Writing Scripts for Silent Movies: How Officer Experience and High-Crime Areas Turn Innocuous Behavior into Criminal Conduct

"[L]ife is full of mysteries, bristling with unanswered questions, both on the street and off. If police were empowered to intrude and detain citizens in every instance in which they do not understand intentions or observed behavior, then any meaningful right to privacy is not only illusory but utterly lost."[1]

I. INTRODUCTION

Despite being innocuous, behavior that appears to an experienced police officer to resemble a typical street-level drug transaction, especially when located in a "high crime area," may be sufficient to justify a stop and search of the individuals involved.[2] Courts addressing similar factual scenarios regularly state that while no single suggestive factor, standing alone, is sufficient to establish the requisite suspicion, the innocuous behavior, in light of the character of the neighborhood and the officer's training and experience—the whole "silent movie"—does tend to establish that a suspect is committing a crime.[3] Unlike actual silent movies, which provide dialogue in subtitles so the audience knows what is happening, the scenes of a street-level silent movie have no accompanying subtitles; instead, a police officer writes the "script" as he infers criminality from the otherwise innocuous behavior.[4] An officer's

1. Francis D. Doucette, Op-Ed., Levy*: A Foray into Troubling Area of Search and Seizure Law*, MASS. LAW. WKLY., Aug. 2, 2010, at 39.

2. *See* Commonwealth v. Santaliz, 596 N.E.2d 337, 339-40 (Mass. 1992) (explaining four factors allowed officer to make reasonable inference of criminality). The unusual nature of a transaction, furtive behavior of the suspects, high-crime character of the location, and experience of the officer are factors that, when taken together, often allow for the inference that a drug transaction took place. *See id.*; *see also* Commonwealth v. Levy, 947 N.E.2d 542, 544 (Mass. 2011) (explaining officer had reasonable suspicion of drug transaction despite not seeing any actual exchange); Commonwealth v. Kennedy, 690 N.E.2d 436, 442 (Mass. 1998) (noting inability to identify object exchanged not fatal to finding of probable cause).

3. *See* United States v. Cortez, 449 U.S. 411, 417 (1980) (stating inquiry must take into account whole picture or totality of circumstances); Commonwealth v. Kennedy, 690 N.E.2d 436, 440 (Mass. 1998) (declaring whole "silent movie," comprised of multiple factors, proper focus of analysis). The Supreme Court has repeatedly stated that the probable cause and reasonable suspicion standards are not capable of being reduced to a concrete set of legal rules; rather, they are fluid concepts that must take into account the totality of the facts and circumstances. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 272-81 (5th ed. 2010) (discussing standards of suspicion and various types of information involved in analysis).

4. *See, e.g.*, People v. Limon, 21 Cal. Rptr. 2d 397, 400 (Ct. App. 1993) (stating expertise of officer can

training and experience and the character of the neighborhood are certainly relevant for assessing the basis of suspicion, but the weight assigned to these categorical judgments creates an imbalance in search and seizure analysis that is inconsistent with the traditional requirement of particularized suspicion.[5]

Street-level drug arrests rarely involve warrants, so suppression matters turn primarily on the testimony of the arresting officer, which almost invariably includes assertions that the neighborhood has a high crime rate and the officer drew inferences based on his training and experience.[6] These two factors often shift the analytical balance toward a finding of reasonable suspicion or probable cause because courts defer to police officers' judgment and do not meaningfully review the factual basis for a high-crime assertion.[7] Weighing these two factors so heavily results in otherwise innocuous behavior being treated as criminal activity based not on objective facts relating to the particular suspect, but on the conclusions of an officer who could not immediately find an innocent explanation to his subjective satisfaction and who chose to use

attach "criminal import" to otherwise innocent facts); Hall v. State, 981 A.2d 1106, 1112 (Del. 2009) (holding suspect exiting parked car and entering another sufficient factual basis for conclusion of narcotics transaction); *Levy*, 947 N.E.2d at 544 (stating, in dicta, unusual series of events and officer experience "more than sufficient" for reasonable suspicion). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (cautioning against officer experience being used to give police unbridled discretion to make stops); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1322-23 (1990) (explaining validation of suspicion in absence of objective and reviewable criteria inappropriate).

5. *See Cortez*, 449 U.S. at 417-18 (declaring totality of circumstances analysis still requires objective, particularized suspicion of individual suspect); *Montero-Camargo*, 208 F.3d at 1129 (stating assessment of whole picture must arouse reasonable suspicion as to particular person stopped); Commonwealth v. Bartlett, 671 N.E.2d 515, 518 (Mass. App. Ct. 1996) (explaining various facts making up totality of circumstances must actually be suggestive of criminality). Lower courts have transformed the reasonable suspicion standard from a device allowing for temporary stops and limited searches as part of criminal investigations into a technique by which police officers can make forcible stops and conduct searches "almost entirely at their discretion." *See* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 987-88 (1998) (noting lower courts accept broad categories of suspicion despite Supreme Court's requirement of specificity).

6. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590-91 (2008) (highlighting use of high-crime area as factor in almost all suppression hearings); Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 755 (2010) (pointing out courts' frequent reliance on officer training and experience in search and seizure analysis); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1498 (2010) (explaining most common justifications based not on particular individual but on character of neighborhood).

7. *See Montero-Camargo*, 208 F.3d at 1139 n.32 (warning high-crime factor utilized too often in questionable circumstances and invites trouble); *see also* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 123-24 (2007) (recognizing expert status automatically given to police unlike other expert witnesses); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 116-17 (1999) (stating courts bootstrap ambiguous conduct to reasonable suspicion based on character of neighborhood).

intrusive means to resolve the puzzle in his mind.[8]

This Note will begin by examining the historical background of the constitutional standards for search and seizure analysis.[9] Next, it will address the gradual erosion of the particularized-suspicion requirement, illustrating the modern trend of courts to allow categorical judgments to serve as the basis for suspicion, as well as the move away from strict standards towards general reasonableness inquiries.[10] The Note will then focus on officer training and experience, first addressing the seemingly inconsistent use of an officer's subjective experiences in what is supposed to be a purely objective analysis of the basis of suspicion, then discussing the differing treatments of officer training and experience, as well as the "expert" nature of officer testimony.[11] Then it turns to the high-crime area factor, highlighting the social, racial, and practical concerns implicated by the high-crime designation.[12] This portion of the Note concludes by providing an example of one court's framework for determining whether a neighborhood merits the high-crime designation, requiring objective, quantifiable support.[13]

II. HISTORY

A. The Fourth Amendment: Origins, Interpretations, and Means of Enforcement

The United States Supreme Court has observed that the Fourth Amendment to the United States Constitution grew largely out of early American colonists' negative experiences with writs of assistance and general warrants formerly used in England.[14] Commentators favoring a narrow reading of the

8. *See* Harold Baer, Jr., *Got a Bad Feeling? Is that Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL'Y 91, 96 (2007) (asserting lower courts moved from insistence on specific facts towards broad "categorical jurisprudence"); Harris, *supra* note 5, at 976 (illustrating reality that police can stop based on categorical judgments regardless of actual individual circumstances); *see also* Doucette, *supra* note 1 (stating trend for courts to approve of searches based on neighborhood and puzzle in officer's mind); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 31 (2010) (arguing individualized suspicion mandate reduces errors and limits police discretion as contemplated by Fourth Amendment).

9. *See infra* notes 14-27 and accompanying text (explaining origin and history of Fourth Amendment and basic formulations of various standards of suspicion).

10. *See infra* notes 28-50 and accompanying text (addressing rise of general reasonableness analysis and trend of allowing categorical judgment based suspicion).

11. *See infra* notes 51-68 and accompanying text (discussing subjective nature of officer experience and comparing testimony of officer to that of expert).

12. *See infra* notes 69-76 and accompanying text (detailing social and racial implications of high-crime area designation and highlighting its flaws).

13. *See infra* notes 77-80 and accompanying text (providing example of sensible approach to address problems with high-crime area analysis).

14. *See* United States v. Chadwick, 433 U.S. 1, 7-8 (1977) (explaining "sweeping power" of general warrants granted by executive rather than judicial authority), *abrogated by* California v. Acevedo, 500 U.S. 561 (1991). The Court further noted that the amendment was concerned not just with searches of the home, but

amendment's protections often rely on such an interpretation, but the Supreme Court has since acknowledged that the amendment served to protect against other evils as well.[15] The most common area of disagreement regarding the framers' intent and the scope of Fourth Amendment protections, in general, is whether there is a connection between the Reasonableness Clause and the Warrant Clause—some commentators assert that all searches require warrants, while others claim that a general reasonableness inquiry governs all search and seizure issues.[16] Even in cases where a constitutional violation undoubtedly occurred, the exclusionary doctrine—the primary means of enforcing Fourth Amendment strictures—is not always applied, as evidenced by the Supreme Court's creation of multiple exceptions to the doctrine in recent cases.[17]

B. The Traditional Standard: Probable Cause

1. The Standard

The Fourth Amendment provides that warrants are to be issued only upon a

with searches in general, including searches of the individual and their effects. *See id.* at 8.

15. *See* Payton v. New York, 445 U.S. 573, 585 (1980) (noting evil amendment designed to prevent broader than simply writs of assistance and general warrants). As support, the Court pointed to the history surrounding the drafting of the Fourth Amendment which illustrates that the amendment's intended scope was broader than the specific cases that "gave it birth," necessarily including warrantless searches and seizures of the person within the class of government actions the amendment requires be reasonable. *See id.* at 585-86.

16. *See* U.S. CONST. amend. IV. The Fourth Amendment states:

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

Id.; *see also* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 32 (2010) (noting even judges favoring framers' intent often abandon it when not supportive of desired results); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 202 (1993) (illustrating Fourth Amendment highly susceptible to inherently contradictory interpretations). *Compare* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767-68 (1994) (contending warrant requirement illogical given numerous exceptions currently recognized), *with* Anthony C. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) (asserting amendment calls for judicial predetermination of probable cause inherent in warrant requirement).

