

From Stop and Frisk to Shoot and Kill: *Terry v. Ohio's* Pathway to Police Violence

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ABSTRACT

Much of the debate about race and police violence against African Americans center on a question about causation: What precisely causes police violence against African Americans? For some, the answer is decidedly simple: rogue police officers acting outside of the boundaries of the law. For others, the answer is far more complex and implicates a number of structural problems, including racial inequality. Typically, both accounts marginalize the role of law. The rogue cop story highlights bad apples, not bad laws; and the structural racial inequality story generally excludes or diminishes the role of law as a structural force that contributes to police violence.

This Article puts the law back on the table—not as the only, or even the most, important variable contributing to police violence against African Americans, but as a factor that we still ought to take quite seriously. More precisely, the Article explains how a particular area of Fourth Amendment law—stop-and-frisk jurisprudence—facilitates police violence against African Americans.

The point of the departure for this Article is a theoretical model that explains the persistence of police violence against African Americans. The Article then describes how stops and frisks fit into that framework. In the context of the discussion, the Article challenges the standard account of *Terry v. Ohio*, the case that constitutionalized stop-and-frisk, as an opinion in which Chief Justice Warren split the proverbial baby. The Article contends that Justice Warren was no Solomon; he gave the baby to the government in the blanket of reasonable suspicion, a burden of proof that is lower than probable cause. Making matters worse, the Chief Justice largely dismissed concerns about race. More precisely, he professed powerlessness to address the very social problem his opinion exacerbated—police targeting of African Americans and their communities.

Central to the Article is the claim that the reasonable suspicion problem in *Terry* is not just that Justice Warren authorized police officers to stop-and-frisk people when officers have reasonable suspicion that their or someone else's safety is in jeopardy. The problem is also that the Chief Justice did not expressly prohibit police officers from using reasonable suspicion to stop-and-question people when officers have no concerns about their or anyone else's safety. Scholars have paid scant attention to this latter dimension of Justice Warren's analysis, a dimension that paved the way for stop-and-question to become a core feature of Fourth Amendment law. The Article argues that, in addition to further eroding the probable cause standard on which Fourth Amendment law has historically rested, the constitutionalization of stop-and-question enables police officers to target African Americans with little to no justification. The frequency of those engagements is one of the factors that overexposes African Americans to the possibility of violence.

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INTRODUCTION

For the past three years, people across the United States have engaged in a national debate about race and police violence. Much of the debate has revolved around violent police mistreatment of African Americans. At the center of the controversy is a question about causation: What precisely causes police violence against African Americans? For some, the answer is decidedly simple: rogue police officers acting outside of the boundaries of the law. For others, the answer is far more complex and implicates a number of structural problems, including background racial inequality, racial segregation, economic marginalization, and political powerlessness.¹

Typically, both accounts marginalize the role of law. The rogue cop story highlights bad apples, not bad laws; and the structural racial inequality story generally excludes or diminishes the role of law as a structural force that contributes to police violence.

This Article puts the law back on the table—not as the only, or even the most, important variable contributing to police violence against African Americans, but as a factor that we still ought to take quite seriously. More precisely, the Article reveals some of the ways in which law *enables* police violence against African Americans (at the front end) and makes it difficult for them to *challenge* state violence when it has occurred (at the back end).

The approach I take has implications for—but certainly does not offer a broad theoretical or empirical account of, lawyers and social movements—the theme of this conference.² That is to say, my intervention in this symposium

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1. See, e.g., Charles M. Blow, Opinion, *Police Violence: American Epidemic, American Consent*, N.Y. TIMES (Sept. 26, 2016), <https://www.nytimes.com/2016/09/26/opinion/police-violence-american-epidemic-american-consent.html>; John Eligon, *In St. Louis, Protests Over Police Violence Disrupt Economy, and Win Attention*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/st-louis-police-protests.html?_r=0; Andrew Sullivan, *Kaepernick's Message Is Getting Lost—Along With the Facts on Race and Police Violence*, N.Y. MAG.: DAILY INTELLIGENCER (Sept. 29, 2017, 9:13 AM), <http://nymag.com/daily/intelligencer/2017/09/nfl-protests-obscure-the-facts-on-race-and-policing.html>.
 2. I should note that I am not going to weigh in directly on the debate about law and social movements. Other participants in this symposium are much better situated for that project than I am. For an excellent synthesis and historical analysis of scholarly debates about law and social movements, see Scott L. Cummings, *The Social Movement Turn in Law*, L. & SOC. INQUIRY (forthcoming 2018). For similarly thoughtful engagements, see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Douglas NeJaime, *Winning*

is decidedly modest. It rests on the view that we cannot fully answer the question, “what is the role of lawyers in social movements?” without first understanding the role of law in constructing the underlying social problems that trigger social movement responses. To state this point more directly, how the law constructs a specific social problem should shape, at least to some extent, how we think about the role of lawyers in social movements organized to eliminate that social problem.

To be clear, my claim here is not necessarily about the role of litigation in social movements. Lawyers could, for example, play an important epistemological function by mapping out the complex ways in which law intersects with other structural forces to create the social problem at hand. This, in turn, could lead to a set of collective discussions with other movement participants about who should be intervening where. While some of those conversations might direct lawyers to various domains of litigation, others would undoubtedly mobilize lawyers towards other movement activities, such as community organizing, media-campaigning, know-your-rights workshops, or public policy advocacy. The point is that *where* lawyers end up in any given social movement, and *what* they do and ought to do for the movement, should be informed by *how* law is operating to create and maintain the social problem that the social movement seeks to address.

This brings me back to the longstanding social problem of police violence against African Americans. What, precisely, is my account of its causes? Part I answers that question. As you will see, Fourth Amendment law is an important part of the story.³ For at least the last three decades, the U.S. Supreme Court has interpreted Fourth Amendment law in ways that allow police officers to force engagements with African Americans with little or no justification. Part I explains how the resulting high frequency of such engagements overexposes African Americans to the possibility of police violence. Parts II, III, and IV then home in on a particular dimension of Fourth Amendment law and its application to stops and frisks to provide a more textured account of the relationship between law and police violence.

Through Losing, 96 IOWA L. REV. 941 (2011); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). The Articles in this volume are obviously another manifestation of these scholarly debates. For perhaps the definitive treatment of this issue as it pertains specifically to client representation, see GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

3. See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9 (5th ed. 2012). See generally U.S. CONST. amend. IV.

Part II begins the discussion by re-describing the genesis of the stop-and-frisk doctrine in *Terry v. Ohio*⁴ and by challenging the standard account of that case as one in which Chief Justice Warren, the very Justice who wrote *Brown v. Board of Education*,⁵ split the proverbial baby. Part II contends that Justice Warren was no Solomon; he gave the baby to the government in the blanket of reasonable suspicion, a burden of proof that is lower than probable cause.⁶

Central to Part II is the claim that the reasonable suspicion problem in *Terry* is not just that Justice Warren authorized police officers to frisk people when officers have reasonable suspicion that their or someone else's safety is in jeopardy. The problem is also that the Chief Justice did not expressly prohibit police officers from using reasonable suspicion to engage in what I call "stop-and-question"—the stopping and questioning of a person when the officer has no concern about his or anyone else's safety. Scholars have paid scant attention to this latter dimension of Justice Warren's analysis, a dimension that paved the way for stop-and-question to become a core feature of Fourth Amendment law.

Part III explains how the constitutionalization of stop-and-question, and the reasonable suspicion standard on which it rests, has facilitated precisely what the Chief Justice said his opinion could do nothing about: the "wholesale harassment"⁷ of African Americans. My goal here is to demonstrate that Justice Warren created conditions of possibility for the very thing he said he was powerless to address—racialized policing.

Part IV focuses more squarely on frisks. As you might already appreciate, "frisks" and "stops" require independent justifications. In other words, that an officer has a basis for stopping and questioning someone does not mean that the officer also has authority to conduct a frisk. In this respect, we should take care to distinguish between what I have been calling stop-and-question (or instances in which an officer stops and questions a person but does not conduct a frisk) and stop-and-frisk (or instances in which an officer

4. 392 U.S. 1 (1968).

5. 347 U.S. 483 (1954).

6. Importantly, Justice Warren does not actually use the term "reasonable suspicion." As I note later in the Article, his "specific and articulable facts" formulation, *id.* at 21, was subsequently re-articulated to become "reasonable suspicion." See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973) (discussing the lack of authority to stop or search the plaintiff and stating there was not "even the 'reasonable suspicion' found sufficient for a street detention and weapons search in *Terry v. Ohio*"). The footnote to this footnote is that term "reasonable suspicion" was first articulated in Justice Douglas dissent in *Terry*. See *Terry*, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

7. *Terry*, 392 U.S. at 14.

stops and frisks a person, but may or may not have subjected that person to questioning). The distinction between stop-and-question and stop-and-frisk is crucial because only the latter requires police officers to have reasonable suspicion that the person is armed or dangerous.⁸ Yet, under the Supreme Court's application of *Terry*, the line between stop-and-question and stop-and-frisk has been blurred. Part IV highlights this troubling development and its manifestation in litigation over the New York Police Department's use of stops and frisks.

An important takeaway from Parts II, III and IV brings us right back to Part I. That takeaway is this: While the constitutional parameters of stops and frisks were not fully articulated in *Terry v. Ohio*, the writing was on the wall that the *Terry* regime would make it easy for police officers to engage African Americans with little or no evidence of criminal wrongdoing. The frequency of those interactions, as Part I discusses, is one of the factors that exposes African Americans to the possibility of police violence.

I conclude the Article by returning the discussion more directly to the theme of lawyers and social movements.

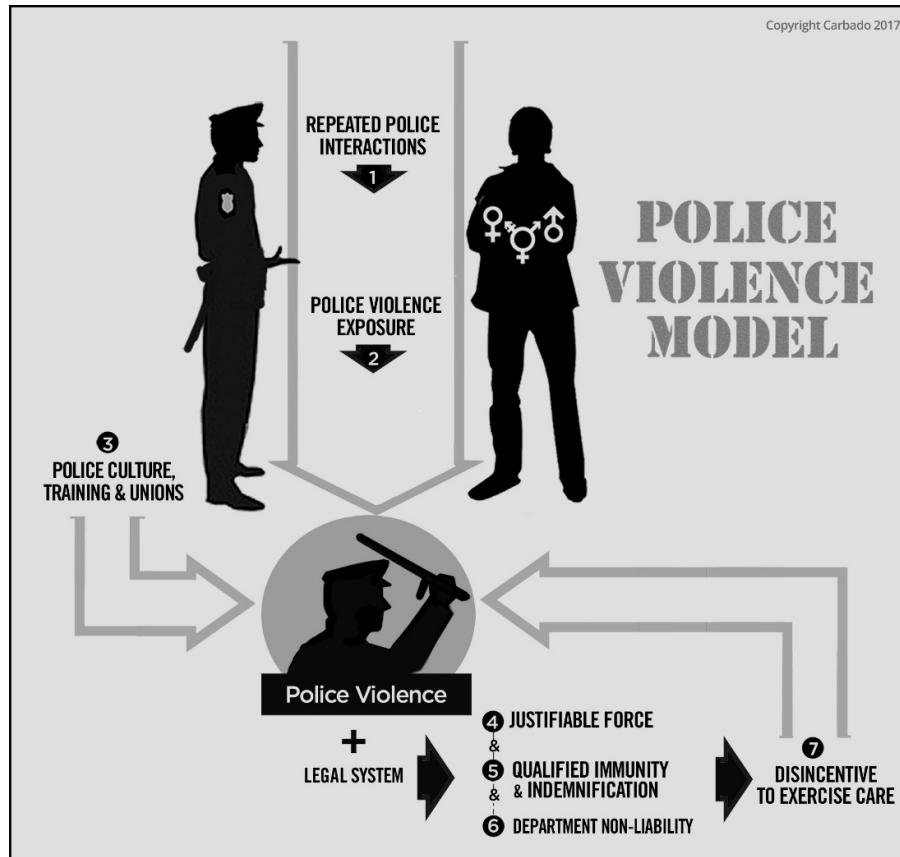
I. A PROVISIONAL MODEL OF THE CAUSES OF POLICE VIOLENCE

This Part offers a theoretical framework that describes some of the causes of police violence against African Americans. My purpose here is threefold: (1) to make clear that police violence is a structural phenomenon that transcends the problem of particular police officers' engaging in discrete acts of violence against individual African Americans; (2) to show how law figures in the overarching phenomenon; and (3) to highlight the specific place the stop-and-frisk practice occupies as a factor in the causal chain that leads to police violence.

