

Flight, Race, and Terry Stops: *Commonwealth v. Warren*

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ABSTRACT

Police officers find critical the ability to stop, question, and frisk someone who is reasonably suspected of being involved in a crime and of being armed. In 1968, the Supreme Court of the United States approved that practice in Terry v. Ohio. Since then, officers and courts have consistently found that a person's unprovoked flight at the sight of an identifiable police officer indicates consciousness of guilt and supports a Terry stop. In Commonwealth v. Warren, however, the Massachusetts Supreme Judicial Court concluded that a suspect's unprovoked flight was not sufficient, by itself or in conjunction with the other evidence known to the police, to justify their stop of Warren to question him about a recent burglary. Although that conclusion alone was mistaken, the court committed a more egregious error by hypothesizing that the suspect may have fled because other persons may have feared that the Boston Police Department had been engaged in a pattern of racially discriminatory stops-questions-and-frisks of young black males. In so ruling, the Massachusetts Supreme Judicial Court made both factual and legal errors. One of the court's mistakes was to look past the facts of the Warren case, to assume the position of a legislature, and, in that capacity, to fail to consider the interests of the black residents of local neighborhoods who wish to avoid becoming victims of a crime. If a court assumes the role of a legislature, the court must consider the interests of the entire affected community, not just the interests of those residents who are suspected of being involved in a crime. By addressing a large-scale societal problem rather than focusing just on the facts of the Warren case, the Massachusetts Supreme Judicial Court assumed a role that should have been left to the state legislature or city council.

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INTRODUCTION

Uniformed police officers interact with the public on a regular basis to learn about community goings-on, to maintain order, and to obtain evidence about wrongdoing. In fact, police officers are more likely to learn more about a burglary or robbery by asking victims, witnesses, passersby, neighborhood residents, and suspects the traditional questions—Who? What? When? Where? How? Why?—than through the type of sophisticated forensics examinations television viewers have come to expect. Those so-called “police-citizen” encounters often consist of little more than ordinary exchanges. From a private citizen’s perspective, the meetings are fully consensual and are generally initiated by an officer or private party to pass along or exchange information, or maybe just to chat with “the cop on the beat.”

Encounters like those are not “seizures” under the Fourth Amendment and therefore do not require that the police have any justification for asking questions.¹ As Chief Justice Earl Warren explained for the Supreme Court of the United States in *Terry v. Ohio*, “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”² From the

1. The Fourth Amendment provides that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, or the person or things to be seized.” U.S. CONST. amend. IV.

2. 392 U.S. 1, 19 n.16 (1968); *id.* at 34 (White, J., concurring) (“There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.”); *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“Our cases make it clear that a seizure does not occur simply because a

colonial era to the present, police officers have broad discretion to approach and question members of the public about a past, ongoing, or potential crime even if the officer must briefly detain someone to do so.³ That questioning is a useful information-gathering practice. *Terry* also allows the police to frisk (or “pat down”) a suspect if they have reasonable suspicion that he is armed and dangerous.⁴

Some of those encounters, however, are coercive. When that is true, they amount to a type of restraint that is known in the vernacular as *Terry* stops. Yet,

police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free ‘to disregard the police and go about his business,’ . . . the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” (citation omitted); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”). The Supreme Court has applied that rule in a variety of settings. *See, e.g., Florida v. Bostick*, 501 U.S. 429 (1991) (ruling that police questioning on a stopped bus is not necessarily a “seizure”); *Florida v. Rodriguez*, 469 U.S. 1, 4–5 (1984) (same, at an airport); *INS v. Delgado*, 466 U.S. 210, 219–21 (1984) (same, at workplace); *cf. Michigan v. Chesternut*, 486 U.S. 563, 567 (1988) (same, police pursuit of a fleeing individual). Even a show of authority, such as a detective flashing a badge and asking someone to answer some questions or ordering a fleeing person to stop, does not constitute a “seizure.” *See, e.g., California v. Hodari D.*, 499 U.S. 621, 626 (1991) (“The word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. (‘She seized the purse-snatcher, but he broke out of her grasp.’) It does not remotely apply, however, to the prospect of a policeman yelling ‘Stop, in the name of the law!’ at a fleeing form that continues to flee. That is no seizure.”) (footnote omitted).

3. At English and American common law, a constable or private party had the authority to detain a “night walker”—*viz.*, someone who wanders about at night without a satisfactory explanation for his conduct—even in the absence of proof that he had committed a felony. *See* Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); *Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring); *Miles v. Weston*, 60 Ill. 361, 365 (1871); 1 EDWARD HYDE EAST, PLEAS OF THE CROWN ch. 5, § 70, at 303 (1803) (“It is said . . . that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself”); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 89 (2010) (1st Am. ed. 1847); 2 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 13, § 6, at 129 (8th ed. 1824) (“It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself.”); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1227–28 (2016); John A. Ronayne, *The Right to Investigate and New York’s “Stop and Frisk” Law*, 33 FORDHAM L. REV. 211, 213–14 (1969). The common law rationale for the detention of a nightwalker was remarkably similar to the contemporary justification for a *Terry* stop. *See Miles*, 60 Ill. at 365–66 (“The reason why night-walking and lurking about the premises of peaceable inhabitants in the night time, is disorderly conduct, is because such conduct cannot, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens, who have a just right to be exempt from such disturbance.”); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 629 n.216 (1999) (“It appears that there were so few legitimate reasons to be out and about at night that night walking was viewed almost as an offense in its own right.”) (citations omitted).

4. *Terry*, 392 U.S. at 16–31. The practice is also called “stop-and-frisk” or, more accurately, “stop-question-and-frisk” or, for those fond of acronyms, “SQF.” A stop and a frisk are separate actions with different justifications. A stop is a brief detention that must be justified by a reasonable suspicion that the person stopped is involved in criminal activity. A frisk or “pat-down” is a search that must be justified by a reasonable belief that a stopped individual is armed. *Id.* at 16–31.

the Fourth Amendment does not require that an officer have the same degree of proof of guilt necessary to arrest someone—probable cause⁵—that he needs to briefly detain someone for questioning.⁶ Because such detentions are useful for gathering information about a past crime or for stopping a crime before it happens, *Terry* decided that a police officer might temporarily detain someone for questioning if the officer has a “reasonable suspicion” that criminal activity “may be afoot.”⁷ The assumption is that informal, on-the-street questioning imposes a small burden on the public but can return great crime control benefits.

Beginning in 1994, the New York City Police Department (NYPD) relied on *Terry* stops to reduce historic homicide rates plaguing the city. The department aggressively used *Terry* stops, particularly in high-crime neighborhoods, in an effort to identify and arrest people illegally possessing firearms and to deter others from doing so.⁸ The department carried out that strategy in communities showing signs of disorder, which predominantly appeared in poorer neighborhoods, and in New York City, these poorer neighborhoods were predominantly African American.⁹

The result over time was two-fold. First, the crime rate, particularly the murder rate dropped dramatically.¹⁰ The risk of being a homicide victim in 2009

5. See *Beck v. Ohio*, 3479 U.S. 89, 91 (1964) (quoted *infra* note 99).

6. See *Terry*, 392 U.S. at 30.

7. *Id.*

8. See, e.g., MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 84–85 (2016) (discussing two NYPD programs: NEW YORK CITY POLICE DEP’T, RECLAIMING THE PUBLIC SPACES OF NEW YORK (1994), and NEW YORK CITY POLICE DEP’T, GETTING GUNS OFF THE STREETS OF NEW YORK (1994)). According to some commentators, The NYPD practice grew out of the theory of order-maintenance policing first articulated by James Q. Wilson and George Kelling in their now-famous *Atlantic Monthly* article entitled *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY 29 (Mar. 1982). See, e.g., ANDREW KARMEN, NEW YORK MURDER MYSTERY 113–14 (2000); Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing*, 56 N.Y. L. SCH. L. REV. 1331, 1332–33 (2011/2012). What has since come to be known as “Broken Windows” policing taught that maintaining order by suppressing physical evidence of neighborhood decline is as important a police responsibility as apprehending felons: It eliminates the public disorder that provides a breeding ground for increasingly serious crime; it contributes to the apprehension of serious criminals because they commit both minor and serious offenses, and it helps to deter crime by encouraging more citizens to be out in public spaces. See WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990). Police strategy applying the Broken Windows Theory is often called “Broken Windows,” “Order Maintenance,” “Problem-Oriented,” “Quality of Life,” or “Zero Tolerance” policing. Wilson defined “order maintenance” as the absence of “disorder,” with disorder being defined as an individual or a neighborhood condition that “disturbs or threatens to disturb the public peace or that involves face-to-face conflict among two or more persons.” JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 16 (1968). In fact, there are material differences between the Broken Windows strategy and the NYPD’s aggressive stop-question-and-frisk tactic. The former is designed to improve community order; the latter to remove guns from the streets. The former does not need to rely on arrests to work; the latter does. See Jeffrey Bellin, *The Inverse Relationship between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1504–05 (2014).

9. See Bellin, *supra* note 8, at 1504–05.

10. See, e.g., FRANKLIN ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL ix–x, 1, 4–14, 46 (2013).

was only 18% of that risk in 1990.¹¹ Berkeley Professor Franklin Zimring colorfully described it as being “as close to the miracle of the loaves and the fishes as criminology has come in the past half-century.”¹² Second, many of the residents of those communities saw the increased policing, stops, frisks, and arrests in their neighborhoods as racial policing or racial profiling.¹³ The disproportionate number of young black males that were stopped gave rise to controversy and litigation over the legality of the department’s practice. “With almost 600,000 of these events each year and 86% minority male targeting,” Professor Zimring added, “it would seem difficult to grow up as a Black or Hispanic male under current policy without some experience of ‘stop and frisk.’”¹⁴

Government officials, researchers, and scholars have frequently analyzed the NYPD Terry stop practice over the last twenty years.¹⁵ Supporters—such as New York City Mayors Rudy Giuliani and Mike Bloomberg, NYPD Police Commissioners William Bratton, Howard Safir, and Ray Kelly—gave that practice credit for the unprecedented drop in violent crime, particularly homicide, in New York City that began in the 1990s and continued into this century.¹⁶ All that while simultaneously lowering the number of people impris-

11. *Id.* at 28.

12. *Id.* at 153.

13. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L. REV.* 457, 461–63 (2000). “Racial profiling” is the use of race as a proxy for criminality. For discussions of reliance in decision-making on statistics, generalizations, stereotypes, and profiles, see JACK GLASER, *SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING* (2015); BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2006); DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (1992); FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

14. ZIMRING, *supra* note 10, at 211.

15. The literature on the NYPD’s practice is voluminous. For a sample, see John Eck & Edward Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006); JASPREET GILL & JENNIFER TRONE, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER* (Mar. 2010) [hereinafter JOHN JAY COLLEGE REPORT]; ELLIOT SPITZER, OFF. OF THE N.Y. STATE ATT’Y GEN’L, *THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICES* (1999); RACE, ETHNICITY, AND POLICING (Stephen K. Rice & Michael D. White eds., 2010); ZIMRING, *supra* note 10; Robert Cottrol et al., *Foreword: Race, Vagueness, and the Meaning of Order-Maintenance Policing*, 89 *J. CRIM. L. & CRIMINOLOGY* 775 (1999); David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y* 853 (2013); Paul J. Larkin, Jr., *Reviewing the Rationale for Stop-and-Frisk*, *THE ATLANTIC* (Mar. 24, 2014) [hereinafter Larkin, *Stop-and-Frisk Rationale*]; Paul J. Larkin, Jr., *Stops, Frisks, Race, and the Constitution*, 82 *GEO. WASH. L. REV. ARGUENDO* 1 (2013) [hereinafter Larkin, *Stops, Frisks, and Race*]; *Debate—David Rudovsky & Lawrence Rosenthal: The Constitutionality of Stop-and-Frisk in New York City*, 162 *U. PA. L. REV. ARGUENDO* 117 (2013); David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?*, 15 *AM. SOCIETY OF CRIMINOLOGY* 31 (2015).

16. See, e.g., WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* (1998); GEORGE L. KELLING & WILLIAM H. SOUSA, JR., *MANHATTAN INSTITUTE CENTER FOR CIVIC INNOVATION, DO POLICE MATTER?: AN ANALYSIS OF THE IMPACT OF NEW YORK CITY’S POLICE REFORMS*, Civic Report No 22, at 18 (2001); Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 *J. L. & ECON.* 235 (2005); John J. DiIulio, Jr., *‘Windows’ Puts New Light on Crime-Fighting Efforts*, *Ideas*, Wash. Times, Nov. 10, 1996, at B8; Craig Horowitz, *The Suddenly Safer City*,

oned.¹⁷ Accolades flowed in from various quarters.¹⁸

But not everyone was a fan. Critics assailed the NYPD's aggressive stop-question-and-frisk policy on two principal grounds.¹⁹ The first one is that the program did not achieve its goal of removing guns from the street because most *Terry* stops did not turn up a firearm.²⁰ Moreover, the NYPD made several major changes to its crime-fighting strategies beginning in 1994, such as increasing the number of police officers citywide; upgrading the quality of life in neighborhoods by enforcing laws directed at public disorder;²¹ and implementing the new Compstat process, which maps the geography of crime in each precinct, delegates authority to precinct commanders to respond to trends, and

NEW YORK 20 (Mar. 1982); George Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217 (1998); Michael R. Bloomberg, Mayor, New York City, "Stop and Frisk" Keeps New York Safe, WASH. POST, Aug. 18, 2013; Raymond W. Kelly, Police Comm'r, New York City, *New York City Police Commissioner Ray Kelly Calls Stop-and-Frisk Decision "Disturbing and Offensive,"* N.Y. DAILY NEWS, Aug. 12, 2013; Howard Safir, New York City Police Comm'r, Statement to the New York City Council Public Safety Committee Tr. 65 (Apr. 19, 1999), excerpted at Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk Policy in the Context of Claims of Racial Bias*, 102 J. AM. STATISTICAL ASS'N 813, 814–15 (2007); Robert J. Sampson & William Julius Wilson, *Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY 37, 37 (John Hagan & Ruth D. Peterson eds., 1995) (citing a 1990 study for the proposition that "a resident of rural Bangladesh has a greater chance of surviving to age 40 than does a black male in Harlem"); cf. William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality of Life Crimes*, 3 J.L. & POL'Y 447 (1995). From 1960 to 1992, gun-related homicides in New York City increased more than 2,000%. From 1994 to 1998, NYPD officers confiscated more than 50,000 guns and made more than 40,000 gun-related arrests. By 2009, there were massive decreases in numerous types of crime, such as homicide (82%), rape (77%), robbery (84%), and assault (67%), from their highest historic levels in 1990. The decreases from 2000 to 2009 alone in those crimes were 33% for homicide; 51% for rape; 84% for robbery; and 67% for assault. The homicide rate in 2009 was 18% of the rate in 1990. While the entire nation witnessed a large decline in the crime rate, the decline in New York City was larger in magnitude than the trends in Los Angeles, Houston, San Diego, San Jose, and Boston and lasted for twice as long as the nationwide trend. WHITE & FRADELLA, *supra* note 8, at 81, 85–88 & Tbl. 4.1; ZIMRING, *supra* note 10, at 5.

17. See Bellin, *supra* note 8, at 1504–05.

18. Including the academy. See, e.g., Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L. J. 407, 418, 429–32 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–73 (1997);

19. Critics, such as Columbia Professor Jeffrey Fagan, also maintain that the "reasonable suspicion" standard endorsed in *Terry* is unreasonably pliable, which makes it difficult for the courts to define the perimeter around that concept and allows the police to concoct after-the-fact justifications for unlawful stops. See, e.g., Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43; Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015). That argument closely related to the implementation of stop-question-and-frisk practices, because an amorphous or unduly broad standard can generate the harms noted above, but it is focused on the *Terry* standard itself rather than the practice discussed here. That debate is beyond the scope of this Article.

20. See, e.g., Bellin, *supra* note 8, at 1498 ("Over the past two decades, the NYPD engaged in a steadily escalating number of coercive encounters with its citizenry. This pattern crested in 2011 when the department recorded almost 700,000 'stops' as part of a citywide effort to stop and frisk suspicious persons, ostensibly to find guns and deter gun-carrying. Almost all of those stopped (90%) were minority males, and the vast majority of the stops (88%) uncovered no evidence of wrongdoing.") (footnotes omitted); *infra* note 178.

21. See *supra* note 8 (discussing the "Broken Windows" Theory of policing).

holds them accountable for their failures.²² That combination of initiatives makes it impossible to identify the specific role played by the NYPD's aggressive street patrol strategy in reducing crime.²³

The second criticism is that the practice singles out young black males for stops and frisks. Pointing to statistics indicating that the police stop and frisk young African-American males far more often than one would anticipate from their numbers in the community,²⁴ critics argue that officers engaged in racial profiling by targeting young black males for stops and frisks without an adequate justification to believe that they have been involved in a crime.²⁵ In fact, the inordinately high number of black males stopped by the police for questioning gives rise to the justifiable belief, the argument concludes, that police officers treat being black as tantamount to being a criminal and therefore stop and question a large number of young black males found on the street, regardless of what they are doing.²⁶

22. See, e.g., Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in Blumstein & Wallman, *supra* note 15, at 2; Eck & Maguire, in Blumstein & Wallman, *supra* note 15, at 224–35; BUREAU OF JUSTICE ASSISTANCE & POLICE EXEC. RES. FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES 2 (2013), <https://www.bja.gov/publications/perf-compstat.pdf> [<https://perma.cc/88ZN-XMCT>] (Compstat is a performance management system underlying data-driven policing with “four generally recognized core components: (1) Timely and accurate information or intelligence; (2) Rapid deployment of resources; (3) Effective tactics; and (4) Relentless follow-up.”).

23. See, e.g., NAT'L RES. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 239 (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING] (“There is a widespread perception among police policy makers and the public that enforcement strategies (primarily arrest) applied broadly against offenders committing minor offenses lead to reductions in serious crime. Research does not provide strong support for this proposition.”); ZIMRING, *supra* note 10, at 136–37; Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175–76 (1998) (“Enforcement activity and related community-based reactive forces almost certainly have contributed to the drop in homicide in specific localities. However, the magnitude of this effect is difficult to gauge, because levels of homicide also have decreased in places with no discernible change in enforcement and because the effects of enforcement tend to interact with other influences over which the police and community leaders have little control.”); Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233 (1998) (disputing NYPD's claims that its Terry stop policy was responsible for New York City's 1990s crime reduction); Eck & Maguire, in Blumstein & Wallman, *supra* note 15, at 228; Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); Gary Lafree, *Social Institutions and the Crime “Bust” of the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1325 (1998) (attributing the 1990s decline in street crime to an improved economy and social institutions).

24. See, e.g., ZIMRING, *supra* note 10, at 119, 123–25.

25. See, e.g., CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 185–87 n.10, 205–06 n.2 (2014) (collecting studies).

26. See, e.g., *id.* at xv–xvi, 6–9; NANCY G. LA VIGNE ET AL., THE URBAN INST., STOP AND FRISK: BALANCING CRIME CONTROL WITH COMMUNITY RELATIONS (2014); WHITE & FRADELLA, *supra* note 8, at 62–63 & nn.51–55, 182–84; Daniel Bergner, *Is Stop-and-Frisk Worth It?*, THE ATLANTIC (Apr. 24, 2014); Donald Braman, *Stop-and-Frisk Did Not Make New York Safer*, THE ATLANTIC (Mar. 26, 2014); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Renee McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the*

In reply, the NYPD maintained that there has been no proof that its crime-fighting strategy is ineffective, whether in the short or long run, or that it is racially biased. The small number of recovered firearms testifies to the deterrent effect of the policy. In fact, opponents of the NYPD's practice would characterize it as harassment, plain and simple, if the police continued to discover a large number of unlawfully possessed handguns. In addition, the department's focus on high crime areas is reasonable and facially neutral even though, given the city's demographics and residential segregation, those neighborhoods are predominantly home to minorities. In fact, those residents benefit from a proven crime-reduction strategy.²⁷ The NYPD's strategy, moreover, is not racist. Focus-

Practice, in POLICING THE BLACK MAN 95, 103–07 (Angela J. Davis ed., 2017); Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 184 (2012); Jack B. Weinstein & Mae C. Quinn, *Terry, Race, and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN'S L. REV. 1323, 1325–27 (1998); cf. Billy R. Close & Patrick L. Mason, *Searching for Efficient Enforcement: Officer Characteristics and Racially Biased Policing*, 3 REV. L. & ECON. 264 (2007) (same results for vehicle stops).

27. See, e.g., Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 POLICE Q. 331, 348 (2012) (“Perhaps the most promising strategy in this area is broken windows policing Crime declined substantially in New York in the 1990s, but estimates of the size of the role broken windows policing played in this decline have ranged from large to significant [or, at the other extreme, from] smaller to nonexistent.” (citations omitted)); *supra* note 15. Supporters of the NYPD also point today to a new, important, and related issue: namely, whether the rise in violent crime that began in 2015 was due to what has been called the “Ferguson Effect,” *viz.*, the reluctance of police to intervene aggressively when a suspect is black due to the fear of being labeled a racist. Manhattan Institute scholar Heather MacDonald has been a fervent advocate of that theory. See, e.g., HEATHER MACDONALD, *THE WAR ON COPS* 55–64, 69–71 (2016) [hereinafter MACDONALD, *WAR ON COPS*]; Heather MacDonald, *The Ferguson Effect*, WASH. POST, July 20, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/20/the-ferguson-effect/?utm_term=.9fca73d49043 [https://perma.cc/VU7R-3854]; Heather MacDonald, *The New Nationwide Crime Wave*, WALL ST. J., May 29, 2015, <https://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425> [https://perma.cc/Z6GH-SNPT]; Heather MacDonald, *Chicago on the Brink*, CITY J. (Summer 2016) <https://www.city-journal.org/html/chicago-brink-14605.html> [https://perma.cc/M56G-RUYQ]; Heather MacDonald, *The Ferguson Effect Lives On*, CITY J., Dec. 23, 2016, <https://www.city-journal.org/html/ferguson-effect-lives-14919.html> [https://perma.cc/S9XC-69KK]; see also Michael Barone, *‘Ferguson Effect’ Is Real and It Threatens to Harm Black Americans Most*, WASH. EXAMINER, May 19, 2016, <https://www.aei.org/publication/ferguson-effect-is-real-and-it-threatens-to-harm-black-americans-most/> [https://perma.cc/M4AE-8NAE]; John G. Malcolm, *The War on Cops*, 17 FED’T SOC. REV. 68, 70 (2016) (reviewing MACDONALD, *WAR ON COPS*, *supra*). A few scholars have argued that any such effect has not yet been proven. See, e.g., John J. Donohue, *Trump, Comey, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297 (2017); Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235 (2017). Law enforcement officials hold a different view. See James B. Comey, Director, FBI, *Law Enforcement and the Communities We Serve: Bending the Lines Toward Safety and Justice*, Remarks Delivered at the U. Chi. L. School (Oct. 23, 2015), <https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice> [https://perma.cc/TP4H-ZMH7] (“What could be driving an increase in murder in some cities across all regions of the country, all at the same time? . . . I’ve also heard another explanation, in conversations all over the country. Nobody says it on the record, nobody says it in public, but police and elected officials are quietly saying it to themselves. And they’re saying it to me, and I’m going to say it to you I spoke to officers privately in one big city precinct who described being surrounded by young people with mobile phone cameras held high, taunting them the moment they get out of their cars. They told me, ‘We feel like we’re under

ing police resources on high-crime areas is an application of the well-known and race-neutral “hot spots” strategy of law enforcement.²⁸ As Professor Zimring wrote, “preventative street policing cannot be made more colorblind than the demographic patterns of violent crime.”²⁹ In fact, poor, predominantly minority neighborhoods benefit most from aggressive police efforts to rid those areas of street crime because they receive a disproportionate amount of police attention due to the fact that they are high-crime areas.³⁰ Accordingly, the NYPD’s practice, the department concludes, is entirely lawful.³¹

The stop-question-and-frisk controversy made its way into Massachusetts state court in *Commonwealth v. Warren*.³² There, the Massachusetts Supreme

siege and we don’t feel much like getting out of our cars.’ . . . So the suggestion, the question that has been asked of me, is whether these kinds of things are changing police behavior all over the country. And the answer is, I don’t know. I don’t know whether this explains it entirely, but I do have a strong sense that some part of the explanation is a chill wind blowing through American law enforcement over the last year. And that wind is surely changing behavior.” (internal punctuation omitted).

