

## CASENOTE

### ***STATE OF LOUISIANA V. MORGAN: AN INQUIRY INTO THE EVOLUTION OF THE FOURTH AMENDMENT AND THE JUSTIFICATIONS FOR REASONABLE SUSPICION FOR AN INVESTIGATORY STOP***

#### I. INTRODUCTION

Application of the Fourth Amendment is not always a straightforward task.<sup>1</sup> In the landmark *Terry v. Ohio* decision, the United States Supreme Court addressed whether it was reasonable for a police officer to stop, or “seize,” a person, and search him when less than probable cause for an arrest existed.<sup>2</sup> The ramifications of *Terry* include the “long-term consequences it sowed by casting the holding in terms of a broadly framed reasonableness balancing test.”<sup>3</sup> Even though former United States Supreme Court Chief Justice Earl Warren offered a

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1. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (noting that the Court’s “holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense”); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding probable cause was no longer required for an investigatory stop but only a reasonable suspicion, which is in accordance with the Fourth Amendment); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (stating “[t]he Fourth Amendment prohibits ‘unreasonable searches and seizures’ by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest”); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (holding that the Fourth Amendment requires “some minimal level of objective justification” for making the stop); *United States v. Brown*, 334 F.3d 1161, 1169-74 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 954 (2004) (holding that the Fourth Amendment was not violated when a police officer opened the door to the defendant’s car, nor when he subsequently opened and searched the car’s trunk).

2. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 423 (2004) (“*Terry* represented a sudden change in direction away from the Warren Court’s focus of protecting individual rights from police abuse of power, evidenced in *Mapp* and *Miranda*, to empowering police and expanding police power on the street in *Terry*.”).

3. Scott E. Sundby, *Terry and the Future: An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1135 (1998).

cautious opinion that implied that “the use of the reasonableness balancing test was meant to be viewed as a narrow departure from the norm of probable cause,” a balancing test that is broader than originally intended now exists, and the notion of “reasonable suspicion” has taken on a life of its own.<sup>4</sup>

This Note focuses on the evolution of the interpretation and application of the Fourth Amendment, using *State v. Morgan*, a 2011 decision of the Louisiana Supreme Court, as its vehicle.<sup>5</sup> Section II of this Note describes the events and procedural process leading up to the court’s decision. Section III lays out the background law pertaining to the Fourth Amendment and investigatory stops. Section IV evaluates the framework and precedent used for the Louisiana Supreme Court’s holding, as well as the dissent. Section V is a critical analysis of the court’s decision and its future impact on society. Lastly, Section VI summarizes the concerns of departing from the Warren Court’s notions of personal rights, as developed in *Terry* and argues that the precedent set by *Terry* allows police officers to conduct investigatory stops based on slightly more than a “hunch” when no probable cause exists, which gives rise to potential abuse and begins the deterioration of rights protected by the Fourth Amendment.

## II. FACTS AND HOLDING

On April 14, 2008 at around 1:45 a.m., Sergeant Greg Brown of the Baker Police Department was patrolling in Baker, Louisiana when he observed Johnny Morgan, the defendant, walking in a poorly illuminated area towards Sergeant Brown’s location.<sup>6</sup> Even though Sergeant Brown did not see Morgan commit any crime, Sergeant Brown stated that he “had a hunch the defendant was ‘up to no good,’ based upon the defendant ‘running and being evasive, at the time of the hour in a poor lit [sic] area.’”<sup>7</sup> Also, according to Sergeant Brown’s uncontradicted testimony, once Morgan noticed the marked police vehicle, Morgan immediately began running in the opposite direction.<sup>8</sup> After chasing Morgan for several blocks, Sergeant Brown stopped

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4. *Sundby*, *supra* note 3, at 1135.

5. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403.

6. *Id.* at 404.

7. *Id.* at 409-10.

8. *Id.* at 404, 410.

Morgan and instructed him to stand in front of his patrol car.<sup>9</sup> Thereafter, Sergeant Brown interviewed Morgan and noticed that Morgan was continuously placing his hands in his pockets and exhibiting increasingly nervous and evasive behavior.<sup>10</sup> The sergeant also observed Morgan sweating, even though it was only around fifty-five degrees outside.<sup>11</sup> Morgan's nervous behavior and grabbing around his waistband led Sergeant Brown to shine his flashlight around Morgan's waist, where he saw a hollowed-out ink pen with one burned end that was fastened onto Morgan's front pants pocket.<sup>12</sup> Sergeant Brown's training and experience with narcotics led him to immediately identify the pen as a crack pipe; Sergeant Brown then confiscated the pen and arrested Morgan.<sup>13</sup> Following the arrest, Sergeant Brown gave Morgan a *Miranda*<sup>14</sup> warning and performed a search incident to arrest.<sup>15</sup> During the search, the sergeant discovered crack cocaine in Morgan's rear pants pocket.<sup>16</sup>

Morgan was charged with possession of illegal narcotics and illegal drug paraphernalia.<sup>17</sup> Morgan's attorney filed a motion to suppress the cocaine and the drug paraphernalia, arguing that they were confiscated during an illegal search and seizure.<sup>18</sup> The defendant claimed that Sergeant Brown lacked reasonable suspicion that Morgan had committed any crime, thus, making

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9. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 404.

10. *Id.*

11. *Id.*

12. *Id.* at 404-05.

13. *Id.* at 405.

14. *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (establishing that criminal suspects should be informed of their rights against self-incrimination prior to police interrogation).

15. *Morgan*, 59 So. 3d at 405.

16. *Id.*

17. *Id.* As to the possession of illegal narcotics, Louisiana law states, "[i]t is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner." LA. REV. STAT. ANN. § 40:967(C) (2012). Schedule II, as defined in LA. REV. STAT. ANN. § 40:964(A)(4) (2012), includes cocaine. As to the possession of illegal drug paraphernalia, Louisiana law states:

It is unlawful for any person to use, or to possess with intent to use, any drug paraphernalia, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Part.

LA. REV. STAT. ANN. § 40:1023(C) (2012).

18. *Morgan*, 59 So. 3d at 405.

the search and seizure illegal because it violated Morgan's rights as protected by the Constitutions of Louisiana and the United States.<sup>19</sup> At the hearing on the motion to suppress, Sergeant Brown was the only witness to testify.<sup>20</sup> He testified that he frequently "had experience with people fleeing when they saw the police coming, that he has arrested such people in the past, and that they were subsequently found with narcotics or weapons."<sup>21</sup> The sergeant also noted that the area where Morgan was noticed fleeing and subsequently stopped was a low-crime area.<sup>22</sup>

The trial judge denied the motion to suppress, stating that due to Morgan's suspicious conduct, Sergeant Brown had a right to stop him and investigate further what he was doing.<sup>23</sup> Morgan then filed an application for writ with the Louisiana First Circuit Court of Appeal, which was subsequently granted.<sup>24</sup> The Louisiana First Circuit Court of Appeal reversed the ruling of the trial court, and the case was remanded.<sup>25</sup> In support of its decision, the Louisiana First Circuit Court of Appeal relied on *State v. Benjamin*, which concluded that there is no justification for a stop based merely on a person's flight from a police officer.<sup>26</sup> The State then filed a writ application with the Supreme Court of Louisiana, which was subsequently granted.<sup>27</sup> The Louisiana Supreme Court held that Morgan's presence in a dimly lit, residential area in the middle of the night, his immediate flight at the sight of a marked police car, and Sergeant Brown's experience were, under the totality of all the circumstances, sufficient to give Sergeant Brown reasonable suspicion to proceed with an investigatory stop of Morgan.<sup>28</sup>

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19. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 405.

20. *Id.* at 409.

21. *Id.* at 411.

22. *Id.* at 410.

23. *Id.* at 405.

24. *Id.* Filing an appeal is permitted as a right once a final decision of the case has been rendered. LaDonte A. Murphy, *Access to Appellate Review: Writs, Appeals, and Interlocutory Judgments*, 34 S.U. L. Rev. 27, 30 (2007). Another method of review is a writ, which immediately allows a party to seek a higher court's review of an erroneous decision of the trial court. *Id.* Writs, however, are not granted as a right, but are discretionary and require applications be filed. *Id.*

25. *Morgan*, 59 So. 3d at 405.

