

DON'T MAKE A RUN FOR IT: RETHINKING *ILLINOIS V. WARDLOW*<sup>1</sup> IN LIGHT OF POLICE SHOOTINGS AND THE NATURE OF REASONABLE SUSPICION

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“Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’”<sup>2</sup>

Fear and distrust of law enforcement have been longstanding in the Black community.<sup>3</sup> Those in power have fueled this fear and distrust through brutal beatings, harassment, and general discrimination.<sup>4</sup> But today, a new tool exacerbates this problem and makes escaping the violence nearly impossible, deepening the contempt and spreading its adverse effects: the media. Using a hierarchy of “if it bleeds, it leads,” the capitalistic fear-based media targets the anxieties and biases of Americans, creating a more profound fear and distrust of law enforcement while simultaneously strengthening the fear and distrust of Black men.<sup>5</sup>

The law has been slow to reflect the implications of these realities. Courts today are unable to make “commonsense judgments”<sup>6</sup> that individuals, mainly minorities, genuinely want to avoid contact with police officers.<sup>7</sup> Instead, courts are bound to maintain a criminal justice system that is blind to the American tradition of violence against

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

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2. *Alberty v. United States*, 162 U.S. 499, 511 (1896).

3. See Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Fears the Police. Here’s Why*, PACIFIC STANDARD (May 8, 2018), <https://psmag.com/social-justice/why-black-america-fears-the-police> [<https://perma.cc/2FR4-PW6J>] (“For [B]lack Americans, policing is ‘the most enduring aspect of the struggle for civil rights,’ because it has always been a mechanism for racial control.”).

4. See *id.*

5. See Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, PSYCHOLOGY TODAY (June 7, 2011), <https://www.psychologytoday.com/us/blog/two-takes-depression/201106/if-it-bleeds-it-leads-understanding-fear-based-media> [<https://perma.cc/6JWY-RDWZ>] (describing fear-based media as “depicting categories of people as dangerous and replacing optimism with fatalistic thinking”).

6. *Wardlow*, 528 U.S. at 125.

7. See Rick Jervis, *Who are police protecting and serving? Law enforcement has history of violence against many minority groups*, USA TODAY (June 15, 2020, 3:20 PM), <https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/> [<https://perma.cc/P738-27DQ>] (describing how the history of violence against minorities has resulted in minority groups’ underusing and avoiding interactions with police).

minorities. By sanctioning the observation of “unprovoked” flight, the Supreme Court decision in *Illinois v. Wardlow* allows for the stop and frisk searches of individuals who flee while present in “high crime” areas, a known proxy for minority neighborhoods.<sup>8</sup> A Black man’s flight is hardly “unprovoked;” it is a result of racial profiling<sup>9</sup> and media-bred fear of fatal encounters.<sup>10</sup>

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8. See *Wardlow*, 528 at 123 & 123 n.1; *infra* II.A (discussion on high crime as a proxy for race).

9. See *Wardlow*, 528 U.S. at 132–33 (Stevens, J., concurring in part and dissenting in part).

10. See *infra* III.A.1 (discussion on police shootings).

INTRODUCTION TO “THE MOST COMMON NEGATIVE INTERACTION”<sup>11</sup>:  
THE STOP AND FRISK SEARCHES

In the wake of highly publicized police shootings, most discussions of the law focus on holding officers accountable.<sup>12</sup> This Article will begin by addressing the standard of reasonable suspicion and the inordinate power it gives police officers over the bodies of Black men. Moving forward to *Illinois v. Wardlow*, this Article will then discuss how, by allowing flight to be considered a factor for reasonable suspicion, the case contributes to the bleakness of police contact with Black men. Subsequently, the discussion focuses on how the reasonable suspicion standard traditionally failed to account for the realities of society even from the time of its creation in *Terry v. Ohio*.<sup>13</sup> To that point, this Article will then explain how the media has added an additional consideration in the Court’s reasonable suspicion analysis in that it has harvested deeper contempt against minority communities and led to significant mental health issues within them. Ultimately, this Article argues that the *Wardlow* decision is concerning because its holding relies on the loose concept of “high crime area” coupled with “unprovoked flight.”<sup>14</sup> Individuals who may be present in their own neighborhoods and avoiding contact with the police are subject to a stop and frisk search without any other justification.<sup>15</sup>

First, as a practical matter, a Black man’s encounter with the police does not always result in fatal wounds. Instead, when subjected to a “stop and frisk search,” his “life [is] interrupted”<sup>16</sup> and his body is felt all over. In *Terry v. Ohio*, the well-established standard for searches and seizures under the Fourth Amendment was diluted<sup>17</sup> when the Supreme Court found that reasonable suspicion, a much lesser standard than probable

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11. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 83 (2017).

12. See, e.g., Ciara McCarthy, *Philando Castile: police officer charged with manslaughter over shooting death*, THE GUARDIAN (Nov. 16, 2016, 12:01 PM), <https://www.theguardian.com/us-news/2016/nov/16/philando-castile-shooting-manslaughter-police-jeronimo-yanez>.

13. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

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

15. At minimum, two Supreme Court justices have at least implied that avoiding contact with the police is legal. See *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (Stewart, J., joined by Rehnquist, J.) (“Police officers enjoy ‘the liberty (again, possessed by every citizen) to address questions to other persons,’ although ‘ordinarily the person addressed has an equal right to ignore his interrogator and walk away.’”) (quoting *Terry*, at 32–33 (Harlan, J., concurring)) (citation omitted).

16. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

17. See Sarah Walker, *Arrest As an Invasion of the Right to Privacy: How Officer Gilroy’s Arrest of Shelwanda Riley for Violating the Fort Pierce Youth Protection Ordinance Violated Her Privacy Rights Under the Florida Constitution*, 19 U. FLA. J.L. & PUB. POL’Y 325, 336 (2008) (“Since *Terry*, the Court’s decisions have required a diminishing quantum of ‘reasonable suspicion’ to justify investigative detentions.”).

cause, was sufficient for a brief stop and search.<sup>18</sup> The police officer in *Terry* was patrolling the area in plain clothes when he observed two men who “didn’t look right.”<sup>19</sup> The police officer approached the men and when they “mumbled something” in response to questions, the police officer grabbed Terry and spun him around to pat the outsides of his body.<sup>20</sup> This is now known as the “stop and frisk search.”<sup>21</sup>

To uphold this government action, the Court in *Terry* established the reasonable suspicion standard: “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>22</sup> The reasonable suspicion standard requires a lower level of justification than the standard used for arrests: probable cause.<sup>23</sup> By recognizing standards other than probable cause to justify searches, “the Court invited more deviation from the traditional outcomes under the Fourth Amendment Doctrine.”<sup>24</sup>

#### I. *ILLINOIS V. WARDLOW* AND ITS COLOR-BLIND<sup>25</sup> APPROACH

In a 5-4 decision, the Supreme Court held that an officer’s actions “did not violate the Fourth Amendment” for stopping an individual who fled from a “high crime” area.<sup>26</sup> The police officers were patrolling an area they deemed to be “heavy” in narcotics trafficking when they observed Wardlow standing next to a building with an “opaque bag” in his hand.<sup>27</sup> Wardlow, allegedly, looked in the direction of the police officers and fled through an alley, which prompted the officers to chase him and conduct a protective pat-down.<sup>28</sup> Wardlow was arrested after a police officer

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18. *Terry*, 392 U.S. at 30.

19. *Id.* at 5.

20. *Id.* at 7.

21. *Id.* at 10.

22. *Id.* at 21.

23. See *Wells v. State*, 922 N.E.2d 697, 700–01 (Ind. Ct. App. 2010) (“Reasonable suspicion is less demanding than probable cause and requires a showing considerably less than a preponderance of the evidence, but still requires a minimal level of objective justification and more than an inchoate and unparticularized suspicion or hunch of criminal activity.”) (citing *Teague v. State*, 891 N.E.2d 1121, 1127 (Ind. Ct. App. 2008)).

24. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: THE POLICE* (5th ed. 2015) at 41.

25. See Keven Jay Kercher, *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, 140–41 (2001) (citing Reply Brief for Petitioner at 16, *Wardlow*, 528 U.S. 119 (No. 98-1036) (arguing for a color-blind approach to applying the Fourth Amendment)).

26. *Wardlow*, 528 U.S. at 121.

27. *Id.* at 121, 121–22.

28. *Id.* at 122 (majority opinion).

squeezed the opaque bag, felt the shape of a gun, and discovered a .38 caliber handgun.<sup>29</sup>

In *Wardlow*, the police officer cited the “high crime area” and the fact that Wardlow ran as the specific, articulate facts needed for reasonable suspicion.<sup>30</sup> The Illinois Supreme Court below, while agreeing that the area Wardlow was located in was dangerous, rejected the argument that flight in a high crime area supported a finding of reasonable suspicion because the “‘high crime area’ factor was not sufficient standing alone to justify a *Terry* stop.”<sup>31</sup> The Illinois Supreme Court held the stop, and the subsequent arrest, invalid upon finding “no independently suspicious circumstances to support an investigatory detention.”<sup>32</sup> The Supreme Court of the United States disagreed,<sup>33</sup> stating that although a high crime area standing alone is insufficient, an area’s characteristics are relevant to determining whether further investigation is warranted.<sup>34</sup>

As he dissented in part, Justice Stevens mentioned the defects in *Wardlow* and stated that individuals fleeing from a high crime area arguably may have more innocent motivations for doing so, making an inference of guilt less appropriate.<sup>35</sup> Justice Stevens proceeded to remind the Court of various innocent reasons why an individual might run regardless of their location: “to catch up with a friend a block or two away, to seek shelter from an impending storm, . . . to avoid contact with a bore or a bully, . . . any of which might coincide with the arrival of an officer in the vicinity.”<sup>36</sup> Even if the flight is prompted by the presence of an officer, an innocent man may still run:

[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime . . . . Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’ Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts . . . .<sup>37</sup>

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29. *Id.*

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

31. *Id.* at 123.

32. *Id.*

33. *Id.* at 125.

34. *Id.* at 124.

35. *Wardlow*, 528 U.S. at 138–39 & 139 (Stevens, J., dissenting in part and concurring in part) (stating that the officer simply testified, “He looked in our direction.”).

36. *Id.* at 128–29.

37. *Id.* at 131 (quoting *Alberty v. United States*, 162 U.S. 499, 511 (1896)).

The concept of innocent men running out of fear that the system will not protect them may be especially prominent for Black men who are constantly being convicted despite never having committed the crime.<sup>38</sup> Remarkably, Justice Stevens acknowledged that minorities have their own innocent reasons for running, such as the belief that “contact with the police itself can be dangerous.”<sup>39</sup> He further stated that “these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.”<sup>40</sup>

Still, the majority asserted that “[unprovoked] flight . . . is the consummate act of evasion,”<sup>41</sup> and found that Wardlow’s presence in a high crime area, coupled with his flight, gave the police officers reasonable suspicion to stop him and conduct a frisk.<sup>42</sup> Notably, the Court stated, “the reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior.”<sup>43</sup> Evidently, this is an objective standard that does not take into account inferences about Black men and their behavior with law enforcement<sup>44</sup>—the reasonable beliefs that Justice Stevens argued for in his dissent.<sup>45</sup>

Shielding police officers under this objective standard allows them to continue seizing individuals in a racially biased manner without any discussion as to whether the stop was motivated by unconstitutional motivations like race. Similar to the objective justifications found in *Terry*—whether a reasonable officer would have feared for his safety<sup>46</sup>—*Wardlow* builds on past Supreme Court decisions<sup>47</sup> and allows judges to

38. See *All Cases*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#defendant-african-american> [<https://perma.cc/G39J-QNTV>] (Click “Filter” to display filter options and under “Race of Defendant,” check the box for “African American.” As of September 2, 2020, the webpage showed 380 defendants who had been convicted of a crime for which they were exonerated in a year ranging from 1989 through 2020; of those 380 defendants, more than half (230) were African American) (demonstrating that the number of wrongful convictions is significantly higher among African American men than men from other racial groups).

39. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting in part and concurring in part).

40. *Id.* at 133.

41. *Id.* at 124 (majority opinion).

42. *Id.* at 124, 125.