Below is a visualization of the model I have in mind, and a summary articulation of the model's seven points:

8. Of course, a police officer might only stop-and-question (but not frisk) a person even though that officer has reasonable suspicion to believe that the person is armed and dangerousness. I am focusing on stop-and-question when officers have no concern about their safety or the safety of others.

FIGURE 1.



- A variety of social forces converge to make African Americans vulnerable to ongoing police surveillance and contact. (Point 1)
- The frequency of this surveillance and contact exposes African Americans to the possibility of police violence. (Point 2)
- Police culture and training encourage (mostly implicitly) such violence and police unions defend or acquiesce in it. (Point 3)
- When police violence encounters the legal system, actors in the civil and criminal processes (for example, prosecutors, judges, and juries) convert that violence into justifiable force. (Point 4)
- A messy and convoluted body of constitutional law—the qualified immunity doctrine—makes it difficult for plaintiffs to win cases against police officers, and a related doctrine of

immunity makes suing police departments virtually impossible. When plaintiffs do win cases against police officers, local governments indemnify the police officers by paying any monetary damages. Police officers pay nothing. (Points 5 and 6)

- The conversion of police violence into justifiable force, the immunity barriers to suing police officers and police departments, and the frequency with which cities and municipalities indemnify law enforcement all send a message of non-accountability to rank-and-file officers on the beat, suggesting to them that they will suffer no legal or financial consequences for their acts of violence. The promulgation of the message of non-accountability potentially discourages police officers from exercising care with respect to when and how they deploy violent force. (Point 7)

If the foregoing description creates the impression of a system of interconnecting parts, each one contributing to the police violence problem, you have a sense of what it means to say that police violence against African Americans is a structural phenomenon. Before expounding on that point, however, an important caveat is in order. This framework does not purport to be a complete explanation for police violence against African Americans. No single framework could provide that. But, as Gary Blasi observes, while structural accounts of social phenomena “may not capture all that exists, . . . ignoring structure risks missing nearly everything.”⁹

My concern is that social movement advocacy against police violence might be missing, not everything, but important details about the places in which, and precisely how, law is doing work in contributing to such violence. I have previously foregrounded the multiple ways in which law helps to produce police violence in the context of a more complete description of the above police violence framework.¹⁰ My focus here is more limited: to highlight a particular dimension of Point 1 in the model, namely the stop-and-frisk doctrine. This body of law is one of the factors that cause African Americans to have repeated interactions with the police in ways that overexpose them to the possibility of violence.

9. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1091 (1994).

10. See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016);

II. THE DOCTRINAL GENESIS OF STOP-AND-FRISK

It was no accident that the Supreme Court decided *Terry v. Ohio* in 1968.¹¹ By the mid-1960s, a number of factors had converged to make it relatively clear that the Supreme Court would adjudicate the constitutionality of stops and frisks. First, African American leaders complained that police officers were utilizing such practices to harass the black community and to curtail black expressions of civil rights.¹² Second, state legislatures weighed in on whether police departments in their states could engage in these tactics.¹³ New York was at the forefront of such efforts, passing a statute that expressly authorized police officers to utilize stops and frisks.¹⁴ Third, states that passed stop-and-frisk statutes, and police departments that employed stops and frisks considered them important law enforcement tools to combat a rising crime rate.¹⁵ Fourth, President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice urged states to articulate the precise scope of police authority to use stops and frisks.¹⁶ Finally, beginning in the earlier 1960s, a number of "race riots" had occurred in American inner cities—including in Philadelphia, Harlem, Watts, Cleveland, Omaha, Chicago, Detroit, Baltimore, and Washington, D.C. among other places.¹⁷ According to the National Advisory Commission on Civil Disorders—the task force which President Lyndon Johnson appointed in 1967 to investigate the cause of the riots¹⁸—the tense relationship between the police and African Americans, including the rampant utilization of stops and frisks, played a causal role in every riot.¹⁹ These developments increased the likelihood that the constitutionality of stops-and-frisks would arrive at the doors of the Supreme Court. And it did in 1968, in *Terry v. Ohio*.²⁰ The author of the Court's opinion was none other than Chief Justice Earl Warren, the man who had

11. *Terry*, 392 U.S. 1 (1968).

12. See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1565 (2011).

13. See John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less than Probable Cause*, in CRIMINAL PROCEDURE STORIES 295, 300 (Carol Steiker ed., 2006).

14. See *id.*

15. Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 337 (2014).

16. Barrett, *supra* note 13, at 300.

17. See JOHN ROBERT GREENE, *AMERICA IN THE SIXTIES* 82–83 (2010).

18. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books ed., 1968).

19. *Id.* at 206, 299–305.

20. 392 U.S. 1 (1968).

penned *Brown v. Board of Education*²¹—one of the most important decisions in American constitutional history.

To understand how stop-and-frisk became law in *Terry v. Ohio*, it is helpful to know that Fourth Amendment jurisprudence is generally structured around an initial trigger question and a subsequent justification question: First, one must ask whether the Fourth Amendment is implicated at all by way of police conduct that constitutes a search or a seizure (the trigger question). Second, assuming that the Fourth Amendment is implicated by a search or seizure, one must ask whether that search or seizure is reasonable (the justification question).²²

The government argued in *Terry* that a stop is not a seizure and a frisk is not a search—and thus neither practice needed to be supported by probable cause.²³ The strongest version of this argument would be that police officers need no evidence of wrongdoing at all to justify their decision to stop-and-frisk suspects. Because stops-and-frisks do not implicate the Fourth Amendment, the argument would go, police officers are free to perform both intrusions without any evidentiary basis. The government advanced a slightly less aggressive claim in *Terry*: While police officers need evidence of suspicious activity (but not probable cause) to conduct a stop, they do not need additional justification to conduct a frisk. The government insisted: “The right of the police to investigate [a person in the context of a stop] gives rise to the right to conduct a reasonable search for weapons in order to protect the safety of officers.”²⁴ To put the government’s point another way, an officer’s power to stop-and-question a person based on the officer’s perception that the person is suspicious carries with it the power to frisk that person—even if there is no specific evidence that the person poses a danger to the officer or to the community.

The defendant in *Terry*, by contrast, argued that a stop is a seizure and a frisk is a search.²⁵ Therefore, both stops and frisks needed to be supported by probable cause.²⁶ Prior to *Terry*, probable cause had been the gold standard and the dominant substantive framework for justifying searches and seizures.²⁷ From

21. 347 U.S. 483 (1954).

22. For a broader discussion of the analytical structure of Fourth Amendment jurisprudence, see Carbado, *supra* note 10.

23. *See id.* at 10.

24. Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio at 17, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113685, at *17.

25. *See id.* at 11.

26. *Id.*

27. *See Dunaway v. New York*, 442 U.S. 200, 209 (1979). The Court in *Dunaway* reasoned: *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment “seizures” so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth

the defendant's perspective, then, it followed that if the Court were to find that stops and frisks implicated the Fourth Amendment, the logical consequence would be for the Court also to conclude that police officers needed probable cause to engage in both practices. How would Chief Justice Warren, writing for the Court, decide?

The Chief Justice's description of the issue the case presented provided a clue: "Whether it is *always* unreasonable for a policeman to seize a person and subject him to a *limited* search for *weapons* unless there is probable cause for an arrest."²⁸ This framing of the case was a signal that Chief Justice Warren did not believe that stops and frisks that lacked probable cause were necessarily unconstitutional: For one thing, few forms of police conduct are "always unreasonable." As a result, when a court frames the legal question a case presents as whether X or Y conduct is "always unreasonable," inevitably the answer will be "no." When one adds to the "always unreasonable" language Justice Warren's characterization of a frisk as a "limited search" not simply for evidence of criminal wrongdoing, but for "weapons" that a person could use to harm police officers or members of the public, the answer to the Chief Justice's question becomes almost inexorable: "No, it is not *always* unreasonable for a police man to seize a person and subject him to a *limited* search for *weapons* unless there is probable cause for an arrest."

But what more specifically was Chief Justice Warren's analysis? Did he fully side with the government? No. Justice Warren ruled that stops are seizures and that frisks are searches.²⁹ Accordingly, both trigger Fourth Amendment scrutiny. This was a win for the defendant. However, while Justice Warren declined to rule on the burden of proof police officers would have to meet when seeking to stop-and-question, but not frisk, people,³⁰ he was clear that police officers do not

Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Id. at 209–10. Some scholars have contested the claim that *Terry* was a departure from earlier Fourth Amendment jurisprudence. See, e.g., Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25 (2007). Assuming, *arguendo*, that "reasonable suspicion"—at least as Chief Justice Warren imagined it—carried the same evidentiary weight as earlier iterations of probable cause and that various statutory regimes in the 1920s seemed to permit police officers to arrest people (at least at night) on less than probable cause, this might indeed change the impression that *Terry* marked a shift in the way in which the Court articulated the boundaries of Fourth Amendment law. A slightly different point is that the authority to stop and question has its origins in English common law.

28. *Terry*, 392 U.S. at 15 (emphasis added).

29. See *id.* at 16.

30. See *id.* at 15.

need probable cause to stop *and* frisk people.³¹ The Chief Justice maintained that an officer who reasonably believes that a person is armed and dangerous may stop that person and subject the person to a frisk.³² This was a win for the government.

Figure 2 summarizes the arguments of the parties and the Court’s response. As you review the table, note that I separate stop-and-question from stop-and-frisk. I do so to highlight a nuance in Justice Warren’s opinion that scholars who teach and write in the area of constitutional criminal procedure often elide and contest the standard account of *Terry v. Ohio* as an instance in which the Chief Justice Warren split the proverbial baby.³³

FIGURE 2.

Legal Actor	Frisk = Search?	Stop = Seizure?	Evidentiary Showing of criminality for Stop-and-Question (without frisk)	Evidentiary Showing of dangerousness for Stop-and-Frisk
Government	No	No	Suspicious activity	None (authority to stop authorizes frisk)
Defendant	Yes	Yes	Probable cause	Probable cause
Supreme Court	Yes	Yes	Does not decide	Reasonable suspicion

Against the backdrop of Figure 2, you may already have a sense of why scholars frequently describe *Terry* as a case in which the Chief Justice split the baby. The basic idea is that both the government and the defendant won—and lost—something. On one level, that is certainly true. However, the Solomonic metaphor is also misleading. It obscures that the government lost less, and won more, than the defendant.

The government lost an argument that should not have been in the cards in the first instance. Recall that the government’s claim was that police officers, without any evidence that a particular individual is armed or dangerous, and based solely on an officer’s perception that the person is suspicious, should have

31. See *id.* at 27.

32. This is another reminder that Justice Warren did not employ the precise language “reasonable suspicion” but rather “specific and articulable facts.” *Id.* at 21.

33. See Paul Butler, “A Long Step Down the Totalitarian Path”: Justice Douglas’s Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 23 (2009); see also Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 49 (2010); Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329 (2013). The evidentiary standard delineated by Justice Warren in *Terry* is a standard that the U.S. Supreme Court would subsequently expressly articulate as “reasonable suspicion.” See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973).

the power to restrict that person's freedom of movement (by conducting a stop) and intrude on his privacy and dignity (by conducting a frisk). This was not a moderate legal argument. The government was staking out an aggressive adversarial position—again, that a police officer has the authority to stop a person based merely on the officer's perception that the person is suspicious; and that in such circumstances, the officer also has the power to frisk that person, without any evidence that the person is armed or dangerous. The government lost this argument, but it was an argument that should have been a nonstarter.

