FLEEING WHILE BLACK: HOW MASSACHUSETTS RESHAPED THE COUNTOURS OF THE *TERRY* STOP

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INTRODUCTION

In its recent opinion in *Commonwealth v. Warren*, the Massachusetts Supreme Judicial Court stated that when a black male flees from a Field Interrogation Operation ("FIO"),[1] such flight "is not necessarily probative of a suspect's state of mind or consciousness of guilt."[2] The court found that because men of color[3] are frequent subjects of racial profiling, when a man of color flees from the police, it may not necessarily be because he is guilty of an underlying criminal offense.[4] This is true, the court said, even when the individual's physical characteristics closely, though "vague[ly]," match those of a wanted suspect-at-large.[5]

In *Warren*, the defendant, a black male, was the target of a FIO because he matched the description of a suspect of a reported breaking-and-entering in Boston's Roxbury neighborhood (he, like the alleged suspect, was wearing a "red hoodie").[6] When the police approached the defendant and ordered him to stop, he ran, "clutching the right side of his pants, a motion [the police officer] described as consistent with carrying a gun without a holster."[7] The police officer later apprehended the

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[1] In Massachusetts, a "field interrogation observation" is "an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area." Commonwealth v. Lyles, 905 N.E.2d 1106, 1108 n.6 (Mass. 2009) (adopting the definition provided in Commonwealth v. Murphy, 822 N.E.2d 320, 324 n.4 (Mass. App. Ct. 2005)). Such interactions are "deemed consensual encounters because the individual approached remains free to terminate the conversation at will." Commonwealth v. Warren, 58 N.E.3d 333, 337 n.5 (Mass. 2016) (citing *Lyles*, 905 N.E.2d at 1109–10).

[2] *Warren*, 58 N.E.3d at 342.

[3] Specifically, "black men." *See id.* The court limited its discussion to black men, and it is unclear whether the court would apply the same analysis if the defendant were a "woman of color," for example.

[4] *Id.* Specifically, the court said, "WE DO NOT ELIMINATE flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's [*scienter* as to any underlying crime]." *Id.*.

[5] *Id.* at 343.

[6] *Id.* at 336–38.

[7] *Id.* at 337.

defendant in the backyard of a residential property.[8] The officer did not recover any contraband from the defendant's person; however, minutes after "arrest[ing]" the defendant, police officers recovered a handgun nearby on the property.[9] Because the defendant did not have a valid license to carry a firearm, he was taken into custody.[10]

The *Warren* decision comes at a time when the sociopolitical context vis-à-vis race relations in the United States is in a challenging state. Notions of color-blindness (itself a problematic term)[11] and living in a "post-racial" society dominate mainstream political and academic discourse.[12] Yet, it is difficult to ignore the implications of such strained race relations on communities of color, particularly when discussing the interactions between such communities and the officers who police them. Indeed, there is substantial evidence indicating that communities of color, which are often most in need of greater police protections, are in fact disproportionately victims of lethal police force.[13] While several (often discordant) theories exist, speculating the cause of such grave abuse of power,[14] the uncontrivable and overwhelming demand for social change can no longer be ignored.

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 338.

[11] *See, e.g.*, SORA HAN, THE CULTURAL LIVES OF THE LAW: LETTERS OF THE LAW: RACE AND THE FANTASY OF COLORBLINDNESS IN AMERICAN LAW 2–3 (2015) (describing the notion of "colorblindness" in the law as a "fantasy," a "legal development staged by the historical demarcation of a 'post-civil rights era,' [which] assumes the past success (even if incomplete) of an established civil rights regime.").

[12] *See, e.g.*, F. MICHAEL HIGGINBOTTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA (2013) (challenging the notion that the United States operates as a post-racial society despite the abolition of Jim Crow laws, explaining that a racial hierarchy and paradigm continues to infiltrate our sociopolitical and legal systems, both subtly and obviously); Eduardo Bonilla-Silva, *The Structure of Racism in Color-Blind, "Post-Racial" America*, 59 AM. BEHAV. SCIENTIST 1358, 1361–63 (2015) (same). *But see* John McWhorter, *Racism in America is Over*, FORBES (Dec. 30, 2008), http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html (opining generally that, because the United States elected an African American president in 2008, racism no longer exists within the sociohierarchical framework).

