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Suspicionless Witness Stops: The New Racial Profiling

*Michael Gentithes**

Young men of color in high-crime neighborhoods are surrounded by poverty and crime, yet distrustful of the police who frequently stop, frisk, and arrest them and their friends. Every encounter with the police carries the potential for a new arrest or worse, fostering a culture of fear and distrust of law enforcement. That culture exacerbates the problems facing the officers patrolling these neighborhoods as more crimes go unsolved because witnesses are unwilling to come forward.

In the past several decades, officers have responded by using a stop-and-frisk technique of dubious constitutionality to control crime. Despite its disastrous implications for the young men of color who are stopped, the technique was an attractive, proactive response to stubborn crime rates. But as stops-and-frisks have fallen into public and judicial disfavor, officers have deployed a new tactic to obtain evidence of crimes from young men of color: suspicionless witness stops.

*In suspicionless witness stops, officers stop individuals in high-crime neighborhoods that they believe may be witnesses to another crime—even though the officers do not suspect that the witnesses themselves have committed any offense. Thus, officers can justify stops without fabricating even the reasonable suspicion of criminal activity typically required to conduct a stop-and-frisk, all by using an analogy to police checkpoint cases like *Illinois v. Lidster*.*

*A robust revival of *Terry v. Ohio*'s reasonable suspicion standard can curb the vast potential for discriminatory deployment of suspicionless witness stops. But early court responses have been tepid and confused. Courts should instead soundly reject the analogy to checkpoint cases. The constitutionality of checkpoints arises from their general applicability to wide swaths of the population, not from their aim to locate witnesses. To encourage witnesses to aid investigations, jurisdictions might instead statutorily grant transactional immunity protection to witnesses that officers stop without suspicion. Otherwise, suspicionless witness stops will only perpetuate the cycle of distrust and unsolved crime.*

TABLE OF CONTENTS

INTRODUCTION	492
I. THE EVOLUTION OF FOURTH AMENDMENT DOCTRINE AND LIDSTER'S CHECKPOINT RULE	497
A. Terry, Reasonable Suspicion, and Escalating Probable Cause	497
B. From Terry to the Border	502
C. Lidster and Police Checkpoints	505
II. TAKING LIDSTER'S LID OFF: COURTS' RESPONSES TO SUSPICIONLESS WITNESS SEIZURES	508

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III. THE DANGERS OF TARGETED, SUSPICIONLESS WITNESS	
STOPS	515
A. <i>Parallels to Stop-and-Frisk</i>	515
B. <i>Possible Repercussions of Widespread Suspicionless Witness Stops</i>	517
C. <i>Lidster's Linchpin</i>	520
D. <i>Reviving Reasonable Suspicion</i>	523
IV. CRIME CONTROL AND IMMUNITY FOR WITNESSES STOPPED WITHOUT SUSPICION	524
CONCLUSION	529

INTRODUCTION

On a hot summer day just a few miles west of Wrigley Field in Chicago, seventeen-year-old Aaron casually steered his bike down Waveland Avenue. Aaron, a Black teenager who lived in this mostly Black neighborhood, was just weeks away from his senior year in high school, where he hoped to graduate near the top of his class. When a police car passed him on the other side of the street, Aaron had little reason for concern; he had never been so much as arrested before, and was not doing anything to raise criminal suspicion. But Aaron's life was about to change because the officers in that car believed Aaron had witnessed a shooting that summer.

Although the officers did not have a warrant to arrest or search Aaron, they hoped to convince him to come to the station voluntarily and answer questions about an ongoing investigation. To make their request persuasive, they wore vests displaying their badges and guns on their hips. After spotting Aaron on his bike, the officers turned around, drove past him, and pulled to a sudden stop, forcing Aaron to a screeching halt. The officers yelled for Aaron to dismount his bicycle and put his hands on the hood of their car, seizing him in full view of his friends and family even though he had not done anything furtive or illegal.

The officers ordered Aaron to identify himself; Aaron complied. Before asking any questions at all about the shooting—the details of which were never revealed in court, and which the officers never confirmed had any connection to Aaron—one officer approached Aaron and patted down his pockets, noticing a bulge and asking what it was. Aaron continued to cooperate, admitting that it was a gun he carried for protection. Knowing that minors could not carry such a weapon in Illinois, the officer asked Aaron to put his hands on the front of the car and performed a full search, recovering the .22 caliber handgun. He then arrested Aaron and drove him to the station. Later, prosecutors charged and convicted Aaron for aggravated unlawful use of a weapon, the only blemish on his otherwise clean criminal record. That adjudication, which cannot be expunged from Aaron's record until after his twenty-fifth birthday, will follow Aaron into every job interview, apart-

ment inquiry, and college application he makes in his early adult life. The shooting that the officers believed Aaron had witnessed remains unsolved.

Aaron's case¹ illustrates a deeply troubling new policing tactic I refer to as suspicionless witness stops. In a suspicionless witness stop, officers encounter individuals whom they believe to have seen another crime currently under investigation, and then stop those individuals—whom the officers do not suspect of any criminal wrongdoing—for brief questioning or a pat-down. This tactic allows officers to discriminatorily seize young men of color although they have no suspicion of criminal activity whatsoever.

What could constitutionally justify stopping individuals without any suspicion that they are involved in criminal activity? As this Article illustrates in Part I, the answer lies in a strained reading of the Supreme Court's holding in *Illinois v. Lidster*,² which authorized brief, suspicionless seizures of potential witnesses passing a roadside checkpoint.³ Although the *Lidster* checkpoint was held constitutional because it was generalized and programmatic, the argument in favor of suspicionless witness stops suggests officers can make similar targeted stops of individual witnesses under a three-part reasonableness test that balances the public concern in solving the earlier crime against the relatively minimal interference such stops work on individual liberty.⁴

In recent years, courts have been asked to decide whether *Lidster*'s holding on generalized roadside checkpoints applies to targeted, suspicionless witness stops. Part II of this Article shows that judicial responses to date have been tepid and confused. Some courts have willingly accepted the *Lidster* analogy;⁵ others have required reasonable suspicion under *Terry v. Ohio*;⁶ and still others have exhibited confusion over the appropriate standard, seeming to require either reasonable suspicion or generally reasonable behavior on the part of officers.⁷

¹ Aaron's fictional story is modeled from the actual facts of the case *In re Tyreke H.*, 89 N.E.3d 914 (Ill. App. Ct. 1st Dist. 2017), for which the author was appellate counsel.

² 540 U.S. 419 (2004).

³ *Id.* at 425–27.

⁴ *Id.* at 426–27 (applying the three-part reasonableness test outlined in *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), which required courts to examine “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty”).

⁵ See, e.g., *Walker v. City of Orem*, 451 F.3d 1139, 1148 (10th Cir. 2006); *State v. Woldt*, 876 N.W.2d 891, 895–96 (Neb. 2016); *State v. LaPlante*, 26 A.3d 337, 340 (Me. 2011); *Tyreke H.*, 89 N.E.3d at 929–31; *Gipson v. State*, 268 S.W.3d 185, 188–89 (Tex. App. 2008); *State v. Garrison*, 911 So. 2d 346, 349–50 (La. Ct. App. 2005); *State v. Watkins*, 88 P.3d 1174, 1177–78 (Ariz. Ct. App. 2004).

⁶ 392 U.S. 1 (1968); see, e.g., *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1084 (9th Cir. 2013); *Lincoln v. Barnes*, 855 F.3d 297, 303 (5th Cir. 2017); *United States v. Kalb*, 2017 WL 132164, at *4 (E.D. Pa. Jan. 13, 2017); *Collender v. City of Brea*, 2013 WL 11316942, at *12 (C.D. Cal. Mar. 4, 2013).

⁷ See, e.g., *Simmons v. City of Chicago*, 2017 WL 497755, at *5–7 (N.D. Ill. Feb. 7, 2017); *Lincoln v. Turner*, 874 F.3d 833, 842–45 (5th Cir. 2017); *State v. Whitney*, 54 A.3d 1284, 1288–90 (Me. 2012); *State v. Mitchell*, 186 P.3d 1071, 1074–75 (Wash. App. Div. 1 2008).

In Part III of this Article, I argue that suspicionless witness stops are both constitutionally dubious and poor policy. They are constitutionally dubious because they extend reasoning based on programmatic checkpoints to individual stops. The *Lidster* Court found highway checkpoints constitutional because they are programmatic and general, asking the same minimally intrusive questions about witnessing an earlier crime to every individual that passes the checkpoint,⁸ not because they focus on potential witnesses. While general checkpoints avoid targeting individuals of specific ethnic or racial backgrounds and intruding into the lives of stopped citizens any more than necessary in order to achieve the government's interests, suspicionless witness stops are targeted at individuals deemed most likely to have observed crime in their own neighborhoods.⁹ General checkpoints are unlikely to provoke anxiety, prove intrusive, involve questions aimed to incriminate drivers, or be unreasonably proliferated given limited police resources.¹⁰ In contrast, suspicionless witness stops are highly intrusive, provoke anxiety for the young people of color who are often seized in full public view, include detailed questioning from the officers designed to elicit self-incriminating information, and can be conducted *ad nauseam* without expending significant police resources or generating negative publicity. Thus, suspicionless witness stops are the next evolution of programmatic stops-and-frisks,¹¹ loosely justified by *Terry*, that have faced a dubious reception from judges¹² and the public.¹³ The belief that an individual wit-

⁸ For a discussion of the distinction between programmatic searches and targeted searches, see BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 177–78 (2017); Barry Friedman and Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286–87 (2016).

⁹ *Illinois v. Lidster*, 540 U.S. 419, 425–26 (2004).

¹⁰ *Id.* Those traits, “taken together,” excuse such checkpoints from presumptive unconstitutionality. *Id.* at 426.

¹¹ Illinois has enacted a “stop and identify” statute, under which police officers are specifically authorized to conduct temporary stops and brief questioning “when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense.” 725 ILL. COMP. STAT. ANN. 5/107-14(a) (West 2018). The statute also requires officers to provide the person stopped with a receipt providing the reason for the stop and the officer's name and badge number. 725 ILL. COMP. STAT. ANN. 5/107-14(b) (West 2018).

In 2015, the Chicago Police Department, the City of Chicago, and the ACLU reached an agreement for independent evaluation and disclosure of stops-and-frisks conducted in the city, including semi-annual statistical reports on such stops, assessments by a magistrate judge on whether police practices comply with the Fourth Amendment and *Terry v. Ohio*, 392 U.S. 1 (1968), and heightened training of officers to conduct such stops only upon reasonable suspicion of criminal activity. See ACLU OF ILLINOIS, LANDMARK AGREEMENT REACHED ON INVESTIGATORY STOPS IN CHICAGO (Aug. 7, 2015), <http://www.aclu-il.org/en/press-releases/landmark-agreement-reached-investigatory-stops-chicago>, archived at <https://perma.cc/YXW4-YN8E>.

¹² See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557–62 (S.D.N.Y. 2013) (finding the New York City Police Department liable for a pattern and practice of racially motivated, unconstitutional stops); *Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996).

¹³ CENTER FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 6 (July 2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>, archived at <https://perma.cc/V8CR-ZQAR> (claiming that warrantless stops “leave people

nessed a crime becomes a substitute for the reasonable suspicion of criminal activity typically required to legitimate a stop-and-frisk.¹⁴

Furthermore, suspicionless witness stops are poor policy. They foster widespread community distrust of law enforcement in high-crime neighborhoods¹⁵ where officers are needed the most. Suspicionless witness stops are far easier to conduct than material witness detentions, which require authorities to provide a judicial officer with an affidavit showing probable cause to believe both that an individual is a material witness and that their presence cannot be secured by subpoena before a warrant will issue.¹⁶ Thus, suspicionless witness stops could easily evolve into a broad, department-wide practice.¹⁷ Unless courts quickly apply a robust form of the *Terry* framework to reject suspicionless witness stops, this practice too may develop into a commonplace abuse of the constitutional rights of people of color across the country. Despite *Terry*'s shortcomings, it requires at least some suspicion that the individual stopped has committed a crime—a suspicion entirely lacking in stops justified only by the need to locate witnesses.¹⁸

feeling unsafe, fearful of police, afraid to leave their homes, or re-living the experience whenever they see police”).

¹⁴ *Terry*, 392 U.S. at 26–27.

¹⁵ Designating an area or neighborhood as “high-crime” is of constitutional significance following the Supreme Court’s decision in *Illinois v. Wardlow*, 528 U.S. 119, 129–30 (2000), which suggested that officers could consider it as a factor in evaluating the reasonableness of a brief constitutional seizure. The phrase is thus a common one in the law enforcement lexicon. But applying that label can have negative repercussions for the very areas and neighborhoods that officers are patrolling. See Reshaad Shirazi, *It’s High Time to Dump the High-Crime Area Factor*, 21 BERKELEY J. CRIM. L. 76, 106 (2016); Andrew Guthrie Ferguson & Daniel Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1623 (2008); Lenese C. Herbert, *Can’t You See What I Am Saying? Making Expressive Conduct a Crime in High Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 145 (2002). I deploy the phrase throughout this Article not to endorse its use, but because it maps neatly onto that police and prosecutorial framework.

¹⁶ See 18 U.S.C. § 3144 (2019); see also NATIONAL CRIME VICTIM LAW INSTITUTE, SURVEY OF SELECT STATE AND FEDERAL MATERIAL WITNESS PROVISIONS (2016), <https://law.lclark.edu/live/files/23521-state-and-federal-material-witness-provisions>, archived at <https://perma.cc/F4DH-T2WF> (collecting state analogues to the federal material witness statute). In contrast to detentions via material witness warrants, prosecutors have argued that suspicionless witness stops can be conducted without any judicial review and without any specific level of suspicion that the stopped individual was actually a witness to another crime.