The defendant, on the other hand, lost an argument that was far more modest: Stops are seizures and frisks are searches; therefore, both require probable cause. Though the defendant's argument was vulnerable to some criticism, it relied on a standard of proof—probable cause—that is expressly written into the text of the Fourth Amendment and that, prior to *Terry*, had functioned as the traditional safeguard against unreasonable searches and seizures.³⁴

With respect to what the parties won from the litigation, the government scored the bigger victory as well. True, the government did not get a reasonable suspicion standard of the precise kind the government wanted. The government wanted the Court to grant police officers the power to stop-and-question people based on reasonable suspicion of general criminality. Armed with such authority, an officer would then have complete discretion to decide whether to conduct a frisk as well. That frisk would not have to be supported by reasonable suspicion that the officer was concerned about his or anyone's safety. Instead, the authority to frisk would flow from the authority to stop. Very broadly understood, such an approach was already used in Fourth Amendment law in the context of the search-incident-to-arrest rule. Pursuant to that rule, when police officers have probable cause to arrest a person, that arrest authority carries with it the power to search as well.³⁵ Under such circumstances, an officer does not need a separate justification to search a person; once the officer has probable cause to arrest an individual, the power to search automatically follows.³⁶ The government was pushing for an analogous rule in *Terry*—essentially a frisk-incident-to-stop doctrine. The Chief Justice said “no” to that.

But Justice Warren answered “yes” to the question of whether police officers may frisk a person for weapons when they have reasonable suspicion (but not

34. To repeat, Justice Warren does not actually employ the precise language of “reasonable suspicion.” For a discussion of the precise language he employs, see *infra* notes 66–69 and accompanying text. For clarity, throughout much of this Article, I will almost always describe *Terry*'s holding with reference to “reasonable suspicion” rather than the exact language that Justice Warren used.

35. *Preston v. United States*, 376 U.S. 364, 367 (1964).

36. *Id.*

probable cause) to believe that the person is armed and dangerous. In so doing, Justice Warren legitimized reasonable suspicion as an evidentiary standard and formally incorporated that standard into Supreme Court Fourth Amendment doctrine. What's more, the Chief Justice's refusal to rule on whether police officers may stop and question (but not frisk) a person when they have no evidence that the person is armed and dangerous left open the possibility that the doctrine would develop to allow for that very possibility.³⁷ In other words, Chief Justice Warren opened one door through which the reasonable suspicion doctrine could travel and failed to close another. I will say more about this point later. For now, it is enough to understand that this opening of one reasonable suspicion door and failure to close another was a profound win for the government.

As for what the defendant won: very little indeed. What the Chief Justice gave to the defendant with one hand, he took away with the other. Specifically, Justice Warren largely eviscerated, or at least undermined, his ruling that stops-and-frisks trigger Fourth Amendment scrutiny in two important ways: First, he weakened the form that Fourth Amendment scrutiny would take—police officers need only reasonable suspicion, not probable cause; and, second, he refused to expressly state that police officers may not stop-and-question a person when they have no evidence that the individual is armed or dangerous. The sum of what I am stressing is that when one compares what the government lost and won in *Terry* to what the defendant lost and won, the Solomonic metaphor might not be the best way to capture the outcome of the case. In my view, Justice Warren did not split the baby; he gave her to the government in the blanket of reasonable suspicion.

For his part, Chief Justice Warren relied on an altogether different metaphor to ground his analysis—the balancing scale.³⁸ His approach was to weigh the government's interest in law and order and officer and public safety against individuals' interest in privacy and a sense of security.³⁹

Beginning with the government's interest, in addition to noting the importance of "effective crime prevention and detection,"⁴⁰ Justice Warren had this to say about officer and public safety:

37. *Terry*, 392 U.S. at 19 n.16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation.").

38. Here, Justice Warren was drawing from an administrative search case, *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967), which stated: "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."

39. *Terry*, 392 U.S. at 22–23.

40. *Id.* at 22.

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

....

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.⁴¹

From Justice Warren's perspective, then, the defendant was wrong to argue that anything short of probable cause necessarily made a search or seizure unreasonable.

On the individual side of the scales, Chief Justice Warren "emphatically reject[ed]" the argument that stops are not seizures.⁴² He reasoned: "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—'arrests' in traditional terminology."⁴³ A seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away."⁴⁴ Stops, for Chief Justice Warren, fit that bill.⁴⁵ Thus, stops are seizures within the meaning of the Fourth Amendment.⁴⁶

But seizures are not all of a piece. Unlike with an arrest, Justice Warren maintained, when an officer only stops a person, he is not permitted to detain that person for an extended period of time.⁴⁷ Therefore, the fact that police officers

41. *Id.* at 23–24.

42. *Id.* at 16.

43. *Id.*

44. *Id.*

45. *Id.* at 19.

46. *Id.*

47. *Id.* at 33.

need probable cause to effectuate arrests does not mean that they also need probable cause to conduct stops.⁴⁸

Chief Justice Warren's analysis tracked, to some extent, an argument made in a number of amicus briefs filed in support of the government, urging the Court to adopt a graduated approach to the Fourth Amendment.⁴⁹ A version of that approach ultimately became the law. Underwriting the approach is the idea that the greater the government's intrusion on our privacy and sense of security, the greater the government's burden to justify its conduct.⁵⁰ Conversely, the more limited the government's intrusion, the lower its burden of justification.⁵¹ For example, some police interactions, such as an officer greeting a person on the street to say hello, are so minimally intrusive that they do not require any justification at all.⁵² These so-called "consensual encounters" are not seizures and do not implicate the Fourth Amendment at all.⁵³ Other police interactions (call them "stops") are seizures, but they are, at least in theory, relatively limited in time and scope. Thus, an officer's reasonable suspicion is enough to make their use constitutionally reasonable.⁵⁴ Still other police interactions are also seizures (call them "arrests"), but they are more extended in time and more intrusive in scope and therefore require an officer to have probable cause before their use is constitutionally reasonable.⁵⁵ Notice how as the level of intrusion increases from a consensual encounter or a non-seizure to an arrest, so, too, increases the level of required justification (from nothing to probable cause). A visual aid, Figure 3, might help you better see the boundaries of this Fourth Amendment gradualism.

48. *Id.* at 27.

49. *Id.* at 22–23; *see, e.g.*, Brief of Americans for Effective Law Enforcement, as Amicus Curiae at 13, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113686, at *13 (“[T]here may be a concept of *variable* probable cause . . . that the true test is the *balancing* of the degree of interference with personal liberty against the information possessed by the officer which compelled him to act.”); Brief of National District Attorneys’ Ass’n, Amicus Curiae, in Support of Respondent at 14, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113688, at *14 (“[I]n judging whether a particular search or seizure is reasonable, the interest of society in effective law enforcement must be weighed against other interests, such as privacy and the desire to continue on one’s way.”); Brief for the United States as Amicus Curiae at 9, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113687, at *9 (“The test of the power to detain must be reasonableness under the circumstances.”); *see also* Brief for Respondent, *supra* note 24, at 2 (“[T]he Court . . . will balance the equities of the individual petitioners in protecting their right to privacy against the equities of our civilized, orderly democratic society and its need for workable rules to use in the repression of ever-increasing crime . . .”).

50. *Terry*, 392 U.S. at 17–19 (discussing the degree to which the scope of the governmental intrusion should determine the level of justification and rejecting an “all-or-nothing model of justification”).

51. *Id.* at 17–19.

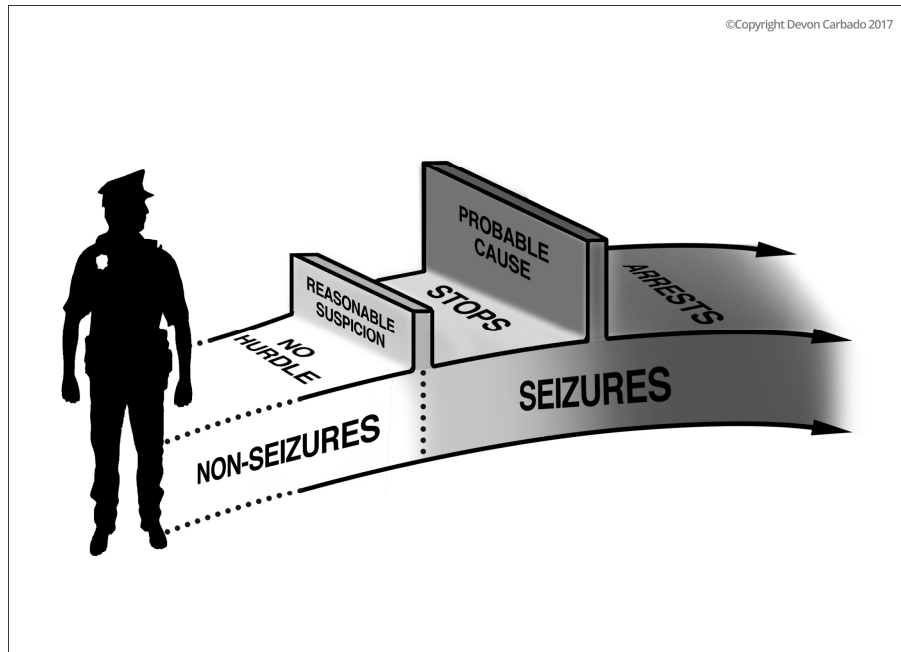
52. For a discussion of when the Fourth Amendment is triggered, *see* Carbado, *supra* note 10.

53. *Id.* at 144.

54. *Terry*, 392 U.S. at 17.

55. *Id.* at 23–27.

FIGURE 3.



Pay attention first to the border that separates non-seizures from seizures. Police conduct that rests on the non-seizure side of the line does not trigger the Fourth Amendment. Examples include following people, questioning people, asking people for identification, and seeking permission to search a person's clothing or personal belongings.⁵⁶ In *Terry*, Chief Justice Warren rejected the argument that stops should be added to that list.⁵⁷ When courts conclude that a police interaction is a non-seizure, the result is that police officers can engage in that conduct without having any evidence of wrongdoing.⁵⁸ That is why in Figure 3 “no hurdle” appears on the landscape above non-seizures: No Fourth Amendment hurdle stands in the way of police conduct that is not a seizure. Police officers can engage in that conduct with any justification or evidence of wrongdoing.

Now focus on the seizure side of the border. The key here is that there is another boundary, internal to seizures, that divides stops from arrests. The reason,

56. See Carbado, *supra* note 10, at 132, 133, 137.

57. *Terry*, 392 U.S. at 17–19.

58. See Carbado, *supra* note 10, at 134 (discussing the implication of cases in which the Court concludes that particular forms of police conduct are not seizures).

again, is that while stops and arrests are both seizures, they require different levels of justification to match their different levels of intrusiveness. This is why Figure 3 depicts a “reasonable suspicion” hurdle before the area marked as “stops” and the slightly higher hurdle, “probable cause,” before the area marked as “arrests.”

To remind you, Figure 3 is an illustration of where the *Terry* regime ultimately landed, not an account of what Justice Warren held. Put another way, Figure 3 captures what I have been calling the stop-and-question doctrine. In *Terry*, Chief Justice Warren expressly punted on the constitutionality of stop-and-question, noting that he was not ruling on “the constitutional propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.”⁵⁹

Turning now to frisks, a similar kind of gradualism applies. To appreciate the parameters of this gradualism, we might begin the way the Chief Justice did by rejecting the idea that frisks are not searches: “[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”⁶⁰ To put a finer point on it, Justice Warren added that “it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’”⁶¹ Indeed, according to the Chief Justice: “Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”⁶²

However, because, in the context of performing a frisk, police officers are not authorized to conduct a full search of the person by, for example, reaching into his pockets, police officers do not need to have probable cause to conduct frisks.⁶³ Chief Justice Warren had in mind a graduated approach to the Fourth Amendment: Some police activities are not searches, and therefore police officers need not have any evidence of wrongdoing to conduct them;⁶⁴ other police activities (call them “frisks”) are searches, but are limited in scope and therefore only require reasonable suspicion; and still other police activities are also searches (call them “full searches”), but because they are more intrusive in scope the government must have probable cause (and sometimes a warrant) prior to being allowed

59. *Terry*, 392 U.S. at 19 n.16.

60. *Id.* at 16.

61. *Id.* at 16–17 (quoting *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964)).