[13] By some estimates, black individuals are three times more likely to be killed by police officers than white suspects. *See, e.g.*, MAPPING POLICE VIOLENCE, http://www.mappingpoliceviolence.org (last visited Jan. 31, 2017). More than two-thirds of these killings involve unarmed victims. *Id*.

[14] *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 267–79 (2007) (finding the roots of police brutality in the nation's history of slavery, Jim Crow-era legislation, normalized capital punishment, and unsanctioned, coercive investigative techniques). *Contra* Lawrence Rosenthal, *Pragmatism, Originalism, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 302–30 (2010) (explaining that in areas with high crime rates in the pre-*Terry* era, police officers responded reasonably and that, post-*Terry*, violent rates of crime dropped significantly in formerly crime-prone areas because policies like "stop-and-frisk" were held to be constitutional).

Absent an effective legislative response at the federal level,[15] several grassroots movements have emerged in recent years, calling upon the criminal justice system to effect meaningful change in policing communities of color.[16] While marginalized communities of color are subjected to police force, the Massachusetts court's opinion suggests a shift away from decades-long precedent that has traditionally granted law enforcement broad discretion in search and seizure.[17] The court's approach in *Commonwealth v. Warren* is a welcome recognition of the extent to which an individual's race plays a role in determining whether a police officer will subject him to a seizure.[18] This piece discusses the extent to which this decision may expand an individual's privacy rights vis-à-vis conduct that permits police officers to execute a lawful search or seizure.

I. DECADES OF EXPANDING POLICE POWER: *TERRY* AND *WARDLOW*

In its 1968 decision in *Terry v. Ohio*, the Supreme Court held that a police stop does not run afoul of an individual's Fourth Amendment rights when a police officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion [into the property or person of another]."[19] The Court implied that this standard is actually meant to

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[15] On June 2, 2015, Senators Barbara Boxer (D-CA) and Cory Booker (D-NJ) introduced legislation in the Senate that would require, *inter alia*, law enforcement agencies nationwide to "report information on any incident involving the shooting of a civilian by a law enforcement officer." Police Reporting Information, Data, and Evidence (PRIDE) Act, S. 1476, 114th Cong. (2015). To date, the Senate has taken no further action on the bill. *See id*.

[16] Most notable is the "Black Lives Matter" international movement, an active campaign against the systemic marginalization of black communities. *See* BLACK LIVES MATTER, http://www.blacklivesmatter.com (last visited Oct. 24, 2016).

[17] *See* Commonwealth v. Fraser, 573 N.E. 2d 979, 981 (Mass. 1991) ("[The police officer] did not 'seize' the defendant within the meaning of the Fourth Amendment merely by approaching him, identifying himself as a police officer, and asking him to take his hands out of his pockets.") (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). In *Mendenhall*, the Court explained that such circumstances include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 554.

[18] Terry v. Ohio, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

[19] *Terry*, 392 U.S. at 21.

impose some burden on police—to articulate their suspicion—[20] and that, in establishing this test,[21] the Court intended to balance legitimate government interests with the sanctity of the right to be free from unreasonable search and seizure.[22] Consequently, over the past forty-eight years, police officers' decisions to seize and search individuals have been given wide deference, so long as officers can articulate specific facts that give a "rational inference"[23] to effectuate the search. While this is a low threshold, the question of whether there is reasonable suspicion is subject to an objective standard, [24] taking into account whether a "man or reasonable caution" would believe the action taken was appropriate.

In 2000, the Court further limited the right to be free from unreasonable seizure in *Illinois v. Wardlow*.[25] In *Wardlow*, unlike in *Terry*, the defendant was not a suspect to any crime—until he ran from the police.[26] The defendant was standing next to a building, carrying an opaque bag in a high-crime area of Chicago "known for heavy narcotics trafficking."[27] An unmarked police car was conducting routine neighborhood surveillance, and, when the car approached the defendant, he began running without provocation.[28] Only after he began to flee did the police pursue him.[29] Once arrested, the police searched the

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[20] *Id.* at 22. ("[S]imple good faith on the part of the arresting officer is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police.") (internal citation omitted).