26. *Id.* (citing *State v. Benjamin*, 97-3065 (La. 12/01/98); 722 So. 2d 988, 989).

27. *Id.*

28. *Id.* at 411.

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### III. BACKGROUND

#### A. SEARCH AND SEIZURE LAWS

Under the United States Constitution, people are protected from unreasonable searches and seizures.<sup>29</sup> 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.<sup>30</sup>

The Louisiana Constitution also provides protection from unreasonable searches and seizures; it also includes protection from invasions of privacy.<sup>31</sup> Therefore, probable cause and a warrant are required prior to a search or seizure in order for it to be deemed reasonable and constitutional.<sup>32</sup> While the reasonableness factor has never been specifically defined, over the years, the United States Supreme Court has delineated the parameters of what constitutes reasonable searches and seizures as well as the very few limited situations that allow warrantless searches.<sup>33</sup>

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29. U.S. CONST. amend. IV.

30. *Id.*

31. LA. CONST. art. I, § 5.

32. Michael Mello, *Stop: Terry v. Ohio Step-by-Step, as an Illustration of Fourth Amendment Analysis (or, What Did Detective Martin McFadden Know, and When Did He Know It?)*, 44 No. 4 CRIM. L. BULL. art. 5 (Summer 2008).

33. See *Katz v. U.S.*, 389 U.S. 347, 357 (1967) (noting that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”); see *generally* *Terry v. Ohio*, 392 U.S. 1 (1968); see also *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 406; see also *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989) (noting that reasonable suspicion, like probable cause, cannot be reduced to fixed legal rules, but instead courts must consider the totality of circumstances); see *generally* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (recognizing the “hot pursuit” exigency exception to the warrant requirement); see *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (a recent case where the Supreme Court upheld the “emergency aid or protection” exception to the warrant requirement); see *generally* *Carroll v. United States*, 267 U.S. 132 (1925) (holding that law enforcement officers are not required to obtain a warrant to search an automobile or other movable vehicle, but only need probable cause to believe the automobile has evidence of a crime).

In *Weeks v. United States*, the United States Supreme Court addressed the admission at trial of evidence that had been obtained by federal officials in violation of the Fourth Amendment.<sup>34</sup> The *Weeks* Court implemented the exclusionary rule, which “generally requires a court to exclude evidence obtained through illegal means from consideration at trial.”<sup>35</sup> The Court “created this remedy as [a] method of enforcing the Fourth Amendment’s prohibition against unreasonable searches and seizures.”<sup>36</sup> The Court used the exclusionary rule to deter governmental misconduct.<sup>37</sup> Even though the Court “imposed the exclusionary rule on federal law enforcement by holding that the Fourth Amendment prohibited federal officials from submitting illegally obtained evidence at trial,” it declined to force this remedy on state proceedings.<sup>38</sup>

Before *Mapp v. Ohio*, police in most states were generally free to act without being restricted by the limitations imposed on them by the Fourth Amendment; police were allowed to stop and search suspects without probable cause and often did so under the pretenses of loitering and vagrancy laws.<sup>39</sup> The exclusionary rule required police to have weightier justifications for interference with a person’s life, liberty, and freedom with less than probable cause.<sup>40</sup> Prior to the *Mapp* decision, the exclusionary rule was not enforced by half of the states.<sup>41</sup> In these states, police were allowed to detain and search without probable cause because such “police conduct had no impact on the outcome of any resulting criminal charges against the subject of the detention and search.”<sup>42</sup> Furthermore, in the states that had not adopted the exclusionary rule, police detained and searched persons under the pretenses of statutes and ordinances regarding suspicious persons, loitering, and vagrancy.<sup>43</sup> Thus, in an effort

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34. Laurence Naughton, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 210 (1996) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).

35. Naughton, *supra* note 34, at 206 (citing *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

36. Naughton, *supra* note 34, at 206.

37. *Id.* at 212 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

38. Naughton, *supra* note 34 at 210-11.

39. Katz, *supra* note 2, at 424-25.

40. *Id.* at 425.

41. *Id.* at 424.

42. *Id.*

43. *Id.* at 424-25.

to further deter police misconduct and protect the Fourth Amendment's right to privacy, the Warren Court in *Mapp* extended the exclusionary rule to the states.<sup>44</sup>

During the time of the Warren Court, the Supreme Court made specific clauses of the Bill of Rights applicable to the states, extended the right to counsel to all indigent defendants, established that suspects to a crime should be informed of their rights, and created, in *Mapp*, what has come to be known as the "poisonous tree doctrine" by disallowing the use of illegally seized evidence at trial.<sup>45</sup> Supreme Court jurisprudence in those years focused on curtailing the police powers of the government and adhered to the ideal displayed by the language of our founding documents of freedom and individual liberties.<sup>46</sup> This was perhaps most evident in *Katz v. United States* and its progeny, where the right to privacy was read into the Fourth Amendment.<sup>47</sup> This created a high water mark for the rights of the accused and upheld the ideal that people are innocent until proven guilty, and should be treated as such.

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44. See *Mapp v. Ohio*, 367 U.S. 643, 655, 657-58 (1961). Prior to the appointment of Earl Warren to the United States Supreme Court, the idea of a constitutional right to privacy did not exist as enforceable law. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1335-37 (1992). The Warren Court established and entrenched the idea that privacy was part and parcel of the Constitution's guarantees to the people through its holdings over the years. *Id.* at 1336-38.

45. See *Gideon v. Wainwright*, 372 U.S. 335, 341, 345 (1963) (extending the right to counsel to all indigent defendants); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (establishing that criminal suspects should be informed of their rights, creating the *Miranda* warning requiring criminal suspects to be informed of their rights against self-incrimination prior to police interrogation); *Mapp*, 367 U.S. at 657 (1961) (creating the rule prohibiting the use of illegally seized evidence at trial, known as the "poisonous tree doctrine").

46. See *Gideon*, 372 U.S. at 342-43 (extending the right to counsel to all indigent defendants); *Miranda*, 384 U.S. at 467 (establishing that criminal suspects should be informed of their rights); *Mapp*, 367 U.S. at 657 (applying the exclusionary rule prohibiting the use of illegally seized evidence at trial to the states).

47. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (noting that the Fourth Amendment's zone of privacy protection applied if: (1) the individual has "exhibited an actual (subjective) expectation of privacy," and (2) the expectation is "one that society is prepared to recognize as 'reasonable.'"); see Gormley, *supra* note 44, at 1366 ("Justice Harlan's concurrence . . . eventually won the day and left an indelible mark on the history of privacy under the Fourth Amendment by offering a notion of 'reasonable expectations of privacy' . . . ." After Justice Harlan's creation of this two-pronged "reasonable expectation of privacy" test in *Katz*, the United States Supreme Court shortly thereafter adopted it by a majority in *Terry v. Ohio*. Gormley, *supra* note 44, at 1441).

At the time of *Mapp*, federal law required probable cause for the legal detention of a suspect.<sup>48</sup> However, courts were then faced with post-*Mapp* cases that consistently resulted in the suppression of evidence because probable cause did not exist for an investigatory stop.<sup>49</sup> Therefore, pressure arose on the courts to allow police to conduct investigatory stops with less than probable cause.<sup>50</sup>

## B. BEHIND THE *TERRY* STOP

In *Terry v. Ohio*, in 1968, the Supreme Court addressed whether it was reasonable for a police officer to stop, or “seize,” an individual and search him for weapons when less than probable cause for an arrest existed.<sup>51</sup> The *Terry* Court held that a seizure of the person occurs when a person believes he does not have the freedom to leave.<sup>52</sup> The Court also found that forcible detentions or investigatory stops were not of the same caliber of a more traditional search and seizure that required probable cause—only reasonable suspicion, as opposed to probable cause, was required for an investigatory stop.<sup>53</sup> Therefore, “a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an

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48. Katz, *supra* note 2, at 427.

49. *Id.* at 438-39.