17. *See* Herring v. United States, 555 U.S. 135, 147-48 (2009) (declaring exclusion inappropriate when violation due to mere attenuated negligence); Hudson v. Michigan, 547 U.S. 586, 601-02 (2006) (stating exclusion only appropriate if deterrence benefits outweigh societal costs of exclusion); United States v. Leon, 468 U.S. 897, 926 (1984) (holding exclusion remedy inappropriate for simple violation of knock and announce rule); *see also* CHEMERINSKY, *supra* note 16, at 165 (asserting exclusionary rule not eliminated though significantly eroded); DRESSLER & MICHAELS, *supra* note 3, at 355 (explaining rule well recognized but legislative history reveals little about origin and development). The creation of various exceptions to the exclusionary rule is a sign of the Supreme Court's increasing reluctance to regulate the police, which undermines the important goals of discouraging improper police conduct and preserving judicial integrity. *See* Baer, *supra* note 8, at 95 (predicting Supreme Court precedent moving Fourth Amendment jurisprudence in "wrong direction").

showing of probable cause, a requirement that served as the primary, if not sole, standard for determining the validity of searches and seizures for much of the history of this area of litigation.[18] Though courts' definitions varied slightly, the substance of all formulations of the standard is a reasonable ground for belief of guilt based on specific facts in the record, rather than mere general suspicions drawn from other sources.[19] Eventually, courts adopted a more refined standard, requiring that the facts and circumstances known to the police officer, and of which he had reasonably trustworthy information, be sufficient in themselves to warrant a man of reasonable caution in the belief that a crime had been, or was being, committed.[20] The Supreme Court has repeatedly characterized probable cause as a practical, nontechnical conception affording the best possible compromise for accommodating the often opposing interests of private citizens and law enforcement.[21]

2. Applying the Standard

The formulation just discussed remains the benchmark to this day, but courts have further refined its analytical application, primarily in response to the ever-increasing use of civilian and confidential informants to provide information in support of warrant applications, as opposed to first-hand observations of police officers.[22] In *Spinelli v. United States*,[23] the Supreme Court declared that when

18. *See supra* note 16 and accompanying text (laying out text of Fourth Amendment); *see also* DRESSLER & MICHAELS, *supra* note 3, at 117 (stating traditional Fourth Amendment jurisprudence featured neutral magistrate as arbiter of probable cause). Even in cases where police officers acted without a warrant, the traditional inquiry was whether the officers had probable cause "at the time of the Fourth Amendment activity." *See* DRESSLER & MICHAELS, *supra* note 3, at 118.

19. *See* McCarthy v. De Armit, 99 Pa. 63 (1881) (establishing general definition of probable cause); The Apollon, 22 U.S. (9 Wheat.) 362, 374 (1824) (rejecting reliance on general characteristics of area and public records unrelated to particular suspect); *see also* Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 786 (2004) (explaining probable cause requirement generally means officer must have "good reason").

20. *See* Carroll v. United States, 267 U.S. 132, 162 (1925) (setting forth first widely recognized formulation of probable cause standard). The Court felt that the Fourth Amendment was to be construed in light of what was considered an unreasonable search or seizure at the time the amendment was drafted. *See id.* at 149. The Court also drew a distinction based on the nature of the objects to be seized, offering less protection for items thought to be contraband than for an individual's personal books and papers. *See id.*

21. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949) (explaining requiring more hampers police but requiring less leaves citizens at mercy of officers' caprice). The Court explained that the standard of proof for probable cause necessarily correlates to what must be proved, in that a search or seizure need only be supported by a probability—not a certainty—of guilt. *See id.* at 175; *see also* DRESSLER & MICHAELS, *supra* note 3, at 134 (suggesting standard requires less evidence than needed to convict but more than bare suspicion); Gould & Stern, *supra* note 19, at 786 (emphasizing justifications for intrusion must be directed to specific individual not mere general suspicions).

22. *See generally* Aguilar v. Texas, 378 U.S. 108 (1964) (noting preference for independent determination of probable cause by magistrate); Spinelli v. United States, 393 U.S. 410 (1969) (stating informant's tip requires more precise scrutiny than mere totality of circumstances approach). The *Spinelli* Court reasoned that in order for a magistrate to fulfill his "neutral and detached" role and make an independent determination of probable cause, a warrant application must provide a reliable factual foundation, not mere conclusory

an informant supplies information used to support probable cause, both the informant's basis of knowledge and his veracity must be established.[24] This two-pronged test, however, was replaced by the "totality of the circumstances" approach established in *Illinois v. Gates*.[25] The totality of the circumstances approach incorporates the basis of knowledge and veracity factors, but as flexible guidelines rather than independent elements, thereby allowing a weak showing in one to be made up for by a particularly strong showing in the other.[26] The Court has been careful to point out that this approach still requires a particularized and objective basis of suspicion regarding the specific individual in question.[27]

C. The New Approach: General Reasonableness

1. A Sliding Scale

While never expressly adopting a sliding-scale approach to Fourth Amendment analysis, the Supreme Court appears to have employed one, as evidenced by its repeated practice of balancing the competing interests of the government, or the public, and the private citizen to determine not whether probable cause exists, but whether an intrusion is reasonable.[28] The resort to a general reasonableness inquiry, however, cuts both ways; government actions involving an unusually high degree of intrusiveness require a more substantial justification than ordinary probable cause—for instance, a "compelling need."[29] Nevertheless, courts generally use interest balancing to relax the relevant

allegations. *See* 393 U.S. at 415-16.

23. 393 U.S. 410 (1969).

24. *See id.* at 413-19 (emphasizing need to establish factual basis for informant's conclusions and credibility or reliability of informant himself).

25. 462 U.S. 213, 233 (1983).

26. *See id.* at 232-39 (describing determination as whether circumstances establish "fair probability" of presence of contraband at location). *But see* Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (rejecting totality of circumstances test as "unacceptably shapeless and permissive").

27. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1980) (acknowledging "whole picture" or totality of circumstances nevertheless requires particularized suspicion of specific individual). The Court, however, somewhat undermined the purely objective nature of the standard by allowing for the circumstances to be "weighed as understood by those versed in the field of law enforcement," rather than simply as understood by ordinary men of reasonable caution. *See id.* at 411-12. *But cf.* United States v. 1964 Ford Thunderbird, 445 F.2d 1064, 1068 (3d Cir. 1971) (declaring standard relates to ordinary man rather than trained officer).

28. *See* DRESSLER & MICHAELS, *supra* note 3, at 137 (asserting if no sliding-scale, then at least "different kinds" of probable cause); *see also* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 995 (2003) (recognizing most searches not supported by probable cause but on basis of general reasonableness). While the probable cause standard still exists and is technically free of any reasonableness balancing, it has become increasingly irrelevant in assessing the constitutionality of most searches and seizures because it is simply not applied very often. *See* Lerner, *supra*.

29. *See* Winston v. Lee, 470 U.S. 753, 766 (1985) (demanding state have compelling need for evidence to extract bullet from suspect's muscle tissue); Schmerber v. California, 384 U.S. 757, 768 (1966) (requiring clear indication testing suspect's blood would furnish destructible evidence).

standards rather than require more from the police.[30] Many commentators, and even some judges, are troubled by this practice because they recognize that police officers often push any such relaxation or exception to the limit.[31]

Some commentators are troubled by the very nature of the interest-balancing approach because it rests on the idea that the government or public interest is always at odds with the interests of the private individual, when, in reality, these interests are often aligned.[32] For example, members of communities that experience repeated invasions of privacy by police may, as a result, be less willing to participate in collective activity that benefits society, such as assisting the police in other investigations or participating in community-based organizations, for fear of intensified surveillance.[33] Another criticism of framing the approach in terms of "competing" interests is that courts often view the suppression of evidence as a major harm to the public's interests; however, the inevitable result of the Constitution's protections against unreasonable searches is that officers who obey constitutional strictures will in fact catch fewer criminals.[34]

30. *See* Amsterdam, *supra* note 16, at 393-94 (explaining sliding-scale approach unpredictable and ad hoc nature of determination risks relaxation of standards); Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1231-32 (2010) (stating courts do not give police testimony at suppression hearings necessary level of scrutiny); *see also* James M. Rosenbaum, *Hunches: Too Much Discretion, Not Enough Control*, 4 J.L. ECON. & POL'Y 107, 114 (2007) (asserting regulation of police necessary and requirement of objective justification should not be discarded); Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1707 (2009) (illustrating courts' reluctance to meaningfully regulate police conduct).

31. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948) (characterizing police work as "competitive enterprise"); *see also* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (warning officers interpret exceptions themselves and push to limit); Cathy Young, Op-Ed., *5-Justice Bloc Imperils Rights*, BOS. GLOBE, May 9, 2001, at A23 (stating most officers will not abuse discretion but still cannot entrust freedoms to officers' goodwill).

32. *See* Reinert, *supra* note 6, at 1475 (describing practice of framing balancing test with interest of public and individual always in tension). The Court's use of the balancing test illustrates its undeniable preference to favor collective security over individual privacy. *See id.* This limited appreciation of the social values implicated by Fourth Amendment intrusions makes the amendment less meaningful on an individual and societal level. *See id.* at 1506.

33. *See id.* at 1487-88 (describing potential harms of failing to enforce Fourth Amendment protections particularly in "targeted" communities). This illustrates how society's interests are often aligned with individual interests—the experience of frequently being stopped and searched is not just an experience of having one's privacy intruded upon, but leaves a lasting impression of unfettered domination by the state over the community as a whole. *See id.* at 1490; *see also id.* at 1495 (noting "very high percentage of stops took place in very public places").

34. *See* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 28 (1994) (criticizing treating individual rights as in tension with public interests). If the courts do not regulate the methods police use in investigating alleged criminals, then those courts will have no mechanism to regulate the police when they inappropriately investigate law-abiding citizens. *See id.* at 8; *see also* Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 293 (2010) (asserting Bill of Rights "inherently envisions" loss of evidence). That the exclusionary rule allows many guilty criminals to go free is itself a flawed proposition—data on federal criminal cases shows that the rule results in a "loss" for the government in only 1.3% of cases. *See* CHEMERINSKY, *supra* note 16, at 161 (summarizing various statistics regarding exclusionary rule's impact in federal courts).

