NOTE

RODRIGUEZ, *TERRY*, AND THE SUPREME COURT'S EVOLVING FOURTH AMENDMENT JURISPRUDENCE: HOW *RODRIGUEZ* DOES (AND DOES NOT) CLARIFY THE FUTURE OF THE FOURTH AMENDMENT*

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I. INTRODUCTION

> *The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*[1]

Most people probably agree that traffic stops are a necessary evil—that as individuals, we choose to endure the occasional speeding ticket, thereby conditioning our "right to be let alone,"[2] so that we may effect the greater societal goal of maintaining safe roads for everybody.[3] Usually, traffic stops are brief, albeit maddening, encounters, but for some Americans, these stops last longer and result in more vehicle searches than they do for others.[4] Sometimes, these stops turn into catastrophic events that inflame the emotions of police officers and civilians alike,[5] leading even the most law-abiding citizens to feel a tinge of apprehension when they see police lights in the rearview mirror. In *Rodriguez v. United States*,[6] the Supreme Court responded to the nation's growing unease with incidents of routine traffic stops ending in violence,[7] but it dodged an opportunity to reign in its current Fourth Amendment jurisprudence with respect to the question of "reasonableness."[8]

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1. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. *Id.*

3. Thomas Paine considered it common sense that "[s]ociety in every state is a blessing, but government even in its best state is but a necessary evil." Thomas Paine, COMMON SENSE 4 (TheCapitol.Net 2009) (1776).

4. *See* Christine Eith & Matthew R. Durose, BUREAU OF JUSTICE STATISTICS, *Contacts Between Police and Public, 2008*, U.S DEP'T OF JUSTICE Prod. No. NNCJ 234599 at 1 (Oct. 5, 2011), http://www.bjs.gov/content/pub/pdf/cpp08.pdf ("[In 2008, b]lack drivers were about three times as likely as white drivers and about two times as likely as Hispanic drivers to be searched during a traffic stop.").

5. *See 547: Cops See It Differently, Part One*, THIS AMERICAN LIFE (Feb. 13, 2015), http://www.thisamericanlife.org/radio-archives/episode/547/cops-see-it-differently-part-one (discussing the surprising reactions of some police officers to recent accounts of police brutality, and comparing the reactions to those of average civilians).

6. Rodriguez v. United States, 135 S. Ct. 1609 (2015).

7. *See* Mark Stern, *The Ferguson Effect*, SLATE.COM (Apr. 21, 2015, 5:16 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/rodriguez_v_united_states_a_huge_win_against_police_overreach_at_the_supreme.html ("It's no surprise that Justices Elena Kagan, Ginsburg, and Sotomayor found in favor of Rodriguez; the three justices have long been extremely sensitive to the coercive pressure police can exert over nervous citizens.").

8. Of all of the current Justices, Justice Sotomayor has been particularly critical of the current state of the Fourth Amendment's reasonableness requirement. *See* Heien v. North Carolina, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting) ("[T]o satisfy the reasonableness requirement, 'what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.' . . . Departing from this tradition means *further eroding the Fourth Amendment's protection of civil liberties in a context where that protection has already been worn down*." (emphasis added) (quoting Illinois v. Rodriguez, 497 U.S. 177, 185 (1990))).

Since the second half of the twentieth century, the Court has faced a massive amount of criticism for its allowance of so-called "*Terry* stops"[9] based on an officer's "reasonable suspicion of criminal activity."[10] The primary criticism is that *Terry* stops create an open forum for the improper use of discretion and racially discriminatory practices by the police, which many argue is antithetical to the spirit of the Fourth Amendment.[11] The problem of racial profiling is especially visible within the arena of traffic stops.[12] Recently, though, the Court has indicated that it might be taking a second look at its privacy-centric interpretation of the reasonableness requirement, especially with regard to vehicle searches, dog-sniffs, and related drug detection techniques.[13]

However, *Rodriguez v. United States* did not go as far in elaborating on this trend as some might have hoped.[14] So why did the Court decline to take this opportunity to answer the questions that its recent Fourth Amendment decisions left unanswered,[15] despite embracing the need for "bright line rules?"[16] This Note will argue that until the Supreme Court (1) goes further in clarifying the standard for Fourth Amendment "reasonableness" and (2) consolidates that standard with its recent subordination of the *Katz*-privacy test,[17] the nation will continue to see incidents of racially motivated searches and

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9. *See generally* Terry v. Ohio, 392 U.S. 1, 22–23 (1968). A "*Terry* stop" is the brief detention of an individual, such as during a traffic stop or a "stop-and-frisk." *Id.* To execute a *Terry* stop, an officer need only have a "reasonable suspicion of criminal activity"—a burden of proof lower than probable cause—to detain a person and determine whether she is carrying drugs or weapons. *Id.*

10. *Id.* at 31. Many critics of the Court's current Fourth Amendment jurisprudence point to *Terry* as the catalyst for the erosion of the Amendment's reasonableness requirement. *See, e.g.*, Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 94 (2003) ("[T]he [*Terry*] rule and its unguided balancing approach have expanded, making police intrusions based on guesses and stereotypes all that much easier.").

11. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 550, 582 (2000) ("[The Framers] demonstrate[d] . . . disdain for the judgment of ordinary officers. Given that distrust, it is wholly implausible that the Framers would have approved of broad use of warrantless intrusions, because such intrusions would necessarily have rested solely on the officers' own judgment. . . .").

12. *See supra* note 4.

