes, parental participation rates, and the scores of the students on various standardized tests. The search rule of Take The Best first looks up the information concerning attendance rate. If school *a* has a high attendance rate, but school *b* does not, search is stopped and the inference is made that high school *a* will have the larger dropout rate. If the condition of the stopping rule is not met, then search is continued for the cue with the second highest validity, and so on. The Minimalist, in contrast, looks up cues in random order.

Czerlinski et al. (1999) compared the performance of the two heuristics with that of multiple regression, and with a simple tallying heuristic that does not calculate the beta weights but only uses unit weights of +1 or -1 (Dawes 1979). There were two tasks: data fitting and prediction. The difference between data fitting and prediction is of great importance and can be understood in analogy to hindsight versus foresight. In hindsight, one already knows what happened, and the task is to construct an explanation post hoc; in foresight, one does not know what will happen, and has to make a true prediction from our theory. Similarly, in data fitting, one already knows the data and fits the parameters of a model post hoc so that they achieve a maximum fit. Prediction, in contrast, is the true test of a theory of human judgment, its moment of truth.

In data fitting, each of the four models had the complete data of each of the twenty problems available, and tried to fit this data. In prediction, each model learned its parameters from half of the objects (training set), and was tested on the other half (test set), a procedure known as cross-validation. Multiple regression, for instance, estimated in the training set its beta weights, whereas Take The Best estimated the order of cues. Figure 4 shows that the two linear models used on average 7.7 cues (exhaustive search), whereas Take The Best and the Minimalist only looked up 2.4 and 2.2 cues, respectively (limited search). Both heuristics were quite frugal, but how accurate were they? The usual assumption is that frugality comes at the price of lower accuracy. Is that true?

A competition between heuristics and multiple regression (Czerlinski et al. 1999). Accuracy is measured for data fitting (hindsight) and prediction (foresight). Results are averaged across twenty different real-world prediction tasks (Table 1). For each of the twenty problems and each of the four strategies, the 95 percent confidence intervals were ≤ 0.42 percentage points. Take The Best and Minimalist are heuristics that practice one-reason decision making, tallying attends to all reasons but ignores weights, and multiple regression uses all information available, calculates its optimal weights, and combines all cues linearly.

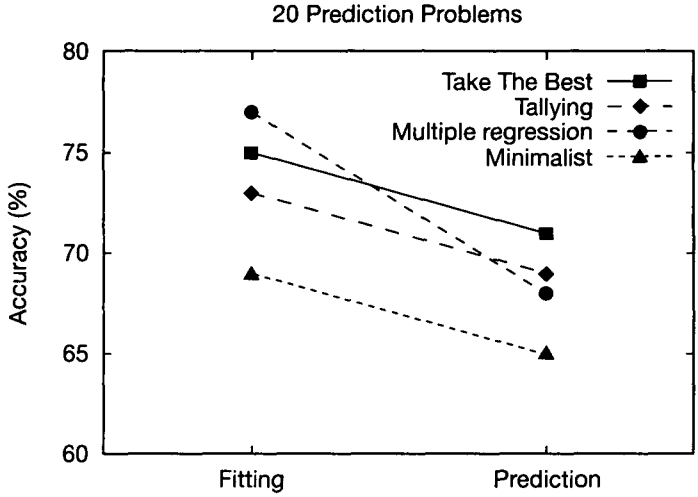

Figure 4

Figure 4 shows the results across all twenty problems. In data fitting (hindsight), multiple regression fitted the data best, followed by Take The Best and the unit-weight linear model. It is remarkable how close Take The Best came to multiple regression, and that it actually was more accurate than the tallying heuristic. In prediction (foresight), however, regression was no longer ahead. The predictive accuracy of tallying outperformed that of multiple regression despite its optimal beta weights. This apparently paradoxical effect—that the "optimal" weights (beta coefficients) are not better than "improper" unit weights of +1 or -1—has been reported earlier (e.g., Dawes 1979; Einhorn and Hogarth 1975). Yet since then, this result has been successfully repressed in the collective memory of decision theory (Hogarth 2005). On average, tallying made more accurate predictions for the twenty complex problems.

The Minimalist heuristic ignores information about the quantitative weights of cues (just as tallying does) and relies on one-reason decision making (just as Take The Best does). The performance of the Minimalist is substantially lower in both fitting and prediction, indicating that ignoring

both weights and cues is too much. For these twenty complex problems, ignoring either cues or their weights is beneficial, but not both.

We surely would be surprised to find that the frugal model produced results comparable to the high end model, the model with ostensibly "better inputs." But how should we react when we find that the frugal model produces results not merely adequate, but demonstrably superior? The performance of the Take the Best Model, in short, presents to us a profoundly counterintuitive result. The predictive accuracy of Take the Best was, on average, higher than that of multiple regression and the other competitors. This may appear paradoxical because multiple regression processed all the information that Take The Best did and more. More remarkable still, regression used complex computational algorithms that require the use of a computer, whereas Take The Best can be done mentally.

And yet, this is not to say that less is necessarily more. The Minimalist heuristic ignores information about the quantitative weights of cues (just as tallying does) and relies on one-reason decision making (just as Take The Best does). The performance of the Minimalist is substantially lower in both fitting and prediction, indicating that ignoring both weights and cues is too much. For these twenty complex problems, ignoring either cues or their weights is beneficial, but not both.

B. *Policy implications*

Knowing which strategy has the highest predictive accuracy can help policy-makers determine how to weigh the various factors in a complex policy problem. For example, Take The Best regarded attendance rate, writing test score, and social science test score as the most valid cues for high school dropout rates, in that order. In contrast, linear regression's top three predictors were percentage of Hispanic students, percentage of students with limited English, and percentage of Black students. The different models each employ a different strategy. Each strategy suggests a different course of action to the policy-maker seeking to lower dropout rates. While the Take The Best analysis would recommend getting students to attend class and teaching them the basics more thoroughly, a regression user would advocate helping minorities assimilate and supporting "English as a Second Language" (ESL) programs.

Again we face the question: "How can one reason be as good as or better than many?" Take The Best strikes a balance between the dangers of overfitting (that is, extracting too much information—noise—from the training set, as multiple regression did) and underfitting (extracting too little information, as the Minimalist did). Generally, a model *A* overfits the training data if there exists an alternative model *B*, such that the accuracy of *A* is higher than or equal to B in the training set, but lower in the test set. Before we take up the question of why and when one-reason decision making works in more detail, we will first send Take The Best back into the ring for

another round of tests. This time, the heuristic will meet the reputed world champions among complex strategies.

C. *Second Competition With Heavyweight Contestants*

The problem of overfitting is a fundamental concern for those interested in machine learning, where sophisticated algorithms are designed with a view to maximizing predictive accuracy (e.g., Mitchell 1997). Those interested in machine learning seek theories of how learning tasks can be accomplished, both from a psychological and an engineering perspective. Machine learning algorithms, in comparison to the competitors discussed above, are typically more complex: they are designed to achieve a high degree of predictive accuracy over a wider range of problems. The product of many years of research in computational learning, these complex algorithms have been tested and applied in the context of many different disciplines: artificial intelligence, evolutionary psychology, etc. These complex algorithms are, in short, true heavyweight competitors, durable and tested, with a strong predictive power. How, then, does the predictive accuracy of Take The Best compare to the predictive accuracy of some standard machine learning algorithms?

We compared Take The Best to three heavyweight competitors, all of which, in a number of guises, have been proposed as models of human decision making (e.g., Chater et al. 2003). The competitors are: (1) the decision tree induction algorithm C4.5 (Quinlan 1993), (2) a feed-forward neural network trained using backpropagation (we will refer to this model as BackProp; Rumelhart, McClelland, and the PDF Research Group 1986), and (3) the nearest neighbor decision rule (referred to below as 1-NN; Cover and Hart 1967).

C4.5. For example, C4.5 constructs a decision tree that represents a system of rules by first growing a tree using the information theoretic measure of entropy. It then prunes back this tree, which results in the rules becoming less specific, in an attempt to avoid overfitting noisy information.

D. *Neural Network*

A neural network addresses the same problem very differently. A neural network encodes an abstract representation of past solutions to a problem using a network of weighted connections between artificial neurons. Several thousand weight updates are required for the network to learn from the past examples, but once it has, trained networks are often very robust against overfitting as they rarely represent hard and fast rules.

E. *Nearest Neighbor Decision Rule*

The third competitor, the nearest neighbor decision rule (1-NN), is an example of an exemplar model in that it stores all presented training examples in a memory. When a prediction is required for a novel example of the problem (such as a previously unseen paired comparison), the most similar previously encountered example is retrieved from memory. Similar to solving a problem by analogy, the exemplar model uses a similar previously encountered example of the problem to propose a solution to the new problem.

A competition between Take The Best and three heavy-weight machine learning algorithms, C4.5, BackProp, and NN-1, over four diverse environments taken from the twenty shown in Table 1. (In the lower right panel, C4.5 and BackProp overlap.)

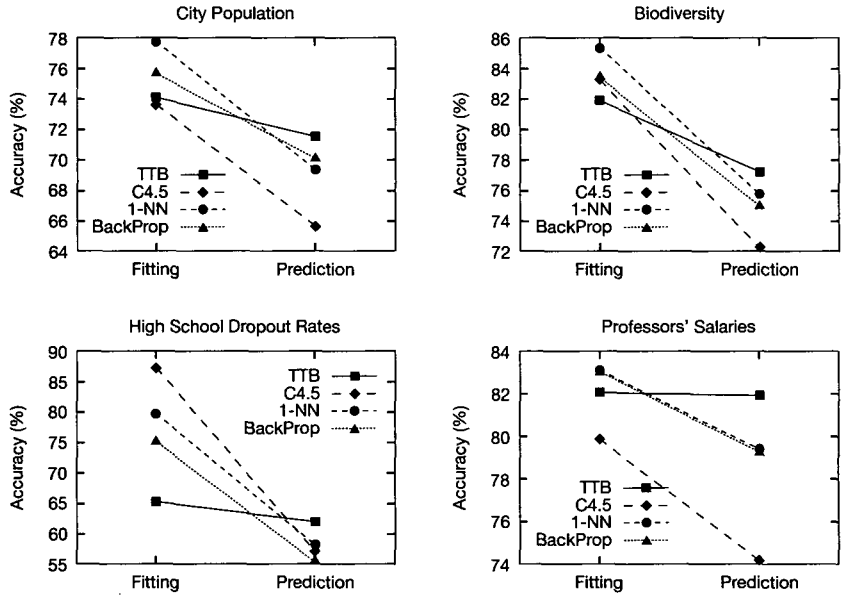

Figure 5

Figure 5 shows how well these three competitors performed in comparison to Take The Best in four tasks which represent the twenty environments contained in the four major complex problems previously discussed (i.e., city populations, biodiversity, high school dropout rates, and professors' salaries.) In all four complex problems, we observed a similar pattern. If the task was data fitting, the complex strategies were substantially better than Take The Best. Yet when these strategies were put to the more important task of prediction, their performance had a steep decline. That is, they

overfitted substantially, despite the various ways in which they have been designed to tackle this problem.

In contrast, Take The Best showed a relatively small propensity to overfit and achieved the highest proportion of correct predictions in each of the four complex problems. Predictive accuracy is not only the task faced by detectives, but also the relevant criterion with which to judge competing models of cognition (Pitt, Myung, and Zhang 2002). The fact that heuristics based on one reason can outperform the most sophisticated complex strategies is an important result that has not yet been demonstrated before.

This heavyweight competition offers further evidence that a heuristic that ignores information can achieve higher predictive accuracy than complex strategies that take much more information into account. Both the neural network model and the exemplar model use all cue values to inform their decision: they weigh and add each cue value to yield a final decision. Furthermore, the results in Figure 5 also show the decision tree algorithm C4.5 to be suffering from a tendency to overfit. This tells us that the decision trees constructed by C4.5 are focusing on irrelevant information. The trees are too specific in what they consider to be informative, which means that too many cues are being considered when making a prediction. The three sophisticated competitors may well identify useful patterns in the data, but this information is likely to be rendered unreliable because all three competitors also identify and act on irrelevant information. On the other hand, Take The Best, the simpler decision strategy, focuses on the useful information and acts on this information alone.

IV. ECOLOGICAL RATIONALITY

How can one reason be better than many? There are two answers. One is that the robustness of simple heuristics protects against overfitting. In a situation where there is uncertainty—and there is, for instance, a lot of uncertainty in predicting dropout rates—only part of the information obtainable today will be of predictive value for the future (Geman, Bienenstock, and Doursat 1992). If one records the temperature of each day of this year in a city, one can find a mathematical equation with sufficiently complex exponential terms that represents the jagged temperature curve almost perfectly.

However, this equation may not be the best predictor of next year's temperature; a simpler curve that ignores much of this year's measures may do better. In other words, only part of the information available in one situation generalizes to another. To make good inferences or predictions under uncertainty, *one has to ignore part of the information available.* The art is to find the part that generalizes. Since Take The Best relies only on the best cue, its chances of ignoring less reliable information are good.

Consider two diagnostic systems, one with more adjustable parameters (e.g., predictors) and one with only a subset of these, that is, with less.

Both systems fit a given body of data (e.g., a sample of patients) equally well. When making predictions about a new sample, the general result is that the simpler system will make more accurate predictions than the system with more parameters will. This form of less-is-more has been mathematically proven for specific situations (see Akaike 1973; Forster and Sober 1994; Geman et al. 1992). With a sufficient number of parameters, one can always fit a sample of observations. In general, the more unpredictable the situation is, the more information should be ignored. The art of good decision making is to focus on that part of the information that generalizes and to ignore the rest. This is what a good hunch does.

Heuristics thrive on particular structures of environments. The left side shows an environment that consists of cues whose weights are noncompensatory (e.g., 1/2, 1/4, 1/8, and so on). In this environment, no weighted linear model can achieve a higher fit than the faster and more frugal Take The Best. The right side shows a compensatory environment, where linear models will have the advantage (Martignon and Hoffrage 1999).

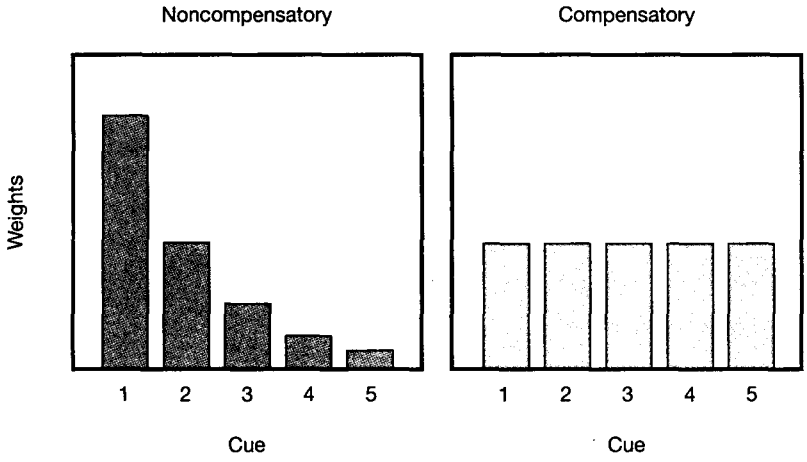

Figure 6

The second answer is the concept of *ecological rationality*, meaning that the match of a heuristic with the structure of environments limits both overfitting and underfitting. There are several structures that one-reason decision making can thrive on (Martignon and Hoffrage 2002). Recall that Take The Best is a noncompensatory strategy: it relies on one cue, and even if all other cues point in the opposite direction, they cannot compensate. One of several structures that Take The Best can exploit is noncompensatory information. Figure 6 shows examples for noncompensatory and compensatory environments. For instance, binary cues with weights that decrease exponentially, such as 1, 1/2, 1/4, 1/8, and so on, are noncompensa-

tory—the sum of all cue weights to the right of a cue can never be larger than its own weight. When the environment has the same noncompensatory structure as Take The Best, one can prove that no linear model, including multiple regression, can obtain a better fit than does the faster and more frugal Take The Best (Martignon and Hoffrage 2002). The right side of Figure 6 shows an environmental structure where Take The Best is less successful but which the tallying heuristic can exploit. In the extreme case shown with equal weights, it is obvious that no sophisticated linear model can outperform the simpler version.