¹⁷ Stop-and-frisk tactics metastasized over time as individual officers who used them received praise from their supervisors but little oversight on the practice’s constitutional limits. “In most agencies . . . a major driving force behind the use and abuse of traffic and pedestrian stops has been the ‘policy’ of using large numbers of stops as a crime-fighting tool.” Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 32 (2019). Such policies were rarely formalized in written rules, and were instead adopted over time at the encouragement of commanders and with little to no oversight by higher officials or the judiciary. *Id.* at 13–14.

¹⁸ As noted in Part III.D, *infra*, this position assumes that a robust version of *Terry*’s reasonable suspicion requirement would meaningfully restrain police conduct in the field. Though it is outside the scope of this paper, the need for fulsome judicial enforcement of *Terry*’s rules is dire as the nation’s experience with stop-and-frisk policies demonstrates.

Given those constitutional and policy-based flaws, I argue in Part III that courts should rely upon a bright constitutional line derived from a robust understanding of *Terry*'s reasonable, articulable suspicion standard to curb abuses of suspicionless witness stops.¹⁹ *Terry* controls interactions between officers and specific, targeted individuals when crime may be afoot. To avoid arbitrary, discriminatory application, both *Terry* seizures and suspicionless witness stops must be justified by some facts that the officer can articulate.²⁰ The reasonable suspicion test must be the touchstone for targeted contacts between police and individuals, and the justification must be based upon the potential that those individuals are about to commit a crime, not merely that they may have seen one.²¹ Courts that apply *Lidster* rather than *Terry* to suspicionless witness stops risk reducing the Fourth Amendment to a parchment barrier to racial profiling and its dire consequences, perpetuating a cycle of unsolved crimes and distrust of authority in the very neighborhoods those stops aim to serve.

Some may object that suspicionless witness stops are a necessary tool for officers desperate to solve serious crimes in neighborhoods where witnesses widely distrust the police and are unwilling to come forward. Though I disagree that suspicionless witness stops are necessary, in Part IV, I answer this objection by proposing a method through which the constitutional and policy dangers of suspicionless witness stops can be reduced. A regime of transactional immunity may offer protection to witnesses compelled to speak with officers in these stops. Officers could demonstrate their good faith by deploying suspicionless witness stops only to solve the most serious felonies, and the individuals stopped could be cloaked in some immunity from prosecution based upon their statements for unrelated crimes. Then the cycle of community distrust in the police force and ever-climbing rates of unsolved crimes might be broken, to the benefit of all concerned. Additionally, where officers can provide a magistrate with probable cause to believe that an individual was a material witness to a crime and their presence cannot

¹⁹ Such stops are inherently demeaning, making minorities feel unwelcome in their own neighborhoods and distrustful of police. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013). Suspicionless stops are “damaging to the detainees’ self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives.” *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) (collecting scholarly sources); see also *STOP AND FRISK: THE HUMAN IMPACT*, *supra* note 13, at 5–10. The potential for the police to publicly shame innocent individuals demonstrates the dangers of widespread application of *Lidster* to suspicionless, targeted stops of possible witnesses. See 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.7(a) (5th ed. 2019) (“[T]he stopping of a single vehicle without sufficient suspicion of it to merit a *Terry* stop should not be upheld on the ground that the stop would have been appropriate had it occurred in a roadblock context.”).

²⁰ FRIEDMAN, *supra* note 8, at 158 (“As a matter of constitutional law, though, if stop-and-frisk is to be retained, the best solution is to return it to its roots: as an investigative tool to be used only when the police—as in *Terry* itself—can specify precisely what crime they suspect is in the offing, and have the facts to back it up.”); see also Friedman & Stein, *supra* note 8, at 346.

²¹ See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 61–62 (2015).

practicably be secured by subpoena, they may be able to obtain a warrant to detain that individual under state and federal material witness statutes, rather than conducting warrantless, suspicionless witness stops without any layer of judicial review.²²

Part I below describes the evolution of checkpoint doctrine leading up to *Lidster*, highlighting the unique, generalized circumstances of such checkpoints and the broader reasonableness tests applied to them. Part II explains how courts have given confusing, contradictory responses to suspicionless witness stops in light of that history. Part III then details the effects of suspicionless witness stops, which, unlike checkpoints, are targeted in nature and are likely to foist long-term damage on people of color and marginalized communities. It also explains the flaws in applying the rules for generalized, programmatic checkpoints to targeted seizures of individual witnesses. If applied, those rules provide an end-run around *Terry* that threatens to undermine the Fourth Amendment rights of young men of color across the country. Finally, Part IV offers a proposal for more measured use of suspicionless witness stops if jurisdictions statutorily provide transactional immunity for the witnesses subjected to those stops.

I. THE EVOLUTION OF FOURTH AMENDMENT DOCTRINE AND *LIDSTER*'S CHECKPOINT RULE

The Supreme Court's *Lidster* decision was a logical expansion of its prior Fourth Amendment doctrine culminating in several border checkpoint cases. A review of those cases reveals why prosecutors might misguidedly suggest that *Lidster*'s holding applies to targeted, suspicionless stops and seizures of potential witnesses.

A. *Terry*, *Reasonable Suspicion*, and *Escalating Probable Cause*

In 1968, *Terry v. Ohio* presented the Supreme Court with a problematic set of facts that fit awkwardly with its Fourth Amendment jurisprudence. A Cleveland police officer in the downtown shopping district observed two men repeatedly walking past the front window of a nearby store and looking inside, leading the officer to suspect that they were casing the store for a robbery and might be armed.²³ The officer, acting on suspicion that admittedly did not amount to full probable cause, followed the two men down the street where they met another man, and then asked for their names.²⁴ When the officer received only "mumbling" in response, he patted down the exterior clothing of the three men, findings guns on two of them.²⁵ In the result-

²² See 18 U.S.C. § 3144 (2019); see also SURVEY OF SELECT STATE AND FEDERAL MATERIAL WITNESS PROVISIONS, *supra* note 16.

²³ *Terry v. Ohio*, 392 U.S. 1, 5–6 (1968); see also FRIEDMAN, *supra* note 8, at 145.

²⁴ *Terry*, 392 U.S. at 6–7; see also FRIEDMAN, *supra* note 8, at 145.

²⁵ *Terry*, 392 U.S. at 7.

ing trial, one of the men challenged the admission of that weapon against him as the fruit of an illegal search, forcing the Court to decide if such a stop-and-frisk based on some modicum of suspicion of criminal activity—though less than full probable cause—was constitutionally permissible.²⁶

The Court ruled that, though such stops-and-frisks do amount to a seizure that implicates the Fourth Amendment,²⁷ officers can constitutionally conduct such seizures where “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”²⁸ The officer’s action must be justified by something more than an “inchoate and unparticularized suspicion or hunch.”²⁹ To undertake such a stop, officers must have a reasonable, articulable suspicion that a person has committed or will soon commit a crime.³⁰

Terry established a new constitutional category of searches, which could be justified by a lower level of suspicion than traditional, full-throated probable cause. It also invited future litigation to test the limits of that new category, resulting in a slow expansion of the doctrine’s applicability, one factual nuance at a time. Today, officers can rely upon reasonable suspicion not as an occasional substitute for probable cause but as their primary justification for investigatory activities.³¹

In the last forty years, the Court has used *Terry* to justify an ever-growing range of searches based upon something less than probable cause. The Court has incrementally expanded the scope of *Terry* stops by suggesting that each additional intrusion described in a subsequent case is only a *de minimis* invasion of the suspect’s privacy beyond what the Court had already permitted.³² Barry Friedman has noted that:

In cases following *Terry*, the Court required only “reasonable suspicion” for, inter alia, pulling over cars near the border and checking occupants’ immigration status; stopping and questioning travelers in airports who were thought to be smuggling drugs; rifling through the personal belongings of kids in schools; searching

²⁶ *Id.*

²⁷ *Id.* at 16–20.

²⁸ *Id.* at 27.

²⁹ *Id.*

³⁰ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30). “While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.” *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

³¹ Friedman & Stein, *supra* note 8, at 292–93.

³² E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 314 (2005) (“Use of the *de minimis* approach overly minimizes the individual privacy interests at stake during a *Terry* encounter. Over time, any privacy interest can be overcome by incremental application of the *de minimis* approach.”).

government employees at their workplace; and entering the private homes of probationers.³³

The *Terry* Court designed the reasonable suspicion requirement as a limited exception to the normal probable cause rule, one that would establish a “set of procedural rules that would control discretion while avoiding the temptations of extralegal police encounters.”³⁴ But that exception has since largely swallowed the rule. As E. Martin Estrada argues, because officers conducting a *Terry* stop now can handcuff a suspect, draw weapons in his direction, force him to lie prone, move him to a different location, and require him to disclose his name, “a *Terry* stop is oftentimes scarcely distinguishable from a traditional arrest,”³⁵ aside perhaps from the greater administrative burdens incurred in documenting and booking a formal arrest.³⁶

At the same time that the Court accepted a growing list of scenarios in which mere reasonable suspicion would suffice, officers and courts began defining reasonable suspicion as a less and less demanding standard. By its very nature, “reasonable, articulable suspicion” is opaque and difficult to define.³⁷ As Jeffrey Fagan notes, most officers interpret it as something like a one-in-four or one-in-five chance that a crime is afoot, a rather low hurdle for officers to meet.³⁸ Officers slowly began failing to meet even that low threshold. Recent studies suggest that officers have taken to generating “reasonable suspicion” *post hoc*, if at all.³⁹ Barry Friedman suggests that officers “no longer even try” to justify their *Terry* stops: “Between 2004 and 2009, the number of stops in which a NYPD officer failed to articulate suspicion of

³³ Friedman & Stein, *supra* note 8, at 292.

³⁴ Fagan & Geller, *supra* note 21, at 53.

³⁵ Estrada, *supra* note 32, at 286. Writing in the wake of the Supreme Court’s ruling upholding stop-and-identify statutes in *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004), Estrada suggested a slippery slope of investigative methods that the Court might soon approve during *Terry* stops, such as “fingerprinting, demanding production of documents, skin and hair sampling, or facial scanning.” *Id.* at 308.

³⁶ Harold Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 NOTRE DAME L. REV. 53, 76 (2005).

³⁷ Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43, 52 (2016). “With time, therefore, reasonable suspicion has become a doctrine that is not just ‘fluid,’ as the Supreme Court concedes, but precariously undefined.” Aliza Hochman Bloom, *When Too Many People Can Be Stopped: The Erosion of Reasonable Suspicion Required for a Terry Stop*, 9 ALA. C.R. & C.L. L. REV. 257, 269 (2018).

³⁸ Fagan, *supra* note 37, at 52–53. “[P]roving a ‘hunch’—the type of suspicion, with a capacious tolerance for error, *Terry* condemns—requires a very low probability indeed.” *Id.* at 53.

³⁹ “Suspicion has become the application of ex ante factors of what suspicion *ought* to look like in a particular circumstance.” Fagan & Geller, *supra* note 21, at 59. When officers do articulate their suspicions, “they often do so after the fact—after the contact is resolved one way or another and sometimes after a further delay.” *Id.* at 60 (citing *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013)).

any particular crime rose from 1[%] to 36[%].”⁴⁰ Discussing the same study, Friedman and Stein note:

In 55% of stops officers identified “high crime area” as a factor [generating reasonable suspicion], but those stops had little to no correlation to actual crime rates, and in 42% of stops officers indicated as a basis for suspicion that the target had engaged in “furtive movements,” encompassing such harmless activities as “walking in a certain way” and “stuttering.” In Newark, police articulated sufficient justification for their stops just 25% of the time.⁴¹

Even though the justifications for *Terry* stops are thin and often provided retroactively, they are still frequently approved by courts when challenged.⁴²

The combination of these trends has been devastating for the young men of color subjected to frequent *Terry* stops-and-frisks over the last twenty years. As *Terry*’s reasonable suspicion standard became both easier to apply and easier to meet, officers began to see *Terry* stops as an entry-point into developing probable cause, generating more arrests, and controlling crime, even if the initial justification for the stops had little or no connection to the eventual crime uncovered.⁴³ Because it is easy to generate reasonable suspicion and easy to act upon it, officers can use *Terry* to question a high volume of individuals until, in at least a few investigations, they develop probable cause for further action. Officers thus use low- or no-suspicion stops as an entry point to escalating probable cause, even if *Terry* itself seems to reject such a practice.⁴⁴

Such *Terry*-based fishing expeditions multiplied rapidly with the expansion of informal stop-and-frisk policies in major metropolitan areas across the country in recent decades. Well-meaning officers, faced with pressure to

⁴⁰ Friedman, *supra* note 8, at 158.

⁴¹ Friedman & Stein, *supra* note 8, at 347.

⁴² Hochman Bloom, *supra* note 37, at 258 (“These cases show the tendency of courts to provide retroactive justification of a law enforcement officer’s particular decision to detain an individual.”). Appellate courts are also hesitant to override trial court rulings on these issues given their fact-specific nature. *Id.* at 261–62.

⁴³ Harold Krent has argued that officers’ expansive use of *Terry* stops to investigate a multitude of other crimes far exceeds the Court’s intended scope for the reasonable suspicion exception to probable cause.

Law enforcement officials should not have the incentive to parlay one search into another, nor the incentive to obtain justification for one search so as to permit an extended or second search for a different purpose. The continuity principle in the Warrant Clause reflects the long-held belief that privacy is protected by blunting law enforcement officials’ incentive to conduct wide-ranging searches untethered to objectives justifying the initial search.

Krent, *supra* note 36, at 67.