13. *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409 (2013) (canine sniff); Bailey v. United States, 133 S. Ct. 1031 (2013) (aerial surveillance); United States v. Jones, 132 S. Ct. 945 (2012) (electronic surveillance); Kyllo v. United States, 533 U.S. 27 (2001) (thermal heat detection).

14. *See* Brief for U.S. Justice Foundation et al. as Amici Curiae Supporting Petitioner, Rodriguez v. United States, 135 S. Ct. 1609 (2015) (No. 13-9972), 2014 U.S. S. Ct. Briefs LEXIS 4087, at *15.

15. *See, e.g.*, Carol A. Chase, *Cops, Canines, and Curtilage: What* Jardines *Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1290 (2015).

16. *See infra* Part II.B.

17. *See* Katz v. United States, 389 U.S. 347, 352 (1967); *infra* note 108.

seizures and the violent consequences often associated with them.[18]

This Note both praises and criticizes the *Rodriguez* decision. It consists of four parts, including this introduction. Part II will review the background of *Rodriguez v. United States* and the Supreme Court's majority and dissenting opinions. Part III will discuss the legacy of *Terry v. Ohio*, explaining how it set the stage for the *Rodriguez* decision. It will then focus on two distinct issues: (1) *Rodriguez*'s relation to *Terry* and the associated criticisms of racial profiling; and (2) the Supreme Court's ambivalent position on the relationship between privacy, property, and personal dignity. Finally, the Note will conclude with Part IV, which will place *Rodriguez* and the Court's evolving Fourth Amendment jurisprudence in the larger perspective of the Fourth Amendment as a whole.

II. CASE RECITATION

A. Background

1. The Facts. Around midnight on March 27, 2012, Officer Morgan Struble parked his cruiser in the highway median to better observe the oncoming traffic.[19] His newly certified drug-sniffing dog, Floyd, sat obediently in the backseat.[20] Before long, a Mercury Mountaineer passed by, piquing Struble's attention.[21] The Mountaineer was not speeding, but Struble decided to pursue it anyway.[22] As the SUV slowly veered towards the shoulder of the road and then quickly jerked back into its lane, Struble turned on his lights and pulled the driver over.[23] It was 12:06 A.M.[24]

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18. The most notable recent example of a police officer's excessive use of force during a traffic stop is that of Walter Scott, an unarmed black man who the officer shot in the back as Scott ran away. *See* Leonard Pitts Jr., *Walter Scott: Another 'Isolated Incident?'*, HOUS. CHRON. (Apr. 10, 2015), http://www.chron.com/opinion/outlook/article/Pitts-Walter-Scott-another-isolated-incident-6192905.php.

19. *See* Joint Appendix at 19, Rodriguez v. United States, 135 S. Ct. 1609 (2015) (No. 13-9972), 2014 U.S. S. Ct. Briefs LEXIS 4054, at *21 [hereinafter Joint Appendix].

20. *See id.* at 17–18. Struble testified that Floyd was certified only six days prior to the stop. *Rodriguez* did not call into question the general reliability of dog sniffs as drug-detectors, although courts are beginning to question the fallibility of dog sniffs. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 411–12 (2005) (Souter, J., dissenting) ("The infallible dog, however, is a creature of legal fiction . . . belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine.").

21. *See* Joint Appendix, *supra* note 19, at 19–21.

22. *See id.* at 26. Rodriguez was driving "a few miles under the speed limit." *Id.* During oral testimony at the suppression of evidence hearing, Rodriguez's attorney suggested that it was something other than a concern with traffic-safety that led Struble to follow Rodriguez, remarking, "I can't get into . . . whether, in fact, it was racial profiling." *Id.* at 62–63.

23. *See id.*

By 12:35 A.M., Struble arrested Dennys Rodriguez for possession of methamphetamine with intent to distribute.[25] Although Floyd had to take two passes around the car before he alerted to the presence of drugs, the collar was good.[26] At the suppression of evidence hearing, Struble testified that it was not his intent to search for drugs when he pulled Rodriguez over.[27] He explained that his suspicions were only aroused when he noticed the "overwhelming scent of air freshener" emanating from Rodriguez's car and the fact that the passenger, Scott Pollman, seemed nervous.[28] Further, Struble definitely knew something was wrong when Rodriguez told him that he and Pollman were on their way back from shopping for a used Mustang.[29] To Struble, Rodriguez was acting like a man with something to hide, for who shops for cars at midnight?[30]

Struble then called for backup and asked for Rodriguez's consent to let Floyd have a go at the car.[31] When Rodriguez declined, Struble instructed Rodriguez to exit the vehicle.[32] Once the other officer arrived, Floyd made his rounds, catching Rodriguez red-handed with a trunk load of methamphetamine.[33]

2. Procedural History. Rodriguez was indicted on one count of possession with intent to distribute fifty grams or more of methamphetamine,[34] in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1).[35] The United States District Court for the District of Nebraska appointed Shannon O'Connor as Rodriguez's public defender.[36] O'Connor quickly moved to suppress the evidence of methamphetamine, arguing that Officer Struble did not have reasonable suspicion to support Rodriguez's detention after Struble issued the traffic

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24. *Id.*

25. Rodriguez v. United States, 135 S. Ct. 1609, 1613 (2015).

26. *Id.*

27. *See* Joint Appendix, *supra* note 19, at 17.

28. *Id.* at 19.

29. *Id.* at 41–42.

30. *Id.* Struble also became suspicious when he asked Rodriguez to exit the vehicle and "have a seat in the front passenger seat of [Struble's] cruiser," and Rodriguez asked whether he was obligated to do so. *Id.* at 9.

31. *Id.* at 12.