V. THE ADAPTIVE TOOLBOX

Modern statistical technology has become an attractive alternative to intuitive judgment, and even informed intuitions are seen as inferior to complex computational strategies. Blind trust in complexity and distrust of informed intuition, however, needs to be replaced by a systematic study of the quality of both. The first step is to explicate the mechanisms that produce hunches. This is not easy, since people, including experts, do not always know how they arrive at a given judgment. We have argued that hunches, at least one class of them, can be explicated in terms of fast and frugal heuristics. That first step leads to the construction of models of heuristics and, in a second step, allows these to be tested in comparison with strategies that use more information and require more computation.

Contrary to the wisdom implicit in most of decision theory, the results we reported indicate that heuristics that base their decision (the hunch) on only one reason are often as accurate as, if not more so, than the most sophisticated statistical strategies available today. Note that our tests assumed heuristics used by people who are not totally ignorant but somewhat knowledgeable, that is, they had a learning phase to estimate what the most important cues are. Our tests did not, however, assume that people know how to weigh cues quantitatively, calculate the dependencies between cues, and integrate these into a final judgment. A number of studies have correctly concluded that people fail to do these computations, but incorrectly made the further inference that this is a sign of mental deficiency. As we have shown, a heuristic that ignores dependencies between cues can actually achieve better results than can strategies that are able to compute dependencies.

What are the consequences of this research for training experts in making good predictions? The way to go, in our view, is to systematically perform research on heuristics for the problem at hand, and to train experts in using, checking, and updating these. This is an alternative to both the traditional "rational choice" training in expected utility maximization, and the replacement of human experts by expensive statistical forecasting technology. In high-technology and high-stakes areas such as medical diagnostics, the systematic teaching of fast and frugal heuristics to doctors is already

under discussion (Elwyn et al 2001; Green and Mehr 1997; Naylor 2001). Given the time pressure and uncertainties of diagnosis, physicians in fact already rely on heuristics, but they do not always admit it, in fear of legal suits. As a result, physicians' hunches tend to be inconsistent, varying from physicians to physician and from teaching hospital to teaching hospital (Gigerenzer 2002). Likewise, police officers, fearful of judicial rebuke, conceal the nature of their thought processes—why they stopped one suspect and not another, why they frisked him, but not her. Their testimony in suppression herrings is larded with "reasons," many of which in fact played little or no role in their decision to make a stop and frisk. Heuristics need to be discussed and evaluated openly, just as complex computational strategies should be checked as to how successful they are. Decision theory and its applications need to move away from the emotional attachment to logical ideals of rationality, and to acquire a more competitive, empirical spirit.

Can hunches be rational? In this chapter we have argued that they can. We have reviewed evidence that heuristics that rely on one good reason can be as accurate as or better than a complex analysis that weighs the pros and cons of multiple factors. The wisdom of a hunch is precisely that it bets on what is important and ignore the rest. Oddly, the current American legal regime insists that police officers cite legions of "objective" data in a suppression hearing, when the fact is that, in many circumstances, an officer who acted on less information will achieve greater success than an officer who tabulated dozens of factors in his mind before acting, if he ever acted at all. We may even speculate that some of the most successful police officers are, to recall the terminology in the beginning of the chapter, "satsificers" when they stop a suspect (acting on little information). By the time they take the witness stand, however, they have will have remade themselves into "maximizers," detailing to an attentive, and usually credulous judge, the myriad of factors that supposedly spurred them to act.

REFERENCES

Akaike, H. 1973. Information theory and an extension of the maximum likelihood principle. In *2nd International Symposium on Information Theory*, ed. B. N. Petrov and F. Csáki, 267-81. Budapest: Akademiai Kiado.

Borges, B., D. G. Goldstein, A. Ortmann, and G. Gigerenzer. 1999. Can ignorance beat the stock market? In *Simple heuristics that make us smart*, G. Gigerenzer, P. M. Todd, and the ABC Research Group, 59-72. New York: Oxford University Press.

Bröder, A., and S. Schiffer. 2003. Take The Best versus simultaneous feature matching: probabilistic inferences from memory and effects of representation format. *Journal of Experimental Psychology: General* 132: 277-93.

Chater, N., M. Oaksford, R. Nakisa, and M. Redington. 2003. Fast, frugal, and rational: how rational norms explain behavior. *Organizational Behavior and Human Decision Processes* 90: 63-86.

Cover, T. M., and P. T. Hart. 1967. Nearest neighbor pattern classification. *IEEE Transactions on Information Theory* 13: 21-27.

Czerlinski, J., G. Gigerenzer, and D. G. Goldstein. 1999. How good are simple heuristics? In *Simple heuristics that make us smart*, G. Gigerenzer, P. M. Todd, and the ABC Research Group, 97-118. New York: Oxford University Press.

Dawes, R. M. 1979. The robust beauty of improper linear models in decision making. *American Psychologist* 34: 571-82.

Einhorn, H. J., and R. M. Hogarth. 1975. Unit weighting schemes for decision making. *Organizational Behavior and Human Performance* 13: 171-92.

Elman, J. L. 1993. Learning and development in neural networks: the importance of starting small. *Cognition* 48: 71-99.

Elwyn, G., A. Edwards, M. Eccles, and D. Rovner. 2001. Decision analysis in patient care. *The Lancet* 358: 571-74.

Forster, M., and E. Sober. 1994. How to tell when simpler, more unified, or less ad hoc theories will provide more accurate predictions. *British Journal of Philosophical Science* 45: 1-35.

Geman, S. E., E. Bienenstock, and R. Doursat. 1992. Neural networks and the bias/variance dilemma. *Neural Computation* 4: 1-58.

Gigerenzer, G. 1999. Betting on one good reason: the Take The Best heuristic. In *Simple heuristics that make us smart*, G. Gigerenzer, P. M. Todd, and the ABC Research Group, 75-95. New York: Oxford University Press.

—— 2002. *Calculated risks: how to know when numbers deceive you.* New York: Simon & Schuster. (United Kingdom version: *Reckoning with risk: learning to live with uncertainty*. London: Penguin Books.)

— 2004. Fast and frugal heuristics: the tools of bounded rationality. In *Blackwell handbook of judgment and decision making*, ed. D. J. Koehler and N. Harvey, 62-88. Oxford, United Kingdom: Blackwell.

— 2007. *Gut feelings: the intelligence of the unconscious*. New York: Viking. (United Kingdom version: London: Allen Lane/Penguin.)

Gigerenzer, G., and D. G. Goldstein. 1996. Reasoning the fast and frugal way: models of bounded rationality. *Psychological Review* 103: 684-704.

Gigerenzer, G., and R. Selten, eds. 2001. *Bounded rationality: the adaptive toolbox*. Cambridge, Massachusetts: MIT Press.

Gigerenzer, G., P. M. Todd, and the ABC Research Group. 1999. *Simple heuristics that make us smart*. New York: Oxford University Press.

Gode, D. K., and S. Sunder. 1993. Allocative efficiency of markets with zero-intelligence traders: market as a partial substitute for individual rationality. *Journal of Political Economy* 101: 119-37.

Green, L., and D. R. Mehr. 1997. What alters physicians' decisions to admit to the coronary care unit? *The Journal of Family Practice* 45: 219-26.

Hogarth, R. M. (In press.) The bumpy road to enlightenment: a history of some simple heuristics. In *Ecological rationality: intelligence in the world*, ed. G. Gigerenzer, P. M. Todd, and the ABC Research Group. New York: Oxford University Press.

Johnson, J. G., and M. Raab. 2003. Take the first: option generation and resulting choices. *Organizational Behavior and Human Decision Processes* 91: 215-29.

Levine, N. 2000. *CrimeStat: a spatial statistics program for the analysis of crime incident locations (Version 1.1)*. Washington, D.C.: Ned Levine & Associates/National Institute of Justice.

Martignon, L., and U. Hoffrage. 1999. Why does one-reason decision making work? A case study in ecological rationality. In *Simple heuristics that make us smart*, G. Gigerenzer, P. M. Todd, and the ABC Research Group, 119-40. New York: Oxford University Press.

— 2002. Fast, frugal and fit: Lexicographic heuristics for paired comparison. *Theory and Decision* 52: 29-71.

Mitchell, T. M. 1997. *Machine Learning*. New York: McGraw-Hill.

Naylor, C. D. 2001. Clinical decisions: from art to science and back again. *The Lancet* 358: 523-24.

Pitt, M. A., J. Myung, and S. Zhang. 2002. Toward a method of selecting among computational models of cognition. *Psychological Review* 109: 472-91.

Quinlan, J. R. 1993. *C4.5: programs for machine learning*. San Mateo, California: Morgan Kaufmann.

Rieskamp, J., and U. Hoffrage. 1999. When do people use simple heuristics and how can we tell? In *Simple heuristics that make us smart*, G. Gigerenzer, P. M. Todd, and the ABC Research Group, 141-68. New York: Oxford University Press.

Rumelhart, D. E., J. L. McClelland, and the PDP Research Group. 1986. *Parallel distributed processing: explorations in micro-structures of cognition*. Vols. 1 and 2. Cambridge, Massachusetts: MIT Press.

Schwartz, B., and A. Ward. 2002. Maximizing versus satisficing: happiness is a matter of choice. *Journal of Personality and Social Psychology* 83: 1178-97.

Serwe, S., and C. Frings. 2006. Who will win Wimbledon? The recognition heuristic in predicting sports events. *Journal of Behavioral Decision Making* 19 (4): 321-32.

Shaffer, D., and M. McBeath. 2002. Baseball outfielders maintain a linear optical trajectory when tracking uncatchable fly balls. *Journal of Experimental Psychology: Human Perception and Performance* 28: 335-48.

Shepard, R. 1964. Attention and the metric structure of the stimulus space. *Journal of Mathematical Psychology* 1: 54-87.

Simon, H. 1982. *Models of bounded rationality*. Cambridge, Massachusetts: MIT Press.

Smith, V. 2003. Constructivist and ecological rationality in economics. *The American Economic Review* 93: 465-508.

Snook, B., P. Taylor, and C. Bennell. 2004. Geographical profiling: the fast, frugal, and accurate way. *Applied Cognitive Psychology* 18: 105-21.

Snook, B., M. Zito, C. Bennell, and P. Taylor. 2005. On the complexity and accuracy of geographical profiling strategies. *Journal of Quantitative Criminology* 21: 1-25.

Törngren, G., and H. Montgomery. 2004. Worse than chance? Performance and confidence among professionals and laypeople in the stock market. *Journal of Behavioral Finance* 5: 148-53.

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THE COMMON SENSE OF PRACTICAL KNOWLEDGE

*Mark Blitz**

I intend to discuss several elements of practical knowledge that will help us understand the possibilities and limits of reasonable, articulable judgment in practical affairs. I also wish to consider, with more precision than we usually muster, phenomena such as context, experience, common sense, and judgment that make up the world of much practical activity. I will draw broadly on the view of politics, practical arts, and prudence that Plato and Aristotle outlined when they initiated political philosophy.[1] I will also draw on parts of Martin Heidegger's discussion in *Being and Time*.[2]

I am not a law professor, which means that I leave to others the application of what I say to the legal issues at hand, although I will reach a conclusion or two on my own. What I do offer in this Article are perspectives from my work on political philosophy and American public life, further developed in a recent book.[3]

I. SOME ELEMENTS OF PRACTICAL KNOWLEDGE

Police act practically, not theoretically;[4] they do not seek to know merely in order to know. Their investigations are tied to a purpose other than simply attaining knowledge, namely, preventing or punishing crime.[5] Because their actions and attempts to know serve a purpose, they are not random or pointless. However, their direction does not derive from following a methodology (as is often the case with theory), but from serving their ends. Their knowledge is what they require while actively trying to prevent

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1 *See* ARISTOTLE, THE NICOMACHEAN ETHICS (H. Rackham ed., Loeb Classical Library 1962); ARISTOTLE, POLITICS (H. Rackham ed., Loeb Classical Library 1959); PLATO, PLATO, VIII, STATESMAN. PHILEBUS. ION (H. N. Fowler and W. R. M. Lamb ed., Loeb Classical Library 1925).

2 MARTIN HEIDEGGER, BEING AND TIME. (TRANSLATED FROM SEIN UND ZEIT (John Macquarrie & Edward Robinson, trans., Harper & Row 1962).

3 MARK BLITZ, DUTY BOUND: RESPONSIBILITY AND AMERICAN PUBLIC LIFE (Rowman and Littlefield, 2005).

4 *See* Craig Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25 (2007) (describing the issue at hand of reasonable suspicion as a standard governing stops and frisks by police); Terry v. Ohio, 392 U.S. 1 (1968).

5 I will discuss later how this purpose is complicated and modified.

or detect crime. In general, the standard for practical knowledge is what succeeds, not what one proves methodologically.[6]

The usual policeman is not removed from action but is involved in hands-on efforts: he persuades, cajoles, commands, and forces. Reasonable knowledge, for him, means knowledge that is embedded in what he does to prevent crime. His understanding is not separate from his actions, but joined to them inextricably. For the police officer, knowing is not an extrinsic outcome, but intrinsic to the activity.

Knowledge that is embedded in action for a purpose is particular knowledge because the active situations and outcomes are individual and distinct from each other. In contrast, each instance of true proof in Euclid's geometry is identical.[7]

The degree of particularity of knowledge, however, varies with differences in practical affairs. Each performance of the same piece of music by a virtuoso is unique, yet also remarkably similar, for the same notes are struck and rhythms maintained. Acts of apprehending criminals also are alike, but their similarity is far from mathematical identity, and several steps away from those practical affairs with the greatest internal similarity. Reasonable knowledge connected to action by police involves much individual judgment: *this* suspect and *this* threat are variable.

Judgment of particulars embedded in action for a purpose does not observe or spectate, unlike theoretical understanding. Rather, it is involved in shaping the occurrence in which it is gaining and deploying understanding. The outcome is not given fully in advance, to be discussed or discovered only after the fact. The truth does not exist simply to be found, as with Euclid. Some practices, of course, are closer to theory than are others. In performance, for example, the score already is written, to be played, however beautifully and differently, only within narrow constraints. Police practice, however, is farther from theory: the outcome is unclear, still to be shaped, similar to other police encounters, but with significant uniqueness in the result and approach. The suspect will, possibly, cover up in changing ways, and an officer will use impermanent "knowledge" to uncover still more evidence. The police interview may be composed of significant lying or misdirection, not of reading lines in a completely set script.

II. PRACTICAL CERTAINTY

Practical knowing belongs to acting in a situation that does not stand still and, more, a situation in which one's knowledge affects the next steps in an action whose shape and conclusion are undetermined. This means

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[6] The craft involved in science belongs to practice, in at least some respects, but the evidence and arguments that prove points differ from craft.

[7] *See* Euclid, *Elements*.

that the degree of certainty one can expect practically is less than what one seeks theoretically, and is of a different sort.[8] Theoretical certainty is connected to events that are unchanging or identically repeatable and, therefore, identically observable. The guiding axioms and principles, accepted in advance, also are believed to hold true.[9] Practical "certainty," however, is weaker because, for the reasons I have given, neither events nor actors are fixed enough to see matters as unchangeable or identically repeatable.[10] Accordingly, a police officer can, at best, seek to know with a "certainty" appropriate to practical events whether a suspect is likely to be carrying illegal narcotics when the officer is in the act of stopping and possibly apprehending him.