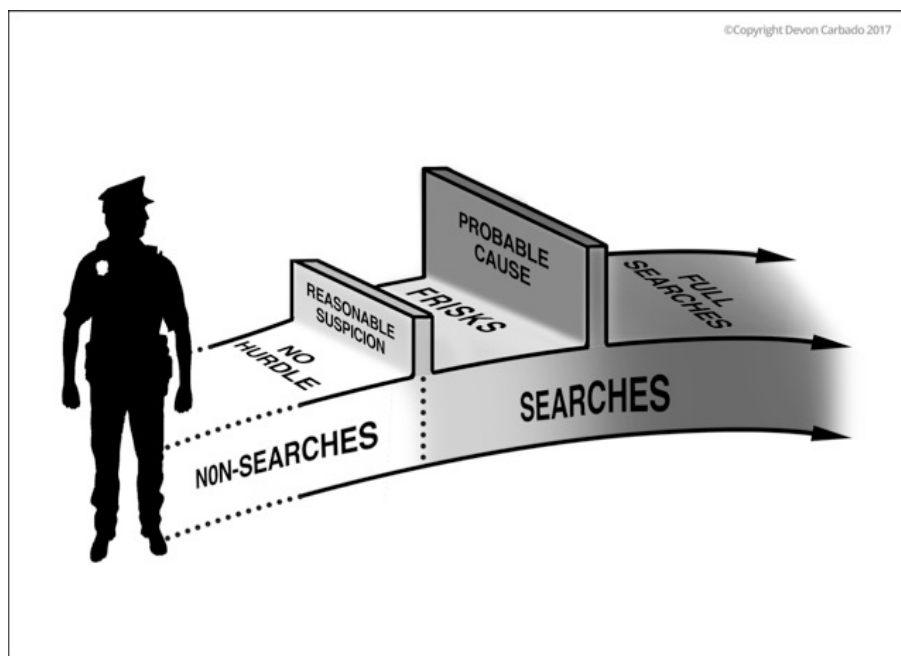
62. *Id.* at 24–25.

63. *Id.* at 25.

64. See Carbado, *supra* note 10, at 137–38 (discussing the Fourth Amendment search doctrine).

to conduct them.⁶⁵ Once again, note that as the level of intrusion increases—this time from non-search activities to full searches—so, too, does the level of requisite justification (from nothing to probable cause, and possibly a warrant). Here, too, a visual aid, Figure 4, might help.

FIGURE 4.



Pay attention first to the line that separates non-searches from searches. As with non-seizures, non-searches require no justification. That is why “no hurdle” appears on the landscape above non-searches. Under Fourth Amendment law, no Fourth Amendment hurdle stands in the way of police conduct that is not a search. Police officers can engage in that conduct with any justification or evidence of wrongdoing.

Now turn to the line, internal to searches, that separates frisks from full searches. Focus on the fact that while frisks only require reasonable suspicion, full searches will generally at least require probable cause. This is why Figure 3 depicts a “reasonable suspicion” hurdle before the area marked as “frisks” and the slightly higher hurdle, “probable cause,” before the area marked as “arrests.”

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

Finally, note that as we move from non-searches to full searches, the government's level of requisite justification increases from nothing, to reasonable suspicion, to probable cause.

Applying the Fourth Amendment gradualism I have described, Chief Justice Warren concluded in *Terry*:

[T]he proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.⁶⁶

Thus, the insertion of (something like) the reasonable suspicion standard into Fourth Amendment law.

Justice Warren made clear that, under the standard he articulated, police officers do not have to be “absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”⁶⁷ To satisfy this standard, police officers are required to set forth “specific and articulable facts.”⁶⁸ An “inchoate and unparticularized suspicion or ‘hunch’” will not do.⁶⁹ This language rejecting police action based on “hunches” and “inchoate unparticularized suspicion” might leave you with the impression that the reasonable suspicion standard meaningfully constrains police officers. As you will soon see, it does not.⁷⁰ Reasonable suspicion turned out to be somewhat strict in theory, but permissive in fact. For now, it is enough to understand that, from Justice Warren's perspective, probable cause was too high of a burden to impose on the government for the relatively low level of intrusion that stops and frisks occasion.

In introducing the reasonable suspicion doctrine into Supreme Court Fourth Amendment case law, Chief Justice Warren understood that race was a matter of concern. The NAACP Legal Defense Fund (LDF) had made sure of it. In its amicus brief, LDF was explicit in linking its investment in “the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes”

66. *Id.* at 27.

67. *Id.*

68. *Id.* at 21.

69. *Id.* at 27.

70. See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 981 (1998) (highlighting the ways in which lower courts, in particular, have interpreted the standard to require very little in the way in justification).

to “[t]he stop and frisk procedure which New York and Ohio ask this Court to legitimate.”⁷¹ According to LDF: “The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.”⁷² Stops and frisks, LDF argued, is precisely what “the ghetto does not need.”⁷³ In addition to the LDF’s amicus brief, Justice Brennan urged the Chief Justice to be mindful of the racial implications of the decision. Brennan worried that *Terry* would “aggravate the already white heat resentment of ghetto Negroes against the police.”⁷⁴

And keep in mind also the broader racial backdrop for the litigation. That, too, would have primed Chief Justice Warren to take up the question of race. The previously mentioned “race riots” were just part of a much larger civil rights context of the case. By the time of *Terry*, the term “Black Power” was in full circulation,⁷⁵ and the Black Panther Party had been founded and had begun to police the police.⁷⁶ As Paul Butler observes, when Black Panther Party members saw police officers harassing African Americans, “they would approach and watch with their guns drawn.”⁷⁷ Moreover, the march from Selma to Montgomery, or Bloody Sunday, during which Alabama state troopers brutally attacked unarmed civil rights demonstrators, was still fresh in the public imagination.⁷⁸ Additionally, coded appeals to whites about the criminality of blacks, or what Ian Haney López calls dog-whistle politics, were everywhere, particularly in candidate Richard Nixon’s run for the White House.⁷⁹ Meanwhile, protests against the Vietnam

71. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 3, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113672, at *3.

72. *Id.*

73. *Id.* at 62 (emphasis omitted).

74. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 826 (1998) (quoting Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren 2 (Mar. 14, 1968) (on file with the Library of Congress)).

75. See SEAN DENNIS CASHMAN, *AFRICAN-AMERICANS AND THE QUEST FOR CIVIL RIGHTS, 1900–1990*, at 198 (1991); *CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY* 598 (Albert P. Blaustein & Robert L. Zangrando eds., 1968); *THE ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA* 120 (David Bradley & Shelley Fisher Fishkin eds., 1998).

76. The Black Panther Party was founded in 1966. See CASHMAN, *supra* note 75, at 201; *ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA*, *supra* note 75, at 118.

77. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 87 (2017).

78. Bloody Sunday occurred on March 7, 1965, and the Selma-to-Montgomery march was finally completed on the marchers’ third attempt on March 21, 1965. See CASHMAN, *supra* note 75, at 189–90; *ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA*, *supra* note 75, at 792–93; see also Richard H. King, *How Long? Not Long: Selma, Martin Luther King and Civil Rights Narratives*, 49 *PATTERNS PREJUDICE* 467 (2015).

79. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND THE WRECKED MIDDLE CLASS* (2014).

war had intensified,⁸⁰ and President John F. Kennedy, Malcolm X, the Reverend Martin Luther King, Jr. and Senator Robert F. Kennedy had all been assassinated.⁸¹ Finally, there was an emerging political debate about the Supreme Court itself. Support for the criticism of the Warren Court that, with respect to civil rights—and particularly issues of criminal justice—it had gone too far too soon, was reaching an all-time high.⁸² Earl C. Dudley, who was a law clerk to Chief Justice Warren when *Terry* came before the Court, described the racial and political backdrop for the case this way:

In 1960, the Civil Rights movement, which had largely received support and encouragement from the Supreme Court, but had relatively little to show for it, took its case from the courthouses to the streets. While bus boycotts, and rallies and demonstrations in support of lunch-counter sit-ins and of voting rights for black citizens effectively dramatized the continuing scourge of racism, they also created a backlash even among those sympathetic to the underlying cause. At the same time, despite legislative victories such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, frustration at the slow rate of progress boiled over into riots in urban ghettos from Newark to Detroit to Los Angeles. It was the decade of the long, hot summers. When opponents of the Vietnam War also took to the streets beginning in about 1967, political tension and violence escalated even further. Only two months before *Terry* was handed down, there was a major outbreak of rioting in many cities, including Washington, D.C., in the wake of the assassination of Dr. Martin Luther King, Jr.⁸³

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80. See DANIEL S. LUCKS, *SELMA TO SAIGON: THE CIVIL RIGHTS MOVEMENT AND THE VIETNAM WAR* 102–03 (2014).
81. President John F. Kennedy was assassinated on November 22, 1963. See *ENCYCLOPEDIA OF THE COLD WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 708 (Spencer C. Tucker et al. eds., 2007). Malcolm X was assassinated on February 21, 1965. See CASHMAN, *supra* note 75, at 176; *ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA*, *supra* note 75, at 560. Martin Luther King, Jr. was assassinated on April 4, 1968. See CASHMAN, *supra* note 75, at 210; *ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA*, *supra* note 75, at 505; see also ROBERT COOK, *SWEET LAND OF LIBERTY?: THE AFRICAN-AMERICAN STRUGGLE FOR CIVIL RIGHTS IN THE TWENTIETH CENTURY* 212–13 (1998). Senator Robert F. Kennedy was assassinated on June 5, 1968. See *ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES* 580 (Otis H. Stephens, Jr. et al. eds., 2006).
82. See Fred Rodell, *The 'Warren Court' Stands Its Ground*, N.Y. TIMES, Sept. 27, 1964, § 6; Jeff Broadwater, *Taking Its Toll: Partisan Judging and Judicial Review*, 4 J. APP. PRAC. & PROCESS 41 (2002); Chris Schmidt, *The Forgotten Backlash Against the Warren Court*, IIT CHICAGO-KENT COLLEGE L.: SCOTUSNOW (Dec. 30, 2014), <http://blogs.kentlaw.iit.edu/iscotus/forgotten-backlash-warren-court> [<https://perma.cc/FAY4-W9MQ>].
83. 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, 892 (1998).

The social upheaval and the protests that were taking place across the United States in the 1960s, and the salience of race in the litigation itself including via LDF's brief, amounted to more than an elephant in the room. Chief Justice Warren presumably knew that he had to say something about race.

And he did. On the one hand, the Chief Justice acknowledged that the aggressive utilization of stops and frisks in African American communities had exacerbated tensions between African Americans and the police.⁸⁴ On the other hand, he suggested that there was little that a case like *Terry v. Ohio* could do to solve that problem. His thinking was that, like in almost all Fourth Amendment litigation, at the heart of *Terry* was a question about the admissibility of evidence: Should the evidence (in *Terry*, a gun) that the officer found on the defendant during a frisk be admitted into evidence?⁸⁵ Justice Warren argued that suppressing the evidence was unlikely to remedy the tensions between African Americans and the police because those tensions derived largely from unruly and illegitimate policing in African American communities. In the Chief Justice's own words: "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."⁸⁶

Justice Warren's point was that litigation over the Fourth Amendment is, to a large extent, litigation over the exclusion of evidence.⁸⁷ The standard case involves a defendant on whose person or premises the government finds incriminating evidence. The defendant, prior to trial and in the context of a suppression hearing, will move to exclude that evidence.⁸⁸ Specifically, the defendant will invoke the so-called exclusionary rule, a rule that permits defendants to suppress evidence that the police have obtained by violating the Fourth Amendment or some other constitutional provision.⁸⁹ The government, meanwhile, will argue that there was no constitutional violation and that the evidence should be admitted.

For several decades now, the dominant rationale for the exclusionary rule has been that it deters unconstitutional police behavior.⁹⁰ The theory is that if

84. *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1967).

85. *Id.* at 12.

86. *Id.* at 14–15 (footnote omitted).

87. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012) (suggesting that courts give content to our Fourth Amendment rights in the context of cases in which defendants are seeking to suppress evidence).

88. *Terry*, 392 U.S. at 7–8 (discussing the defendant's motion to suppress the gun the officer found upon conducting a frisk).