28. See, e.g., Bellin, *supra* note 8, at 1516–17 (“As for the disproportionate rate of stops of minorities, the NYPD insists that its officers (a majority of whom are minorities) are not racist. Instead, the City argues, the stop rates track the demographics of suspects in violent crimes. NYPD statistics reflect that suspects in “shootings,” defined as “any crime where [a] victim is struck with [a] bullet,” are 78% black, 19% Hispanic, 2.4% white, and 0.5% Asian. These statistics emboldened Mayor Bloomberg and Police Commissioner Kelly to argue that the critics have it backwards, ‘we disproportionately stop whites too much and minorities too little.’”); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 43 *FORDHAM URB. L.J.* 539, 565 (2016) (“[T]he nature and extent of racial bias in the policing of motorists and pedestrians remains unsettled empirically.”) (footnote omitted). The “hot spots” theory is discussed *infra* at text accompanying notes 239–43.

29. ZIMRING, *supra* note 10, at 212; see, e.g., GREG RIDGEWAY, RAND, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES (2007) (concluding that the NYPD policy was not intentionally discriminatory). See generally WHITE & FRADELLA, *supra* note 8, at 81–102 (discussing arguments and studies pro and con).

30. See William J. Stuntz, *Terry’s Impossibility*, 72 *ST. JOHN’S L. REV.* 1213, 1225–26 (1998) (“[C]ities are not like General Motors, and paying for policing is not like making cars. Businesses sell products and services to people who benefit from those products and services, and the beneficiaries pay. Businesses that supply private policing—the biggest growth industry in the world of law enforcement—are like that. City police forces are not. They tend to devote their attention not to where the paying customers are, but to where the street crime is. Street crime tends to be concentrated in poor neighborhoods, meaning that both criminals and victims tend to inhabit those neighborhoods (street crime is overwhelmingly local). So that is where police are concentrated, where the greatest number of police man-hours are spent. [¶] Poor neighborhoods thus receive a disproportionate share of police protection—disproportionate relative to their share of the population, though not relative to their share of serious crime. But that police protection is paid for out of general tax revenues, and the taxes come primarily from other neighborhoods, where property values and sales receipts are higher. (The large majority of police work for local governments, not state or national ones.) Policing in most American cities is thus redistributive: Its beneficiaries are poorer than its payors.”).

31. The NYPD does not appear to have argued that racial profiling is legally and normatively permissible. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) (both ruling that Border Patrol agents may rely on a person’s Mexican or Latino ethnicity in deciding whether he can be stopped for illegally entering the United States from Mexico); Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 *PHIL. & PUB. AFF.* 131, 135, 141–42 (2004) (arguing that considerations of statistics, efficiency, and maximization of social welfare could be advanced in defense of racial profiling).

32. See *Commonwealth v. Warren*, 31 N.E.3d 1171, 1172 (Mass. App. Ct. 2015), *vacated and remanded*, 58 N.E.3d 333 (Mass 2016). Another prominent case addressing that subject is *Floyd v. City*

Judicial Court wrote that an African-American's unprovoked flight from a uniformed police officer is as likely to reflect an effort to avoid the indignity inherent in a street stop as a guilty state of mind. More importantly, the Massachusetts Supreme Judicial Court all but instructed the state courts in an unknown number of cases to overlook a factor that has been recognized as strong proof of consciousness of guilt since the *Book of Proverbs*.³³

There is abundant reason for police and lawmakers to take to heart the Massachusetts Supreme Judicial Court's concern with the data regarding the stop-question-and-frisk practice in the Bay State. At the same time, there is a great need for legislatures, the public, and other courts to consider this issue from another perspective—namely, that of the victims of crime, who also are predominantly black, in the communities where black men are disproportionately stopped. This Article adds to that important and necessary discussion.

There are three parts to this Article. Part I will describe the facts of the *Warren* case and the rulings by the Massachusetts state courts. We learn from them that the Massachusetts Supreme Judicial Court mistakenly concluded that the stop of Warren was unsupported by reasonable suspicion that he had recently been a participant in a home burglary. In an almost off-hand manner, the Massachusetts Supreme Judicial Court also sought to justify Warren's flight by noting that numerous other black males in Boston, like Warren, had been stopped by the police in numbers much greater than their percent of the Boston population. Part II then focuses on one important aspect of the facts and rulings: Warren's unprovoked flight from an identifiable police officer who said nothing more to him than "Hey guys, wait a minute" or "Hey Fellas." For more than a century, American courts, including the Supreme Court of the United States, have treated flight from the police as powerful evidence of consciousness of guilt, as has the Massachusetts Supreme Judicial Court. Warren's own flight was highly probative and justified a *Terry* stop. Finally, Part III addresses a highly controversial, emotionally laden issue to which the Massachusetts Supreme Judicial Court devoted only one brief paragraph at the end of its opinion: the question whether the disproportionate number of law enforcement stops of black males is proof of racially biased policing. The relationship between race and *Terry* stops has been a subject of considerable discussion. The preponderance of that discussion has focused on the race of the persons stopped. There is another side to that issue, however, which involves the race of the people who might benefit from *Terry* stops. The Massachusetts Supreme Judicial Court gave

of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (opinion on the merits), *supplemented*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (opinion on remedies), *remedial order stayed pending appeal and case remanded to district court for reassignment to another judge*, 538 Fed. Appx. 101 (2d Cir.), *supplemented*, 736 F.3d 118 (2013), *granting limited remand for settlement discussions*, 743 F.3d 362, *affirmed in part, motion to intervene denied, and case remanded*, 770 F.3d 1051 (2014).

33. *Proverbs* 28:1 (KJV) ("The wicked flee when no man pursueth: but the righteous are bold as a lion.").

short shrift to a complex issue that deserves far more discussion than the one paragraph the court devoted to it.

I. *COMMONWEALTH V. WARREN*

On a 23-degree Christmas-time Sunday night in December 2011, Lewis Anjos, a uniformed Boston Police Officer, was driving his squad car in the area of Roxbury that he had patrolled for ten years.³⁴ At 9:20 pm, a call came over the radio about a nearby home burglary. The dispatcher said that “there was a breaking and entry in progress and the suspects were fleeing the area,” albeit in very different directions.³⁵ Officer Anjos drove to the scene of the break-in and interviewed the residents, a teenage male and his foster mother, for approximately eight to twelve minutes.³⁶ The burglary victims gave the officer what little information they could provide. She had alerted her foster son to noises in his bedroom, which he entered only to find an intruder jumping out an open window into the cold, dark night.³⁷ All that the teenager observed of the escapee was that he was a black male in a red “hoodie” (hooded sweatshirt). The teenager also saw two other nearby black males, one wearing a black hoodie, the other wearing dark clothing, standing in a street outside, whom the escapee joined.³⁸ The trio ran off together down the street with the teenager’s laptop computer, backpack, and five baseball hats.³⁹ While at the crime scene, Officer Anjos also determined that the trio had escaped without accidentally leaving behind any readily identifiable physical evidence (e.g., a wallet with a driver’s license), which made it impossible to determine a precise physical description of the burglars.⁴⁰ After radioing what he knew to headquarters, Officer Anjos left to search for them within four or five blocks of the residence.⁴¹

Officer Anjos saw no one in the cold outside walking along the adjoining or connecting streets as he drove around the neighborhood for approximately the next 15–18 minutes before heading back to the police station to write a report.⁴²

34. Transcript of Motion to Suppress Hearing at 10–12, *Commonwealth v. Warren*, No. 1102CR004737 (Bos. Mun. Ct. Dec. 12, 2012) [hereinafter Tr.]. Officer Anjos was working at District B-2 in Roxbury that night. *Id.* at 11. “The overall crime rate in Roxbury is 35% higher than the national average.” AREAVIBES, ROXBURY, BOSTON, MA CRIME, <http://www.areavibes.com/boston-ma/roxbury/crime/> [https://perma.cc/9DH9-4E6R] (last visited Feb. 21, 2017).

35. *Warren*, 31 N.E.3d at 1172. The call was to “the area of Hutchings Street near Harold Street.” Tr. at 11. Dispatcher told Officer Anjos that the suspects were fleeing on foot, but gave inconsistent directions in different messages. *Id.* at 12 (“The first one stated that the suspects were heading towards Jackson Square. There was another one stating that they were heading towards Seaver Street.”).

36. Tr. at 15.

37. *Id.* at 13–15.

38. *Id.* at 14.

39. *Id.* at 15, 34. The teenager said that the three confederates ran down Seaver Street, which could take them to Columbus Avenue. *Id.* at 15.

40. *Id.* at 13–15.

41. *Id.* at 15–16; *Commonwealth v. Warren*, 31 N.E.3d 1171, 1172–73 (Mass. App. Ct. 2015), *vacated and remanded*, 58 N.E.3d 333 (Mass. 2016).

42. Tr. at 16–17.

But as he approached a familiar basketball court, Officer Anjos saw two individuals walking towards him on a local boulevard.⁴³ He noticed that they were both black males in black clothing, one wearing a hoodie.⁴⁴ That fit the victims' description of two of the three burglars. The pair was in a high crime area, about ten blocks from the victims' home, at most 25 minutes after the crime.⁴⁵

Officer Anjos drove toward them in his marked cruiser without turning on his lights or siren.⁴⁶ He planned to ask them who “they were and where they were coming from.”⁴⁷ As his squad car drew near, Officer Anjos rolled down his passenger-side window and said, “Hey guys, wait a minute.”⁴⁸ The pair made eye contact with Anjos, turned, and walked or jogged off—straight into a park that Anjos had grown familiar with over his ten years working in the area.⁴⁹ The park was not known for its scenery or ambiance, but for its summertime basketball, as well as gun violence and shootings, assaults and batteries, firearm arrests, drinking in public, and status as a hang-out for “a lot of gang members from the local area.”⁵⁰ Officer Anjos knew from experience that “[o]nce you get inside [the park], you’ve got a cover so nobody can see you unless you walk in on them.”⁵¹

Watching the two run off, Officer Anjos broadcasted a description of “several males that matched a description” from the earlier burglary.⁵² Officer Christopher Carr arrived nearby seconds later with his partner, Officer David Santosusso, both in uniform in their marked police cruiser, and saw the joggers on the move.⁵³ Officer Carr parked 15 yards away from them. He did not turn on his lights or siren, nor did he draw his service weapon.⁵⁴ He simply got out, took two steps from his marked squad car, and said: “Hey Fellas.”⁵⁵ That is all it took to send one of the pair running again.⁵⁶ He did a “180 complete” and “[took] off back into the park,” which Officer Carr also knew had been the scene of at least

43. *Id.* at 17. The area where Officer Anjos saw the two males was on Martin Luther King Boulevard about 10–12 minutes by foot from the victims' home. *Id.* at 17, 35–36.

44. *Id.*

45. *Id.* at 22, 27.

46. *Id.* at 17–19.

47. *Commonwealth v. Warren*, 58 N.E.3d 333, 337 (Mass 2016).

48. *Tr.* at 19.

49. *Id.* at 19–20, 29, 31, 36.

50. *Commonwealth v. Warren*, 31 N.E.3d 1171 (Mass. Ct. App. 2015), *vacated and remanded*, 58 N.E.3d 333 (Mass. 2016); *Tr.* at 43. It is unclear what the park was called. At the suppression hearing, the officers generally referred to it as Washington Park, *Tr.* at 52, 57, 59, but did also refer to it as Malcolm X Park, *id.* at 36, which is the name that appears in a map of the area appended to the court of appeals' opinion, *Warren*, 31 N.E.3d at 1190. The latter seems to be the correct name.

51. *Tr.* at 20.

52. *Warren*, 31 N.E.3d at 1173.

53. *Tr.* at 43. Like Officer Anjos, Officer Carr was assigned to Area B-2 in Roxbury. *Id.* at 39.

54. *Id.* at 43–44.

55. *Id.* at 44.

56. *Id.*

two recent shootings.⁵⁷ Officer Carr pursued the man who fled into the park, whom he soon realized appeared to be under eighteen, “[d]efinitely under the age of twenty-one,” whom he saw was “clutching the right side of his pants . . . consistent with carrying a gun without a holster.”⁵⁸ Officer Carr did manage to stop the suspect but only after he had trespassed onto someone else’s backyard.⁵⁹ The police recovered a Walther .22 caliber handgun “less than five yards off the sidewalk on the inside of the fence of [the residential yard where Warren was arrested].”⁶⁰

Jimmy Warren was tried and convicted at a bench trial of carrying a firearm without a license.⁶¹ He moved to suppress the gun on the ground that the police lacked reasonable suspicion for a *Terry* stop. The judge ruled that the totality of the circumstances gave the police justification to stop Warren, even if no particular fact provided justification.⁶²

Warren appealed to the Massachusetts Court of Appeals, which affirmed the trial court’s decision by a 3-2 vote. The majority agreed with the trial judge that the totality of the circumstances⁶³ justified a reasonable suspicion of criminal

57. *Warren*, 31 N.E.3d at 1173–74; Tr. 46 (describing Officer Carr referring to “[s]hots fire[d] calls” and “[m]any rounds recovered”).

58. Tr. 45–46, 49, 65. Officer Carr testified that based on his training, this was indicative of the defendant having a gun. Officer Carr also noted that the defendant looked as if he was well under the age of 21, which would make it illegal for the defendant to possess a handgun. Tr. 45–46; Mass. Gen. Laws ch. 269, § 10(a) (2006) (criminalizing the possession of a firearm without a license). There is confusion in this case about when Officer Carr saw the suspect make the touching motion relative to Carr’s verbal commands to stop, the material consequence being whether or not Carr had reasonable suspicion that the individual was armed before or after the command, and thus whether the stop itself was constitutional. *Compare* 31 N.E.3d at 1174 n.7, with 58 N.E.3d, 338–39 nn.7–9.

59. *Commonwealth v. Warren*, 58 N.E.3d 333, 335 n.2 (Mass 2016) (“The trial judge allowed the defendant’s motion for a required finding of not guilty on a trespass charge.”) (citing General Laws ch. 266, § 120, which textually exempts trespass on Sundays); *see also* Tr. 47–49.

60. *Warren*, 31 N.E.3d at 1174; Tr. 48–49.

61. *Warren*, 31 N.E.3d at 1172.

62. Decision on Defendant’s Motion to Suppress at 3, *Warren*, No. 1102CR004737. The judge determined that the stop occurred when Carr verbally commanded Warren to “stop,” shortly before the gun was recovered near the defendant that led to his arrest, prosecution, and conviction. *Id.* As later summarized by the Massachusetts Supreme Judicial Court, the trial judge found the following facts sufficient to establish reasonable suspicion:

[T]he defendant and his companion “matched” the description of two of the three individuals being sought by the police; they were stopped in close proximity in location (one mile) and time (approximately twenty-five minutes) to the crime; they were the only persons observed on the street on a cold winter night as police canvassed the area; and they evaded contact with the police, first when both men jogged away into the park, and later when the defendant fled from Carr after being approached on the other side of the park.

Warren, 58 N.E.3d at 338–39.

63. *Warren*, 31 N.E.3d at 1175 (“We consider it significant in the present case that, at the time Officer Carr directed the defendant to stop, he and other officers were engaged in the investigation of a report of recent criminal activity in the vicinity. In such circumstances, we find instructive the inventory of factors identified in *Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 554–56, 778 N.E.2d 1023 (2002): (1) the particularity of the description of the suspects; (2) the number of persons in the area at the relevant time; (3) the proximity of the stop to the location of the reported crime; (4) the time elapsed

mischief.⁶⁴ Two judges dissented. In their view, the facts known by the police when Warren fled from Officer Carr⁶⁵ did not establish reasonable suspicion that he was one of the burglars.⁶⁶ Warren's flight, the dissent concluded, also had little persuasive value. "In the absence of other factors indicating that a person has, is, or is about to commit a crime," they wrote, "flight from the police adds no weight to the calculation of reasonable suspicion."⁶⁷ The dissenting judges also expressed their concern that the officers may have stopped Warren and his companion simply because they were black males given that the Boston Police Department (BPD) at one time had "pursued a policy calling for 'searches on sight' of black youths in Roxbury."⁶⁸

between the reported crime and the investigatory stop; (5) the actions of the suspect upon the initial encounter with police (including any evasive action); (6) police corroboration of the reported criminal activity; (7) the geographic area where perpetrators might be expected to have gone after the crime; and (8) whether the area is or is not a 'high crime area'").

64. *Id.* at 1174–77; *see id.* at 1176 ("[W]ith Officer Anjos having interviewed the victims of the crime at the scene, the officers had verified the reliability of the report. The description of the men involved in the home invasion had included two men of color, dressed in dark clothing, with one man wearing a hooded sweatshirt. We acknowledge that the description was somewhat general and lacking in detail. Nonetheless, two men who fit that description were seen on the street some nine or ten blocks away, within only about thirty minutes of the report of the crime. It was twenty-three degrees outside and none of the officers had seen anyone else walking on the street since the report. The relatively close proximity of the defendant to the time and place of the reported crime, together with the fact that the officers saw no one else on the streets on that cold evening, furnishes further justification for a threshold inquiry.").

65. *Id.* at 1185 n.16 ("For purposes of this analysis, I assume that the defendant was not seized until the second officer told him to stop as the defendant was running up the hill.").

66. *Id.* at 1178–80 (Agnes & Rubin, JJ., dissenting) (footnotes omitted) ("In the present case, the description of the perpetrators taken by Boston police Officer Luis Anjos and passed on to other officers was too general to establish individualized suspicion connecting the defendant, Jimmy Warren, to the breaking and entering on Hutchings Street in the Roxbury section of Boston at the time of the stop. Neither of the two males Officer Anjos encountered matched the most descriptive parts of the victim's observations of the perpetrators—that one was wearing a red sweatshirt and one was carrying a backpack (containing stolen goods). Additionally, the observation of two black males wearing dark clothing about one mile from the scene of a breaking and entering involving three black males in a densely populated residential neighborhood of Roxbury, lacks the element of proximity to the scene of the crime that so often is a significant factor in cases involving legitimate threshold inquiries In this case, Officer Anjos acted on a hunch that the two black males he encountered about one mile away from the crime scene and about thirty minutes after the commission of the offense, were somehow connected to that crime. To this day, that remains unestablished as the defendant is not charged with the breaking and entering that precipitated these events. For these reasons, I respectfully dissent.").

67. *Id.* at 1185 (Agnes & Rubin, JJ., dissenting).

68. *Id.*; *see also id.* at 1185–86 & n.18 (Agnes & Rubin, JJ., dissenting) (citing *Commonwealth v. Phillips*, 595 N.E.2d 310, 314–15 (Mass. 1992) (asserting that at one time the BPD "pursued a policy calling for 'searches on sight' of black youths in Roxbury" and noting that "the debate continues regarding whether" BPD officers "are influenced by race" when stopping black males); *id.* at 498–500 (Rubin, J., dissenting) ("Three African-American men were involved in the commission of a burglary, one dressed in red, two in black, at least one of those wearing a hooded sweatshirt (hoodie). They stole a backpack, a laptop computer, and five custom baseball hats. There were conflicting reports about the direction in which they ran. [¶] Under art. 14 of the Massachusetts Declaration of Rights, the police were not entitled on this basis thirty minutes later to stop any pair of African-American men in dark clothes walking within a twelve-square-mile area so long as at least one of them was wearing a hoodie—a widely worn fashion particularly among young people of color, *see, e.g., Staples, Young,*

The Massachusetts Supreme Judicial Court granted review and reversed, siding with the dissenting judges in the appeals court.⁶⁹ The Supreme Judicial Court parsed the facts of the case and, one-by-one, second-guessed every aspect of the lower courts' and law enforcement officers' judgment. In the court's eyes, the physical description was too vague for the police to consider at all.⁷⁰ The defendant's proximity in time and distance to the crime, as well as his presence in a high-crime area, was no more than "random" occurrence; the officer's thoughts on likely flight paths from the crime scene were "mere conjecture."⁷¹ Because "the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus."⁷² The fact that no one else was outside, late into that 23-degree night four days before Christmas, was inconsequential.⁷³ Any and all evasive behavior was merely "a factual irony."⁷⁴ "Where a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion."⁷⁵ Any other rule, the court wrote, would "seriously undermin[e]" the difference between consensual and nonconsensual police-citizen encounters.⁷⁶

The court then went on to say that "whenever a black male is the subject of an investigatory stop . . . flight is not necessarily probative of a suspect's state of

Black, Male and Stalked by Bias, N.Y. Times, Apr. 14, 2012, Chasmar, Smithsonian Director Wants Trayvon Martin's Hoodie, Washington Times, July 31, 2013 [I]t is impermissible for the police to stop any two black men walking on the street wearing hoodies simply because thirty minutes earlier and one mile away two black men in dark clothing, at least one of whom was wearing a hoodie, were among three men involved in a burglary. Action of this type clearly violates the protection our Massachusetts Declaration of Rights provides to all persons in the Commonwealth. It is also corrosive of the relationship between law enforcement and the members of communities they are sworn to protect. Yet that describes what happened here.").

69. The Massachusetts Supreme Judicial Court's opinion relies heavily on the dissenting opinion of Judge Agnes in the appeals court. *Commonwealth v. Warren*, 58 N.E.3d 333, 338–41 (Mass 2016). Curiously, The Massachusetts Supreme Judicial Court normally has seven members, but the vote to reverse was only 4–0 because three justices retired before the Court issued its decision. *Id.* at 335 n.1.