⁴⁴ *Id.* at 66 (arguing that *Terry* “starkly rejects any notion of using such stops to launch fishing expeditions. Rather, the seizure must be ‘reasonably related in scope to the justification’ for the seizure’s initiation.”) (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

lower crime statistics, began subtly embracing stop-and-frisk tactics in myriad ways such as: tacit approval of insufficiently justified stops, encouragement of reports that created reasonable suspicion for stops after the fact, and active support of officers who showed a predilection for frequent stops and subsequent arrests.⁴⁵ Over time, “good policing [was] articulated from the top down . . . to include aggressive, systematic, ‘legalistic’ field interrogations designed to suppress crime.”⁴⁶ As Maria Ponomarenko notes, “broadly, the prevalence of stops—including unconstitutional stops—is driven by the strategic decision, embraced by most major cities in the 1990s and early 2000s, to use stops and other enforcement encounters as a primary tool for addressing crime.”⁴⁷ Officers have thus executed stops-and-frisks millions of times on young men of color in the past decades,⁴⁸ even though courts have suggested they are likely unconstitutional.⁴⁹

Suspicionless witness stops are a new potential entry point for officers seeking to generate escalating probable cause. With stop-and-frisk policies falling into disfavor, officers pressured to reduce crime rates may seek a new justification to talk to, and potentially uncover incriminating information about, the young men living in high-crime neighborhoods. Though officers might use commonly-violated traffic or vagrancy laws as an entry point to justify full arrests, such a program would generate significant administrative hurdles given the time and energy required by the formal booking process,⁵⁰ and might also create political problems for the department if broad swaths of the public are subjected to such treatment.⁵¹ Suspicionless witness stops present no such hurdles. They take little time and effort to conduct; are unlikely to be noticed by citizens with political clout; and, if courts apply the reasoning from police checkpoint cases like *Lidster* to such stops, are quite easy for officers to justify.

⁴⁵ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 592–601 (S.D.N.Y. 2013) (detailing how commanders guided officers on the street, through CompStat meetings and various performance evaluations, to employ more stops-and-frisks).

⁴⁶ Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69 (2015) (citing James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 L. & Soc’y REV. 367, 370 (1978)).

⁴⁷ Ponomarenko, *supra* note 17, at 32.

⁴⁸ Between 2004 and 2012, the NYPD conducted over four million stops, more than 80% of which were of Black or Hispanic men. Friedman & Stein, *supra* note 8, at 343 (citing *Floyd*, 959 F. Supp. 2d at 575).

⁴⁹ See *Floyd*, 959 F. Supp. 2d at 557; *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996). The *Floyd* court found the New York City Police Department liable for a pattern and practice of racially motivated, unconstitutional stops; though the City appealed, it then agreed to drop the appeal and entered into a joint remedial process with the plaintiffs. *What We Do: Active Cases*, CENTER FOR CONSTITUTIONAL RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al>, archived at <https://perma.cc/4U5B-U7GQ>.

⁵⁰ Krent, *supra* note 36, at 76–77.

⁵¹ *Id.* at 77 (“[T]here may well be political repercussions from arresting generally law-abiding citizens for routine traffic offenses (or jaywalking) . . .”).

B. From Terry to the Border

A series of decisions about border searches is the link between *Terry* and *Lidster*. As noted above, in *Terry* the Court sought a new, limited exception to the warrant requirement when officers possessed some modicum of articulable suspicion but less than full-throated probable cause. But from its earliest days, courts considered whether *Terry*'s logic might be applicable outside the narrow facts of an experienced officer observing potential thieves case their mark. One such application involved checkpoints and seizures, first in border areas and later in locations some distance away from the border itself.

In the first of these cases, *United States v. Brignoni-Ponce*,⁵² border patrol agents had visually scanned passing cars near, but not actually on, the United States-Mexico border.⁵³ Officers stopped the defendant's car to ask questions about the occupants' immigration status.⁵⁴ They admitted the stop was based simply upon the apparent Mexican descent of the occupants.⁵⁵ The Court considered whether border patrol agents could conduct "roving-patrol stop[s]" of individual drivers that they observed passing an area near the border without reasonable suspicion of criminal activity.⁵⁶

According to the Court, such suspicionless roving stops violated the vehicle occupants' Fourth Amendment rights.⁵⁷ The Court acknowledged that, under *Terry*, when an officer reasonably suspects that a car may contain undocumented persons, the officer may stop the car and briefly investigate.⁵⁸ However, the Court refused to permit officers to "dispense entirely with" the reasonable suspicion requirement in favor of a "broad and unlimited discretion" to stop cars, perhaps in a discriminatory manner that focuses on drivers of particular ethnic backgrounds, as the search in this case did.⁵⁹ According to the Court, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official inter-

⁵² 422 U.S. 873 (1975).

⁵³ *Id.* at 874-75. The Court quickly noted that this brief stop was less constitutionally intrusive than full searches of random vehicles stopped in roving patrols, *id.* at 880, which the Court had disapproved of several years earlier in *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-75 (1973).

⁵⁴ *Brignoni-Ponce*, 422 U.S. at 874-75.

⁵⁵ *Id.* at 875.

⁵⁶ *Id.* at 876.

⁵⁷ *Id.* at 886 ("Even if [the officers] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.").

⁵⁸ *Id.* at 881.

⁵⁹ *Id.* at 882 ("To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.").

ference.”⁶⁰ Thus, “officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”⁶¹

The Court’s logic in *Brignoni-Ponce* was simple and familiar to Fourth Amendment scholars. Under the Fourth Amendment, officers cannot seize individual citizens unless they have some modicum of articulable suspicion to support the stop. Even under *Terry*, targeted stops may not always require full probable cause, but they still require *some* reasonable, articulable suspicion. The simple fact that an individual is of a certain ethnic background is insufficient, even under *Terry*, to qualify as suspicion that constitutionally justifies such a stop.

Just one year later, in *United States v. Martinez-Fuerte*,⁶² the Court considered whether *Terry* applied to similar questioning conducted by border patrol agents on random cars passing a fixed checkpoint farther away from the border.⁶³ Border patrol officers had created a permanent roadside checkpoint more than sixty miles north of Mexico.⁶⁴ Without any articulable suspicion, officers stopped a randomly-selected subset of passing vehicles for three- to five-minute questionings about the occupants’ citizenship and immigration status.⁶⁵ In the defendants’ cases, that brief questioning revealed that they were transporting undocumented persons.⁶⁶ The defendants challenged the stops on Fourth Amendment grounds, arguing that, per *Terry*, reasonable suspicion is required to effectuate such stops.⁶⁷

This time, the Court used a constitutional analysis outside of the *Terry* framework to find fixed checkpoints permissible. It held that routine checkpoint stops create a “quite limited” intrusion upon Fourth Amendment rights.⁶⁸ A law-abiding driver is “appreciably less” frightened by such checkpoints;⁶⁹ while roving patrols may catch such a driver by surprise, at fixed checkpoints the driver “can see that other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.”⁷⁰ Because the location of such checkpoints is fixed in advance, the disruption to legitimate traffic is minimal.⁷¹

⁶⁰ *Brignoni-Ponce*, 422 U.S. at 883.

⁶¹ *Id.* at 884.

⁶² 428 U.S. 543 (1976).

⁶³ *Id.*

⁶⁴ *See id.* at 545–46.

⁶⁵ *Id.* at 546–48.

⁶⁶ *Id.* at 547–48.

⁶⁷ *Id.* at 548, 556.

⁶⁸ *Martinez-Fuerte*, 428 U.S. at 557; *see also id.* at 560 (“The objective intrusion of the stop and inquiry thus remains minimal.”).

⁶⁹ *Id.* at 558.

⁷⁰ *Id.* (quoting *Brignoni-Ponce*, 422 U.S. at 894–95).

⁷¹ *Id.* at 559.

Perhaps most crucially, the Court noted that border patrol officers have less discretion to use such checkpoints for improper, discriminatory reasons. Higher-ranking officials, rather than officers in the field, choose the locations of such fixed checkpoints to maximize limited enforcement resources, reducing the likelihood of abusive or harassing stops.⁷² Those limitations on enforcement resources also ensure that questioning will be “routine and limited” and “cannot feasibly be made of every motorist where the traffic is heavy.”⁷³ Thus, the Court held that *Terry* does not apply to checkpoint stops for brief questioning, which “may be made in the absence of any individualized suspicion.”⁷⁴

These decisions draw a (perhaps poorly-articulated) distinction between targeted stops and checkpoints. Targeted stops fit under a traditional Fourth Amendment analysis, where officers must have some modicum of cause, either probable cause or *Terry*-style reasonable suspicion, to justify the stop. In contrast, checkpoints are governed by a reasonableness analysis. Officers can operate them without any suspicion at all, so long as they are reasonably designed to avoid discriminatory, overly-invasive interruptions of the lives of citizens.

This distinction was helpfully elucidated by Barry Friedman and Cynthia Benin Stein.⁷⁵ According to Friedman and Stein, searches can broadly be categorized as either “investigative searches” of the sort normally seen on television, where an officer has a particular suspect in mind, or “programmatically searches,” where officers stop a wide swath of people at random largely in an effort to deter criminal activity rather than to solve a particular crime.⁷⁶ Different constitutional protections are required for each category to ensure that officers do not engage in wholly arbitrary searches—the primary evil towards which the Fourth Amendment is aimed.⁷⁷ For investigatory searches, officers must have either full probable cause or at least reasonable suspicion under *Terry*.⁷⁸ In contrast, for programmatic, deterrent searches, such as roadside checkpoints that stop large swathes of the population, generality, rather than reasonable suspicion, is required: “[e]ither everyone is searched or who gets searched must be decided in a truly random or otherwise nondiscriminatory way—in a manner that eliminates arbitrariness or uncabined discretion.”⁷⁹

The Court seemed to follow this distinction between targeted stops and checkpoints in the 1979 case *Delaware v. Prouse*.⁸⁰ In *Prouse*, an officer stopped a vehicle with no suspicion of any wrongdoing—he made the stop

⁷² *Id.*

⁷³ *Id.* at 560.

⁷⁴ *Martinez-Fuerte*, 428 U.S. at 562.

⁷⁵ Friedman & Stein, *supra* note 8, at 286–87.

⁷⁶ *Id.*; see also FRIEDMAN, *supra* note 8 at 177–78.

⁷⁷ Friedman & Stein, *supra* note 8, at 316 n.189.

⁷⁸ *Id.* at 290–92, 346–47.

⁷⁹ *Id.* at 288.

⁸⁰ 440 U.S. 648 (1979).

simply to check the driver's license and registration—and discovered drugs in plain view.⁸¹ The defendant challenged the introduction of that evidence on the grounds that it was discovered after what the officer described as a “routine” stop made without any probable cause or reasonable suspicion of criminal activity.⁸²

The Supreme Court analyzed suspicionless roadside stops by comparing them to the border patrol cases, noting their similarities to the roving patrols for which *Terry*-style reasonable suspicion is required.⁸³ Roving patrols and suspicionless roadside stops both involve an “unsettling show of authority,” in contrast to the visible displays of proper authority seen at checkpoints.⁸⁴ Further, both roving patrols and suspicionless roadside stops “create substantial anxiety” for those stopped, in part because officers do not publicly subject all passing vehicles to the same treatment.⁸⁵ Thus, the Court held that the Fourth Amendment requires *Terry*-style reasonable and articulable suspicion of some driving infraction before officers can stop a vehicle to check the driver's license and registration.⁸⁶

That holding fits well with the logical framework Friedman and Stein espouse, and with the Court's decisions in *Brignoni-Ponce* and *Martinez-Fuerte*. When stops are targeted at individuals, as they were in *Brignoni-Ponce* and *Prouse*, they must be based, at least, upon reasonable, articulable suspicion. In contrast, when stops are made randomly at a border checkpoint aimed at a broad swath of the population, they need not be supported by any suspicion. Instead, they must merely be random enough that passing drivers can see that they have not been singled out for discriminatory treatment, and the stop must be no more intrusive than necessary to achieve the government's important aims.

C. Lidster and Police Checkpoints

These cases left a constitutional question unanswered: What, if any, level of suspicion must a police officer in the heart of the country have in order to use checkpoints to briefly question all passing drivers? In a series of cases in the early 2000s, the Court determined that the answer depends upon the purposes of the checkpoint.

In *City of Indianapolis v. Edmond*, the Court addressed a “drug checkpoint” that officers established “to detect evidence of ordinary criminal wrongdoing” in all cars that passed by.⁸⁷ Such stops were admittedly made

⁸¹ *Id.* at 650–51.

⁸² *Id.*

⁸³ *Id.* at 657.

⁸⁴ *Id.*

⁸⁵ See *Prouse*, 440 U.S. at 657.; see also *id.* at 661 (“This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”).

⁸⁶ *Id.* at 663.

⁸⁷ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

without any individualized suspicion, in the hopes that some percentage of the individuals stopped would be involved in the local narcotics trade.⁸⁸ Officers hoped that the highly-publicized, random checkpoints would make criminals think twice about bringing narcotics into the city for fear that they might be caught.⁸⁹

The Supreme Court held that, in the absence of special circumstances, such checkpoints ran afoul of the Fourth Amendment.⁹⁰ It noted that, under *Prouse*, a “general interest in crime control” was insufficient to constitutionally justify a regime of suspicionless stops.⁹¹ Though the Court acknowledged the magnitude of harms from the narcotics trade, it emphasized that it was “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control end.”⁹² While the Court noted that certain “exigencies” might permit “appropriately tailored” checkpoints without individualized suspicion, it “decline[d] to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.”⁹³

What, then, are appropriate “exigencies” beyond “general crime control” that might allow officers to operate checkpoints that do not rely upon some level of individualized suspicion? The Court provided an example four years later in *Illinois v. Lidster*.⁹⁴ Officers in *Lidster* had created a checkpoint blocking all traffic on a highway where a hit-and-run had occurred a week earlier at around the same time.⁹⁵ The officers stopped each vehicle that reached the checkpoint for ten to fifteen seconds, asking the occupants if they had seen anything happen there the previous weekend.⁹⁶ While operating the checkpoint, the officers noticed the defendant’s vehicle swerving on the road and later detected alcohol on his breath, eventually charging him

⁸⁸ *Id.*

⁸⁹ FRIEDMAN, *supra* note 8, at 170 (“[T]he main point of the roadblocks wasn’t catching people with drugs and weapons: it was to forestall the problem [G]iven the publicity attendant on the roadblocks they might not catch many drug traffickers, but they would ‘deter people’ from bringing in drugs in the first place.”).