III. CONTEXT

We should examine practical certainty more thoroughly in order to better understand it and practical activity generally. For, despite what I just said, few things are more certain than: a man is driving this blue car at this moment. Such knowledge is practical, not theoretical. How, then, can we grasp more subtly the certainty that may exist in practical affairs? It depends on several elements. One is that what we know is not always disputable. That this car is blue, and that drugs are or are not currently present in it, are impermanent truths, but rarely at a given time doubtful ones. However, that someone seems suspicious is both impermanent and unclear. Why? Because, when we judge suspicion, the acts of merely looking and seeing are not enough. We also must speak and listen. As soon as we speak and listen, however, natural and easy possibilities for fraud become apparent. Human lying is a stumbling block to practical certainty.

Ascertaining whether a set of actions is suspicious also is disputable because the actions need to be grouped and separated with a name—"suspicious"—and require a background or context to stand out.[11] Mute articulation is insufficient here, although it is usually good enough for knowing that a car is blue. When we need to articulate actions by our words their presence is more disputable than things that stand out on their own, because we easily misjudge terms and their application.[12] Moreover, context—purpose, recent actions, and the next set of expected actions—affects a judgment of whether behavior is suspicious or innocuous much

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

9 At the least, the principles hold true for the events in question within some broader premises.

10 Human freedom and complexity are involved, so neither the events nor the axioms hold simply.

11 *See Terry*, 392 U.S. at 20, 36, 38. *See generally* People v. Cowman, 223 Cal.App.2d 109 (1963).

12 *See* JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (Peter Nidditch ed., Oxford University Press, 1979) (1689).

more than it affects whether a car looks blue. The greater the importance of context, the less obviously certain are practical statements.

The significance of context is as true for understanding a bulge in the pocket as for properly comprehending shifty eyes and general nervousness. Shifty-eyed concern displayed by an owner at a horse race or a coach at a tennis match is the innocuous norm, as is the bulge in his pocket because of his fat wallet. But perhaps the race is fixed and the match being thrown. The shifty eyes then take on a different meaning. The dependence of much practical knowledge on context causes uncertainty, because context is easy to overlook. Context is easy to ignore or pretend to ignore by focusing merely on what is said or done, isolated from its surroundings. And, context is possible to shift, disguise, or dispute by claiming to mean one thing, not another, and, therefore, to be doing something different from what the same set of actions otherwise suggests. ("I'm not throwing the race," a jockey may claim, "I'm pulling my horse back so I can find an opening on the inside.")

Indeed, what seem to be more or less the same actions may legitimately serve several purposes, so that context can be especially difficult to grasp. Although the major purpose of police is to prevent or punish crime, they in fact have many ends—apprehension of particular suspects, general crime reduction, the safety of this particular neighborhood, and following proper procedure. These goals are not identical: at different times we emphasize some more than others. It is not always crystal clear whether a policeman is ignoring apparently suspicious behavior because it does not fit today's constitutional understanding of suspicious, because he is saving his resources for other crimes, or because he is lazy. Variability of purpose is one important element that allows contexts to be redefined so that otherwise culpable behavior is excusable. ("I wasn't hiding our bankruptcy from you during those surreptitious phone calls," one might say, "I was planning a surprise birthday party.") Nonetheless, we are usually correct about the context in which we find ourselves.

Context, as we said, often is connected to what happened recently or will happen soon. What, however, counts as recent or soon? In practical affairs, time is not a matter of neutral counting but, rather, the usual or appropriate span in which to achieve something.[13] Distance is not a matter of neutral miles but of effective space, so that the same distance is too far or too close for different activities and even within similar ones.[14] Three hundred feet from home plate is too far away to place a tarpaulin to cover a rainy infield and too far away to put the fences for Little League baseball. But, it is too close to the crowd for a jetliner flying by and too close for the center field fences in a major league ballpark. Nonetheless, in all these cases, it is three hundred feet. A black bag is good when a physician carries

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13 *See* HEIDEGGER, BEING AND TIME, PART 1, DIVISION TWO, VI.

14 *Id.*

it and bad when a terrorist does. A car sometimes goes too slow and sometimes too fast when it goes fifty miles per hour.

IV. SUBJECTIVITY AND OBJECTIVITY

The objective facts in a context, the times, distances, and matters that are not overly subject to disputable definitions and talk, sometimes are more useful than what is "subjective" for recognizing or acting within it. But, this is not always so. Recognizing the context often may center on what is subjective about it—a sense one has of the end, goal, or order before it is announced, or an implicit knitting together of clues to confirm, develop, or reach a new or deeper view. Seeing the bulge as a dangerous gun follows from first seeing the context and, sometimes, adjusting one's understanding of it. A whole such as a context cannot simply be built up from a series of separate, meaningless, objective factors, but involves grasping ends and intentions together with actions that look (in)appropriate.[15]

One fact or two, however, may sometimes be vital in setting a context concretely. Unlike most of us, police on the beat, especially when crime has been high or warnings are specific, presumably work within a general awareness that sees human ends as potentially nefarious and behavior as potentially criminal. Bulges are likely to look like guns, and help make concrete the general context of possible criminality. Even here, however, police first see things (such as the dangerous gun) within a whole that allows other facts to be meaningful. Practical action deals with particulars, but the particulars are inseparable from the generality that gives them meaning. The shape of this generality will always be difficult to describe in all its elements and interconnections before or after one acts. At the heart of the generality is an understanding of goals and motives that is largely subjective, and easy to lie about, or to mistake. In any event, if by objective one means the simply neutral scientific point of view, then, when we are acting, even objective facts are usually subjective, for, in practice, one rarely deals with, say, a nine by three inch metal cylinder, but, rather, with the wrong bulge, at the wrong time, at the wrong place, in the wrong pocket. This is why factors such as level of threat, prior history, and high-crime are important: they set the ground for how to look and see things as potentially dangerous and incriminating.[16]

We know implicitly the matters I am describing, but we do not usually articulate them. One reason is that they seem trivial, perhaps because we take them for granted. To surface what we take for granted is intellectually significant, however, especially as we advance from random observation to

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15 Moreover, if it could be, one could hardly do it in time to act within the context.

16 *See Terry*, 392 U.S. 1.

comprehensive understanding.[17] Another reason why we do not often articulate such matters is that only hard and numerical factors seem to be scientifically real: three hundred feet is objective, for example, while too close and too far seem merely emotional. A third reason is that theoretical talk about practical matters does not seem very useful unless one is a professor seeking tenure. However, theoretical talk becomes practically useful when it clarifies the place of ends and purposes in ordinary understanding, and modifies narrow and erroneous views that lead to questionable or harmful conclusions.

In general, practical knowledge is measured by utility and appropriateness for a purpose. Context is primarily the nexus of purpose and use. Purpose and use are often clear, but sometimes are easy to disguise or overlook: contexts shift and can be subject to human (mis)interpretation. Knowing and acting in contexts often involves shaping and achieving, not merely observing, usually looks down the road, rather than stares at the here and now, and rarely is scientifically objective. Too heavy, too fast, and too long mark the value of weights and measures, compared to neutral descriptions of five pounds, five minutes, and five miles, although these are all related. The subjective aspects of practical affairs are as crucial as the objective ones in understanding them, and although the certainty of practical knowledge varies, it falls short of what theory and science teach us to expect.

V. COMMON SENSE

The knitting together of subjective and objective intentions, purposes, and clues is one major element of what we call common sense. Common sense means: first, seeing contexts for what they are; second, seeing events and actions in them for what they are; third, knowing one's way about an activity; and, fourth, having this skill in the usual areas of everyday life. Knowing one's way about is primarily knowing how much weight to give to thoughts and actions—knowing how important they are, or knowing how seriously to take them. Exercising common sense is to grasp, on the spot and prior to calculation, the order in which events should occur, how likely it is that an event will occur, and to which factors one should pay attention. To know one's way around is to have judgment. It is to be able to see the usually important, and to grasp the actually important, from among the many possibilities.[18]

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[17] *See* ARISTOTLE, *supra* note 1, at Book One.

[18] "Hunches" cover much of the same area as judgment. When they are not used identically, hunches refer to the elements of judgment that are least amenable to training—those that rely most on experience or on factors such as talent that not even experience can provide sufficiently.

One can judge incorrectly, of course.[19] Moreover, because many practical affairs involve persuading, cajoling, convincing, and threatening, judgments of a practical affair can always shift. For example, a policeman may be required to exercise judgment when encountering a volatile suspect. How irrational is the suspect—how likely is he to take low reward, high-risk measures or high reward, high-risk measures? How is the suspect seeing the confrontation and expressing his character? Is he responding as a matter of pride and respect or as a matter of calculated interest?[20] What is the likely extent of the damage he might cause?

Judgment, therefore, not only involves seeing what is likely to happen and which trick from one's bag will work, but also involves discerning the immediate purpose of the actor. As we said, purpose affects, more than any other factor, the context that gives words, actions, and gestures their meaning.

Let me develop these points about judgment further. A tailor who makes a suit for a regular customer can have quite exact knowledge, because much uncertainty about ends and means is controlled. If he tries to make a sale to a new customer, however, he needs to "sense" or judge which fabric, in which style, will make the sale and preserve his reputation. He needs to follow the customer while also pushing and directing him. Mass marketers to anonymous consumers have an even more difficult task because the customers' actual purpose in purchasing (looks, trends, comfort) can be obscure.[21]

To take another example, clients hire Washington lobbyists because the clients know that something is missing in the charts that show how bills become laws, and in the descriptions of neutral bureaucratic decisions. But the clients do not know which levers to pull, and what precisely these levers control. If they do know, they see that these matters sometimes change quickly and unaccountably, and that they need to exercise continual judgment and attention about whom to push, how far, and at what times. The elements of friendship and persuasion, moreover, and even of threat, are significant politically. Yet, we need to activate friendship, persuasion, and threat peculiarly and differentially (and, therefore, unpredictably). Their effect depends on personality, effort, and links to other events and to one's own standing.[22] The difference between practical and merely academic knowledge in politics becomes evident when one recognizes that the true

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[19] Any context of knowledge allows better and worse, more or less knowledge, and having common sense judgment is key to being better, although it is hard to be perfect. We must recognize the possibility or inevitability of error in practical affairs.

[20] Underestimating or ignoring this difference is more likely to mislead a bourgeois lawyer, judge, or professor than a policeman.

[21] Advertising attempts to control matters by making a market for what one already has produced or plans to produce.

[22] Moreover, much is always up for grabs politically as soon as it has been decided, because legislation is not permanent, elections intervene, and bureaucratic personnel changes.

generalizations that one might make—such as the ones you have just read about lobbying—are far from being instructive enough actually to get the job done. Clients hire lobbyists because the clients do not know enough to succeed without them.

On the other hand, when we focus on these fluid factors in lobbying we can easily forget that formal or ordered elements exist that shape the political context: that some people, not others, are the elected legislators (so, one's uncertainty about which levers to pull is not infinite), that some agencies and committees, not others, are relevant for one's issue (so, one need not talk with everyone), and that one seeks a specific kind of outcome (a law, bureaucratic rule, or executive decision). The formal elements in a context enable us to recognize and learn it.

The procedures that one must employ to achieve a successful outcome differ in various practical contexts. The procedures can be more or less obvious (we might contrast, say, good weaving with beneficial lawmaking), more or less subject to choice (playing a piece's notes versus composing it), more or less open to cajoling, and more or less different in scope and precision (legislatively authorizing defense spending versus building a specific weapon). The more precise and exactly arranged the formal elements are, and the more the purpose is absorbed in following proper forms, the more securely are our actions directed. Think how easy policing would be if all that mattered were following correct procedures outlined in advance, with no attention given actually to preventing and reducing crime.

VI. TEACHING AND EXPERIENCE

My discussion may make practical knowledge seem mysterious or occult, but, in fact, much of it can be taught, although this is easier in some areas than others.[23] The more we can teach, the more we can articulate our actions after the fact, even if in time our actions become matters of sense, feel, instinct, and judgment. Much training consists of learning the technical skills to act within a context. Some training involves learning to deal persuasively within it, some involves learning what is important and likely to happen within it, and some consists of learning how to maneuver at its edges, where it incorporates other purposes and actions. In all of these cases, however, we must first learn to recognize and absorb the peculiar forms of the activity. We teach prospective attorneys to see familiar things

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[23] In many of Plato's dialogues, that something can be learned indicates that it is an art, and if you can display your teachers (and pupils), you presumably have the art. (See, for example, his dialogue on courage, the *Laches*.) A shoemaker or tailor can tell you precisely, step-by-step, how he makes shoes or suits (but, as we said, he will not be so precise in telling you how he successfully cajoles customers). Socrates often claims that virtue, too, is knowledge, but he also suggests paradoxically that it cannot be taught. (See the *Protagoras*, for example.)

in a new way, largely by stripping complexity from everyday matters and reducing them to particular elements. Only certain arguments are deemed relevant and valid; others are not. We must learn to follow new, and perhaps odd, procedures in order to act in the approved way. Normal terms become terms of art. In diplomacy, innocuous words have legal and political weight that most people do not recognize. Even if laymen recognize terms of art, they cannot use them quickly and securely.[24]

Varied ways of teaching indicate differences in the degree to which we can generalize particular pieces of practical knowledge. The more teachable skills are those that involve clearly defined success (e.g., a comfortable pair of shoes versus a beautiful poem), few elements of pure talent, and little unusual physical aptitude. They also are those where recognizing an example of something is easy, and where circumstances and materials are alike, i.e., where one faces few quirks. They are not terribly open to surprising interventions, and require little "in the moment concentration" to choose what to do when, i.e., they are activities where choice is neither difficult nor overly subject to emotion.[25]

The need for "experience" in practical affairs, such as policing, is connected to what is never fully teachable in them. This limit on what we can teach involves recognizing what actually counts as success or a good result here and now, i.e., what the audience, purchaser, or boss really wants no matter what he says. It also concerns skills that we exercise in the flesh and must improve in the hands, such as being a good carpenter or musician.[26] It involves, further, the concreteness of recognition, seeing, say, that this is the rare appearance of a symptom not usually caused by this disease, rather than merely knowing the possibility. And, in addition, it concerns knowing, say, that this gun has a tendency not to shoot exactly according to specifications. Useful experience in some of these areas is easy to gain. In others, such as recognition, experience is difficult to achieve because the skill is tied to judgment and to the subjective (verbal, holistic, and emotional) areas of common sense.

Factors that limit the degree to which we can teach practical knowledge are not restricted to the need for experience in the usual way we mean it. Rather, they involve persistence, seriousness, and persuasiveness. Speaking generally, these factors involve a link between knowing and do-

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[24] This is a reason that witnesses, diplomats, and politicians run special risks if they let people put words in their mouths.

[25] Compare, say, written briefs to oral arguments.

[26] Although experience is connected to activity in the hands, it differs from mere "practicing" because in actual events we are more concerned about success and failure and there is less opportunity to do things again. This concern makes doing the right thing, at the right time, more difficult than in "practicing," because it is hard to concentrate when the stakes are high and more difficult to choose what is relevant in the complex world of confusion than in the artificial world of practicing. For some who always practice inattentively, however, choice and concentration become easier when matters are real.

ing, where we cannot fully separate knowledge from immediate and changing events. Successful persuasion, for example, is achieved not only through a speaker's knowledge of his audience and the causes of their responses, but also by the speaker's presence and conviction. A persuasive speaker raises hopes and fears in his audience that may warp or enlarge their calculations about present goods; he is also able to recognize something for what it is, on time, when it counts. These skills or talents can be enhanced, but not guaranteed, through experience and education. Immediate or quick recognition and concentration is a form of intelligence, as are timely application of forceful persuasiveness (a good cop-bad cop instinct), and the talent actually to do what needs to be done. These abilities are not easily taught or described because only some of their elements can be generalized, and particular experience cannot make up all the deficiencies in talent and understanding.