50. *Id.*

51. *Id.* at 423 (stating that after *Terry*, the Court’s focus moved away from protecting individual rights from abuse of police power and moved towards not only allowing, but actually increasing police power). In *Terry v. Ohio*, the defendant and another man were standing on a corner in downtown Cleveland around 2:30 in the afternoon, when they gained the attention of a police officer patrolling the area in plain clothes. *Terry v. Ohio*, 392 U.S. 1, 5 (1968). The officer testified that he “was unable to say precisely what first drew his eye to them,” but he had patrolled that downtown vicinity for 30 years. *Id.* After observing the two men “pacing, peering and conferring” in front of store windows for around ten minutes, the men walked off together. *Id.* at 6. The officer testified he “had become thoroughly suspicious,” believing the men were armed and were “casing a job.” *Id.* at 6. Thus, the officer followed the men, stopped them for questioning, and patted them down, whereupon he felt a weapon in the defendant’s jacket. *Id.* at 6-7. The defendant was formally charged with carrying a concealed weapon. *Id.* at 7. The Court upheld the patting down of defendant’s outer clothing because, due to the totality of the circumstances, the officer had reasonable suspicion to believe the suspect was armed and engaged in a criminal activity. *Terry*, 392 U.S. at 30-31.

52. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

53. Katz, *supra* note 2, at 423, 447-48.

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arrest.”<sup>54</sup>

In order to determine the reasonableness of an officer’s actions, the police officer must have “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” an intrusion on the constitutionally protected interests of a private citizen.<sup>55</sup> The Court has held that this reasonable suspicion, which must be supported by articulable facts that criminal activity has or is about to take place, satisfies the reasonableness requirement of the Fourth Amendment.<sup>56</sup> The Supreme Court further stated that when making the determination of whether the police officer proceeded reasonably, “due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”<sup>57</sup> However, after the *Terry* decision, it was noted that there was “an abrupt, unexpected change in the Court’s direction that led away from the emphasis on protecting individual rights” from the abuse of power by police, as demonstrated in *Mapp* and *Miranda*, “to empowering police and expanding police power on the street in *Terry*.”<sup>58</sup>

### C. THE EVOLUTION OF SEARCH AND SEIZURE LAWS AFTER *TERRY*

In 1981, the Supreme Court further explained that a police officer’s reasonable suspicion would be allowed based on that particular police officer’s “own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”<sup>59</sup> Also, the Court stated that due deference must be

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54. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 406 (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)); see also *United States v. Cortez*, 449 U.S. 411, 417 (1981) (citations omitted) (stating that “[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity”).

55. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

56. *Morgan*, 59 So. 3d at 406 (citations omitted). See *infra* Section III.C for further discussion on articulable facts to support an officer’s reasonable suspicion.

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

58. *Katz*, *supra* note 2, at 423; see, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment right against self-incrimination consists of proper procedural protections against police abuse of “the process of in-custody interrogation of persons suspected or accused of crime”).

59. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *United States v.*

given “to the factual inferences drawn by the law enforcement officer and District Court Judge.”<sup>60</sup> Though “reasonable suspicion” was never specifically defined, the Supreme Court noted that it requires “some minimal level of objective justification” for making an investigatory stop.<sup>61</sup> The Supreme Court further instructed lower courts that, when reviewing whether an investigatory stop was legal, they must take into account “the totality of the circumstances—the whole picture.”<sup>62</sup> In addition, the D.C. Circuit Court of Appeals held the following in *United States v. Brown*:

[T]he question of whether reasonable suspicion existed can only be answered by considering the totality of the circumstances as the officer on the scene experienced them . . . . Hence, even though a single factor might not itself be sufficiently probative of wrongdoing to give rise to a reasonable suspicion, the combination of several factors—especially when viewed through the eyes of an experienced officer—may.<sup>63</sup>

Furthermore, the totality of circumstances is considered on a case-by-case basis, and the court must consider whether the police officer had a particular, articulable, objective footing for suspecting that the person stopped was involved in criminal activity.<sup>64</sup>

#### D. EXAMINING THE TOTALITY OF THE CIRCUMSTANCES

Once the Supreme Court began applying the “totality of the circumstances” test, the Court carved out various factors that are especially pertinent when examining an officer’s reasonable suspicion.<sup>65</sup> Specifically, the Court has stated that, “courts

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

60. *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

61. *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

62. *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

63. *United States v. Brown*, 334 F.3d 1161, 1165 (D.C. Cir. 2003) (citing *United States v. Edmonds*, 240 F.3d 55, 59-60 (D.C. Cir. 2001)) (citations omitted); *see also Arvizu*, 534 U.S. at 273; *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968).

64. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 406 (citing *Sokolow*, 490 U.S. at 7); *see also Terry*, 392 U.S. at 27; *United States v. Cortez*, 449 U.S. 411, 417 (1981).

65. *Morgan*, 59 So. 3d at 406.

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examine the totality of the circumstances known to the officer at the time of the stop, including the experience of the officer and the behavior and characteristics of the suspect.”<sup>66</sup> Courts also must consider the time and location of the stop, as well as the defendant’s actions, including his behavior during and prior to the stop.<sup>67</sup>

In *Illinois v. Wardlow*, the Supreme Court found that, alone, the mere presence of a person in a high-crime area is not enough to satisfy reasonable suspicion.<sup>68</sup> However, the character of a location is a relevant consideration in determining whether further investigation is warranted.<sup>69</sup> Nevertheless, Justice Stevens, concurring in part and dissenting in part, disagreed:

The State, along with the majority of the Court, relies as well on the assumption that this flight occurred in a high crime area. Even if that assumption is accurate, it is insufficient because even in a high crime neighborhood unprovoked flight does not invariably lead to reasonable suspicion. On the contrary, because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so. Like unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.<sup>70</sup>

The Court also held that nervous and evasive behavior is another relevant factor to consider in determining whether the police officer had reasonable suspicion, “and headlong flight is the

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66. *United States v. Lawshea*, 461 F.3d 857, 859 (7th Cir. 2006) (citing *United States v. Lenoir*, 318 F.3d 725, 729 (7th Cir. 2003)).

67. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 406; see *Illinois v. Wardlow*, 528 U.S. 119, 135 (2000). In *Wardlow*, the defendant was in an area of Chicago known for frequent narcotics trafficking, and upon seeing a convoy of police vehicles enter the area, the defendant fled. *Wardlow*, 528 U.S. at 119. Once officers caught up with the defendant and stopped him, they conducted a pat-down search. *Id.* at 122. During the pat-down, the officers discovered a handgun and arrested the defendant. *Id.* While the Supreme Court upheld the stop due to the totality of circumstances, the Court stated that, standing alone, neither mere presence in a high crime area nor flight are not sufficient for reasonable suspicion. *Id.* at 124-25.

68. *Morgan*, 59 So. 3d at 406 (citing *Wardlow*, 528 U.S. at 124).

69. *Wardlow*, 528 U.S. at 119, 124 (citing *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972)).

70. *Id.* at 139 (Stevens, J., concurring and dissenting).

consummate act of evasion.”<sup>71</sup> Furthermore, the Court stated that flight “is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”<sup>72</sup> The Court also explained:

In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.<sup>73</sup>

The *Wardlow* Court added that “unprovoked flight is simply not a mere refusal to cooperate.”<sup>74</sup> Flight is inherently the opposite of “going about one’s business,” but flight alone is “not necessarily indicative of ongoing criminal activity.”<sup>75</sup> While flight alone is not sufficient for reasonable suspicion, the overall nature of the defendant’s flight is also a relevant consideration.<sup>76</sup> There is a “degree of suspicion that attaches to a person’s flight—or, more precisely . . . [there are] commonsense conclusions [that] can be drawn [with] respect[] [to] the motives behind that flight.”<sup>77</sup>

In addition to *Wardlow*, reviewing courts have allowed, over time, other factors to determine the totality of the circumstances when evaluating reasonable suspicion.<sup>78</sup> For instance, courts have recognized that the time of day when the criminal activity

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71. *Illinois v. Wardlow*, 528 U.S. 119, 119, 124 (2000).

72. *Id.* at 124.

73. *Id.* at 124-25.

74. *Id.* at 119, 125.