32. *Id.* at 14.

33. *Id.* at 16–18.

34. Rodriguez v. United States, 135 S. Ct. 1609, 1613 (2015).

35. *Id.* 21 U.S.C. § 841(a)(1) (2012) makes it "unlawful for any person to knowingly or intentionally . . . manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(b)(1)(A)(viii) (2012) specifies the sentencing guidelines for any person who possesses fifty grams or more of methamphetamine.

36. *See* Joint Appendix, *supra* note 19 at 1.

warning.[37] The Magistrate Judge seemed inclined to agree, but he recommended the motion to suppress be denied anyway.[38] Under Eighth Circuit precedent, a dog sniff that occurs in less than ten minutes between the end of the traffic stop and the dog's indication of drugs is only a *de minimis* intrusion on a defendant's Fourth Amendment rights, and is therefore not constitutionally prohibited.[39] It had taken Floyd only seven or eight minutes to alert to the drugs.[40]

The district court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress.[41] Rodriguez entered a conditional guilty plea and received a five-year prison sentence.[42] The Eighth Circuit Court of Appeals affirmed, agreeing that a "seven- to eight-minute delay" was a permissible "*de minimis* intrusion on Rodriguez's personal liberty."[43] Having decided that the traffic stop was not unreasonably prolonged,[44] the court did not address whether the circumstances of the stop gave rise to sufficient reasonable suspicion to detain Rodriguez.[45]

Rodriguez filed a petition for a writ of certiorari in the Supreme Court,[46] presenting evidence of a circuit split over whether the Fourth Amendment does indeed permit a *de minimis* extension of an otherwise-concluded traffic stop.[47] The Court

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37. *See id.* at 61–69.

38. *See Rodriguez*, 135 S. Ct. at 1613 ("The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. . . . Officer Struble had [no]thing other than a rather large hunch.") (internal quotations omitted).

39. *See, e.g.*, United States v. Alexander, 448 F.3d 1014 (8th Cir. 2006) (holding that even if the traffic stop terminated when the officer told defendant he would receive a warning, the dog sniff was a *de minimis* intrusion on defendant's Fourth Amendment rights); United States v. $404,905.00 in United States Currency, 182 F.3d 643 (8th Cir. 1999) (determining that a two-minute canine sniff was a *de minimis* intrusion on defendant's personal liberty).

40. *Rodriguez*, 135 S. Ct. at 1613.

41. *See id.*

42. *See id.*

43. United States v. Rodriguez, 741 F.3d 905, 907–08 (8th Cir. 2014), *vacated*, 135 S. Ct. 1609 (2015).

44. *Id.* (relying on *Illinois v. Caballes*, 543 U.S. 405 (2005)).

45. *See Rodriguez*, 741 F.3d at 905.

46. *See* Petition for Writ of Certiorari at 15, Rodriguez v. United States, 135 S. Ct. 1609 (2015) (No. 13-9972), 2014 U.S. S. Ct. Briefs LEXIS 4111.

47. *Compare* State v. Box, 73 P.3d 623, 629 (Ariz. Ct. App. 2003) (adopting the *de minimis* exception for suspicionless dog sniffs conducted immediately after a legitimate traffic stop), *and* State v. Sellars, 730 S.E.2d 208, 212–13 (N.C. Ct. App. 2012) (holding that dog sniff that extended the stop after issuance of warning ticket is *de minimis* extension that requires no additional justification), *with* United States v. Stepp, 680 F.3d 651, 661–62 (6th Cir. 2012) ("When the initial traffic stop has concluded, we have adopted a bright-line rule that any subsequent prolonging, even *de minimis*, is an unreasonable extension of an otherwise lawful stop.") *and* State v. Louthan, 744 N.W.2d 454, 461–62 (Neb. 2008) ("We are not persuaded to abandon

granted certiorari and, in a 6–3 decision,[48] held that in the absence of reasonable suspicion, the canine sniff and subsequent search of Rodriguez's car violated his Fourth Amendment rights.[49] The Court vacated and remanded the case to the lower court to make a factual determination as to whether Officer Struble did in fact have sufficient reasonable suspicion.[50]

B. Justice Ginsburg's Majority Opinion[51]

In rejecting the idea that a *de minimis* extension of an otherwise completed traffic stop is constitutionally acceptable, the majority relied heavily on its previous decisions in *Illinois v. Cabelles*[52] and *Arizona v. Johnson*.[53] In line with these decisions, Justice Ginsburg set forth a bright line rule: absent some reasonable suspicion apart from the traffic violation that would warrant a separate investigation, a dog sniff that adds even a minimal amount of time to a stop is per se unreasonable.[54] The Court analogized a routine traffic stop to a "*Terry* stop,"[55] explaining that a traffic stop should last no longer than the time it takes for a diligent police officer to address the traffic violation that warranted the stop.[56]

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the reasonable suspicion standard in favor of the '*de minimis rule*' advocated by the State.").

48. Justice Ginsburg delivered the opinion of the Court and was joined by Chief Justice Roberts, Justice Scalia, Justice Breyer, Justice Sotomayor, and Justice Kagan. *See* Rodriguez v. United States, 135 S. Ct. 1609, 1612 (2015).

49. *See id.* at 1612.

50. *See id.* at 1617.

51. *Id.* at 1612–17.

52. In *Illinois v. Caballes*, the Court held that an officer's actions did not implicate a legitimate privacy interest when he deployed a drug-detection dog to sniff the outside of a vehicle during an otherwise-legitimate traffic stop. 543 U.S. 405 (2005).