VII. THE VARIETY OF PURPOSES

One apparent effect of my approach is to isolate practical activities from each other. But, in fact, the ends and means of practical activities usually are linked to other ends; practical actions rarely are closed or self-sufficient. A weaver who makes clothes or a pilot who carries passengers works for someone else. The goal that directs the production is not his own, but the employer's. The user, in turn, is directed by his understanding of best, proper, and just use, and by being allowed to acquire and employ only the resources that the community permits.

Aristotle's *Politics* and Plato's *Statesman* and *Republic* express these links most clearly.[27] As they see it, the founders of the community's way of life, its legislators, or, as we might say, the authors of its constitution ultimately validate and permit its ends and means. The founders form many activities into a whole. Resources are at the beck and call of the community in war, and actions need to observe rules of use, possession, and distribution. In our case, the weaver and pilot need to observe property law, criminal law, and regulations such as mandated education. Because of Americans' broad freedom in pursuits and satisfactions, however, the place of the whole in directing and organizing our choices is less visible to us than to the ancients. Nonetheless, our constitutional whole is significant in at least four ways. First, it is visible in the public opinion and embedded practices

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[27] *See* ARISTOTLE, *supra* note 1, at Book One.; PLATO, *supra* note 1, at STATESMAN. I ignore for this argument the cosmopolitan status of theoretical inquiry. I also set aside explicit reference to Heidegger's understanding of the horizon of the everyday world, to which I referred earlier, because it is less useful in understanding the substance of liberal democracy. Nonetheless, its concepts—averageness, the they, and so on—are important in understanding how trust and opinion work, and what belongs to the implicit preconceiving involved in more explicit understanding.

that push the talented young in certain directions, say, to business or law. Second, it is central in the kind of character that we encourage—classic virtues such as courage and moderation, and modern virtues such as considerateness, tolerance, industriousness, and responsibility that help us to use our rights effectively and leave room for others. Third, the constitutional whole is crucial in forming and enforcing the laws that organize and restrict acquisition and private choice. And, fourth, it channels what we say and how we say it, so that we conduct arguments in terms of equality and rights, where equality and license are the norm and inequality and control are looked on suspiciously and need to be justified.

These elements more or less subtly direct what we do, how we do it, and what we say about our actions and ourselves. Practical activities work within this larger context or way of life. It helps constitute the particular common sense horizons in terms of which we act and understand. It gives us a general sense of what others will and will not do, how far they will go, what we are permitted to say and not say, and how we ought to treat each other. It helps us understand, in advance, what to expect of others' behavior and interests and how our ends interconnect. It also gives us an implicit grasp of the dangers and difficulties involved in our dealings, and thus indicates when we should use explicit contracts and employ attorneys, when the behavior of those we meet is usual and unusual, when such behavior can be relied upon, or when it is worrisome.

We can join these elements and suggest that there is an implicit (and sometimes explicit) trustworthiness and reputation among those with whom we deal. This trustworthiness involves obeying the normal limits and showing the usual effort and responsibility on which we rely, as these take place in activities whose pursuit is structured by equal rights. This broader trustworthiness informs to a greater or lesser degree the particular contexts of action.

These larger considerations that shape practical affairs are not fixed. The range of ordinary expectations about how others will act and how it is permissible to react to them varies in two ways. One is where we become more explicit, as when we lay out expectations meticulously in contracts. The other is where we broaden (or narrow) what counts as fair, decent, responsible, and equal, most obviously when views change about who is an equally trustworthy, responsible, and just holder of certain rights. These variations affect the description of "reasonable" searches, "probable" cause and the like, because defined procedures replace what had been implicit. This replacement often occurs because the treatment that had arisen from implicit expectations violates a new understanding of who deserves equal treatment.[28] Equality makes us especially sensitive to using, or admitting that we use, racial, gender, or religious clues in our implicit expectations,

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[28] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

puts them out of bounds in explicit law, and shifts the limits of protecting the dignity and encouraging the responsibility of individuals.

Explicit measures and public embarrassment, however, cannot eliminate all the things we implicitly take for granted about our larger horizon. What we make explicit always depends on the context of expectation, of trust and opinion, from which it draws and to which it applies.[29] We cannot validate all this implicit knowledge quickly because the immediacy and fluidity of practical affairs make assumptions necessary. Indeed, the explicit legal, judicial, and constitutional deliberation that shapes the broad context of rights and equality also involves much that we must take for granted, without which we could not operate successfully in an atmosphere of persuasion and formal powers.

VIII. CONCLUSION

It is beyond my training and assignment to draw from this discussion suggestions about the current regime of reasonable, articulable suspicion. Such conclusions would depend on a broader analysis of appropriate standards for constitutional jurisprudence than I can outline in this Article.[30] I will, however, make several general points.

We have seen that objective facts in most practical circumstances are not objective in the neutral scientific sense, but are tied to their context. What counts in practice, and what one sees, is the bulge as a bulge and as a possible weapon, not a nine-inch, two-pound thing. The context, moreover, is structured primarily by purposes, intentions, and disputable terms such as "suspicious" that pick out actions and phenomena. Because these subjective matters are necessary for locating and specifying the practically objective ones, it is wrong to eliminate them as reasonable causes of actionable concern. Moreover, the fluid quality of persuasion in practical affairs makes it artificial to isolate a particular fact as the defining event for motivating action. Police are involved in calming, quieting, and bracing, for example, at the same time that they may be noticing signs of possible additional crimes. A police officer cannot reasonably be expected to follow a laboratory checklist. Furthermore, although practical action involves particular concerns, the meaning of practical situations depends on a context that is like other contexts, and the objective facts within it are similar to other facts. This particular dangerous gun is like other dangerous guns and,

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[29] Some of what is implicit seems silly to make explicit. ("I worried about the snarling dog, not the jittery goldfish in the bowl."). The boundaries are permeable, however: perhaps drugs have been dumped in the fish tank.

[30] *See* MARK BLITZ, DUTY BOUND: RESPONSIBILITY IN AMERICAN PUBLIC LIFE Chapter 4 (Rowman and Littlefield, 2005).

indeed, is dangerous because it is like these others. The split between acceptably particular and unacceptably general knowledge seems arbitrary.

Much can be stated after the fact about what made a situation look as it did, although at the time of action one sees the relevant elements all at once, not step by step. There is no reason that some clues cannot be surfaced *ex ante*, although they cannot be articulated at the time of action and neither their meaning nor the context in which they appear can be known with absolute certainty. So, whatever the limits, we can generalize and articulate much that is suspicious. Police are taught how to recognize and deal with threats and apprehensions, and how to acquire information from those they interview. Presumably, an officer can describe the scene to a sufficient extent that experienced supervisors can judge whether his instincts were plausible at the time. Most of what can be taught before the event can be articulated after the fact, even if it is not noted explicitly while it is happening.

The main issue is the conflicting goals we set for police officers. Were the only goal the apprehension of criminals, it would be easy to show justifiable suspicion that there are drugs or weapons stashed in certain cars at certain times. We require, however, that police apprehend criminals in the right way, without intrusive harassment. We do not serve our major political purpose, to secure rights, only by preventing and punishing crime. We encounter and intend to treat fellow citizens in a context of equality and trustworthiness.

How, then, can we distinguish justifiable suspicion from intrusive harassment? How do we distinguish common sense about likely perpetrators from invasive stereotyping? In some circumstances, in airports, for example, we can combine specific watch lists with general intrusiveness so that we do not single out racial, economic, religious, and political groups. Even there, however, we cannot always dissociate worrisome clues about a person's intentions from race and religion. Procedural nicety, moreover, although often a healthy restraint on action, does not guarantee substantive fairness. If insignificant procedural steps are made too important, the goal of preventing and punishing crime suffers irrationally. If we do not adjust permitted actions to the danger and immediate threat of possible crimes we are foolishly ignoring our common sense. Legislation should set standards for what can be permitted, and training and respect for experience should be used to implement these standards, without excessive judicial interference.

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AFFECT, REASON, AND MERE HUNCHES

Paul Slovic[*]

> [I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.
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> Terry v. Ohio, 392 U.S. 1, 27 (1968)

There is a growing respect for the wisdom of emotion and intuition that has emerged from recent research in cognitive psychology and neuroscience. This paper reviews a segment of this research dealing with intuitive feelings, which my colleagues and I call *affect*. The processing of affect by the human brain is indeed sophisticated, contributing greatly to rationality. Nevertheless, our intuitions can sometimes lead us astray. Better understanding of affective intuition is necessary to enable us to maximize the benefits and minimize the errors of this remarkable system.

I. BACKGROUND AND THEORY: THE IMPORTANCE OF AFFECT

A. *Two Modes of Thinking*

As used here, "affect" means the specific quality of "goodness" or "badness" (i) experienced as a feeling state (with or without consciousness) and (ii) demarcating a positive or negative quality of a stimulus. Affective responses occur rapidly and automatically—note how quickly you sense the feelings associated with the stimulus word "treasure" or the word "hate."

Affect plays a central role in what has come to be known as dual-process theories of thinking, knowing, and information processing (Chaiken and Trope 1999; Kahneman and Frederick 2002; Sloman 1996). As Epstein (1994) observed,

> There is no dearth of evidence in everyday life that people apprehend reality in two fundamentally different ways, one variously labeled intuitive, automatic, natural, nonverbal, narrative, and experiential, and the other analytical, deliberative, verbal, and rational (710).

Table 1, adapted from Kahneman (2003), further compares these two systems which Stanovich and West (2000) labeled *System 1* and *System 2*.

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One of the characteristics of the experiential system is its affective basis. Although analysis is certainly important in many decision-making circumstances, reliance on affect and emotion is a quicker, easier, and more efficient way to navigate in a complex, uncertain, and sometimes dangerous world. Many theorists have given affect a direct and primary role in motivating behavior (Barrett and Salovey 2002; Clark and Fiske 1982; Forgas 2000; LeDoux 1996; Mowrer 1960; Tomkins 1962, 1963; Zajonc 1980). Epstein's (1994) view on this is as follows:

> The experiential system is assumed to be intimately associated with the experience of affect, . . . which refer[s] to subtle feelings of which people are often unaware. When a person responds to an emotionally significant event . . . [t]he experiential system automatically searches its memory banks for related events, including their emotional accompaniments . . . . If the activated feelings are pleasant, they motivate actions and thoughts anticipated to reproduce the feelings. If the feelings are unpleasant, they motivate actions and thoughts anticipated to avoid the feelings (716).

Generally speaking, the two "fundamentally different ways" of apprehending reality correspond to the dichotomous approach to decision making reflected in Chief Justice Earl Warren's opinion in *Terry v. Ohio*. One way is "inchoate" and "hunching"; the other is methodical and deliberate. Warren unmistakably assumes that the two approaches are not only separable, but that the latter is preferable. A growing number of scientists find this to be a simplistic account of the matter; there are strong elements of rationality in both systems. It was the experiential system, after all, that enabled human beings to survive during their long period of evolution. Long before there were probability theory, risk assessment, and decision analysis, there were intuition, instinct, and gut feeling to tell us whether an animal was safe to approach or the water was safe to drink. As life became more complex and humans gained more control over their environment, analytical tools were invented to "boost" the rationality of our experiential thinking.

In his Nobel Prize address, Daniel Kahneman notes that the operating characteristics of System 1 are similar to those of human perceptual processes (Kahneman 2003). He further observes that one of the functions of System 2 is to monitor the quality of the intuitive impressions formed by System 1. Kahneman and Frederick (2002) suggest that this monitoring is typically rather lax and allows many intuitive judgments to be expressed in behavior, including some that are erroneous.

B. *Evaluability*

A particularly important idea to come from research on deal-process theories is the link between affect and the meaning and use of information as demonstrated by the concept of *evaluability* (Hsee 1996). In one study, Hsee asked subjects to assume they were music majors looking for a used music dictionary. In a joint-evaluation condition, participants were shown

two dictionaries, A and B (see Table 2), and asked how much they would be willing to pay for each. Willingness-to-pay was far higher for Dictionary B, presumably because of its greater number of entries. However, when one group of participants evaluated only A and another group evaluated only B, the mean willingness to pay was far higher for Dictionary A. Hsee explains this reversal by means of the *evaluability principle*. He argues that without a direct comparison, the number of entries is hard to evaluate because the evaluator does not have a precise notion of *how good* or *how bad* 10,000 (or 20,000) entries is. But the defects attribute is an *affective* variable that translates easily into a good/bad response. Most people find a defective dictionary unattractive and a like-new one attractive. Because of its affective clarity, this minor attribute carries more weight in the independent evaluation than the important attribute (entries). Under joint evaluation, the buyer can see that B is far superior on the more important attribute, number of entries. Thus, the number of entries becomes *evaluable* through the comparison process and is given its proper weighting.

In another study, Hsee asked people how much they would pay to take a planned flight on each of two airlines described in terms of number of safety violations during the past year and whether or not they served a hot meal on this flight. Willingness to pay was far higher for the airline with fewer safety violations. However, in a between-group design in which subjects judged only one airline, willingness to pay was higher for the airline that served the hot meal. One explanation for these results is that "number of safety violations" does not map precisely into an affective impression whereas hot meals do.

The evaluability principle thus asserts that the weight of a stimulus attribute in an evaluative judgment or choice is proportional to the ease or precision with which the value of that attribute (or a comparison on the attribute across alternatives) can be mapped into an affective impression. In other words, affect bestows meaning on information and affective meaning influences our ability to use judgment and decision making.

Hsee's work on evaluability is noteworthy because it shows that even important attributes may not be used by a decision-maker unless they can be translated precisely into an affective frame of reference. Some might attempt to downplay the significance of Hsee's findings by limiting them to unfamiliar attributes or measures (e.g., numbers of safety violations or dictionary entries). However, in other studies, Hsee finds evaluability effects with familiar attributes such as the amount of ice cream in a cup. Later in this paper, I will describe similar effects with other "thoroughly familiar" concepts such as amounts of money or human lives.

C. *The Dance of Affect and Reason*

We now recognize that the experiential mode of thinking and the analytical mode of thinking are continually active, interacting in what we have

characterized as "the dance of affect and reason" (Finucane, Peters, and Slovic 2003). While we may be able to "do the right thing" without analysis (e.g., dodge a falling object), it is unlikely that we can employ analytical thinking rationally without guidance from affect somewhere along the line. Affect is essential to rational action. As Damasio (1994) observes:

> The strategies of human reason probably did not develop, in either evolution or any single individual, without the guiding force of the mechanisms of biological regulation, of which emotion and feeling are notable expressions. Moreover, even after reasoning strategies become established . . . their effective deployment probably depends, to a considerable extent, on a continued ability to experience feelings (xii).

D. *The Affect Heuristic*

The feelings that become salient in a decision-making process depend on characteristics of the individual and the task as well as the interaction between them. Individuals differ in the way they react affectively and in their tendency to rely upon experiential thinking. (Gasper and Clore 1998; Peters and Slovic 2000; Peters et al. 2005). As will be shown later in this paper, tasks differ regarding the evaluability (relative affective salience) of information. These differences result in the affective qualities of a stimulus image being "mapped" or interpreted in diverse ways. The salient qualities of real or imagined stimuli then evoke images (perceptual and symbolic interpretations) that may be made up of both affective and instrumental dimensions.

The mapping of affective information determines the contribution stimulus images make to an individual's "affect pool." All of the images in people's minds are tagged or marked to varying degrees with affect. The affect pool contains all the positive and negative markers associated (consciously or unconsciously) with the images. The intensity of the markers varies with the images.

People consult or "sense" the affect pool in the decision-making process. Just as imaginability, memorability, and similarity serve as cues for probability judgments, (e.g., the availability and representativeness heuristics, Kahneman, Slovic, and Tversky 1982), affect may serve as a cue for many important judgments (including probability judgments). Using an overall, readily available affective impression can be easier and more efficient than weighing the pros and cons of various reasons or retrieving relevant examples from memory, especially when the required judgment or decision is complex or mental resources are limited. This characterization has led us to the use of affect being labeled a "heuristic" (Finucane et al. 2000; Kahneman 2003).