89. *Id.* at 12–15 (describing the genesis and rationales for the exclusionary rule).

90. For an early articulation of the exclusionary rule, see *Boyd v. United States*, 116 U.S. 616 (1886). Initial justifications for the exclusionary rule sounded in the language of judicial integrity, the idea being that courts should not sanction the illegal conduct of police officers. See *Weeks v. United*

police officers know that evidence they acquire by violating a person's constitutional rights will be inadmissible at trial, they are more likely to comply with the commands of the Constitution, including the Fourth Amendment's prohibition against unreasonable searches and seizures.⁹¹ Police officers who disregard the Constitution run the risk that they will lose their case against a defendant because a judge will exclude relevant and potentially compelling evidence of criminal wrongdoing.⁹² As the Supreme Court has explained, "the only effectively available way" to ensure that police officers respect the Constitution is to eliminate "the incentive to disregard it."⁹³ Excluding illegally obtained evidence potentially eliminates that incentive.

But not all forms of policing involve police officers who are interested in evidence or in seeing a case through to prosecution. For Chief Justice Warren, police racial harassment was a case in point. Justice Warren argued that because police officers who harass African Americans are not motivated by a desire to secure evidence, the exclusionary rule will not deter their conduct. To put the point the way Justice Warren did, the exclusionary rule is "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."⁹⁴ According to the Chief Justice, "some other goal"—and not the acquisition of evidence—is precisely what police officers have in mind when they racially target African Americans. That is why he concluded that "[t]he wholesale harassment by certain elements of the police community . . . will not be stopped by the exclusion of any evidence from any criminal trial."⁹⁵

Chief Justice Warren was entirely correct to observe that the exclusionary rule is ill-equipped to deter police conduct aimed at non-evidentiary purposes. He was wrong, however, to assume that racial harassment necessarily, or even presumptively, falls into that category. In the 1960s, police officers presumably harassed African Americans for multiple reasons, including the pursuit of evidence of criminal wrongdoing. Longstanding associations between African Americans and crime, which were expressly and openly articulated during that period, would have made it supposedly rational for police officers to repeatedly

States, 232 U.S. 383, 393 (1914); *see also* *Elkins v. United States*, 364 U.S. 206, 222–23 (1960), *cited in* *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). Subsequently, the Court would rest the justification for the rule more squarely on arguments about deterrence. *See* Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821 (2013).

91. *Terry*, 392 U.S. at 12.

92. *Id.*

93. *Elkins*, 364 U.S. at 217.

94. *Terry*, 392 U.S. at 14.

95. *Id.* (footnote omitted).

stop and question (that is, harass) African Americans as an evidence-gathering technique.⁹⁶

To be fair, Chief Justice Warren never explicitly stated that an officer's interest in racial harassment is always in tension with the officer's interest in gathering evidence. Furthermore, he made clear that police interactions can take various forms. Still, Justice Warren's "wholesale harassment" argument lacked nuance. For the most part, his analysis posited a narrow view of racially harassing policing: rogue forms of police interactions in which evidence-gathering and criminal prosecution are not motivating factors. He was wrong to conceptualize racial harassment in this way.

Justice Warren was also wrong to believe that remedies other than the exclusionary rule would sufficiently address concerns about race and policing.⁹⁷ According to Justice Warren: "Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."⁹⁸ It is not at all clear what other remedies or constitutional constraints Justice Warren had in mind. His opinion never says.

Finally, Justice Warren was wrong to frame the question of whether the Fourth Amendment can do anything about the "wholesale harassment" of African Americans by the police almost entirely with reference to the exclusionary rule. Recall that Justice Warren's view was that the exclusionary rule can do little to solve racial harassment because police officers who practice racial harassment are not interested in gathering evidence. But the question for Justice Warren should not have been whether the exclusionary rule can deter racial harassment, but rather whether a reasonable suspicion standard would encourage it. Which is to say, rather than throwing his hands in the air through an argument

96. For an argument about the systematic ways in which crime and notions of criminality were written into blackness, see KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA* (2010). Importantly, at least one of the amicus briefs in *Terry* expressly argued that the reason police officers disproportionately target blacks is because blacks commit more crimes than whites. Brief of Americans for Effective Law Enforcement, *supra* note 49, at 14. On the notion of "rational racism" or "rational discrimination," see generally JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997), and David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

97. See *Terry*, 392 U.S. at 15; David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 371-74 (2001).

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

about the limitations of the exclusionary rule, Justice Warren should have used them to pen an opinion that more robustly explored the racial consequences of permitting police officers to search and seize people without having probable cause.

We know that Justice Warren's initial instinct in *Terry* was to hold the probable cause line.⁹⁹ That he did not ultimately do so has facilitated not only racially targeted policing motivated by a desire to gather evidence—the kind of policing Justice Warren seemed not to have contemplated—but also racially targeted policing directed at the “wholesale harassment” of African Americans, the kind of policing that was unequivocally on his mind. It was one thing for Justice Warren to note that the exclusionary rule cannot stop the “wholesale harassment” of African Americans. It was quite another for him to put in place a legal regime that effectively provided police officers with a constitutional mechanism to engage in that very practice.

At this point, it bears repeating that my criticism of Justice Warren is not just that he ruled that police officers may use reasonable suspicion to stop-and-frisk people when officers are concerned about their safety or the safety of others. The problem is also that the Chief Justice did not prohibit police officers from using reasonable suspicion to stop-and-question people when officers have no concerns about their safety or the safety of others. Scholars have paid virtually no attention to this dimension of Justice Warren's analysis, although a recent article by Jeff Fagan comes close to the point I want to stress here. According to Fagan:

Terry's original sin took two forms. First the majority created the reasonable suspicion standard that allowed subjective assessments of suspects' behavior to substitute for the more demanding standard of probable cause. This was done, as discussed earlier, in the interest of protecting officers from harm. The *Terry* Court declined to articulate clear standards of suspicion, defaulting to the professional “experience” and judgment of the officer. The second sinful act was the doctrinal shift over time from the original officer safety rationale to permitting reasonable suspicion stops in the interest of crime control.¹⁰⁰

I entirely agree with Fagan's assessment. The specific critique I am adding here is that the juridical possibility for “the doctrinal shift over time” that Fagan laments was planted, in large part, by what the Chief Justice knowingly and intentionally did not do in *Terry*: close the door on stop-and-question by declaring the practice inconsistent with the Fourth Amendment. It is hard to imagine that Justice Warren failed to appreciate the import of this omission. State legislators

99. See Dudley, *supra* note 83, at 893–94.

100. Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43, 56 (2016) (footnote omitted).

around the country,¹⁰¹ including in New York,¹⁰² had expressly authorized stop-and-question on the view that the practice (separate and apart from frisks) was a critical law enforcement tool. Moreover, in his *Terry* concurrence, Justice Harlan was already re-articulating Justice Warren's opinion to authorize precisely what Justice Warren had ostensibly left open: the constitutionality of stop-and-question.¹⁰³

Finally, notwithstanding Justice Warren's claims to the contrary, parts of his opinion spoke to the constitutionality of stop-and-question. One salient example of this doctrinal mix-messaging appears in Justice Warren's balancing analysis. He wrote:

One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that 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 arrest.¹⁰⁴

This language seems to support the idea that police officers may stop-and-question a person when they have reasonable suspicion to believe that the person has committed or will commit a crime—full stop. Nothing in the above quote links reasonable suspicion to a concern about officer safety or the safety of others.

But, as I have already said and want to repeat, Justice Warren disavowed that he was ruling on stop-and-question. Recall the relevant quote: “We . . . decide nothing today concerning the constitutional propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.”¹⁰⁵ In this respect, we might say that *Terry* reflects the juridical embodiment of two

101. For a list of states that had stop-and-question statutes in 1967, see Brief of American Civil Liberties Union, Amici Curiae at 8 n.6, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113689, at *8 n.6, which lists New Hampshire, Rhode Island, Delaware, Hawaii, Massachusetts, and the city of Miami, Florida. Also see the Uniform Arrest Act, printed in Sam Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–47 (1942), which authorized police officers to detain and question suspects on less than probable cause. For a current list of states with stop-and-frisk statutes, see *Stop and Frisk in Other Cities*, ACLU ILL, <http://www.aclu-il.org/stop-and-frisk-in-other-cities> [<https://perma.cc/PU3X-L5H3>], and Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397 (2017).

102. See N.Y. CRIM. PROC. LAW § 180-a (1966) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney Supp. 2017)).

103. Justice Harlan reasoned that stop in the case was constitutional “only because” the officer had a legitimate reason to engage the defendant “in an effort to prevent or investigate a crime.” *Terry*, 392 U.S. at 34 (Harlan, J., concurring). The caveat here is that one could argue that Justice Harlan's language about investigating a crime should not be disaggregated from the particular crime at issue in *Terry*, one for which the officer (according to Justice Warren and Justice Harlan) had grounds to fear for his safety.

104. *Id.* at 22 (majority opinion).

105. *Id.* at 19 n.16.

Justice Warrens, one firmly committed to constitutionalizing stop-and-frisk; the other committed to preserving the possibility that stop-and-question would subsequently be woven into the constitutional fabric of Fourth Amendment law.

The thrust of my argument is that the writing was on the wall (by Justice Warren himself!) that Fourth Amendment doctrine would develop to embrace and legitimize, rather than repudiate and constrain, the already ubiquitous and openly deployed practice of stop-and-question. It should thus be no surprise that stop-and-question soon became a core component of Fourth Amendment law. With virtually no fuss or fanfare, later cases would hold that, absent any concern for safety, police officers armed with reasonable suspicion may stop-and-question people to detect or prevent criminal wrongdoing.¹⁰⁶

Significantly, Justice Warren's ability to constitutionally constrain stop-and-question transcended *Terry*. On the same day in 1968, the Supreme Court decided *Sibron v. New York*,¹⁰⁷ in which the defendant claimed that New York's stop-and-frisk statute was facially unconstitutional. Under that statute:

A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.¹⁰⁸

Consistent with the defendant's argument, this language appears to authorize stop-and-question even when an officer is not concerned about her or anyone else's safety. Justice Harlan, concurring, agreed.¹⁰⁹ According to Justice Harlan: "The core of the New York statute is the permission to stop any person reasonably suspected of crime."¹¹⁰ Moreover, from Justice Harlan's perspective, the statute was thoroughly consistent with *Terry*: "Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional."¹¹¹

For the Chief Justice, the statute's facial invalidity was far from clear. In particular, it was not at all obvious to Justice Warren that "stops" in the statute

106. See Fagan, *supra* note 100, at 57–67 (discussing the doctrinal development); see also Carbado & Harris, *supra* note 12, at 1568–78 (discussing the extension of *Terry* to the immigration enforcement context).

107. 392 U.S. 40 (1968).

108. *Id.* at 43 (quoting N.Y. CRIM. PROC. LAW § 180-a (McKinney Supp. 1966) (currently codified at N.Y. CRIM. PROC. LAW § 140.15 (McKinney 2004))).

109. See *id.* at 70 (Harlan, J., concurring).

110. *Id.* at 71.

111. *Id.*

meant “seizures” in the Fourth Amendment sense.¹¹² That uncertainty, among others, persuaded Justice Warren that the Court should not weigh in on whether, on its face, New York’s stop-and-frisk legislation passed constitutional muster.¹¹³

I should make clear that my critique of *Sibron* is less that the Chief Justice should have determined the constitutionality of the New York statute and more that he should have articulated a position on the constitutionality of stop-and-question. The *Sibron* litigation, and certainly Justice Harlan’s concurrence, provided *additional* notice that absent judicial intervention, stop-and-question—not just stop-and-frisk—would likely become a constitutional feature of Fourth Amendment law, further eroding the probable cause baseline on which the bulk of that law had been built.