2. Warrants: From Requirement to Preference

There is much debate about whether the Fourth Amendment imposes a warrant "requirement"—a warrant is an indispensable component of a reasonable search—or a warrant "preference"—a warrant helps demonstrate the reasonableness of a particular intrusion, but is not necessarily required.[35] Proponents of the warrant requirement assert that the Fourth Amendment is "quintessentially a regulation of the police," and a judicial predetermination of the basis for probable cause is a necessary check on otherwise unfettered police discretion.[36] The Supreme Court has expressed a similar position.[37] The opposing view is that the Warrant Clause does not inform the Reasonableness Clause, but is independent of it, meaning that a search may be reasonable notwithstanding the absence of a warrant—a position which also finds support in Supreme Court opinions.[38] While commentators staking their position at the extremes continue to debate the propriety of a warrant requirement, the general view is that there is a warrant preference, subject to numerous, well-delineated exceptions.[39] The most-impactful exception is the ability of police to conduct street-level stops and frisks based merely on reasonable suspicion.[40]

3. Reasonable Suspicion: The Standard for a Stop and Frisk

In *Terry v. Ohio*,[41] the Supreme Court first announced the controversial holding that police may seize a citizen and conduct a preliminary investigation

35. *See* CHEMERINSKY, *supra* note 16, at 32 (noting Supreme Court's reliance on framers' intent varies depending on desired outcome); Cloud, *supra* note 16, at 202 (illustrating purpose of Fourth Amendment susceptible to contradictory interpretations). *Compare* Amar, *supra* note 16, at 767-68 (arguing Court's creation of exceptions for warrantless searches demonstrates amendment does not contain warrant requirement), *with* Amsterdam, *supra* note 16, at 394 (contending warrant requirement evidenced by amendment's desire for judicial predeterminations of probable cause).

36. *See*, Amsterdam, *supra* note 16, at 371 (emphasizing necessity of regulating police conduct).

37. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (stating warrantless searches per se unreasonable unless falling under recognized exception). The Court noted that in the absence of a well-recognized exception to the warrant requirement, justifying a search not conducted pursuant to a warrant "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification." *Id.* at 358 (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)).

38. *See* United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950) (declaring relevant inquiry whether search reasonable rather than whether practical to obtain warrant), *overruled on other grounds by* Chimel v. California, 395 U.S. 752 (1969); *see also* Amar, *supra* note 16, at 767-68 (arguing true warrant requirement inconsistent with Court's own recognition of multiple exceptions thereto).

39. *See* DRESSLER & MICHAELS, *supra* note 3, at 162-64 (describing current state of debate and modern treatment by courts).

40. *See* Reinert, *supra* note 6, at 1492 (explaining relaxed standards lowered quantum and quality of evidence necessary to justify intrusion). Lowering the relevant standard of suspicion implicitly permitted an increased number of fruitless searches as well. *See id.* For example, of the 217,179 individuals frisked on grounds of reasonable suspicion in New York City in 2006, a weapon or contraband was found only 3.4% of the time. *See id.* at 1494-95.

41. 392 U.S. 1 (1968).

based on less than probable cause.[42] At issue was whether a police officer, having observed conduct indicative of a robber "casing a job," was justified in temporarily detaining the suspects on the street to conduct a limited "pat-down" of their outer clothing—later dubbed a "*Terry*-stop."[43] In upholding the stop and frisk of the suspects, the Court explained that for some police-citizen encounters, the government interest is so substantial and the intrusion so minor that it would be impractical to subject such encounters to the warrant procedure, or even the requirement of probable cause.[44] Instead, the propriety of such street-level encounters should be assessed under the reasonable suspicion standard: an officer must be able to point to specific and articulable facts which, taken together with rational inferences, reasonably warrant the particular intrusion.[45] In determining that reasonable suspicion was established, the *Terry* Court expressly relied on a "series of acts," none alone sufficient to establish the requisite suspicion, but which, when viewed as a whole, warranted further action on the part of the officer.[46]

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42. *See id.* at 29-30 (holding stop and limited search of suspects valid because officer had reasonable belief crime occurring). The Court relied on the newly established "reasonable suspicion" standard—essentially a general reasonableness inquiry—rather than engaging in probable cause analysis. *See id.* at 20.

43. *See id.* at 5-7 (describing suspects' behavior and detailing officer's course of conduct). The officer observed the suspects repeatedly walk back and forth in front of some retail stores, look inside the window of one particular store multiple times, and confer with each other before walking towards the store window once again. *Id.* The officer then approached the suspects, temporarily detained them in order to ask some preliminary questions, and patted down their outer clothing looking for weapons the officer suspected would be present given the nature of the alleged crime. *Id.* at 6-7.

44. *See id.* at 20-21 (noting reasonableness inquiry more practical for situations with minimal intrusion and substantial law enforcement interests). The Court pointed out that such street-level encounters represent an "entire rubric of police conduct" involving swift action based upon on-the-spot observations of suspicious activity, and the most appropriate approach is to test such conduct in relation to the general proscription against unreasonable searches and seizures. *See id.* at 20.

45. *Terry*, 392 U.S. at 20-22 (announcing inquiry as whether facts would warrant reasonable man in believing action taken was appropriate). To give substance to its reliance on general reasonableness, the Court stated, "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" *See id.* at 21 (quoting Camara v. Mun. Court, 387 U.S. 523, 534-35 (1967)). The Court did, however, make clear that the standard it was elaborating did not confer unlimited discretion on police:

> [T]he Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

See id.

46. *See id.* at 22 (stating officer's actions legitimate in light of circumstances and in interests of his safety). While laying the foundation for an entire area of search and seizure jurisprudence based on less than probable cause, this case focused more on the propriety of the officer's decision to frisk the suspects for weapons than it did on the justification for the initial stop. *See id.* at 23; *see also* Harris, *supra* note 5, at 982 (noting *Terry* opinion "supplied only the sparest guidance" on when police may lawfully stop suspect). It is important to recognize that the specific facts cited as grounds for suspicion must have been known to the officer prior to, rather than as a result of, a stop or search. *See* United States v. Di Re, 332 U.S. 581, 595

D. Out on the Streets: The Current State of Search and Seizure Law

1. Generalized Particularity: Reliance on Categorical Judgments

The diminishing probable cause standard and the ability of police to conduct *Terry*-stops has effectively taken the law of search and seizure back in the direction of pre-exclusionary doctrine law, where police enjoyed almost unfettered discretion and rarely, if ever, resorted to the warrant procedure.[47] This is due to a disconnect between the rhetoric of the Supreme Court regarding the requirement of individualized suspicion for all searches, and the law as applied by lower courts, who have moved towards a general acceptance of categorical judgments serving as the basis for a stop and frisk.[48] While not universally accepted by lower courts, these categorical judgments are most often manifested in the dual assertions of ambiguous behavior that appeared criminal to the police officer in light of his many years of experience, and the location of the stop being widely recognized as a "high crime area."[49] Some courts have gone so far as to allow for stops based merely on the suspect falling under one or two broad categories–fitting the profile of a drug dealer or avoiding contact with police in a "high crime area"—despite the fact that the suspect's behavior is consistent with completely innocent activity and presents only a remote possibility of criminality.[50]

(1948) (declaring search not made legal by what it turns up).

47. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding exclusionary rule applicable to state criminal proceedings); *see also* Harris, *supra* note 5, at 985 (recognizing significant portion of discretion returned to police). Prior to *Mapp*, police "ruled the streets on simple gut instinct" without fear of suppression of evidence, and while *Terry* required some articulable basis of suspicion, it also gave back to police a significant amount of the discretion they enjoyed in the days before *Mapp*. Harris, *supra* note 5, at 985. Some commentators contend that the Supreme Court has sent the "obvious" message that "lower courts need not formulate concrete standards" for search and seizure analysis. Maclin, *supra* note 4, at 1317 (asserting Court uninterested in constitutional checks on police and prefers relying on officers' common sense).

48. *See* Harris, *supra* note 5, at 987 (highlighting instances where courts rely on broad categories to supply reasonable suspicion). Lower courts have repeatedly permitted stops based not on a careful assessment of the specific facts and circumstances, but on an officer's assertion that a suspect matched one or two "broad criteria that may have nothing to do with criminal conduct." *See id.*; *see also* Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 653 (2009) (explaining problem worsened by Court using cases discussing one standard as part of its reasoning regarding other standard).

49. *Compare* Commonwealth v. Kennedy, 690 N.E.2d 436, 442 (Mass. 1998) (permitting inference of presence of contraband despite inability to actually see object exchanged), Commonwealth v. Santaliz, 596 N.E.2d 337, 339-40 (Mass. 1992) (crediting officer's inference of criminality in light of his experience and criminal history of area), *and* Commonwealth v. Thompson, 985 A.2d 928 (Pa. 2009) (weighing officer experience as factor itself and not merely "lens" for analyzing particular facts), *with* Commonwealth v. Helme, 503 N.E.2d 1287, 1289 (Mass. 1987) (rejecting basis of suspicion as insufficient because too many innocent explanations for observed behavior), *and* Commonwealth v. Garcia, 614 N.E.2d 1031, 1034-35 (Mass. App. Ct. 1993) (refusing to permit search by experienced officer based only on observation of dual-use object).