II. EMPIRICAL SUPPORT FOR THE AFFECT HEURISTIC

Support for the affect heuristic comes from many diverse empirical studies. Only a few of these studies, in particular those bearing on decision making in situations involving risk, will be reviewed here.

A. *Risk and Benefit Judgments*

Some of the earliest studies of risk perception found that although risk and benefit tend to be positively correlated in the world, they are negatively correlated in people's minds and in their judgments (Fischhoff et al. 1978). The significance of this finding for the affect heuristic was not realized until a study by Alhakami and Slovic (1994) found that the inverse relationship between perceived risk and perceived benefit of an activity (e.g., using pesticides) was linked to the strength of positive or negative affect associated with that activity as measured by rating the activity on bipolar scales such as *good/bad, nice/awful, dread/not dread,* and so forth. This result implies that people base their judgments of an activity or a technology not only on what they *think* about it but also on how they *feel* about it. If their feelings towards an activity are favorable, they are moved toward judging the risks as low and the benefits as high; if their feelings toward it are unfavorable, they tend to judge the opposite-high risk and low benefit. Much like Zajonc proposed, affect comes prior to (and even directs) judgments of risk and benefit under this model. This process, which has been called "the affect heuristic" (see Figure 1), suggests that if a general affective view guides perceptions of risk and benefit, providing information about benefit should change perception of risk and vice-versa (see Figure 2). For example, information stating that benefit is high for a technology such as nuclear power would lead to more positive overall affect which would, in turn, decrease perceived risk (Figure 2A).

Finucane et al. (2000) conducted this experiment, providing four different kinds of information designed to manipulate affect by increasing or decreasing perceived benefit or perceived risk for each of three technologies. The predictions were confirmed. Because by design there was no apparent logical relationship between the information provided and the nonmanipulated variable, these data support the theory that risk and benefit judgments are influenced, at least in part, by the overall affective evaluation (which was influenced by the information provided). Further support for the affect heuristic came from a second experiment by Finucane et al. finding that the inverse relationship between perceived risks and benefits increased greatly under time pressure, when opportunity for analytical deliberation was reduced. These two experiments are important because they demonstrate that affect influences judgment directly and is not simply a response to a prior analytical evaluation.

III. IDIOSYNCRASIES AND FAILURES OF EXPERIENTIAL THINKING

The sophisticated mechanisms of perception and intuition serve us well most of the time, but under some circumstances they mislead us seriously. Indeed, if it were always optimal to follow our intuitive instincts, then there would have been no need for System 2 thinking to have evolved and become so prominent in law and human affairs. For example, there is extensive literature on the powerful and systematic biases of perception known as visual illusions (Coren and Girgus 1978). One such illusion is shown in Figure 3, where the square marked A appears considerably darker in shading than the square marked B due to contrasts with the adjacent squares. But A and B are actually identical, as revealed by superimposing two vertical bars of uniform shading on the checkerboard (see Figure 3). Although square B still looks lighter than square A, one also sees that both A and B exactly match the uniform shading of the vertical bars. Like perception, intuitive judgments are also susceptible to systematic biases, as will be shown in the remainder of this section.

A. *Judgments of Probability, Relative Frequency, and Risk*

The affect heuristic shares much in common with the model of "risk as feelings" proposed by Loewenstein et al. (2001) and with dual-process theories put forth by Epstein (1994), Sloman (1996), and others. Epstein argues that individuals apprehend reality by two interactive, parallel processing systems. The *rational* system is a deliberative, analytical system that functions by way of established rules of logic and evidence (e.g., probability theory). The *experiential* system encodes reality in images, metaphors, and narratives to which affective feelings have become attached.

To demonstrate the influence of the experiential system, Denes-Raj and Epstein (1994) showed that when offered a chance to win $1.00 by drawing a red jelly bean from an urn, individuals often elected to draw from a bowl containing a greater absolute number but smaller proportion of red beans (e.g., 7 in 100) than from a bowl with fewer red beans but a better probability of winning (e.g., 1 in 10). These individuals reported that although they knew the probabilities were against them, they *felt* they had a better chance when there were more red beans.

We can characterize Epstein's subjects as following a mental strategy of "imaging the numerator" (i.e., the number of red beans) and neglecting the denominator (the number of beans in the bowl). Consistent with the affect heuristic, images of winning beans convey positive affect that motivates choice.

Although the jelly bean experiment may seem frivolous, imaging the numerator brings affect to bear on judgments in ways that can be quite consequential. Slovic, Monahan, and MacGregor (2000) demonstrated this in a

series of studies in which experienced forensic psychologists and psychiatrists were asked to judge the likelihood that a mental patient would commit an act of violence within six months after being discharged from the hospital. An important finding was that clinicians who were given another expert's assessment of a patient's risk of violence framed in terms of relative frequency (e.g., "Of every 100 patients similar to Mr. Jones, 10 are estimated to commit an act of violence to others") subsequently labeled Mr. Jones as more dangerous than did clinicians who were shown a statistically "equivalent" risk expressed as a probability (e.g., "Patients similar to Mr. Jones are estimated to have a 10% chance of committing an act of violence to others").

Not surprisingly, when clinicians were told that "20 out of every 100 patients similar to Mr. Jones are estimated to commit an act of violence," 41% would refuse to discharge the patient. But when another group of clinicians was given the risk as "patients similar to Mr. Jones are estimated to have a 20% chance of committing an act of violence," only 21% would refuse to discharge the patient.

Follow-up studies showed that representations of risk in the form of individual probabilities of 10% or 20% led to relatively benign images of one person, unlikely to harm anyone, whereas the "equivalent" frequentistic representations created frightening images of violent patients (e.g., "Some guy going crazy and killing someone"). These affect-laden images likely induced greater perceptions of risk in response to the relative-frequency frames. Similar strong reactions to relative frequencies have been found by Yamagishi (1997), whose subjects rated a disease that kills 1,286 people out of every 10,000 as more as more dangerous than one that kills 24.14% of the population.

Although frequency formats produce affect-laden imagery, story and narrative formats appear to do even better in that regard. Hendrickx, Vlek, and Oppewal (1989) found that warnings were more effective when, rather than being presented in terms of relative frequencies of harm, they were presented in the form of vivid, affect-laden scenarios and anecdotes. Sanfey and Hastie (1998) found that compared with respondents given information in bar graphs or data tables, respondents given narrative information more accurately estimated the performance of a set of marathon runners. Furthermore, Pennington and Hastie (1993) found that jurors construct narrative-like summations of trial evidence to help them process their judgments of guilt or innocence.

Perhaps the biases in probability and frequency judgment that have been attributed to the availability heuristic (Tversky and Kahneman 1973) may be due, at least in part, to affect. Availability may work not only through ease of recall or imaginability, but because remembered and imagined images come tagged with affect. For example, Lichtenstein et al. (1978) invoked availability to explain why judged frequencies of highly publicized causes of death (e.g., accidents, homicides, fires, tornadoes, and

cancer) were relatively overestimated and underpublicized causes (e.g., diabetes, stroke, asthma, tuberculosis) were underestimated. The highly publicized causes appear to be more affectively charged, that is, more sensational, and this may account both for their prominence in the media and their relatively overestimated frequencies.

B. *Proportion Dominance*

There appears to be one generic information format that is highly evaluable (e.g., highly affective), leading it to carry great weight in many judgment tasks. This is a representation characterizing an attribute as a proportion or percentage of something, or as a probability. The influence of probability, proportion, or percentage may be excessive, thus compromising rational evaluation.

Proportion or probability dominance was evident in an early study by Slovic and Lichtenstein (1968) that had people rate the attractiveness of various two-outcome gambles. Ratings of a gamble's attractiveness were determined much more strongly by the probabilities of winning and losing than by the monetary outcomes. This basic finding has been replicated many times (Goldstein and Einhorn 1987; Ordóñez and Benson 1997).

Slovic et al. (2002) tested the limits of this probability dominance by asking one group of subjects to rate the attractiveness of a simple gamble (7/36, win $9) on a 0-20 scale and asking a second group to rate a similar gamble with a small loss (7/36, win $9; 29/36, lose 5¢) on the same scale. The data were anomalous from the perspective of economic theory, but expected from the perspective of the affect heuristic. The mean response to the first gamble was 9.4. When a loss of 5¢ was added, the mean attractiveness jumped to 14.9 and there was almost no overlap between the distribution of responses around this mean and the responses for the group judging the gamble that had no loss.

Slovic also performed a conjoint analysis where each subject rated one of 16 gambles formed by crossing four levels of probability (7/36, 14/36, 21/36, 28/36) with four levels of payoff ($3, $6, $9, $12 in one study and $30, $60, $90, $120 in another). He found that, although subjects wanted to weigh probability and payoff relatively equally in judging attractiveness (and thought they had done so) the actual weighing was 5 to 16 times greater for probability than for payoff.

These curious findings can be explained by reference to the notion of affective mapping and evaluability. According to this view, a probability is evaluable in the sense that it maps relatively precisely onto the attractiveness scale. It has an upper and lower bound and people know where a given value falls within that range. In contrast, the mapping of a dollar outcome (e.g., $9) onto the scale is diffuse, reflecting a failure to know whether $9 is good or bad, attractive or unattractive. Thus, the impression formed by the gamble offering $9 to win with no losing payoff is domi-

nated by the rather unattractive impression produced by the 7/36 probability of winning. However, adding a very small loss to the payoff dimension puts the $9 payoff in perspective and thus gives it meaning. The combination of a possible $9 gain and a 5¢ loss is a *very attractive* win/lose ratio, leading to a relatively precise mapping onto the upper part of the scale. Whereas the imprecise mapping of the $9 carries little weight in the averaging process, the more precise and now favorable impression of ($9:-5¢) carries more weight, thus leading to an increase in the overall favorability of the gamble.

Proportion dominance surfaces in a powerful way in a very different context, the life-saving interventions studied by Baron (1997), Fetherstonhaugh et al. (1997), Friedrich et al. (1999), and Jenni and Loewenstein (1997). These studies found that, unless the number of lives saved is explicitly comparable from one intervention to another, evaluation is dominated by the proportion of lives saved (relative to the population at risk), rather than the actual number of lives saved.

The results of the lifesaving study by Fetherstonhaugh et al. (1997) are important because they imply that a specified number of human lives may not carry precise affective meaning, similar to the conclusion about stated payoffs (e.g., $9) in the gambling studies. The gamble studies suggested an analogous experiment with lifesaving. In the context of a decision pertaining to airport safety, my colleagues and I asked people to evaluate the attractiveness of purchasing new equipment for use in the event of a crash landing of an airliner. In one condition, subjects were told that this equipment affords a chance of saving 150 lives that would be in jeopardy in such an event. A second group of subjects were told that this equipment affords a chance of saving 98% of the 150 lives that would be in jeopardy. We predicted that, because saving 150 lives is diffusely good, hence only weakly evaluable, whereas saving 98% of something is clearly very good, support for purchasing this equipment would be much greater in the 98% condition. We predicted that other high percentages would also lead to greater support, even though the number of lives saved was fewer. The results, reported in Slovic et al. (2002) confirmed these predictions (See Figure 4).

These studies suggest that the affective system is designed to sensitize us to small changes in our environment (e.g., the difference between 0 and 1 deaths) at the cost of making us less able to appreciate and respond appropriately to larger changes further away from zero (e.g., the difference between 500 deaths and 600 deaths). Fetherstonhaugh et al. (1997) referred to this insensitivity as "psychophysical numbing." Nobel-Prize-winning biochemist Albert Szent-Gyorgi described another from of insensitivity associated with loss of life: "I am deeply moved if I see one man suffering and would risk my life for him. Then I talk impersonally about the possible pulverization of our big cities, with a hundred million dead. I am unable to multiply one man's suffering by a hundred million."

C. *Insensitivity to Probability*

Outcomes are not always affectively as vague as the quantities of money and lives that were dominated by proportion in the above experiments. When consequences carry sharp and strong affective meaning, as is the case with a lottery jackpot or cancer, the opposite phenomenon occurs—variation in probability often carries too little weight. As Loewenstein et al. (2001) observe, one's images and feelings toward winning the lottery are likely to be similar whether the probability of winning is one in 10 million or one in 10,000. They further note that responses to uncertain situations appear to have an all or none characteristic that is sensitive to the *possibility* rather than the *probability* of strong positive or negative consequences, causing very small probabilities to carry great weight. This they argue, helps explain many paradoxical findings such as the simultaneous prevalence of gambling and the purchasing of insurance. It also explains why societal concerns about hazards such as nuclear power and exposure to extremely small amounts of toxic chemicals fail to recede in response to information about the very small probabilities of the feared consequences from such hazards. Support for these arguments comes from Rottenstreich and Hsee (2001), who show that, if the potential outcome of a gamble is emotionally powerful, its attractiveness or unattractiveness is relatively insensitive to changes in probability as great as from .99 to .01.

D. *Background Mood*

Feelings contributed by background moods may also bias intuitive judgments of risk. Background mood, in the tense and fearful weeks following the terrorist acts on September 11, 2001, was invoked by Catalano et al. (2005) to explain a spike in police-initiated involuntary admissions to psychiatric emergency services following the attacks. Examinations by mental health professionals and voluntary admissions to emergency services did not increase during this period, an indication that the elevated response by law enforcement personnel was not due to an increase in the number of dangerous persons with mental illness. Consistent with the affect heuristic, Catalano et al. propose that the vivid imagery of September 11 and resulting feelings of anxiety led police to interpret the actions of people with mental disorders as more threatening than usual.

E. *Shooter Bias*

Under time pressure, behavior is governed by System 1, and thus is prone to influence by associations. If those associations are biased, the resulting actions may be regrettable. This may explain the erroneous shoot-

ing of Amadou Diallo, which garnered a great deal of media attention and triggered violent riots in February 1999. Four plain-clothes police officers were searching a Bronx, New York, neighborhood for a rape suspect. They saw Diallo, a 22-year-old West African immigrant, standing in the doorway of his apartment building. According to the police, Diallo resembled the suspect they were tracking. When they ordered him not to move, Diallo reached into his pants pocket. Believing he was reaching for a gun, the police fired a total of 41 shots, 19 of which hit and killed Diallo. Diallo was in fact unarmed. All four officers were later acquitted of any wrongdoing in the case.

Correll, Park, Judd, and Wittenbrink (2002) set out to study whether Diallo's death may have been influenced by a stereotypic association between African-Americans and violence. Using a simple videogame, they examined the effect of ethnicity on Shoot/Don't Shoot decisions. In the game, African-American or White targets, holding guns or other objects, appeared in complex backgrounds. Participants were told to "shoot" armed targets and to "not shoot" unarmed targets. They found that the decision to shoot an armed target is made more quickly and more accurately if that target is African-American than if he is White, whereas the decision not to shoot is made more quickly and more accurately if the target is White. Further studies showed that the magnitude of the "shooter bias" varied with perceptions of the cultural stereotype of African-Americans as dangerous. The study also revealed equivalent levels of bias among White and African-American participants in a community sample.

IV. MANAGING EMOTION, REASON, AND RISK

Now that we are beginning to understand the complex interplay between emotion, affect, and reason that is wired into the human brain and essential to rational behavior, the challenge before us is to think creatively about what this means for relying on intuition. On the one hand, how do we apply reason to temper the strong emotions engendered by some risk events? On the other hand, how do we infuse needed "doses of feeling" into circumstances where lack of experience may otherwise leave us too "coldly rational?" In this section I shall briefly describe research on several questions relevant to our understanding of the benefits and risks of intuition and hunches.