70. *Id.* at 339 ("Lacking any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics, the victim's description 'contribute[d] nothing to the officers' ability to distinguish the defendant from any other black male' wearing dark clothes and a 'hoodie' in Roxbury With only this vague description, it was simply not possible for the police reasonably and rationally to target the defendant or any other black male wearing dark clothing as a suspect in the crime.") (citation omitted).

71. *Id.* at 340 ("The location and timing of the stop were no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere conjecture.").

72. *Id.*

73. *Id.* at 341 ("[T]he defendant's presence on the street, some distance away from the crime, within a time frame inconsistent with having recently fled the scene, is hardly revelatory of an individualized suspicion of the defendant as the perpetrator of the crime.").

74. *Id.* at 341–42 ("Where a suspect is under no obligation to respond to a police officer's inquiry, . . . flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined.").

75. *Id.* at 341.

76. *Id.*

mind or consciousness of guilt.”⁷⁷ That opinion, like the dissent below, was based in part on reports “documenting a pattern of racial profiling” by the BPD.⁷⁸ As the court put it:

[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston According to the study, based on [Field Interrogation and Observation (FIO)] data collected by the department, black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionately targeted for repeat police encounters. 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 state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such 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. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report’s findings in weighing flight as a factor in the reasonable suspicion calculus.⁷⁹

To address what it perceived to be a systemic problem, the court not only ordered suppression of the handgun that Warren abandoned during his flight, but, in light of “the reality” of the disproportionate number of *Terry* stops of black males, also directed the lower state courts to treat the flight of other young, black males like Warren as being entirely innocent “in appropriate cases,” a category that it did not define.⁸⁰

II. FLIGHT AND *TERRY* STOPS

Terry v. Ohio held that a police officer may stop and briefly detain a person for investigative purposes if the officer observes suspicious conduct that, considered in light of all the evidence known to the officer and filtered through his training and experience, tells him that criminal activity was, is, or is about to be afoot.⁸¹ The Supreme Court has explicated and reaffirmed *Terry* on numerous

77. *Id.* at 539.

78. *Id.* The reports are discussed *infra* notes 152–64.

79. *Id.* at 342 (citations omitted).

80. *Id.*

81. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

occasions since 1968,⁸² and has also extended *Terry* to various other settings not involving street stops of pedestrians.⁸³

The Fourth Amendment does not permit a police officer to rely on an “inchoate and unparticularized suspicion or hunch.”⁸⁴ It requires “some minimal level of objective justification” for a *Terry* stop.⁸⁵ An officer must be able to “point to specific and articulable facts which,” along with “rational inferences from those facts,” justify the conclusion that a specific person did commit, was committing, or was about to commit a crime.⁸⁶ Put differently, *Terry* requires an officer to have “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”⁸⁷ Rather than consider each fact in isolation, an officer may rely on “the mosaic” of evidence⁸⁸—“the totality of the circumstances,” “the whole picture,” or “the cumulative information”—when making that judgment.⁸⁹ An officer need not discount facts suggesting that a person might have been innocent of any crime.⁹⁰ Instead, the officer is entitled

82. See, e.g., *United States v. Arvizu*, 534 U.S. 266 (2002); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Alabama v. White*, 496 U.S. 325 (1990); *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Cortez*, 449 U.S. 411 (1981); *Adams v. Williams*, 407 U.S. 143 (1972). As the Court has summarized:

Articulating precisely what “reasonable suspicion” and “probable cause” mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. As such, the standards are not readily, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not finely-tuned standards, comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

Ornelas v. United States, 517 U.S. 690, 695–96 (1996) (citations and internal punctuation omitted).

83. See, e.g., *United States v. Knights*, 534 U.S. 112 (2001) (upholding search of probationer’s residence based on reasonable suspicion); *Maryland v. Buie*, 494 U.S. 325 (1990) (upholding “protective sweep” of a home); *Michigan v. Long*, 463 U.S. 1032 (1983) (upholding sweep of the interior of a car to determine if weapons are present); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (upholding detention of mail based on a reasonable suspicion it contained illegal drugs).

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

85. *INS v. Delgado*, 466 U.S. 210, 217 (1984).

86. *Terry*, 392 U.S. at 21, 30; *Sibron v. New York*, 392 U.S. 40, 78 (1968) (Harlan, J., concurring) (the *Peters v. New York* and *Sibron* cases were consolidated).

87. *Cortez*, 449 U.S. at 417; see also, e.g., *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *Navarette v. California*, 134 S. Ct. 1683, 1687–88 (2014).

88. *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

89. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Cortez*, 449 U.S. at 417 (“the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 n.10 (1975) (“Each case must turn on the totality of the particular circumstances.”).

90. See, e.g., *Navarette*, 134 S. Ct. at 1691; *Arvizu*, 534 U.S. at 277 (“A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.”); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

to “piec[e] together the information at [his] disposal,”⁹¹ to consider each “fact on fact and clue on clue” as a whole⁹² because “a series of acts, each of them perhaps innocent in itself . . . taken together [might] warrant[] further investigation.”⁹³

When evaluating the facts, an officer may make “commonsense judgments and inferences about human behavior”⁹⁴ and rely on his training and experience to draw “inferences and deductions that might well elude an untrained person.”⁹⁵ When a court reviews an officer’s judgment, the evidence “must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”⁹⁶ The reason is that “a police officer’s trained instinctive judgment operating on a multitude of small gestures and actions [may be] impossible to reconstruct” after the fact.⁹⁷ Indeed, it would make little sense for the courts and law enforcement agencies to instruct police officers in the inferences they may draw from facts observed in the field if the officers could not use those lessons when making on-the-spot judgments about whether a crime has occurred.

Finally, the quantum of proof necessary to establish reasonable suspicion is not only lower than what is required to prove a defendant’s guilt at trial,⁹⁸ but is also considerably lower than the “probable cause”⁹⁹ necessary to make an arrest or obtain a search warrant.¹⁰⁰ As the Court has often explained, “[t]he process

91. *Cortez*, 449 U.S. at 419.

92. *Id.* at 418.

93. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *see also, e.g., United States v. Sokolow*, 490 U.S. 1, 9–10 (1989) (discussing how factors that individually were consistent with innocent travel collectively amounted to reasonable suspicion).

94. *Wardlow*, 528 U.S. at 119–20; *Terry*, 392 U.S. at 27.

95. *Cortez*, 449 U.S. at 418; *see also, e.g., Arvizu*, 534 U.S. at 275–76 (“We think it quite reasonable that a driver’s slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area’s inhabitants.”); *Ornelas*, 517 U.S. at 700 (“To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel.”); *United States v. Ortiz*, 422 U.S. 891, 897 (1975).

96. *Cortez*, 449 U.S. at 418.

97. *Sibron v. New York*, 392 U.S. 40, 78 (1968) (Harlan, J., concurring).

98. *See infra* note 100.

99. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964) (defining “probable cause” to arrest as being whether, at the moment of an arrest, “the facts and circumstances within [the police officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense”); *see also, e.g., Adams v. Williams*, 407 U.S. 143, 148; (1972); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

100. *See Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (“Although a mere hunch does not create reasonable suspicion the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause . . .”) (citations and internal punctuation omitted); *Arvizu*, 534 U.S. at 274; *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Adams*, 407 U.S. at 145. As the Court explained in *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000): “In allowing such detentions, *Terry* accepts the risk that officers may stop

does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same—and so are law enforcement officers.”¹⁰¹

Numerous factors provide evidence of wrongdoing, such as a person’s suspicious presence at night in an area known for criminal activity.¹⁰² The facts that Officer Carr knew when he stopped Jimmy Warren include many of the factors that federal and state courts have found create a reasonable suspicion of wrongdoing. The victims gave their account of the burglary shortly after the crime occurred. They had no reason to lie to Officer Anjos; in fact, filing a false police report is a crime under Massachusetts’s law.¹⁰³ It was after 9:30 p.m. on a 23-degree Sunday night shortly before Christmas, yet there were no Christmas shoppers out and about. One would especially not want to be out late in high crime areas because street crimes like armed robbery and burglary increase during the holidays.¹⁰⁴ No other pedestrians were outside; Warren and his

innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.”

101. *Sokolow*, 490 U.S. at 8 (quoting *Cortez*, 449 U.S. at 418); see also, e.g., *Arvizu*, 534 U.S. at 274 (“In *Sokolow*, for example, we rejected a holding by the Court of Appeals that distinguished between evidence of ongoing criminal behavior and probabilistic evidence because it ‘create[d] unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment.’”) (quoting *Sokolow*, 490 U.S. at 7–8); *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546–47 (11th Cir. 1985) (en banc) (“[W]e frequently take into account matters of common sense or general knowledge. That knowledge changes with changing times and conditions.”).

102. An individual’s presence on a high-crime area alone is insufficient to establish reasonable suspicion, or everyone who lives there could be stopped at will. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Brown v. Texas*, 443 U.S. 47, 52 (1979); JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL* 218 (2d ed. 1975). It is, however, a factor that can be considered along with others. See, e.g., *Wardlow*, 528 U.S. at 124; *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (“Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area.”); *Adams*, 407 U.S. at 147–48; *Terry*, 392 U.S. at 5–6, 30; *Commonwealth v. Wilson*, 754 N.E.2d 113, 117 (Mass. App. Ct. 2001) (stating that a suspect’s presence in a high crime area at nighttime are relevant factors).

103. See MASS. GEN. LAWS ch. 269, § 13A (1982) (“Whoever intentionally and knowingly makes or causes to be made a false report of a crime to police officers shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment in a jail or house of correction for not more than one year, or both.”); *Commonwealth v. Fortuna*, 951 N.E.2d 687, 694 (Mass. App. Ct. 2011) (“The most obvious way to make a ‘false report of a crime’ would be to report a crime that the speaker knew had never occurred. But we do not view the statute as limited to such circumstances. For example, we believe that someone could readily be said to have made a false report of a crime where, in reference to a crime that actually occurred, he intentionally misidentified the perpetrator.”).

104. See Tyler Paley, *Burglary Victim Says Family Puppy, Christmas Gifts Stolen*, USA TODAY, Dec. 14, 2016, <http://usat.ly/2oCKL15> [<https://perma.cc/PQU8-FUYS>]; Matt Zepotosky, *FBI Warns of an Increase in Bank Robberies in December*, WASH. POST, Nov. 28, 2014 (“Local authorities said they often see more crime around the holidays, when dusk comes earlier and more people are carrying cash or gifts that can be swiped. But those factors, they said, are more apt to explain street robberies or thefts.”), <http://wapo.st/2oI5SzK> [<https://perma.cc/YZV7-E8BL>].

companion were the only two people that Officers Anjos and Carr saw. They were spotted “some nine or ten blocks away” from a crime that had occurred only 25-30 minutes beforehand.¹⁰⁵ Both were dressed in black clothing, matching a general description of two of the burglars given directly to an investigating officer by one of the victims, who had an incentive to be truthful.¹⁰⁶ And they were in the vicinity of where the perpetrators could have fled. Those facts would strike most police officers—in fact, most people—as an adequate justification for Officer Anjos’ remark: “Hey guys, wait a minute.”¹⁰⁷

But there is more. Warren did not run into a nearby building to warm up in a manner indicating he had been out for exercise, that he was (or had finished) socializing, that he had somewhere to be, or that he had been out for some other innocent purpose. Warren went into a park that Officer Anjos knew to be a particularly dangerous, gang-affiliated location that would provide ample cover from police. Moments later, when Officer Carr—who was also uniformed and standing two steps from a marked police cruiser—said “Hey Fellas,” Warren’s evasion became more, not less suspicious. His “one-eighty” sprint back into the park confirmed any suspicion that he preferred the cover and concealment opportunities offered by the park, or a possible late-night rendezvous with armed gang members, to a certain interaction with the police in an open street. His about-face also refutes the inference that Warren was moving toward a certain destination beyond the park.

That conduct alone strongly suggested that Warren was involved in wrongdoing. One of the most probative items of evidence is evasive conduct,¹⁰⁸ and the paradigm instance of evasive conduct is unprovoked flight from a recognizable police officer. As one scholar has noted, “It is unlikely that an innocent person will flee a uniformed officer after a request to stop.”¹⁰⁹ Law enforcement officers have always treated flight as strong proof of guilt. As one study concluded, “Certainly officers on patrol assume that flight is strong evidence of guilt. They almost always attempt to stop and question a person who flees from

105. *Commonwealth v. Warren*, 31 N.E.3d 1171, 1176 (Mass. Ct. App. 2015).

106. *See Navarette v. California*, 134 S. Ct. 1683, 1689 (2014) (“There is also reason to think that the 911 caller in this case was telling the truth Another indicator of veracity is the caller’s use of the 911 emergency system. A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity.”) (citations omitted); *Florida v. J.L.*, 529 U.S. 266, 276 (2000) (Kennedy, J., concurring) (noting that features allowing the police to identify the person providing otherwise anonymous information helps to establish its reliability); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (noting that “[t]he informant was known to him personally and had provided him with information in the past”); *cf. J.L.*, 529 U.S. at 270 (noting that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity”) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)).

107. *Warren*, 31 N.E.3d at 482–83; *see also* Tr. at 19.

108. *See, e.g., Florida v. Rodriguez*, 469 U.S. 1, 6 (1984); *United States v. Sokolow*, 490 U.S. 1, 8–9; (1989); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

109. Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L. J.* 214, 220 (1983) (footnote omitted).

them, even though they suspect no specific crime.”¹¹⁰ The criminal law has deemed that inference a reasonable one, historically treating flight as proof of guilt. For example, renowned evidence scholar John Henry Wigmore wrote, “It is universally conceded today that the fact of an accused’s flight . . . [is] admissible as evidence of consciousness of guilt, and thus of guilt itself.”¹¹¹ The Supreme Court endorsed the proposition that flight is probative of wrongdoing more than 120 years ago. The Court concluded that flight is not tantamount to proof of guilt, but it is “competent evidence against [the accused] as having a tendency to establish his guilt.”¹¹² In more recent cases interpreting the Fourth Amendment, the Court has often noted that evasive conduct, especially flight, at the sight of a police officer is significant proof that a crime was, is being, or will be committed.¹¹³ So too have numerous lower federal and state courts.¹¹⁴

110. LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME* 32 n.19 (Frank J. Remington ed. 1967).

111. 2 JOHN HENRY WIGMORE, *EVIDENCE* § 276, at 122 (James H. Chadbourn rev. ed. 1979).

112. *Allen v. United States*, 164 U.S. 492, 499 (1896); *see also Hickory v. United States*, 160 U.S. 408, 416–23 (1898) (noting that, while it is wrong to treat flight “under divine and human law, [as] conclusive proof of guilt,” it is relevant proof of guilt); *Alberty v. United States*, 162 U.S. 499, 508–11 (1896) (noting, “undoubtedly the flight of the accused is a circumstance proper to be laid before the jury as having a tendency to prove his guilt,” but it cannot be treated as tantamount to, or a presumption of, guilt).

113. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124–25; (2000); *Peters v. New York, decided together with Sibron v. New York*, 392 U.S. 40, 66–67 (1968); *Husty v. United States*, 282 U.S. 694, 701 (1931); *Brinegar v. United States*, 338 U.S. 160, 166 n.7 (1949).

114. *See, e.g., United States v. Nora*, 765 F.3d 1049, 1053 (9th Cir. 2014) (stating “unprovoked flight” at the sight of police officers adds “weight to the inference that criminal wrongdoing might be afoot”); *United States v. Guardado*, 699 F.3d 1220, 1224 (10th Cir. 2012) (contrasting the reasonableness of stopping a suspect in headlong flight from identifiable police with the facts in *United States v. Davis*, 94 F.3d 1465 (10th Cir. 1996), where police lacked reasonable suspicion to stop the defendant who was a known gang member in a high crime area, but merely walked away from the officer before being seized); *United States v. Horton*, 611 F.3d 936, 940 (8th Cir. 2010) (finding “unprovoked flight at the sight of an officer can contribute to reasonable, articulable suspicion”); *United States v. Luqman*, 522 F.3d 613 (6th Cir. 2008) (woman’s flight from defendant’s car, late at night, in “known prostitution area,” contributed to reasonable suspicion of criminal mischief); *United States v. Muhammad*, 463 F.3d 115, 121 (2d Cir. 2006) (“When the noticed presence of officers provokes a suspect’s headlong flight in a high crime area, the officers are justified in suspecting criminal activity on the part of the suspect and a *Terry* stop is warranted.”); *United States v. Smith*, 396 F.3d 579, 584 (4th Cir. 2005) (reasoning that “the principles of *Wardlow* apply to evasive conduct by drivers approaching a police roadblock”); *Price v. City of Philadelphia*, No. CV 15-1909, 2017 WL 895586, at *13 (E.D. Pa. Mar. 7, 2017) (stating “flight upon noticing police, plus some other indicia of wrongdoing, can constitute reasonable suspicion.”); *Hargraves v. District of Columbia*, 134 F. Supp. 3d 68 (D.D.C. 2015); *United States v. Conerly*, 75 F. Supp. 3d 1154, 1163 (N.D. Cal. 2014); *United States v. Smith*, 994 F. Supp. 2d 758, 762 (E.D. Va. 2013) (reasoning it is possible that “[p]resence in a high crime area” plus “[u]nprovoked flight upon seeing a police officer” equals “reasonable suspicion”); *United States v. Jones*, 609 F. Supp. 2d 113 (D. Mass. 2009); *United States v. Saddler*, 445 F. Supp. 2d 862, 870 (S.D. Ohio 2006) (stating “‘flight plus a bad area equals probable cause,’” although “the threshold requirement” in such cases “is lower than probable cause; it is merely reasonable suspicion”); *United States v. Stone*, 73 F. Supp. 2d 441, 447 (S.D.N.Y. 1999) (“It was only after the defendant fled that reasonable suspicion arose, thus making the subsequent *Terry* stop lawful.”); *United States v. Duffy*, 796 F. Supp. 1252, 1259 (D. Minn. 1992); *Harris v. State*, 423 S.E.2d 723, 724 (Ga. App. 1992); *Platt v. State*, 589 N.E.2d 222, 224, 226–27 (Ind. 1992); *State v. Williams*, 416 So.2d 91, 94 (La. 1982); *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989); *State v. Anderson*, 454 N.W.2d, 763, 764, 767–68 (Wis. 1990). *Contra* *People v. Souza*, 885 P.2d 982, 987–91 (Cal. 1995); *People v. Wilson*, 784 P.2d 325, 327 (Colo. 1989); *State v. Hicks*, 488 N.W.2d

Officers Anjos and Carr simply made the same type of common-sense judgment to establish reasonable suspicion that the Supreme Court and other courts had found sufficient proof of guilt in other cases. Tellingly, the Massachusetts courts once also endorsed that common-sense view.¹¹⁵

Three Supreme Court cases in particular are instructive in this regard. One is *Peters v. New York*.¹¹⁶ At issue there was the significance of flight from an off-duty police officer wearing civilian clothes. When he heard noises in the hallway outside of his apartment, he decided to investigate and saw two men tiptoeing in the hall. When they saw him, they fled. Writing for the Court, Chief Justice Earl Warren concluded that the officer had not only reasonable suspicion to stop them for questioning, but probable cause to arrest them. As he wrote, “deliberatively furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*,” and, when added to an officer’s knowledge tying someone to a crime, “they are proper factors to be considered in the decision to make an arrest.”¹¹⁷ In fact, “[i]t is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity.”¹¹⁸

The second case is *Illinois v. Wardlow*.¹¹⁹ Two uniformed police officers were driving the last car in a four-vehicle caravan heading toward a Chicago neighborhood known for heavy drug trafficking. One officer spotted William Wardlow standing near a building holding an opaque bag. Wardlow looked in the officers’ direction and fled “through [a] gangway and an alley.”¹²⁰ The officers tracked

359, 361–66 (Neb. 1992); *State v. Tucker*, 642 A.2d 401, 406–07 (N.J. 1994); *State v. Nicholson*, 188 S.W.3d 649, 661 (Tenn. 2006) (all ruling that flight is relevant but flight alone does not constitute reasonable suspicion).

The Massachusetts courts are among those that have found flight to be ample proof of guilt. *See Commonwealth v. Grandison*, 741 N.E.2d 25, 30–32 (Mass. 2001); *Commonwealth v. Mercado*, 663 N.E.2d 243, 246 (Mass. 1996); *Commonwealth v. Moses*, 557 N.E.2d 14, 17 & n.3 (Mass. 1990); *Commonwealth v. Wren*, 463 N.E.2d 344, 345 (Mass. 1984); *Commonwealth v. Rupp*, 783 N.E.2d 475, 479–80 (Mass. App. Ct. 2003); *Commonwealth v. Doocey*, 778 N.E.2d 1023, 1028–29; (Mass. App. Ct. 2002); *Commonwealth v. Fisher*, 763 N.E.2d 1106, 1109 (Mass. App. Ct. 2002); *Commonwealth v. Harkess*, 624 N.E.2d 581, 584, (Mass. App. Ct. 1993) (“On seeing two persons run into an apartment building in apparent response to an approaching police vehicle, the police had the right—if not the duty—to conduct further visual investigation while the two persons remained in public view.”). The U.S. Court of Appeals for the First Circuit also finds flight persuasive evidence of guilt. *See, e.g., United States v. Wright*, 582 F.3d 199 (1st Cir. 2009) (ruling that a suspect’s unprovoked flight, clutching at his sweatshirt, and refusal to stop gave rise to reasonable suspicion); *United States v. Aitoro*, 446 F.3d 246, 249 (1st Cir. 2006) (ruling that it was reasonable for police officers to stop two men who saw them, said “Oh shit,” then “did an abrupt about-face and sprinted in the reverse direction.”); *United States v. Sealey*, 30 F.3d 7, 8 (1st Cir. 1994) (finding reasonable suspicion where officer called out from his patrol car to a suspect, “Hey Steven, what’s up?,” and the suspect fled); *See generally WAYNE R. LAFAVE, SEARCH AND SEIZURE* § 9.5 (5th ed. 2004) (collecting cases).

115. *See supra* note 114.

116. *Peters v. New York, decided together with Sibron v. New York*, 392 U.S. 40 (1968).

117. *Id.* at 66–67.

118. *Id.* at 66.

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

120. *Id.* at 122.

Wardlow down and spotted him. Believing that Wardlow might be armed because drugs, cash, and guns go together like bacon, lettuce, and tomato on a sandwich,¹²¹ one of the officers frisked Wardlow and found a loaded .38 caliber pistol. On an appeal after his conviction for being a felon in possession of a firearm, the Illinois Supreme Court ruled that the stop was unlawful because the officers lacked a reasonable suspicion that Wardlow was engaged in criminal activity.¹²² His unprovoked flight was inadequate to establish reasonable suspicion, the court held, because everyone has the right to refuse to answer a police officer's questions and go on his way.¹²³ The U.S. Supreme Court disagreed and reversed.