75. *Id.*

76. *United States v. Lawshea*, 461 F.3d 857, 859-60 (7th Cir. 2006) (citing *Wardlow*, 528 U.S. at 123-26). In *Lawshea*, the defendant was conversing with another man in a lit courtyard outside of a housing complex around midnight when they noticed a marked patrol car. *Id.* at 857-58. While the other male ran into a nearby apartment, the defendant began walking away from the patrol car. *Id.* at 858. However, as the patrol car followed the defendant into the courtyard, the defendant began running. *Id.* Even though the police officer followed the defendant around the housing complex and twice ordered him to stop, the defendant continued fleeing from the police officer, running around the same building three times. *Id.* at 859-60. The Supreme Court held that such flight from police in a high-crime area around midnight gave the officer a reasonable suspicion to stop the defendant and conduct a Terry search. *Id.* at 860.

77. *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000) (internal quotation marks omitted).

78. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So.3d 403, 407.

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occurred should be considered when weighing the totality of the circumstances.<sup>79</sup> Furthermore, courts have recognized that a dimly lit area is a relevant factor to consider when determining a police officer's reasonable suspicion.<sup>80</sup> However, courts have also recognized that a dichotomy may exist where "certain behavior in isolation may have an innocent explanation yet that same behavior may give rise to reasonable suspicion when viewed in the context of other factors at play."<sup>81</sup>

In conclusion, the Court in *Wardlow* held that a police officer's reasonable suspicion is justified if an individual's presence in a high-crime neighborhood is coupled with the individual's unprovoked flight upon seeing the police officer or unit.<sup>82</sup> In other words, the Court stated that neither flight alone, nor mere presence in a high-crime area, is sufficient to justify an investigatory stop; however, these factors combined may give rise to a police officer's justifiable reasonable suspicion for a stop.<sup>83</sup>

**E. LOUISIANA'S ADOPTION OF THE *TERRY* EXCEPTION AND THE "TOTALITY OF THE CIRCUMSTANCES" TEST**

Not only did the Louisiana Supreme Court adopt the *Terry* exception involving the temporary questioning of a person in public places and the associated stop and frisk for weapons, but the legislature has also codified it in Louisiana Code of Criminal Procedure article 215.1.<sup>84</sup> Additionally, in 1983 the Louisiana

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79. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So.3d 403, 407; *see also* *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (the fact that the "hour was late" was considered in the totality of the circumstances test); *United States v. See*, 574 F.3d 309, 314 (6th Cir. 2009) (holding that "the time of day is relevant, but the fact that it was very early in the morning does not alone provide reasonable suspicion"); *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995) ("[f]actors that may reasonably lead an experienced officer to investigate include time of day or night . . ."); *United States v. Jones*, 432 F.3d 34, 41 (1st Cir. 2005) ("any person who happened to wander into a high-crime area late at night, in the immediate aftermath of a serious crime, could be detained").

80. *United States v. Bailey*, 417 F.3d 873, 877 (8th Cir. 2005), *vacated on other grounds*, 2005 U.S. App. LEXIS 19891 (8th Cir. Sept. 15, 2005) (holding that a poorly lit area was a relevant factor to consider).

81. *United States v. Lawshea*, 461 F.3d 857, 859-60 (7th Cir. 2006) (citing *United States v. Baskin*, 401 F.3d 788, 793 (7th Cir. 2005)).

82. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

83. *Id.*; *see also* *Lawshea*, 461 F.3d at 859-60 (holding that the nature of the flight, coupled with other factors, such as time of night, were enough to justify the officer's reasonable suspicion to conduct a *Terry* search).

84. LA. CODE CRIM. PRO. ANN. art. 215.1 (2012) Temporary questioning of

Supreme Court held that “[t]he right to make an investigatory stop and question the particular individual detained must be based upon reasonable cause to believe that he has been, is, or is about to be engaged in criminal conduct.”<sup>85</sup> The court also recognized that the totality of the circumstances must be taken into consideration.<sup>86</sup> Taken alone, neither jumpiness, flight, or becoming startled upon seeing a police officer is sufficient to justify an investigatory stop, but each may be considered in the totality of the circumstances.<sup>87</sup>

Furthermore, the Louisiana Supreme Court adopted the *Wardlow* ruling that flight is inherently the opposite of “going

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persons in public places; frisk and search for weapons:

A. A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions.

B. When a law enforcement officer has stopped a person for questioning pursuant to this Article and reasonably suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon. If the law enforcement officer reasonably suspects the person possesses a dangerous weapon, he may search the person.

C. If the law enforcement officer finds a dangerous weapon, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

D. During detention of an alleged violator of any provision of the motor vehicle laws of this state, an officer may not detain a motorist for a period of time longer than reasonably necessary to complete the investigation of the violation and issuance of a citation for the violation, absent reasonable suspicion of additional criminal activity. However, nothing herein shall prohibit a peace officer from compelling or instructing the motorist to comply with administrative or other legal requirements of Title 32 or Title 47 of the Louisiana Revised Statutes of 1950.

See *State v. Chopin*, 372 So. 2d 1222, 1224 (La. 1979) (recognizing the *Terry* exception, the court stated the “right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct” is codified by La. Code Crim. Pro. Ann. art. 215.1); see also *State v. Drew*, 360 So. 2d 500, 509 (La. 1978) (stating that La. Code Crim. Pro. Ann. art. 215.1, “as well as federal and state jurisprudence, recognizes the right of a law enforcement officer to temporarily detain and interrogate a person whom he reasonably suspects is committing, has committed or is about to commit a crime”); *State v. Robinson*, 342 So. 2d 183 (La. 1977); *State v. Perique*, 340 So. 2d 1369 (La. 1976); *State v. Dixon*, 337 So. 2d 1165 (La. 1976); *State v. Cook*, 332 So. 2d 760 (La. 1976); *State v. Rogers*, 324 So. 2d 403 (La. 1975); *State v. Jefferson*, 284 So. 2d 882 (La. 1973).

85. *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983) (citing *State v. Andrishok*, 434 So. 2d 389 (La. 1983)).

86. *Id.* at 1198.

87. *Id.* (citing *State v. Chopin*, 372 So. 2d 1222 (La. 1979)); *State v. Truss*, 317 So. 2d 177 (La. 1975); *State v. Williams*, 421 So. 2d 874 (La. 1982); *State v. Wade*, 390 So. 2d 1309 (La. 1980)).

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about one's business."<sup>88</sup> Also, the Louisiana Supreme Court stated that when a defendant turns away from police officers and runs, it is more than a mere assertion of his right to walk away from the police.<sup>89</sup> Therefore, the Louisiana Supreme Court held that when there is *unprovoked* flight, a greater level of suspicion becomes associated with it because unprovoked flight is more than a "mere refusal to cooperate or an assertion of one's right to walk away."<sup>90</sup>

In *State v. Lewis*, the Louisiana Supreme Court stated that a defendant's unprovoked flight from a police officer was the most important factor in the totality of the circumstances test.<sup>91</sup> The court further found reasonable suspicion for an investigatory detention when all the circumstances were "known to the officer at the time, including the residents' complaints of drug activity, the 'hot spot' nature of the area, the respondent's nervousness, and, most importantly, his unprovoked headlong flight from the officer."<sup>92</sup> The court has also held that "the lateness of the hour, the high crime character of the area, and the nervous demeanor" of the defendant present "minimal objective justification for an investigatory stop."<sup>93</sup>

Lastly, the Louisiana Supreme Court found that reasonable suspicion existed even in a case where the only other factor besides flight was that the defendant clutched his waistband,

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88. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 407 (citing *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000)); *see also* *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983).

89. *State v. Alvarez*, 2009-0328 (La. 3/16/10); 31 So. 3d 1022, 1024.

90. *Morgan*, 59 So. 3d at 409-11 (citing *State v. Alvarez*, 2009-0328 (La. 3/16/10); 31 So. 3d 1022, 1024).