50. *See* CHEMERINSKY, *supra* note 16, at 160 (noting Supreme Court ruled in favor of police in 90% of Fourth Amendment cases last decade); Harris, *supra* note 5, at 987-90 (illustrating lengths courts will go to validate stops and searches); Maclin, *supra* note 4, at 1317 (contending deference to police provides little guidance, slight protection, and no objective criteria for review). Extreme deference and reliance on broad,

2. Officer Training and Experience

a. Objective Subjectivity

The probable cause and reasonable suspicion standards frame the analysis in objective terms: how a prudent man, or a man of reasonable caution, would view and understand the relevant facts and circumstances known to the officer at the time he initiated the stop, search, or arrest.[51] The "purely" objective nature of general Fourth Amendment inquiries is further supported by the Court's outright refusal to inject subjective beliefs, intentions, or understandings of a particular officer into the analysis of the propriety of a stop or search.[52] In stark contrast, however, is the Court's willingness to give great weight to the subjective inferences and personal experiences of an officer when determining whether the requisite level of suspicion for a stop or search existed, especially when based on inferences drawn from seemingly innocuous behavior.[53]

The Court's reasoning for disregarding subjective considerations is that police officers are necessarily engaged in law-enforcement activities and have neither the time nor the legal knowledge to recognize subtle nuances or make hairline distinctions—essentially, police need bright-line rules to effectively carry out their law-enforcement duties.[54] Reasonable suspicion determinations,

categorical assertions conflicts with important Supreme Court pronouncements about the requirement of particularity. *See Terry v. Ohio*, 392 U.S. 1, 22 n.18 (1968) (noting demand for specificity central teaching of Court's Fourth Amendment jurisprudence). While the Court has made clear that an officer's suspicion need not be correct, but only reasonable, there are well-documented harms associated with repeatedly subjecting individuals to embarrassing public intrusions based on suspicions that prove incorrect. *See* Taslitz, *supra* note 8, at 10-12 (arguing concept of reasonable suspicion tolerating massive false-negative rates fundamentally flawed conception).

51. *See supra* notes 20-27 and accompanying text (tracing development of probable cause standard from original definition to modern formulations).

52. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (declaring stop based on probable cause not rendered invalid by officer's improper subjective motivations); *see also* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (refusing consideration of officer's subjective understanding of crime for which he effected arrest of suspect). *But see* United States v. Di Re, 332 U.S. 581, 595 (1948) ("It is the officer's responsibility to know what he is arresting for, and why."). The Court has stated that it would be inappropriate to ascribe the "arbitrarily variable protection" to the Fourth Amendment that would result if the permissibility of an arrest could vary "from place to place and from time to time" based on the knowledge and level of experience of the particular arresting officer. *See Devenpeck*, 543 U.S. at 153-55 (addressing situation where probable cause to arrest existed but officer announced incorrect charge to suspect). The Supreme Court has essentially stated that the pretextual nature of a stop is acceptable so long as there is some other technically sufficient ground for effecting the seizure. *See* DRESSLER & MICHAELS, *supra* note 3, at 282 (discussing racial bias and pretextual stops in light of holding in *Whren*).

53. *See* United States v. Cortez, 449 U.S. 411, 418 (1981) (approving suspicion based on inferences drawn by experienced officer that might elude untrained person); *see also* Kinports, *supra* note 6, at 760-61 (noting courts use officer experience when helpful for requisite suspicion but not when harmful).

54. *See* New York v. Belton, 453 U.S. 454, 459-61 (1981) (providing "workable rule" allowing police to search entire passenger compartment of car incident to arrest); Foley, *supra* note 34, at 278 (noting Court's reliance on "anti-intellectualism" of police as necessitating creation of bright-line rules). Recurring

however, almost always involve subjective considerations—an officer's inferences, personal experiences, and training—resulting in inconsistent and unpredictable applications of constitutional protections, which the Court has, on numerous other occasions, considered unacceptable.[55] When creating workable rules that afford police broad discretion, the Court emphasizes that officers are not legal tacticians and are unable to engage in careful analysis in the field, yet when faced with a challenge to the basis of suspicion for a particular intrusion, the Court inexplicably omits any reference to these analytical limitations of police officers and instead credits their ability to make hairline distinctions and draw complex inferences from highly ambiguous conduct.[56]

b. A Lens or a Factor?

The practical reality is that an officer's personal knowledge, training, and experiences are relevant to probable cause and reasonable suspicion determinations, but courts differ greatly in the weight they assign to such considerations—some treat officer experience as a "lens" through which to view the objective facts and circumstances particular to the suspect, while others treat officer experience as a stand-alone factor capable of adding independent support for the probable cause showing in and of itself.[57] When courts treat officer experience as a lens, officers usually claim that the other objective facts and circumstances fit a "pattern" of criminal behavior, such as

circumstances, often innocuous, can form the basis for bright-line rules, such as both the first and last passenger exiting a plane fitting the DEA's drug-courier profile, or nervousness and failing to make eye contact with police during a traffic stop being criminally suspicious. *See* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 7 TEX. J. WOMEN & L. 153, 175-76 (2008) (noting courts defer to police sweeping almost any factor within categorical rules of suspicion).

55. *See Belton*, 453 U.S. at 459-60 (stating undesirable for citizen and officer not to know scope of protections and authority). In regards to searches incident to arrest, the Court noted that without a "bright-line" rule, citizens cannot know how a court will apply a settled principle to a recurring factual situation, which it felt was inappropriate because the result is that the citizen cannot know the scope of his constitutional protection. *See id.*; *see also* Taslitz, *supra* note 8, at 11 (asserting even if sometimes correct, high error rate wastes police resources and undermines public trust).

56. *See* Raigrodski, *supra* note 54, at 208-09 (highlighting courts' dichotomous treatment of subjective considerations like officer experience). Essentially, courts exclude any consideration of "bad" subjective factors like pretextual stops, improper motives, or biases, while expressly relying on "good" subjective factors like the knowledge, training, and experiences of an individual officer in search and seizure analysis. *See id.*; *see also* Kinports, *supra* note 6, at 760-61 (noting courts only use experience to bolster suspicion but never to undercut it). *Compare* Horton v. California, 496 U.S. 128, 138 (1990) (explaining "evenhanded law enforcement" best achieved by applying objective standards of police conduct), *and Belton*, 453 U.S. at 458 (asserting "single, familiar standard" essential to guide police), *with* United States v. Cortez, 449 U.S. 411, 419 (1981) (emphasizing facts meaningless to layman often highly useful to trained officers in making deductions).

57. *Compare* Ornelas v. United States, 517 U.S. 690, 699 (1996) (summarizing process as viewing objective facts through "lens" of police officer's experience), *and* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (holding experience furnishes background for assessment of facts but not independent factor), *with* Commonwealth v. Thompson, 985 A.2d 928, 935 (Pa. 2009) (announcing officer experience fairly regarded as relevant factor in probable cause analysis).

"furtive" gestures, concealed exchanges, quick transactions, the suspect's criminal record, and, most importantly, the character of the neighborhood.[58] Even when treated as a lens, however, it is difficult to identify any meaningful difference in the outcome of the analysis because the very notion of training and experience is amorphous, and every officer possesses such credentials to some degree.[59] A finding of the requisite suspicion becomes almost automatic when courts treat officer experience as a stand-alone factor, essentially allowing an officer to "bootstrap" a hunch by referring to, and relying on, his experience as the proper foundation for his suspicion of criminal activity.[60]

Despite the Supreme Court cautioning lower courts not to abdicate their responsibility to evaluate the basis of suspicion in favor of an officer's judgment, in practice, an officer's training, experience, and, as a corollary, his testimony overall, are given great deference.[61] As a startling example of this "bootstrapping" effect—where highly ambiguous conduct is construed as criminal in the eyes of an experienced officer—one court credited an officer's inference that contraband had been exchanged between two individuals, despite the fact that the officer did not even see an object change hands, never mind whether he could discern its contraband nature.[62]

58. *See* Commonwealth v. Santaliz, 596 N.E.2d 337 (Mass. 1992) (establishing four-factor test for probable cause in context of street-level drug transactions); *see also supra* note 2 and accompanying text (discussing examples of pattern analysis and factors typically involved).

59. *See* Kinports, *supra* note 6, at 761-62 (describing shortcomings inherent in both factor and lens approach). The inference underlying the use of officer experience—that an officer is more likely than a civilian to recognize criminal activity—should be offset by the fact that police officers have a tendency to view everyone with suspicion, or else the assessment of reasonable suspicion under either approach may become a self-fulfilling prophecy. *See id.* at 763.

60. *See id.* at 758-59 (explaining constitutionally insufficient objective evidence becomes sufficient when officer experience added to evaluation). Theoretically, treating officer experience as a stand-alone factor means that whenever a veteran officer begins his shift, at least one factor supporting probable cause is automatically established as to every single individual the officer cares to observe. *See id.* at 759; *see also* Raigrodski, *supra* note 54, at 176 (asserting courts allow veteran officers to "interpret almost any conduct as suspicious").

61. *See* Note, *supra* note 30, at 1707 (illustrating courts' reluctance to regulate police despite obvious benefits of defining scope of permissible conduct). Even with recent improvements in police training and professionalism, courts ought to continue to take a regulatory role over the conduct of police. *See id.* at 1717-18.