The Court noted that someone's mere presence in a high-crime area does not establish reasonable suspicion, but "the relevant characteristics of a location" are among "the relevant contextual considerations in a *Terry* analysis."¹²⁴ Atop that factor, the Court went on to point out, was Wardlow's "unprovoked flight upon noticing the police."¹²⁵ Evasive conduct is strong evidence of criminality, the Court noted, and "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."¹²⁶ If an officer lacks reasonable suspicion or probable cause, the Court acknowledged, a person can decline to answer a police officer's question and go on his way.¹²⁷

But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.¹²⁸

Wardlow did not hold that unprovoked flight alone creates reasonable suspicion, but it also did not rule out that conclusion.¹²⁹

The last case is *Wong Sun v. United States*.¹³⁰ Relying on a tip by someone they had just arrested for heroin possession, federal narcotics officers went to a San Francisco laundry at 6 a.m., and one agent rang the bell. When James Toy

121. See Glenn Fry, *Smuggler's Blues*, YOUTUBE (1984), <https://www.youtube.com/watch?v=dcxBWbyDjIg>.

122. *People v. Wardlow*, 701 N.E.2d 484 (Ill. 1998).

123. *Id.* at 487 (discussing, inter alia, *Florida v. Royer*, 460 U.S. 491 (1983)).

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

125. *Id.*

126. *Id.*

127. *Id.* at 125 (discussing *Royer*, 460 U.S. at 498 (plurality opinion)).

128. *Id.*

129. Both before and after *Wardlow*, the lower courts have disagreed over the issue whether flight alone justifies a *Terry* stop. See Keven Jay Kerchner, *Case Comment, Criminal Law—Search and Seizure: The Investigative Stop: What Happens When We Run?: Illinois v. Wardlow*, 528 U.S. 119 (2000), 77 N.D. L. REV. 123, 132–34 & nn. 111–27 (2001) (collecting cases); *supra* note 114.

130. 371 U.S. 471 (1963).

opened the door, the agent asked to pick up his laundry. Toy told the agent that the store did not open until 8 a.m. and started to close the door, but the agent forced his way into the building. As he did, the agent said that he was a federal agent and pulled out his badge. As the door was being pushed open, Toy immediately fled down the hall toward the back of the building where his wife and children were sleeping in a bedroom. Toy denied selling heroin, but told the agents that Wong Sun sold it. The agents took Toy to the address he gave them for Wong Sun, where they entered, found heroin, and arrested him. Wong Sun claimed that he bought the heroin from Toy.¹³¹

The Supreme Court found that the agents had neither probable cause nor reasonable suspicion based on the tip of a previously untested informant just taken into custody for heroin trafficking. The agents also had no reason to believe that Toy was the person identified by the informant. Toy's flight also was not probative of guilt because he had no reason to believe that the agent was a law enforcement officer rather than an assailant.¹³² As the Court explained, although the agent did eventually disclose that he was a law enforcement officer, "he affirmatively misrepresented his mission at the outset, by stating that he had come for laundry and dry cleaning. And before Toy fled, the officer never adequately dispelled the misimpression engendered by his own ruse."¹³³ Toy was therefore entitled to infer that the officer was an intruder. "Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion."¹³⁴

The facts in the *Warren* case far more closely resemble those of *Peters* and *Wardlow* than *Wong Sun*. Unlike *Wong Sun*, the facts regarding Warren's flight were not ambiguous. Officer Anjos was clearly identifiable as a police officer, given that he was uniformed and seated in his marked patrol car. Warren saw him and ran away at no more than Officer Anjos' presence and the words, "Hey guys, wait a minute." That statement was not a threat of imminent unlawful activity that might explain Warren's flight as an effort to avoid physical harm. Nor did it convey an insult, an implication of guilt, or even a significant restraint or inconvenience. In fact, even if Officer Anjos' statement amounted to "a show of authority" for Fourth Amendment purposes, it did not constitute a command, let alone a restraint, as the Supreme Court has expressly held.¹³⁵ Yet, Warren took off into an area that could have been called a "gangland." Once he

131. *Id.* at 473–76.

132. *Id.* at 480.

133. *Id.* at 483.

134. *Id.*

135. See *California v. Hodari D.*, 499 U.S. 621, 623–29 (1991) (ruling that a police officer had not stopped a party that fled at the sight of the officer until that party was brought under police control). The Massachusetts Supreme Judicial Court, however, has disagreed with the Supreme Court decision in *Hodari D.*, ruling that a similar show of authority amounts to a seizure under the state constitution. See *Commonwealth v. Stoute*, 665 N.E.2d 93, 95–98 (Mass. 1996).

emerged, he saw Officer Carr, did an about-face, and ran back into the “gangland.” It is reasonable to assume—as case law, scripture, and common sense tell us—that Warren’s “unprovoked flight gave the police ample cause to stop him.”¹³⁶

Consider the alternative. There are situations, as Justice John Harlan noted, in which “the officer ha[s] to act quickly if he [is] going to act at all.”¹³⁷ The *Warren* case is a good example. Officers Anjos did no more than identify himself and ask Warren and his companion to “wait a minute” before Warren took flight: Officer Carr, not even that much. As the text of the amendment makes clear, “the ultimate touchstone of the Fourth Amendment is reasonableness.”¹³⁸ Accordingly, as the Supreme Court made clear in *Terry*, “the central inquiry under the Fourth Amendment” is “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”¹³⁹ The Supreme Court agreed with the police that “in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.”¹⁴⁰ To address that need while also still requiring the police to be “reasonable,” the Court approved brief detentions for the purpose of questioning someone reasonably believed to be involved in a crime in an effort to accommodate the needs of law enforcement and an individual’s entitlement to personal freedom of movement. It would be nonsensical to demand that police officers do no more than wave goodbye when someone like Warren takes off at the mere sight of a police officer. The Supreme Court endorsed that proposition in *Peters* and *Wardlow*. The Massachusetts Supreme Judicial Court should have listened to what the Supreme Court said and did in those cases.

Now, step back from the law and ask yourself these questions: Why did Warren run—twice—from an identifiable police officer? Was it because he was engaged in wrongdoing or for some innocent reason? Now, before you answer those questions, keep the following points in mind. You do not need to be absolutely correct to infer that Warren may have been involved in a crime. Nor do you need to establish that your conclusion is correct beyond a reasonable doubt or by a preponderance of the evidence—the burdens of proof to establish guilt at a criminal or civil trial, respectively. You also need not establish a persuasive enough case, based on probable cause, to convince a magistrate to issue an arrest warrant for Warren.¹⁴¹ All that is necessary is “some minimal level of objective justification,” a reasonable suspicion, that a crime may be

136. *Michigan v. Chesternut*, 486 U.S. 563, 576 (1988) (Kennedy, J., joined by Scalia, J., concurring).

137. *Sibron v. New York*, 392 U.S. 40, 78 (1968) (Harlan, J., concurring in the result).

138. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (internal punctuation omitted).

139. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

140. *Id.* at 10.

141. *See supra* notes 98–101.

afoot.¹⁴² Put another way, “[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’”¹⁴³ Warren’s flight alone justified the officers’ inference that he may have been involved in criminal activity. When added atop the other facts, Warren’s flight did not merely support reasonable suspicion; it *screamed* reasonable suspicion.¹⁴⁴

How did the Massachusetts Supreme Judicial Court escape that conclusion? In three ways. First, the court largely pursued a fact-by-fact evaluation of each item of evidence, rather than make a common-sense assessment of the totality of the facts known to the officers, as the Supreme Court has directed. Second, without expressly saying as much, the court undertook a more exacting scrutiny of the evidence than U.S. Supreme Court case law requires. The court’s opinion gives the impression that Officers Anjos and Carr might have been mistaken about the reason why Warren fled and therefore could not have had reasonable suspicion that he was involved in a crime. Third, the court gave no weight to Warren’s flight even though it was well settled under Supreme Court and Massachusetts state law that flight was very probative of guilt.¹⁴⁵

If the Massachusetts Supreme Judicial Court had made only the first two mistakes, the court’s opinion could readily be discounted as just one more in a long line of a run-of-the-mill *Terry* stop cases. “Nothing to see here; just move on,” as the police often say on television. Each year the lower federal and state courts hand down thousands of Fourth Amendment decisions. The *Warren* decision would be merely one more, the difference being that the Massachusetts Supreme Judicial Court misapplied settled Fourth Amendment law to the particu-

142. *INS v. Delgado*, 466 U.S. 210, 217 (1984); *see also, e.g.*, *United States v. Cortez*, 449 U.S. 411, 418 (1981); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion); *supra* notes 85–86.

143. *Heien*, 135 S. Ct. at 536.

144. One former Washington, D.C., police officer has said that a “‘code’ of police subculture” is that “if a citizen runs from one of us, we are to beat him severely.” MALCOLM SPARROW, *HANDCUFFED: WHAT HOLDS POLICING BACK, AND THE KEYS TO REFORM* 35 (2016) (quoting Christopher Cooper, *Entrenched Subculture Is at Root of Police Brutality and Bias Cases*, PHILADELPHIA INQUIRER, July 21, 2009). Nothing Officer Anjos or Carr said communicated any such threat, the Massachusetts Supreme Judicial Court did not cite to anything in the record indicating that Warren believed that proposition, and that court did not rely on it—perhaps because, even if were true in Boston, it would *deter* flight, not *encourage* it.

145. Additionally, the court did not attempt to reconcile this reasoning with its own recognition elsewhere that flight is, in and of itself, inherently suspicious. As the court had earlier recognized, “flight constitutes classic evidence of consciousness of guilt.” *Commonwealth v. Vick*, 910 N.E.2d 339, 348 (Mass. 2009). In Massachusetts, “Consciousness of guilt instructions are permissible when there is an ‘inference of guilt that may be drawn from evidence of flight’” *Commonwealth v. Stuckich*, 879 N.E.2d 105, 110 (Mass. 2008) (quoting *Commonwealth v. Toney*, 433 N.E.2d 425, 431 (Mass. 1982)). And a judge need not “bring to the attention of the jury the defendant’s own innocent explanation for the alleged flight,” even where the judge gives the jury a “consciousness of guilt” instruction regarding evidence of flight. *Commonwealth v. Toney*, 433 N.E.2d 425, 432 (Mass. 1982). Thus, a jury could convict a defendant on the basis of evidence that, according to the *Warren* court, does not even furnish a basis for reasonable suspicion. Such an oddity creates a tension in the court’s jurisprudence, to say the least.

lar facts of the *Warren* case. But that happens now and then.¹⁴⁶ Neither the government nor the defense does or should win every such case; most of them pass unnoticed into the history books, where they will soon be forgotten as other, newer cases take their place. In sum, this would just be another mistaken application of settled search-and-seizure law if the Massachusetts Supreme Judicial Court had made only the first two mistakes.

The court's third mistake, however, makes the *Warren* case stand out from the crowd. In the penultimate paragraph of its opinion, the court wrote that Warren may have fled at the mere sight of Officers Anjos and Carr because he might have feared becoming the victim of an unlawful *Terry* stop simply because he was a black male in Boston. The court did not cite any testimony by Warren offering that explanation. Instead, to support that hypothesis, the court relied on studies purporting to show that the BPD as a whole had engaged in racially discriminatory stops and frisks in the recent past. In other words, the court attributed Warren's flight to a fear of being the victim of yet another stop-question-and-frisk by the racist BPD.

That aspect of the Massachusetts Supreme Judicial Court's decision is quite problematic. It could also prove far more troublesome in the long run than the mistakes that the court made in suppressing the handgun that Warren jettisoned during his flight. The reason is that the Massachusetts Supreme Judicial Court took an entirely one-sided approach to the analysis of the issues that arise at the intersection of *Terry* stops and the race of a suspect. What the court did was to examine that issue exclusively from the perspective of the person who is stopped without considering at all the interests of the other parties with a stake in the proper disposition of any such controversy: namely, the interests of the vastly greater number of law-abiding black residents of communities beset by crime who wish only to be as free from its adverse effects as the residents of any other locale, regardless of their race. In fact, the court did not even recognize that someone other than the suspect of a crime—in particular, the interests of the law-abiding residents of a community plagued by violent crime—might have an interest in deciding whether a particular police practice is “reasonable” under the Fourth Amendment. As explained below, it is a mistake to ignore the interests of those residents when the Fourth Amendment is under discussion.

III. RACE AND *TERRY* STOPS

The Massachusetts Supreme Judicial Court was obviously troubled by the fact that Warren was a young black male and expressed concern that he had been targeted for that reason. The Massachusetts Supreme Judicial Court did not identify any evidence in the record of Warren's case that Officers Anjos and

146. As several Supreme Court decisions demonstrate. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266 (2002); *Florida v. J.L.*, 529 U.S. 266 (2000); *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Cortez*, 449 U.S. 411 (1981).

Carr (or their partners) were motivated by racial animus when they emerged from their vehicles and caught Warren's attention. Rather, the court cited statistical studies evaluating the BPD's general stop-question-and-frisk policies. The court was troubled by the facts revealed in two recent reports about the BPD stop-question-and-frisk practices. For example, the reports concluded that, of the 204,739 FIO reports discussed in one study, "the subjects were 89.0% male, 54.7% ages 24 or younger, and 63.3% Black."¹⁴⁷ Plus, 5% of all suspects "repeatedly stopped or observed accounted for more than forty per cent [sic] of the total interrogations and observations conducted by the police department."¹⁴⁸ Based on its review of those reports, the court directed state trial judges to treat flight as innocuous "in appropriate cases."¹⁴⁹

A. The Studies Cited by the Massachusetts Supreme Judicial Court

The relationship between race and *Terry* stops has been the subject of considerable academic discussion. Most scholars have criticized the stop-question-and-frisk practices used by large metropolitan police departments on the ground that they discriminately target young black males.¹⁵⁰ Some have even argued that a substantial number of police officers believe that minorities are more likely than whites to commit crime.¹⁵¹ Of particular interest to the Massachusetts Supreme Judicial Court were an October 2014 report prepared by the American Civil Liberties Union (ACLU)¹⁵² and a June 2015 report prepared by four criminal justice professors at the request of the BPD and the ACLU.¹⁵³ Because of the importance of those reports to the Massachusetts Supreme Judicial Court, a summary of their conclusions is in order.

The ACLU Report concluded that, from 2007 to 2010, of the 204,739 field interrogation and observation reports discussed in the study, 63.3% of the subjects were black even though blacks were only 24.4% of Boston's population.¹⁵⁴ Plus, blacks were more likely to be subjected to repeated *Terry* stops and frisks.¹⁵⁵ "The bottom line," the ACLU concluded, was that "the BPD unfairly targets Black people because of their race."¹⁵⁶

147. 58 N.E.3d at 342 n.15.

148. *Id.* at 342 n.16.

149. *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass 2016).

150. *See supra* notes 19–26.

151. *See Johnson, supra* note 109, at 236 & n.151 (collecting authorities).

152. ACLU, BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007–2010 (Oct. 2014) [hereinafter ACLU REPORT].

153. JEFFREY FAGAN ET AL., AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK AND/OR SEARCH REPORTS: FINAL REPORT (June 15, 2015) [hereinafter PROFESSORS' STUDY], <http://raceandpolicing.issuelab.org/resources/25203/25203.pdf>; *see also* Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *FORDHAM URB. L. J.* 575 (2016).

154. ACLU REPORT, *supra* note 152, at 4, 6. The Professors' Study adds that 89% of the subjects were male and 54.7% were age 24 or younger. PROFESSORS' STUDY, *supra* note 153, at 2.

155. ACLU REPORT, *supra* note 152, at 1

156. *Id.* at 3.

The Professors Study found that, “between 2007 and 2010, the BPD arrested 28,427 suspects,” of whom 50.4% were black, 26.8% were white, 20.6% were Hispanic, and 2.2% were Asian or some other racial category.¹⁵⁷ After analyzing the FIO reports and the relevant demographic characteristics of communities served by the BPD, the report came to several conclusions. First, the reporting of criminal activity in Boston neighborhoods was the strongest predictor of the amount of FIO activity in those locations.¹⁵⁸ Second, “the percentage of Black and Hispanic residents in Boston neighborhoods were also significant predictors of increased FIO activity after controlling for [the crime rate] and other social factors.”¹⁵⁹ Third, only a small number people were the subject of repeated Terry stops.¹⁶⁰ Fourth, gang membership and an arrest record were significant

157. PROFESSORS’ STUDY, *supra* note 153, at 28.

158. *Id.* at i (“Controlling for a variety of factors including race of residents, the logged number of crimes in Boston neighborhoods was the strongest predictor of the amount of FIO activity in Boston neighborhoods.”); *id.* at 8 (“The monthly number of total Index crimes (logged, lagged) in a tract was a consistently significant positive predictor of the monthly count of FIO reports in a tract across models with varying benchmarks. This suggests that the intensity of BPD FIO activity in a tract is associated with the amount of serious crime experienced in a tract controlling for other conditions [T]he Boston police prioritized crime problems in the allocation of FIO activity by tract and police district during this period.”); *id.* at 24 (“FIO reports made by BPD officers in 2010 tended to concentrate in census tracts with higher rates of total crime incidents and higher percentages of black resident populations.”).

159. *Id.* at i; *id.* (“[T]he analyses revealed that the percentage of Black and Hispanic residents in Boston neighborhoods were also significant predictors of increased FIO activity after controlling for crime and other social factors. These racial disparities generate increased numbers of FIO reports in minority neighborhoods above the rate that would be predicted by crime alone. For instance, a neighborhood with 85% Black residents would experience approximately 53 additional FIO reports per month compared to an ‘average’ Boston neighborhood.”); *id.* at 8 (“The consistent size and direction of the race and ethnicity coefficients suggests a consistent race effect after controlling for crime, police activity, and other relevant factors, even if the effects were modest in size.”); *id.* at 8 (“The consistent size and direction of the race and ethnicity coefficients suggests a consistent race effect after controlling for crime, police activity, and other relevant factors, even if the effects were modest in size.”); *id.* at 13 (“Black and Hispanic suspects were more likely to be frisked or searched during an FIO encounter, after controlling for non-racial suspect characteristics.”); *id.* at 17 (“Detectives were 49.5 percent more likely to frisk/search subjects during FIO encounters relative to non-detectives, controlling for assignment, rank, and other factors YVSF officers were 24.3 percent more likely to frisk/search subjects during FIO encounters relative to non-YVSF officers, controlling for assignment, rank, detective status, and other factors Despite the frequent FIO activity by YVSF officers, these results suggest that they exercise caution in proceeding from an encounter to a frisk or search. YVSF officers were far more active in FIO activity, by orders of magnitude, than their non-YVSF counterparts, yet only a fraction of their encounters proceeded to a frisk or search.”).

160. “FIO activity was concentrated on repeated interactions with a relatively small number of people. Roughly 5 percent of the N=72,619 unique individuals subjected to FIO encounters accounted for more than 40 percent of the total number of FIO reports made during the study time period. 67.5 percent of the FIO subjects only experienced one FIO and, as a group, accounted for 24.6 percent of the total number of FIO reports made by BPD officers during the study time period.” *Id.* at i; *id.* at 7 (“The number of repeat FIO reports per subject is concentrated among a small number of individuals who experience large numbers of FIO encounters About one in 20 (5.2 percent) experienced 10 or more FIOs and, as a group, accounted for 40.2 percent of the total number of FIO reports made by BPD officers during this time.”).

predictors of repeated *Terry* stops.¹⁶¹ Fifth, a small number of BPD officers accounted for a disproportionate number of stops and frisks,¹⁶² particularly detectives and officers in the BPD Youth Violence Strike Force (YVSF).¹⁶³ Sixth, white BPD officers made more *Terry* stops and frisks than the officers who belonged to a different racial group, but they stopped and frisked people of all races equally without discrimination.¹⁶⁴

161. “Gang membership and prior arrest histories were significant predictors of (a) repeated FIO reports of the same subject and (b) whether suspects were frisked/searched during an FIO encounter. These effects were present after controlling for age, sex, and race. In addition, Black subjects experienced 8 percent higher numbers of repeat FIOs and were roughly 12 percent more likely to be frisked/searched during an FIO encounter, controlling for prior criminal history, gang membership, and other factors.” *Id.* at i; *id.* at 12 (“[P]rior arrest history and gang membership each mediate the influence of race on the number of FIO encounters experienced by subjects, reducing the size of the race estimates but they remain statistically significant Gangs evidently are a priority in using FIO authority, and account for at least some of the racial disparity in FIO encounters. The reduction in effect size for race once gang status is introduced hints that race and gang status are serving as proxies for one another in FIO activity Gangs are thought to be an important source of the city’s gun violence problem, which leads to this attention. We also see that like the general population of those with FIO encounters, gang membership also is skewed by both individual and neighborhood racial composition”) (footnote omitted).

162. “FIO reports were also concentrated among a small number of very active BPD officers. Roughly 4 percent of N=2,349 BPD officers made over 43 percent of the FIOs during the study time period. Youth Violence Strike Force Officers (informally known as the ‘gang unit’) were associated with the highest numbers of FIO reports. During the study period, nearly 26 percent of BPD officers did not file a single FIO report. These officers were primarily assigned to administrative positions or were on leave for significant portions of the study time period.” *Id.* at i–ii.

163. “Unit assignment also was a significant predictor of officers’ FIO activity. BPD officers assigned to the YVSF made almost 12 times as many FIO reports per month compared to officers assigned to other specialized units or policing districts, controlling for other factors. Their mission explains in part this emphasis: YVSF officers are charged with preventing outbreaks of gang violence. Completing FIO reports on gang member whereabouts, their associations and routine activities represent a central activity in pursuing that mission by massing information on the routine activities of gang members.”); *id.* at 16–17 (“White and Hispanic officers had substantially more FIO encounters than Black officers White YVSF officers have about 6.5 times more FIO encounters per month than White officers in other units. The differences for Black and Hispanic officers in the YVSF units are even greater. [¶] Here again, we see the importance of the YVSF unit in explaining racial disparities in FIO encounters between citizens and police. This is not to say that there is no evidence of racially disparate treatment by officers in other commands; the data show that, in fact, regardless of command, White officers and Hispanic officers are more active in FIO work [W]ithin this focus of police officers, the race disparities within officer racial categories are quite large, and officers from all racial and ethnic groups are more active once assigned to this command. The results suggest an institutional dimension to explain officer FIO activity that is separate from an individual officer’s taste or preference for discrimination.”).