91. *State v. Lewis*, 00-3136 (La. 04/26/02); 815 So. 2d 818, 821. Officers were patrolling a typical "hot spot" due to complaints by housing development residents of trespassers selling drugs. *Id.* at 820. The defendant and a companion advanced toward the uniformed officers. *Id.* The officers, with nearly three years of experience in this specific development, did not recognize either the defendant or his companion. *Id.* One of the officers testified that the defendant appeared "very nervous," and then he parted from his companion. *Id.* The officers stopped the two individuals and began asking them their reason for being there, for their identification, etc. *Id.* Then the defendant ran, threw a bag—later discovered to contain rocks of cocaine—into a sewer drain, and continued running until apprehended by the officer. *Lewis*, 815 So. 2d at 820. The court held it was a justified stop due to the totality of circumstances. *Id.* at 821. The court further stated that an individual's unprovoked flight from an officer is not equivalent to one's refusal to listen to questions and go on his way. *Id.*

92. *Id.*

93. *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809, 811.

indicating that he was potentially supporting a weapon or contraband.<sup>94</sup> The Louisiana Supreme Court overruled an appellate court's holding that found the stop illegal and stated that "it is not a crime to run from the police while clutching one's waistband."<sup>95</sup> The court explained that "[p]olice do not have to observe what they know to be criminal behavior before investigating. The requirement is that the officer has a reasonable suspicion of criminal activity."<sup>96</sup>

#### IV. THE LOUISIANA SUPREME COURT'S DECISION IN *STATE V. MORGAN*

In finding that Sergeant Brown had reasonable suspicion for the stop, the Louisiana Supreme Court relied on three sets of considerations, the first two of which are interrelated. First, the Court held that the totality of the circumstances must be weighed to determine whether the stop was justifiable.<sup>97</sup> Second, the court stressed that due deference must be given to Sergeant Brown's experience and deductions, which led him to stop the defendant—specifically his observation of the time of day, the lighting of the area, and the unprovoked flight of the defendant.<sup>98</sup> Third, the court found that prior precedent supported justification for a stop due to unprovoked flight even in a low-crime area.<sup>99</sup>

##### A. TOTALITY OF THE CIRCUMSTANCES AND DUE DEFERENCE TO LAW ENFORCEMENT'S INFERENCES

State and federal precedent dictate that the totality of the circumstances analysis must be considered in determining whether a stop is justifiable.<sup>100</sup> The court observed that Sergeant Brown's uncontested testimony indicated that even though he did not see Morgan commit any crime, he had a feeling the defendant

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94. *State v. Benjamin*, 97-3065 (La. 12/01/98); 722 So. 2d 988, 989.

95. *Id.*

96. *Id.*

97. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 408 (citing *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983)).

98. *Id.* at 409-10.

99. *Id.* at 410.

100. *Id.* at 408 (citing *State v. Belton*, 441 So. 2d 1195 (La. 1983)); *see also* *United States v. Arvizu*, 534 U.S. 266 (2002); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Bailey*, 417 F.3d 873 (8th Cir. 2005); *United States v. Lawshea*, 461 F.3d 857 (7th Cir. 2006); *State v. Lewis*, 00-3136 (La. 04/26/02); 815 So. 2d 818; *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809.

was “up to no good” because it was late at night in a poorly lit area and the defendant was running and evasive.<sup>101</sup> The court further stated that it previously had recognized the same three factors Sergeant Brown relied upon—lighting, time of day, and unprovoked flight—as pertinent in the totality of the circumstances analysis.<sup>102</sup> However, the Louisiana Supreme Court noted that it never before “had to determine whether these three specific factors . . . are sufficient to give an officer reasonable suspicion of criminal activity when the defendant is *not* in a high-crime area.”<sup>103</sup>

The Louisiana Supreme Court looked to *Wardlow* for assistance.<sup>104</sup> Even though the majority in *Wardlow* held that a defendant’s actions in high-crime areas are more suspicious than in low-crime areas, the Louisiana Supreme Court relied on Justice Stevens’ opinion to the contrary.<sup>105</sup> Justice Stevens stated that the type of neighborhood arguably is less likely to imply guilt than other considerations.<sup>106</sup> On the other hand, the majority in *Wardlow* held that officers must use common sense and should use relevant knowledge of a location or neighborhood to determine if there are sufficiently suspicious activities to merit further investigation.<sup>107</sup>

The Louisiana Supreme Court also relied on its prior decision in *State v. Johnson*.<sup>108</sup> It recognized that police officers may “draw on their own experience and specialized training to make inferences from and deductions” about all the information

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101. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 409-10.

102. *Id.* at 410.

103. *Id.* at 59 So. 3d at 410 (emphasis added).

104. *Id.*

105. *Id.*

106. *Illinois v. Wardlow*, 528 U.S. 119, 139 (2000) (Stevens, J., concurring and dissenting).

107. *Id.* at 124; *see also* *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809, 811. In *Johnson*, the defendant and his companion were walking, just after midnight, through a courtyard of a housing development. 815 So. 2d at 810. According to the officer’s testimony, the area was a narcotics “hot spot” where they were conducting a routine patrol. *Id.* The officer testified the two men quickened their pace “nearly running,” looked repeatedly over their shoulders toward the officers’ direction, and headed to a courtyard where the patrol unit could not gain access. *Id.* at 810-11. The officers stopped them and conducted a pat down search. *Id.* at 811. The defendant then dropped an object to the pavement, which the officer retrieved and discovered it to be a crack cocaine pipe. *Id.* The court held that the investigatory stop was justified. *Id.*

108. *Johnson*, 815 So. 2d at 811.

and circumstances available to them at the time.<sup>109</sup> The court found that even though *Wardlow* and *Johnson* permit police officers to infer and deduce information about an individual and his behavior, neither case “specifically limits these deductions to an individual’s actions in a high-crime area.”<sup>110</sup> Therefore, the Louisiana Supreme Court held that regardless of whether the area where an individual’s actions occur is classified as high-crime or low-crime, officers are permitted to make assumptions and conclusions therefrom regarding the likelihood of criminal activity.<sup>111</sup>

### B. UNPROVOKED FLIGHT

The Louisiana Supreme Court additionally relied on its prior rulings regarding a defendant’s unprovoked flight.<sup>112</sup> As the court deduced from *Alvarez*, unprovoked flight is “*more suspicious than ordinary flight.*”<sup>113</sup> Furthermore, since unprovoked flight is inherently suspicious, there is a lesser degree of information required to determine if reasonable suspicion exists for a justifiable stop.<sup>114</sup> Because flight is naturally suspicious, the court found that a defendant’s unprovoked flight from a police officer was the most important factor.<sup>115</sup>

Applying the principles laid out before it, the Louisiana Supreme Court concluded that Sergeant Brown had sufficient justification to stop Morgan and investigate further.<sup>116</sup> The court agreed that Sergeant Brown was a trained officer and had experience dealing with fleeing suspects who were also possessors of narcotics or weapons.<sup>117</sup> Also, Sergeant Brown had observed Morgan walking in a dimly lit, residential area around 1:45 in the morning.<sup>118</sup> Upon noticing Sergeant Brown’s marked police vehicle, Morgan immediately began running in the opposite

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109. *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809, 811.

110. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 410.

111. *Id.*

112. *Id.* at 410-11; *see State v. Lewis*, 00-3136 (La. 04/26/02); 815 So. 2d 818, 821.

113. *Morgan*, 59 So. 3d at 410-11 (citing *State v. Alvarez*, 2009-0328 (La. 3/16/10); 31 So. 3d 1022, 1024).

114. *State v. Benjamin*, 97-3065 (La. 12/01/98); 722 So. 2d 988, 989.

115. *Lewis*, 815 So. 2d at 821; *Morgan*, 59 So. 3d at 408.

116. *Morgan*, 59 So. 3d at 410.

117. *Id.* at 411.