62. *See* Commonwealth v. Kennedy, 690 N.E.2d 436, 440-41 (Mass. 1998) (holding officer had probable cause to believe drugs exchanged based on whole "silent movie"). The court in *Kennedy* reasoned that one could infer from the officer's testimony that he inferred from the observed conduct that drugs had been exchanged, given that it resembled a "pattern" indicative of the sale of drugs—a startling example of the extreme leaps of logic lower courts are willing to entertain for probable cause determinations. *See id.*; *see also* Doucette, *supra* note 1 (describing "pattern" or "silent movie" as impermissible hunch in disguise). Courts frequently use the metaphor of a silent movie as seen through the eyes of an experienced officer, thus allowing an officer to piece together otherwise innocuous observations to conclude that the requisite level of suspicion for a search exists. *See* Doucette, *supra* note 1 (examining development of search and seizure analysis in line of "silent movie" cases).

c. Sleeping Gatekeepers: Officers Giving Expert Testimony Without Establishing Expertise

While the Federal Rules of Evidence (Rules) do not apply at suppression hearings—the epicenter of reasonable suspicion and probable cause challenges—some of the harms the Rules were designed to prevent pervade these pretrial hearings, such as courts essentially treating police officers as experts without requiring them to establish their expertise.[63] The Supreme Court itself perpetuates these unfortunate pretrial practices; despite the ordinary citizen's inability to draw reasonable inferences of criminality from the objective facts, the Court allows police officers to conclude otherwise based solely on their own unproven expertise.[64] When an officer's experience is necessary to understand fine distinctions and inferences drawn from the objective evidence, a court's assessment goes beyond that provided for in the reasonable suspicion standard and more closely resembles the fact-finding process contemplated by the expert-testimony provisions of the Rules.[65] While Rule 702 provides that expert testimony is appropriate where it would aid the fact finder in understanding the evidence, it requires that the expert be properly qualified, which obligates the courts to act as "gatekeepers" for expert testimony by ensuring that the underlying data and methodology are reliable.[66] The impact of officer testimony is actually more significant at suppression hearings—where the officer is permitted to testify about his own conclusion of the suspect's guilt—than at jury trials, where even qualified narcotics experts are allowed only to describe relevant factors and patterns of narcotics transactions but may not testify about their conclusions regarding the facts of

63. *See* Alschuler, *supra* note 7, at 123-24 (pointing out danger posed by presumption of officer expertise); *see also* FED. R. EVID. 702 (defining expert testimony and providing requirements for its use).

64. *See* Texas v. Brown, 460 U.S. 730, 746 (1983) (White, J., concurring) (crediting officer's conclusion of illegality despite object observed having multiple legal uses); United States v. Cortez, 449 U.S. 411, 417-18 (1981) (permitting officers to draw conclusions ordinary people could not). The Court has expressly stated that an officer may rely on his training and experience to draw conclusions of criminality even though an ordinary person would be unable to make the same inference based on the objective evidence. *See Cortez*, 449 U.S. at 417-18 (explaining courts may properly take into account inferences of seasoned and trained law enforcement agents).

65. *See* FED. R. EVID. 702 (allowing expert to testify when needed to assist jury's understanding). This Rule limits the admissibility of expert testimony by requiring that the expert witness be qualified by knowledge, skill, experience, training, or education—factors similar to those underlying the deferential treatment given to police testimony. *See id.*; *see also* Alschuler, *supra* note 7, at 124 (warning deference to officer's unproven expertise frustrates independent review Fourth Amendment requires); Ferguson & Bernache, *supra* note 6, at 1617 (asserting Constitution does not allow courts to abdicate judicial responsibilities in favor of officer's judgment).

66. *See* FED. R. EVID. 702 (permitting expert testimony if technical or specialized knowledge needed to assist jury). Rule 702 was designed to charge courts with the responsibility of acting as "gatekeepers" to ensure that expert testimony is based on sufficient facts or data and is the product of reliable principles. *See id.* advisory committee's note. Two of the factors the Rules present as central to the reliability issue are "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion," and "[w]hether the expert has adequately accounted for obvious alternative explanations." *See id.*

the case.[67] While an officer's testimony about complex inferences drawn in light of his experience appears quite similar to expert testimony as defined by the Rules, most courts simply defer to an officer's judgments and assertions with little in the way of scrutiny or meaningful review.[68]

3. High-Crime Areas

Closely related to the reliance on an officer's training and experience, is the equally prevalent claim that the stop or search in question took place in a "high crime area."[69] Much like the "bootstrapping" effect of officer experience, the assertion that a neighborhood is a high-crime area will often elevate observations of minimal significance to the level of reasonable suspicion.[70] A major source of criticism of this factor is the tendency of courts to accept blanket assertions that an area is known for a high incidence of crime without requiring any objective, verifiable data to support such assertions.[71]

67. *See* Commonwealth v. Frias, 712 N.E.2d 1178, 1181 (Mass. App. Ct. 1999) (noting expert may describe pattern of drug transactions but cannot express opinion regarding present case); Commonwealth v. Dennis, 604 N.E.2d 48, 51 (Mass. App. Ct. 1992) (emphasizing limitation of officer's testimony to general information, not opinion regarding facts of case); *see also* FED. R. EVID. 704(b) (prohibiting expert testimony on ultimate issue regarding criminal defendant's mental state or condition). *Compare* Commonwealth v. Melton, 711 N.E.2d 909, 910 (Mass. App. Ct. 1999) (holding officer's trial testimony that he "knew for a fact" improper expert opinion), *with* Commonwealth v. Levy, 924 N.E.2d 771, 774, 778 (Mass. App. Ct. 2010) (crediting officer's testimony that he "knew for a fact" drug deal occurred) *rev'd on other grounds*, 947 N.E.2d 542 (Mass. 2011).

68. *See* United States v. Prandy-Binett, 995 F.2d 1069, 1075 n.2 (D.C. Cir. 1993) (Edwards, J., dissenting) (noting majority's acquiescence to police assertions repugnant to meaningful constitutional protections); Maclin, *supra* note 4, at 1324-27 (addressing tendency for judges to "blindly accept the government's claims," which informs officials their actions unreviewable). One state court, in searching for support in upholding probable cause, allowed probable cause to be based on a judge's inferences, which themselves were based on an officer's inferences, which themselves were expressed in "garbled" testimony. *See* Commonwealth v. Kennedy, 690 N.E.2d 436, 439-40 (Mass. 1998) (stating reasonable for judge to supplement with own inferences officer's testimony about officer's inferences). In fact, there is anecdotal evidence that many trial judges are partial towards police testimony, giving it more credence than defendants' testimony. *See* Pepson & Sharifi, *supra* note 30, at 1192, 1231-32 (describing ease with which officer can satisfy low burden of proof).

69. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (declaring officers need not ignore characteristics of location in determining whether circumstances sufficiently suspicious); *see also* Ferguson & Bernache, *supra* note 6, at 1603-04 (referencing Supreme Court's approval of high-crime area as salient factor in probable cause analysis); Raymond, *supra* note 7, at 100-01 (explaining high-crime area factor often critical to finding of reasonable suspicion).

70. *See* Raymond, *supra* note 7, at 100 (noting factor frequently invoked basis for arguing ambiguous conduct sufficiently suspicious). The Supreme Court has made clear, however, that the high-crime area factor, standing alone, is not enough to justify a *Terry*-stop, though asserting almost any additional suspicious factors, such as furtiveness or flight at the sight of police, will often suffice. *See id.* at 112-15 (discussing holding of Brown v. Texas, 443 U.S. 47 (1979)).

71. *See* State v. Morgan, 539 N.W.2d 887, 892 (Wis. 1995) (stating officer's mere perception of neighborhood as high-crime area sufficient for use as factor); Ferguson & Bernache, *supra* note 6, at 1607 (demonstrating majority of courts rely on officers' assertion of high-crime area without much analysis). The high-crime designation casts otherwise innocuous behavior in "a more suspicious light" and "gives police enormous discretion," yet courts generally do not make a serious inquiry into the legitimacy of the label. *See*

a. The Concerns of Relying on the Character of a Neighborhood

The fundamental problem with allowing suspicion to be based largely upon categorical judgments—like a neighborhood's reputation for criminal activity—is that this practice contradicts the oft-repeated requirement that the police officer be able to point to specific facts involving a particular suspect.[72] By crediting unfounded assertions that a neighborhood is a high-crime area, courts have essentially condoned stops of citizens based not on their particular behavior, but on the area in which they are found.[73] Equally unacceptable is the fact that the high-crime designation has become a proxy for race-based judgments and stereotyping; in reality, many law-abiding citizens live and work in these areas and are entitled to constitutional protections despite the character of their neighborhood.[74]

The empirical basis for a high-crime designation is often unreliable because any perceived disparity in the rate of crimes committed by one particular group makes it economically rational to focus enforcement resources on that group due to the greater payoff in arrests, resulting in a "multiplier effect" that encourages police to "pile on" by proactively scouring one area over another.[75]

Taslitz, *supra* note 8, at 10, 47 (asserting tolerance for unfounded characterizations or false-negative rates imposes high costs on communities).

72. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (requiring detaining officers have particularized and objective basis of suspicion); *see also* United States v. Montero-Camargo, 208 F.3d 1122, 1139 n.32 (9th Cir. 2000) (describing weakness in relying on officers' "war stories" for high-crime area designation). The concurring opinion in *Montero-Camargo* appropriately points out that despite warning about the inherent weakness of basing a high-crime designation on the opinions of just one or two officers, the majority does just that, and as a result, validates the availability heuristic as a permissible basis for reasonable suspicion. *See* 208 F.3d at 1143 (Kozinski, J., concurring).

73. *See* Raymond, *supra* note 7, at 100-01 (illustrating harm of basing suspicion for stop on character of neighborhood). If the reasonable suspicion standard is to have any real meaning, it must be based on something more than statistical likelihoods of criminal activity occurring in a particular neighborhood. *See id.* at 105-06. Many poor racial minorities live in high-crime neighborhoods, and by sanctioning stops on little more than the location where they took place, courts have essentially allowed the phrase "high crime area" to criminalize race. *See* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1473-74 (2010) (noting little else beyond assertion of high-crime area needed for finding of reasonable suspicion). By focusing on privacy as the central interest of the Fourth Amendment and giving the most protection to the home, courts favor those who already have the most protection to begin with—people who can afford to live in separate, detached single-family houses—as opposed to the urban poor who usually live in multi-unit buildings. *See id.* at 1475.

74. *See Montero-Camargo*, 208 F.3d at 1138 (demanding cautious use of description to prevent sweeping entire communities of minorities within scope); Curtis v. United States, 349 A.2d 469, 472 (D.C. 1975) (characterizing high-crime area as familiar "talismanic litany" inappropriate as sole support for inference of criminality); *see also* Commonwealth v. Holley, 755 N.E.2d 811, 815 (Mass. App. Ct. 2001) (stating high-crime designation not alone sufficient for stop because it risks inconsistent protection); Raymond, *supra* note 7, at 125 (noting even crime-ridden neighborhoods populated with honest, law-abiding people); David Seawell, Wardlow*'s Case: A Call To Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1131 (2001) (alleging high-crime designation leads to diminished privacy expectations and perpetuates politics of identification).