53. In *Arizona v. Johnson*, the Court held that an officer lawfully ordered a passenger out of a car and patted him down, despite the lack of nexus between the traffic-stop and the passenger's detainment. 555 U.S. 323 (2009). The common caveat to both *Caballes* and *Johnson* is that in each case, the action taken by the officers did not meaningfully extend the otherwise-legitimate stop or unduly intrude on an individual's personal liberty. *See also* Muehler v. Mana, 544 U.S. 93, 101 (2005) (holding that an officer may also deploy a drug-detection dog to sniff the outside of a vehicle during an otherwise-legitimate traffic stop); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (determining that an officer may ask a driver to step out of the car during the encounter).

54. *But see* United States v. Sharpe, 470 U.S. 675 (1985). Under *Sharpe*, an officer's performance of investigatory tasks that routinely occur in any stop does not violate the Fourth Amendment, even if it extends the stop's duration, so long as the overall duration of the stop remains reasonable. *Id.* at 687.

55. *See supra* note 9. During a "*Terry* stop," commonly known as a "stop and frisk," an officer needs only reasonable suspicion of criminal activity (as opposed to the higher burden of probable cause) to briefly detain someone by patting her down. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968). The Supreme Court has long analogized routine traffic stops to *Terry* stops. *See, e.g.*, Knowles v. Iowa, 525 U.S. 113, 115–17 (1998); Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

56. *See Rodriguez*, 135 S. Ct. at 1614; *Caballes*, 543 U.S. at 407. *See also Sharpe*, 470 U.S. at 685–86 ("[I]t [is] appropriate to examine whether the police diligently pursued

Justice Ginsburg reconciled this case with *Johnson* by explaining that while officers are "allowed to conduct certain unrelated checks during an otherwise lawful traffic stop . . . [they] 'may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."[57] She rejected the government's argument that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation."[58] Rather, Justice Ginsburg concluded that "[t]he reasonableness of the seizure . . . depends on what the police in fact do."[59] Accordingly, any on-scene investigation into other crimes detours from the traffic-safety mission of a traffic stop and is unreasonable regardless of the duration.[60]

C. The Dissent

Justices Thomas, Kennedy, and Alito dissented.[61] According to all three Justices, the majority incorrectly interpreted *Cabelles*,[62] which the dissenters interpreted to mean that "conducting a dog sniff [does] not change the character of a traffic stop" as long as the traffic stop itself is reasonable.[63] Thus, Justice Thomas reasoned that the only question in this case was whether Officer Struble did in fact conduct the traffic stop reasonably when he addressed all of the traffic-safety issues before bringing the dog out.[64] Justice Thomas went on to determine that Struble did execute the stop in a reasonable manner.[65] Moreover, according to Justice Thomas, Officer Struble did have reasonable suspicion sufficient to justify an independent

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[the investigation] when determining the reasonable duration of a traffic stop."); Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

57. *Rodriguez*, 135 S. Ct. at 1615. According to the Court, permissible "unrelated checks" include "'ordinary inquiries incident to [the traffic] stop.'" *Id.* (citing Illinois v. Caballes, 543 U.S. 405, 408 (2005)). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id. See also* WAYNE LAFAVE, SEARCH AND SEIZURE § 9.3(c), 507–17 (5th ed. 2012).

58. *Rodriguez*, 135 S. Ct. at 1616. *See also* Initial Brief: Appellee-Respondent at 18, Rodriguez v. United States, 135 S. Ct. 1609 (2015) (No. 13-9972), 2014 U.S. S. Ct. Briefs LEXIS 4413 at *18.

59. *Rodriguez*, 135 S. Ct. at 1616 (citing Knowles v. Iowa, 525 U.S. 113, 115–17 (1998)).

60. *See Rodriguez*, 135 S. Ct. at 1616.

61. *See id.* at 1617–25 (dissenting opinion).

62. *See* Illinois v. Caballes, 543 U.S. 405, 408 (2005).

63. *See id.*

64. *See Rodriguez*, 135 S. Ct. at 1618 (Thomas, J., dissenting).

65. *See id.* at 1622–23.

investigation, so that there really was no point in hearing this case at all.[66]

III. ANALYSIS

A. Terry *and* Rodriguez*: Strange Bedfellows?*

1. Terry*'s Legacy*. As previously noted, the likening of a routine traffic stop to a *Terry* stop is nothing new.[67] But what exactly is a *Terry* stop,[68] and what does it have to do with "reasonable suspicion," "probable cause," and racial profiling?[69] As Professor Cynthia Lee explains, before *Terry*, "[i]t was widely assumed that police officers needed probable cause to engage in any kind of search or seizure. In *Terry v. Ohio*, the Court for the first time held that an officer may briefly seize an individual and search him for weapons upon less than probable cause."[70] After *Terry*, it became a matter of an officer's discretion to determine when, where, and why to temporarily seize a person.[71]

a. In 1968, the Supreme Court Was Struggling to Advance the Goals of the Civil Rights Movement Without Appearing Soft on Crime. At first blush, it is difficult to reconcile the *Terry* decision with the 1960s often characterized as an era dominated by anti-establishment politics and civil rights activism. Earl C. Dudley, a clerk in the Warren Court who helped Chief Justice Warren work on *Terry*, recently put this idiosyncrasy into

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66. *See id.* at 1622–25.

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

68. *See* Taslitz, *supra* note 9.