Justice Warren’s failure to close the stop-and-question door and his retreat from probable cause is all the more troubling because it came at precisely the moment when the Supreme Court was beginning to play a more critical role in regulating state and local police practices. Only seven years prior to *Terry*, in *Mapp v. Ohio*,¹¹⁴ the Supreme Court had departed from precedent¹¹⁵ to rule that defendants may invoke the exclusionary rule in state court proceedings involving cases in which local or state police officers had violated a defendant’s Fourth Amendment rights.¹¹⁶ Prior to *Mapp*, local and state police officers could violate a person’s Fourth Amendment rights, obtain incriminating evidence, and employ that evidence against the person in a state court proceeding. Although the evidence was clearly the “fruit of the poisonous tree,”¹¹⁷ the exclusionary rule did not apply. *Mapp* ended that absurdity.

Roughly a year before *Terry*, the Court ended another absurdity in an iconic, if controversial, case—*Miranda v. Arizona*.¹¹⁸ In *Miranda*, the Court held that police officers may not subject a person to custodial interrogation without first informing him of his rights, including his right to remain silent and his right to an attorney.¹¹⁹ The Court ruled that these *Miranda* warnings were necessary to

112. *Id.* at 60 n.20 (majority opinion).

113. *Id.* (raising questions about whether the scope of police authority under the statute, including questions about the length of detention the statute permitted, the scope of questioning, and the circumstances under which probable cause might apply).

114. 367 U.S. 643 (1961).

115. *See* *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding that the exclusionary rule does not apply to “prosecution[s] in a State court for a State crime”).

116. *Mapp*, 367 U.S. at 654.

117. This is the standard language the Court employs as a predicate to exclude evidence. *See, e.g.,* *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

118. 384 U.S. 436 (1966).

119. *Id.* at 444.

mitigate the coercion that inheres in custodial interrogations, and to prevent police officers from pressuring people into offering self-incriminating statements.¹²⁰

Yet, only one year after *Miranda* and a few years after *Mapp*, Chief Justice Warren swung the pendulum back in the direction of police power in *Terry*. The reasonable suspicion path he laid down, and the one he did not pull up, left the question of whether police officers would use stops-and-frisks to systematically target African Americans¹²¹ and to engage in the “wholesale harassment” of black communities almost entirely a matter of police discretion. This might sound like hyperbole. Part III explains why it is not. There, I describe the relatively broad discretion police officers have to employ stops and frisks to racially target African Americans.

III. STOPS AND FRISKS AND THE “WHOLESALE HARASSMENT” OF AFRICAN AMERICAN COMMUNITIES

*Terry v. Ohio*¹²² facilitates the “wholesale harassment” of African Americans through what I call “prophylactic racial profiling.” A prophylactic, of course, is a safeguard one puts in place to avert some unwanted outcome. For example, *Miranda* warnings are a prophylactic against coerced confessions.¹²³ At least in theory, when police officers inform suspects of their *Miranda* rights, they mitigate the coercive nature of custodial interrogations. Similarly, prophylactic racial profiling is also supposed to function as a safeguard. The practice entails police officers aggressively targeting African Americans, not necessarily because the officers think that those targeted will, in the moment of the encounter, have evidence of criminality, but rather to create a disincentive for African Americans to possess weapons or otherwise engage in criminality. If African Americans know, for example, that they are likely to be stopped and frisked every time they traverse the streets of New York, they may be less likely to engage in criminal activity when they are out in public.

Evidence exists that the NYPD has employed stop-and-frisk practices to engage in prophylactic racial profiling.¹²⁴ For example, the plaintiffs’ expert in

120. *Id.* at 460–61.

121. Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105 (2003); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

122. 392 U.S. 1 (1967).

123. *Miranda*, 384 U.S. 436 (describing the warnings as a prophylactic against compelled self-incrimination).

124. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661–62 (S.D.N.Y. 2013). For an excellent discussion of the Floyd litigation, see Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of*

the recent case of *Floyd v. City of New York*,¹²⁵ Dr. Jeffrey Fagan, examined UF-250 forms, also known as the “Stop, Question and Frisk Report Worksheet,” which police officers in New York are required to complete after each *Terry* stop.¹²⁶ His analysis uncovered the following:

- The number of stops made by the NYPD per year significantly increased from 314,000 in 2004 to a high of 686,000 in 2011.
- Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.
- Only 12 percent of the 4.4 million stops culminated in an arrest or a summons. 88 percent of the people stopped suffered no additional law enforcement sanction or formal prosecution.
- Blacks and Latinos were the subjects of 83 percent of the 4.4 million stops; whites were the subjects of 10 percent of stops.
- New York City is roughly 23 percent black, 29 percent Latino, and 33 percent white.
- The NYPD frisked 52 percent of the people they stopped.
- Police found weapons on 1.0 percent of the blacks they frisked, on 1.1 percent of Latinos, and on 1.4 percent of whites.
- To put those numbers another way, the NYPD did not find weapons on 98.5 percent of the roughly 2.3 million people they frisked.
- The NYPD conducted a full search (meaning, they reached into the clothing) of 8 percent of the people they stopped. Their justification for doing so was that while conducting the frisk, they felt a weapon.
- In only 9 percent of cases involving a full search did the NYPD find a weapon. Ninety-one percent of the time the person searched was unarmed.
- The racial demographics of an area or precinct policed by the NYPD predicted the rate of stops even when controlling for the crime rate.

Criminals, Race and the Meaning of Terry v. Ohio: A Content Analysis of Floyd v. City of New York, 15 RUTGERS RACE & L. REV. 65, 156 (2014).

125. 959 F. Supp. 2d 540.

126. *Id.* at 573.

- Further, less than 10 percent of the stops resulted in an arrest or the finding of weapons or other contraband.¹²⁷

At the very least, the above statistics raise the question of whether the NYPD was employing stops and frisks programmatically to target blacks and Latinos.¹²⁸

In addition to those statistics, then-Mayor Michael Bloomberg expressly justified the NYPD's utilization of stop-and-frisk practices as a programmatic prophylactic strategy.¹²⁹ According to Bloomberg: "By making [a gun] 'too hot to carry,' the NYPD is preventing guns from being carried on our streets."¹³⁰ He added that "our real goal [is] preventing violence before it occurs, not responding to the victims after the fact."¹³¹ Particularly telling is a meeting about which New York Senator Eric Adams testified in the *Floyd* litigation, and in which then-New York City Police Commissioner Kelly expressly endorsed the use of stops and frisks to target African Americans and Latinos. The judge in *Floyd* described that meeting this way:

Senator Adams, a former NYPD captain, testified about a small meeting he attended at the Governor's office in Manhattan in July 2010. Former New York Governor David Paterson, Senator Adams, another state senator, a state assemblyman, and Commissioner Kelly were all present to discuss a bill related to stop and frisk. Senator Adams raised his concern that a disproportionate number of blacks and Hispanics were being targeted for stops. Commissioner Kelly responded that he focused on young blacks and Hispanics "because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police." Senator Adams testified that he was "amazed" that

127. *Id.* at 558–60, 574, 583–84; see also CTR. FOR CONSTITUTIONAL RIGHTS, STOP-AND-FRISK: FAGAN REPORT SUMMARY, (2010), <https://ccrjustice.org/sites/default/files/assets/Fagan%20Report%20Summary%20Final.pdf> [<https://perma.cc/858M-WR63>]; *Stop and Frisk in Other Cities*, *supra* note 101.

128. The literature criticizing the programmatic nature of contemporary usage of stop and-frisk is growing. See, e.g., Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286–87 (2016); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2016); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of A Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 865–68 (2014). For a particularly interesting argument linking the programmatic use of stop-and-frisk to the redeployment of colonial power, see Frank Rudy Cooper, *Colonization by Programmatic Stop and Frisk*, 22 MICH. J. RACE & L. (forthcoming 2018).

129. Kate Taylor, *Stop-and-Frisk Policy 'Saves Lives,' Mayor Tells Black Congregation*, N.Y. TIMES, June 11, 2012, at A14.

130. *Id.*

131. *Id.*

Commissioner Kelly was “comfortable enough to say that in the setting.”¹³²

Quite apart from that meeting, evidence in the litigation revealed that during roll call police officers were sometimes expressly instructed to employ stops and frisks, as well as the threat of arrest, as mechanisms to control New York City neighborhoods. As one prescient supervisor put it, “You’re working in Bed-Stuy where everyone’s got a warrant.”¹³³ “If they’re on a corner, make them move. They don’t want to move, you lock them up. Done deal.”¹³⁴ Moreover, mid-level managers reported that they felt pressured to encourage the use of stops and frisks, and performance evaluations in the department were tied to the number of stops and frisks police officers conducted.¹³⁵ The short of it is that, across the NYPD, police officers routinely employed stops and frisks as an order-maintenance strategy and a prophylactic device to deter blacks from carrying weapons or otherwise engaging in criminal conduct.

This brings us back to *Terry*. Contrary to Justice Warren’s view, order-maintenance and prophylactic policing do not require police officers to forego their interest in obtaining evidence. Recall that part of Justice Warren’s argument about race in *Terry* was that there is little the Fourth Amendment can do about police officers who engage in the “wholesale harassment” of minority communities because those officers are not motivated by law enforcement interests, including the gathering of evidence for purposes of prosecution. But as my discussion of the practices of the NYPD above reveals, the “wholesale harassment” and systematic targeting of African Americans by that department was very much motivated by a law enforcement interest: deterring African Americans from possessing weapons or other evidence of wrongdoing. And, when police officers pursue this interest, they do not have to give up their interest in criminal prosecution. This is because even when a police officer discovers evidence of wrongdoing while engaging in prophylactic racial profiling, the government will often still be able to use that evidence at trial. The officer would simply need to conceal his racial motivation for stopping and frisking the person and invoke non-racial reasons for the intrusion. Remember: the officer’s reasons for the stop and the frisk need only satisfy the reasonable suspicion standard. They do not have to meet the requirements of probable cause. The weakness of the reasonable suspicion standard will make it relatively easy for the officer to justify his decision

132. *Floyd*, 959 F. Supp. 2d at 606.

133. *Id.* at 597.

134. *Id.* at 598.

135. *Id.* at 590, 592.

after the fact.¹³⁶ Think about the matter this way: The lower the standard for justifying a search or seizure, the less persuasive police officers need to be about why they conducted a particular search or seizure. The reasonable suspicion standard allows police officers to justify their behavior by saying very little about the basis for their decision to stop or frisk, and courts largely defer to what they say.¹³⁷ This weakness in the standard makes it easy for police officers to employ racial suspicion as an investigatory tool or programmatic policing without having to admit that they are doing so. While police officers are not permitted to say that they stopped a suspect because he is black, or that they systematically target a group of people because they are black, *Terry's* low evidentiary bar enables them to engage in both practices without admitting it.

And let's not forget that even when an officer does not intentionally act on his racial suspicions, the possibility exists that he might do so unintentionally.¹³⁸ As Song Richardson observes, *Terry's* suggestion that an officer may not detain a person on the basis of a "hunch" is unrealistic against the background of implicit biases, or what she re-articulates in the *Terry* context as "racial hunches," of African Americans as criminally suspect and dangerous.¹³⁹ Here, the problem is not that reasonable suspicion's low evidentiary hurdle enables the officer to conceal racial biases he consciously holds and acts on, but rather that this low bar enables the officer to act on racial biases he does not know he has.

To appreciate the weakness of the reasonable suspicion standard, imagine Tanya, an African American woman who lives in a predominantly black part of Los Angeles. She has had lots of negative interactions with the police. She is not alone in that respect. Her siblings, friends, relatives, and neighbors regularly discuss among themselves their frustrations with being repeatedly stopped and questioned by the police. One afternoon, Tanya observes a police car driving slowly down a road a few blocks from her house. She decides that she is not up to another encounter in which she has to justify her presence in her own neighborhood. She does not want to have another encounter in which the police will effectively force her to compromise her rights (by answering their questions and/or consenting to a search) to prove that she is innocent. Tanya thus decides

136. See *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990) ("[T]he 'reasonable suspicion' threshold from *Terry* is low. . . ."), quoted in LAFAVE, *supra* note 3, § 9.5(d).

137. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (relying on the officer's past narcotics experience to conclude that his search was reasonable).

138. For a discussion of the relevance of various literatures in social cognition to policing, see generally, Carbado & Rock, *supra* note 10. Also see L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012).

139. L. Song, Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks 9* (unpublished manuscript) (on file with author).

to avoid the encounter altogether, graduating her fast-paced walk to a run. The police, who observe Tanya running, exit their car and chase after her. Assume that prior to seeing Tanya run, the officers have no reason to believe that Tanya has done anything wrong.