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

44. *Wardlow*, 528 U.S. at 132 n.7 (Stevens, J., dissenting in part and concurring in part) (citing Johnson, *Americans’ Views on Crime and Law Enforcement: Survey Findings*, NAT. INSTITUTE OF JUSTICE J. 13 (Sept. 1997) (“reporting study by the Joint Center for Political and Economic Studies in April 1996, which found that 43% of African-Americans consider ‘police brutality and harassment of African-Americans a serious problem’”).

45. See *Wardlow*, 528 U.S. at 133–34 (Stevens, J., dissenting in part and concurring in part).

46. *Terry*, 392 U.S. at 30.

47. *Cf. Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that where there is probable cause to detain a person temporarily for a traffic violation, the seizure does not violate the Fourth Amendment even though the underlying motivation for the stop might have been some other matter).

assess reasonable suspicion without any discussion of the officer's motivations for the initial pursuit and without the individual's motivations for fleeing. Such a combination results in disparate application of stop and frisk searches.

## II. DISPARATE APPLICATION OF STOP AND FRISK SEARCHES DESPITE *WARDLOW* AND BECAUSE OF *WARDLOW*

In 2014, a police officer who performed a stop and frisk search on 16-year-old Darrin Manning squeezed the minor's testicles so hard that one ruptured<sup>48</sup> and a grown man reported a police officer for fingering him.<sup>49</sup> The Supreme Court acknowledges that a stop and frisk search “may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”<sup>50</sup> Yet, stop and frisk searches continue to be “the most common negative interaction[] that citizens have with the police.”<sup>51</sup> Police officers abuse their discretion in choosing their targets and interpreting their actions. For example, officers are more likely to identify “Furtive Movements”<sup>52</sup> in their justification for stopping Blacks and Hispanics than for whites.<sup>53</sup> As a result, minorities are disproportionately stopped and frisked.<sup>54</sup> Stop and frisk searches are day-to-day interactions

48. See Sebastian Murdock, *Darrin Manning, Pa. Teen, Allegedly Has Testicle Ruptured by Cop*, HUFFPOST (Jan. 23, 2014, 12:40 PM), [https://www.huffpost.com/entry/darrin-manning-testicle-rupture\\_n\\_4651700](https://www.huffpost.com/entry/darrin-manning-testicle-rupture_n_4651700) [<https://perma.cc/7VSP-CXGA>]; see also Joaquin Sapien et al., *Over a Dozen Black and Latino Men Accused a Cop of Humiliating, Invasive Strip Searches. The NYPD Kept Promoting Him*, PROPUBLICA (Sept. 10, 2020, 5:00 AM), <https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him> [<https://perma.cc/4VX2-KKWJ>].

49. See Maria Perez, *Police Officer Sued for Inappropriate Stop and Frisk, ACLU Lawsuit Alleges*, NEWSWEEK (June 20, 2018), <https://www.newsweek.com/police-officer-sued-inappropriate-stop-frisk-aclu-washington-dc-1034950> [<https://perma.cc/HP8J-ZF6L>].

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

51. BUTLER, *supra* note 11.

52. Furtive movements have been described in myriad ways by different officers at the same police department. One would offer examples of someone's “changing direction, walking in a certain way, [a]cting a little suspicious.” Another would explain it as someone “hanging out in front of [a] building . . . and then making a quick movement.” *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (internal quotations omitted). See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78 (2015) (“The term ‘furtive movements’ can be used to refer to an almost-infinite number of actions that an officer might find suspicious. This factor is vague in its meaning and subjective in its interpretation.”).

53. *Floyd*, 959 F. Supp. 2d at 661 n.760 (“[O]fficers are more likely to check Furtive Movements as the basis for stopping [B]lacks and Hispanics than for whites . . .”).

54. *NYCLU Releases Report Analyzing NYPD Stop-And-Frisk Data*, NYCLU (Mar. 14, 2019), <https://www.nyclu.org/en/press-releases/nyclu-releases-report-analyzing-nypd-stop-and-frisk-data> [<https://perma.cc/V5HT-JYN9>] (“Young [B]lack and Latino males between the ages of 14 and 24 account for only five percent of the city's population, compared with 38 percent of reported stops. Young [B]lack and Latino males were innocent 80 percent of the time.”)

that cause widespread detriment and are indisputably conducted in a racially biased manner.<sup>55</sup> *Wardlow* allows for a broader and more fluid application of reasonable suspicion that intensifies the problematic applications of the stop and frisk search.

#### A. *How Wardlow has Adverse Effects on Minorities in Particular*

The *Wardlow* Court held that flight and presence in a “high crime area” support a finding of reasonable suspicion.<sup>56</sup> Notably, the phrase “high crime” has been recognized as a proxy for race.<sup>57</sup> This becomes apparent upon recognizing that virtually all search and seizure cases lack a discussion of what an officer meant by “high[ ]crime.”<sup>58</sup> Sheri Lynn Johnson, “an expert on the interface of race and issues in criminal procedure,”<sup>59</sup> warns against relying on the expertise of police officers during suppression hearings.<sup>60</sup> She states that “when a police officer describes a neighborhood as ‘high crime’ or ‘drug-prone,’ a court may completely accept the expertise, risking that the officer’s prejudice about ghetto neighborhoods clouds his evaluation of the probability of crime contributed by the neighborhood.”<sup>61</sup>

Police officers are not immune to racial biases.<sup>62</sup> By not inquiring further into the intentions of the police to discover whether their actions

55. See *Floyd*, 959 F. Supp. 2d at 562 (finding the city of New York liable for the constitutional violations and stating that the city “acted with deliberate indifference toward the NYPD’s practice of making unconstitutional stops and conducting unconstitutional frisks”). The Second Circuit removed Judge Scheindlin for having the appearance of impartiality and stayed the imposition of the remedies she mandated. *Ligon v. City of New York*, 736 F.3d 118, 121 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). Some argue that Judge Scheindlin’s opinion was based heavily on, and deeply supported by, the data discussed. See *CCR Disappointed by Appeals Court’s Refusal to Hear Judge Reassigned from Stop-and-Frisk Case*, CTR. FOR CONST. RIGHTS (Nov. 14, 2013), <https://ccrjustice.org/home/press-center/press-releases/ccr-disappointed-appeals-court-s-refusal-hear-judge-reassigned-stop> [<https://perma.cc/M5DD-5FT9>].