118. *Id.*

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direction.<sup>119</sup> Using the totality of the circumstances test, the court held that due to these factors, Sergeant Brown had sufficient reasonable suspicion to proceed with an investigatory stop.<sup>120</sup> Therefore, the Louisiana Supreme Court upheld the trial court's ruling denying Morgan's motion to suppress the evidence seized during the stop and ruled that the court of appeal had erred in reversing the trial court.<sup>121</sup>

**C. THE DISSENT**

In her dissenting opinion, Justice Johnson argued that unprovoked flight, as a singular factor, does not amount to reasonable suspicion for an investigatory stop.<sup>122</sup> She stated that, in order for a justifiable stop and frisk, there must be other suspicious factors in addition to flight, and a police officer must be capable of articulating those other factors.<sup>123</sup> For Justice Johnson, the police officer must be able to articulate reasons more than a "hunch."<sup>124</sup> She further stated that some citizens perceive unexpected police presence as a sign of criminal activity, and "[m]any law abiding citizens would want to avoid a crime scene at 'any' cost."<sup>125</sup>

Justice Johnson, quoting *Wardlow*, stated that "[t]he totality of the circumstances, as always, must dictate the result."<sup>126</sup> She also noted that the *Wardlow* Court rejected the State's argument "that flight alone in response to police presence always provides reasonable suspicion for a stop."<sup>127</sup> Thus, Justice Johnson concluded that the court must rely on the Fourth Amendment and assess "the totality of the circumstances, aligned as they may be between two poles fixed by *Terry v. Ohio*," which requires a minimal degree of objective justification with articulable reasons and more than merely a "hunch."<sup>128</sup>

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119. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 411.

120. *Id.*

121. *Id.*

122. *Id.* at 412 (Johnson, J., dissenting) (citing *State v. Benjamin*, 97-3065 (La. 12/01/98); 722 So. 2d 988, 988).

123. *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119, 120 (2000)).

124. *Id.* (citing *Wardlow*, 528 U.S. at 123-24).

125. *Morgan*, 59 So. 3d at 412 (Johnson, J., dissenting).

126. *Id.* (citing *Wardlow*, 528 U.S. at 136).

127. *Id.* (citing *Wardlow*, 528 U.S. at 123-24).

128. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

## V. ANALYSIS

In *Morgan*, the Louisiana Supreme Court lowered the bar for what qualifies as reasonable suspicion. By following the general direction courts have been heading after *Terry*, the court vitiated an important factor as unnecessary to the establishment of reasonable suspicion. After deciding that mere unprovoked flight in a dimly lit residential neighborhood meets the burden of reasonable suspicion, the court leaves only two prongs remaining in the test: flight and time of day.<sup>129</sup> Because it was previously deemed suspicious to run at night in a high-crime area, by extending that to now allow reasonable suspicion in a low-crime or residential area, the type of area is no longer a prong in the analysis. Thus, reasonable suspicion is now merely running in the opposite direction of where law enforcement officers happen to be at night. Furthermore, should the courts continue moving away from the Warren Court's notions set forth in *Terry*, it is not unthinkable that the reasonable suspicion test could be further whittled down to look at only, for instance, a subject's mere presence in a dimly lit area.

Under *Morgan*, in order for reasonable suspicion to exist, a suspect need only run at night in a low-crime area.<sup>130</sup> While flight was always a factor to be considered, it has never been the sole justification allowing a stop. If the facts of this case were slightly altered to present the same issue with the incident occurring during the day, the reasoning the court employs in *Morgan* would not prevent a finding of reasonable suspicion. The Louisiana Supreme Court relies too heavily on the nature and circumstances of the flight, and it focuses little of its energy in distinguishing the time of day from other similar cases. Previously, reasonable suspicion could be satisfied only in a high-crime area. By extending this to areas that are not recognized as such, all that is needed to search and seize a person is flight upon seeing an officer, ostensibly while at night.

This Note makes five criticisms of the current search and seizure laws. First, it contends that the evolution of the totality of the circumstances test and the reasonable suspicion analysis has allowed courts to more leniently approach search and seizure laws and strip away constitutional liberties in the process.

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129. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 409-10.

130. *Id.*

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Second, the reliance on a police officer's personal experience transforms the objective basis of reasonable suspicion into a subjective analysis, giving more power to the police. Third, empowering the police with such unbridled discretion will inevitably lead to the abuse of that power. Fourth, considering mere presence in a low-crime area in the totality of circumstances test further deteriorates the notion of reasonableness. Finally, allowing police officers to conduct an investigatory stop based on unprovoked flight alone not only opens the door to potential abuse, but also predisposes courts to unraveling the rights protected by the Fourth Amendment.

**A. CRITICISMS OF THE EVOLUTION OF THE TOTALITY OF THE CIRCUMSTANCES TEST AND REASONABLE SUSPICION ANALYSIS**

While the Louisiana Supreme Court is following the historical direction of precedent regarding search and seizure, this devolution effectively amounts to a return to the pre-*Mapp* era of the Fourth Amendment jurisprudence. The continuing expansion of police power, wherein police are allowed to conduct investigatory stops under the pretenses of "reasonable suspicion," has led modern courts away from the Warren Court's ideals. Stricter application of the totality of circumstances test and the reasonable suspicion analysis should be implemented to assure citizens are not stripped of their constitutional liberties.

The Warren Court established some of the most basic and fundamental principles of criminal procedure and the requirements incumbent on law enforcement regarding treatment of suspects.<sup>131</sup> Since that time, however, both the United States Supreme Court and state courts have slowly begun to chip away at the protections granted by the Constitution and applied by the Warren Court.<sup>132</sup> Rules set forth by seminal cases, such as *Mapp*,<sup>133</sup> have been modified, scaled back, limited in application, and generally eroded over the last forty years.<sup>134</sup> If the

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131. Christopher D. Totten, *The Removal of Constitutional Criminal Procedural Rights in the Post-Warren Era: A Taxonomy of Methods*, 47 No. 3 CRIM. L. BULL. art. 6 (Summer 2011).

132. *Id.*; see also Gormley, *supra* note 44, at 1425.

133. *Mapp v. Ohio*, 367 U.S. 643 (1961).

134. See generally *United States v. Leon*, 468 U.S. 897 (1984) (creating the good faith exception to the exclusionary rule); see also *Herring v. United States*, 555 U.S. 135, 147-48 (2009) (holding that "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional

progressive era and the Warren Court saw an upswing in rights and freedoms granted by the courts, the period since has seen a decline. The unraveling of the tapestry sewn by the Warren Court has happened piecemeal, but is no less significant for its gradual pace.

Beginning in 1968, the Warren Court, itself, set this process in motion, though it still attempted to limit the intrusive nature and potential abuse of police powers with its holding in *Terry*. The *Terry* Court established that, under certain circumstances, an intermediate level of detention of a suspect was permissible without a warrant, and it lowered the standard for such a search from the previously constitutionally mandated probable cause to mere reasonable suspicion.<sup>135</sup> While it is true that this exception was allowed in consideration of officer safety and only applicable to potential searches for weapons, this holding opened the door to a flood of future cases that would eventually strip the criteria for the detention and invasion of a suspect's privacy down to its proverbial bones.

For example, the United States Supreme Court has allowed police to draw on their own experience and training for determining reasonable suspicion.<sup>136</sup> In *United States v. Lawshea*, the United States Supreme Court added further exceptions to the warrant requirement by considering the mere behavior and characteristics of the suspect as a factor.<sup>137</sup> In *Wardlow*, the Court also lowered the threshold to satisfy the totality of the circumstances test by holding that nervous and evasive behavior is another relevant factor, which granted more power to the police—stripping protections from the individual.<sup>138</sup> These cases demonstrate how each court further deteriorated the original notions of what constitutes reasonable suspicion, and courts are now directed towards a trend that will soon allow for invasion of a citizen's privacy.

Even though the United States Supreme Court required reasonable suspicion to consist of "specific and articulable facts" in order to intrude on a citizen's constitutionally protected rights,

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requirements, any marginal deterrence" will not be sufficient to permit exclusion).

135. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

136. *Id.* at 27 (1968); *see also* *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

137. *United States v. Lawshea*, 461 F.3d 857, 859-60 (7th Cir. 2006) (citing *United States v. Lenoir*, 318 F.3d 725, 729 (7th Cir. 2003)).

138. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

*Terry* opened the door to allow investigatory stops without probable cause—merely reasonable suspicion.<sup>139</sup> While the Louisiana Supreme Court specifically noted that weight should not be given to “unparticularized suspicion” and the totality of the circumstances must be taken into consideration, the *Morgan* Court nevertheless relied on Sergeant Brown’s “hunch” that Morgan was “up to no good.”<sup>140</sup> Therefore, courts after the *Terry* decision demonstrated an abrupt move away from protecting individual rights from abuse of police power, which was the focus of the Warren Court.<sup>141</sup> Hence, the original focus on the protection of citizens from the abuse of police power turned into an expansion of the power of the police.<sup>142</sup>

This expansion of police power in using the totality of the circumstances and reasonable suspicion is evidenced by subsequent decisions, including *State v. Morgan*, whereby more allowances are made to stretch thinner and thinner the cloak of protection until little of it remains.<sup>143</sup> While the *Wardlow* Court correctly found that scientific certainties cannot and should not be demanded from law enforcement, it allowed for law enforcement to rely on “commonsense judgments and inferences about human behavior.”<sup>144</sup> These allowances leave much room for interpretation and implementation on the streets, where the line between subjective and objective reasoning becomes less clear.

## B. OBJECTIVE V. SUBJECTIVE ANALYSIS

The *Morgan* Court used the totality of the circumstances test to determine whether reasonable suspicion existed.<sup>145</sup> In determining whether an investigatory stop was justified, police, as well as courts, should take into account the entire picture of events.<sup>146</sup> However, in doing so, the Louisiana Supreme Court

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139. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); Katz, *supra* note 2, at 423.

140. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 409-10; *see also Terry*, 392 U.S. at 27 (1968); *United States v. Sokolow*, 490 U.S. 1, 8 (1989);

141. Katz, *supra* note 2, at 423.

142. *Id.* at 423; *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

143. *See generally Morgan*, 59 So. 3d at 403; *Illinois v. Wardlow*, 528 U.S. 119, 135 (2000); *United States v. Lawshea*, 461 F.3d 857 (7th Cir. 2006); *United States v. Bailey*, 417 F.3d 873, 877 (8th Cir. 2005); *United States v. Jones*, 432 F.3d 34, 41 (1st Cir. 2005).

144. *Wardlow*, 528 U.S. at 124-25.

145. *Morgan*, 59 So. 3d at 409.

146. *United States v. Sokolow*, 490 U.S. 1, 8 (1989).

gives much weight to an officer's reasonable suspicion.<sup>147</sup>

Instead of having a general rule for courts to apply to the facts of a case, the courts now have to rely on the facts of a particular case to determine the legality of the act. Courts should focus on establishing laws that are universal and foundational. The underlying concern of creating law that is too flexible is that it creates too much gray area, and, thus, society may have an extremely difficult time adhering to those laws.

Even though the Louisiana Supreme Court required "some minimal level of objective justification" for making an investigatory stop,<sup>148</sup> much weight is given to a particular police officer's personal "experience and specialized training to make inferences from and deductions about the cumulative information available to them."<sup>149</sup> This reliance on personal experience transforms the objective basis to a case-by-case, subjective analysis and allows for more flexible, subjective standards, which gives more power to the police than to the protection of the people. Furthermore, the subjectivity lies in the particular police officer's knowledge and experience, which can lead to or allow for abuse of police powers.

### C. CONCERNS REGARDING THE POTENTIAL FOR ABUSE OF POWER

The Louisiana Supreme Court's loose interpretation of the factors constituting "reasonable suspicion" is slowly giving unbridled powers to police, taking society back to a pre-*Miranda* and pre-*Mapp* era. The ramifications of relying solely on the subjective testimony of police officers involve the same concerns as seen in the long-term consequences following *Terry*. This comes at a time when trust in police in much of the state of Louisiana is arguably at an all-time low. New Orleans, Louisiana, for instance, is the center stage for "one of the most significant police misconduct cases in American history," known as the Danziger Bridge Shooting.<sup>150</sup>

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147. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 406.

148. *Id.* at 407 (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)); *see also* *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984).

149. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)); *see also* *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

150. Brendan McCarthy, *New Orleans is at the Center of a Key Federal Pursuit*, *TIMES-PICAYUNE*, Aug. 8, 2011,

With trust in police power in Louisiana being constantly eroded by corruption, misconduct, and scandal, courts should be

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[http://www.nola.com/crime/index.ssf/2011/08/new\\_orleans\\_is\\_at\\_the\\_center\\_o.html](http://www.nola.com/crime/index.ssf/2011/08/new_orleans_is_at_the_center_o.html). As a general matter, alleged police misconduct cases continue to be prevalent in our courts and on the news. While not tied to search and seizure related misconduct, the Danziger Bridge Shooting displays the general concerns of the abuse of power by police. “As it happens, the Danziger prosecution arose during a period of growing federal emphasis on such civil rights cases.” *Id.* Over the last several years, there have been many highly-publicized occurrences of police corruption and misconduct, which illustrate the growing problems with police power. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 354 (2011) (footnote omitted). For example, days after Hurricane Katrina hit New Orleans, “New Orleans police officers opened fire upon several citizens as they were crossing Danziger Bridge to flee the hurricane’s devastation.” *Id.* The officers killed two citizens while four others were injured—one of the victims sustained seven gunshot wounds in the back. *Id.* Even though the officers claimed they were protecting themselves from shots being fired from the victims on the bridge, it was found that none of the victims were armed. *Id.* Lastly, the authorities who were assigned to investigate the shooting were also charged with covering up the shooting. *Id.*

Subsequently, the Department of Justice (DOJ) identified the rampant abuses occurring in the New Orleans Police Department (NOPD) and intervened in order “to resolve allegations of unlawful police misconduct . . . [and] ensure effective and constitutional policing in New Orleans.” *Justice Department Announces Consent Decree with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department: Negotiated Agreement Concludes Two-Year Investigation and Begins Federal Court Oversight of Police Department Reform*, DEPT OF JUSTICE (July 24, 2012), <http://www.justice.gov/opa/pr/2012/July/12-ag-917.html> [hereinafter *Justice Department Announces Consent Decree*]. The DOJ’s investigation, which began in May 2010, revealed patterns of unlawful and unconstitutional misconduct by the New Orleans Police Department in violation of the Fourth Amendment. *Id.* In July 2012, the DOJ entered into a consent decree with the NOPD, which requires a multitude of broad changes to the NOPD’s policies and practices, such as those regarding the “use of force; stops, searches and arrests; custodial interrogations; photographic line-ups; [and] preventing discriminatory policing . . .” to name a few. *Id.* (emphasis added); see also Marjorie Esman, *Long-Awaited Improvements Coming to New Orleans Police Department*, ACLU OF LA. (July 26, 2012), <http://www.aclu.org/blog/criminal-law-reform-free-speech/long-awaited-improvements-coming-new-orleans-police-department> (stating that a consent decree “is essentially a contract monitored by a judge to ensure that the terms of the agreement are met.”). The consent decree mandates complete oversight by a court-appointed team, and the decree will continue to be enforced until the NOPD “demonstrates it has complied with its provisions for two years, or until the monitor’s assessment” of the outcome of the decree “demonstrates sustained and continuing improvement in constitutional policing.” *Justice Department Announces Consent Decree, supra*. Even though other major cities’ police departments also have similar agreements with the DOJ, the scope of the consent decree with NOPD is considered “the broadest of its kind and includes requirements that no other department has had to implement.” Michael Kunzelman, *Revamp of New Orleans PD Comprehensive, Expensive*, ATLANTA JOURNAL-CONSTITUTION (July 25, 2012), <http://www.ajc.com/news/nation-world/revamp-of-new-orleans-1484348.html>.

cautious when relying solely on the testimony of police, not because they are police, but because they are human. Police testimony, like all testimony, needs to be corroborated by facts. Laws, as well as the individuals who enforce them, should be deployed to protect the people and not merely to ensure that people comply with the letter of the law while implicitly avoiding the intent of those protections. Thus, police officers should have less discretion.