⁹⁰ *Edmond*, 531 U.S. at 44.

⁹¹ *Id.* at 41 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

⁹² *Id.* at 43.

⁹³ *Id.* at 44 (“Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the Court of Appeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.”)

⁹⁴ 540 U.S. 419 (2004).

⁹⁵ *Id.* at 422.

⁹⁶ *Id.*

with driving under the influence.⁹⁷ The defendant challenged the constitutionality of the checkpoint, which was not based upon any suspicion that passing drivers had committed a crime, but was merely designed “to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.”⁹⁸

The Supreme Court held that this checkpoint was justified by something beyond the general crime control ends of the *Edmond* stop; this stop was an “information-seeking” highway checkpoint of possible witnesses.⁹⁹ Such checkpoints have several unique, constitutionally-redeeming traits.¹⁰⁰ The Court reasoned that ten-to-fifteen-second, information-seeking checkpoints are unlikely “to provoke anxiety or to prove intrusive,” given their brevity and the fact that the officers “stopped all vehicles systematically” in full public view.¹⁰¹ They are also unlikely to involve “questions designed to elicit self-incriminating information.”¹⁰² Additionally, a rule of presumptive unconstitutionality is not necessary to prevent “an unreasonable proliferation of police checkpoints”; limited police resources and public resistance to traffic slow-downs practically limit any such proliferation.¹⁰³ Those traits, “taken together,” excuse suspicionless checkpoints from presumptive unconstitutionality under *Terry*.¹⁰⁴ Instead, suspicionless checkpoints are subject to a three-factor reasonableness test established in *Brown v. Texas*,¹⁰⁵ which examines “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”¹⁰⁶ The Court approved the checkpoint in *Lidster* (1) because of the grave public concern over a recent, deadly hit-and-run; (2) because the checkpoint was closely tailored to resolving that public concern given the officers’ strategy to stop all traffic passing the same area at the same time one week later; and (3) because the checkpoint was brief enough that it “interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect.”¹⁰⁷

Lidster thus established that in at least some cases, a suspicionless police checkpoint that aims to gather information from potential witnesses to a crime is constitutionally permissible without *Terry*-style reasonable suspicion. The Court suggested that several circumstances must be present to justify such suspicionless action.¹⁰⁸ Officers must avoid provoking anxiety by

⁹⁷ *Id.*

⁹⁸ *Id.* at 423.

⁹⁹ *Id.* at 426.

¹⁰⁰ *Lidster*, 540 U.S. at 426.

¹⁰¹ *Id.* at 422, 425, 428.

¹⁰² *Id.* at 425.

¹⁰³ *Id.* at 426 (citation omitted).

¹⁰⁴ *Id.*

¹⁰⁵ 443 U.S. 47 (1979).

¹⁰⁶ *Lidster*, 540 U.S. at 426–27 (quoting *Brown*, 443 U.S. at 51).

¹⁰⁷ *Id.* at 427.

¹⁰⁸ *Id.* at 423.

targeting individual motorists, eschew lengthy interrogations likely to elicit self-incriminating information, and employ techniques that are unlikely to be proliferated in the future.¹⁰⁹ Under those circumstances, suspicionless stops are subject to a three-part reasonableness test, rather than *Terry*'s comparatively stringent standard.

The Court's distinction between the stops in *Edmond* and *Lidster* is difficult to see; in each case, crime control was, on some level, the officers' ultimate aim, and each case resulted in an arrest.¹¹⁰ Indeed, Friedman argues that both checkpoints should pass constitutional muster, so long as both truly stop all passengers (or a random subset) without discriminatorily selecting individuals without suspicion, and are brief and relatively unobtrusive.¹¹¹

Putting aside *Edmond*'s constitutional *bona fides*, *Lidster* established that checkpoints are constitutionally permissible without any suspicion of criminal activity when officers use them to seek witnesses to a specific crime. However, they must be (1) entirely random, without discriminating against particular drivers or groups of drivers, and (2) made in an identical, minimally invasive way for each individual stopped.

II. TAKING *LIDSTER*'S LID OFF: COURTS' RESPONSES TO SUSPICIONLESS WITNESS SEIZURES

Courts addressing suspicionless witness stops have struggled to align the practice with Fourth Amendment jurisprudence. To date, courts have engaged in only surface level constitutional analysis, exhibiting widespread confusion over the applicable rules. Many courts have eschewed *Terry*'s reasonable suspicion standard, instead applying the less stringent reasonableness test outlined in *Brown* and adopted in *Lidster*. While some courts have applied *Terry*, still others exhibit confusion, applying both tests while expressing doubt over the proper analysis.

* * *

Suppose a police officer observes a traffic violation, but is unable to immediately apprehend the driver as he quickly flees the scene. Hoping to learn the driver's identity, the officer stops and questions other drivers in the area in hopes that they saw the suspect and know his whereabouts or identity. When stopping one such potential witness, the officer detects the strong odor of alcohol on the driver's breath, determines that he was driving under

¹⁰⁹ *Id.* at 426–27.

¹¹⁰ FRIEDMAN, *supra* note 8, at 171–72.

¹¹¹ Friedman makes this argument in favor of upholding the checkpoints in *Edmond*, noting that they should not have been unconstitutional because they were “set up to avoid officer arbitrariness and discretion” in that they required supervisor approval weeks in advance, were designed to stop entirely random groups of cars, and were executed so that each search was identical and minimally invasive. *Id.* at 183–84.

the influence, and arrests him, even though the officer did not suspect the witness of any wrongdoing at the outset of the stop. Should courts analyze such suspicionless witness stops under the reasonable suspicion test outlined in *Terry* or the relatively less stringent reasonableness test applied to a checkpoint aimed at locating witnesses in *Lidster*?

The Nebraska Supreme Court has applied *Lidster* (and the reasonable test it borrowed from *Brown*) to such circumstances. In *State v. Woldt*,¹¹² an officer stopped one driver on suspicion of drunk driving, and then stopped a nearby driver whom he believed might have witnessed the first driver, only to learn that the witness was also drunk.¹¹³ When analyzing the constitutionality of the stop, the Nebraska Supreme Court applied *Lidster*'s reasonableness test, eschewing *Terry*'s standard.¹¹⁴ Indeed, the *Woldt* court found *Lidster* applicable to an individual suspicionless stop without seriously considering if different constitutional rules should apply when officers do not deploy broad, systemic checkpoints.¹¹⁵ The court thus ruled that the suspicionless seizure of a possible witness to another man's impaired driving was reasonable under the Fourth Amendment.¹¹⁶

However, other courts have refused to apply *Lidster*'s reasonableness test to justify similar stops. For instance, in *State v. Whitney*,¹¹⁷ an officer found an abandoned, crashed car and began to canvass the area for witnesses.¹¹⁸ Approximately four miles away and ninety minutes later, the officer stopped the defendant driver to ask questions about the original car crash, only to detect alcohol on his breath and arrest him.¹¹⁹ The Supreme Judicial Court of Maine held that, although suspicionless stops are sometimes permitted under *Lidster*, this stop was "significantly distinguishable" from *Lidster*-style highway checkpoints.¹²⁰ Ruling such stops constitutional would grant officers "unfettered discretion to randomly stop any given motorist . . . in the absence of any reasonable articulable suspicion of criminal conduct."¹²¹ Because the failure to report an accident was not a grave public concern, the stop was unlikely to aid the investigation, and the stop was likely to cause alarm, *Lidster* did not justify the officer's actions.¹²² Further-

¹¹² 876 N.W.2d 891 (Neb. 2016).

¹¹³ *Id.* at 893–94.

¹¹⁴ *Id.* at 895–96. The court reasoned that both highway checkpoints of potential witnesses and suspicionless seizures of individual witnesses are "less intrusive than a traditional arrest," and thus are not presumptively unconstitutional despite the lack of any reasonable, articulable suspicion of criminal activity on the part of those stopped. *Id.* at 896.

¹¹⁵ *Id.* at 895–96.

¹¹⁶ *Id.* at 896–98.

¹¹⁷ 54 A.3d 1284 (Me. 2012).

¹¹⁸ *Id.* at 1285.

¹¹⁹ *Id.* at 1285–86.

¹²⁰ *Id.* at 1287–88.

¹²¹ *Id.* at 1288.

¹²² *Id.* at 1288–89.

more, because there was no reasonable suspicion to justify a *Terry* stop, the stop was unconstitutional.¹²³

* * *

These divergent approaches are a microcosm of the confusion surrounding suspicionless witness stops across the country. Many courts have extended *Lidster*'s reasoning to such stops, making them constitutionally permissible under *Brown*'s balancing test rather than requiring *Terry*-style reasonable suspicion. In the case that inspired the opening vignette in this Article, the Illinois Appellate Court found the seizure of a juvenile, whom the seizing officers did not suspect of any criminal wrongdoing, was constitutional because the officers asserted the juvenile was a witness in an ongoing homicide investigation.¹²⁴ The Tenth Circuit, as well as the District of Alaska and the Northern District of Georgia, have also applied *Lidster* to individual witness seizures.¹²⁵ In the early 2000s, state courts in Texas,¹²⁶

¹²³ *Whitney*, 54 A.3d. at 1290. The court took a similar approach a year earlier in *State v. LaPlante*, 26 A.3d 337 (Me. 2011). In that case, an officer observed a car excessively speeding, followed by the defendant driving safely on his motorcycle. *Id.* at 338. The officer attempted to follow the speeding car but could not catch it; he then stopped the defendant to ask if he saw the car. *Id.* at 339. The officer quickly discovered that the defendant was drunk and arrested him. *Id.* The Maine Supreme Court applied the balancing test *Lidster* adopted from *Brown* to analyze the officer's stop. *Id.* at 340. However, the Court ruled that stop unconstitutional even under that reasonableness test: Given the officer's wide discretion, the "significant potential to cause alarm and anxiety," and the relative insignificance of the speeding crime that the defendant may have witnessed, this particular witness stop violated the Fourth Amendment. *Id.* at 343.

¹²⁴ *In re Tyreke H.*, 89 N.E.3d 914, 919 (1st Dist. 2017). According to the court, a suspicionless seizure of a potential witness was not presumptively unconstitutional under *Lidster*. *Id.* at 930. The court analogized the officers' seizure of a potential witness for questioning to a police roadblock designed to question all passing drivers for a few seconds about a recent crime. *Id.* at 928–30. Just as checkpoint stops are unlikely to provoke anxiety, prove intrusive, or involve questions designed to elicit self-incriminating answers, the officers' stop of the juvenile in his neighborhood in midday was found not likely to be self-incriminating, intrusive, or anxiety-provoking. *Id.* at 930 (quoting *Lidster*, 540 U.S. at 424–25). Applying *Brown*'s reasonableness test adopted in *Lidster*, the court approved the stop because the homicide investigation was of grave public concern, the stop was narrowly tailored to that investigation, and the juvenile failed to show that the stop severely burdened his liberty. *Id.* at 930–31.

¹²⁵ *In Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), the Tenth Circuit addressed officers' pursuit of a man who had stolen his sister's car and called family members to indicate that he was suicidal. *Id.* at 1144. Once the man drove to his parents' home, family members witnessed officers shoot the man after he held a two-inch knife against his wrist. *Id.* at 1144–45. When officers then detained several of the family members on the grounds that they were witnesses to the shooting, the family members filed a § 1983 suit. *Id.* at 1145. In assessing the officers' assertion of qualified immunity, the Tenth Circuit analyzed the seizure of the family members under *Lidster*'s balancing test, rather than requiring reasonable suspicion under *Terry*. *Id.* at 1148. Comparing the detention of the family members to *Lidster*'s roadside checkpoint, the Court noted that the officers had "reason to believe that one or more of the [family members] had specific information about the shooting in question" that officers could reasonably seek. *Id.* Although the court found the ninety-minute detention more intrusive than a highway checkpoint, *id.* at 1149, it granted qualified immunity because a reasonable officer could have believed that *Lidster* permitted such a detention, *id.* at 1151.

Louisiana,¹²⁷ Washington,¹²⁸ and Arizona¹²⁹ followed a similar course in extending *Lidster*'s reach.

The District of Alaska also applied *Lidster* when analyzing the brief detention of a shooting victim's wife in *Estate of Tasi v. Anchorage*, No. 3:13-CV-00234-SLG, 2016 WL 370694, at *3, 12 (D. Alaska, Jan. 28, 2016). After her husband was shot during an altercation with police, officers detained the victim's wife—whom the officers knew was inside during the shooting and did not see it—for approximately ten minutes. *Id.* at *3. The wife filed a § 1983 suit alleging an unlawful seizure. *Id.* at *10. When analyzing the officers' claim to qualified immunity, the court applied *Lidster*, claiming that it permitted officers "to detain non-suspect witnesses on a temporary basis" provided that the detention is reasonable. *Id.* at *11. Ultimately, however, the court found that the officers were not entitled to qualified immunity even under *Lidster*, given the severity of the intrusion and the officers' knowledge that the wife did not actually witness the shooting. *Id.* at *14.