75. *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 216

These trends are evidenced by the uneven geographic distribution of high-crime areas, most of which are concentrated in inner-city neighborhoods whose residents are usually minorities and tend to be poorer and older than their counterparts in suburban locations.[76]

b. Show, Don't Tell: The First Circuit's Three-Part Framework

In *United States v. Wright*,[77] the First Circuit Court of Appeals proposed a workable, three-part inquiry for high-crime area determinations, requiring the prosecution to provide objective evidence establishing: the nexus between the type of crime for which an area is known and the specific crime at issue in the case; carefully defined geographic boundaries for the relevant area; and temporal proximity between the evidence of heightened criminal activity and the date of the stop or search in question.[78] There would not be much of a burden on police to gather and provide the necessary data because many police departments already collect information about criminal hotspots for use in allocating the departments' limited resources most efficiently.[79] The First Circuit's approach results in high-crime designations being permitted only where the crime charged is related to the type of crime an area is known for, the geographic boundaries of the area are limited, and most importantly, the assertion of a high crime rate is supported by current, reliable crime statistics.[80]

(2002) (characterizing inherent incentive to concentrate on certain areas as "cop cascade"). This over-enforcement in high-crime areas perpetuates the well-recognized distrust of law enforcement by minority communities, who have come to view the police as just another "gang." *See id.* at 195; *see also* Taslitz, *supra* note 8, at 47 (noting empirical research suggests officers' judgments about criminal character of entire neighborhoods often wrong). Social norms are perpetuated by de facto racially segregated neighborhoods, and the reality is that many people see an implicit association between minorities and crime, which affects voluntary compliance with the law. *See* Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 57 (2009) (illustrating tendency to associate minorities with criminal activity which damages perceived legitimacy of law enforcement).

76. *See* CHEMERINSKY, *supra* note 16, at 149 (declaring racial minorities at significant disadvantage in all aspects of criminal justice system); Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 712 (2009) (arguing police asserting "command presence" through masculinity contests also responsible for concentration of enforcement); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-78 (1994) (pointing out zones of high criminal activity usually identical to racially segregated areas).

77. 485 F.3d 45 (1st Cir. 2007).

78. *See id.* at 53-54 (establishing tripartite framework for high-crime area analysis). This test is not required, but is merely a recommended approach to the issue. *See id.*

79. *See* Ferguson & Bernache, *supra* note 6, at 1627-31 (explaining crime mapping software and pattern analysis already in prevalent use); Harris, *supra* note 5, at 999 (recognizing well-supported assertions of high crime rate using data and experience deserves some weight).

80. *See supra* note 78 and accompanying text (describing underlying rationale for three-part test). *But see* United States v. Bonner, 363 F.3d 213, 219 (3d Cir. 2004) (asserting officer's belief in high-crime area often legitimate despite no data in records).

III. ANALYSIS

Fourth Amendment litigation has traditionally involved applications of the warrant requirement and probable cause standard, but suppression matters arising out of street-level drug arrests are governed almost exclusively by reasonable suspicion determinations.[81] Though characterized as an objective standard requiring specific and articulable facts, in practice, reasonable suspicion is more often based on a police officer's inferences drawn in light of his training and experience, the character of the neighborhood, or both.[82] To bring lower court search and seizure jurisprudence in line with the principles and requirements announced by the Supreme Court—specific and articulable facts particular to the individual stopped—the officer experience and high-crime area factors must be reexamined so as to ensure that the facts, data, assumptions, beliefs, and practices on which they are based are actually reliable.[83]

Officer training and experience should be restricted to the role of a "lens" through which other, truly objective, facts relating to the particular suspect are viewed.[84] Closely related to inferences of experienced officers are inferences

81. *See* Beck v. Ohio, 379 U.S. 89, 96 (1964) (cautioning lenient treatment of warrantless searches bypasses safeguards of objective predetermination of basis of suspicion); DRESSLER & MICHAELS, *supra* note 3, at 118 (noting even for warrantless search cases traditional inquiry whether officers had probable cause); *see also* Terry v. Ohio, 392 U.S. 1, 20 (1968) (declaring street-level stops and frisks governed by general reasonableness inquiry not warrant requirement); Lerner, *supra* note 28, at 995 (explaining probable cause still exists, but increasingly irrelevant in assessing most searches and seizures).

82. *See* People v. Limon, 21 Cal. Rptr. 2d 397, 400 (Ct. App. 1993) (announcing experienced officer's inferences can attach "criminal import" to innocuous observations); State v. Morgan, 539 N.W.2d 887, 892 (Wis. 1995) (holding officer's knowledge of frequent crimes in area salient factor); Ferguson & Bernache, *supra* note 6, at 1603-04 (highlighting Supreme Court's recognition of high-crime area as relevant factor for suspicion); Harris, *supra* note 5, at 987 (recognizing courts frequently rely on broad categories and criteria for reasonable suspicion determinations); Raymond, *supra* note 7, at 100 (discussing frequent use of high-crime area as basis for suspecting crime from ambiguous conduct). *See generally* Illinois v. Wardlow, 528 U.S. 119 (2000) (noting ambiguous conduct proper basis in light of officer experience and character of neighborhood); United States v. Cortez, 449 U.S. 411 (1981) (permitting facts meaningless to untrained person to serve as foundation for trained officer's inferences).

83. *See Cortez*, 449 U.S. at 417-18 (announcing assessment of whole picture must yield particularized and objective suspicion of specific individual); *Terry*, 392 U.S. at 22 n.18 (stating demand for specificity of information predicated on central teaching of Court's Fourth Amendment jurisprudence); United States v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000) (stressing even totality of circumstances must raise suspicion as to particular person stopped); *see also* Alschuler, *supra* note 7, at 123-24 (illustrating dangers posed by courts' approval of unproven officer expertise); Baer, *supra* note 8, at 96 (warning use of unproven categorical assertions erodes reasonable suspicion and produces inconsistent results); Ferguson & Bernache, *supra* note 6, at 1617 (emphasizing courts must not abdicate responsibilities in favor of officer's untested inferences); Kinports, *supra* note 6, at 761-62 (explaining reliance on officers' inferences risky because police tend to view everyone as suspicious).

84. *See* Ornelas v. United States, 517 U.S. 690, 699 (1996) (describing process as viewing facts through "lens" of officer's experience to provide context); *Montero-Camargo*, 208 F.3d at 1131 (declaring experience not appropriate as independent factor in reasonable suspicion analysis). Well-founded suspicions are necessarily based on individualized, "*objectively observable factors*" suggesting the individual stopped is involved in criminal activity. *Montero-Camargo*, 208 F.3d at 1132; *see also* Kinports, *supra* note 6, at 758-59

based on the character of the neighborhood—an issue that could be addressed by treating high-crime designations as questions of fact requiring empirical support.[85] Finally, given the purported expertise of police officers in drawing inferences from observations that would be meaningless to an untrained person, courts should require that officers testifying at suppression hearings establish their expertise, as is required of all other expert witnesses.[86] While these proposals may result in cases where the government cannot meet its burden and evidence is suppressed, it is important to view such a result not as a product of politics forced upon an unwilling citizenry by judges, but as a cost the framers were willing to accept to ensure the protection of individual privacy against unrestrained governmental power.[87]

A. The Ex-Factor: Officer Training and Experience as an Analytical Aid, not a Crutch

While the Supreme Court has not resolved whether officer experience is meant to be an analytical aid or a separate factor in and of itself, much of the Court's language points toward the former treatment.[88] There are various characterizations for this type of treatment—some courts describe it as a "background" against which objective facts are assessed, and others call it a

(arguing factor status allows officers to bootstrap constitutionally insufficient hunches by adverting to experience); *cf.* Commonwealth v. Thompson, 985 A.2d 928, 935 (Pa. 2009) (granting factor-status but requiring officer to demonstrate nexus between experience and arrest in question).

85. *See Montero-Camargo*, 208 F.3d at 1139 n.32 (asserting high-crime designation requires careful examination because unchecked use as factor for reasonable suspicion may invite trouble). Courts must take extra care to prevent the high-crime area factor from being used with respect to whole communities "in which members of minority groups regularly go about their daily business," such as by limiting the designation to specific locations where crimes are unusually prevalent. *See id.* at 1138. Lower courts commonly allow police to use location in a high-crime neighborhood to indicate reasonable suspicion, despite having no specific reasons to suspect any involvement in crime. *See* Harris, *supra* note 5, at 1015 (identifying problem not use of categories, but breadth of categories recognized by lower courts). In other words, the lower courts' treatment of the issue allows an officer to rely, in large part, on the high-crime area factor regardless of the individual circumstances. *See id.* at 976; *see also* Raymond, *supra* note 7, at 132 (proposing high-crime area inquiry incorporating consideration of lawful behavior in neighborhood).

86. *See* FED. R. EVID. 702 (requiring expert be duly qualified as prerequisite to admissibility of expert's opinion testimony); *see also* Alschuler, *supra* note 7, at 123-24 (recognizing inherent dangers of presuming officer expertise). Deference to an officer's unproven expertise frustrates the independent review of searches the Fourth Amendment requires. *See* Alschuler, *supra* note 7, at 124.

87. *See* CHEMERINSKY, *supra* note 16, at 156 (addressing temptation to consider criminal procedure protections as safeguards for criminals only). Fourth Amendment protections were meant to "protect everyone from the possibility of police misconduct and prosecutorial overreaching." *See id.* While it is a "hard reality," the Fourth Amendment is essentially a regulation of the police, or, in other words, a means of policing the police. *See* Maclin, *supra* note 34, at 6-8 (arguing framers anticipated and accepted price entailed by requiring compliance with constitutional formalities); *see also* Foley, *supra* note 34, at 312 (stating even casual reading of Bill of Rights shows it mandates under-enforcement).