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

57. See Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 493 (2004) (stating that the phrase “high crime neighborhood” is often a proxy for race).

58. See Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1591 (2008) (“Rarely is there any analysis of why this particular area is a high-crime area, on what objective, verifiable, or empirical data the police officer has based his conclusion,” or whether the cop was aware of this before he made the stop).

59. *Faculty: Professional Biography: Sheri Lynn Johnson*, CORNELL LAW SCHOOL, [https://www.lawschool.cornell.edu/faculty/bio\\_sheri\\_johnson.cfm](https://www.lawschool.cornell.edu/faculty/bio_sheri_johnson.cfm) [<https://perma.cc/ZB5X-26AE>].

60. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 255 (1983) (“The possibility of prejudice is omnipresent in a jury trial, but prejudice may sneak in the back door at a suppression hearing.”).

61. See *id.*

62. See *infra* Part III (discussing, in part, the history of race in America); cf. Mark W. Bennet, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 396 (“[C]ommentators ‘almost universally agree’ that racial disparities are pervasive in the U.S.



amount to racial animus, the judiciary is at risk of placing bias beyond the reach of the law.<sup>63</sup> The phrase “high-crime area” has essentially become a term of art and “[t]he neighborhoods typically described as high in crime are disproportionately urban, nonwhite, and poor.”<sup>64</sup> Moreover, since a person of color is deemed suspicious simply by being present in a white neighborhood,<sup>65</sup> where are these individuals supposed to go to be free from governmental intrusion? To remedy this issue, “courts must begin taking seriously the requirement that the term be based on objective, quantifiable—statistical or otherwise—settled data . . . .”<sup>66</sup>

### B. *The Implications of United States v. Mendenhall*<sup>67</sup> Urges Reconsideration of the *Wardlow* Decision

The *Wardlow* decision becomes more problematic when considered in conjunction with pre-existing Supreme Court decisions, such as *Mendenhall*. In *Mendenhall*, two DEA agents approached the defendant in an airport because they thought she might be carrying narcotics.<sup>68</sup> The agents asked whether the defendant would accompany the agents to the DEA office for questioning; the defendant agreed, subsequently consenting to a search that revealed drugs.<sup>69</sup> Despite the authoritative presence of the DEA agents and their decision to focus on the defendant, the Court found that the defendant was free to leave at any point during the encounter because a “reasonable person would have believed that he was [free to leave].”<sup>70</sup>

Under the “free to leave” logic developed in *Mendenhall*, Black men would live in perpetual states of seizure in their own neighborhoods

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criminal justice system.”) (citing Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 872 n1. (2015)).

63. See Katheryn Russell-Brown, *The Academic Swoon over Implicit Racial Bias: Costs, Benefits, and Other Considerations*, 15 DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE 185, 193 (2018) (“[W]hen an act of racial bias is categorized as an act of implicit bias, it makes establishing racial animus difficult and may place the racial discrimination beyond legal reach.”).

64. L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 280 (2012) (citing David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994)).

65. See P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> (quoting Paul Butler as saying, “You’re required to justify your existence and your presence in a white space. It makes you feel like less of a citizen and less of a human being.”).

66. Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1593 (2008).

67. *United States v. Mendenhall*, 446 U.S. 544 (1980).

68. *Id.* at 547.

69. *Id.* at 548.

70. *Id.* at 554.

should *Wardlow* be taken to its logical conclusion.<sup>71</sup> Since a Black man's flight from police, especially in a "high crime" area, is seen as a legitimate factor for reasonable suspicion, a Black man can never truly be "free to leave."<sup>72</sup> A Black man would always be subject to pursuit and detention should he try to evade the police. This result is unjust and legally unsound. It should not stand.

### III. A BRIEF DISCUSSION OF RACIAL BIAS, WHY BLACK MEN RUN, AND THE MEDIA'S CONTRIBUTION

A discussion of the interactions between Black men and the police in America warrants an initial acknowledgment that these interactions historically have not been race-neutral. History evidences the disparity in treatment of minorities, first bred by power and violence, then by bias.<sup>73</sup>

There is an American tradition of "unprovoked killing of Black men" and it "is an old and deep wound that many people in the African American community still grieve."<sup>74</sup> Today, this animosity is not only present in violent interactions,<sup>75</sup> but it has propelled into bias that transcends generations. Unsurprisingly, developmental research suggests that racism, bias, and prejudices are "transmitted from one generation to the next."<sup>76</sup> Police officers are not immune from bias: Research has consistently shown "that police use greater force, including lethal force, with minority suspects than with White suspects."<sup>77</sup>

Police violence is a leading cause of death for young Black men, and at a rate more than twice as high as for young white men.<sup>78</sup> About 1 in 1,000 Black boys and men can expect to die when interacting with police

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71. *Id.*

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

73. See, e.g., Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (last updated May 29, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>.

74. Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J. L. & PUB. POL'Y 271, 274 (2012).

75. See *infra* III.A (discussion on documented incidents).

76. See Bart Duriez & Bart Soenens, *The Intergenerational Transmission of Racism: The Role of Right-Wing Authoritarianism and Social Dominance Orientation*, 43 J. RES. PERSONALITY 906 (2009), <http://doi.org/10.1016/j.jrp.2009.05.014> [<https://perma.cc/2XTQ-YYBL>] (detailing how racism and prejudice dispositions transmit from one generation to the next as a result of "fundamental intergenerational transmission of ideology").

77. Joshua Correll et al., *Across the thin blue line: Police officers and racial bias in the decision to shoot*, 92 J. PERSONALITY. SOC. PSYCHOL. 1006, 1006 (2007), <http://dx.doi.org/10.1037/0022-3514.92.6.1006>.

78. Amina Khan, *Getting killed by police is a leading cause of death for young black men in America*, L.A. TIMES (Aug. 19, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men>.

officers.<sup>79</sup> These events have spillover effects on the mental health of Black communities not directly involved with the incidents.<sup>80</sup> These effects are part of the reason why Black men and boys run in the presence of police officers.