A. *Can Generation of Reasons Degrade Decision Quality?*

Kahneman (2003) argues that highly accessible impressions produced by the experiential system (System 1) control judgments and decisions, unless modified or overridden by the deliberate operations of the analytic system (System 2). This suggests that deliberative, reason-based analysis

generally will improve decision quality. This view also implies that errors of intuitive judgment involve failures of both systems—System 1, which generates the error, and System 2, which fails to detect and correct it. The corrective operations of System 2 may be impaired by time pressure (Finucane et al. 2000), by cognitive load (Shiv and Federikhan 1999; Gilbert 2002), by stress, by age, or by personal cognitive limitations (Peters et al. 2005).

But what happens when System 2 is brought into play early, as when an individual is asked to generate reasons to support a judgment or decision? Research by Wilson and colleagues demonstrates that, when affect is important, an attempt by the decision maker to provide reasons might produce an inferior decision by interfering with the affective "vibes" that subsequently determine the quality of experience with the consequences of the decision (Wilson and Schooler 1991; Wilson et al. 1993). For example, Wilson et al. found that people who gave numerous reasons for liking an art poster prior to choosing it were subsequently less satisfied with it than those who chose without explicitly considering reasons. Similar degrading of decision performance due to introspection is reported by Tordesillas and Chaiken (1999).

B. *Can Risk Analysis Benefit from Experiential Thinking?*

The answer to this question is almost certainly yes. Even such prototypical analytic exercises as proving a mathematical theorem or selecting a move in chess benefit from experiential guidance. The mathematician senses whether the proof "looks good" and the chess master gauges whether a contemplated move "feels right," based upon stored knowledge of a large number of winning patterns (de Groot 1978). Analysts attempting to build a model to solve a client's decision-making problem are instructed to rely upon the client's sense of unease about the results of the current model as a signal that further modeling may be needed (Phillips 1984). A striking example of failure because an analysis was devoid of feeling was perpetrated by Philip Morris. The company commissioned an analysis of the costs to the Czech government of treating diseased smokers. Employing a very narrow conception of costs, the analysis concluded that smokers benefited the government by dying young. The analysis created so much hostility that Philip Morris was forced to issue an apology (*New York Times*, July 27, 2001, C12). Another example of the need to respect "experiential wisdom" comes from the inquiry into the causes of the Columbia Space Shuttle disaster, which pointed to the failure of NASA's risk assessment protocols to give weight to the worries and hunches of personnel who had observed suspicious damage to heat-shielding tiles on previous flights. An article in *Aviation Week* asserted that lack of hard data to buttress "common sense analysis" prevented the consideration of such analysis in the risk-assessment process (Covault 2003). Elsewhere I have argued that risk

analysis needs to be sensitive to the "softer" values underlying such qualities as dread, equity, controllability, etc. that underlie people's concerns, as well as to degrees of ignorance or scientific uncertainty (Slovic 1987; 2000). A blueprint for doing this is sketched in the National Academy of Sciences report *Understanding Risk: Decision Making in a Democratic Society* (National Research Council 1996).

Someone once observed that, "statistics are human beings with the tears dried off." The studies of psychophysical numbing described above demonstrate the potential for neglect of statistical fatalities, thus raising the question, "how can we put the tears back on?" There are attempts to do this that may be instructive. Organizers of a rally designed to get Congress to do something about the 38,000 deaths a year from handguns piled 38,000 pairs of shoes in a mound in front of the Capitol. After September 11th, many newspapers published biographical sketches of the victims, a dozen or so each day until all had been featured. Writers and artists have long recognized the power of the written word to bring meaning to tragedy. *The Diary of Anne Frank* and Elie Weisel's *Night* certainly convey, in a powerful way, the meaning of the Holocaust statistic, "six million dead."

C. *How Can an Understanding of "Risk as Feeling" Help Us Cope With Threats from Terrorism?*

Research by Rottenstreich and Hsee (2001) demonstrates that events associated with strong feelings can overwhelm us even though their likelihood is remote. Because *risk as feeling* tends to overweigh frightening consequences, we need to invoke *risk as analysis* to give us perspective on the likelihood of such consequences. For example, when our feelings of fear move us to consider purchasing a handgun to protect against terrorists, our analytic selves should also heed the evidence showing that a gun fired in the home is 22 times more likely to harm oneself or a friend or family member than to harm an unknown, hostile intruder.

In some circumstances, risk as feeling may outperform risk as analysis. A case in point is a news story dated March 27, 2002, discussing the difficulty of screening 150,000 checked pieces of baggage at Los Angeles International Airport. The best analytic devices, utilizing x-rays, computers, and other modern tools, are slow and inaccurate. The solution—rely upon the noses of trained dogs.

Some species of trouble—such as terrorism—greatly strain the capacity of quantitative risk analysis. Our models of the hazard-generating process are too crude to permit precise and accurate predictions of where, when, and how the next attacks might unfold. What is the role of risk analysis when the stakes are high, the uncertainties are enormous, and time is precious? Is there a human equivalent of the dog's nose that can be put to good use in such circumstances, relying on instinctual processing of affec-

tive cues, using brain mechanisms honed through evolution, to enhance survival?

D. *How Can We Improve Our Intuitive Skills?*

Guidance regarding this last, critical question is provided by Hogarth (2001; 2005), who presents a framework for helping people develop their intuitive skills. Central to this development is the notion that our tacit, experiential system is constantly honing its responses based upon feedback from the environment. "Thus, selecting appropriate learning environments and monitoring the kinds of feedback that we receive must rank high on the conditions that foster the acquisition of good intuitions" (Hogarth 2005, 80). Hogarth also urges people to be more aware of how often they allow themselves to make decisions automatically as opposed to exercising greater cognitive control (System 2). Greater awareness of the dual nature of thought, he concludes, may lead to better use of our limited cognitive resources. As we gain a deeper understanding of intuitive judgment, we may also find ways to restructure the decision environment to correct for the biases we discover.

V. CONCLUSION

Contemplating the workings of the affect heuristic helps us appreciate neuroscientist Antonio Damasio's contention that rationality is not only a product of the analytical mind, but of the experiential mind as well (Damasio 1994). The perception and integration of affective feelings, within the experiential system, appear to be the kind of high-level maximization process postulated by economic theories since the days of Jeremy Bentham. These feelings form the neural and psychological substrate of what economists call "utility." In this sense, the affect heuristic and the feelings associated with intuitive judgments enable us to be rational actors in many important situations. But not in all situations. They work beautifully in situations where our intuitions are honed by experience. However, intuition, like perception, fails in a variety of circumstances that we are becoming better able to recognize and correct. Effective use of police officers' hunches depends upon the ability to discriminate the former situations from the latter—when, that is, a "mere hunch" is better than "specific articulable reasons."

REFERENCES

Alhakami, A. S., and P. Slovic. 1994. A psychological study of the inverse relationship between perceived risk and perceived benefit. *Risk Analysis* 14: 1085-96.

Baron, J. 1997. Confusion of relative and absolute risk in valuation. *Journal of Risk and Uncertainty* 14: 301-09.

Barrett, L. F., and P. Salovey. 2002. *The wisdom in feeling: psychological processes in emotional intelligence.* New York: The Guilford Press.

Catalano, R., E. Kessell, A. Christie, and J. Monahan. 2005. Involuntary examinations for danger to others in Florida following the attacks of September 11, 2001. *Psychiatric Services* 56: 858-62.

Chaiken, S., and Y. Trope, eds. 1999. *Dual-process theories in social psychology.* New York: The Guilford Press.

Clark, M. S., and S. T. Fiske, eds. 1982. *Affect and cognition.* Hillsdale, New Jersey: Lawrence Erlbaum Associates, Inc.

Coren, S., and J. S. Girgus. 1978. *Seeing is deceiving: the psychology of visual illusions.* Hillsdale, New Jersey: Lawrence Erlbaum Associates, Inc.

Correll, J., B. Park, C. M. Judd, and B. Wittenbrink. 2002. The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals. *Journal of Personality & Social Psychology* 83: 1314-29.

Covault, C. 2003. Echoes of Challenger. *Aviation Week and Space Technology* 158 (17): 29-31.

Damasio, A. 1994. *Descartes' error: emotions, reason, and the human brain.* New York: Avon Books.

de Groot, A. 1978. *Thought and choice in chess.* New York: Monton.

Denes-Raj, V., and S. Epstein. 1994. Conflict between intuitive and rational processing: when people behave against their better judgment. *Journal of Personality and Social Psychology* 66: 819-29.

Epstein, S. 1994. Integration of the cognitive and the psychodynamic unconscious. *American Psychologist* 49 (8): 709-24.

Fetherstonhaugh, D., P. Slovic, S. Johnson, and J. Friedrich. 1997. Insensitivity to the value of human life: a study of psychophysical numbing. *Journal of Risk and Uncertainty* 14 (3): 283-300.

Finucane, M. L., A. Alhakami, P. Slovic, and S. M. Johnson. 2000. The affect heuristic in judgments of risks and benefits. *Journal of Behavioral Decision Making* 13: 1-17.

Finucane, M. L., E. Peters, and P. Slovic. 2003. Judgment and decision making: the dance of affect and reason. In *Emerging perspectives on judgment and decision research,* ed. S. L. Schneider and J. Shanteau, 327-64. United Kingdom: Cambridge University Press.

Fischhoff, B., P. Slovic, S. Lichtenstein, S. Read, and B. Combs. 1978. How safe is safe enough? A psychometric study of attitudes toward technological risks and benefits. *Policy Sciences* 9: 127-52.

Forgas, J. P. 2000. Affect and information processing strategies: an interactive relationship. In *Feeling and thinking: the role of affect in social cognition*, ed. J. P. Forgas, 253-82. New York: Cambridge University Press.

Friedrich, J., P. Barnes, K. Chapin, I. Dawson, V. Garst, and D. Kerr. 1999. Psychophysical numbing: when lives are valued less as the lives at risk increase. *Journal of Consumer Psychology* 8: 277-99.

Gasper, K., and G. L. Clore. 1998. The persistent use of negative affect by anxious individuals to estimate risk. *Journal of Personality and Social Psychology* 74: 1350-63.

Gilbert, D. T. 2002. Inferential correction. In *Heuristics and biases: the psychology of intuitive judgment*, ed. T. Gilovich, D. Griffin, and D. Kahneman, 168-84. New York: Cambridge University Press.

Goldstein, W. M., and H. J. Einhorn. 1987. Expression theory and the preference reversal phenomena. *Psychological Review* 94 (2): 236-54.

Hendrickx, L., C. Vlek, and H. Oppewal. 1989. Relative importance of scenario information and frequency information in the judgment of risk. *Acta Psychologica* 72: 41-63.

Hogarth, R. 2005. Deciding analytically or trusting your intuition? The advantages and disadvantages of analytic and intuitive thought. In *The routines of decision making*, ed. T. Betsch and S. Haberstroh, 67-82. Mahwah, New Jersey: Erlbaum.

Hsee, C. K. 1996. The evaluability hypothesis: an explanation for preference reversals between joint and separate evaluations of alternatives. *Organizational Behavior and Human Decision Processes* 67: 247-57.

Jenni, K., and G. Loewenstein. 1997. Explaining the identifiable victim effect. *Journal of Risk and Uncertainty* 14: 235-57.

Kahneman, D. 2003. A perspective on judgment and choice: mapping bounded rationality. *American Psychologist* 58 (9): 697-720.

—— 2003. Maps of bounded rationality: psychology for behavior economics. *The American Economic Review* 93: 1449-75.

Kahneman, D., and S. Frederick. 2002. Representativeness revisited: attribute substitution in intuitive judgment. In *Heuristics and biases: the psychology of intuitive judgment*, ed. T. Gilovich, D. Griffin, and D. Kahneman, 49-81. New York: Cambridge University Press.

Kahneman, D., P. Slovic, and A. Tversky, eds. 1982. *Judgment under uncertainty: heuristics and biases*. New York: Cambridge University Press.

LeDoux, J., ed. 1996. *The emotional brain: the mysterious underpinnings of emotional life*. New York: Simon & Schuster.

Lichtenstein, S., P. Slovic, B. Fischhoff, M. Layman, and B. Combs. 1978. Judged frequency of lethal events. *Journal of Experimental Psychology: Human Learning and Memory* 4 (6): 551-78.

Loewenstein, G., E. Weber, C. Hsee, and N. Welch. 2001. Risk as feelings. *Psychological Bulletin* 127 (2): 267-86.

National Research Council. Committee on Risk Characterization. 1996. *Understanding risk: informing decisions in a democratic society.* Washington, D.C.: National Academy Press.

Mowrer, O. H. 1960. *Learning theory and behavior.* New York: Wiley.

Ordóñez, L. D., and L. Benson III. 1997. Decisions under time pressure: how time constraints affect risky decision making strategies. *Organizational Behavior and Human Decision Processes* 71: 121-40.

Pennington, N., and R. Hastie. 1993. A theory of explanation-based decision making. In *Decision making in action: models and methods*, ed. G. Klein, J. Orasano, R. Calderwood, and C. E. Zsambok, 188-204. Norwood, New Jersey: Ablex.

Peters, E., and P. Slovic. 2000. The springs of action: affective and analytical information processing in choice. *Personality and Social Psychology Bulletin* 26: 1465-75.

Peters, E., and D. Västfjäll. 2005. Affective processes in decision making by older adults. In *Papers from the workshop on decision making by older adults*, ed. National Research Council. Washington, D.C.: National Academy of Sciences. http://www7.nationalacademies.org/csbd/peters_paper.pdf (last visited Feb. 21, 2008).

Peters, E., D. Västfjäll, P. Slovic, C. K. Mertz, K. Mazzocco, and S. Dickert. 2006. Numeracy and decision making. *Psychological Science* 17: 407-13.

Phillips, L. D. 1984. A theory of requisite decision models. *Acta Psychologica* 56: 29-48.

Rottenstreich, Y., and C. Hsee. 2001. Money, kisses, and electric shocks: on the affective psychology of risk. *Psychological Science* 12: 185-90.

Sanfey, A., and R. Hastie. 1998. Does evidence presentation format affect judgment? An experimental evaluation of displays of data for judgments. *Psychological Science* 9: 99-103.

Shiv, B., and A. Fedorikhin. 1999. Heart and mind in conflict: the interplay of affect and cognition in consumer decision making. *Journal of Consumer Research* 26: 278-92.

Sloman, S. A. 1996. The empirical case for two systems of reasoning. *Psychological Bulletin* 119: 3-22.

Slovic, P. 1987. Perception of risk. *Science* 236: 280-85.

—— 2000. *The perception of risk.* London: Earthscan.

Slovic, P., and S. Lichtenstein. 1968. The importance of variance preferences in gambling decisions. *Journal of Experimental Psychology* 78: 646-54.

Slovic, P., M. Finucane, E. Peters, and D. G. MacGregor. 2002. The affect heuristic. In *Heuristics and biases: the psychology of intuitive judgment*, ed. T. Gilovich, D. Griffin, and D. Kahneman, 397-420. New York: Cambridge University Press.

Slovic, P., J. Monahan, and D. G. MacGregor. 2000. Violence risk assessment and risk communication: the effects of using actual cases, providing instructions, and employing probability vs. frequency formats. *Law and Human Behavior* 24 (3): 271-96.

Stanovich, K. E., and R. F. West. 2000. Individual differences in reasoning: implications for the rationality debate? *Behavioral and Brain Sciences* 23: 645-65.

Tomkins, S. S. 1962-1963. *Affect, imagery, consciousness.* Vols. 1 and 2. New York: Springer.

Tordesillas, R. S., and S. Chaiken. 1999. Thinking too much or too little? The effects of introspection on the decision-making process. *Personality and Social Psychology Bulletin* 25 (5): 623-29.

Tversky, A., and D. Kahneman. 1973. Availability: a heuristic for judging frequency and probability. *Cognitive Psychology* 5: 207-32.