88. *See* United States v. Cortez, 449 U.S. 411, 417-19 (1981) (describing process of assessing basis for particularized suspicion with officer experience in mind). The Court's meticulous assessment of each objective fact and the officers' inference drawn therefrom demonstrates that experience is a lens for analyzing facts, not a stand-alone factor to be added to those facts. *See id.* at 419.

"lens" through which the totality of the circumstances are viewed—but regardless of the terminology, officer experience should only serve as a guide for making sense of how particular facts suggest criminal activity, not added to those facts as a separate factor.[89] In theory, the lens approach is more practical because an officer's experience is not an observable fact forming part of the "whole silent movie" upon which inferences are based, but rather serves as the vehicle for drawing those inferences.[90] Also, the great deference to police discretion inherent in treating training and experience as a stand-alone factor is at odds with the underlying concerns of the Fourth Amendment; such deference risks bypassing the procedural safeguards the Supreme Court has regarded as essential to the reasonableness of a search or seizure.[91]

If officer experience is treated as a stand-alone factor, then, hypothetically, every time a veteran police officer starts a shift, one key part of the basis for reasonable suspicion is established as to every citizen in the jurisdiction, regardless of how ambiguous or innocent their behavior.[92] Should that veteran officer be patrolling in a high-crime area, every resident of the neighborhood is merely one "furtive" gesture away from being stopped and potentially searched.[93] The Supreme Court's declaration that subjective considerations are

89. *See, e.g.*, *Ornelas*, 517 U.S. at 699 (explaining contextual factors like lens of officer experience inform judge's assessment of historical facts); United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (asserting officer experience furnishes background for assessing objective facts and circumstances, not stand-alone factor).

90. *See* Commonwealth v. Thompson, 985 A.2d 928, 935 (Pa. 2009) (illustrating necessary analysis for assertions of officer experience). Even the *Thompson* court, which held that officer experience merits status as an independent factor, cautioned that an officer's testimony must not simply reference his training and experience, but must also explain how those considerations are applicable to the facts at hand. *See id.* In other words, courts must demand that an officer demonstrate the nexus between his relevant experience and the particular facts and circumstances in dispute. *See id.*; *see also Cortez*, 449 U.S. at 418 (describing training and experience as facilitating inferences from objective facts); United States v. Ortiz, 422 U.S. 891, 897 (1975) (explaining officer's knowledge and experience properly aid in inferential process).

91. *See* Beck v. Ohio, 379 U.S. 89, 96 (1964) (explaining warrantless search or arrest substitutes less reliable after-the-fact justification for preferred objective predetermination). The only check on officer discretion—and the primary determination of reasonable suspicion—occurs long after the stop and frisk at a suppression hearing, where the justification offered is too likely to be subtly influenced by the "familiar shortcomings of hindsight judgment." *See id.* Reliance on generalizations and categories seems at odds with the Supreme Court's oft-quoted declaration that the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *See* Terry v. Ohio, 392 U.S. 1, 22 n.18 (1968) (discussing need for objective determination of reasonable suspicion supported by specific facts).

92. *See* Kinports, *supra* note 6, at 758-59 (illustrating bootstrapping effect of officer experience). According an officer's experience independent factor-status allows him to bootstrap a hunch or other constitutionally insufficient observations simply by referencing his experience as the foundation for his suspicion. *See id.* While officer experience is routinely used to bolster the prosecution's reasonable suspicion showing, the absence of relevant experience is almost never cited as a factor undermining the basis of suspicion. *See id.* at 760-61.

93. *See generally* Illinois v. Wardlow, 528 U.S. 119 (2000) (holding reasonable suspicion established based merely on "flight" in high-crime area). Slouching, facing a wall while making a phone call, and "perfect driving" are factors police often rely on in formulating a basis of suspicion. *See* Taslitz, *supra* note 8, at 65-67

not part of ordinary Fourth Amendment analysis also militates against elevating officer experience to factor-status; injecting an individual officer's knowledge, intentions, and beliefs into reasonable suspicion analysis would result in arbitrarily variable constitutional protections.[94] If the permissibility of a stop, search, or arrest could vary based on an officer's status as a veteran or a rookie, individuals would be unable to determine the scope of their protections, because the same set of facts and circumstances would lead to different outcomes in reasonable suspicion determinations.[95] Limiting officer experience to the role of a lens would avoid inconsistency of protection by ensuring that reasonable suspicion turns on specific, objective facts relating to the particular suspect, rather than subjective characteristics of the arresting officer.[96]

B. Follow Their Lead: A Sensible Approach to the High-Crime Area Issue

To add legitimacy to the designation, courts in all jurisdictions should follow the First Circuit's lead by evaluating the empirical support for an officer's characterization of a neighborhood as a high-crime area.[97] Crediting blanket

(illustrating variety of otherwise innocuous movements or behaviors often cited as suspicious). The problem is not that such behavior is totally irrelevant, but rather that placing too much weight on conduct common among the law-abiding population inappropriately expands police discretion and is inconsistent with the meaningful limits on government authority contemplated by the Fourth Amendment. *See id.*

94. *See* Raigrodski, *supra* note 54, at 209-11 (noting individual officer's experience inherently personal and subjective though never recognized as such by courts). The Supreme Court's practice of "disregarding some aspects of police subjectivity and valuing other aspects of it serves to reinforce the power of the police over the citizenry," while remaining hidden under the guise of objectivity. *See id.* at 199.

95. *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (stating inappropriate to allow arbitrary protections caused by injecting subjectivity into Fourth Amendment analysis); New York v. Belton, 453 U.S. 454, 459-60 (1981) (illustrating harm when individual cannot predict how court will apply settled principle to factual scenario); *cf.* Commonwealth v. Bartlett, 671 N.E.2d 515, 518 (Mass. App. Ct. 1996) (asserting searches based on hunch unacceptable because random and arbitrary in nature). The *Bartlett* court made clear that while officers may add up multiple suggestive factors, the factors must actually be suggestive—no matter how experienced the officer, adding up "eight zeros" (innocuous observations) does not necessarily justify an investigatory stop. *See* 671 N.E.2d at 518.

96. *See* United States v. Prandy-Binett, 995 F.2d 1069, 1075 n.2 (D.C. Cir. 1993) (Edwards, J., dissenting) (stating acquiescence to police techniques repugnant to courts' responsibility to provide meaningful protections). If courts give "serious scrutiny" to officers' decisions, those officers will be motivated to conduct more careful investigations in order to get their judgments right, rather than simply desiring to rack up arrests that may eventually be overturned. *See* Taslitz, *supra* note 8, at 32 (noting providing individualized evidence calls for data-gathering, meaning more data available to inform judgments). Also, the mere expectation that a court will evaluate an officer's inferences, rather than just blindly approve them, reduces reliance on biases and generalized characteristics because an officer will know that he must articulate his basis of suspicion with specificity in order to justify a search, seizure, or arrest. *See id.*

97. *See* United States v. Wright, 485 F.3d 45, 53-54 (1st Cir. 2007) (explaining character of stop's location treated as factual issue to evaluate); *see also* United States v. Montero-Camargo, 208 F.3d 1122, 1139 n.32 (9th Cir. 2000) (pointing out inherent weakness of basing high-crime designation on officers' mere "war stories"). The problem is that some courts do not stop to ask what in fact qualifies as a high crime rate, and instead rely on an officer's bald, undocumented assertions—the result being that a neighborhood is a high-crime area simply because the arresting officer says it is. *See Montero-Camargo*, 208 F.3d at 1143 (Kozinski,

assertions of a high-crime area alters individuals' constitutional protections without specific and objective reasons supporting that alteration—the high-crime designation "almost always shifts the analytical balance toward a finding of reasonable suspicion."[98] This unfortunate result could be avoided by treating the high-crime designation as a factual issue to be assessed by examining three factors: the nexus between the crime charged and that for which the area is known, the geographic boundaries of the area in question, and the "temporal proximity" between the evidence of heightened criminal activity and the observations made by the testifying officer.[99]

Gathering the relevant data would pose a minimal burden because many police departments and government agencies already utilize advanced crime-mapping software as part of their "staffing and resource allocation decisions"; requiring police to analyze that data in defining the boundaries of, and type of crime most prevalent in, a purported high-crime area places a premium on understanding a community and the nuances that distinguish ordinary behavior of law-abiding residents from criminally suspicious behavior meriting investigation.[100] This approach necessarily demands "a measure of precision" that would avoid the social and racial tensions that result when an entire community is swept within the scope of a carelessly defined high-crime area.[101] By limiting high-crime designations to specific locations and identifying the particular types of crime for which a location is selected, the designation would become more probative of criminality when combined with an officer's observations of suspicious behavior associated with the relevant crime of interest for the location.[102]

J., concurring); *see also* Ferguson & Bernache, *supra* note 6, at 1628-44 (proposing objective, verifiable approach to high-crime area determinations); Harris, *supra* note 5, at 999 (suggesting courts distinguish between vague assertions of high-crime reputations and statements supported by reliable data).

98. *See* Ferguson & Bernache, *supra* note 6, at 1590 (noting high-crime designation usually determinative in legitimizing police conduct). The practical reality is that citizens in a purportedly high-crime area "have different Fourth Amendment protections than they would in other locations in the same town, city, or state." *See id.* at 1589. Crediting categories of suspicion such as the neighborhood, and sometimes even race, erodes reasonable suspicion and produces inconsistent applications of constitutional protections. *See* Baer, *supra* note 8, at 96 (stating lower courts moved towards routine acceptance of generalizations).

99. *See* United States v. Wright, 485 F.3d 45, 53-54 (1st Cir. 2007) (declaring character of location factual issue requiring evidentiary support given factor's significance in evaluating suspicion); Ferguson & Bernache, *supra* note 6, at 1595 (suggesting tripartite inquiry ensures direct, relevant connection between character of neighborhood and otherwise ambiguous actions).