164. “White BPD officers made significantly higher numbers of FIO reports during the study time period relative to Black and Asian officers. White BPD officers also were more likely to frisk/search subjects during FIO encounters relative to minority officers. However, white officers did not seem to discriminate by subject race and ethnicity. Also, White officers made elevated numbers of FIO reports and were more likely to frisk and search during FIO encounters for subjects of all races and ethnicities. However, within suspect race categories, Black officers were less likely to FIO or frisk White or Black suspects than were White officers.” *Id.* at ii; *id.* at 14 (“There were large differences in FIO activity by officer race or ethnicity. Black officers made 42.5 percent fewer FIO reports per month compared to White officers, controlling for age, sex, rank, detective status, and assignment Relative to White officers, Asian officers made 44.8 percent fewer FIO reports, controlling for officer demographic, rank,

B. The Limitations of the Studies Cited by the Massachusetts Supreme Judicial Court

Those studies do not prove that BPD officers have discriminated against blacks on a large-scale, widespread, and long-term basis. Start with the fact that there are several serious shortcomings in the data underlying both reports. During the relevant period, BPD officers did not file an FIO report if a police-citizen encounter resulted in an arrest; instead, the officers prepared an arrest report.¹⁶⁵ Accordingly, lawful, racially unbiased *Terry* stops that led to an arrest were not included in the data on which the two studies relied. To be sure, it is highly likely that some arrests were based on an arrest warrant resting on the report of an eyewitness to a crime, and that some involved a person caught *in flagrante delicto* with contraband. But it is also reasonable to assume that a fair number of those arrests may have begun as lawful *Terry* stops. Why? The police are entitled to a presumption that they acted lawfully,¹⁶⁶ and neither the Professors' Study nor the ACLU Report challenged those arrests as unjustified or discriminatory.

The second hole in the evidence, however, might point in the other direction. A large number of FIO reports filed by BPD officers involved a frisk—40%—and in 75% of those cases the only justification offered by the BPD the officer was “investigation [sic] person” without any further elaboration or discussion of the underlying facts. The frisk in some unknown number of those cases may not have been lawful under *Terry*, but no one can know at this date because the reports did not identify the factual predicate for the frisk. Because of those problems with the evidence, the Professors' Study acknowledged, “the type of outcome analysis that has been widely applied to resolve Fourth and Fourteenth Amendment claims in policing litigation was not possible in [their] analysis.”¹⁶⁷

There are other reasons why the Massachusetts Supreme Court should not have so readily concluded that the racially disproportionate numbers cited in the

and assignment covariates.”); *id.* at 20 (“Table 10a shows higher FIO activity for White officers for suspects of all races, including White suspects, compared to Black officers. White officers have significantly more encounters with White suspects than they have with suspects of other races. Column 1 shows that Black officers, compared to White officers, are significantly less active across all suspect race groups, again suggesting discrimination other than preference-based. The pattern for frisks and searches in Table 10b is similar. White officers are more likely to frisk or search both Black and White suspects compared to cross-racial frisks or searches by Black officers. Black officers again show lower rates of frisks and searches compared to White officers, and are equally likely to frisk or search both White and Black suspects [W]hile White officers may not discriminate between suspects of different races, they do have stronger preferences for stops between races than do Black officers. This is evident for suspects of all races There may not be preferences by race, but there does appear to be stronger preferences for FIO activity overall. Put another way, white officers are biased toward everyone compared to Black, Hispanic, or Asian officers.”).

165. PROFESSORS' STUDY, *supra* note 153, at 3; ACLU REPORT, *supra* note 152, at 1, 12.

166. *Cf.* United States v. Armstrong, 517 U.S. 456, 464 (1996) (ruling that prosecutors are entitled to “[t]he presumption of regularity” with respect to their charging decisions) (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14–15 (1926)).

167. PROFESSORS' STUDY, *supra* note 153, at 3.

reports are proof of systematic racial bias by the BPD. The professors' detailed and sophisticated analysis of the data supplied by the BPD did not establish a practice of racially biased *Terry* stops by BPD officers. Their study revealed "racially disparate treatment of minority persons in BPD FIO activity," and also that "neighborhoods with higher percentages of Black and Hispanic residents experienced higher numbers of FIOs relative to 'average' Boston neighborhoods."¹⁶⁸ The report also found, however, that "this research cannot determine whether the identified patterns were generated by bias or other processes of racial discrimination in BPD FIO practices."¹⁶⁹ Moreover, the Professors Report also contained important information that would tend to rebut any claim of systematic police racial discrimination. The study found that, because "[g]angs are thought to be an important source of the city's gun violence problem," there is "intense police attention to gang members by Boston police, including reputed gang members who may have had no criminal history."¹⁷⁰ The Professors' Study also found that "BPD FIO activity is concentrated in high-crime neighborhoods and largely focused on gang-involved and criminally-active individuals" and that, like the general population of those with FIO encounters, "gang membership also is skewed by both individual and neighborhood racial composition."¹⁷¹ Plus, a small number of officers performed a large number of stops of blacks, and those officers were either members of the YVSF, a task force specifically focused on gang violence in Boston, or detectives, who are tasked with the investigation of completed crimes.¹⁷² The Massachusetts Supreme Judicial Court did not consider whether the data reflecting the actions of those two cohorts of police officers skewed the overall data for the BPD. The court should have done so because it is a mistake to conclude that, even if those two categories of officers targeted African Americans solely because of their race (which the evidence did not prove), all BPD officers, including *patrol officers* like Anjos and Carr, are motivated by the same discriminatory animus.

C. *The Legal Errors Made by the Massachusetts Supreme Judicial Court*

The Massachusetts Supreme Judicial Court also committed an error of law by assuming that the Fourth Amendment issue *in this case* can be resolved by considering a study of *Terry* stops *in other cases*. The Professors' Study did not consider the facts of the *Warren* case. Nor from what the study says did it examine the totality of the circumstances in any other case it analyzed. In an ordinary suppression case, the trial court would consider suppression hearing testimony by the defendant and the arresting officers, and the judge could make an evaluation of their respective credibility based on what he saw and heard in

168. *Id.* at 20.

169. *Id.* at 21.

170. *Id.* at 12.

171. *Id.* at 20; *id.* at 12 (footnote omitted).

172. *Id.* at 17.

court. Yet, credibility findings like those are not what drove the Massachusetts Supreme Judicial Court in *Warren*. That court relied on the Professors' Study, which examined evidence of the BPD's stop-question-and-frisk practice *in globo*. It is a mistake, however, to assume that a claim alleging an unlawful department-wide practice can be analyzed under the Fourth Amendment in that manner. On the contrary, the Supreme Court's *Terry* stop decisions, including *Terry* itself, have consistently made it clear that whether the facts known to a police officer justify a *Terry* stop must be analyzed in light of the totality of the circumstances in each case.¹⁷³ A consequence of that case-specific focus is that courts may not make across-the-board conclusions about the legality of a particular stop by analyzing the entirety of a police department's *Terry* stop practices.¹⁷⁴

A federal district court made the same mistake in *Floyd v. City of New York*.¹⁷⁵ *Floyd* was a civil case, a class action lawsuit brought under the Fourth Amendment and the Fourteenth Amendment's Equal Protection Clause challenging the NYPD's stop-question-and-frisk practice that it employed since the 1990s. The plaintiffs argued that statistical proof shows that blacks and Hispanics are stopped and frisked far more often than can be explained by their numbers in the community or the amount of crime in the relevant neighbor-

173. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *supra* notes 84–89.

174. Consider these observations about the difficulty of recreating in a social science study the factual variation that occurs in *Terry* stops:

“Suspicious behavior” is the spark for both pedestrian and traffic stops. Pedestrian stops are at the very core of policing, used to enforce narcotics and weapons laws, to identify fugitives or other persons for whom warrants may be outstanding, to investigate reported crimes and “suspicious behavior,” and to improve community quality of life. For the NYPD, a “stop” intervention provides an occasion for the police to have contact with persons presumably involved in low-level criminality without having to effect a formal arrest, and under the lower constitutional standard of “reasonable suspicion. Indeed, because low-level “quality of life” and misdemeanor offenses were more likely to be committed in the open, the “reasonable suspicion” standard is more easily satisfied in these sorts of crimes.

However, in pedestrian and traffic violations, the range of suspicious behavior in neighborhood policing is sufficiently broad to challenge efforts to identify an appropriate baseline against which to compare race-specific stop rates. Accordingly, attributing bias is difficult; causal claims about discrimination would require far more information about such baselines than the typical administrative (observational) datasets can supply. Research *in situ* that relies on direct observations of police behavior requires officers to articulate the reasons for their actions, a task that is vulnerable to numerous validity threats. Instead, reliable evidence of ethnic bias would require experimental designs that control for other factors so as to isolate differences in outcomes that could only be attributed to race or ethnicity. Such experiments are routinely used in tests of discrimination in housing or employment. But observational studies that lack such controls are often embarrassed by omitted variable biases; few studies can control for all of the variables that police consider in deciding whether to stop or search someone.

Gelman, *supra* note 16, at 814–15 (citations omitted).

175. 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (opinion on the merits) (for the later history of the case, see *supra* note 32).

hood.¹⁷⁶ Those numbers, the plaintiffs maintained, suggested racial bias on the part of the NYPD.¹⁷⁷ They also pointed out that the success rate for *Terry* frisks is extraordinarily low, with weapons recovered in only a tiny fraction of cases.¹⁷⁸ That poor success rate, they said, undermines any defense that, however disruptive and offensive it may be, the NYPD's stop-question-and-frisk practice was necessary to prevent violent crime.¹⁷⁹ In response, the NYPD disputed the inferences that should be drawn from the statistical evidence arguing that most *Terry* stops occurred in a small number of predominantly black or Hispanic, high-crime precincts. The number of stops would naturally be the highest in those neighborhoods because the police needed to prevent gun violence and drug trafficking in the locales where those crimes were the greatest risk to the public. The NYPD also maintained that the low gun-recovery success rate was proof of the practice's effectiveness. The purpose of the stop-question-and-frisk practice was not only to identify parties illegally carrying handguns, but also to deter others from doing likewise. Accordingly, far from undermining the legality of the practice, the low success rate proved its effectiveness. Finally, some supporters of the NYPD practice maintain that it reduced the crime rate without imposing the unduly punitive sentences imposed by, for example, federal law for the possession of drugs, and therefore was a less burdensome

176. See, e.g., WHITE & FRADELLA, *supra* note 8, at 62–63 & nn.51–55 (discussing studies). In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white. The number of *Terry* stops per year rose from 314,000 in 2004 to a high of 686,000 in 2011, for a total of 4.4 million stops. In 52% of those stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white. *Floyd*, 959 F. Supp. 2d at 558–59.

177. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 133 (The New Press rev. ed. 2012); JOHN JAY COLLEGE REPORT, *supra* note 15, at 3–22; Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1634 (2012); see generally Fagan & Davies, *supra* note 13, at 458–59 (“When it comes to debating theories of crime and law, some people pretend that race does not matter at all, while others accord it undue, if not determinative, significance. Unfortunately, recent events in policing seem to tip the balance of reality toward the latter view. There is now strong empirical evidence that individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested by police. This occurs in part because of their race, in part because of heightened law enforcement intensity in minority communities, in part because of the temptation among law enforcement officers to simply ‘play the base rates’ by stopping minority suspects because minorities commit more crimes, and in part because of the tacit approval of these practices given by their superiors.”) (footnotes omitted).

178. More than half (52%) of those 4.4 million *Terry* stops were followed by a frisk for weapons, but weapons were found in only 1.5% of the total number of frisks. Broken down by race, weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites. Non-weapon contraband was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites. In 8% of all stops, the officer felt an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In those cases, the officer conducted a full search into the stopped person's clothing. In only 9% of those searches was that object in fact a weapon. In only 14% of these searches, the felt object was in fact contraband. Only 6% of all stops resulted in an arrest. The same percentage resulted in the issuance of a summons. No further law enforcement action was taken in the remaining 88% of the 4.4 million stops. *Floyd*, 959 F. Supp. 2d at 658–59.

179. See *supra* note 20.

alternative for African Americans.¹⁸⁰

The district court agreed with the plaintiffs that the NYPD's stop-question-and-frisk practice violated both the Fourth Amendment and the Equal Protection Clause.¹⁸¹ The district court considered the facts of nineteen individual cases only after analyzing the NYPD practice as a whole. In making that inquiry, the court relied heavily on a statistical analysis of the 4.4 million *Terry* stops that NYPD officers made between January 2004 and June 2012.¹⁸² The Supreme Court, however, has required courts to separately and individually review the facts underlying each *Terry* stop without extrapolating from one or more individual cases to the legality of a police department's entire stop-question-and-frisk practice. The reasoning of the Court's *Terry* stop cases, particularly their emphasis on the critical need to consider "the totality of the circumstances," makes clear that a court cannot rely on a statistical analysis of the validity of stops in *other* cases to decide whether the particular stop at issue in *this* case was supported by reasonable suspicion. The court must conduct a fact-specific inquiry into the case at hand because the Fourth Amendment outlaws unreasonable *individual* searches and seizures, not unreasonable stop-question-and-frisk *policies*.¹⁸³

Consider the Court's decisions in *Adams v. Williams*¹⁸⁴ and *United States v. Sokolow*.¹⁸⁵ In *Adams*, an informant provided a tip to a police officer that a particular individual sitting in a car had a firearm. The Court rejected the argument that an informant's tip could never supply reasonable suspicion, but also ruled that a tip would not always be sufficient.¹⁸⁶ Instead, a court must

180. See WHITE & FRADELLA, *supra* note 8, at 92–93; JOHN JAY COLLEGE REPORT, *supra* note 15, at 11–12 (summarizing the NYPD's argument); Marc Maurer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 12 (1999) (same).

181. *Floyd*, 959 F. Supp. 2d at 658–67.

182. *Id.* at 556, 558–60, 572–624.

183. See Larkin, *Stops, Frisks, and Race*, *supra* note 15, at 5; Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1036 (2011) ("Congress cannot violate this clause by authorizing a search; only the President can violate it, and only by executing a search.") (emphasis in original). Another mistake that the district court made in *Floyd* followed from that one. The court ruled that the success of the program at deterring the unlawful public possession of firearms and in reducing violent crimes was irrelevant to its constitutionality. See *Floyd*, 959 F. Supp. 2d at 256. The district court would have been correct if what it referred to was the constitutionality of *each stop considered by itself*. A *Terry* stop is valid only if it is supported by reasonable suspicion, not simply because it turns up evidence of a crime. But that is not how the district court in *Floyd* analyzed the matter. It considered the NYPD's practice *as a whole* and found it insufficient. As explained in the text, that is the wrong way to resolve a *Terry* stop claim. But if it were appropriate to analyze a stop-question-and-frisk practice in its entirety and if the overall success rate mattered, then the effectiveness of the program at discovering weapons and deterring crime would necessarily be relevant. That is, if the proper question were whether a *police practice is reasonable overall*, proof that it leads to the discovery of illicit handguns on some people and dissuades others from illegally carrying them is certainly relevant.

184. 407 U.S. 143 (1972).

185. 490 U.S. 1 (1989).

186. See, e.g., *Adams*, 407 U.S. 147 (refusing to forbid police reliance on informants to establish reasonable suspicion: "Informants' tips, like all other clues and evidence coming to a policeman on the

evaluate each tip on its own facts, a rule that the Court has reaffirmed in later cases involving informants.¹⁸⁷ *Sokolow* involved the stop of a passenger who had made a short trip to Miami under suspicious circumstances. The U.S. Court of Appeals for the Ninth Circuit had adopted a two-part test to assess reasonable suspicion in that setting, with one factor consisting of “ongoing criminal behavior” and the other “probabilistic” evidence.¹⁸⁸ The Court rejected that approach. Starting from the principle that “reasonable suspicion, like probable cause, is not ‘readily, or even usefully, reduced to a neat set of legal rules,’” the Court explained that the circuit court’s “effort to refine and elaborate the requirements of ‘reasonable suspicion’” made unduly difficult the application of “one of the relatively simple concepts embodied in the Fourth Amendment”—namely, that a court must evaluate “the totality of the circumstances—the whole picture,” when deciding whether an agent had reasonable suspicion of wrongdoing.¹⁸⁹ The defendant also sought to challenge the legality of the “drug courier” profile, a collection of factors that the Drug Enforcement Administration uses to teach its agents how to identify drug couriers.¹⁹⁰ The Court declined to reject or approve that “profile,” ruling instead that each stop must be analyzed on its own.¹⁹¹ *Adams* and *Sokolow* demonstrate that it is a mistake to determine whether a particular stop is supported by reasonable suspicion by relying on generalities or on broad-scale assessments.

The Supreme Court made that point most clearly in *Sibron v. New York*.¹⁹² Both parties to the case urged the Court to decide whether the New York stop-question-and-frisk statute was facially constitutional.¹⁹³ The Court de-

scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.”)

187. See *Navarette v. California*, 134 S. Ct. 1683 (2014); *Florida v. J.L.*, 529 U.S. 266 (2000); *Alabama v. White*, 496 U.S. 325 (1990).

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

189. *Id.* at 7–8 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983), and *United States v. Cortez*, 449 U.S. 411, 417 (1980), respectively).

190. See *id.* at 10 n.6 (“Since 1974, the DEA has trained narcotics officers to identify drug smugglers on the basis of the sort of circumstantial evidence at issue here.”).

191. “We do not agree with respondent that our analysis is somehow changed by the agents’ belief that his behavior was consistent with one of the DEA’s ‘drug courier profiles.’ Brief for Respondent 14–21. A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a ‘profile’ does not somehow detract from their evidentiary significance as seen by a trained agent.” *Id.* at 10 (footnote omitted).

192. 392 U.S. 40 (1968).

193. In 1968, New York law provided as follows:

1. 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.

clined their invitation “to be drawn into what we view as the abstract and unproductive enterprise of laying the extraordinary elastic categories of [the New York statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible.”¹⁹⁴ Only a case-by-case analysis was appropriate, the Court reasoned, because “[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case.”¹⁹⁵ Neither the ACLU Report, nor the Professors’ Study, nor the Massachusetts Supreme Judicial Court’s *Warren* opinion (nor the federal district court’s opinion in *Floyd* for that matter) distinguished *Sibron*, and no obvious distinction readily appears. Accordingly, while a statistical analysis like the one considered in *Floyd* may be relevant to the question whether the BPD had a *policy* of encouraging unlawful *Terry* stops, any such study is of no use in deciding whether a *particular* stop was lawful.¹⁹⁶

The rule is no different even when the claim is made that a stop-question-and-frisk program has a discriminatory effect or is motivated by racial bias. The relevant Fourth Amendment question even in that case is whether the officer had an objective and particularized basis for believing that the person stopped was involved in criminal activity. The Fourth Amendment and the Equal Protection Clause address different concerns, protect different interests, and ask different questions. The former asks whether a particular stop was justified by evidence of a crime; the latter, whether a particular stop or a particular law enforcement practice was motivated by racial animus.¹⁹⁷

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2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Sibron, 392 U.S. at 43–44 (quoting the statute).

194. *Id.* at 59.

195. *Id.*; see also, e.g., *United States v. Drayton*, 536 U.S. 194, 201 (2002) (“[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of ‘all the circumstances surrounding the encounter.’”) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)); *Sokolow*, 490 U.S. at 8 (rejecting the lower court’s two-part test for reasonable suspicion: “The rule enunciated by the Court of Appeals, in which evidence available to an officer is divided into evidence of ‘ongoing criminal behavior,’ on the one hand, and ‘probabilistic’ evidence, on the other, is not in keeping with the quoted statements from our decisions. It also seems to us to draw a sharp line between types of evidence, the probative value of which varies only in degree.”); cf., e.g., *Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988) (rejecting a bright-line rule whether “all investigatory pursuits” are a Fourth Amendment seizure and “adher[ing] to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure”); *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (“[O]ur cases impose no rigid time limitation on *Terry* stops.”).

196. See Larkin, *Stops, Frisks, and Race*, *supra* note 15, at 5.

197. See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop and Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 170–171 (2015) (“It probably matters whether we ask these questions in the context of the Fourth Amendment or the Fourteenth Amendment.

The Supreme Court's decision in *Whren v. United States*¹⁹⁸ is instructive in that regard. The police witnessed the driver engage in unusual conduct and stopped the vehicle to give him a traffic warning. When the officer approached the truck, however, he saw a bag of cocaine and arrested the driver and other occupant. They argued that the evidence should be suppressed because the stop was "pretextual"; that is, the officer suspected the occupants of drug trafficking and sought to use the traffic stop as an excuse to detain and question the occupants in the hope of finding evidence of drug possession. Pretextual seizures, the defendants argued, also posed a risk that, given the inevitability that a driver will violate some traffic ordinance, the police could stop a driver for racially discriminatory reasons, but justify the basis for the stop as a legitimate traffic infraction.¹⁹⁹ Nonetheless, the Supreme Court rejected the argument that a pretextual or discriminatory intent could invalidate an otherwise justified *Terry* stop. After discussing its precedents making the point that the issue whether a seizure is justified turns on objective considerations, the Court explained its conclusion in the following terms:

We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amend-

In the context of the Fourth Amendment, crime control is obviously relevant because the Amendment authorizes police action in the first place. There should be a close connection between stops and frisks and crime, given that the point of stops and frisks either at the incident or program level is to intervene in or to prevent crime. The job of officers is to act when they acquire enough information to believe that crime is afoot. In the context of the Fourteenth Amendment, the potential relevance of effectiveness at crime reduction is more complicated, because the question is not whether the state has a good reason to act, but instead whether the enforcement that the state has engaged in, whether justified under the Fourth Amendment or not, is based on race. If a court finds that the state has made an impermissible racial classification, the burden shifts to the state to show that its practice is narrowly tailored and serves a compelling interest. In theory, the city could make an argument that crime reduction is such an interest.").

198. 517 U.S. 806 (1996).

199. *Id.* at 810 ("They argue, however, that 'in the unique context of civil traffic regulations' probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.").

ment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.²⁰⁰

Whren is fatal to Warren's Fourth Amendment claim for several reasons. To start with, statistical evidence might be relevant to an equal protection claim that, given their history of stopping blacks simply because of their race, Officers Anjos and Carr likely stopped Warren for the same reason.²⁰¹ But the two reports cited by the Massachusetts Supreme Judicial Court considered the *Terry* stops conducted by the entire BPD from 2007 to 2010, not just the ones attributable to those two officers. Moreover, those reports do not prove systematic, department-wide racial bias on the part of all BPD officers, particularly all *patrol* officers, like Officers Anjos and Carr. But even if the ACLU's Report and the Professors' Study did establish that point, it would be a mistake, known to statisticians as an "Ecological Fallacy," to conclude that Officers Anjos and Carr acted out of racial bias merely because other BPD officers did. In any event, the Massachusetts Supreme Judicial Court did not conclude that Officers Anjos and Carr violated the Equal Protection Clause. It relied on the Fourth Amendment, even though, as *Whren* held, the actual state of mind that motivated those officers to stop Warren is irrelevant for Fourth Amendment purposes. In other words, as long as a reasonable police officer would have stopped Warren under the facts of his case, Officer Anjos and Carr could *not* have violated the Fourth Amendment even if *they* did stop Warren due to racial animus because *their subjective intent* is irrelevant for Fourth Amendment purposes. Their intent would have been relevant if the issue in *Warren* was whether the stop violated the Equal Protection Clause, but that provision was *not* involved in the *Warren* case. The Massachusetts Supreme Judicial Court therefore mixed apples and oranges.²⁰²

One scholar, Professor Tracey Meares, recognizes that the validity of a particular stop and the validity of a particular police department-wide practice are different issues and that the case-by-case analysis *Terry* demands does not work well for a case like *Floyd*. The officer in *Terry* saw three men whom he believed were casing a jewelry store for a daylight armed robbery and sought to question them about their activities. The officer reacted to what he believed was a crime in the offing. By contrast, *Floyd* involved a massive NYPD stop-question-and-frisk program designed to proactively prevent crime from occurring by directing beat officers to look for unusual or suspicious factors and follow up with questions or a frisk as necessary.²⁰³ Case-by-case determinations are not a

200. *Id.* at 813.