[21] The Massachusetts courts have interpreted *Terry* to establish a two-prong test to determine when a police officer "may . . . escalate a consensual encounter [from a stop] into a protective frisk . . . [when he or she has] a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense *and* is armed and dangerous." Commonwealth v. Narcisse, 927 N.E.2d 439, 445 (Mass. 2010). "When an individual appears to be ready to commit violence, either against police officers or bystanders, it is reasonable to believe that he 'about to commit a crime,' thus satisfying *Terry*'s first prong." *Id.* at 446 (citing Commonwealth v. Wilson, 805 N.E.2d 968, 975 (Mass. 2004)). Massachusetts courts find that the second prong of the test is satisfied when a person's conduct "gives rise to a reasonable belief that he is armed and dangerous." *Id.*, citing *Terry*, 392 U.S. at 30.

[22] *Terry*, 392 U.S. at 22–24.

[23] *Id.* at 21.

[24] *Id.* "[A] judge . . . must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *See id.* at 21–22 (internal citation omitted).

[25] *See* 528 U.S. 119 (2000).

[26] *Id.*

[27] *Id.* at 124.

[28] *Id.*

[29] *Id.* at 121–22.

defendant, recovering a .38-caliber handgun and several rounds of ammunition from his person.[30]

The *Wardlow* case weaved through the Illinois judicial system, and, in 1998, the Illinois Supreme Court found that the defendant's conduct was insufficient to trigger a lawful *Terry* stop,[31] finding other U.S. Supreme Court jurisprudence, apart from *Terry* to be instructive.[32] Thus, according to the Illinois court, absent a lawful pursuit, an individual suddenly running away from the police did not provide a reasonable basis for pursuing him under the *Terry* analysis.[33] Effectively, the court found that the defendant was in the wrong place at the wrong time. The U.S. Supreme Court disagreed, however, reversing the decision[34] and noting that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion; [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[35] Such an indication, the Court explained, prompted "reasonable suspicion . . . based on commonsense judgments and inferences about human behavior."[36]

The *Wardlow* holding is troublesome because it further limits an individual's right to be free from government interference and fails to properly account for the role of socioeconomic disparities. The Court explicitly stated that the character of the neighborhood in which a seizure occurs—specifically its crime rate and its notoriety for heavy substance abuse—is relevant to the analysis of whether that seizure is constitutional under *Terry*.[37] The real-world implications of *Wardlow*, resulted in an expansive gulf of distrust between high-crime, high-policed communities

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[30] *Id.* at 122.

[31] People v. Wardlow, 701 N.E.2d 484, 486 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000). The court referenced "[a] majority of jurisdictions" in which "flight alone is insufficient to justify a *Terry* stop and cited accordant decisions from New Jersey, Nebraska, Michigan, California, Colorado, and Maryland in support of its finding. *Id.*

[32] *See* Florida v. Royer, 460 U.S. 491, 497–98 (1983) ("The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.") (citing *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring)); *id*. at 34 (White, J., concurring). The court in *Wardlow* explained that "[a] person may decline to listen to [a police officer's] questions at all and simply go on his or her way. If the option to 'move on' is chosen, the person 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.'" 701 N.E.2d at 486–87 (quoting Florida v. Royer, 460 U.S. 491, 498 (1983)).

[33] *Id.* at 489.

[34] *Wardlow*, 528 U.S. at 126.

[35] *Id.* at 124.

[36] *Id.* at 125 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

[37] *Id.* at 124 ("[T]he fact that the stop occurred in a high crime area [is] among the relevant considerations in a *Terry* analysis. In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police.") (internal citations omitted).

and the police officers who serve them—a gap that has continued to widen.[38] Despite its myriad issues and challenges, *Wardlow*, like *Terry*, is still binding law. Taken together, then, both *Terry* and *Wardlow* stand for the proposition that an individual's Fourth Amendment right to be free from unreasonable government intrusion is not violated when an officer can proffer an "objective justification"[39] for initiating a lawful stop. Among these "objective" reasons are the character of the neighborhood in which a person is walking, how that person carries himself, and how that person reacts when he sees a police officer.