Studies reveal that this aggression towards Black boys and men is fueled by America's historically irrational fear of Black men.<sup>81</sup> A study found that white people are more likely to perceive a Black male's facial expressions as threatening; white participants were unable to reduce their perception of a threat when a neutral Black male face followed an angry Black male face.<sup>82</sup> Researchers have additionally identified concerns about implicit bias among police, such as finding that "[B]lack suspects are more likely to be brutalized than white suspects despite engaging in identical behaviors" and finding that "officers are more likely to believe that the use of force against a [B]lack suspect is both reasonable and necessary . . . ."<sup>83</sup>

Although the reality that police officers brutally harass, beat, and shoot Black Americans is traumatizing enough for those in the same community, seeing the images makes the effect more impactful.<sup>84</sup>

#### A. *How an Impactful Media Contributes to Why Black Men Run*

It goes without saying that law enforcement work environments are among some of the riskiest.<sup>85</sup> Black Americans especially are able to mentally and emotionally compartmentalize warranted shootings and those that involve irrational killings of unarmed Black men.<sup>86</sup> However,

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79. *Id.*

80. *Id.*

81. See Colin Holbrook et al., *Looming large in others' eyes: racial stereotypes illuminate dual adaptations for representing threat versus prestige as physical size*, 37 *EVOLUTION & HUM. BEHAV.* 67, 68 & 69 (2016).

82. Tom Jacobs, *Black Male Faces More Likely to be Seen as Threatening*, PAC. STANDARD (June 14, 2017), <https://psmag.com/economics/black-male-faces-3571>; see, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3–4, 4 n.2 (1985) (officer described the defendant as 17 or 18 and about 5'5" or 5'7" when in fact he was 15 and 5'4").

83. L. Song Richardson & Philip Atiba Goff, *Interrogating Racial Violence*, 12 *OHIO ST. J. CRIM. L.* 115, 123 (2014).

84. See *Trauma After Gun Violence*, VANTAGE POINT: BEHAV. HEALTH & TRAUMA HEALING, <https://vantagepointrecovery.com/trauma-gun-violence/> (stating that people who are in the middle of a traumatic experience can have their daily lives affected by their fear, pain and anxiety. "Senseless violence and shocking events can shatter our assumptions that we live in a safe world.").

85. See *Floyd*, 959 F. Supp. 2d at 562 n.27 (citing CHARLES OGLETREE, *THE PRESUMPTION OF GUILT* 125 (2012) ("[P]olice work diligently every day . . . . They work for relatively low pay for the risks that they take . . . .").

86. See Alexander Tsai et al., *Antwon Rose's killing by police affects blacks' mental health across the country*, STAT (June 27, 2018), <https://www.statnews.com/2018/06/27/when-police-officers-kill-unarmed-blacks-it-affects-blacks-mental-health-across-the-country/> [<https://perma.cc>

positive interactions are not the topic of conversation in the area of police practices,<sup>87</sup> much less in the media. This assessment focuses on what impact unlawful police conduct—or police conduct that is presented as unlawful in the media—has on the behavior of Black men.

The media's determination to focus on the police<sup>88</sup> can be acknowledged as a positive effort to prompt officials to hold the officers accountable. Although holding individuals accountable for their wrongful actions will likely have a deterrent effect, images of police officers emptying their magazines on Black teenagers<sup>89</sup> have left an unaccounted-for impact in the legal system.

### 1. Highly Publicized Police Shootings: A Discussion of Recent Incidents

These recent<sup>90</sup> incidents were selected from the tragically vast collection of highly publicized police shootings because they resulted in the death of a Black man and the shooting was recorded. These criteria were chosen because the likelihood of a shooting receiving national attention is high when the death was caught on camera and the topic is easily shared on social media after receiving national attention. Additionally, it is hard to deny that police officers are shooting and killing Black men when the incidents are recorded. These are a sample of the incidents that the Black youth grow up coping with. All of the victims were Black.

Given the data about young Black boys being perceived as older, it is unsurprising that after twelve-year-old Tamir Rice was shot, an officer

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/CLF5-9PJC] (significant mental health effects were found among Blacks as a result of police killings of unarmed but not of armed Black Americans).

87. See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 685 (1998) (stating that “the Fourth Amendment goal of regulating the use and abuse of government power” was “a goal the Court in *Terry* cited when it reaffirmed the judiciary’s ‘traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security’”) (footnotes omitted).

88. See Nina Feldman, *Police release name of detective who shot unarmed man in Kensington*, WHYY (May 21, 2019), <https://whyy.org/articles/police-shooting-of-harmless-unarmed-man-in-kensington-raises-questions/> [https://perma.cc/SS6U-REUA]. But see Daniel Politi, *Cleveland Paper Thinks You Should Know Tamir Rice’s Father Has Abused Women*, SLATE (Nov. 28, 2014), <https://slate.com/news-and-politics/2014/11/cleveland-paper-defends-publishing-details-about-tamir-rices-parents-criminal-background.html>.

89. See *infra* note 109.

90. The shooting of Oscar Grant in Fruitvale Station meets the criteria for discussion but happened more than ten years ago. See Jemima Kiss, *Fatal police shooting posted on YouTube*, THE GUARDIAN (Jan. 9, 2009), <https://www.theguardian.com/technology/2009/jan/09/subway-killing-video-footage> [https://perma.cc/Q7K3-UHKW].

stated he was a “[B]lack male, maybe [twenty].”<sup>91</sup> In November of 2014, police officers responded to a 911 call reporting someone, “probably a juvenile,” waving a gun around that was “probably fake.”<sup>92</sup> Surveillance footage captured Officer Loehmann hopping out of his cruiser and, within two seconds, shooting the Black child twice from close range while the child was sitting in a gazebo.<sup>93</sup> After pressure from the public and a written request from the Rice family, the surveillance footage was released for all of America to see,<sup>94</sup> including other Black men, teens, and children. Two responding officers administered first aid to Rice almost four minutes after he had been shot because the officers on the scene did not;<sup>95</sup> Rice died hours later from the wounds.<sup>96</sup> A grand jury decided not to indict the shooting officer.<sup>97</sup>

In 2016, over three million Facebook users watched police officers execute Philando Castile while his girlfriend and her four-year-old daughter were in the car.<sup>98</sup> When he was stopped for a broken taillight, Castile let the police officer know that he had a firearm.<sup>99</sup> The officer said “don’t pull it out” to which Castile replied, “I’m not pulling it out.”<sup>100</sup> But

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91. See German Lopez, *Police thought 12-year-old Tamir Rice was 20 when they shot him. This isn’t uncommon*, VOX (Nov. 26, 2014, 6:10 PM), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police>.