69. In Part II.C. of his dissent in *Rodriguez*, Justice Thomas gave a brief review of "reasonable suspicion" and "probable cause" in traffic stops: "A traffic stop based on reasonable suspicion, like all *Terry* stops, must be 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.'" 135 S. Ct. at 1621 (quoting Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 185 (2004)). Justice Thomas continued,

> By contrast, a stop based on probable cause affords an officer considerably more leeway. In such seizures, an officer may engage in a warrantless arrest of the driver, a warrantless search incident to arrest of the driver, and a warrantless search incident to arrest of the vehicle if it is reasonable to believe evidence relevant to the crime of arrest might be found there. *Id.*

Id. (internal citations omitted) (citing Riley v. California, 134 S. Ct. 2473 (2014); Arizona v. Gant, 556 U. S. 332, 335 (2009); and Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)).

70. CYNTHIA LEE, SEARCHES AND SEIZURES 138 (2011); Terry v. Ohio, 392 U.S. 1 (1968).

71. Today, an officer's discretion to temporarily seize someone is judged ex post facto by determining whether the officer's reasonable suspicion was a "'particularized and objective basis for suspecting the particular person stopped of" breaking the law. Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

perspective.[72] Dudley explains that in the late-1960s, the Civil Rights Movement had seen some support from the Court, but had little to show for it:

> While bus boycotts, rallies, and demonstrations . . . effectively dramatized the continuing scourge of racism, they also created a backlash even among those sympathetic to the cause. At the same time, despite legislative victories[,] . . . frustration at the slow rate of progress boiled over into riots. . . . Only two months before Terry was handed down, there was a major outbreak of rioting in many cities . . . in the wake of the assassination of Dr. Martin Luther King, Jr. At the same time, the Supreme Court had come under heavy fire for its decisions enforcing the constitutional claims of those accused of crimes.[73]

Dudley went on to explain that while the Republican presidential campaign targeted the Court for being soft on crime, the police made a powerful argument that they needed greater authority to deal with street encounters.[74] The Court struggled to come up with a solution that would quell the violence associated with race riots without impeding the progress of the Civil Rights Movement.[75]

b. The Court's New Reading of the Fourth Amendment Paved the Road To Rodriguez.[76] Justice Brennan suggested a new reading of the Fourth Amendment by separating the Warrant Clause's standard of "probable cause" from the "reasonableness" of a search and seizure.[77] Based on this reading, the Court did away with its tradition of encouraging the police to always obtain a warrant from a judge before continuing a search.[78] Now, in contexts where it was implausible for police to obtain warrants—such as during a riot—the definition of a "reasonable" search could be cut free from

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72. *See* Earl C. Dudley Jr., Terry v. Ohio*, The Warren Court and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891 (2012).

73. *Id.* at 892.

74. *See id.* at 893 ("Individually, the Justices of the Supreme Court may have felt differing degrees of sympathy with the arguments of the police, but collectively they were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets.").

75. *See id.* at 893–94. Chief Justice Warren acknowledged that minorities "frequently complain" about police harassment, but nevertheless argued that stop-and-frisk was a necessary part of effective law enforcement and was authorized by the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 7 (1968). *See also* Quinn Brown, Arizona v. Johnson*: Latest Developments on the War on Terry*, UW BOTHELL POL'Y J. 39, 40 (2012).

76. Of course, *Rodriguez* is not a direct result of the *Terry* decision. Rather, *Rodriguez* is a result of *Terry*'s subsequent extension to traffic stops. *See supra* note 9 and accompanying text.

77. *See* Dudley, *supra* note 72, at 893.

78. *See id.*

"probable cause" in the Warrant Clause, and no warrant would be required.[79] The hope was that by giving the police more authority, the police would be able to suppress the riots and make room for the more "well behaved" civil rights activists.[80] From that point forward, police were authorized to briefly detain a person based on a "reasonable suspicion" of criminal activity.[81] It was based on this re-reading of the Fourth Amendment that Officer Struble initiated the canine-sniff of Rodriguez's car.

c. Despite Terry's Good Intentions, Its Application to Subsequent Decisions Had a Negative Impact on Race Relations. Although the Court made clear in *Terry* that seizures of persons should not be based on "suspicion[s] or 'hunch[es],'"[82] some scholars argue that the Court did just that when it validated the stop-and-frisk of John Terry based on the officer's explanation that Terry just "didn't look right."[83] Indeed, there is no shortage of scholarly critiques and explanations about how *Terry* and its subsequent applications "gave cops a green light to continue racial profiling."[84] Thus, while the *Terry* decision was handed down at least in part to abate the volatility between the police and minorities, it may have only made the already-strained relationship worse.

Perhaps more than any other case, *Whren v. United States*[85] is frequently attacked for its perceived expansion of the "*Terry*

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79. *See id.* The Warren Court effectively severed the Fourth Amendment's Warrant Clause (" . . . *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") from the "reasonableness requirement" ("The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated . . . .") U.S. CONST. amend. IV (emphasis added). The Court thus came up with the incongruous solution of recognizing a greater power in one police officer than that which a court could give him under the Warrant Clause.

80. *See generally* Brown, *supra* note 75, at 42.

81. Potential factors with which to build reasonable suspicion may include: being out at an unusual time of day, being out of place, being in a high-crime area, wearing unusual clothes, behaving unusually, furtive movements, suspicious sounds or smells, hearsay, an officer's past knowledge of a suspect, and suspicious statements by the suspect. Brown, *supra* note 75, at 39

82. Terry v. Ohio, 392 U.S. 1, 27 (1968); *cf.* Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.").

83. Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 487 (2007) ("From the outset, the Terry 'reasonable suspicion' test exhibited the form of a standard devoid of any real substance. Consequently, later courts relying on this standard mired in vagary have further weakened 'reasonable suspicion' to uphold stops based on nothing or very little more than race or socioeconomic status.").