Tanya is in law enforcement trouble. More than two decades ago, David Harris noted: “A substantial body of law now allows police officers to stop an individual based on just two factors: presence in an area of high crime activity, and evasive behavior.”¹⁴⁰ In 2000, the Supreme Court, in *Illinois v. Wardlow*,¹⁴¹ came close to adopting this “right of locomotion” rationale.¹⁴² At least in part, the Court drew on a logic about evasion and criminality that Justice Scalia had expressed in an earlier case by noting that “the wicked flee when no man pursueth.”¹⁴³ According to the *Wardlow* Court: “Our cases have . . . recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion. . . .”¹⁴⁴ The Court went on to note that the fact that a person’s flight takes place in a “high crime area” is “among the relevant contextual considerations in a *Terry* analysis.”¹⁴⁵

To be sure, the *Wardlow* Court never expressly stated that unprovoked flight in a high crime area gives rise to reasonable suspicion. But, that proposition is a sensible way to read the opinion, given that the Court: (1) stressed that “it was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight;”¹⁴⁶ and (2) ultimately concluded that the officers were “justified in suspecting that Wardlow was involved in criminal activity.”¹⁴⁷ As Andrew Ferguson notes, *Wardlow* is a case in which reasonable suspicion was “based on the ‘totality of circumstances’ of only two factors—a high-crime area plus an unprovoked flight from police.”¹⁴⁸

140. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994).

141. 528 U.S. 119 (2000).

142. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990), quoted in Harris, *supra* note 140, at 663.

143. *Proverbs* 28:1, quoted in *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991).

144. *Wardlow*, 528 U.S. at 124 (citations omitted).

145. *Id.*; see also Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 254 (2010) (“The police have more power in high-crime neighborhoods than in low-crime neighborhoods.”); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999).

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

147. *Id.* at 125.

148. Andrew Guthrie Ferguson, *Crime-Mapping and the Fourth Amendment: Redrawing “High-Crime Areas”*, 63 HASTINGS L.J. 179, 183 (2011). One could argue that the Court’s analysis also included

It is worth saying more about the “high crime area” factor, which seems to function as “magic words” with respect to judicial findings of reasonable suspicion.¹⁴⁹ As Ninth Circuit Judge Alex Kozinski put it:

Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop’s repertoire of war stories to determine what is a “high-crime area”—and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion—strikes me as an invitation to trouble. If the testimony of two officers that they made, at most, 32 arrests during the course of a decade is sufficient to turn the road here into a high crime area, then what area under police surveillance *wouldn’t* qualify as one? There are street corners in our inner cities that see as much crime within a month—even a week. I would be most reluctant to give police the power to turn any area into a high crime area based on their unadorned personal experiences.¹⁵⁰

Part of Kozinski’s message is that once the designation of an area as a “high crime area” can function as a basis for suspicion—as a matter of law—it creates an incentive for police officers to invoke that factor to justify their decisions to stop, question, and even frisk people. Recall my discussion above of the UF-250 form that the NYPD used to record their stops and frisks. According to data from the forms, “High Crime Area” was used as a basis for stops 55 percent of the time.¹⁵¹

One might say that it is not at all clear how this Article’s discussion about “high crime” areas bears on the scenario in which Tanya finds herself. After all, the hypothetical does not have her in a “high crime area” (which, as discussed, can be a basis for reasonable suspicion). The hypothetical stipulated that Tanya was in a predominantly black neighborhood, a factor on which courts do not expressly rely in their reasonable suspicion analyses. But, as a practical matter, the difference is arguably semantic. As several scholars have noted, there is no clear defini-

the fact that the defendant was holding an opaque bag, as well as the officers’ sense of the neighborhood vis-à-vis drug distribution.

149. Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590 (2008).

150. *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring) (citation omitted).

151. Report of Plaintiffs’ Expert Dr. Jeffrey Fagan at 17 & tbl. 11, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 12 Civ. 2274), 2012 WL 8282311, at *17.

tion of what constitutes a “high crime area,”¹⁵² and one has even suggested that *Wardlow*’s use of “high crime neighborhood” was “code for poor Black ghetto.”¹⁵³ At the very least, one may reasonably wonder whether, in both lower court cases and in Supreme Court opinions, the phrase “high crime area” is a way of not expressly referring to, but still implying, predominantly black neighborhoods.¹⁵⁴

That running in a high crime area effectively gives rise to reasonable suspicion can also render Tanya vulnerable to arrest. In states with stop-and-identify statutes, if officers have reasonable suspicion to believe that Tanya has engaged in criminal wrongdoing, they may insist that Tanya provide her name.¹⁵⁵ Her failure to do so would give the officers probable cause to arrest her for failing to comply.

To summarize Tanya’s overall predicament: At the outset of the hypothetical, she is technically “free to leave” or “terminate the encounter”¹⁵⁶ because the police officers have no reason to believe that she has done anything wrong. If Tanya chooses to exercise that right by running and she is running in a “high crime neighborhood,” those two facts could potentially give rise to reasonable suspicion.¹⁵⁷ The existence of reasonable suspicion would permit the officers to seize Tanya lawfully. If, in the context of that seizure, Tanya does not provide her name, and Tanya is in a jurisdiction with a stop-and-identify statute, the officers may arrest her.

One might think that the scenario is not as dire as the hypothetical suggests. After all, Tanya’s options are not limited to running away or remaining in place. There is a third way: Tanya could avoid the police by walking. Doing so would not be considered evasive behavior.

152. See, e.g., Ferguson & Bernache, *supra* note 149, at 1590–91 (discussing the failure of courts to offer guidance on what constitutes a “high crime area”).

153. See Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER RACE & JUST. 47, 67 (2012) (suggesting that *Wardlow*’s use of “high crime neighborhood” is code for poor Black ghetto”); see also Tovah Renee Calderón, *Race-Based Policing From Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 93–101 (2000) (noting how “when officers claim they are patrolling a ‘high crime area’ they are often speaking in ‘code’ about a poor, black urban neighborhood,” and further suggesting how *Wardlow* substantiates this “code”).

154. See Butler *supra* note 145, at 250–52; I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); Ferguson & Bernache, *supra* note 149, at 1609; Ferguson, *supra* note 148; Raymond, *supra* note 145.

155. For a list of the twenty-four states that have enacted “stop-and-identify” statutes by 2012, see Patricia Haines, *Your Papers, Please: Police Authority to Request Identification From a Passenger During a Traffic Stop in Alaska*, 29 ALASKA L. REV. 261, 269 n.78 (2012).

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

157. *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

Assume that, upon observing the officers, Tanya does indeed walk away. The officers could lawfully follow Tanya, because the act of following a person is neither a search nor a seizure and therefore does not trigger the Fourth Amendment.¹⁵⁸ The officers could also question Tanya as they followed her, because the act of questioning a person is neither a search nor a seizure and therefore does not require any Fourth Amendment justification.¹⁵⁹ Technically, Tanya is “free to leave.” But how can she exercise that freedom if the officers are following and questioning her? Moreover, will Tanya even know that she is “free to leave”? At some point, Tanya is likely to be pressured into consenting to an encounter with the officers, and a court would subsequently rule that she did so of her own free will.

Against the background of what counts and does not count as a seizure, the *Terry* regime makes it virtually impossible for African Americans in predominantly black neighborhoods to avoid contact with the police. The relatively high threshold for triggering the Fourth Amendment and the relatively low evidentiary threshold for the reasonable suspicion doctrine further contribute to force that engagement.

None of what I have said is intended to suggest that Chief Justice Warren would be happy with where the reasonable suspicion doctrine has landed. Nor am I saying that he intended the negative effects that the reasonable suspicion standard has had on the lives of African Americans. But even accepting the fact that hindsight is always 20/20, the Chief Justice should have known that the reasonable suspicion door he opened, and the one he refused to close, would create a meaningful risk that the law of stop-and-frisk would develop to empower the police to target African Americans, and disempower African Americans to resist that targeting.¹⁶⁰ Indeed, by the time *Terry v. Ohio* reached the Supreme Court, lower courts had already interpreted the reasonable suspicion standard in ways that revealed that it would likely function more as a sword for police officers than as a shield for lay people.¹⁶¹ Moreover, the briefs for the National District Attorneys’ Association,¹⁶² Americans for Effective Law Enforcement,¹⁶³ Attorney

158. See Carbado, *supra* note 10 (discussing the circumstances under which the Fourth Amendment is triggered).

159. *Id.*

160. For a thoughtful discussion of whether Justice Warren should have anticipated where the *Terry* regime landed, see Steiker, *supra* note 33, which argues that Justice Rehnquist played a critical role pushing the *Terry* standard well beyond the boundaries that Justice Warren articulated.

161. See LAFAVE, *supra* note 3, § 9.1(a) at 354–57; see, e.g., U.S. *ex rel.* Anderson v. Rundle, 274 F. Supp. 364 (E.D. Pa. 1967); *Com. v. Hicks*, 223 A.2d 873 (Pa. Super Ct. 1966).

162. Brief of National District Attorneys’ Ass’n, *supra* note 49.

163. Brief of Americans for Effective Law Enforcement, *supra* note 49.

General of the State of New York,¹⁶⁴ and the United States Government¹⁶⁵ each reflected the view that the reasonable suspicion standard should apply not only to cases in which officers have reasonable suspicion to believe that a person is armed and dangerous, but also to cases in which no such concern obtained.¹⁶⁶ In other words, the reasonable suspicion door Chief Justice Warren refused to close—whether the Fourth Amendment permits police officers to stop-and-question (but not frisk) people they perceive to be suspicious (but not dangerous)—was one these briefs argued should be left wide open. Finally, LDF littered its brief with concrete examples of the degrading, humiliating, and violent ways in which African Americans were experiencing stop-and-frisks on the ground.¹⁶⁷ In short, while the full story of stops and frisks remained to be told in 1968, the writing was already on the wall that police officers were employing the practice not only to surveil and socially control African Americans, but as an onramp to arrest and mobilize violence against them.

IV. A MORE SPECIFIC FOCUS ON THE FRISK

In some sense, stops and frisks require the same level of justification: Generally, both stops and frisks need to be supported by reasonable suspicion. However, some doctrinal nuance is relevant to understanding how the Fourth Amendment's treatment of stops and frisks facilitates racial profiling and opens the door to racial violence.

The constitutionality of stops and frisks turns on two separate doctrinal questions. With respect to the stop, the question is whether the government has

164. Brief of Attorney General of the State of New York as Amicus Curiae in Support of Appellees, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113674.

165. Brief for the United States as Amicus Curiae, *supra* note 49.

166. Brief of Americans for Effective Law Enforcement, *supra* note 49, at 13 (“[T]here may be a concept of *variable* probable cause which applies to pre-arrest investigatory procedures such as field interrogation, and that the true test is the *balancing* of the degree of interference with personal liberty against the information possessed by the officer which impelled him to act.”); Brief of Attorney General of the State of New York, *supra* note 164, at 3, 4 (discussing “the common law right of a police officer to question any individual in a public place where there is a reasonable suspicion that a crime has been committed or is about to be committed” and arguing that “[t]his power to question is a necessary element in crime prevention”); Brief of National District Attorneys’ Ass’n, *supra* note 49, at 9 (“Granting the police the right of temporary field detention and protective patdown on a standard less than probable cause to arrest is the only effective way to meet ‘the challenge of crime in a free society.’” (quoting NICHOLAS DEB. KATZENBACH ET AL., PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967))); Brief for the United States, *supra* note 49, at 2 (“[A] lesser showing will meet the constitutional test of reasonableness in the case of a brief detention on the street [as compared to] the case of a conventional arrest.”).

167. See generally Brief for the N.A.A.C.P. Legal Defense and Educational Fund, *supra* note 71.

reasonable suspicion that the suspect is engaging in, or will engage in, criminal wrongdoing.¹⁶⁸ If the answer is “yes,” the officer may detain the suspect for questioning. With respect to the frisk, the question is whether the government has reasonable suspicion that the suspect is armed or dangerous.¹⁶⁹ If the answer is “yes,” the officer may frisk the suspect’s outer person for weapons. Of course, the government may have reasonable suspicion to believe that someone is engaging in criminal wrongdoing but not have reasonable suspicion to believe that the person is armed and dangerous. Under this scenario, police officers would be permitted to stop the person, but would not be permitted to perform a frisk.