The Northern District of Georgia recently took a similar approach in *United States v. Patrick*, No. 4:17-CR-00034-HLM-WEJ, 2018 WL 6596461, at *1 (N.D. Ga. Oct. 17, 2018). In that case, police officers received a call of shots fired from a black Lincoln Town Car and then located a matching vehicle at a nearby gas station. *Id.* When officers approached the car, it was unoccupied; however, several groups of three to four people were standing in the area. *Id.* at *2. Officers did not allow those individuals, including the defendant, to leave the area while they tried to determine who was inside the car. *Id.* Officers then noticed a bulge in the defendant's sock, which he admitted was marijuana, and discovered a gun in his pocket in a search pursuant to his arrest. *Id.* The officers were later able to determine that the Defendant was one of three individuals who had occupied the Lincoln Town Car during the earlier shooting. *Id.* at *3. Though the officers lacked reasonable suspicion that the defendant personally committed any crime, the court classified the stop as a "detention of potential witnesses for investigative purposes" that should be analyzed under *Lidster*'s and *Brown*'s reasonableness test. *Id.* at *4. Because there was grave public concern over the earlier shooting and the officers only asked questions aimed to resolve that case while detaining the witnesses for less than ten minutes, the court found the stop constitutional and denied the defendant's motion to suppress. *Id.* at *5–6.

¹²⁶ In *Gipson v. State*, 268 S.W.3d 186 (Tex. App. 2008), the Court of Appeals of Texas considered the stop of a vehicle leaving the parking lot of a store that had just been robbed. The officer stopped the car because he believed the occupants "were potential suspects or witnesses to a crime." *Id.* at 187. The officer's belief was later confirmed; a search of one of the occupants revealed the proceeds of the robbery. *Id.* at 187. However, that occupant challenged the constitutionality of the initial stop, arguing that the officer lacked reasonable, articulable suspicion under *Terry* where he believed the car's occupants were merely witnesses. *Id.* The court apparently agreed that the officer lacked reasonable suspicion, but elected to apply *Lidster* and *Brown*'s reasonableness test, rather than the *Terry* standard, to the stop. *Id.* at 187–88. According to the court, "When an officer detains a person to determine whether the person being detained was a witness to a crime, the detention becomes distinguishable from those involved in *Terry*." *Id.* at 188. Applying *Lidster*, the court reasoned that because the stop advanced a grave public concern in solving the recent robbery and was minimally invasive, it was reasonable and permissible under the Fourth Amendment. *Id.* at 188–89.

¹²⁷ The Louisiana Court of Appeals also applied *Lidster* to an individual witness stop in its 2005 decision in *State v. Garrison*, 911 So.2d 346, 349 (La. Ct. App. 2005). An officer stopped the *Garrison* defendant's car because the defendant may have seen another individual driving recklessly in a campus parking lot late at night. *Id.* at 347. The officer then smelled alcohol on the defendant's breath and arrested him for driving while impaired. *Id.* at 347–48. When the defendant challenged the constitutionality of the stop, the court upheld it under *Lidster*, rather than requiring reasonable suspicion under *Terry*. *Id.* at 349–50. The court reasoned that "[a]n officer does not violate the prohibition against unlawful seizures by requesting that an individual give information or cooperation in the investigation or prevention of a crime." *Id.* at 349. Though the officer lacked reasonable suspicion at the outset of the stop, it was reasonable, and thus constitutionally permissible, to minimally intrude upon the driver to resolve the nearby disturbance, which was of public concern. *Id.* at 349–50.

¹²⁸ The Washington Appellate Court has likewise held that officers can briefly detain a possible witness without any reasonable suspicion of criminal activity in *State v. Mitchell*, 186 P.3d 1071, 1072 (Wash. Ct. App. 2008). In that case, officers responded to a 911 call of a

However, a minority of courts have not granted officers the discretion that *Lidster* allows, ruling that officers must have reasonable suspicion under *Terry* to seize a possible witness to another crime. For instance, the Eastern District of Pennsylvania found *Lidster* inapplicable when officers stopped an anonymous tipster who reported seeing his friend injure himself while stripping copper wire from a federal building.¹³⁰ Both the Ninth Circuit and the Central District of California similarly refused to apply *Lidster* to the detention of potential witnesses to police shootings.¹³¹ The Ohio Court of Appeals

robbery and interviewed the defendant, who appeared to be the victim. *Id.* The defendant gave conflicting statements about the alleged robbery then asked to leave the scene when officers requested permission to process his car as part of the scene. *Id.* An officer asked the defendant to stay on the scene because he was the victim of and witness to a possible violent crime. *Id.* Eventually, officers saw drugs in plain view in the defendant's car and charged him with their possession. *Id.* at 1072–73. The Washington Appellate Court found that although the officer initially lacked reasonable suspicion to detain the defendant, *Lidster* permitted the defendant's temporary seizure as a possible witness to the crime. *Id.* at 1074.

¹²⁹ See *State v. Watkins*, 88 P.3d 1174, 1175–77 (Ariz. Ct. App. 2004) (applying *Lidster* to a stop of a defendant walking fifty feet away from a recent burglary perpetrated by men recently seen in the defendant's apartment).

¹³⁰ In *United States v. Kalb*, No. 16-12, 2017 WL 132164, at *1 (E.D. Pa. Jan. 13, 2017), the defendant called the police anonymously from a payphone to report that his friend had been electrocuted while stripping copper wire from a federal building. The defendant attempted to drive away from the area, but officers stopped and questioned him, claiming that they believed he was a potential witness to the crime and extracting a potentially incriminating statement from him. *Id.* The Eastern District of Pennsylvania declined to extend *Lidster* to that brief roadside stop. *Id.* at *2–4. The court noted that the stop itself was based upon a hunch that the defendant had committed a crime, but it did not meet *Terry*'s reasonable and articulable suspicion requirement. *Id.* at *3. The court thus accused the State of using *Lidster* to expand its power when it failed to meet *Terry*'s requirements. *Id.* The stop was both longer than *Lidster* contemplated and more likely to produce incriminating information. *Id.* Because the government's "sweeping view of police power [did] not comport with the Constitution," the court declined to extend *Lidster* to suspicionless witness stops. *Id.* at *4.

¹³¹ The Ninth Circuit required *Terry*-style reasonable suspicion for a suspicionless witness detention in its 2013 decision in *Maxwell v. County of San Diego*, 708 F.3d 1075, 1084 (9th Cir. 2013). In *Maxwell*, family members of a shooting victim filed a § 1983 suit after responding officers separated the family members from that victim and questioned them, all while delaying the departure of the victim's ambulance. *Id.* at 1079–81. The officers claimed qualified immunity, suggesting that the detentions were reasonable under *Lidster*. *Id.* at 1084. In rejecting the officers' qualified immunity claim, the Ninth Circuit specifically noted that *Lidster* did not give the officers reasonable grounds to believe they could "detain, separate, and interrogate" the victim's family, which would have required reasonable suspicion under *Terry*. *Id.*

The Central District of California followed suit in *Collender v. City of Brea*, No. SACV 11-0530 AG, 2013 WL 11316942, at *1 (C.D. Cal. Mar. 4, 2013), where an officer was investigating the plaintiffs' son for possible involvement in an armed robbery and parked his car outside the family's home. When the son walked outside, the officer exited his cruiser, pointed a rifle at the son, and announced that he was an officer. *Id.* at *1–2. The officer believed he saw the son reach for a weapon, so he fired a single, deadly shot. *Id.* at *2. The plaintiffs then ran outside, and officers handcuffed and detained them for approximately one hour without any suspicion that they had committed any crime. *Id.* at *3. The plaintiffs filed a § 1983 suit against the officers; the officers moved for summary judgment, claiming they were entitled qualified immunity because *Lidster* permitted the detention. *Id.* at *13. The court rejected that qualified immunity claim. *Id.* The court noted that *Lidster* involved only a brief stop of motorists to ask for information, while the officers' detention of the plaintiffs was "significantly more intrusive." *Id.* Though the court did not explicitly analyze the stop under *Terry*, it rejected *Lidster*'s application to the suspicionless stop. *Id.*

also required *Terry*-style reasonable suspicion where officers stopped a witness to an illegal gun sale, only to discover drugs in the witness's car.¹³²

* * *

Unsurprisingly, some courts have exhibited confusion about whether suspicionless stops of possible witnesses to a police shooting are controlled by *Lidster* or are presumptively unconstitutional under *Terry*.¹³³ The Fifth Circuit's divergent analyses in two cases stemming from one incident provide a poignant example.

The day after Christmas of 2013, John Lincoln was eating dinner at his father's house.¹³⁴ Though John was on medication to treat his bipolar disorder, he had not been able to refill his prescription during the holidays.¹³⁵ John left dinner, took his father's gun, and drove to the house where his mother and 18-year-old daughter Erin lived.¹³⁶ Fearing for the safety of their loved ones, John's father and another family member called the police.¹³⁷ When SWAT officers responded, tragedy struck. John opened the door holding the gun and began shouting at the police.¹³⁸ Amidst the ensuing confusion, officers shot John to death while his daughter Erin stood by his side.¹³⁹ After Erin collapsed next to John's body, an officer handcuffed her, threw her over his shoulder, and placed her in a police cruiser for approximately two hours.¹⁴⁰ Other officers later moved Erin to the police station and interrogated her for five more hours.¹⁴¹ Erin was never charged with any crime; the

¹³² The Ohio Court of Appeals declined to analogize a suspicionless witness stop to the checkpoint in *Lidster* in *State v. Wilson*, No. 22001, 2007 WL 4305715, at *1 (Ohio Ct. App. Dec. 7, 2007). In that case, undercover officers observed the defendant sell a handgun to a man they later identified as a convicted felon; though that sale itself was not illegal, the officers believed the defendant was now a witness to the buyer's crime of possessing a handgun after being convicted of a felony. *Id.* at *1. The officers thus stopped the defendant's car without any suspicion that he committed any crime, only to later uncover cocaine inside the car. *Id.* The court affirmed the suppression of that cocaine given the lack of *Terry*-style reasonable suspicion about the defendant. *Id.* at *5. The court expressly rejected the State's attempted analogy to *Lidster*. *Id.* As the court reasoned, this individual witness seizure caused far more anxiety and alarm than a checkpoint and was a significant intrusion on the defendant's liberty. *Id.* at 4–5. Doubting that the Supreme Court “would have approved the checkpoint stop in *Lidster* if the officers there had engaged in similar conduct,” the court suppressed evidence obtained through a targeted, suspicionless seizure of an alleged witness. *Id.* at *4–5.

¹³³ See, e.g., *Lincoln v. Barnes*, 855 F.3d 297, 304 (5th Cir. 2017); *Lincoln v. Turner*, 874 F.3d 833, 842, 844 (5th Cir. 2017); *Simmons v. City of Chicago*, No. 14 C 9087, 2017 WL 497755, at *5 (N.D. Ill. Feb. 7, 2017).

¹³⁴ *Barnes*, 855 F.3d at 299.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Lincoln v. Turner*, 874 F.3d 833, 838 (5th Cir. 2017) (“When Erin fell to the ground beside John and cried out, Turner handcuffed her and threw her over his shoulder.”); see also *Barnes*, 855 F.3d at 299–300.

¹⁴¹ *Barnes*, 855 F.3d at 300.

officers claimed they held her simply to obtain her statement as a witness to the shooting.¹⁴² When Erin filed a § 1983 suit against several of the officers, the Fifth Circuit issued two conflicting rulings on *Lidster*'s applicability to a suspicionless seizure of a potential witness.¹⁴³

First, in a suit against one of the officers who questioned Erin at the police station, the Fifth Circuit rejected the officer's argument that the reasonableness test in *Lidster* governs all witness detentions.¹⁴⁴ The court reasoned that *Lidster* involved stops that only minimally interfered with vehicle operators' Fourth Amendment liberty, unlike the seizure of a potential witness for extended interrogation.¹⁴⁵ The seizure of a shooting witness simply to obtain information from her was ruled to be *per se* unreasonable absent other exigent circumstances.¹⁴⁶ The court thus rejected the officer's claim of qualified immunity.¹⁴⁷

Just a few months later, however, the Court reached the opposite conclusion in a suit against the officer who originally detained Erin.¹⁴⁸ In *Lincoln v. Turner*,¹⁴⁹ the Fifth Circuit noted that the incident could be categorized as "an investigatory stop that must be supported by reasonable suspicion, or [as] a witness detention subject to the *Brown* balancing test" pursuant to *Lidster*.¹⁵⁰ Noting that the "boundaries are blurred" between those categories, the court then applied both *Terry* and *Lidster* to the facts.¹⁵¹ The court found that the officers violated the plaintiff's constitutional rights under either standard, holding specifically that "[t]his was not the type of 'minimally intrusive' stop authorized by *Lidster*."¹⁵² However, in a final demonstration of its confusion, the court held that the officer was entitled to qualified immunity.¹⁵³ According to the court, *Lidster* did not "clearly establish[] that a law enforcement officer could not detain a witness to a police shooting for these two hours."¹⁵⁴

¹⁴² *Id.*

¹⁴³ See *id.* at 303; *Turner*, 874 F.3d at 838.

¹⁴⁴ *Barnes*, 855 F.3d at 303.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 304.

¹⁴⁷ *Id.* at 303–04.

¹⁴⁸ *Turner*, 874 F.3d at 838.

¹⁴⁹ 874 F.3d 833 (5th Cir. 2017).

¹⁵⁰ *Id.* at 841.

¹⁵¹ *Id.*

¹⁵² *Id.* at 845.

¹⁵³ *Id.* at 848–50.