201. See Meares, *supra* note 197, at 170.

202. The suppression hearing transcript also does not address the various issues that are critical to consider when a defendant claims that he has been the victim of a racially-biased stop. See Fagan et al., *supra* note 28, at 560 (describing the necessary proof).

203. See Meares, *supra* note 197, at 162–63 ("When policing agencies engage in an organizationally determined practice of stopping certain 'sorts' of people for the stated purpose of preventing or

satisfactory way to review such a program. “[W]hen a mass of stops are considered in the aggregate, the data make clear that police are not investigating people that they suspect to be committing particular crimes in progress but are instead proactively policing people that they suspect *could* be offenders.”²⁰⁴ That is true even if most individual stops are lawful under *Terry*.²⁰⁵ The reason is that *Terry* sought to protect *every individual* (minority or majority) against arbitrary detention, whereas *Floyd* sought to protect a *category of people* (minorities) from insulting police conduct. Only broadening the scope of the inquiry and considering statistical evidence of a large number of *Terry* stops could accomplish the latter goal.²⁰⁶

Professor Meares makes a persuasive case why a *legislature* should intervene to balance the interests of all parties. *Terry* and later cases, however, do not allow a *court* to undertake that assignment. The district court in *Floyd* did so only by making a critical error in its analysis. The plaintiffs in *Floyd* sued New York City under Section 1983 of Title 42 of the U.S. Code, which requires a party to prove that a city official committed a constitutional tort pursuant to an official municipal policy.²⁰⁷ The district court conflated the question whether the plaintiffs had established an official NYPD and New York City policy to make *Terry* stops on a regular basis with the question whether the Fourth Amendment prohibits the adoption of any such policy. That mistake was fatal to its analysis. The court—quite reasonably—declined to evaluate the constitutionality of the 4.4 million stops conducted in the relevant period, evaluating only the legality of the stops in the cases of the nineteen named plaintiffs.²⁰⁸ After doing so, the court held that New York City was liable because it had endorsed “a policy of indirect racial profiling based on local criminal suspect data” and because senior city officials had been “deliberately indifferent to the intentional discriminatory application of stop and frisk at the managerial and officer levels.”²⁰⁹ *Terry* does not permit that type of analysis.

To be sure, the Massachusetts Supreme Judicial Court was right to be concerned about the possibility that BPD officers were using their stop-question-and-frisk authority to harass blacks or were acting on the basis of the illegiti-

detering crime, as the NYPD did, they are engaging in what I call a ‘program.’ The stops that flow from these programs are not individual incidents that grow organically—endogenously—out of a collection of individual investigations occurring between an officer and a person that the officer believes to be committing a crime. Rather, programmatic stops are imposed from the top down and are exogenous to the fabric of community-police relations. In *Terry*, the Court dictated a framework to assess the constitutionality of police action in the endogenous context, but proactive policing of crime does not fit that model. Because proactive policing is carried out differently from the one-off intervention into a crime in progress that *Terry* concerned, those who are subject to it experience it differently. And it is that reality that fueled the litigation in *Floyd*.”)

204. *Id.* at 164.

205. *See id.*

206. *See id.* at 175–79.

207. *See, e.g.,* *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

208. *See Floyd*, 959 F. Supp. 2d at 624–59.

209. *Id.* at 660.

mate belief that African Americans are more likely to commit crime than members of other races simply because they are black. That syllogism—blacks are criminals; John Doe is black; ergo, John Doe is a criminal—is forbidden by the Constitution on the ground that it is an illegitimate stereotype and irrational to boot. Unfortunately, however, it is a syllogism that has plagued the American criminal justice system for centuries. The relationship of the race of a suspect or offender to the criminal justice system has been a point of controversy ever since American states forced blacks into chattel slavery in the seventeenth and eighteenth centuries.²¹⁰ De jure discrimination against blacks in the criminal justice system continued throughout most of the nineteenth century.²¹¹ Even though the Equal Protection Clause of the Fourteenth Amendment sought to outlaw both de jure and intentional discrimination,²¹² the latter persevered from the late nineteenth century into the twentieth.²¹³ Critics have argued that, despite the efforts that society has made to end racial discrimination, the American criminal justice system is still biased against African Americans.²¹⁴ The BPD may have given them ammunition for that attack during the 1990s, when it adopted an aggressive stop-question-and-frisk strategy that was effective at addressing youth street-gang violence,²¹⁵ but worsened relations between

210. See, e.g., A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

211. See, e.g., KY. GEN. STAT. ch. 62, art. III, §2 (Bullitt & Feland 1881) (“No person shall be a competent jurymen for the trial of criminal, penal, or civil cases in any court, unless he be a white citizen, at least twenty-one years of age, a housekeeper, sober, temperate, discreet, and of good demeanor.”); *Jordan v. Smith*, 14 Ohio 199, 201 (1846) (“No matter how pure the character, yet, if the color is not right, the man cannot testify. The truth shall not be received from a black man, to settle a controversy where a white man is a party. Let a man be Christian or infidel; let him be Turk, Jew, or Mahometan; let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be witness in our Courts if he is not black.”); A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1998).

212. See, e.g., U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (“[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”).

213. See, e.g., *Whitus v. Georgia*, 385 U.S. 545 (1967); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Norris v. Alabama*, 294 U.S. 587 (1935); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Carter v. Texas*, 177 U.S. 442 (1900); *Neal v. Delaware*, 103 U.S. 370 (1881); *Ex parte Virginia*, 100 U.S. 339 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004).

214. See, e.g., ALEXANDER, *supra* note 177; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

215. See Anthony A. Braga et al., *Losing Faith? Police, Black Churches, and the Resurgence of Youth Violence in Boston*, 6 OHIO ST. J. CRIM. L. 141, 141 (2008) (footnotes omitted) (“Boston received national acclaim for its innovative approach to preventing youth violence in the 1990s. The well-known Operation Ceasefire initiative was an interagency violence prevention intervention that focused enforcement and social service resources on a small number of gang-involved offenders at the heart of the city’s youth violence problem. The Ceasefire strategy was associated with a near two-thirds drop in youth homicide in the late 1990s.”).

the department and the black community.²¹⁶

Critics are right that racial discrimination is always reprehensible, particularly in the criminal justice system,²¹⁷ not only because of the burdens that it imposes on blacks, but also because of the message of inferiority that it sends.²¹⁸ It is also counterproductive because it engenders hostility in commu-

216. Several scholars, including one who was a member of the group that authored the PROFESSORS' STUDY, *supra* note 153, described the problem of youth violence and gangs in Boston as follows:

Like many American cities during the late 1980s and early 1990s, Boston suffered an epidemic of youth violence that had its roots in the rapid spread of street-level crack-cocaine markets. Measured as a homicide problem, Boston experienced a dramatic increase in the number of youth victims ages 24 and under During the "pre-epidemic" years of 1980 through 1988, Boston averaged approximately 28 youth homicides per year. The number of youth homicides increased to 40 victims in 1989 and peaked at 73 victims in 1990. While youth homicide subsequently decreased from the peak year, the yearly number of victims never returned to levels of the pre-epidemic years. Between 1991 and 1995, Boston averaged nearly 45 youth homicides per year. The city remained in crisis over its youth violence problem.

Unfortunately, the Boston Police Department was ill equipped to deal with the sudden increase in serious youth violence. Boston Police relied upon highly aggressive and often imprudent policing tactics to deal with street gang violence. A series of well-publicized scandals emanating from an indiscriminate policy of stopping and frisking all black males in high-crime areas outraged Boston's black community. These scandals lead to the establishment of the St. Clair Commission, an independent committee appointed to investigate the policies and practices of the Boston Police. In 1992 the Commission released its report, which cited widespread corruption and incompetent management and called for extensive reform including the replacement of top personnel.

In response, the Boston Police overhauled its organization, mission, and tactics during the early 1990s. The existing command staff, including the Commissioner, were replaced with new officers who were known to be innovative and hardworking; investments were made to improve the Department's technology to understand crime problems; a neighborhood policing plan was implemented; and beat-level officers were trained in the methods of community and problem-oriented policing. In 1991, the Anti-Gang Violence Unit (AGVU) was created and charged with disrupting ongoing gang conflicts rather than following the past policy of simply arresting as many offenders as possible. By 1994, the AGVU evolved into the Youth Violence Strike Force (YVSF), an elite unit of some 40 officers and detectives, and its mandate was broadened beyond controlling outbreaks of gang violence to more general youth violence prevention. While these changes were important in creating an environment where the police could collaborate with the community, residents of Boston's poor minority neighborhoods remained wary of and dissatisfied with a police department that had a long history of abusive and unfair treatment.

Braga et al., *supra* note 215, at 143–45 (footnotes omitted). Some have expressed concern that same problem appears elsewhere. *See, e.g.*, Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 REV. OF ECON. & STATISTICS 163, 177 (2009) (concluding that "preference-based [*viz.*, racially-biased] discrimination plays a substantial role in explaining differences in the rate at which motorists from different racial groups are searched during traffic stops").

217. *See, e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

218. *See Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); James J. Fyfe, *Terry: An Ex-Cop's View*, 72 ST. JOHN'S L. REV. 1231, 1243 (1998) ("A *Terry* stop says terrible things about its subject; it is the officer's way of telling a person you look wrong and I am going to check out my feelings about you

nity residents fearful of being victimized by crime, who would otherwise support police efforts to make the neighborhood a safer place.²¹⁹ Sadly, critics also are correct that, despite our best efforts to extirpate it, racial discrimination still surfaces in the criminal justice system even in this century.²²⁰

To be sure, not every instance of offensive police behavior is the product of racial bias; a goodly amount may be due instead to loutish or needlessly aggressive police conduct, which blacks may mistakenly believe police officers would not use in the case of whites.²²¹ Nonetheless, racial bias is a problem that

even if it embarrasses you.”); Stuntz, *supra* note 30, at 1218 (noting that the victims of unlawful *Terry* stops can potentially suffer four different harms: (1) an invasion of locomotion and privacy; (2) the effect of being “targeted” as a criminal, (3) racial discrimination, and (4) associated police violence).

219. See, e.g., John J. Donohue & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J. L. & ECON. 367, 368 (2001) (“It is frequently argued that without the cooperation of community members in reporting crimes and identifying criminals, there may be little that police can do either to prevent crime or to punish those who commit crimes.”) (footnote omitted).

220. See, e.g., *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867–71 (2017) (ruling that the Equal Protection Clause entitles a defendant to prove his claim that racial bias infected jury deliberations); *Buck v. Davis*, 137 S. Ct. 759, 775–77 (2017) (finding prejudicial the introduction of testimony by a defense psychologist that black males are prone to violence); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (ruling that the prosecution used peremptory challenges to dismiss members of the venire because of their race); RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* 32 (2006) (“The existence of police prejudice has been documented in studies going back for decades”); Lawrence W. Sherman, *Fair and Effective Policing*, in *CRIME PUBLIC POLICIES FOR CRIME CONTROL* 383, 402 (James Q. Wilson & Joan Petersilia eds., 2002) (“Considerable evidence suggests that there is indeed racial discrimination or disparity in arrest decisions by police, even when appropriate denominators are employed.”); James B. Comey, Director, FBI, *Hard Truths: Law Enforcement and Race*, Remarks Delivered at Georgetown University, Washington, D.C. (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> [<https://perma.cc/R6DT-C2LX>]; Larkin, *Stops, Frisks, and Race*, *supra* note 15. For a discussion of how police cadet training may create that mindset, see Seth Stoughton, Commentary, *Law Enforcement’s “Warrior” Problem*, 129 HARV. L. REV. F. 225 (2015).

221. See, e.g., MacDONALD, *WAR ON COPS*, *supra* note 27, at 18 (“Without question, there are plenty of officers who treat civilians rudely and who desperately need retraining in professional courtesy.”); Robert J. McGuire, *Terry v. Ohio: A Police Commissioner’s Musings*, 72 ST. JOHN’S L. REV. 1249, 1252 (1998) (former NYPD Commissioner, “There is no question when you talk to African Americans and Hispanics that they feel that many of these stops are due to race. I grew up in New York and I have had cops use language to me that was not very pleasant, even if I questioned what was happening at a police scene. Police officers do not necessarily speak disrespectfully to you because you are African American or Hispanic. They may be inartfully asserting their authority in order to get people to do what they want, and that is part of police work. However, some cops go over the line. Some cops just do not know how to do things in a courteous and professional manner. There is no question that this behavior serves to exacerbate community tensions.”) (footnote omitted); Sherman, *supra* note 220, at 385 (“*What makes police appear discriminatory when they are not?* The gruff, bossy manners many police use in talking to citizens are out of date in an egalitarian, consumerist culture, where minorities in particular define such manners as unfair.”) (emphasis in original); *id.* at 404–05 (“Even when police are not disposed to let race influence their discretion in any way, their perception of a hierarchy between police and citizen can create an appearance of discrimination. White people stopped by police often comment on the gruff, didactic manner of police officers, both black and white. While white citizens may call this rudeness, minority citizens may call it racism. Minorities often assume that police do not treat white people so rudely.”); *id.* at 405 (“This research [*viz.*, in New Jersey the use of cameras on state police cars and microphones by officers disproved claims of racial bias] suggests a major hypothesis about the movement against racial profiling. The hypothesis is that criticism of the police is caused more by the manners police use than by the decisions they make. In a context of much lower trust in police

American society will be fighting forever—just like the burglary that gave rise to the *Warren* case. Discrimination, both when it occurs and when it mistakenly appears to have occurred, exacerbates any police-citizen tensions that already exist within a community and dissuades the victims of crime in those neighborhoods from cooperating with the police.²²² When that happens, everyone loses—everyone, that is, except the ones who commit crime.

D. The Critical Information Ignored by the Massachusetts Supreme Judicial Court

If it were appropriate for a court to analyze the value of a police department's stop-question-and-frisk practice—that is, if it were appropriate for a court to act like a legislature—there would have been another, critical factor that the Massachusetts Supreme Judicial Court left out of the calculus: the interests of the victims of crime. By that we do not mean simply the general societal interest in seeing a reduction in the crime rate. The interest of neighborhood residents in being able to be and to feel safe from harm is the human manifestation of a reduction in crime that otherwise shows up only in a table or graph showing reduced rates of victimization. The freedom for children to avoid feeling compelled to join a gang or carry a firearm for the protection that it affords, the confidence of parents to send their children to school without the fear of their being assaulted, the ability of the elderly to sit outside without the worry of being hit by a stray bullet fired between members of rival drug-dealing gangs, and the feeling of safety that residents have due to the knowledge that the neighborhood police are interested in their well-being and will be responsive and proactive in maintaining order—all of those interests are shared by the victims of street crimes, and all of them should be given the respect they deserve when deciding what is the proper response of a democracy to neighborhood violence. Justice Clarence Thomas eloquently made that point in his dissent from the majority opinion in *Chicago v. Morales*,²²³ which held unconstitutionally vague a municipal anti-gang, anti-loitering ordinance designed to improve local neighborhood life:

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of

among African Americans than among whites . . . the bossy manners some police use on everyone are taken as evidence that police are picking on minorities. This climate then obscures the facts in an important public policy discussion about how police resources should be allocated.”)

222. See, e.g., TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (concluding that people generally follow the law out of respect, not fear); PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 9 (1991) (“As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.”).

223. 527 U.S. 41, 98–115 (1999).

terror and misery The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have virtually overtaken certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. *See* U.S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence . . . is both physically and psychologically debilitating.")

* * * * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described: "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." . . . By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice STEVENS . . . elevates above all else—the "freedom of movement." And that is a shame. I respectfully dissent.²²⁴

It is easy to see how the interests of victims can be overlooked. "Offenders are arrested, convicted, sentenced, and imprisoned—events that lend themselves to statistics, photographs, and media stories. Crimes that do not occur—and people who do not become victims—are invisible."²²⁵ In public policy, as in baseball, something always beats nothing. But the interests of victims—the law-abiding residents in crime-riddled communities, communities often disproportionately populated by blacks—should be considered in deciding, at the

224. *Id.* at 98–99, 114–15 (1999) (Thomas, J., dissenting) (citations and some internal punctuation omitted); *see also* Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1346–47 (1998).

225. Larkin, *Stop-and-Frisk Rationale*, *supra* note 15; *see also* Comey, *supra* note 27 ("A problem we face today is that nobody speaks for those who have not been victimized by crime in recent years because those 'victims' don't exist. There are tens of thousands of people who were not murdered or raped or robbed or intimidated because crime dropped in our country. The victims don't exist, so they can't form a constituency, they can't talk to the press, they can't talk to Congress").

macro-level, whether any police department's stop-question-and-frisk practice is reasonable. The Fourth Amendment certainly allows the interests of victims to be considered in that calculus. After all, the text uses the term "reasonable" to describe the limitation placed on the government's search and seizure authority,²²⁶ and numerous Supreme Court decisions have explained that the community's interests in the enforcement of the criminal laws is a legitimate factor to be weighed in the balance when determining whether a particular police practice is "reasonable."²²⁷ Yes, the lives of stopped black males matter. But the lives of the black males and females who do not become crime victims due to police intervention also matter, even though they are unseen, unidentifiable, and unquantifiable.²²⁸

226. See Meares, *supra* note 197, at 161 ("The Fourth Amendment in particular calls for a reasonable balance between liberty and order, seemingly an explicit invitation to consider law enforcement effectiveness.") (footnote omitted).

227. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) ("The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (citations omitted); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) ("[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.") (internal punctuation omitted); *Michigan v. Summers*, 452 U.S. 692, 699 (1981) ("[S]ome seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity."); *Terry*, 392 U.S. at 19 ("The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."); *id.* at 27 (noting the Court's "evaluation of the proper balance that has to be struck in this type of case"); *Camara v. Municipal Ct.*, 387 U.S. 523, 536–37 (1967) ("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.").

228. The concern that *Terry* stops can be used as an instrument for racial harassment is not new. No one in public life in 1968 could have been unaware of that worry. The Supreme Court was certainly aware of it. See *Terry v. Ohio*, 392 U.S. 1, 14–15 & n.11 (1968) (noting that the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183–84 (1967) (noting that police stops for questioning often generated "friction" between the police and minorities); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960) (criticizing vagrancy laws on the ground that they allow arrests to be made on the basis of suspicion, not probable cause: "The persons arrested on 'suspicion' are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police."); 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, 893 (1998) ("[M]any of the Justices were skeptical about the scope of the authority claimed by the police. The President's Commission on Law Enforcement and the Administration of Justice, chaired by Attorney General Katzenbach, had just issued its massive report,

Considering the interests of the people who never become crime victims adds a strong counterpoint to the argument that the BPD has engaged in a racially heavy-handed stop-question-and-frisk program. Community residents are not the police, and they cannot be blamed for any misconduct that the police have committed in the distant or recent past. If they become crime victims, like many do in large urban areas such as Chicago, the police are likely their only hope of seeing the offenders brought to justice. If they avoid becoming victims, it is because, with the help of the police, they have beaten the odds.²²⁹

Why is that true? For a combination of reasons. The residential housing patterns characteristic of large urban American communities show that, for a variety of reasons (such as historic government-sanctioned or privately-imposed discrimination in housing and employment), minorities such as African Americans overpopulate blighted neighborhoods.²³⁰ Street crime tends to be local, so offenders and victims generally live nearby each other.²³¹ Violent offenders are more likely to be young and male than old and male, or female of any age.²³² Finally, drug trafficking in African American communities is an important factor contributing to violent crime, as former FBI Director James Comey and others have concluded.²³³

which was critical of many police practices, including some aspects of so-called ‘aggressive patrol’ tactics in urban ghettos.”) (footnote omitted).

229. “If the body count is racking up in many of our inner cities, it is not because police officers are wantonly shooting black people; it is because black people, predominantly black men, are shooting each other. As [Heather] MacDonald correctly notes, ‘young black men commit homicide at nearly ten times the rate of young white and Hispanic males combined,’ and their victims are overwhelmingly other black residents who live in their communities. In Chicago, for instance, in 2015, 2,460 African American people were shot (nearly seven each day), compared to only 78 white people (one every 4.6 days); in 2011 (the last year for which data was released by the Chicago police), 71% of those committing murder were black and 75% of murder victims were black. Homicide is now the number one cause of death among African Americans between the ages of 1 and 44. And, MacDonald adds, ‘until the black crime rate comes down, police presence is going to be higher in black neighborhoods, increasing the chance that when police tactics go awry, they will have a black victim.’” Malcolm, *supra* note 27, at 71.

230. See, e.g., MARK MAUER, RACE TO INCARCERATE 164 (2d ed. 2006); RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 26–33 (2010); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in THE FUTURE OF IMPRISONMENT 27, 35 (Michael Tonry ed., 2004); Fagan & Davies, *supra* note 13, at 638 (“[H]igh crime areas’ and social disadvantage often are conflated both perceptually and statistically with concentrations of minority citizens.”) (footnote omitted); *id.* at 638 n.98 (collecting authorities).

231. Stuntz, *supra* note 30, at 1225–26.

232. See, e.g., MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES: POLICY MEMO 6 (2014) (listing data showing that young males commit far more crime than older males and females of any age); PROFESSORS’ STUDY, *supra* note 153, at 2; David Farrington, *Age and Crime*, 7 CRIME & JUST. 189 (1986); Allen E. Liska & Paul E. Bellair, *Violent-Crime Rates and Racial Composition: Convergence over Time*, 101 AM. J. SOCIOLOGY 578 (1995); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 432 (2006); Jeffrey Ulmer & John H. Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Costs of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

233. Consider the remarks by Former Director Comey in a speech at the University of Chicago Law School:

Add together those findings and what you wind up with is this: Blacks living in ghettos are often the perpetrators and victims of neighborhood violent crimes. The vast majority of law-abiding members of a predominantly black

When I worked as a prosecutor in Richmond, Virginia, in the 1990s, that city, like so much of America, was experiencing horrific levels of violent crime. But to describe it that way obscures an important truth: for the most part, white people weren't dying; black people were dying. Most white people could drive around the problem. If you were white and not involved in the drug trade as a buyer or a seller, you were largely apart from the violence. You could escape it. But if you were black and poor, it didn't matter whether you were a player in the drug trade or not, because violent crime dominated your life, your neighborhood, your world. There was no way to drive around the violence that came with the drug trade and the drug trade was everywhere in your neighborhood. And that meant the violence was everywhere. The notion of a "non-violent" drug gang member would have elicited a tired laugh from a resident of Richmond's worst neighborhoods. Because the entire trade was a plague of violence that strangled Richmond's black neighborhoods. The lookouts, runners, mill-workers, enforcers, and dealers were all cut from the same suffocating cloth. Whether they pulled the trigger or not, those folks were killing the community. Like so many in law enforcement in the 1980s and 1990s, we worked hard to try to save lives in those Richmond neighborhoods—in those black neighborhoods—by rooting out the drug dealers, the predators, the gang bangers, the killers. Of course, we also worked "up the chain" to lock up big-time dealers all the way to Colombia. But we felt a tremendous urgency to try to save lives in the poor neighborhoods of Richmond. . . . I remember being asked why we were doing so much prosecuting in black neighborhoods and locking up so many black men. After all, Richmond was surrounded by areas with largely white populations. Surely there were drug dealers in the suburbs. My answer was simple: We are there in those neighborhoods because that's where people are dying. These are the guys we lock up because they are the predators choking off the life of a community. We did this work because we believed that all lives matter, especially the most vulnerable. But the people asking those questions were not the black ministers or community leaders in the poorest neighborhoods. Those good people in those bad neighborhoods already knew why we were there locking up felons with guns and drug addicts with guns. They supported it because they, too, dreamed of a future of freedom and life for their neighborhoods. Those leaders and ministers were the seeders, who hoped to grow something in the safe space created by our weeding—something that would be healthy and that would last.