100. *See* Ferguson & Bernache, *supra* note 6, at 1626-28 (noting data-gathering tools already exist and could facilitate accurate assessments in court); *see also* Raymond, *supra* note 7, at 131-32 (asserting focusing inquiry on how behavior sets suspect apart encourages careful understanding of neighborhood).

101. *See* Ferguson & Bernache, *supra* note 6, at 1635 (highlighting benefits of limiting high-crime area to locations actually deserving label). The demand for empirical evidence provides objective criteria for conducting a meaningful review of an officer's claims and avoids the dramatic effects of "police dealings with society's disfavored classes." *See* Maclin, *supra* note 4, at 1318-20 (explaining reliance on "common sense" rather than objective criteria provides little guidance).

102. *See* Raymond, *supra* note 7, at 126-28 (demonstrating nexus requirement makes otherwise innocuous observations more meaningful by providing context). When the nexus element is supported by reliable data, it

C. Waking the Gatekeepers: Requiring Officers to Establish Their Expertise

If the specific facts and circumstances on which an officer's inferences are based would be meaningless to an ordinary, untrained person viewing them objectively, then an officer testifying about such inferences should first be required to establish his relevant expertise.[103] Like most ordinary persons, judges are usually not experts in criminology, so when their assessment of reasonable suspicion turns on inferences only an experienced officer could make, it is important to ensure that those inferences are reliable and the officer is qualified to make them—the "gatekeeping" function for expert witness testimony.[104] Considering that even duly qualified narcotics experts testifying at criminal trials are not permitted to express personal opinions regarding a suspect's guilt, it seems even more important to require that an officer establish his qualifications as an expert at suppression hearings, which necessarily involve assertions of the officer's own conclusion of the suspect's guilt.[105] This could be accomplished by requiring the officer to demonstrate his analytical methodology and provide proof that it is reliable, such as by offering "hit rate" data showing that the purportedly suggestive factors in the current case have proven to be reliable indicators of actual commission of the suspected crime in the past.[106] In other words, if an officer's inferences of

is highly relevant to the reasonable suspicion inquiry because it contextualizes observations that are not sufficient on their own, but are suggestive of the specific crime at issue and for which the area is known. *See id.*

103. *See* Alschuler, *supra* note 7, at 123-24 (emphasizing danger posed by presumption of officer expertise); Maclin, *supra* note 4, at 1324 (noting despite "allure of government statistics," judges often unable to appraise basis for seizure); Rosenbaum, *supra* note 30, at 114 (stating requirement of objective facts, rather than even expert hunches, necessary protection); *see also* FED. R. EVID. 702 (laying out definitions and requirements for expert testimony). The need to ensure that officer testimony is reliable is demonstrated by the fact that judges often have to sift through a wide variety of innocuous factors because "the police will cite virtually *any* circumstance" to justify a stop or search. *See* United States v. Prandy-Binett, 995 F.2d 1069, 1077 n.3 (D.C. Cir. 1993) (Edwards, J., dissenting) (discussing majority's extremely lenient treatment of cited suspicious factors).

104. *See* FED. R. EVID. 702 (requiring expert be duly qualified given importance of their testimony). Repeated police errors affect the guilty and innocent alike and undermine public trust of law enforcement, making it less likely they will cooperate with police requests. *See* Taslitz, *supra* note 8, at 11-12 (describing harms of stops and searches based on erroneous suspicion of criminal activity). Meaningful judicial review, especially regarding the particularization and articulation requirements, "serves goals of accountability and transparency" and reduces the risk of error. *See id.*

105. *See* Commonwealth v. Frias, 712 N.E.2d 1178, 1181 (Mass. App. Ct. 1999) (noting expert may describe pattern of drug transactions but cannot express opinion regarding present case). The point of an officer providing general information about drug transactions is to help an untrained factfinder in understanding the evidence, but it is the factfinder's duty alone to draw conclusions of criminality, who, in the context of suppression hearings, is the judge. *See id.*

106. *See supra* note 39 and accompanying text (providing statistical evidence that officers' suspicion turns out incorrect in large majority of cases). Meaningful review of the basis of suspicion encourages more careful, thorough investigation and is more likely to lead to the recovery of evidence of a crime, as demonstrated by the fact that warranted searches have up to a 68% better recovery rate than warrantless searches. *See* Reinert, *supra* note 6, at 1499 (describing costs of doing away with warrant requirement); *see also* Taslitz, *supra* note 8,

criminality are based on objective facts that would otherwise be insufficient, then those facts do not make his inferences any more reliable or reasonable unless they have consistently led to the uncovering of the same crime on previous occasions.[107] The weight given to an officer's opinion testimony is similar to the faith juries place in the expert testimony of a doctor or scientist; so requiring officers to demonstrate that they are qualified to give such testimony is an approach more consistent with the expert testimony provisions of the Rules and the reliability concerns they address.[108]

IV. CONCLUSION

It is time for courts to seriously reexamine their treatment of the two most pivotal aspects of probable cause and reasonable suspicion determinations: officer experience and high-crime area designations. The entire area of search and seizure law is constantly in flux, ripe with seemingly contradictory rules, and lacking any meaningful guidance for conducting reasonable suspicion determinations. While it is easy to blame this unfortunate state of affairs on the lower courts because they have failed to consistently apply the requirements of particularity, specificity, and objectivity—all regarded by the Supreme Court as essential components of any search and seizure inquiry—the Supreme Court itself is not without blame.

One major problem is the Court's contradictory positions regarding the role of subjective considerations in Fourth Amendment analysis. The Court apparently finds it too difficult and unreliable to evaluate subjective factors when doing so would expose improper motives or biases and potentially invalidate a police officer's actions, but it is not so difficult to assess subjective

at 31-32 (explaining serious scrutiny encourages officers to get decisions right, not just make arrests).

107. *See* Taslitz, *supra* note 8, at 58-59 (recommending police departments engage in own data-gathering and analysis). An officer using a drug-dealing pattern or drug-courier profile to make stops might be personally satisfied if he finds contraband in 5% of the cases where he stops suspects fitting the pattern or profile, but the degree of accuracy society considers reasonable may be much higher. *See id.* The most basic evidence militating against the presumption of police expertise is that the vast majority of stops and searches "result in neither arrest nor the discovery of contraband or weapons." *See* Reinert, *supra* note 6, at 1498 (summarizing data from study of reasons asserted for investigatory stops). Even the data currently available on success rates for *Terry*-stops is somewhat unreliable because "the vast majority of Fourth Amendment intrusions are experienced by innocent individuals, who simply do not have the incentive to bring their complaints to the Court's attention." *See id.* at 1504.

108. *See* FED. R. EVID. 702 (calling for expert testimony if technical or specialized knowledge necessary to understanding facts). Rule 702 was designed to charge courts with the responsibility of acting as "gatekeepers" to ensure that expert testimony is based on sufficient facts or data and is the product of reliable principles. *See id.* advisory committee's note. There is substantial evidence that in the context of suppression hearings, many judges are biased towards police officers and generally give officers' testimony greater credence than defendants' testimony. *See* Pepson & Sharifi, *supra* note 30, at 1189-92, 1231-32 (describing "institutional bias" favoring police testimony). This judicial practice, when combined with the already relaxed reasonable suspicion standard, "detracts from the accuracy of the fact finding that takes place at suppression hearings." *See id.* at 1234.

factors when necessary to bolster an otherwise inadequate basis of suspicion. Selectively resorting to subjective inquiries only when it supports the government's reasonable suspicion showing, but refusing to engage in the very same type of assessment when it might undermine the permissibility of police conduct is a judicial practice that ought to be abandoned, at least if the Supreme Court wishes to have logically consistent reasoning to support its rulings in search and seizure cases.

While disapproving of the arbitrarily variable protections that result from inconsistent applications of settled principles to recurring factual scenarios, the Supreme Court has created a body of search and seizure case law that frequently produces such results. Under current Supreme Court precedent, whether certain objective facts justify an investigatory stop depends on the officer's status as a veteran or a rookie. Also, whether certain conduct is suggestive of criminality depends largely on whether the conduct took place in a safe, affluent suburb or an allegedly high-crime, urban neighborhood. But the justification for a government intrusion should be based on factors pertaining to the individual stopped or searched, not on the tenure of the observing officer or the character of the surrounding neighborhood. The problem is not that police experience and high crime rates are unhelpful or irrelevant, but that courts weigh these categorical factors so heavily that they, rather than objective facts about the particular suspect, become outcome determinative. This would not be a concern if courts tested the accuracy and reliability of the assumptions, principles, and ideas on which these factors rest.

Some courts already conduct careful review of the basis for an assertion of a high-crime area by treating it as an issue of fact and demanding that the prosecution provide empirical evidence clearly defining the geographic and temporal scope of such a label and identifying the types of criminal activity most prevalent in the area. Similar review should be conducted for references to an officer's training and experience when asserted as support for reasonable suspicion. A court should rely on a police officer's inferences drawn in light of his training and experience only if that training and experience has actually proved helpful and reliable in uncovering evidence or catching criminals. If an officer conducts hundreds of *Terry*-stops a year based on a fairly consistent set of purportedly suggestive observations but only succeeds in uncovering evidence of a crime in a small percentage of those encounters, then testimony about that officer's inferences of criminality drawn from those observations does not make his suspicion any more reasonable, and, in fact, ought to make it that much less reasonable. Statistical facts and data about an officer's success rate would provide a reasonable metric to evaluate the reliability of his purported expertise. The same way requiring evidentiary support for a high-crime designation adds legitimacy to that factor's use in reasonable suspicion determinations, so too would the use of officer experience as a factor or lens be legitimized by requiring an officer to demonstrate his qualifications and the

relevance of his training and experience to the facts of the case. By explaining the proper role of subjective considerations in the otherwise objective search and seizure analysis, demanding empirical data to support high-crime area assertions, and requiring officers to demonstrate their qualifications before testifying about expert inferences, courts could take a big step toward restoring the public's faith in the criminal justice system as it plays out on the streets, while also ensuring that citizens are afforded meaningful constitutional protections.

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