¹⁵⁴ *Id.* at 850. The Fifth Circuit is not alone in its confusion. The Northern District of Illinois recently applied both *Terry* and *Lidster* to analyze the detention of a witness to the shooting of an officer. *Simmons v. City of Chicago*, No. 14 C 9087, 2017 WL 497755, at *1–2 (N.D. Ill. Feb. 7, 2017). In *Simmons*, officers executed a search warrant for the plaintiff's brother's home, where plaintiff was visiting. *Id.* While the plaintiff peacefully complied with orders in the basement kitchen, an unknown individual shot an officer upstairs, and the officer fell down the stairs and into the kitchen. *Id.* at *2. Officers then handcuffed the plaintiff and detained him before transporting him to the police station. *Id.* When the plaintiff filed a § 1983 claim, the court analyzed his detention under both the *Terry* and *Lidster* standards. *Id.* at *1, *5–6. It first noted that officers may have had reasonable suspicion of a threat to officer safety,

* * *

As this part demonstrates, courts' responses to suspicionless witness stops diverge widely. A slim majority of courts have applied the reasonableness test outlined in *Brown* and adopted in *Lidster*, rather than stringently applying *Terry*'s relatively more demanding reasonable suspicion standard. The following part considers the potential consequences if that analysis carries the day, offering a retort in favor of robust reasonable suspicion.

III. THE DANGERS OF TARGETED, SUSPICIONLESS WITNESS STOPS

If more courts adopt an expansive reading of *Lidster* in suspicionless witness stop cases, officers will have practically unfettered discretion to seize citizens in high-crime areas, many of whom will be young men of color. So long as the officers believe (or claim to believe) an individual is a witness to another crime, such a stop would be constitutional, even if the stop was implemented on a discriminatory basis.

A. *Parallels to Stop-and-Frisk*

Targeted, suspicionless witness stops share many traits with stops-and-frisks, suggesting that suspicionless witness stops may also develop organically into a department-wide practice. First, both actions cost few departmental resources, even when conducted *en masse*. Officers can replicate targeted, suspicionless witness stops thousands of times over at only the cost of the officers' time, just as officers have executed stops-and-frisks millions of times on young men of color in recent history.¹⁵⁵ This makes suspicionless witness stops an attractive tool to the police for general crime control, much as stops-and-frisks have been attractive to commanders under pressure to lower crime statistics.¹⁵⁶ Second, some percentage of both types of stops are likely to uncover evidence of crimes committed by the individuals stopped, increasing their attractiveness to law enforcement. The most likely targets for either variety of stop are individuals living in high-crime neighbor-

justifying a *Terry* stop, without specifically applying *Terry* to the encounter. *Id.* at *5. It then discussed *Lidster*'s possible application in detail, concluding that: (1) the plaintiff's detention served a grave public concern; (2) witness detentions "for a few minutes" advanced that public interest "even where officers have little reason to believe that any individual detainee has specific information"; and (3) any interference with the plaintiff's liberty was "slight" and "insignificant." *Id.* at *5–6. The court concluded that the detention was reasonable, irrespective of whether *Terry* or *Lidster* applied. *Id.* at *6–7.

¹⁵⁵ Between 2004 and 2012, the NYPD conducted over four million stops, and more than 80% were of Black or Hispanic men. Friedman & Stein, *supra* note 20, at 343 (citing *Floyd v. City of New York*, 959 F. Supp. 2d 540, 575 (S.D.N.Y. 2013)).

¹⁵⁶ For a discussion of such department-wide pressure in New York City, see *Floyd*, 959 F. Supp. 2d at 592–601.

hoods.¹⁵⁷ Carrying weapons for self-defense is commonplace in those areas. These stops will likely reveal instances of low-level drug possession; even though the individuals stopped may actually be less likely than the general population to possess drugs,¹⁵⁸ frequent stops will reliably uncover some contraband.¹⁵⁹ Third, just as stops-and-frisks were often actively encouraged by supervisors within police departments, targeted, suspicionless witness stops are likely to win favor with supervisors, receiving little to no critical oversight.¹⁶⁰ Commanders may actively encourage practices that provide statistical evidence of the department's efforts to suppress crime.¹⁶¹

Citizens subjected to these tactics have few resources to lodge complaints that will publicize any abusive practices or draw judicial or public scrutiny to their damaging side-effects. To begin, not all citizens will be targeted for suspicionless witness searches at once and in view of a wide swath of society, apart from the friends and neighbors who happen to observe the search. Police checkpoints like those in *Edmond* are highly publicized in part to deter criminal behavior.¹⁶² There is often political backlash against such checkpoints when they are subjected to public comment and political pressure, just as the public responded with protests to broad-based programs such as roadside seatbelt checkpoints, checkpoints outside of a mall, and even airport safety lines.¹⁶³ In contrast, targeted, individual stops of

¹⁵⁷ The Newark police department's stop-and-frisk policy incorrectly suggested that mere presence in a high-crime area was sufficient on its own to justify a stop, which may have contributed to the Department of Justice finding that 75% of the stops officers reported under that policy failed to meet the reasonable suspicion standard constitutionally required under *Terry*. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 2, 9 (2014).

¹⁵⁸ See Dylan Matthews, *The Black/White Marijuana Arrest Gap, in Nine Charts*, WASH. POST (June 4, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-black-white-marijuana-arrest-gap-in-nine-charts/>, archived at <https://perma.cc/6U6F-G3J7> (citing *The War on Marijuana in Black and White*, AMERICAN CIVIL LIBERTIES UNION (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> archived at <https://perma.cc/3TM6-MZ2R>); Friedman & Stein, *supra* note 8, at 303 ("[N]umerous studies show that, in all manner of contexts, minorities are stopped more often than others but the 'hit rate'—the level at which they are found carrying contraband—is lower, indicating that profiling is baseless.").

¹⁵⁹ See INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 157, at 20 ("The likelihood of recovering evidence during a frisk is 13.6% for whites and 12.7% for blacks, and the likelihood of recovering evidence during a search is 14.2% for whites and 14.8% for blacks.").

¹⁶⁰ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561, 592–601 (S.D.N.Y. 2013).

¹⁶¹ Meares, *supra* note 46, at 168–69 ("[S]top-and-frisk under this approach is not simply a tool on the officer's belt to be used when the situation is right. . . . Rather, good policing is articulated from the top down throughout the entire agency to include aggressive, systematic, 'legalistic' field interrogations designed to suppress crime.").

¹⁶² FRIEDMAN, *supra* note 8, at 170 ("[T]he main point of the roadblocks wasn't catching people with drugs and weapons: it was to forestall the problem . . . given the publicity attendant on the roadblocks they might not catch many drug traffickers, but they would 'deter people' from bringing in drugs in the first place.").

¹⁶³ Krent, *supra* note 36, at 99–100 (citing Chuck Avery, *Angry Consumers Need Outlet*, PALLADIUM-ITEM (Richmond, Ind.), Oct. 28, 2002, at 6A; Leonel Sanchez, *Issa Meets Check-*

alleged witnesses are conducted one at a time, typically in high-crime neighborhoods where neither those searched nor those who observe the searches can easily publicize or remedy the behavior. Because those searches are aimed at individuals, rather than generalized and open to public view, they can fly under the radar of activists and journalists for years,¹⁶⁴ much as stop-and-frisk policies did in recent decades. Furthermore, those that can observe the searches lack the wherewithal to band together and challenge them; the very neighborhood characteristics that make residents likely targets for suspicionless witness stops limit those residents' capabilities to curb any damages they may cause.

One distinction between stops-and-frisks and suspicionless witness stops makes the latter an even likelier candidate for widespread adoption. If courts apply the reasonableness test described in *Brown* and adopted in *Lidster*, targeted, suspicionless stops will be even easier for officers to justify constitutionally than stops-and-frisks. Young men of color living in high-crime neighborhoods are almost certain to have witnessed a serious offense that officers can claim to be investigating. Even if the officers have no other articulable suspicion of any criminal wrongdoing under the *Terry* standard, they can almost always plausibly allege that they believed the individual stopped was a witness in some ongoing investigation.

B. Possible Repercussions of Widespread Suspicionless Witness Stops

Should departments frequently deploy suspicionless witness stops in an effort to gather evidence of unrelated crimes that the witness may have committed and thereby lower crime rates, they risk replicating many of the documented harms of discriminatory stop-and-frisk policies.

One side-effect is the humiliation suffered by the young men of color typically subjected to these searches. When officers seize all drivers who pass a highway checkpoint, "the humiliation implicit in being singled out as an object of suspicion is absent."¹⁶⁵ The very generality of the checkpoint, assuming it is implemented in a truly random and non-discriminatory fashion, curbs abusive practices that might lead to arbitrary searches of individu-

point Supporters, SAN DIEGO UNION-TRIB., Aug. 2, 2002, at B3; William F. West, *Candidate Bright Answers Critics*, MONTGOMERY ADVERTISER, Aug. 6, 2003, at A1); see also Friedman & Stein, *supra* note 8, at 321 n.218 (citing William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992) ("Fourth Amendment regulation is usually unnecessary where large numbers of affected parties are involved. Citizens can protect themselves in the same way that they protect themselves against most kinds of government misconduct—they can throw the rascals out.")).

¹⁶⁴ Krent, *supra* note 36, at 97 ("[S]earches and seizures by law enforcement officials on the beat generally affect only one individual at a time. In such cases, it is more difficult to predict who will be adversely impacted from such singling out, and those affected will have great difficulty forming coalitions to oppose the law enforcement activity due to the lack of identifiability.").

¹⁶⁵ LAFAYE, *supra* note 19 (citing MODEL CODE OF PRE-ARREST PROCEDURE 266 (AM. LAW INST. 1975)).

als based upon characteristics unrelated to crime or crime control.¹⁶⁶ Ensuring that kind of generality and eliminating arbitrariness typically means either ensuring that everyone in the community is searched, or that at least a random subset of those passing a specific checkpoint are searched, reducing the likelihood that any one individual feels targeted for unfair treatment.¹⁶⁷ But humiliation is omnipresent when officers conduct a targeted, suspicionless seizure of an individual, particularly a young man of color. When officers seized Aaron at midday in his minority-majority neighborhood, Aaron could see that the authorities wanted to speak only to him, not to all passing vehicle operators.¹⁶⁸ Even though the officers did not suspect Aaron of any wrongdoing, they required him to publicly submit to their authority in full view of his neighbors and friends.¹⁶⁹ This implicated Aaron in a criminal act that the officers had no reason to suspect, while Aaron was in full public view.¹⁷⁰

If officers need only the faintest notion that an individual has witnessed a crime to seize him without a warrant, the Fourth Amendment is a parchment barrier to racial profiling and its dire consequences. To begin, nothing stops officers from employing the tactic on a widespread basis. Information-gathering checkpoints have practical limitations, because they require significant police resources to plan and implement.¹⁷¹ Stopping each passing vehicle at a particular checkpoint for an extended period of time takes manpower, equipment, and resolve; police departments simply lack the capacity to spare those resources very often. But those practical limitations are absent where officers make individual suspicionless seizures. Officers have a much greater capacity to employ that tactic at their own discretion, creating a vast potential for abuse.¹⁷²

Suspicionless stops of individual witnesses are also likely to be discriminatory, even when well-meaning officers use such stops. Setting aside

¹⁶⁶ According to Barry Friedman, to render checkpoint searches constitutional, officers must “subject *everyone* to the same treatment. In that way the risk of arbitrary, discriminatory searches disappears. That’s what the *Prouse* Court was saying about roadblocks, and that’s pretty much what happens (or should happen) at airports.” FRIEDMAN, *supra* note 8, at 181.

¹⁶⁷ Friedman adds that if checkpoint searches are suspicionless, “we need to ensure that the search is conducted in a way that avoids arbitrariness—usually by making sure everyone is searched.” *Id.* at 183.

¹⁶⁸ See generally Craig B. Futterman et al., *‘They Have All the Power’: Youth/Police Encounters on Chicago’s South Side* (Univ. Chi. Pub. Law & Legal Theory, Working Paper No. 573, 2016), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/572/ archived at <https://perma.cc/WZY9-GP4K> (describing similar experiences of police encounters in public).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Illinois v. Lidster*, 540 U.S. 419, 426 (2004).

¹⁷² See *Brown v. Texas*, 443 U.S. 47, 52 (1979) (“When . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.”); *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (“We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.”).

those acting with discriminatory intent, officers who are genuinely seeking to control crime in their jurisdictions will predictably focus their efforts on the citizens they believe are most likely to be witnesses: individuals living in high-crime neighborhoods, predominantly young men of color. Discrimination is baked into the very logic of such stops. And that tendency will only be exacerbated by the implicit biases that even well-meaning officers struggle to leave behind.¹⁷³ Those biases found expression in stop-and-frisk policies, where officers often focused their efforts on young Black and brown men. “In the mid-1990s, along I-95 in Maryland, African Americans represented only 17% of drivers violating the traffic code, yet accounted for a whopping 72% of the stops. . . . In Boston, blacks represent one quarter of the population but made up nearly two-thirds of street-based police encounters from 2007 until 2010.”¹⁷⁴ Such biases were also prevalent in the NYPD’s use of stop-and-frisk policies in the early 2000s, where officers did not have reasonable suspicion for the majority of their stops. Litigation revealed that between around 6% and 36% of the 4.4 million stops conducted between 2004 and 2012 may have lacked the reasonable suspicion constitutionally required under *Terry*.¹⁷⁵ As such stops evolved into department-wide policy, officers were “not investigating people that they suspect[ed] to be committing particular crimes in progress but [were] instead proactively policing people that they suspect[ed] *could* be offenders.”¹⁷⁶

Suspicionless witness stops seem likely to cause the same consequences, foisting widespread humiliation upon young men of color. Such

¹⁷³ See, e.g., Rob Voight et al., *Language From Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NAT’L ACAD. SCI. 6521, 6521 (2017) (examining body camera footage and demonstrating differences in police demeanor depending upon the ethnicity of the subject in an encounter); Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 286 (2012) (measuring police response times in the decision to shoot potentially harmful targets of varying ethnicities, and demonstrating anti-Black racial bias in those responses); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876 (2004) (detecting the influence of Black faces on police officers’ ability to spontaneously detect degraded images of crime-relevant objects); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 581 (S.D.N.Y. 2013) (“Unconscious bias could help explain the otherwise puzzling fact that NYPD officers check ‘Furtive Movements’ in 48% of the stops of blacks and 45% of the stops of Hispanics, but only 40% of the stops of whites. There is no evidence that black people’s movements are objectively more furtive than the movements of white people.”).