#### D. RESERVATIONS CONCERNING THE FINDING OF REASONABLE SUSPICION BASED ON PRESENCE IN A LOW-CRIME AREA

Prior to *Morgan*, the Louisiana Supreme Court had never specifically addressed whether unprovoked flight constituted reasonable suspicion in a low-crime area.<sup>151</sup> The *Morgan* court relied heavily upon Justice Stevens' dissenting opinion in *Wardlow*, in which Stevens stated that the majority holding that a defendant's actions in high-crime areas are more suspicious than in low-crime areas was unfounded.<sup>152</sup> While this dissent was persuasive, the majority was correct in its statement that unprovoked flight in a high-crime area is more suspicious than in a low-crime area because a low-crime area necessarily indicates that there is a lack of current criminal activity that would give rise to suspecting potential additional criminal activity. Also, from a purely objective perspective, it is questionable whether a police officer would be focused on an individual in a low-crime area unless there was a report of suspicious activity, which was not noted in the case at hand.<sup>153</sup>

Even though *Wardlow* held that officers should use any relevant knowledge of a location or neighborhood to determine if there are suspicious activities that merit further investigation, the Court was referring exclusively to high-crime areas.<sup>154</sup> Therefore, a police officer's knowledge that a particular area is drug-infested and high-crime would be relevant in his assessment

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151. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 410.

152. *Id.*

153. *Id.* at 404-05. In the present case, the defendant was walking down a dimly lit road in a low-crime area, at the same time the patrol car was traveling in his direction. *Id.* at 404. *See also supra*, Section II. The record states the officer was simply patrolling and does not reflect that the officer was responding to any suspicious or potentially criminal activity. *Id.*

154. *See generally* *Illinois v. Wardlow*, 528 U.S. 124 (2000); *see also* *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809, 811.

of reasonable suspicion. However, there is not sufficient, relevant knowledge about a low-crime area that would give rise to a presumption of suspicious activity unless there was a particularized suspicion, perhaps by a third-party bystander, which was also not noted in the instant case.

By deferring completely to Sergeant Brown's discretion, the *Morgan* Court has intertwined a police officer's "hunch" with what should be a specific reasonable inference capable of being drawn from the facts.<sup>155</sup> The Louisiana Supreme Court noted that even though Sergeant Brown did not see Morgan commit any crime, "he had a hunch the defendant was 'up to no good,' based upon the defendant 'running and being evasive, at the time of the hour in a poor lit [sic] area.'"<sup>156</sup> Therefore, Sergeant Brown admitted to having a hunch upon seeing the defendant, which eventually led to the stopping of Morgan. This seems to fall in line with an "act first and ask questions later" policy, which would make the stop unreasonable.

**E. PROBLEMS WITH PLACING SUCH A HEAVY RELIANCE UPON UNPROVOKED FLIGHT IN THE TOTALITY OF CIRCUMSTANCES DETERMINATION**

Ultimately, it appears Louisiana courts have swung even further away from the Warren Court's concepts and ideals set forth in *Terry*. Louisiana courts have now gone so far as to hold that flight is a highly suspicious activity, and unprovoked flight is even more suspicious.<sup>157</sup> Therefore, unprovoked flight provides a higher degree of suspicion to consider in the balancing of the totality of the circumstances.<sup>158</sup> However, as noted in Justice Johnson's dissent, there are many reasons that some law-abiding citizens would want to avoid police, especially when there is an unexpected police presence, which may signal criminal activity and danger to those citizens.<sup>159</sup> Also, reconciling unprovoked flight within a low-crime area, Justice Johnson's notion does not seem so far removed.

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155. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 409.

156. *Id.* at 409-10.

157. *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983) (holding that flight is a highly suspicious activity); *State v. Alvarez*, 2009-0328 (La. 3/16/10); 31 So. 3d 1022, 1024 (holding that unprovoked flight is more suspicious than mere flight).

158. *Morgan*, 59 So. 3d at 410-11.

159. *Id.* at 412 (Johnson, J., dissenting).

Further, allowing police officers to stop and search an individual on the basis of unprovoked flight alone seems unfounded and unconstitutional because it begs the question: where does the law draw the line? Beyond the privacy, liberty, and limited governmental power issues contained herein, there are other concerns that make this decision questionable and ill-conceived. First, the potential for abuse of this doctrine is profound. Second, the Louisiana Supreme Court failed to establish guidelines that would serve to limit that potential.

There are many reasons why a person may run from an area, particularly when police officers are present, that are neither illegal nor suspicious. For instance, as Justice Johnson pointed out in her dissent, some citizens perceive unexpected police presence as a sign of criminal activity, and “many law abiding citizens would want to avoid a crime scene at ‘any’ cost.”<sup>160</sup> Such citizens may also want to avoid being associated with the criminal activity and decide to run away. While it may be argued that running away from police officers is indicative of hiding something, merely hiding something is not justification for infringing on a person’s rights and invading one’s privacy to ascertain what that “something” is.

Beyond this, it would not strain credulity to imagine a situation where a suspect merely walked another way, and yet was stopped by authorities who will later claim “flight.” A person also might legitimately flee a situation, only to later discover that a police officer happened to turn a corner in his direction, and now, that officer can detain, question, and search him. Even one accused of crimes still enjoys constitutionally protected rights, and police officers have to respect those rights and issue a specific warning when making an arrest.

United States Supreme Court Chief Justice Warren did not believe in coddling criminals; thus, in *Terry v. Ohio*, he gave police officers leeway to stop and frisk those whom police had reason to believe held weapons.<sup>161</sup> However, the danger of pretextual stops, conducted using merely flight and the “lateness of the hour” as justifications, is real, and it fails to adhere to the reasonableness mandate imposed in the reasonable suspicion standard. This potentiality, coupled with the lack of appropriate

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160. *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403, 412.

161. *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

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guidance on behalf of the court as to what constitutes flight, allows for an inappropriately wide range of legitimate, legal, and unsuspecting circumstances that meet the burden established in *Morgan*. How fast is flight? Is there a speed under which a person may move away from an officer that is not suspicious? Is any attempt to avoid interaction by movement deemed inherently suspicious? Given the slope the state supreme court has recently slid in its privacy and criminal procedure jurisprudence,<sup>162</sup> it is not unthinkable that eventually a person's privacy might be invaded, his body seized by the state, and his effects searched simply for being outside of his home at sunset and uninterested in a conversation with law enforcement.

Sergeant Brown offered other factors, such as the dimly lit area and the lateness of night, as reasons for his reasonable suspicion.<sup>163</sup> However, in cases where the Louisiana Supreme Court previously found reasonable suspicion when there was unprovoked flight at night, the occurrence of such activity took place in a high-crime area.<sup>164</sup> Therefore, in allowing for police to make inferences and deductions based primarily on their own personal experience, regardless of the character of the neighborhood, an unacceptably high level of discretion and power has been given to the police.

## VI. CONCLUSION

Over time, both federal and state courts have departed ever further away from the Warren Court's protective view of personal rights, as set forth in *Terry*, and reverted back to permitting more police powers. The incessant stretching of *Terry's* interpretation has empowered the police and directed the courts to chip away at the policies established to limit police power. In *Morgan*, the Louisiana Supreme Court lowered the bar for what qualifies as reasonable suspicion yet again.

The evolution of both the totality of the circumstances test and the reasonable suspicion analysis have led the courts to apply more lenient approaches to the laws governing searches and seizures, and this is stripping away constitutional liberties.

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162. See generally *State v. Morgan*, 2009-2352 (La. 03/15/11); 59 So. 3d 403.

163. *Id.*

164. See *State v. Johnson*, 01-2081 (La. 04/26/02); 815 So. 2d 809; see also *State v. Lewis*, 00-3136 (La. 04/26/02); 815 So. 2d 818; *State v. Benjamin*, 97-3065 (La. 12/01/98); 722 So. 2d 988.

Additionally, the reliance on a police officer's personal experience transforms what was an objective analysis of reasonable suspicion into a subjective analysis; thus, giving more power to the police. Empowering the police with unbridled discretion will lead to abuse of that power. Furthermore, giving such weight to an individual's mere presence in a low-crime area in the totality of circumstances test and permitting investigatory stops based on unprovoked flight alone, weakens the notion of reasonableness and deteriorates the rights protected by the Fourth Amendment. Over the coming years, stricter approaches to the reasonable suspicion analysis and totality of the circumstances test should be implemented to bring courts back to the middle and to assure that citizens are not stripped of their constitutional liberties.

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