92. See Jennifer Schuessler, *911 Operator in Tamir Rice Case Receives 8-Day Suspension*, N.Y. TIMES (Mar. 15, 2017) (stating that the 911 operator who took the call was disciplined by the city’s police chief after failing to relay the “probably a juvenile” and “probably fake” gun information to responding officers).

93. Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events That Led to the 12-Year-Old’s Death*, CLEVELAND (Jan. 11, 2010), [https://www.cleveland.com/court-justice/2017/01/tamir\\_rice\\_shooting\\_a\\_breakdow.html](https://www.cleveland.com/court-justice/2017/01/tamir_rice_shooting_a_breakdow.html) [<https://perma.cc/E4SV-3JMU>].

94. Ryllie Danylko, *Protests Break Out in Cleveland over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND (Jan. 12, 2019), [https://www.cleveland.com/metro/2014/11/protests\\_break\\_out\\_in\\_cleveland.html](https://www.cleveland.com/metro/2014/11/protests_break_out_in_cleveland.html) [<https://perma.cc/5KM2-C9MY>].

95. Police inactivity is not uncommon in shootings. See David Hunn & Kim Bell, *Why was Michael Brown’s body left there for hours?*, STL TODAY (Sept. 14, 2014), [https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article\\_0b73ec58-c6a1-516e-882f-74d18a4246e0.html](https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html) [<https://perma.cc/MUV4-CUBP>] (Michael Brown’s body was left on the street for four hours.).

96. Caroline Bankoff, *Cops Who Shot Tamir Rice Didn’t Bother to Give Him First Aid*, N.Y. INTELLIGENCER (Nov. 29, 2014), <http://nymag.com/intelligencer/2014/11/cops-who-shot-tamir-rice-didnt-give-first-aid.html>.

97. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/76JP-P9PT>].

98. Issie Lapowsky, *For Philando Castile, Social Media Was the Only 911*, WIRED (July 7, 2017), <https://www.wired.com/2016/07/philando-castile-social-media-911/> [<https://perma.cc/3Y3P-UF8X>].

99. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html> [<https://perma.cc/AG2T-42SL>].

100. *Id.*

the officer was already drawing his weapon—in a matter of seconds, he fired seven bullets into the car, five of which hit Castile.<sup>101</sup> Castile’s moans can be heard in the video as he sits with his seat belt still on.<sup>102</sup> A second video recorded by Castile’s girlfriend, viewed by millions of people across the nation, shows him bleeding out in his last moments, gasping for air, with his white shirt quickly dampening red and a gun still aimed at him.<sup>103</sup> The officer handcuffed Castile’s girlfriend and placed her in the back of the police car with her daughter.<sup>104</sup> Because she cried and screamed in shock, her four-year-old daughter, who also witnessed the shooting, said: “It’s O.K., Mommy,” “I’m right here with you,” “Mom, [inaudible] because of the screaming, because I don’t want you to get [shot],” and “I’m scared.”<sup>105</sup> The police officer was acquitted.<sup>106</sup>

Laquan McDonald was seventeen years old when he was shot sixteen times on the night of October 20, 2014.<sup>107</sup> In a police report, Officer Van Dyke states that the teen advanced on him, “swinging the knife in an aggressive, exaggerated manner,” so he shot once; the department ruled the shooting justifiable and did not take further action.<sup>108</sup> A whistleblower disclosed that an existing video captured by a dashcam contradicted the officer’s accounts of the night of the murder, and public pressure resulted in the release of the dashcam footage.<sup>109</sup> The dashcam footage showed McDonald walking away from the officers when Van Dyke fired the first shot; McDonald spun and fell to the ground.<sup>110</sup>

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101. *Id.*

102. CNN, Combined Videos Show Fatal Castile Shooting, YOUTUBE (June 21, 2017), [https://youtu.be/85Y\\_yOm9IhA?t=118](https://youtu.be/85Y_yOm9IhA?t=118) [<https://perma.cc/W6C8-D2ZA>].

103. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YOUTUBE (July 7, 2016), <https://www.youtube.com/watch?v=PEjipYKbOOU> [<https://perma.cc/V3CH-XCKJ>].

104. *Philando Castile, Diamond Reynolds, and a Nightmare Caught on Video*, N.Y. TIMES (June 24, 2017), <https://www.nytimes.com/video/us/100000005181340/philando-castile-diamond-reynolds-and-a-nightmare-caught-on-video.html> [<https://perma.cc/F43L-WZT5>].

105. *Id.*

106. *Id.*

107. Dan Good, *Chicago Police Officer Jason Van Dyke Emptied His Pistol and Reloaded as Teen Laquan McDonald Lay on Ground During Barrage; Cop Charged with Murder for Firing 16 Times*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>. For record purposes, unlike the previous incidents, the victim here was carrying a knife at the time of the shooting.

108. Sophia Tareen, *Chicago Cops’ Versions of Laquan McDonald Killing at Odds with Video*, THE HERALD NEWS (Dec. 5, 2015), <https://www.theherald-news.com/2015/12/05/chicago-cops-versions-of-laquan-mcdonald-killing-at-odds-with-video/aneg9zn/?page=1>.

109. Curtis Black, *How Chicago Tried to Cover up an Execution*, CHI. REP. (Nov. 24, 2015), <https://www.chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/>.

110. *Chicago Dashcam Video Shows Police Killing of Laquan McDonald – video*, THE GUARDIAN (Nov. 24, 2015), <https://www.theguardian.com/us-news/video/2015/nov/24/chicago-officials-release-video-showing-police-killing-of-laquan-mcdonald-video> [<https://perma.cc/PJ3Q-55P9>].