84. LEE, *supra* note 70, at 161.

85. 517 U.S. 806 (1996).

rule" and criminalization of "driving while black."[86] Under *Whren*, a police officer can pull a car over for committing a traffic violation, even if the officer's true motivation is to investigate for drugs.[87] As Professor Harris explains, the *Whren* Court adopted the "could have" standard: "any time the police *could have* stopped the defendant for a traffic infraction, it does not matter that the police *actually* stopped him to investigate a crime for which the police have little to no evidence."[88] Given the comprehensive scope of traffic laws, it is hard for any driver to go more than a few blocks without committing some form of violation.[89] This means that while officers cannot possibly pull everyone over for committing a violation, they can usually find a reason to pull anyone over.[90]

2. (Almost) Fifty Years After Terry*: Is* Rodriguez *Representative of a Fourth Amendment Sea Change? Rodriguez* and *Terry* were both decided in social climates characterized by popular outcries against police brutality.[91] On one hand, perhaps *Rodriguez* can be understood as the Supreme Court declining to make the same mistake that it did in *Terry*, which was to respond to a volatile situation by implementing a solution that ultimately made race relations worse. Whereas the Court's solution in *Terry* was to give the police more authority,[92] perhaps the Justices thought that *Rodriguez* offered a welcome opportunity to take some of that authority away.

Under this interpretation, *Rodriguez* is an applause-worthy attempt to reign in the racial profiling that resulted after *Terry* and *Whren*.[93] Now, even though police can still use traffic violations as pretexts to search for drugs,[94] they are a bit more limited, at least in duration, in the ways they can form their "rea-

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86. *See generally* David A. Harris, *'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 544–82 (1997) (discussing the Supreme Court's decision in *Whren* and predicting an increase in traffic stops pretexted on race).

87. *Whren*, 517 U.S. at 816–17 (1996). *See also* Harris, *supra* note 86, at 544–45.

88. Harris, *supra* note 86, at 544.

89. *Id.* at 545.

90. *See id.*

91. *Compare* Stern, *supra* note 7 (analyzing *Rodriguez* as part of a larger discussion about recent accounts of discriminatory police practices), *with* Dudley, *supra* note 72 (discussing the impact of the Civil Rights Movement on the *Terry* decision).

92. *See supra* Part III.A.1.c.

93. Harris, *supra* note 86.

94. *Contra* Whren v. United States, 517 U.S. 806, 811 (1996) (condemning police use of valid bases of action against citizens as "pretexts" for pursuing other investigatory agendas).

sonable suspicions" to justify lengthening the seizure.[95] That is, if an officer pulls a car over for a traffic violation, and nothing suspicious happens during the course of the limited tasks the officer must complete to affect the "mission" of the traffic-stop,[96] the officer cannot then deploy other methods (such as a dog-sniff) to smoke out suspicious activity. Possibly, this knowledge will lead to a decrease in the use of traffic violations as pretexts for drug investigations, along with a decrease in racially motivated traffic-stops.

This interpretation of *Rodriguez*, however, might be giving the Court too much credit. *Rodriguez* can also fairly be seen as a perpetuation of *Terry* and the system of unchecked police discretion associated with it.[97] After all, one of the first points that Justice Ginsburg makes in the *Rodriguez* opinion is that a traffic stop is no different from a *Terry* stop,[98] suggesting that the Court has no intentions of backing down from *Terry*'s loose standard of reasonable suspicion.[99]

With regard to reasonable suspicion, it is also interesting that the *Rodriguez* majority declined to make an assessment of its presence (or absence) in the facts of this case.[100] Although the majority indicated that its hands were tied in assessing the reasonability of Officer Struble's suspicion,[101] the dissent clearly thought otherwise;[102] Thomas wrote extensively as to the suspicious nature of the air freshener in Rodriguez's car and the nervous behavior of his passenger, Scott Pollman.[103] So why did the

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95. Under *Rodriguez*, a traffic stop should take no longer than it takes a reasonably diligent officer to complete the traffic-safety mission of a traffic stop. *See* Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015); LAFAVE, *supra* note 57.

96. *See* LAFAVE, *supra* note 57, at § 9.3(c) (listing the tasks required to effect the "mission" of the stop as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance).

97. *See generally* Harris, *supra* note 86.

98. *Rodriguez*, 135 S. Ct. at 1614.

99. *See also* Heien v. North Carolina, 135 S. Ct. 530, 540 (2014) (ruling that reasonable suspicion could rest on an officer's mistaken understanding of the law); Stern, *supra* note 7 ("In *Heien*, the court considered a traffic stop conducted by a cop who misunderstood state law. Although the driver he stopped actually did nothing wrong, eight justices decided the stop was still 'reasonable' within the meaning of the Fourth Amendment. In other words, ignorance of the law is no excuse for breaking the law—unless you're a police officer. ").

100. *See Rodriguez,* 135 S. Ct. at 1614 (limiting the issue to "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff.").

101. *See id.* at 1616–17. Justice Ginsburg noted that while the Judge Magistrate found the dog sniff not to be "independently supported by individualized suspicion," the appellate court did not review that determination, so neither would the Court. *Id.*

102. *See id.* at 1617–23 (Thomas, J., dissenting).

103. *See id.* at 1622–23 ("These facts, taken together, easily meet our standard for reasonable suspicion.").

majority remain silent on this issue?[104] This question is especially pertinent in light of the Court's changing interpretation of the relationship between reasonableness and privacy, which will be discussed in the next section.