II. DOES *WARREN* REPRESENT A DEPARTURE FROM *TERRY* AND *WARDLOW*?

Warren arguably represents a paradigmatic shift away from the trend of expanding and deferring to the discretion of police officers. Superficially, the Massachusetts Court's opinion in *Warren* and the Illinois Supreme Court's decision in *Wardlow* (which the U.S. Supreme Court reversed) stand for a similar proposition. Both courts found that a defendant running away from the police is not on its own probative of a defendant's guilty conscience, and thus sufficient "reasonable suspicion" to justify a police stop.[40]

One of the critical differences between *Wardlow* and *Warren* , however, hinges on the nature of the *Terry* stops. Though the basis for investigating the defendant was flawed, the officers in *Warren* had reason to suspect that *someone* was responsible for a crime because they were summoned to the scene and charged with canvassing the

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[38] For a discussion of this issue, see Conor Friedersdorf, *Addressing Distrust Between Cops and Communities of Color*, THE ATLANTIC (June 28, 2016), http://www.theatlantic.com/politics/archive/2016/06/addressing-distrust-between-cops-and-communities-of-color/488966/ (discussing the complicated relationship between the Black Lives Matter movement, pro-bono legal agencies, and law enforcement personnel, acknowledging that "seemingly small changes in policing policy at the local level can change the culture within police departments and make police officers significantly more accountable.").

[39] *Wardlow*, 528 U.S. at 123 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)). *See also Terry*, 392 U.S. at 15 ("[C]ourts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.").

[40] *See Warren*, 58 N.E.3d at 342 (explaining that a defendant's flight from police may still be an indicium of "reasonable suspicion," but the conduct is not probative of a defendant's guilty conscience, even when he is the subject of an investigation). *But see Wardlow*, 701 N.E.2d at 486, *rev'd*, 528 U.S. 119 (2000) (finding that fleeing from police, even when one is *not* the subject of an investigation, is neither probative of a guilty conscience nor may it be a general contextual factor giving rise to a "reasonable suspicion.").

neighborhood in pursuit of the suspects.[41] Meanwhile, Mr. Wardlow in Chicago was merely "standing next to a building holding an opaque bag."[42] It was only after he began running upon seeing a police vehicle that the police became suspicious that criminal activity was afoot..[43] Though he possessed a handgun unlawfully, his decision to run at the sight of police may have been entirely unrelated to this fact.[44] Indeed, nearly twenty years after the Illinois Supreme Court's decision in *Wardlow*, the *Warren* court states that when a black man is "approached by the police, [he] might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[45]

Warren thus clarifies the weight that should be given to an individual's flight from police when making a "reasonable suspicion" determination in the context of *any* citizen-police interaction in Massachusetts. When a person of color runs from the police, even in circumstances in which police officers may have other reasons for suspecting or stopping an individual under *Terry* or *Wardlow*, or both, the flight itself does not conclusively provide an adverse inference of a suspect's guilty conscious as an element of the underlying criminal offense giving rise to the attempted stop or arrest.[46] Instead, Massachusetts courts must consider the totality of the circumstances before deciding whether a person's flight from police officers provides a reasonable justification for further search upon seizure.[47]

CONCLUSION

Warren seems to suggest that lower courts may be recalibrating the balance between an individual's right to be free from unreasonable government interference and the government's obligation to protect the public from criminal activity. In reaching its holding, the court explicitly points to studies demonstrating that "black men" in urban areas are

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[41] *Warren*, 58 N.E.3d at 336–37.
[42] *Wardlow*, 528 U.S. at 121–22.
[43] *Id.* at 122.
[44] *Id.* at 132–33 ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'") (Stevens, J., dissenting in part).
[45] *Warren*, 58 N.E.3d at 342.
[46] *See id.* at 342 (explaining that while a court may consider "flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop," the conduct must be considered together with all of the circumstances to be "probative of a suspect's state of mind.").
[47] *See id.*

"more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations," and that black men are also "disproportionally targeted for repeat police encounters."[48] The court further highlighted the tension between communities of color and the police, noting that "[s]uch an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[49]

The decision is a judicial response to an ongoing crisis in cities throughout the United States—a crisis that has given rise to several social movements and demand for legislative action, both at the state and at the federal level. By reshaping, expanding, and prioritizing the individual's liberty, even if the individual is suspected of criminal activity, the Supreme Judicial Court of Massachusetts asserts a call to action. Elected officials, law enforcement officers, and members of the public must begin a difficult but essential dialogue that candidly recognizes the myriad factors at play in police-community dynamics.

[48] *Warren*, 58 N.E.3d at 342.
[49] *Id.*