Wilson, T. D., D. J. Lisle, J. W. Schooler, S. D. Hodges, K. J. Klaaren, and S. J. LaFleur. 1993. Introspecting about reasons can reduce post-choice satisfaction. *Personality and Social Psychology Bulletin* 19 (3): 331-39.

Wilson, T. D., and J. W. Schooler. 1991. Thinking too much: introspection can reduce the quality of preferences and decisions. *Journal of Personality and Social Psychology* 60 (2): 181-92.

Yamagishi, K. 1997. When a 12.86% mortality is more dangerous than 24.14%: implications for risk communication. *Applied Cognitive Psychology* 11: 495-506.

Zajonc, R. B. 1980. Feeling and thinking: preferences need no inferences. *American Psychologist* 35: 151-75.

Two Modes of Thinking: Comparison between Intuition and Reasoning[1]

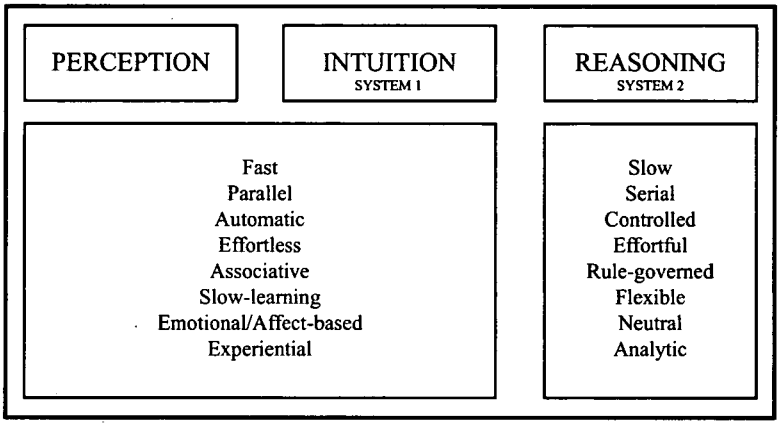

Table 1

Attributes of Two Dictionaries in Hsee's Study			
	Year of Publication	*Number of Entries*	*Any Defects?*
Dictionary A	1993	10,000	No, it is like new
Dictionary B	1993	20,000	Yes, the cover is torn; otherwise it is like new

Table 2

[1] Source: adopted from Kahneman (2003).

A model of the affect heuristic explaining the risk/benefit confounding observed by Alhakami and Slovic (1994). Judgments of risk and benefit are assumed to be derived by reference to an overall affective evaluation of the stimulus item.[2]

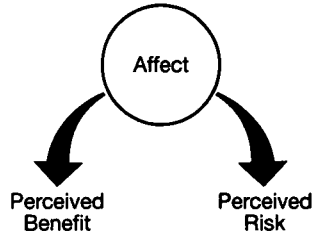

Figure 1

Model showing how information about benefit (A) or information about risk (B) could increase the positive affective evaluation of nuclear power and lead to inferences about risk and benefit that coincide affectively with the information given. Similarly, information could make the overall affective evaluation of nuclear power more negative as in (C) and (D), resulting in inferences about risk and benefit that are consistent with this more negative feeling.[3]

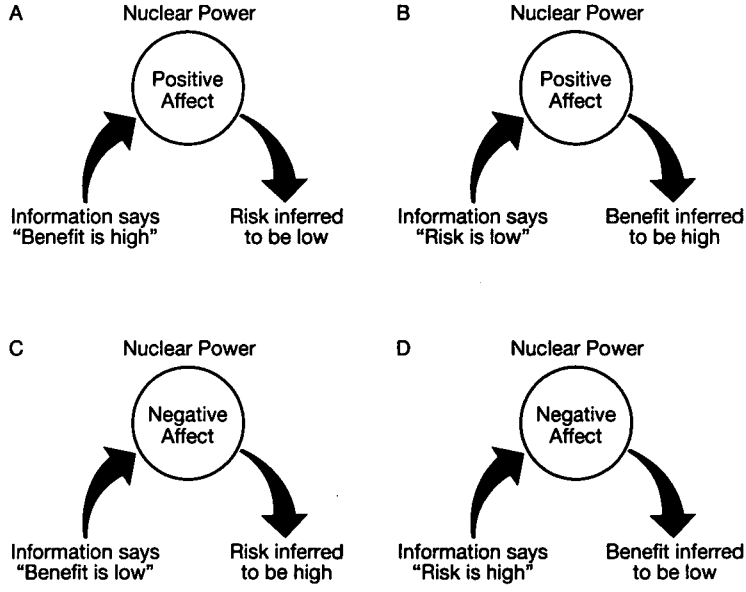

Figure 2

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2 Source: Finucane et al (2000).

3 Source: Finucane et al (2000).

Checkershadow Illusion[4]

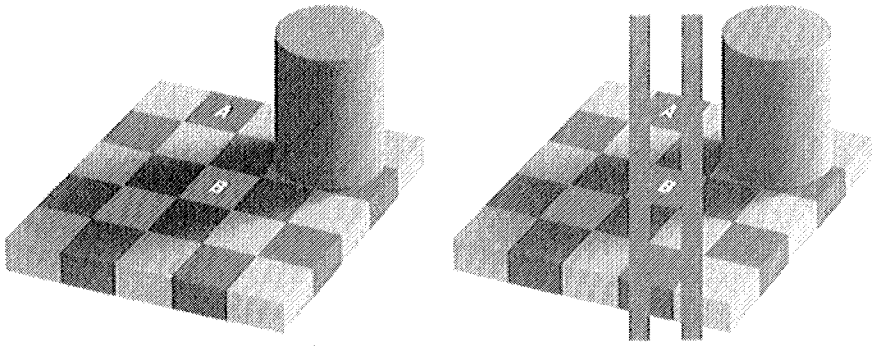

Figure 3

Airport Safety Study: Saving a Percentage of 150 Lives Receives Higher Support Ratings Than Does Saving 150 Lives[5]

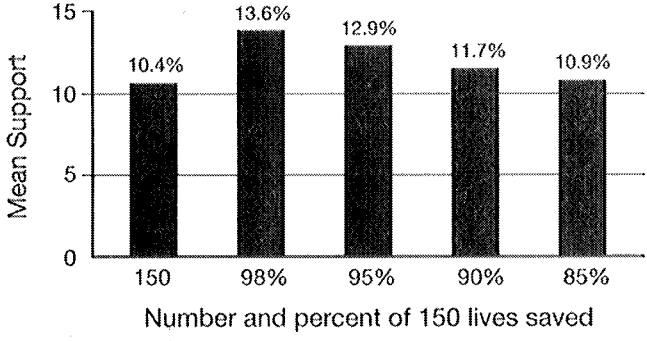

Figure 4

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[4] Source: Edward H. Adelson (1995).

[5] Note: Bars describe mean responses to the question, "How much would you support the proposed measure to purchase the new equipment?" The response scale ranged from 0 (would not support at all) to 20 (very strong support).

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BOOK REVIEW

Bernard E. Harcourt's *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (2006)*

*John W. Bagby**

In his 2006 book, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*,[1] Professor Bernard E. Harcourt[2] explores the deployment of actuarial methods into the public policy of sentencing and parole decisions. Harcourt's vast professional and scholarly experience in the criminal justice and human rights arenas provide a fitting background, enabling him to pose prescient questions about integrating social science research methods into the public policy of law enforcement, and then to urge caution in their wholesale adoption.

In the book, Harcourt expresses clear pessimism towards the biases inherent in deploying empirical and actuarial methods in criminal justice decisions concerning punishment, sentencing, and parole. His main thesis is a plea to reverse the incursion of many rational economic-based social scientific methods into realms increasingly receiving strict scrutiny because of their longstanding demographic sensitivities. In Part I, Harcourt meticulously chronicles the ascendance of actuarial methods in criminal justice, starting in the 1920s with Ernest W. Burgess's introduction of prediction instrumentation[3] through modern day profiling.[4] Part II discusses three risks of injustice stemming from the current ubiquity of actuarial methods.[5] In Part III, Harcourt proposes clinical methods and randomization techniques that largely do not rely on the vast accumulation of empirical criminal justice data.[6] The implications of resisting the pressures to record, analyze, and apply predictions using actuarial methods are potentially significant for criminal justice and for related fields, such as counter-terrorism.

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1 BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (Univ. Chic. Press, 2006).

2 Professor Harcourt is Julius Kreeger Professor of Law and Criminology at the University of Chicago Law School.

3 *Id.* at 47-76.

4 *Id.* at 77-107.

5 *Id.* at 109-92.

6 *Id.* at 193-239.

This book is a useful introduction to the complexity of assumptions and statistical techniques used in empirical social science methods, how these methods are utilized in making predictions, and how such predictions are currently used administratively in criminal justice. Harcourt urges that alternatives to the prevalent actuarial method would impose less social discrimination based on, race, color, religion, sex, national origin, age, etc.

Generally, the actuarial method is used to predict recidivism, thus affecting decisions to mete out punishment, adjust sentences, and set parole conditions. Actuarial prediction generally relies on demographic and personal history factors, which are then combined in various structured methods to score an individual's threat of recidivism. For example, crime statistics inform ratings using demographic variables such as age, gender, race and personality or character, individual diagnoses compute risk of recidivism suggested by characteristic disorders, and the individual's past behavior and experiences can reveal life history predictors.[7] Harcourt urges clinical prediction,[8] a method only minimally dependent on empirical social science evidence, yet heavily reliant on professional heuristics. Harcourt argues that this shift from actuarial to clinical methods will overcome the risk of three key injustices that arise within widespread deployment of actuarial methods.

In chapter 4, Harcourt explores the mathematics underlying the first risk from using actuarial methods: the problem of demographic groups' differential responsiveness, a form of varying elasticities of offending to policing by each demographic group.[9] Essentially, this is a form of signaling failure, in which the demographic groups targeted by variations in punishment stringency either fail to understand the signals from criminal justice administration or simply fail to heed those signals. Crime rates of such unresponsive demographic groups remain unreduced by criminal justice administration based on actuarial predictors. Harcourt also argues a significant externality may actually encourage other groups not targeted to use actuarially based systems to their advantage. As law enforcement becomes fixated on groups with higher offending rates it may ignore the crimes of the lower offending groups that are not sufficiently targeted.

In chapter 5, Harcourt describes the second actuarial method risk as a ratchet effect; essentially this is a self-fulfilling prophecy.[10] Under this theory, the broader population observes a persistent taint and consequently

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[7] *See* William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical—Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293 (1996) (documenting studies of actuarial method's success compared with clinical methods).

[8] *See, e.g.*, John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predator, and Patients*, 92 VA. L. REV. 391, 406-07 (2006).

[9] HARCOURT, *supra* note 1, at ch. 4.

[10] *Id.* at ch. 5.

shuns the whole population of the groups targeted by harsher punishment and parole. Outcomes dictated under actuarial methods therefore actually worsen the targeted groups' condition and fail to reduce criminal activity. This is a view consistent with the post-civil war reconstruction Amendments and the anti-discrimination laws that seek to limit stereotyping and profiling.[11] Harcourt suggests strict scrutiny is needed of actuarial method-based predictions when they lead to criminal justice decisions.

Chapter 6 frames the third actuarial method risk as a distortion of traditional justice. Harcourt frets that the objectivity of the contributing fields of psychology, sociology, and demography unwittingly bias society's conception of justice and its mechanism of distribution. Of course, the methodological coherence of these disciplines' empirical methods remains understandably detached from the fundamental, underlying public policy goals of criminology. However, Harcourt queries whether justice should be defined primarily by disciplines simply because they are diligent, exhibit internal technical coherence and deploy reliable metrics? Harcourt argues that actuarial prediction is the result of all these disciplinary advances and that the predominant criminal justice method, incapacitation, directly results from criminal justice outcomes based on recidivism measures because this system simplifies decision making. However, actuarially driven incapacitation may fail to adequately embrace other, often equally compelling goals of criminal justice: rehabilitation, moral repugnance, retribution, and deterrence. If social science cannot assist in fully developing criminal justice goals, is it not then just an interloper, lacking any central interest in the public policy heritage? If so, Harcourt asserts, the widespread adoption of the actuarial approach dupes a society blinded by the technical wizardry of actuarial methods in social science,[12] eventually losing its social justice compass.

Against Prediction raises important and broad questions, such as how public policy should be driven by scientific theory and scientific findings. This is the more general case of both Harcourt's second and third actuarial prediction risks and represents a fundamental conundrum for all forms of justice and public policy. The use of scientific evidence in litigation can provide a certain amount of insight. Significant public policy review has focused in recent years on the influence of scientific evidence and its sponsoring experts in litigation outcomes and how this influences public policy. Since the *Daubert/Joiner/Kumho* trilogy of cases,[13] litigation has assumed the task of integrating scientific, technical, and other specialized knowledge

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[11] *See, e.g.*, U.S. CONST. amend. XIV; Civil Rights Act of 1866, 14 Stat. 27; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[12] HARCOURT, *supra* note 1, at 70-76 (describing Salient Factor Scoring technique), 78-87 (discussing the Level of Services Inventory-Revised (LSI-R) risk-assessment instrument).

[13] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

into dispute resolution.[14] Also consider how public policy was influenced by scientific research and how adjustments were made to accommodate particular public policies in three controversies: the debate over the "callous" deployment of discounted cash flow damage computation techniques in the September 11th Victim Compensation Fund of 2001;[15] the stem-cell research debate; and the global warming debate. In each instance, policy adjustments were made despite the apparent certainty that science should trump public policy concerns because the latter lack convincing mathematical models or supporting empirical evidence.[16]

Harcourt's appendices are both extensive and replete with useful bibliographies, which include a chronological development of the parole prediction debate literature, mathematical proofs of the economic model underlying racial profiling. The endnotes supply significant pinpoint citations and textual asides that will be useful to many readers. However, the extensive endnotes in *Against Prediction* would be considerably more useful if relocated as footnotes. Additionally and perhaps unfortunately, the discourse methods of some social sciences exhibit insularity reinforced by stubborn adherence to this cumbersome endnote format dictated by traditional style standards.[17] Many traditional social science journals and book publishers

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[14] Considerable policy questions remain under *Daubert/Joiner/Kumho* about: (1) the definition of particular scientific disciplines or of any technical field of expertise; (2) how the public policy impact of scientific evidence should be used and how it should be limited; (3) how particular experts should be qualified as proponents of each discipline's knowledge; and (4) how hotly debated controversial science should be reconciled. Nevertheless, litigation would appear to blaze this trail; consider the noticeably more mysterious embedding of scientific theory and findings into executive policy, legislation, or regulation.

[15] The September 11th Victim Compensation Fund of 2001 is codified in Title IV of the Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-241 (codified as amended at 49 U.S.C. § 40101 (2006)). *See also* John W. Bagby, Norman G. Miller & Michael E. Solt, *The Determination of Compensatory Damages: A Valuation Framework*, 22 AM. BUS. L.J. 1, (1984) (developing a computational model to calculate compensatory damage value of lost human life in wrongful death tort cases while acknowledging how public policy adjustments are accommodated). Similarly, cross-cultural policy difficulties arose with the Bhopal victim compensation computation method because it was based on U.S. economic assumptions primarily focusing on earning power.

[16] *See, e.g.*, John Watson Bagby, *Regulatory Impact Analyses: Toward a Reasonable Economic Impact From Federal Regulations*, 19 NEW ENG. L. REV. 533 (1983-84) (arguing that cost-benefit/analysis in regulatory impact analyses risks biasing results towards the apparent precision of empirical and computational methods at the expense of public policy concerns when the latter is burdened by lacking well-developed computational methods developed by the scientific community).