B. Rodriguez *and the Reasonable Dog Sniff*

The question of reasonable suspicion is not the only issue about which the Court remained silent. Before the Court issued its decision, it was predicted that the Justices would take this opportunity to clear up some unanswered questions about the intersection between canine-sniffs and vehicular searches.[105] Before 2012, the two cases that dominated the issue of dog-sniffs and the Fourth Amendment were *Cabelles*[106] and *U.S. v. Place*.[107] In both cases, the Court held that dog sniffs are "not a search" because they do not intrude upon a "reasonable expectation of privacy."[108]

1. A Vehicular Dog Sniff Might Not Be a Fourth Amendment Search. If a vehicular dog sniff is not a "search" within the meaning of the Fourth Amendment, then a police officer does not need reasonable suspicion, let alone probable cause to effectuate it. Recently, however, in *Florida v. Jardines*,[109] the Court held that a dog sniff conducted in the curtilage of a person's home is a search, not because it infringes on privacy interests,[110] but because it infringes on

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104. The government argued in its amicus brief that the Court should determine as a matter of law that Officer Struble had reasonable suspicion. *See* Initial Brief: Appellee-Respondent, *supra* note 58, at *22. Blogger Rory Little pointed out "[i]f the Court were to accept that view, then the 'detention for dog sniff without suspicion' question would presumably be moot." *See* Rory Little, *Argument Preview: Dog Sniffs and Traffic Stops*, SCOTUSBLOG (Jan. 21, 2015 3:12 AM), http://www.scotusblog.com/2015/01/argument-preview-dog-sniffs-and-traffic-stops-once-more-to-the-fourth-amendment-well/.

105. For example, it was surmised before oral arguments that if the Court predicated the issue around whether the dog-sniff of Rodriguez's car was a "search" within the meaning of the Fourth Amendment, the Court might be forced to overturn *Caballes*, because the Court in that case explicitly determined that a vehicular dog-sniff was not a search. *Id.*

106. 543 U.S. 405 (2005).

107. 462 U.S. 696 (1983).

108. The "reasonable expectation of privacy" test has its roots in *Katz v. United States*, which was decided only one year before *Terry v. Ohio*. *Compare* Katz v. United States, 389 U.S. 347 (1967) *with* Terry v. Ohio, 392 U.S. 1 (1968). Since *Katz*, the Court has used the reasonable expectation of privacy test to determine whether a "search" is a "search" within the meaning of the Fourth Amendment. It has held that a permissible Fourth Amendment search occurs when a defendant "manifests an actual expectation of privacy that society is willing to recognize as legitimate, justifiable, or reasonable." LEE, *supra* note 70, at 66.

109. 133 S. Ct. 1409 (2013).

110. *See id.* at 1417 ("The *Katz* reasonable-expectations test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically in-

property interests.[111] Thus, after Jardines, the constitutionality of a dog-sniff (and the detention that necessarily accompanies it) is not as clear-cut as it was before 2013.[112]

A couple of other recent cases also suggest that the Court is rethinking its Fourth Amendment jurisprudence,[113] especially with regard to the intersection of drug-detection techniques and the Fourth Amendment. Moreover, for over fifteen years now, scholars have been commenting on an impending transformation in the Court's Fourth Amendment interpretive techniques.[114] According to Professor Sklansky, Justice Scalia has been leading the other members of the Court to "ma[ke] the principal criterion for identifying violations of the Fourth Amendment 'whether a particular governmental action . . . was regarded as an unlawful search or seizure under common law when the Amendment was framed.'"[115]

2. The Court Declined to Discuss Its New Stance on the Reasonable Expectation of Privacy Test in Rodriguez. So why did the Court decline to elaborate on its new, post-Katz interpretation of a Fourth Amendment search in Rodriguez? One obvious response is that the Court simply views a car as less pertinent to a person's constitutionally protected interests.

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truding on constitutionally protected areas.") (internal quotations omitted) (citing United States v. Jones, 132 S.Ct. 945, 951–52 (2012)).

111. In an amicus brief filed on Rodriguez's behalf, the U.S. Justice Foundation argued that the sniff of Rodriguez's car similarly violated his well-established property right to exclude unreasonable trespasses on his "person" because when he detained Rodriguez, Officer Struble "physically intruded upon Rodriguez's inherent right of freedom of movement." Brief for U.S. Justice Foundation et al., *supra* note 14, at *15.

112. *See generally Jardines*, 133 S. Ct. at 1409. The U.S. Justice Foundation amicus brief also argued that under *Jardines* and several other recent cases, the Court should call *Caballes* into question as to whether or not a dog sniff on the outside of someone's car constitutes a Fourth Amendment search. *See* Brief for U.S. Justice Foundation et al., *supra* note 111, at *18–20. The argument is fourfold: (1) after *Jardines*, a dog sniff in the curtilage of someone's house is a search regardless of privacy interests; and (2) after *United States v. Jones*, 132 S. Ct. 945 (2012), using a GPS locator to monitor cars on public roads is also a search; and (3) after *Kyllo v. United States*, 533 U.S. 27 (2001), using a thermal heat imager from a public road is a search when it when it detects information inside a house; so (4) the dog sniff that occurred on a public road to detect information inside Rodriguez's car should also be a considered a search. *Id.*

113. *See, e.g.*, *Jardines*, 133 S. Ct. at 1409 (canine sniff); Bailey v. United States, 133 S. Ct. 1031 (2013) (aerial surveillance); *Jones*, 132 S. Ct. at 945 (electronic surveillance); *Kyllo*, 533 U.S. 27 (2001) (thermal heat detection).