¹⁷⁴ Friedman & Stein, *supra* note 8, at 300–01. As articulated by Professors Fagan and Geller, “[m]ore recently, Professor Geoffrey Alpert and his colleagues showed that police on patrol are more likely to view a minority citizen as suspicious based on nonbehavioral cues—location, associations, and appearances—while relying more often on behavioral cues to develop suspicion for White citizens.” Fagan & Geller, *supra* note 21, at 57–58 (citing Geoffrey P. Alpert, John M. MacDonald & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 422–23 (2005)).

¹⁷⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 582 (S.D.N.Y. 2013).

¹⁷⁶ Meares, *supra* note 46, at 164. The variable with the strongest correlation to the frequency of stops in a neighborhood was its racial composition, rather than the frequency of crime committed in the area. *Id.* at 174 (citing Report of Jeffrey Fagan, Ph.D. at 30–33, *Floyd*, 959 F. Supp. 2d 540 No. 08 Civ. 01034; *Floyd*, 959 F. Supp. 2d at 667).

stops are inherently demeaning, making people of color feel unwelcome in their own neighborhoods and distrustful of police.¹⁷⁷ An individual targeted for a seizure cannot avoid the stigma associated with a public interaction with police officers.¹⁷⁸ Suspicionless stops are “damaging to the detainees’ self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives.”¹⁷⁹ The history of discriminatory stop-and-frisk policies sets a troubling precedent, suggesting that officers who deploy suspicionless witness stops primarily against men of color are likely to publicly shame massive numbers of innocent individuals, even though the likelihood that the people of color stopped have committed a crime is the same as, if not lower than, the rest of the population.¹⁸⁰ This is the danger of a widespread application of *Lidster* to suspicionless, targeted stops of possible witnesses.¹⁸¹

C. *Lidster’s Linchpin*

In light of these risks, suspicionless witness stops should provoke a robust response from courts, one that revives a comparatively stringent reasonable suspicion requirement for such encounters. *Lidster’s* more relaxed balancing test should not apply to suspicionless witness stops. The legal analysis in *Lidster* clearly excludes such individualized stops.

The *Lidster* Court found highway checkpoints constitutional because they asked the same minimally intrusive questions about witnessing an earlier crime to every individual that passed the checkpoint.¹⁸² Such broad questioning of a wide, randomly selected group of citizens—what Friedman and

¹⁷⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

¹⁷⁸ See Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *FORDHAM URB. L.J.* 539, 559 (2016) (describing “the stigma harm of being singled out when innocent” and “the shaming of being singled out by the police and physically interrogated in front of one’s family and neighbors” as harms associated with an individual stop).

¹⁷⁹ *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) (collecting scholarly sources); see also *Stop and Frisk: The Human Impact*, CTR. FOR CONSTITUTIONAL RIGHTS, 6 (July 2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>, archived at <https://perma.cc/4N7A-DQH5> (noting that warrantless stops “can leave people feeling unsafe, fearful of police, afraid to leave their homes, or re-living the experience whenever they see police”).

¹⁸⁰ FRIEDMAN, *supra* note 8, at 155 (“In 2008, a study of LAPD data found not only that racial minorities were far more likely to be stopped, to be frisked when stopped, to be arrested when stopped, and to be searched, but also that they were substantially *less* likely to be found with weapons, drugs, or other contraband after a frisk. In other words, the hit rate was lowest in the groups facing the most police scrutiny.”); Friedman & Stein, *supra* note 8, at 303 (“[N]umerous studies show that, in all manner of contexts, minorities are stopped more often than others but the ‘hit rate’—the level at which they are found carrying contraband—is lower, indicating that profiling is baseless.”).

¹⁸¹ See LAFAYE, *supra* note 19 (“[T]he stopping of a single vehicle without sufficient suspicion of it to merit a *Terry* stop should not be upheld on the ground that the stop would have been appropriate had it occurred in a roadblock context.”).

¹⁸² *Illinois v. Lidster*, 540 U.S. 419, 425–26 (2004). According to the Court, such checkpoints are unlikely to provoke anxiety or prove intrusive, involve questions aimed to incrimi-

Stein call “programmatic searches”—can be constitutionally permissible, even in the absence of cause.¹⁸³ Put another way, what made the checkpoint in *Lidster* constitutional was not its focus on potential witnesses; the aim of that checkpoint was almost happenstance. Instead, what made the *Lidster* checkpoint constitutional was its generalized nature, which did not target individuals of specific ethnic backgrounds and avoided intruding into the lives of stopped citizens any more than necessary in order to achieve the government’s interests (which just so happened to be locating witnesses to recent crime).¹⁸⁴ *Lidster*’s holding is not applicable to just any search of witnesses; it is only applicable to generalized, random searches that lack individualized suspicion, regardless of purpose, because those searches avoid arbitrariness and unfettered police discretion.¹⁸⁵

Suspicionless witness stops, which by their very nature are targeted at individuals, are unconstitutional because they are not applied generally to random swaths of the population that happen to pass a given checkpoint. Suspicionless witness stops do not meet the criteria *Lidster* announced for a constitutional programmatic search.

First, as noted above, suspicionless witness stops are far more likely to provoke anxiety and prove intrusive than roadside checkpoints. Unlike checkpoints, suspicionless witness stops do not cast a wide net over everyone passing by, letting all those stopped see that they and their neighbors are subject to the same minimally intrusive treatment.¹⁸⁶ Checkpoints are unlikely to provoke anxiety in innocent citizens;¹⁸⁷ suspicionless witness stops perpetuate exactly that kind of anxiety.

Second, unlike checkpoints, suspicionless witness stops often include detailed questions designed to elicit self-incriminating information. Checkpoints operate by triage. Officers must process hundreds of drivers as efficiently as possible while seeking the diamond in the rough who may have relevant information. By necessity, officers must limit their inquiry of each

nate drivers, or be unreasonably proliferated given limited police resources. Those traits, “taken together,” excuse such checkpoints from presumptive unconstitutionality. *Id.*

¹⁸³ Friedman & Stein, *supra* note 8, at 286–87; see also FRIEDMAN, *supra* note 8, at 177–78.

¹⁸⁴ Friedman & Stein, *supra* note 8, at 288 (arguing that for programmatic, deterrent searches to be constitutional, “[e]ither everyone is searched or who gets searched must be decided in a truly random or otherwise nondiscriminatory way—in a manner that eliminates arbitrariness or uncabined discretion”).

¹⁸⁵ See Krent, *supra* note 36, at 95 (“[T]o the extent that law enforcement officials treat many individuals similarly, no one individual is singled out for differential treatment, and the individual subsequently searched will not be as stigmatized.”).

¹⁸⁶ The “distinguishing characteristic” of a public search is “to reach everyone in a category rather than only a chosen few.” Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 263 (2011).

¹⁸⁷ See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 43–44 (2011); LaFAVE, *supra* note 19 (explaining that “the humiliation implicit in being singled out as an object of suspicion is absent” in dragnet searches) (quoting MODEL CODE OF PREARRAIGNMENT PROCEDURE 266 (AM. LAW INST. 1975)).

driver to a few cursory questions likely to elicit answers about the crime they are investigating rather than about the drivers themselves and their backgrounds or activities. But officers conducting suspicionless witness stops are under no pressure to question multiple individuals quickly. Instead, officers can engage in more detailed inquiries, fleshing out not only the witness's possible knowledge of a crime, but also their possible involvement in that incident or other illegal activities.

Third, a prophylactic rule of presumptive unconstitutionality is necessary to restrain officers from proliferating suspicionless witness stops, unlike generalized police checkpoints. Checkpoints are inexorably visible to a wide number of citizens across the socio-economic spectrum, increasing officer accountability for checkpoints through democratic processes.¹⁸⁸ In contrast, suspicionless witness stops may be concealed from most citizens with real political power. Officers can deploy stops strategically to avoid detection by most segments of civil society, making it "more difficult to predict who will be adversely impacted" and much harder to "form[] coalitions to oppose the law enforcement activity due to the lack of identifiability."¹⁸⁹

¹⁸⁸ See Friedman & Stein, *supra* note 8, at 321 (citing William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992)); Krent, *supra* note 36, at 96 ("[T]he more that the political process is open to challenge the law enforcement measure, the less the concern for the absence of a warrant."). Such highly public programs can generate significant public debate and even resistance.

In a recent election for the mayor of Montgomery, Alabama, for instance, opponents and the press criticized the city administration for establishing checkpoints around the Montgomery Mall, and citizens in Indianapolis protested about checkpoints established to determine compliance with seatbelt laws. Hearings on airport safety have been widely publicized. At times, legislators have advanced the cause of citizens and sought to alter law enforcement practice. Congressman Darrell Issa, a member of the House Subcommittee on Immigration, Border Security and Claims, tried to close immigration checkpoints in his district because they tied up traffic and because the funds used could be "rerouted to more effective use." The political process serves as a safety valve to vent concerns about checkpoints. Individuals affected can band together to gain redress through the political process.

Id. at 99–100 (quoting Leonel Sanchez, *Issa Meets Checkpoint Supporters*, SAN DIEGO UNION-TRIB., Aug. 2, 2002, at B3) (citing Chuck Avery, *Angry Consumers Need Outlet*, PALLADIUM-ITEM (Richmond, Ind.), Oct. 28, 2002, at 6A; William F. West, *Candidate Bright Answers Critics*, MONTGOMERY ADVERTISER, Aug. 6, 2003, at A1).

¹⁸⁹ Krent, *supra* note 36, at 97. Suspicionless witness stops are akin to checkpoints "erected in particular parts of town" that lack the "power in the political process" necessary to curb discretionary abuses. *Id.* at 102. As noted above, suspicionless witness stops are also distinct from roadside checkpoints because police need not expend significant resources to conduct the former. Police departments lack the technical and personal wherewithal to deploy checkpoints on anything close to an everyday basis. But suspicionless witness stops can be folded into the everyday routine of officers on patrol, just as stop-and-frisk policies were. Meares, *supra* note 46, at 168–69. The possible breadth of suspicionless witness stops invites abuses that the Supreme Court has long feared. "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.'" *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

Lidster's linchpin was the unique set of circumstances of a generalized roadside checkpoint: systematic stops of all passing vehicles, brief questioning centered only on other crimes, and the practical limitations to their proliferation. None of those characteristics are present, however, when officers make targeted, suspicionless stops of individual witnesses. *Lidster*, by its own terms, does not apply to such suspicionless witness stops.

D. Reviving Reasonable Suspicion

Applying *Terry*'s requirements to suspicionless witness stops would dramatically alter the calculus of officers in the field who question particular individuals that may have seen a crime. Some might respond that it is wrong to assume *Terry*'s reasonable suspicion requirement is a high hurdle for officers in the field; in reality, applying *Terry* might not make a meaningful difference, given the ease with which officers can formulate that level of suspicion *post hoc* to justify a stop.¹⁹⁰ This response is premised upon a real-politik view of court enforcement of *Terry*'s requirements, one that accounts for officers' broad failure to provide reasons for executing a stop based upon observable, articulable phenomena, rather than tropes of suspicion popularized as *post hoc* justifications.¹⁹¹ My position is thus necessarily intertwined with a broader call for honest judicial enforcement of a robust version of *Terry*'s reasonable suspicion standard.

Terry fills an important doctrinal gap. It gives officers the constitutional authority to act quickly when their instincts suggest, because of some observable facts, that crime may be afoot. But to avoid arbitrary, discriminatory application, the reasonable suspicion test must mean what it says. It must require some facts that the officer can articulate to justify stopping someone on suspicion of a crime.¹⁹² The reasonable suspicion test is designed to apply to individual, retail contacts between police and those whom they believe are about to commit a crime, but "the current 'wholesale' practice is quite different from the vision of the *Terry* Court."¹⁹³ Put another way, *Terry* "has grown well beyond its Warren Court britches."¹⁹⁴

Suspicionless witness stops are a species of the same problem facing *Terry* and the reasonable suspicion test. They allow officers to target particular individuals for brief seizures without any real facts to justify their ac-

¹⁹⁰ See *supra* Part I.A.

¹⁹¹ "As stops increased in New York City from fewer than 100,000 in 1998 to more than 685,000 in 2011, individuated suspicion was diluted as officers defaulted to convenient and stylized narratives to justify stops." Fagan & Geller, *supra* note 21, at 86.

¹⁹² FRIEDMAN, *supra* note 8, at 158 ("As a matter of constitutional law, though, if stop-and-frisk is to be retained, the best solution is to return it to its roots: as an investigative tool to be used only when the police—as in *Terry* itself—can specify precisely what crime they suspect is in the offing, and have the facts to back it up."); see also Friedman & Stein, *supra* note 8, at 346.

¹⁹³ Fagan & Geller, *supra* note 21, at 61.