[17] *See, e.g.*, THE CHICAGO MANUAL OF STYLE, ¶¶ 16.19, 16.59 (15th ed. 2003); THE PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION (Am. Psych. Assn. ed., 5th ed. 2001). There is an apparent reactive aversion to the citation conventions developed in law scholarship. The law domain emphasizes extensive pinpoint citations and frequent aside commentary generally located conveniently at the foot of the referring page.

eschew the asides that legal scholars and their readership find useful.[18] The scholarly communities of criminology and counter-terrorism policy are most susceptible to influence by *Against Prediction* as these are decidedly interdisciplinary fields arguably best served with flexible forms of discourse that should be accessible to a broad readership that likely includes legislators, regulators, judges and influential public policy wonks. As some social sciences liberalize their citation regimes, their readership and influence should broaden. Consider how economics and political science increasingly provide handy frequent pinpoint citations that encourage access to cited works and provide sufficient aside abundance to make their scholarship more transparent to other disciplines.[19] *Against Prediction* might benefit from such a citation revolution.

In sum, Harcourt's first actuarial method risk, that criminal justice signaling may fail to influence the groups targeted, is his weakest argument. Public policy should not surrender promising methods just because identified offenders may not heed signals or because overlooked offenders could game the system. Indeed, policy can address the inefficiencies of signaling in a myriad of ways without ignoring valid scientific findings. Furthermore, because gaming is common and foreseeable, it should always be specifically addressed. Harcourt's second argument, that some policies should be given preference over others here, the application of anti-discrimination policy occasionally trumping stereotyping—is well supported in anti-discrimination law. This is one of Harcourt's major contributions: policymakers should be constantly reminded that the deployment of social science methods, such as actuarial and profiling techniques, should be subjected to adjustments. Harcourt's third difficulty may be his strongest argument: integrating the findings from science into policy is almost never as simple as its proponents suggest. Perhaps too often policymakers, regulators, and judges prematurely accept broad generalizations of scientific findings, but these should be confined to their context until their implications are better understood.

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[18] Asides define esoteric terms and concepts, anticipate and address reader confusion, acknowledge controversies, and ventilate opposing theories or contrary evidence that would break up the flow in the main text. Legal scholars generally do not consider these as digressive sophistry or fallacious reasoning through diversion, nor is there hasty generalization that textual footnotes are unnecessary tangential pontification.

[19] Indeed, the proliferation of Internet citation holds promise for expanding the utility of scholarly discourse to and from outside each discipline's community. These are frequently hyper-linked, arguably inviting reader demand for instant access to cited works increasingly supplied by the burgeoning accessibility of cited scholarship online. Improved citation accessibility arguably improves scholarship productivity through more widespread dissemination and transfer that in turn increases the frequency and breadth of reader assessment, arguably to the benefit of each discipline's contributions to knowledge. This transparent citation likely exposes authors to more immediate and frequent critique because their assumptions, sources, and methods become more readily accessible.

There are substantial pressures to collect, archive, analyze, and inform decision making using actuarial data. Indeed, much decision making in business is based on only small statistical advantages of one decision-making method over another. Data profiling has become a ubiquitous and essential tool for many successful business models in marketing, employment screening, credit granting, and risk underwriting. The data brokerage and reporting industry is eager to expand and supply profiling reports to law enforcement and counter-terrorism information markets. Such data are valid indicators when used properly, but are also subject to forbidden use when seemingly useful demographic data would influence particular groups negatively (e.g., red-lining). In the profiling context, however, the alternative of discarding the actuarial baby with the negative externality bathwater is just too severe. Furthermore, while the argument in *Against Prediction* might appear confined to the criminal justice realm, its implications to shun actuarial approaches or other demographic profiling techniques could have a profound negative impact on counter-terrorism.[20]

The integration of scientific research findings into public policy is seldom straightforward and should be approached with care. The integration of social and natural sciences into policy has made great strides over the past fifteen to twenty years. *Against Prediction* may be interpreted to advocate a reversal of this trend towards the integration of the sciences. While this might satisfy some advocates, it could usher in uncertain criminal justice results and would likely retard the useful contribution of the sciences to public policy. A more useful reading of *Against Prediction* recognizes the challenges of integrating scientific evidence with other compelling public policies. Policymakers must balance the influence of contemporary scientific theory and evidence against those persuasive public policies that are not yet modeled with as much computational certainty.

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[20] HARCOURT, *supra* note 1, at 227-36 (providing a short coda on the actuarial risks in succumbing to the effectiveness promise of deploying actuarial and profiling techniques in counter-terrorism).

BOOK REVIEW

Bernard E. Harcourt's *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (2006)*

*Russell L. Jones**

Criminal profiling—the use of selected data to predict criminality—is a staple in the administration of criminal justice.[1] Scholars who support criminal profiles suggest that more streamlined suspect pools permit law enforcement officers to better target limited resources to protect the non-offending population.[2] In the administration of criminal justice, few will scorn profiles that have the ability to predict criminality; they are embraced as effective and efficient methods to detect and reduce crime. Profiles that are based on race or ethnicity are probably the only exceptions to this axiom.

In *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*,[3] Bernard E. Harcourt[4] challenges the idea that actuarial predictions used in profiling are an effective means to reduce crime, and suggests that they can be more harmful than useful. He argues that instead of embracing actuarial predictions in criminal law, the virtues of randomization should be celebrated.

Harcourt uses the actuarial label in a very narrow sense to describe the methods presently applied by criminal justice practitioners. He points out that actuarial predictions "use statistical methods—rather than clinical methods—on large datasets of criminal offending rates in order to determine the different levels of offending associated with a group or with one or more group traits and, on the basis of those correlations, to predict the past, present, or future criminal behavior of a particular person and to administer a criminal justice outcome for that individual."[5] Harcourt contends

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1 Brandon del Pozo, *Guided by Race: An Ethical and Policy Analysis of Racial Profiling in Law Enforcement Decisionmaking*, 1 QUEENSLAND U. TECH. L. & JUST. 266, 272 (2001).

2 *Id.*

3 BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (University of Chicago Press 2007).

4 Julius Kreeger Professor of Law and Criminology at the University of Chicago Law School and Director of the Center for Studies in Criminal Justice.

5 HARCOURT, *supra* note 3, at 16.

that the use of actuarial predictions in criminal law in this narrow context produces "hidden distortions with significant costs for society."[6]

One of the strongest arguments for the use of actuarial methods is the decrease in offending rates among the higher-offending group and the increase in efficiency of crime detection. Harcourt suggests that this is misleading, stating that these outcomes depend on the "relative elasticity of the offending to policing of the two groups."[7] The two groups referred to are the targeted or offending group and the non-targeted or non-offending group and, according to Harcourt, "The elasticity of offending to policing is the degree to which changes in policing affect changes in offending."[8] That is, to what degree does increased or decreased policing of a particular group change its rate of offending? If the targeted group responds as expected and its offending rate is reduced, comparative elasticity of the two groups must be computed. Because the non-targeted group feels immune to police scrutiny, the change in that group's offending rate—its elasticity to reduced policing—increases.[9] The non-targeted group's reduced elasticity to policing may minimize any gain in the reduced offending rate of the targeted group. Thus, the actuarial method's ability to reduce crime is questionable.

Assume that the targeted group has a lower elasticity of offending to policing, i.e., they are less responsive to policing than other groups. Targeting this group for enforcement efforts will also increase the amount of crime in society as a whole because the increase of crime by the non-targeted group will exceed the decrease in crime by the targeted group.[10] Harcourt argues, "In raw numbers, the effect of the profiling will be greater on the more elastic non-profiled and smaller on the less elastic profiled."[11] For these reasons, Harcourt concludes that profiling predictions are more appropriate to suggest areas where law enforcement should apply its resources for immediate short-term effect. However, long-term crime reduction eludes profiling.

Actuarial methods have been used to determine who should be incarcerated and for what duration. Harcourt contends that incarcerating certain targeted groups for longer sentences will have a nominal effect on reducing crime and that the method distorts the carceral population, arguing that "[o]rdinary incapacitation effects are likely to be relatively small. Generally, they will be washed out by the effect of any change in offending: there is no incapacitation effect if you imprison a recidivist versus an ordinary citizen once the rates of offending have equalized."[12]

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6 *Id.* at 21.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 HARCOURT, *supra* note 3, at 21

12 *Id.* at 28.

Harcourt states that incarceration that focuses more on one group will have a "ratchet effect," and asserts, "The use of accurate prediction instruments will have a distortive effect on the targeted population, a distortion that ultimately operates as a ratchet."[13] When samples are taken from a higher-offending population, instead of sampling randomly, the results are likely skewed, because the ratchet effect disproportionately distributes criminality on the targeted or profiled population. The disproportionate distribution of criminality "reduces work opportunities, breaks down families and communities, and disrupts education. It contributes to the exaggerated general perception of the criminality of the targeted group in the public imagination and among law enforcement officers."[14] Hence the targeted group's ability to obtain employment or pursue educational opportunities is undermined. Further, disaffected members of the profiled group may have a greater disregard of the criminal law because of perceived or real prejudice.

The ratchet effect places both the profiled group and the criminal justice system in a "lose-lose" situation. The profiled group believes, due to past experiences with police, that it will be targeted regardless of current behavior of individual's in the group. Further, the lack of educational and job opportunities forces its members to engage in crime in order to survive in American society. Therefore, the group's elasticity to policing is very low. Instead of overall crime decreasing with increased policing of the high offending group, the ratchet effect causes crime rates to increase. "The ratchet effect is most clearly evident in the context of racial profiling."[15]

The ratchet is also noticeable in punishment and sentencing matters. Recidivists are disproportionately denied parole or sentenced under enhanced statutes and are therefore disproportionately represented in prisons. The result is "a powerful symbolic message that turns convicts into even worse offenders."[16]

Harcourt's final critique of actuarial methods is that they have begun to shape America's conception of just punishment. He declares, "[W]e have an intuitive but deep sense that it is just to determine punishment largely on the basis of an actuarial risk assessment."[17] The prediction of future criminality is associated with punishment. Harcourt believes that incapacitation grew with the use of actuarial methods to predict criminality. The American criminal justice system is a slave to technology that suggests that just punishment is related primarily to the statistical probability of re-offending.

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13 *Id.*

14 *Id.* at 29.

15 *Id.* at 30.

16 HARCOURT, *supra* note 3, at 30.

17 *Id.* at 31.

In the first part of the book, Harcourt explores the rise of the actuarial paradigm. He dates the birth of actuarial in American criminal justice to 1933. That year, Ferris F. Luane, Ph.D., assumed the newly created post of Sociologist and Actuary at the Illinois State Penitentiary in Joliet. He would be the first to officially implement the "Burgess method" of parole prediction. The Burgess method was developed in 1927 and 1928 when Ernest W. Burgess, a noted University of Chicago sociologist, refined a study done by Sam B. Warner. In 1923, Warner published a study on the factors used to determine parole at a Massachusetts Reformatory and their correlation with success on parole. Warner eyeballed sixty-six background characteristics, but he used no statistical tests to reach his conclusions.

Burgess recommended that the Illinois parole board create a multifactor test to determine the likelihood of parole success. After considering Warner's study, Burgess created a twenty-one-factor test to grade inmates and used an actuarial table to predict success expectancy. This was the first attempt to use actuarial methods to predict a prisoner's success on parole. When Ferris F. Luane was hired as sociologist and actuary at the Illinois State Penitentiary at Joliet he used Burgess' actuarial method to prepare a report that predicted the likelihood of success on parole.

The Luane report sparked a debate about the use of actuarial methods to predict parole and other criminal justice issues. Several academic papers that both criticized and lauded Burgess' methods were written on the use of actuary models to predict parole success. Despite the debate and research on the Burgess method, the early success of the use of actuarial models to predict parole was nil. By 1961, parole boards in only two states were using predictive methods.

However, in the 1970s, the actuarial approach became more widely accepted. Peter B. Hoffman, director of research, and James L. Beck, a research assistant at the United States Board of Parole developed the Salient Factor Score as an aid in predicting parole performance. The instrument was developed from the Burgess model, but it reduced the number of factors from twenty-one to nine and later to seven, and focused heavily on prior criminal history. Harcourt acknowledges this and notes that "the actuarial models developed in the parole context evolved over the course of the twentieth century, focusing on a narrower set of factors and especially on the prior criminal history of the incarcerated."[18]

The rise of parole-prediction instruments prompted the increase of actuarial methods in a number of other criminal justice areas, in particular the development of selective incapacitation. According to Harcourt, "Selective incapacitation is based on the central insight that a small subset of repeat offenders is responsible for the majority of crime and that incapacitating that small group would have exponential benefits for the overall crime

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[18] *Id.* at 72.

rate."[19] The concept uses prior criminal history as a proxy for future dangerousness. Habitual-offender statutes, known in several states as "three-strikes" statutes, grew out of the theory of selective incapacitation. The use of criminal history in the actuarial model to selectively incarcerate resulted in increased prison sentences.

In the second part of the book, Harcourt critiques actuarial methods. He surmises that the rise of actuarial methods has been associated with the loss of individualization in the criminal justice system. Harcourt examines racial profiling to show the fallacy in actuarial methods. Citing Gary Becker's work on "tastes for discrimination," Harcourt demonstrates through statistical paradigms how racist police officers use actuarial methods to determine who to stop and search. He suggests that officers that have a taste for discrimination will continue to stop and search minorities beyond the point where black and white hit-rates for crime equalizes. Even if the assumption that one racial group offends more than members of another racial group is not spurious, continuous investigation of the targeted group beyond the point where the hit-rates equalize will increase the crime rate in society. Further, the relationship between the comparative elasticity of offending to policing of non-minority and minority groups, and the comparative offending rates (i.e., the total increase in absolute numbers of offending by non-minorities because of the lack of policing), may outweigh the total decrease of minority offending in absolute numbers. Thus, the crime rate does not decrease and police do not receive a greater return for their efforts. Harcourt concludes that unless we know more about the relative elasticities and offending rates of different groups in society before engaging in actuarial policing, criminal profiling may be counterproductive to crime reduction.

The use of actuarial models also has a social cost. It appends certain criminal activity to certain racial groups and thereby reinforces a public perception that certain groups are more prone to crime than others. Consequently, the actuarial approach polarizes social and political divisions, rather than defusing them. Harcourt suggests, "[A]ctuarial methods should not reshape or distort our conceptions of justice, nor should they indirectly—by accident—discourage difference and stifle eccentricity."[20]

In the third part of the book, Harcourt makes an argument for randomization or individualization in punishing and policing. He believes that randomization is the only way to achieve a carceral population that reflects the offending population. Harcourt defines randomization as a form of random sampling that neutralizes the perverse effects of prediction.[21] This means eliminating the effect of predictions of future dangerousness in sentencing and focusing on individual concepts, such as the harm associated

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19 *Id.* at 88.

20 *Id.* at 191.

21 *Id.* at 238.

with the offense or whether the sentence will achieve it purported goal. In criminal investigations, randomization means randomly sampling racial and ethnic groups equally rather than on a spurious assumption of offending. Harcourt's main proposition is that the virtues of randomization exceed the harm caused by actuarial methods. He states, "For it is only by randomizing law enforcement that we will promote the central moral intuition of just punishment, namely, that everyone who commits a crime should have the same likelihood of being apprehended, regardless of race, ethnicity, gender, class or any other irrelevant group trait. Randomization is the only way to achieve a carceral population that reflects the offending population. It also avoids the risk that profiling will ultimately increase rather than decrease the overall amount of crime in society."[22]

In *Against Prediction*, Harcourt makes a compelling argument against actuarial predictions in criminal justice in support of individual analysis of issues. He adroitly uses actuarial and economic principles to discredit actuarial methods as an effective tool in reducing crime. The book is a must read for anyone interested in criminal punishment, investigation or racial profiling. The examples in the book point out that the current methods used to reach predictions of criminality are flawed. Harcourt's approach will not totally eliminate the use of actuarial methods in the criminal justice system, but it will force us to rethink how predictions are used and how we can achieve a fairer distribution in punishment and policing.

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22 HARCOURT, *supra* note 3, at 38.