114. Professor David Sklanksy, for example, coined the ironic term "Scalia's new originalism" to refer to this change of interpretive tide. *See* David Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1740–62 (2000).

115. *Id.* at 1743 (citing Wyoming v. Houghton, 526 U.S. 295 (1999)); *accord* Florida v. White, 526 U.S. 559, 119 S.Ct. 1555 (1999); Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

In *Cardwell v. Lewis*, the Court implied as much by stating, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and . . .it travels public thoroughfares where both its occupants and contents are in plain view."[116]

But there is another, more disheartening, reason why the Court might have declined to address whether a dog sniff conducted in the "curtilage" (so to speak) of someone's vehicle constitutes a Fourth Amendment search. That is that perhaps the Court recognizes that issues of civil rights are implicated more frequently with traffic stops and vehicular searches than they are with searches of people's homes. One reason for this is that a person's skin color is more visible through a windshield than it is through the walls of a home. Sadly, it seems that when issues of civil rights crop up within the context of the Fourth Amendment, the Court would rather turn a blind eye.[117]

Thus, it is possible that the Court felt that by applying its new, post-*Katz* Fourth Amendment jurisprudence to traffic stops,[118] it would have to address issues of civil rights, as concerned as the new jurisprudence is with issues of personal dignity.[119] Of course, it is possible that the Court simply is not ready to do away with a system that does get a lot of drugs and criminals off the street, despite its discriminatory side effects. This is, and always has been, the conundrum of the Fourth Amendment—the balancing of the government's interest in creating a safe, drug-free society versus the private interests of being free from discriminatory, often "annoying, frightening,

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116. Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

117. The closest the Court has come to addressing issues of racial discrimination in connection with Fourth Amendment searches was in *Whren*, when Justice Scalia, writing for the majority, stated, "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. *But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause*, not the Fourth Amendment." Whren v. United States, 517 U.S. 806, 811 (1996) (emphasis added).

118. *See supra* note 112 and accompanying text.

119. *See supra* note 111 and accompanying text. Professor Castiglione argues for a reasonableness standard characterized by considerations of human dignity rather than the outdated considerations of privacy:

> If a more sound jurisprudence is to emerge, a value distinct from privacy must be articulated and incorporated into the reasonableness analysis. . . . I seek to pair privacy, which, as noted, has become the dominant value behind the reasonableness requirement, with dignity, which is an even more fundamental value that underlies not only the Fourth Amendment, but arguably the entire constitutional structure. *Id.*

John C. Castiglione, *Human Dignity under the Fourth Amendment*, 655 WIS. L. REV. 656, 660 (2008)

and perhaps humiliating experience[s]"[120] of being searched by the police.

IV. CONCLUSION

Rodriguez is a perfect example of the Court struggling to consolidate these competing interests of a "right to be let alone"[121] and a desire to live in a safe, crime-free environment. On the one hand, the Court could have made a determination as to whether Officer Struble had sufficient reasonable suspicion to justify Rodriguez's detainment. In doing so, the Court might have responded to the panoply of pleas from legal scholars to modernize the standard of reasonable suspicion.[122]

The impossible consolidation of the right to be let alone and the right to live securely in a crime free environment will be a battle within the Supreme Court for as long as the Court exists. In the nearly half of a century since *Terry*, the Court arguably placed more of its weight on the latter interest by incrementally loosening *Terry's* "reasonable suspicion of criminal activity" standard.[123] As a result, race relations have suffered.[124]

Still, the Fourth Amendment tide is turning, as evidenced by the Court's recent subordination of the *Katz* "reasonable expectation of privacy"[125] test in favor of a property- and dignity-based standard for Fourth Amendment protections. Given the "pro-criminal-defendant"[126] nature of this evolving standard, it is fair to predict that the Court is shifting its weight more towards the "right to be let alone" end of the spectrum.

Rodriguez, while failing to answer some important procedural questions about the Fourth Amendment, fits nicely into this pattern. Although *Terry* is not going anywhere anytime soon, if the Court keeps ruling the way it did in *Rodriguez*, the standard of "reasonable suspicion" will eventually be strengthened to the extent that police procedures will be less conducive of racial profiling. Until then and until the Court more explicitly consoli-

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120. Terry v. Ohio, 392 U.S. 1, 25 (1968) (acknowledging the negative consequences implicated by a "*Terry* stop").

121. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

122. *See, e.g.*, Lewis R. Katz, *'Lonesome Road': Driving Without the Fourth Amendment*, 36 SEATTLE U.L. REV. 1413, 1413–14 (2013) ("Our streets and highways have become a police state where officers have virtually unchecked discretion . . . to transform the traffic stop into an investigation of other serious crimes without the check of reasonable suspicion or probable cause to limit the inquiry.").

123. *See* Harris, *supra* note 86.

124. *Id.*

125. *See generally* Katz v. United States, 389 U.S. 347 (1967).

126. Sklansky, *supra* note 114, at 1746.

dates the reasonableness standard with its new, post-*Katz* Fourth Amendment jurisprudence, stories of racial profiling and the violence associated with it will continue to dominate the evening news.[127]

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127. *E.g.*, Teresa Younger, *Unequal Justice*, HUFFINGTON POST (June 23, 2015, 2:35 PM), http://www.huffingtonpost.com/teresa-c-younger/unequal-justice_b_7621530.html (describing a recent incident wherein a white police officer slammed a young, unarmed girl to the ground in McKinney, Texas).