¹⁹⁴ Estrada, *supra* note 32, at 317.

tions. Courts should require officers to meet a full-throated version of *Terry*'s requirement to articulate "real facts" to justify any targeted stop, be it a stop-and-frisk or a suspicionless witness stop.¹⁹⁵ Otherwise, suspicionless witness stops might be the death knell of individualized suspicion, slowly replacing it over time with "an actuarial matrix of collective suspicion" of whole categories of young men of color.¹⁹⁶

IV. CRIME CONTROL AND IMMUNITY FOR WITNESSES STOPPED WITHOUT SUSPICION

What, then, is the well-meaning officer to do in order to solve more crimes in a high-crime neighborhood? Such officers face a very real problem. These neighborhoods are also high in distrust towards the police. Residents view officers as an invading, dangerous force; young men living in high-crime neighborhoods learn from a young age to avoid any encounter with officers, lest they be arrested and charged themselves, or worse.¹⁹⁷ Because many residents have criminal records, they are unlikely to turn to the police when they are victims of, or witnesses to, a crime; they fear that a prior act of misconduct or an outstanding warrant may come to the fore in the reporting process.¹⁹⁸ This in turn can make those residents the target of more crime because of their inability to rely on the police to protect them, perpetuating the deterioration of these neighborhoods.¹⁹⁹ In light of such trends, residents are perhaps less likely than ever to share information about crimes they have witnessed when an officer asks, let alone to proactively seek out officers and report such details voluntarily. Officers therefore struggle to find witnesses to crimes, more of which go unsolved because of a lack of evidence.

¹⁹⁵ "To the extent any deviation from probable cause is allowed, police must be required to specify the crime that they believe is being violated, and provide facts to justify this. Real facts." Friedman, *supra* note 8, at 159.

¹⁹⁶ Fagan & Geller, *supra* note 21, at 62.

¹⁹⁷ Alice Goffman's heart wrenching sociological account of a group of young men in a high-crime neighborhood in Philadelphia brings this view into painfully clear focus. See ALICE GOFFMAN, *ON THE RUN* (2014). Goffman recorded one of the young men in her study imparting the following lesson to his younger brother:

If you hear the law coming, you merk on [run away from] them n[*****]. You don't be having time to think okay, what do I got on me, what they going to want from me. No you hear them coming, that's it, you gone. Period. 'Cause whoever they looking for, even if it's not you, nine times out of ten they'll probably book you.

Id. at 23–24.

¹⁹⁸ *Id.* at 29–31 ("A man intent on staying out of jail cannot call the police when harmed, or make use of the courts to settle disputes. . . . [T]hey cannot turn to the police because their legal entanglements prevent them from doing so. The police are everywhere, but as guarantors of public safety, they are still out of reach.").

¹⁹⁹ *Id.* at 32 ("If young men known to have a warrant become the target of those looking for someone to exploit or even to rob, they may resort to violence themselves, for protection or for revenge.").

This cycle of community distrust, fewer witness statements, and more unsolved crimes may motivate well-intentioned officers to make more suspicionless witness stops. Aaron's case in the Introduction provides a worst-case example where officers used their belief, however flimsy, that an individual witnessed another crime as a mere pretext to questioning him, hoping all along to uncover evidence of additional crimes the witness himself committed. But in some suspicionless witness cases, officers have nobler motives. They may instead seek to talk to witnesses to a crime under investigation in hopes of solving that crime only; accidentally, they may learn of additional crimes that the witness committed and feel duty bound to pursue them.

But deploying suspicionless witness stops will likely undermine the well-meaning officers' goal of locating witnesses to unsolved crimes. These stops engender even greater distrust of the police in high-crime communities, leading to less cooperation and higher rates of unsolved crime.²⁰⁰ Members of the community see discriminatory stops as their primary point of contact with law enforcement, rather than cooperative efforts to reduce crime near their homes.²⁰¹ Individual stops undermine faith in officers' goodwill, particularly among people of color, youth, and the poor.²⁰² When racial minorities feel targeted by unnecessary police stops, they perceive the entire police force as illegitimate.²⁰³ Public safety is negatively impacted as the community grows dubious of the police and becomes even less willing to cooperate with officers.²⁰⁴

Importantly, officers may not need to conduct warrantless suspicionless witness stops to talk to some witnesses. They may instead be able to obtain warrants to detain "material witnesses" to crimes through federal and state material witness statutes. Where authorities can provide a magistrate with probable cause to believe that an individual is a material witness to a crime

²⁰⁰ The more targeted street and vehicle stops a person experiences, the lower the person's view of police legitimacy. See Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 776 (2014).

²⁰¹ Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2398 (2017).

²⁰² L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2074 (2011); Tom R. Tyler, Jonathan Jackson & Avital Mentovich, *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 627 (2015) ("People who feel suspected by the police . . . are likely to be minorities, young, poor, and male."); Tyler, Fagan & Geller, *supra* note 200, at 756 ("In a survey of more than 18,000 Chicago public school students, about half reported that they had been stopped and asked questions by the police, and 'told off or told to move on' by the time they were in ninth or tenth grade.").

²⁰³ Meares, *supra* note 46, at 175 (citing Rod K. Brunson, "Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences, 6 CRIM. & PUB. POL'Y 71, 85 (2007)).

²⁰⁴ See Tyler, Fagan & Geller, *supra* note 200, at 753; see also U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 11 (July 2014) ("The indiscriminate use of stopping and questioning individuals will be detrimental to the positive community relations that this Department strives to obtain.") (citation omitted).

and that it would be impractical to secure their testimony via subpoena, the authorities can obtain warrants based upon probable cause to detain those individuals.²⁰⁵ Rather than conducting suspicionless witness stops without any judicial review, officers with reasonable suspicion that an individual truly was a witness to another crime have a route to obtaining a warrant supported by probable cause.

However, officers may not be able to produce the reasonable suspicion necessary to obtain a material witness warrant in every case. Additionally, officers may observe a suspected witness in public and not have time to seek a material witness warrant—a genuine problem because officers cannot rely upon an exigency exception to material witness statutes as they might from the Fourth Amendment’s warrant requirement. Therefore, an olive branch might be necessary to serve the interests of crime control where officers question a witness without suspicion in genuine hopes of solving an underlying crime. A rule that balances officers’ sometimes urgent need to solve crimes against a witness’s desire to avoid self-incriminating interactions with investigators could do the trick.

A potential solution is a form of testimonial immunity for individual witnesses stopped without suspicion of wrongdoing. Declining rates of witness cooperation may provide evidence of a special need that justifies suspicionless witness stops, but only insofar as those stops produce evidence that is used to solve the underlying crime the officers believe stopped individuals saw. In other words, if the officers’ actions compel witnesses to come forward with information about a crime, these witnesses would be entitled to a form of immunity from prosecution based upon the statements they provide during the encounter.

Providing witnesses stopped without suspicion with a form of immunity will also discourage arbitrary stops aimed at generating evidence of other crimes. If officers know that witnesses stopped without suspicion cannot be prosecuted on the basis of the statements they provide or the evidence they possess, they will be less likely to deploy such stops as a pretext for uncovering crimes that these alleged witnesses committed. Immunity in this context functions as a deterrent to officer misconduct and as a safeguard against further degradation of the constitutional rights of the young men of color subjected to such stops.

A proposal granting immunity to witnesses stopped without suspicion finds support in the Fifth Amendment’s protection against compelled testimony that may be self-incriminating. Witnesses can assert their Fifth Amendment privilege in a proceeding in which they reasonably believe that their statements could be used in a criminal prosecution against them, or that

²⁰⁵ See 18 U.S.C. § 3144 (2019); *see also* NAT’L CRIME VICTIM LAW INST., SURVEY OF SELECT STATE AND FEDERAL MATERIAL WITNESS PROVISIONS (2016), <https://law.lclark.edu/live/files/23521-state-and-federal-material-witness-provisions>, *archived at* <https://perma.cc/3LMJ-X98R> (collecting state analogues to the federal material witness statute).

their statements could lead to other evidence that might be used in such a prosecution.²⁰⁶ Investigators can overcome an assertion of the privilege and compel testimony, but only if they provide witnesses with some form of immunity in exchange for their statements.

Prior to the 1970s, Supreme Court jurisprudence and statutes in all fifty states allowed investigators to compel a privilege-claiming witness to testify only if the government also provided “transactional immunity” to the witness.²⁰⁷ Such transactional immunity provided the witness full protection against any prosecution whatsoever for an offense related to the compelled testimony.²⁰⁸ However, in its 1972 decision in *Kastigar v. United States*,²⁰⁹ the Supreme Court held that investigators could also compel testimony from a witness who claims the Fifth Amendment privilege if they provided lesser protections.²¹⁰ The Court approved the practice of compelling testimony in exchange for “use and derivative use” immunity, granted by court order through a recently passed provision of the Organized Crime Control Act of 1970.²¹¹ Such use immunity “prohibits the prosecutorial authorities from using the compelled testimony in any respect,” though it does not preclude prosecution for crimes detailed in the testimony so long as the witness’s statement and its investigatory byproducts are not used as evidence against them.²¹² According to the Court, use immunity was sufficient to ensure the witness did not involuntarily incriminate themselves; it “leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.”²¹³ Such use immunity was therefore “coextensive with the privilege” and could be used to supplant it when necessary to compel a witness to give a statement.²¹⁴

In some cases, use immunity may arise not from a court order, but simply by operation of law. Where a public employer compels its employee to make a statement under threat of termination, the speaker is granted use

²⁰⁶ *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972); Charles J. Walsh & Steven R. Rowland, *Immunized Testimony and the Inevitable Discovery Doctrine: An Appropriate Transplant of the Exclusionary Rule or an Excuse for a Broken Promise?*, 23 SETON HALL L. REV. 967, 970–80 (1993) (summarizing the history of the Fifth Amendment privilege against self-incrimination).

²⁰⁷ Peter Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1690 (1982); see also *Kastigar*, 406 U.S. at 447, 453 (noting that the immunity statutes then in place in all fifty states were “part of our constitutional fabric”) (quoting *Ullmann v. United States*, 350 U.S. 442, 438 (1956)).

²⁰⁸ *Kastigar*, 406 U.S. at 453.

²⁰⁹ 406 U.S. 441 (1972).

²¹⁰ *Id.* at 453.

²¹¹ *Id.* at 462; Walsh & Rowland, *supra* note 206, at 978–80.

²¹² *Kastigar*, 406 U.S. at 453.

²¹³ *Id.* at 462.

²¹⁴ *Id.*

immunity by operation of law via the Fifth Amendment.²¹⁵ For example, self-executing use immunity may arise where an internal affairs investigator requires an officer to provide a statement or face dismissal.²¹⁶ The government cannot use the statement itself or any evidence derived therefrom in a future prosecution; it must instead prove that evidence was derived from a source independent of the statement itself.²¹⁷

Jurisdictions interested in reducing crime rates through suspicionless witness stops thus have two choices. The less desirable option is to argue that a constitutional rule of self-executing use immunity should apply for witnesses stopped without suspicion. When well-meaning officers ask such witnesses about an underlying crime—perhaps a necessary tactic to solve a serious felony committed in a high-crime community where most citizens do not trust the police—the officers' show of authority and targeting of the individual seized could be seen as a form of compelled statement. To the extent that the individual stopped is forced to reveal self-incriminating information in the course of the conversation, his statements ought to be enveloped with protection against the use or derivative use of them in a future prosecution.

But as the opening vignette regarding Aaron's suspicionless witness stop shows, use immunity may not go far enough. Where officers also uncover evidence, be it physical evidence or incriminating statements, of an unrelated crime that the witness committed, only full transactional immunity would provide that witness with protection from prosecution and a motive to cooperate with questioning officers. Jurisdictions that hope to use suspicionless witness stops as a crime control tool could adopt statutes affording transactional immunity to witnesses so stopped. Such a statute would fully protect the witness from later prosecution, and likewise encourage more witnesses to speak to officers without fear of ancillary negative consequences.

As further protection against police abuse of suspicionless witness stops, these jurisdictions should limit the use of the tactic to the investigation of certain categories of serious crimes. Jurisdictions could prohibit suspicionless witness stops unless the underlying crime falls in the most serious class of felony in the jurisdiction. In such cases, the well-meaning officer may need space to effectively investigate such high-salience crimes, but potential witnesses should be cloaked in use immunity in exchange for their seemingly coerced cooperation with the investigation.

²¹⁵ Kate E. Bloch, *Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements*, 1992 U. ILL. L. REV. 625, 638 (1992).

²¹⁶ *Id.* at 630; *see also* *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.").

²¹⁷ Bloch, *supra* note 215, at 646; *see also* *Erwin v. Price*, 778 F.2d 668, 669–70 (11th Cir. 1985) ("A public employee may not be coerced into surrendering the privilege by threat of sanctions, and if he has been coerced into waiving the privilege, his answers are not admissible against him in a subsequent criminal trial.") (citations omitted).

CONCLUSION

Suspicionless witness stops carry huge risks, both for the individuals subjected to them and the officers conducting them. For stopped individuals, the technique leads to public embarrassment and shaming, further distrust of the police force, and potential criminal charges based upon evidence uncovered during the stop. For the officers, the technique may actually undermine efforts to solve more crimes in high-crime neighborhoods, as residents will increasingly view the police as an invading force that discriminatorily stops young men of color.

As this Article has argued, courts should not approve suspicionless witness stops because they do not meet *Terry*'s requirement that officers have reasonable suspicion of criminal activity to conduct a seizure. Courts should not analogize suspicionless witness stops to roadside checkpoints seeking potential witnesses. Cases like *Illinois v. Lidster* focused on the unique circumstances of generalized roadside checkpoints: their systematic, broad application; their brief questioning; and their practical limitations given restricted police resources. None of those characteristics are present when officers make targeted, suspicionless stops of individual witnesses.

Aside from the constitutional issues facing suspicionless witness stops, police departments should not deploy them because of the likelihood that they will be counterproductive in solving crimes and will only perpetuate a cycle of discriminatory police action followed by broad community distrust of police authority. These risks are too great for officers to deploy suspicionless witness stops as a substitute for stop-and-frisk policies that have fallen into disfavor. Future research should focus on alternative methods to end this cycle of discrimination and distrust. This Article offers an initial suggestion—perhaps jurisdictions interested in uncovering more witnesses to unsolved crimes should provide statutory immunity protection to individuals stopped without suspicion. But further consideration of options that will balance the need to protect individual liberty while positively shaping police practice is sorely needed. The process will be long and difficult, but is well worth undertaking.