Comey, *supra* note 27; see also ALEXANDER, *supra* note 177, at 51 ("No one should ever attempt to minimize the harm caused by crack cocaine and the related violence. As David Kennedy correctly observes, '[c]rack blew through America's poor black neighborhoods like the Four Horsemen of the Apocalypse,' leaving behind unspeakable devastation and suffering.") (footnote omitted) (quoting DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 10 (2011)); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 630–32 (1993). Drug crime in blighted communities contributes to the *Terry* stop problem. See Stuntz, *supra* note 30, at 1220–21 ("The centrality of drugs makes this problem still worse. Drug markets are not the same everywhere; one tends to find street markets in poor urban neighborhoods, and more discreet means of distribution in more upscale areas. In late twentieth-century America, poor urban neighborhoods are both disproportionately black and heavily segregated. It is much easier for the police to catch buyers and sellers in street markets than in the kind of drug markets that function more discreetly in more middle-class, and whiter, neighborhoods. Street markets also seem to cause more collateral social injury. Put these points together, and you have a recipe for racially disparate enforcement of the drug laws. Yet the racial disparity arises naturally, without any racial animus, and it is very hard to see how the legal system can combat it by the way it regulates street policing.").

community who wind up as crime victims are likely to have been victimized by young black offenders in the same neighborhood.²³⁴ In fact, the nationwide

234. See, e.g., BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, NCJ 239424, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993–2010 (Dec. 2012) (surveying relationships, including neighbors, between victims and criminals); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 227669, CRIMINAL VICTIMIZATION, 2008, Tbl. 5 (Mar. 2010) (surveying intra-racial criminal victimization rates); BRENDAN O'FLAHERTY & RAJIV SETHIZ, HOMICIDE IN BLACK AND WHITE 2 (Jan. 15, 2010) ("African-Americans are roughly six times as likely as white Americans to die at the hands of a murderer, and roughly seven times as likely to murder someone; their victims are black 82% of the time."), <http://www.columbia.edu/rs328/Homicide.pdf>; FBI, CRIM. J. INFO SERVS. DIV., UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2015 Tbl. 6 (Expanded Homicide Data) (noting that, of the 2,380 black victims of homicide, approximately 89% (2,664) were committed by black offenders); OFFICE OF POLICY DEVELOPMENT AND RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *NEIGHBORHOODS AND VIOLENT CRIME*, EVIDENCE MATTERS, Summer 2016, at 18 ("[I]n Boston, about 85 percent of gunshot injuries occur within a single network of people representing less than 6 percent of the city's total population."); EPP ET AL., *supra* note 25, at 46 ("Poor black neighborhoods do have higher crime rates than other neighborhoods, and African Americans are disproportionately represented in all aspects of the criminal justice system.") (footnotes omitted); Sampson & Wilson, *supra* note 16, at 38 (death records and survey reports show that "blacks are disproportionately victimized by, and involved in, criminal violence"); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 20 (1998) ("[I]n terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racial misconduct of White police officers."); MACDONALD, WAR ON COPS, *supra* note 27, at 17 ("In 2014 . . . there were 6,095 black homicide victims in the United States The killers of those black homicide victims are overwhelmingly other blacks—who are responsible for a death risk ten times that of whites in urban areas."), 67, 92, 153, 217; PROFESSORS' STUDY, *supra* note 153, at 2, 26 ("Several studies show that neighborhood crime rates, including violent crime, are strongly associated with concentrated social disadvantage") (footnote omitted); Barone, *supra* note 10; Robert Sampson & Janet Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in 22 CRIME AND JUSTICE 311–74 (Michael Tonry ed., 1997); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 79 (1995) ("Thus the answer to the question, 'Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison?' is no, with one important caveat . . . concerning drugs. From every available data source, discounted to take account of their measurement and methodological limits, the evidence seems clear that the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites."); WEITZER & TUCH, *supra* note 220, at 10 ("It is true that African Americans are disproportionately involved in violent crime, according to both victimization surveys (where victims identify the offender's race) and self-report surveys[,] which ask respondents about their own involvement in crime [T]hey are overrepresented as violent offenders and that their neighborhoods experience more serious crime than other neighborhoods") (citations omitted); JAMES Q. WILSON, THINKING ABOUT CRIME 36–39 (1975); Braga et al., *supra* note 215, at 152 (footnotes omitted) ("Youth homicide victims and youth homicide offenders [from 2000 to 2006] share essentially the same demographic characteristics. Homicide victims were mostly male (92.8%, 192 of 207 youth victims) and largely from minority groups. The racial and ethnic breakdown of youth homicide victims was 75.4% Black non-Hispanic, 8.7% White Hispanic, 5.8% Black Hispanic, 5.3% White non-Hispanic, and 4.8% Asian or other ethnic groups. Arrested youth homicide offenders were also mostly male (95.9%, 116 of 121 youth offenders) and largely from minority groups. The racial and ethnic breakdown of youth homicide offenders was 71.9% Black non-Hispanic, 9.9% White non-Hispanic, 8.2% Asian or other ethnic groups, 6.6% White Hispanic, and 3.3% Black Hispanic. Both youth homicide victims and youth homicide offenders were mostly between the ages of 18 and 24. Only 23.2% of youth homicide victims (48 of 207) and 20.7% of youth homicide offenders (25 of 121) were ages 17 and under."); ZIMRING, *supra* note 10, at 203 ("[V]iolent crime in New York City remains intensely concentrated in socially isolated environments."), 207–90; Lauren J. Krivo et al., *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOC. 1765 (2009); Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39

violent crime victimization rate is higher for blacks than whites.²³⁵ That conclusion militates in favor of assigning more police officers to minority communities and using the same tactics there that have proved successful elsewhere at

CRIMINOLOGY 517 (2011); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918 (1997). Those figures do not mean that blacks are “crime prone.” The differences could be due to the prevalence of structural processes encouraging crime (such as the need to resort to theft or prostitution for income and the need to resort to violence in self-defense or to establish status) or the lack of informal social structures that discourage crime (such as the absence of law-abiding adult male role models and communitywide support groups, and the increasing isolation of individuals, particularly the elderly). See PETERSON & KRIVO, *supra* note 230, at 33–37.

235. In the 2014 National Crime Victimization Survey (NCVS), the comparative victimization rate for violent crimes (rape or sexual assault, robbery, aggravated assault, and simply assault) for black and white victims per 1,000 persons age 12 or older was reported at 22.5 and 20.303, respectively. JENNIFER L. TRUMAN & RACHEL M. MORGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIME VICTIMIZATION, 2015 tbl. 7, at 9 & n.a. (Oct. 2016) [hereinafter CRIME VICTIMIZATION]. In 2015, the numbers were 22.6 and 17.4. *Id.* In 2014 and 2015, the numbers for serious violent crimes (rape or sexual assault, robbery, and aggravated assault) were, respectively, 10.1 and 7.0, and 8.4 and 6.0. *Id.* Those numbers understate the difference between black and white victimization rates because the NCVS is based on victim interviews, which cannot be conducted in the case of homicides. *Id.*; see also, e.g., MACDONALD, *WAR ON COPS*, *supra* note 27, at 30 (“Black males between the ages of 14 and 17 die from shootings at more than six times the rate of white and Hispanic male teens combined, thanks to a ten times higher rate of homicide committed by black teens.”); *id.* at 73 (describing statistics showing that, in 2009 in the nation’s largest 75 counties, blacks disproportionately commit violent crimes); *id.* at 89 (same, Los Angeles); *id.* at 130 (same, Chicago); PETERSON & KRIVO, *supra* note 230, at 5–8, 13–20 (noting that nationwide statistics reveal that African American communities have “startlingly high” rates of violent crime compared to white communities and that blacks are more likely to be offenders and victims of violent crime); Sampson & Wilson, *supra* note 16, at 37 at 37–54; James Q. Wilson, *Crime*, in *BEYOND THE COLOR LINE* 115, 116 (Abigail & Stephan Thernstrom eds., 2002) (“Black men commit murder at a rate about eight times greater than that for white men. This disparity is not new; it has existed for well over a century [F]or young black men homicide is the leading cause of death”); WILSON, *supra* note 234, at 36–39, 72, 83; Fagan et al., *supra* note 28, at 578–79 (“Several studies show that neighborhood crime rates, including violent crime, are strongly associated with concentrated social disadvantage.”) (footnotes omitted); Michael J. Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978); Johnson, *supra* note 109, at 237–38; Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13, 1999 [hereinafter Kennedy, *Suspect Policy*]; Randall Kennedy, *The State, Criminal Law, and Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) [hereinafter Kennedy, *Discrimination*]; Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOCIAL FORCES 619 (1996); Edward S. Shihadeh & Michael O. Maume, *Segregation and Crime: The Relationship Between Black Centralization and Urban Black Crime*, 1 HOMICIDE STUDIES 254 (1997); Walter E. Williams, *We Don’t Need Another ‘National Conversation’ On Race*, INVESTOR’S BUS. DAILY, July 13, 2016, <http://www.investors.com/politics/columnists/walter-williams-we-dont-need-another-national-conversation-on-race/> [https://perma.cc/9MEH-Z7MV]; Walter E. Williams, *Should Black People Tolerate This?*, TOWNHALL, May 23, 2012, <https://townhall.com/columnists/walterewilliams/2012/05/23/should-black-people-tolerate-this-n1263867> [https://perma.cc/Z6UD-PQXD] (“Though blacks are 13 percent of the nation’s population, they account for more than 50 percent of homicide victims. Nationally, black homicide victimization rate is six times that of whites, and in some cities, it’s 22 times that of whites. Coupled with being most of the nation’s homicide victims, blacks are most of the victims of violent personal crimes, such as assault and robbery. The magnitude of this tragic mayhem can be viewed in another light . . . young black males have a greater chance of reaching maturity on the battlefields of Iraq and Afghanistan than on the streets of Philadelphia, Chicago, Detroit, Oakland, Newark and other cities.”).

reducing violent crime.²³⁶ If those strategies work, law-abiding black residents of predominantly black communities will be the principal beneficiaries.²³⁷ That may explain why they want more, not less, police presence in their communities.²³⁸

The “hot spots” strategy of policing states that crime is concentrated in certain neighborhood locations.²³⁹ That theory argues in favor of assigning more police officers and other law enforcement assets to those locations, regardless of their racial makeup. In some cities, those locations may be predominantly African American, which means that the statistics may show a higher number of *Terry* stops of blacks in those neighborhoods than one might expect from the percent of blacks in the entire city.²⁴⁰ Focusing on “hot spots” in neighborhoods might make it appear that the police are biased against the

236. See MACDONALD, WAR ON COPS, *supra* note 27, at 17–18 (noting that “young black men commit homicide at nearly ten times the rate of young white and Hispanic men combined,” which means that “police officers are going to be sent to fight crime disproportionately in black neighborhoods”); Larkin, *Stop-and-Frisk Rationale*, *supra* note 15.

237. As Heather MacDonald has argued, “The biggest beneficiaries of that crime decline [beginning in the 1990s] were the law-abiding resident of minority neighborhoods. Senior citizens could go out to shop without fear of getting mugged. Businesses moved into formerly desolate areas. Children no longer had to sleep in bathtubs to avoid getting hit by stray bullets. And tens of thousands of individuals were spared premature death by homicide.” MACDONALD, WAR ON COPS, *supra* note 27, at 2; see also Kennedy, *Discrimination*, *supra* note 235, at 1261–70; Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 153 (Stephen Gottlieb ed., 1993); Stuntz, *supra* note 30.

238. See MACDONALD, WAR ON COPS, *supra* note 27, at 32–33 (“No stronger proponents of public-order policing exist than law-abiding residents of high-crimes areas. Go to any police-and-community meeting in Brooklyn, the Bronx, or Harlem, and you will hear pleas such as the following: Teens are congregating on my stoop; can you please arrest them? SUVs are driving down the street at night with their stereos blaring; can’t you do something? People have been barbecuing on the pedestrian islands of Broadway; that’s illegal! The targets of those complaints may be black and Hispanic, but the people making the complaints, themselves black and Hispanic, don’t care. They just want orderly streets.”); *id.* at 38 (“there is a huge, unacknowledged measure of support for the police in the inner city”).

239. See, e.g., ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION (2010); FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 23, at 237–40; DAVID WEISBURD ET AL., PLACE MATTERS: CRIMINOLOGY FOR THE TWENTY-FIRST CENTURY (2016); PETER K. B. ST. JEAN, POCKETS OF CRIME: BROKEN WINDOWS, COLLECTIVE EFFICACY, AND THE CRIMINAL POINT OF VIEW (2007); DAVID WEISBURD & ELIZABETH R. GOFF, THE CRIMINOLOGY OF PLACE: STREET SEGMENTS AND OUR UNDERSTANDING OF THE CRIME PROBLEM (2012); Anthony A. Braga et al., *An Post Facto Evaluation Framework for Place-Based Police Interventions*, 35 EVALUATION REV. 592, 616–17 (2012).

240. See Meares, *supra* note 197, at 173 (“Because the demographics of New York City are such that the higher-crime areas contain a higher proportion of African American and Hispanic residents, one would expect, all else equal, that police would stop people of color disproportionately to their representation in the city’s population if they chose, as Fourth Amendment doctrine seems to direct, to focus on so-called high crime areas. That is, *legal* policing of the streets of New York most likely would burden African Americans more than other groups because of the connection between race, place, and crime.”) (emphasis in original; footnotes omitted); Sherman, *supra* note 220, at 403 (differential arrest rates between blacks and whites could be due to “race-neutral, crime risk policies that place more police in high-crime areas in which black offenders are more spatially concentrated than white offenders. Discrimination and spatial inequality in housing may be more important in accounting for this difference than police decisions, given the concentration of black poverty relative to the dispersion of white poverty . . .”).

residents, but there is a difference between correlation and causation. As Lawrence Sherman has explained, “Crime risks based on place are often correlated with race, but the correlation is a coincidence rather than a cause.”²⁴¹ “Policing for crime risks may create an appearance of racial profiling”—that is, the use of race as a proxy for criminality, which leads to the stop and frisk of every one of the target race—but “race is only a correlate, not the cause of policing based on objective methods of offense analysis.”²⁴² In fact, refusing to focus on a high-crime locale because the neighborhood is predominantly African American would promote the same racially-based refusal to enforce the law that has led to the past victimization of blacks.²⁴³

Yet, no discussion or data dealing with the range of purposes and outcomes of police-citizen encounters²⁴⁴ or the black crime and victimization rates²⁴⁵ can be found in the Massachusetts Supreme Judicial Court’s opinion. Why? A state legislature or city council would consider the interests of past and future victims when deciding what restraints to impose on police officers when they conduct *Terry* stops. If so, a court acting like an assembly should do the same. Failing to consider interests of victims when deciding what is “reasonable” is like thinking you can lop off one of three corners and still have a triangle.

Warren is not the first time that a court has mistakenly ignored the interests of the victims of crime when addressing a legal or policy issue. In fact, for most of our history the criminal justice system did just that. Legal and policy debates considered only the interests of the government and a suspect or defendant. The

241. Sherman, *supra* note 220, at 399.

242. *Id.* at 384.

243. See Kennedy, *Discrimination*, *supra* note 235, at 1256 (“[T]he main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal protection of the laws.”).

244. See LYNN LANGTON & MATTHEW DUROSE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 11, tbl. 10 (2016) (Reporting that individuals “suspected of something or [who] matched description of someone police were looking for” comprised 40.7% of all stopped persons, 60.8% of them felt the “reason for [the] stop was legitimate,” and 68.5% felt that “[p]olice behaved properly.” In at least 15.5% of all reported street stops, “[p]olice were seeking information about another person or investigating a crime,” and 92.1% of those stopped persons felt that the stop was legitimate, 89.8% felt that police behavior was proper. In at least another 6.9% of street stops, the “[p]olice were providing a service,” wherein 90.8% and 95.9% of stopped persons experienced a legitimate stop and proper police behavior, respectively.).

245. “From 1976 through 1997, 85 percent of white murder victims were killed by whites and 94 percent of black victims were killed by blacks. During the same period, blacks were seven times more likely than whites to be homicide victims and eight times more likely than whites to commit homicides.” U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, NATION’S LARGEST CITIES LEAD THE WAY AS HOMICIDES FALL TO LOWEST RATE IN THREE DECADES (Jan. 2, 1999), <https://www.bjs.gov/content/pub/press/htius.pr>; see also U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIME DATA BRIEF, HOMICIDE TRENDS IN THE UNITED STATES: 1998 UPDATE (Mar. 2000), <https://www.bjs.gov/content/pub/pdf/htius98.pdf> [<https://perma.cc/qq34-7jqe>] (“Blacks were six times more likely to be homicide victims and seven times more likely than whites to commit homicides.”).

system valued crime victims only for their limited role as complainants or witnesses. Otherwise, the system shunted victims to the sidelines, with the game being “The Government versus The Defendant.”²⁴⁶ The criminal justice system removed those barriers in the 1980s as victims successfully asserted “a right to be involved in a process that begins with their misfortune.”²⁴⁷ Victims and their interests have become a legitimate and necessary factor in criminal justice policy and legal calculus.²⁴⁸ Decision makers can no longer ignore their interests or voice.²⁴⁹

It is critical to consider the interests of law-abiding African American residents when analyzing the prevalence of stop-question-and-frisk tactics in their communities and when deciding what response society should pursue to the aggressive use of *Terry* stops as a crime-fighting tool. Some scholars have recently argued that the increase in the number of African American men in prison today cannot simply be attributed to lingering racism because a majority of the black community supported aggressive law enforcement in their neighborhoods.²⁵⁰ That should have given the Massachusetts Supreme Judicial Court pause. African American residents in communities like Roxbury—where the burglary in *Warren* occurred and which the ACLU acknowledged is predominantly black²⁵¹—are the principal victims of violent crime, and they should have their interests weighed in the balance.²⁵² They are the ones who suffer the

246. See Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J. L. & PUB. POL’Y 241, 284 (2014) (footnote omitted).

247. *Id.*

248. See, e.g., the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2012); the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2012); the Victims’ Rights and Restitution Act of 1990, 42 U.S.C. § 10607 (2012); Fed. R. Crim. P. 32(i)(4)(B) (“Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.”); *Payne v. Tennessee*, 501 U.S. 808 (1991) (ruling that victim impact statements may be admitted at the sentencing stage of a capital case); PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982); DOUGLAS BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE (3d ed. 2010); Paul G. Cassell, *The Maturing Victims’ Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

249. See *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (“[I]n the administration of criminal justice, courts may not ignore the concerns of victims.”).

250. See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015); Jason L. Riley, *The Other Side of Mass Incarceration*, WALL ST. J., July 4, 2017, <https://www.wsj.com/articles/the-other-side-of-mass-incarceration-1499194908> [<https://perma.cc/HX5E-ZMU9>] (discussing FORMAN and FORTNER); cf. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

251. ACLU REPORT, *supra* note 152, at 3.

252. “Violent crime is one of the most regressive taxes operating in the United States, with almost all of its negative effects concentrated among low-income minority groups and residential areas. The dark-skinned poor pay twice for high rates of violent crime—with rates of victimization many times higher than middle-income white and Asian groups and with rates of imprisonment vastly higher than non-minority populations. So large declines in serious crimes should generate double benefits.” ZIMRING, *supra* note 10, at 170.

effects of private violence, who endure the suffocating fear created by a community ruled by outlaws, who need a neighborhood that is a less frightening place, and who will be at greater risk of being stopped.²⁵³ Ask yourself, who are victims, like the ones in *Warren*, to contact for help after a thief escapes into the night with their property? If the courts handcuff the police from undertaking any questioning of potential suspects—based not on a mere hunch, but objective, articulable facts—the burden of loss falls squarely on those victims. In predominantly black communities, forcing that injury on them just adds to the burdens they already bear. It is difficult enough for them if the government does not adequately police their community. It is worse when the courts order the police to refrain from undertaking what residents see as a valuable means of halting crimes in the offing.

Ultimately, whether the Massachusetts Supreme Judicial Court correctly applied the law governing flight to the facts in *Warren* is less important than the court's willingness to take a position on the volatile issue of racial discrimination by police officers without considering the entire picture. The court's glib comments on that radioactive issue could well do more harm to the victims of crime than its mistaken devaluation of the probative value of Warren's unprovoked flight. From rookie street cops to chiefs of police and police commissioners, police officers believe that the ability to briefly detain and question a suspect is critical to their ability to keep some crimes from happening.²⁵⁴ Telling them that, unless they want to be labeled as racist, police officers have to stand still and watch some unknown number of black males suspected of criminal activity run away in some unspecified number of "appropriate" cases (whatever that term means) for some unspecified future period signals that the past inappropriate use of force by other officers (probably now retired) will be treated as a secular form of original sin: enduring, ineradicable, and no fault of the current generation.

At the same time, perhaps we should not overstate the Massachusetts Supreme Judicial Court's ruling in *Warren* or necessarily assume the worst. The court did not start from the assumption that the BPD is a modern-day version of the Ku Klux Klan, just outfitted in blue uniforms rather than white robes, riding

253. Consider this story:

In the face of community disruptions, some families isolate themselves from neighbors. In a series of interviews in the South Bronx, Andres Rengifo (2006) has observed that many residents seek to withdraw from their impoverished surroundings. One housing project resident, a single mother with four children (one of whom was attending Yale University and two of whom were in the prestigious Bronx High School of Science public school) said that although she had lived in the projects for seven years, "this place is a dump. I don't talk to anyone, I don't know anyone. That's how we made it here."

TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007).

254. See, e.g., Fyfe, *supra* note 218, at 1231 ("If there is a unanimous view among cops, it is the belief that the authority to stop, question and, where danger apparently exists, to frisk suspicious persons, is an indispensable part of their work.").