*Terry v. Ohio*¹⁷⁰ itself hinted at, but did not develop, this dual doctrinal inquiry, although many scholars read the opinion as having done so.¹⁷¹ The *Terry* Court did not have to separate the stop analysis from the frisk analysis, because the government claimed that the officer had a reasonable basis to believe that the defendant was armed and dangerous. When that is the case, the authority to frisk necessarily includes the authority to stop; one cannot frisk a person without also stopping him. However, authority to stop does not necessarily entail authority to frisk.¹⁷² A police officer may have reasonable suspicion to believe that a suspect has engaged in criminal activity without having reason to believe that the person is also armed and dangerous. Since *Terry*, the Supreme Court has made this point abundantly clear as a formal doctrinal matter.¹⁷³

However, as a practical matter, the legal distinction between stops and frisks might not mean very much.¹⁷⁴ Quite apart from how the Supreme Court has

168. See *Michigan v. Summers*, 452 U.S. 692, 698–700 (1981); LAFAVE, *supra* note 3, at § 9.5; see also *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

169. See *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Terry*, 392 U.S. at 30; LAFAVE, *supra* note 3, at § 9.5.

170. 392 U.S. 1.

171. See Carbado & Harris, *supra* note 12, at 1565–68 (discussing this point).

172. See WILLIAM E. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 13:3 (Justin D. Franklin & Steven C. Bell eds., 2016).

173. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 92–93 (1979) (“The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat down of a person for weapons.”); *Adams*, 407 U.S. at 146 (discussing the criteria for a stop first, before moving on to discuss distinct criteria necessary for the frisk: “So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.” (footnote omitted)).

174. See, e.g., *United States v. Hill*, 752 F.3d 1029, 1038 n.9 (5th Cir. 2014) (refusing to address the issue of whether the officer had a reasonable suspicion that the defendant was armed and dangerous, justifying a frisk, when the officer could not show that the investigatory stop was based on a reasonable suspicion of criminal activity); *United States v. McMullin*, 739 F.3d 943, 946 (6th Cir. 2014) (stating that an officer’s reasonable suspicion of criminal activity alone may justify a stop and a frisk in certain circumstances).

blurred the boundaries between the stop and the frisk is the question of whether police officers do so on the ground. An illustrative example of such blurring comes from the *Floyd v. City of New York*¹⁷⁵ litigation discussed above. It appears that the distinction between a stop and a frisk meant very little to the NYPD during the period covered by the litigation.¹⁷⁶ Which is to say, evidence from the litigation suggests that New York police officers did not take seriously the notion that a stop and a frisk require separate justifications.¹⁷⁷ The NYPD frisked more than half of the people it stopped—and sometimes without even having *any* evidence of criminal wrongdoing, much less evidence of armed and dangerousness.¹⁷⁸ The district court was correct to conclude, then, that the NYPD had violated the Fourth Amendment.¹⁷⁹ On this point of law, the opinion was hardly radical, notwithstanding the controversy the case generated.¹⁸⁰ The court did nothing more than hold the *Terry* line on reasonable suspicion and make clear that race cannot be a ground for reasonable suspicion.¹⁸¹

The outcome in the *Floyd* litigation was important, but hardly a major victory because it left the reasonable suspicion standard largely intact. Perhaps not quite an instance of winning backward,¹⁸² the *Floyd* victory nonetheless obscures the fact that the *Terry* regime was itself a loss from a civil liberties perspective. Celebrating that *Floyd* requires police officers to have reasonable suspicion creates the false impression that the standard has teeth and is a meaningful restraint on

175. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

176. As the district court recounted:

[T]he pervasiveness of unconstitutional frisks was established by the uncontested fact that over half of all people stopped are frisked, while only 1.5% of frisks reveal a weapon, as well as the institutional evidence of inaccurate training regarding when to frisk, testimony by officers who did not know the constitutional standard for a frisk, and anecdotal evidence of routine unconstitutional frisks in this case.

Id. at 660.

177. *See id.*

178. *Id.* at 558 (“Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops. . . . 52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.” (footnotes omitted)).

179. *Id.* at 667.

180. *See, e.g.*, Ray Sanchez et al., *New York Drops Appeal of Controversial Stop-and-Frisk Ruling*, CNN (Jan. 30, 2014, 4:44 PM), <http://www.cnn.com/2014/01/30/us/new-york-drops-stop-frisk-appeal> [<https://perma.cc/Q43P-W84P>]; Bill Weir & Nick Capote, *NYPD’s Controversial Stop-and-Frisk Policy: Racial Profiling or ‘Proactive Policing’?*, ABC NEWS (May 1, 2013), <http://abcnews.go.com/US/nypds-controversial-stop-frisk-policy-racial-profiling-proactive/story?id=19084229> [<https://perma.cc/SHU9-348P>].

181. *Floyd*, 959 F. Supp. 2d at 556, 666–67.

182. *See generally* Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POLY & L. 721, 722 (2012) (“Winning backward is a victory whose legal basis sets back a goal greater than the immediate outcome.”).

the police. Much ink has been spilt making precisely the opposite point, namely that reasonable suspicion is a nominal restraint on police officers and effectively expands the scope of police power.¹⁸³ Frank Rudy Cooper, for example, has argued that the doctrine should be abolished,¹⁸⁴ and Bennett Capers has observed that “if the Fourth Amendment itself has a poisonous tree, its name is *Terry v. Ohio*.”¹⁸⁵

Such points can get lost in a case like *Floyd*, whose much-needed victory is built upon the problematic root and branches of *Terry*'s poisonous tree. To ex-coriate *Terry* is not to criticize the litigation strategy in *Floyd*, or the manner in which the lawyers argued that case. Those attorneys were forced to play the doctrinal hand the *Terry* regime deals, and they played that hand remarkably well. Just as any lawyer worth her salt understands that she should invoke racial diversity as a justification in defending a university's affirmative action admissions plan, even if she would much rather argue the case on other (and in particular social justice) grounds, the lawyers challenging the NYPD's use of stops and frisks recognized that they had to argue their case within the reasonable suspicion framework. Judge Scheindlin is likewise not to blame; the opinion was clear in holding that reasonable suspicion requires some showing of wrongdoing.

The *Floyd* litigation was not intended to challenge the constitutionality of stops and frisks writ large. The general public may not understand that Judge Scheindlin assumed the legitimacy of stops and frisks (as did the parties to the litigation) and focused on whether New York police officers were violating *Terry*'s reasonable suspicion standard. That the stops and frisks themselves were never really on the constitutional chopping board in *Floyd* is important to emphasize. Because while part of the controversy over stops and frisks is that police officers frequently stop-and-question and stop-and-frisk people without reasonable suspicion, the other part of the problem is that police officers have little difficulty justifying their decision to stop-and-question or stop-and-frisk individuals because reasonable suspicion is a low evidentiary bar.

Little attention has been paid to the fact that *most* of the stops that formed the basis for the *Floyd* litigation were legal, not illegal. According to Jeffrey Fagan, between roughly 7 percent and 30 percent of the NYPD's stops lacked reasonable

183. See, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–65 (1999); see also, e.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

184. Frank Rudy Cooper, *The Spirit of 1968: Toward Abolishing Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539 (2007).

185. I. Bennett Capers, *Rethinking The Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 32 (2011); see also Fagan, *supra* note 100 (critiquing the reasonable suspicion standard and framing it as “*Terry*'s original sin”).

suspicion.¹⁸⁶ That is to say, it is possible (though unlikely) that as many as 93 percent of the stops were perfectly constitutional. Tracey Meares, one of the few scholars who has focused on this dimension of the *Floyd* litigation, puts the point this way:

If a court had analyzed any one of the stops carried out as part of the NYPD program, or as part of a similar program in another city, the court likely would have found that police appear to abide by Terry's strictures most of the time. Further, if that court had analyzed each stop-and-frisk individually, the court might have assumed that, because police get it right most of the time, it would be a good idea to give police a great deal of discretion to intervene in criminal incidents that unfold before them in order to keep the public safe.¹⁸⁷

To beat a dead horse: *Terry's* reasonable suspicion standard is decidedly weak and therefore relatively easy for police officers to meet. The standard encourages police officers not only to approach African Americans without having any evidence of criminal wrongdoing and to invoke the reasonable suspicion standard as an *ex post* justification, but also to use the reasonable suspicion standard to target African Americans for stops and frisks because the evidence they need to justify those practices is quite literally little more than nothing at all.

More worrisome still is the reality that the availability of the reasonable suspicion standard to justify stops and frisks increases the likelihood that police departments will employ those practices programmatically as the go-to law enforcement tool to carry out proactive policing.¹⁸⁸ Certainly that is what the NYPD was doing—deploying “stop-and-frisk . . . systematically, deliberately, and with great frequency” against African Americans.¹⁸⁹

Needless to say, litigants will not always have access to the kind of data on which Judge Scheindlin relied in *Floyd* to rule that NYPD's use of stops and frisks violated the Constitution. Nor will there always be a judge who is prepared to use that data to demonstrate constitutional violations. But, even if the data exists and the judge is ready to use it, we should keep in mind that chances are that the data will tell a story about police officers acting lawfully, and not just unlawfully.

186. See *Floyd*, 959 F. Supp. at 559 (“[A]t least 200,000 [of the 4.4 million] stops were made without reasonable suspicion.” (referring to Fagan's expert testimony)); CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 127, at 1 (“All together, 30 percent of all stops are either illegal or questionable legality, underlining a severe lack of adequate officer oversight in the NYPD.” (referring to Fagan's findings)).

187. Meares, *supra* note 128, at 164 (footnotes omitted).

188. For an excellent discussion of the extent to which the programmatic use of stops and frisks might be understood as an enactment of colonial power, see Cooper, *supra* note 128.

189. *Id.*

Recall the point I made earlier that most of the stops and frisks the NYPD conducted were supported by reasonable suspicion. This should not surprise us. The fact that reasonable suspicion is such a low evidentiary bar means that most of the people police officers stopped and frisked will have done nothing wrong. The victory in *Floyd* does not change that reality.

CONCLUSION

This Article began by claiming that how law shapes the social problem underlying a social movement should inform how we think about the role of lawyers in that social movement. To advance that argument, this Article focused on how a specific body of law (stop-and-frisk jurisprudence) is implicated in a specific social problem (police violence against African Americans). The Article stressed that the stop-and-frisk doctrine is an important part of the police violence problem because that body of law allows police officers to force engagements with African Americans based on little or no justification. The Article suggested that the frequency of those engagements overexposes African Americans not only to surveillance, discipline, and social control, but also to arrests and the possibility of violence, including serious bodily injury and death.

Advocates against police violence typically do not frame stop-and-frisk practices in the way this Article has. Indeed, the tendency has been to disaggregate discussions of stops and frisks from discussions of police violence. That disaggregation provides a partial explanation as to why the contestations over police violence in Ferguson and those about the NYPD's use of stops and frisks often occurred in separate epistemic universes.

An additional problem with some of the advocacy against police violence is that to the extent it engages with questions of racial profiling, it sometimes conceptualizes the phenomenon as a problem of individual lawlessness, obscuring the degree to which the underlying rule of law itself is problematic. This Article (and my broader body of work in this area)¹⁹⁰ intends to demonstrate that the *Terry* regime, and Fourth Amendment law more generally, provides police officers with an opportunity to target African Americans without violating the law. The over-policing of African Americans, of which racial profiling is a part, is a problem of legality, not just illegality—that is, it is a problem of bad laws, and not just bad police officers. At the very least, lawyers involved in movements against police violence should clearly articulate the foregoing legal dimensions of the problem.

190. See generally Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Carbado & Harris, *supra* note 12; Carbado, *supra* note 10; Carbado & Rock, *supra* note 10; Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545 (2017).

Such an articulation has the potential to shape both the contours of campaigns to end police violence and the role of lawyers in those campaigns.