“blue and whites”²⁵⁵ rather than horses. Nor did the court find any such conclusion in the studies it cited in or dehors the record. So it may well be that the court realized that there was no basis in the *Warren* record, in the BPD studies, or in the law that would permit the court to create an entirely new and separate rule that flight by some black males from an identifiable police officer should not be treated as evidence of guilt.

If so, however, why did that court give a reader the impression that it supported such a rule? Maybe the court realized that it could not go as far as it hoped. Maybe the court was aware that its ruling stretched the facts and misapplied the law. Maybe the court feared that the BPD was becoming unduly aggressive in communities like Roxbury. Maybe the court just wanted to let the BPD know that it was watching and would intervene to stave off an explosive situation. Maybe the court does not expect the trial courts to give much weight to its directive regarding unprovoked flight by black suspects and expects that the number of “appropriate” cases leading to suppression will be few and far between. Or, by contrast, maybe the court expected trial judges to regularly treat flight by black males as an innocuous fact. Maybe. The Massachusetts Supreme Judicial Court’s opinion reveals none of those suppositions, however, and the police and trial judges are busy enough without having to take on the additional burden of mind reading. If we read the opinion as it is written, however, there is a noticeable irony to it. The Massachusetts Supreme Judicial Court wound up doing an injustice to the larger black community that the court thought it was protecting.

If that conclusion is correct, it gives us a better forum to remedy the problem than the one that court chose: the state legislature or, perhaps a more localized and better option, the city council. When *Terry* was decided, the courts afforded minorities the only chance they had for a fair trial. Indeed, it can be powerfully argued that the underlying motivation for the criminal procedure revolution that the Warren Court undertook in the 1950s and 1960s was to ensure that, unlike the defendants in *Brown v. Mississippi*,²⁵⁶ no black suspect would ever again be whipped and hung until he confessed.²⁵⁷ The courts offered African Americans their only refuge from brutal, racist police officers.

That sad era is behind us. “The political and social landscape has changed immensely since 1968.”²⁵⁸ Due to the Voting Rights Act of 1965,²⁵⁹ blacks are now part of the political process.²⁶⁰ They hold office in the federal, state, and

255. The slang term used to describe BPD squad cars. ACLU REPORT, *supra* note 152, at 2.

256. 297 U.S. 278, 281–83 (1936).

257. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

258. Meares, *supra* note 224, at 1346; see also, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2625–31 (2013).

259. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

260. Meares, *supra* note 224, at 1346–47.

local governments. Even where they do not, legislators cannot ignore their pleas or interests as they once could. Police departments have also changed, with police forces and sheriffs' offices staffed and headed by blacks.²⁶¹ The issue here also is not one pitting blacks versus whites. The major problem for young black males is being stopped in black communities, and the principal concern for the law-abiding members of black communities is avoiding the crimes committed by young black males.²⁶² The problem is deciding what limits to place on a police department's aggressive use of the stop-question-and-frisk technique when it both benefits and burdens blacks. Today, black residents of urban communities might urge elected officials to use that technique along with anti-loitering laws to fend off gang crime in their neighborhoods. That request is powerful evidence that its use is not the type of heavy-handed, biased police practice that we often saw inflicted on blacks fifty years ago. While the police can overuse and misuse their authority to conduct a *Terry* stop, the opinion of the Massachusetts Supreme Judicial Court does not show that this is an instance in which the courts need to intervene in order to protect a minority group from a diffident or hostile legislature.²⁶³ The result is that the courts can let legislators do what they do — devise an arbitrary compromise that benefits and burdens the parties on each side of a dispute — a task that courts cannot do without becoming legislatures.²⁶⁴

261. *Id.* at 1346; see also William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) (noting the oddity between the claims that the criminal justice system is motivated by anti-black bias and the rise in black political power; "Our generation has seen massive gains in black political power over big-city governments, and (not coincidentally) in black representation on urban police forces. Meanwhile, white police officers (and white legislators, prosecutors, and judges) are surely less racist as a class than they were twenty or thirty years ago. A rise in systemic racism coincident with a decline in the level of racism of those who populate the system seems strange, even preposterous.").

262. As Professor Franklin Zimring put it:

The risks and burdens associated with urban life fall most heavily on poor and minority populations, but nowhere else with the special force of urban violence and crime. African American and Hispanic minorities are the overwhelming majority of the victims of any big city's most dangerous forms of criminal violence. The same communities of color also dominate the statistics on criminal offenders, and this creates a second major cost to the communities and families where crime and violence is concentrated. The blunt ends of urban crime control—stops, arrests, jailing and imprisonment—remove young men of color from the same streets and neighborhoods where they are the predominant crime victims. Not without reason has urban violence been called the most regressive tax in modern American life.

ZIMRING, *supra* note 10, at 205.

263. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

264. Professors Kahan and Meares have made that point.

Many forms of inner-city criminality are fueled by widely resented norms. In a school in which many students are armed, even ones who resent guns will choose to arm themselves. In a neighborhood in which many juveniles hang out on the street corner at night, many will feel compelled to hang out so as not to be excluded from social life. In a community in which gang activity is rampant, many individuals will choose to join gangs, not because they look up to gang members, but because they perceive (incorrectly) that a majority of their peers do and (correctly) that failing to join exposes them to a risk of predation. Laws that interfere with these norms will decrease the liberty of those who intrinsically value carrying guns, hanging

The claim of racial discrimination, whether raised in a particular case or as a broad-scale challenge to a stop-question-and-frisk program, is irrelevant to the Fourth Amendment but is of paramount concern to the Equal Protection Clause. At the same time, the district court in *Floyd* was right in realizing that no one judge could examine the constitutionality of every *Terry* stop in a jurisdiction like New York City. In fact, the entire federal bench could not do the job even if they did nothing else for several years. A party can challenge a particular *Terry* stop as having been the product of racial animus, but no individual can bring a broad-based challenge to a police department's stop-question-and-frisk practice.²⁶⁵ A legislature like the Massachusetts General Court, the New York State Assembly, or the city councils in Boston and New York City are suited to undertake that task. The courts are not, as Professor Bill Stuntz explained:

Unfortunately, felt harm does not necessarily correlate with police misconduct. Blacks in a given jurisdiction may be stopped much more often than whites, and that disproportion may give rise to anger and upset among those blacks who are stopped, yet that jurisdiction's police may be behaving quite properly. Crime rates are not constant across population groups; if the racial breakdown of suspects tracks the racial breakdown of criminals, the police will stop many more people in some groups than in others. That much explains why even the most enlightened, community-sensitive police force will engage in tactics that have a racially disparate impact, and the disparities can be quite large. Once one acknowledges that point, it becomes nearly impossible for courts to distinguish racist police harassment from good, color-blind police work. Indeed, the difficulty is greater still. Historically, police racism often took the form of underenforcement—of ignoring black crime because so much of it was visited on black victims. The police forces

out at night, and joining gangs, but *increase* the liberty of those who want the option of *not* engaging in these activities without suffering the adverse consequences of acting contrary to prevailing norms.

The complicated interactions between law, norms, and liberty should make judges humble. They can't legitimately infer, for example, that curfews, gang-loitering laws, and other elements of the new community policing restrict liberty just because they interfere with individual choices. For those laws, through their effect on norms, may in fact be constructing options that individuals value and wouldn't otherwise have. The only way to figure out what their net effect on liberty is under such circumstances is to determine if the norms they regulate are welcome or unwelcome by a majority of the persons who are subject to them—an empirical question that judges can't possibly answer through introspection.

Kahan & Meares, *supra* note 257, at 1153–54 (footnotes omitted).

265. It is problematic that individual cases can be combined in the manner that the district court did in *Floyd* or as the Massachusetts Supreme Judicial Court assumed could be done in *Warren*. There are several problems with such a consolidation aside from the ones discussed in this Article. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (ruling that an individual cannot establish Article III standing to obtain an injunction against a police “choke hold” practice without establishing that he will be subject to that practice, even if he can prove that it was used against him in the past); Fed. R. Civ. P. 232(b)(3) (specifying that a class action is appropriate only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members”). Explication of those problems is beyond the scope of this Article.

with the smallest racial disproportion in street stops actually may be the most racist police forces. Given these cross-currents, reliably separating bad discrimination from good law enforcement (remember that good law enforcement is likely to produce racially disparate outcomes) is probably beyond courts' ability.²⁶⁶

Having legislatures weigh the dignity concerns of stopped African Americans against the crime-fighting interests of the black community is not only the most sensible way to resolve this dispute, but also is consonant with the proper equal protection analysis of aggressive stop-question-and-frisk policies. The purpose of stop-question-and-frisk policies is facially legitimate. The goal is to reduce violent crimes, such as homicide and robbery, by taking off the street illegally possessed handguns and the people who carry them. That purpose applies equally to people of all races. Even if the number of blacks stopped in predominantly black communities exceeds the number of whites stopped in predominantly white communities, the violent crime rate and percent of black residents who benefit from a stop-question-and-frisk practice in the former exceeds the corresponding numbers for white residents in the latter. African Americans are on each side of that issue: we all want to be free from race-based stops and the harms they cause as well as from the crime that stops might prevent, and we all want to see visible evidence that the police are committed to community safety.²⁶⁷ That matters. Those interests distinguish a case like this one from matters, such as discrimination in college acceptance or employment,

266. Stuntz, *supra* note 30, at 1219–20 (footnotes omitted).

267. Consider how Professor Bill Stuntz described the problem:

Street-level policing has large, complicated, and poorly understood social effects. Aggressive police tactics may send the signal that the police are in control of the streets, and hence that the streets are safe for ordinary citizens. That signal could in turn have enormous social benefits; the perception that the streets are safe could lead to greater law-abiding street traffic, which in turn would lead to the reality of safer streets. Or, such tactics may send the signal that young men of the wrong race or ethnicity are automatic targets for the police, and hence that the police are a hostile presence in the community. That signal could have large social costs: If the police and, through them, the criminal justice system, come to be seen as illegitimate, the norms of law-abiding behavior could unravel, with the streets becoming less safe, not more so. More plausibly, such tactics may send a mix of these two signals, with the mix varying depending on local circumstances.

These kinds of benefits and costs can easily dwarf the effects of a given kind of police behavior on particular suspects. Indeed, one might well think that these diffuse social signals ought to be what street-level policing is about. But there is no workable mechanism by which a court can determine what mix of signals a given kind of policing in a given neighborhood sends. The difficulty is one that cuts to the heart of legal regulation in this area: The social effects of particular kinds of police behavior are likely to be heavily dependent on context—on the community's culture, on its past relationship to the local police, on the culture of the police force, on its racial makeup, on the character of local politics, . . . I could go on, but you get the point. Courts cannot measure or evaluate these things, and yet these things determine whether different types of street-level policing are good or bad—whether they impose large costs on the community, and whether, if they do, they nevertheless create substantial benefits. Moreover, even if courts could measure these political and social vari-

where blacks and whites can be adversaries. Here, the benefits and costs of the chosen legal rule fall on the same category of parties. Contemporary legislatures can be trusted to decide an issue like this one.²⁶⁸

Black residents are both the principal subjects of frequent *Terry* stops and the primary beneficiaries of that practice. The presence of black residents on both sides of the equation helps dispel the notion that a disparity on one side of the equation proves that stop-question-and-frisk policies are just a façade for racial animus. The issue is more complicated than that. Courts cannot make the factual, policy, and moral choices underpinning controversies like this one without becoming unelected legislators. When that is the case and when minorities can receive a fair hearing by elected legislators, the sensible approach is to allow them to resolve the matter. The political muscle that African Americans can flex today distinguishes a racial issue like this one from the problems that blacks faced earlier in our history and ensures that each side of the issue will

ables, the logical consequence would be a law of street-level policing that varied from neighborhood to neighborhood. That would send its own negative signals.

Stuntz, *supra* note 30, at 1216–17 (footnotes omitted).

268. Professor Randall Kennedy made that point in 1994:

Conventional racial critiques of the state maintain that the criminal justice system is infected with a pervasive, systemic racial bias. This bias, the argument goes, subjects African-Americans (particularly men) to unfair targeting at every level of contact that individuals have with officials charged with protecting the public safety: surveillance, stops, arrests, prosecutions, and sentencing. These critics (depending on age) allude to bitter memories of the Scottsboro Boys or Rodney King, and portray the police as colonial forces of occupation, and prisons as centers of racist oppression. . . .

Fueled by the conviction that invidious racial discrimination pervades definitions of criminality and the administration of law enforcement, these beliefs give rise to a distinctive stance characterized by hostility toward the agencies of crime control, sympathetic identification with defendants and convicts, and a commitment to policies aimed at narrowly constraining the powers of law enforcement authorities. Those who adopt this stance frequently proceed as if there existed no dramatic discontinuities in American history, as if there existed little difference between the practices and sentiments that characterized the eras of slavery and de jure segregation and those prevalent today, as if African-Americans had completely failed in their efforts to reform and participate in the creation and implementation of government policy, and as if black mayors, chiefs of police, and legislators did not exist. But, of course, there has been substantial change in the terrain of race relations, and today, some of the policies most heatedly criticized by certain sectors of black communities are supported and enforced by other African-Americans within these same communities. These facts call for a reconsideration of old paradigmatic images that guide intuitions about the meaning of racial disparities in arrests, prosecutions, and sentencing. Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but under-enforcement of the laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity.

Kennedy, *Discrimination*, *supra* note 235, at 1257–59 (footnotes omitted). The political influence of African Americans—one of whom became President from 2009 to 2017—has not disappeared since 1994.

receive a fair say in its resolution.²⁶⁹

Does this mean that the legislature can authorize the police to stop-question-and-frisk individuals in violation of the Equal Protection Clause? No. But legislatures can address the issue that some argue is at the heart of this controversy. In their view, the problem is not that individual officers are biased, but is that blacks are far more likely to be stopped than whites, perhaps precisely because they are residents in a neighborhood beset with crime. The practice of directing street cops to look for suspicious parties rather than imminent law-breakers leads to an increase in the number of blacks stopped even when individual police officers are not motivated by racial animus.²⁷⁰ For blacks, a police department's systematic practice of using *Terry* stops to find illegally possessed firearms or contraband means that those stops will become "common, repeated, routine, and even scripted" and wind up treating blacks "not as individuals worthy of dignity but as numbers to be processed in search of the small number" of blacks engaged in crime.²⁷¹ That problem is materially different from the ones that blacks suffered in the 1950s and 1960s at the hands of the likes of Bull Connor, and the state and local political processes today are quite different from the ones that blacks faced during that era. Those differences matter. If the principal victims of a police practice designed to prevent violent crime belong to the same race as the principal victims of the violent crimes that the practice is designed to stop, the legislature or city council is the appropriate arena in which each side can make its case how that practice should be regulated.²⁷²

Keep in mind that it is by no means certain who will triumph in that debate: the victims of unlawful *Terry* stops or the victims of crime. On the one hand, community residents *and* the victims of unlawful *Terry* stops could decide that the reduced homicide rate outweighs the indignities resulting from aggressive—and perhaps even often unlawful²⁷³—NYPD's stop-question-and-frisk practices

269. See Larkin, *supra* note 246, at 288–94; cf. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (“The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”).

270. See EPP ET AL., *supra* note 25, at 41–48, 50–51.

271. *Id.* at 6.

272. See Larkin, *supra* note 246, at 278–92 (making that argument in the context of the harsh sentences imposed under the federal laws prohibiting the distribution of crack cocaine); Stuntz, *supra* note 30, at 1213–14 (“[M]ost legal theory suffers from a tendency to underestimate the magnitude and importance of error costs. That tendency is a particular problem when it comes to legal regulation of street-level policing because that kind of legal regulation is especially prone to error . . . [T]here is no getting around the central difficulty of *Terry* and the law it has spawned. Most of what we would like that law to accomplish is impossible; the necessary legal judgments cannot be made with even a decent degree of accuracy.”).

273. A troubling fact noted in various studies is that the number of black males arrested after *Terry* stops is markedly lower than the corresponding number of white males. See GLASER, *supra* note 13, at 34–35, 39. That fact suggests that the police are either using a lower threshold than “reasonable suspicion” to stop blacks or that they are using no standard at all. That would explain why numerous

on the theory that *Terry* stops are temporary and death is forever. Professor Zimring explained how someone could make that decision:

Over time, then, the significant benefits to minority males of lower death and injury from crime and sharply reduced rates of imprisonment have to be balanced against the increased burden of expanded misdemeanor arrests and police street stops when coming to a judgment about the net effect of changes in crime and law enforcement in the city. The large declines in catastrophic outcomes—violent death and imprisonment—are probably more important than the broader prejudice of misdemeanor arrests and promiscuous targeting of minority youth for stop and frisk screenings.²⁷⁴

On the other hand, community residents and the victims of unlawful stops could decide that they can no longer tolerate a police force that unjustifiably uses that tool to assert authority in an insulting, racially discriminatory manner over people already suffocating in poverty, crime, and despair. Notwithstanding the potential crime-reduction benefits of an aggressive stop-question-and-frisk strategy, a sufficient number of African Americans might coalesce to reach a critical mass and reject the police strategy. As one of us wrote about the disparate effect of the federal crack cocaine sentencing laws:

[A]t some point a majority of residents in urban black communities may come to doubt—or to condemn—the integrity of the criminal justice system. Black residents in poor urban neighborhoods might believe that, because each separate feature of the criminal justice system has a harsher effect on blacks than on whites, the system in its entirety has it out for them, even if each separate feature could be justified as race-neutral. If that is true, if black crack cocaine traffickers *and* the black victims of crack cocaine trafficking *both* question the integrity of the federal crack sentencing laws, we seem to have reached the point where there is little left to justify continuing the harsh punishments the Anti-Drug Abuse Act of 1986 imposed on crack dealing. The racial tensions and distrust generated by refusing to reduce further or eliminate the racial disparities generated by that law might not be worth whatever deterrent effect its severe penalties might have.²⁷⁵

In New York City in 2014, the victims of unlawful *Terry* stops prevailed. The NYPD's *Terry* stop practice was the focal point of the 2013 New York City mayoral campaign; candidate Bill de Blasio made clear his opposition to that program; and, after being elected, he withdrew the city's appeal of the adverse judgment in the *Floyd* case, allowing the district court's remedial orders to go

studies have found that the police have engaged in racial profiling. *Id.* at 21–41. The police are unconsciously relying on stereotypes. *Id.* at 43.

274. ZIMRING, *supra* note 10, at 211.

275. Larkin, *supra* note 246 at 290–91 (footnotes omitted; emphasis in original).

into effect.²⁷⁶ Other cities might choose differently. An assembly could come out on either side.

No decision will be easy. As Professor Bill Stuntz once put it, “When regulating street policing, we are living in a land of bad choices.”²⁷⁷ Balancing the benefits and burdens of an aggressive stop-question-and-frisk program for the people in the affected neighborhoods is difficult enough without the added problem of trying to decide how much of the balance on each side is due to the lingering effects of the poor history of racial relations that America had so long ago and, in some locales, continues to have today. Members of today’s society can debate how *Terry* stops differently affect men and women or adults and minors without the discussion becoming explosive.²⁷⁸ That does not happen today when the racial implications of that practice are at stake. Hopefully, that will change over time.²⁷⁹

The authors of this Article do not have a solution for this problem.²⁸⁰ In fact, it may be that each generation might have to reassess the balance anew. What we do believe is that the law-abiding members of local, predominantly black communities are on both sides of that balance and that each group should be given the opportunity to make its case. As Michael Javen Fortner put it, “our new American dilemma is Janus-faced. There are those who have endured the

276. See WHITE & FRADELLA, *supra* note 8, at 112 (“[T]he NYPD’s SQF program . . . became a defining feature of the New York City mayoral election in the fall of 2013, with candidates advocating both for and against the NYPD’s use of the practice. In effect, the mayoral election became a referendum on SQF, and mayoral candidate William de Blasio was elected in part because of his opposition to the NYPD SQF program.”); Eliana Dockterman, *New NYC Mayor Drops Stop-and-Frisk Appeal*, TIME, Jan. 30, 2014, <http://nation.time.com/2014/01/30/stop-and-frisk-bill-de-blasio-michael-bloomberg-appeal-crime/> [<https://perma.cc/35AQ-RX93>].

277. Stuntz, *supra* note 30, at 1214.

278. The evidence is overwhelming that violent offenders are more likely to be male, and predominantly young and male, than female of any age. See, e.g., MARTIN DALY & MARGO WILSON, HOMICIDE 146 (1988) (“The difference between the sexes is immense, and it is universal. There is no known human society in which the level of lethal violence among women even begins to approach that among men.”); MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 145 (1990) (“Gender differences [regarding violent crime] appear to be invariant over time and space.”); MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES: POLICY MEMO 6 (2014) (listing data showing that young males commit far more crime than older males and females of any age); Monahan, *supra* note 232, at 432.

279. It would help if the most vocal police critics once tried to look at the problem from a crime victim’s or an officer’s perspective, or at least toned down their rhetoric. People shouting “Kill the pigs!” are not engaging in reasoned debate. It is unfortunately true that, in the nature of things, shrill cries for violence repeatedly broadcast over television will have an effect on some people who, perhaps because they are already unhinged for other reasons, feel a call to use violence to eradicate a perceived “enemy.” See, e.g., Comey, *supra* note 220; Malcolm, *supra* note 27, at 68–69 & nn.2–7; Peter Nicholas et al., *GOP Lawmakers Targeted in Ballfield Shooting Spree*, WALL ST. J., June 14, 2017, <https://www.wsj.com/articles/rep-steve-scalise-wounded-in-virginia-shooting-1497442320> [<https://perma.cc/YY6Y-KZ82>]. Two parties cannot debate when one is calling for the other’s death.

280. Nor is it clear how far down a city council can or should delegate decision making authority. For example, in New York City the decision could be made on a citywide basis, at the borough level, or by the neighborhood in each NYPD precinct. Perhaps a reasonable argument can be made for each one. The answer to that question is beyond the scope of this Article.

inequities of the penal system, and there are those who have suffered the unfairness of crime. This second face deserves a fair hearing.”²⁸¹

CONCLUSION

At stake in cases like *Warren* are the interests not only of the stopped individuals, but also of the community in which they live. The use of stop-question-and-frisk tactics by police officers in all fifty states testifies to its value in acquiring evidence of a past crime (such as burglary), of one that is “in progress” (such as illegal possession of a handgun), or of one that is in the offing (such as armed robbery). There always is good reason for police departments to reassess their stop-question-and-frisk policies, particularly when they appear to burden racial minorities. But any such re-evaluation needs to consider the interests of the people in the community who wish to avoid becoming future victims of crime, people who may benefit from this practice, people who likely have the same skin color as the people being stopped.

The Massachusetts Supreme Judicial Court had an opportunity to tee up that issue for elected officials and the public in the commonwealth to work out in the best way that the democratic process allows. The court flubbed its chance, however, because it forgot or ignored the interests of law-abiding African American community residents who do not want to become victims and who see an aggressive stop-question-and-frisk policy as a reasonable defense against local crime. It now falls to other courts and lawmakers to consider the issues raised by the *Warren* case. With luck, they will look at the matter more responsibly.

281. FORTNER, *supra* note 250, at x.