Detectives stated that “only two of the wounds can be linked to the time McDonald was standing.<sup>111</sup> Although McDonald never moved on the ground, Van Dyke emptied his chamber and even reloaded; McDonald was on the ground for at least thirteen of the fifteen seconds during which Van Dyke continuously fired his gun.<sup>112</sup> Van Dyke was the only officer, of eight present, to shoot.<sup>113</sup> The video was watched on many platforms; one post was viewed more than 4.3 million times.<sup>114</sup>

The McDonald murder has been characterized as a modern-day lynching<sup>115</sup> due to depictions of the killing as being racially charged and caused by a group acting under a false pretext of justice.<sup>116</sup> McDonald’s body “was not dangling from a poplar tree, but it was indeed strange fruit.”<sup>117</sup> Van Dyke was found guilty of second-degree murder and sixteen counts of aggravated battery; he will serve fewer than three and a half years in prison.<sup>118</sup>

The deaths of Black people at the hands of police are moving, and many recordings capture the inhumane post-death treatment of these victims by law enforcement. The videos continue for several minutes where officers do not check on the victim for vital signs and sometimes calls for an ambulance are delayed.<sup>119</sup> It is as if they had not taken a human life.<sup>120</sup> For example, Michael Brown’s body laid uncovered for at least ten minutes for spectators to see, and then he was left on the street for four hours.<sup>121</sup> These lynching displays were likely left for deterrence

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111. Dan Good, *Chicago Police Officer Jason Van Dyke Emptied His Pistol and Reloaded as Teen Laquan McDonald Lay on Ground During Barrage; Cop Charged with Murder for Firing 16 Times*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>.

112. *Id.*

113. *Id.*

114. Block Club Chicago, *Dashcam Video of Officer Jason Van Dyke Shooting Laquan McDonald*, YOUTUBE (Nov. 24, 2015), [https://www.youtube.com/watch?v=Ix2N6\\_jLAGA](https://www.youtube.com/watch?v=Ix2N6_jLAGA) [<https://perma.cc/QD7L-GYGY>].

115. Shaun King, *Death of Laquan McDonald at the Hands of Chicago Officer Jason Van Dyke is Modern Day Lynching*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shaun-king-laquan-mcdonald-death-modern-day-lynching-article-1.2446023>.

116. KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 35–52 (Richard Delgado & Jean Stefancic eds., 2d ed.1998).

117. King, *supra* note 115.

118. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> [<https://perma.cc/V3EJ-AUNQ>].

119. Block Club Chicago, *supra* note 114.

120. *Violence: An American Tradition* (Kunhardt Productions Nov. 21, 1995) (stating that the depictions of victims as being less than human facilitate acts of violence against them).

121. David Hunn & Kim Bell, *Why was Michael Brown’s body left there for hours?*, STL TODAY, (Sept. 14, 2014), <https://www.stltoday.com/news/local/crime-and-courts/why-was->

purposes.<sup>122</sup> Also, during unarmed Eric Harris' last moments, body camera footage shows him face-down on the ground bleeding and crying out "I'm losing my breath," to which Tulsa County sheriff's deputy Joseph Byars responded, "fuck your breath."<sup>123</sup> Harris' family issued a statement: "Perhaps the most disturbing aspect of all of this is the inhumane and malicious treatment of Eric after he was shot."<sup>124</sup> One YouTube account shows the video of Eric Harris was viewed more than 2.7 million times.<sup>125</sup>

Seeing an unarmed individual killed by the very force that swears to ensure public safety becomes more alarming when a lack of empathy for the Black race bleeds through after such an execution. In plain terms, "[t]here's a heightened sense of fear and anxiety when you feel like you can't trust the people who've been put in charge to keep you safe. Instead, you see them killing people who look like you."<sup>126</sup>

### B. *How The Graphic and Highly Publicized Incidents Affect The Mental Health of Black Youth*

Longstanding tensions between the Black community and law enforcement multiply both in intensity and scope when incidents of police brutality are easily accessible and splattered across peoples' screens.<sup>127</sup> What has changed are not the feelings of apprehension and general distrust of police but how and to what degree police behavior impacts communities of color. Because of post-traumatic stress disorder (PTSD), the apprehension of individuals who were personally mistreated by police

michael-brown-s-body-left-there-for-hours/article\_0b73ec58-c6a1-516e-882f-74d18a4246e0.html [https://perma.cc/DET6-A9KJ].

122. *Lynching in America*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/emmett-lynching-america/> [https://perma.cc/4MHT-MM4Y] ("[L]ynching, an act of terror meant to spread fear among [B]lacks, served the broad social purpose of maintaining white supremacy in the economic, social and political spheres.").

123. Carlos Miller, *Oklahoma Sheriff Glanz Resigns After "Fuck Your Breath,"* PINAC NEWS (Oct. 4, 2015), <https://newsmaven.io/pinacnews/citizen-journalism/oklahoma-sheriff-glanz-resigns-after-fuck-your-breath-9L3sudpRqkuGUyif5dVaBA/> [https://perma.cc/BG9F-M42U].

124. CBS This Morning, *Tulsa police release video of accidental shooting: "I shot him. I'm sorry."*, YOUTUBE (Apr. 13, 2015), [https://www.youtube.com/watch?v=3Eb\\_fDe3III](https://www.youtube.com/watch?v=3Eb_fDe3III) [https://perma.cc/85KH-2BJ2].

125. *Id.*

126. Kenya Downs, *When black death goes viral, it can trigger PTSD-like trauma*, PBS NEWS (July 22, 2016), <https://www.pbs.org/newshour/nation/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma> [https://perma.cc/7HBB-9JRJ].

127. Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, THE NEW REPUBLIC (Feb. 13, 2019), <https://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice> [https://perma.cc/3VFV-B4ZE] (stating that "repeated footage [of police violence] can also make some viewers so piercingly aware of police violence that they instinctively disengage from the police rather than risk facing them").



officers is amplified when they see another Black man or child killed by a police officer.<sup>128</sup> Those who have not personally been targeted by police brutality experience the effects secondhand through media exposure.<sup>129</sup> For example, LaWanna Gunn-Williams, a psychotherapist, says young adults who repeatedly view footage of police “shooting civilians” can develop PTSD.<sup>130</sup> This phenomenon is known as “vicarious trauma,” where indirect exposure to violent events can cause emotional distress among those not involved.<sup>131</sup> Bottom line, when an unarmed Black individual is killed by police officers, especially if it appears to be senseless, their deaths are suffered greatly by the entire Black community watching.<sup>132</sup>

A study, using data from the U.S. Behavioral Risk Factor Surveillance System and the website “Mapping Police Violence,” uncovered national trends in mental health and police use of deadly force and quantified the resulting PTSD.<sup>133</sup> Results revealed that “police killings of unarmed [B]lack Americans are responsible for more than 50 million additional days of poor mental health per year among [B]lack Americans.”<sup>134</sup> No significant impacts on the mental health of Black Americans were found when police killed white Americans, at the lowered rate, or armed Black Americans.<sup>135</sup> By contrast, during the week of Castile’s death, social media timelines of Black users uncovered indirect “expressions of mental and psychological anguish, from pleas for others not to share these videos, to declarations of a social media hiatus,” said Monnica Williams, a clinical psychologist, and director of the Center for Mental Health Disparities at the University of Louisville.<sup>136</sup>

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128. See Imani J. Jackson, *The trauma of police brutality: Column*, USA TODAY (Sept. 2, 2016), <https://www.usatoday.com/story/opinion/policing/spotlight/2016/09/02/trauma-police-brutality-column/89019122/> [<https://perma.cc/3YCD-CC3P>].

129. See *id.* (discussing that “people who aren’t physically present during a violent episode or who have never been the victims of brutality can also experience vicarious trauma”).

130. Downs, *supra* note 126.

131. *Id.*

132. See Jacob Bor et al., *Health Effects of Police Violence Project*, 392 LANCET 302, 306–07 (2018), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2818%2931130-9> [<https://perma.cc/RKG2-3FP5>].

133. *Id.*

134. Tsai et al., *supra* note 86.

135. *Id.*

136. Downs, *supra* note 126; see The Association of Black Psychologists & Community Healing Network, *Family-Care, Community-Care and Self-Care Tool Kit: Healing in the Face of Cultural Trauma* (July 2016), <https://d3i6fh83elv35t.cloudfront.net/newshour/app/uploads/2016/07/07-20-16-EEC-Trauma-Response-Community-and-SelfCare-TookKit-1.pdf> (responding to the findings of adverse mental health effects, Black psychologists released guidelines for African-Americans experiencing cultural trauma from recent media coverage of racial tension).

Predictably, no significant mental health effects were found among white Americans when police killed unarmed Black Americans.<sup>137</sup> This is unsurprising because Blacks and whites have enduring differences in their perceptions of how well police officers do their jobs.<sup>138</sup> White people most likely believe that police officers are just doing their best while combating crime, but in fact, Black people are more likely to be killed than their white counterparts even though “white people [are] more likely to be armed when police kill them.”<sup>139</sup> This dangerous disconnection impedes any significant improvement in the disparate treatment of Black Americans by police.

Since viewers of police violence, especially those whose race matches the victim’s, may develop PTSD from the images, it is noteworthy to acknowledge the effects that PTSD has on the fight-or-flight-response. Fight or flight “prepares the human body to deal with the threat, either by running away or confronting the threat.”<sup>140</sup> The problem with this response is that “[t]he threshold for triggering threat-based hyperarousal is lowered so that any stressor, large or small, can trigger the fight-or-flight response.”<sup>141</sup> This suggests that when a Black man is in the presence of police officers, PTSD-like trauma is working in conjunction with the individual’s fight-or-flight response.<sup>142</sup>

The Black man’s interaction with the police is heavily documented but its uniqueness has not yet found a meaningful place in the justice system. As Justice Stevens acknowledged, minorities run because “contact with the police can itself be dangerous.”<sup>143</sup> Continuing to allow

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137. Tsai et al., *supra* note 86.

138. See John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RES. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/F8UB-ZZ84>] (showing in a 2017 survey that Blacks gave officers an average rating of 47 and believed the system was biased and whites gave officers an average rating of 72 and thought the system was fine).

139. Brentin Mock, *What New Research Says About Race and Police Shootings*, CityLab, BLOOMBERG (Aug. 6, 2019, 2:28 PM), <https://www.bloomberg.com/news/articles/2019-08-06/race-and-police-shootings-what-new-research-says> [<https://perma.cc/HE79-WD4H>].

140. Barry C. Edwards et al., *How to Transform the Judicial System: Lessons from the Institutionalization of Veterans’ Treatment Courts*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 841, 860 (2019).

141. *Id.* at 861.

142. For a discussion on earlier theories of unique black interactions, see Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 755 (1996) (discusses the criminal defense of “[B]lack rage” where defendants presented the expert testimony “to the effect that they possessed a character trait known as [B]lack rage, which ‘apparently causes[B]lacks to react in a certain way against white police officers because [B]lacks judge the actions of a police officer in a manner different from others, thereby allegedly rendering reasonable their actions in this specific case’”).

143. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting in part and concurring in part).

flight to support a reasonable suspicion determination will create situations where officers use excessive force, such as the stop and frisk searches, all the more likely.

#### IV. TREATMENT OF REASONABLE SUSPICION AND FLIGHT POST *WARDLOW*

Before *Wardlow*, state courts disagreed about whether “unprovoked flight” was sufficient grounds to constitute reasonable suspicion.<sup>144</sup> Since *Wardlow*, “flight and the term ‘high crime area’ have gained weight as important factors in determining whether reasonable suspicion of a crime exists.”<sup>145</sup> However, some courts have applied a case-by-case, totality of the circumstances test.

##### A. A Challenge to *Wardlow*

Citing data indicating that “[B]lack men may have a legitimate reason to flee,” the case that most directly challenged the *Wardlow* decision came from the Supreme Judicial Court of Massachusetts.<sup>146</sup> In *Commonwealth v. Warren*,<sup>147</sup> the court stated: “the finding that [B]lack males in Boston are disproportionately and repeatedly targeted for [field interrogation and observation] . . . suggests a reason for flight totally unrelated to consciousness of guilt.”<sup>148</sup> *Warren* cautioned judges assessing reasonable suspicion to consider the findings of a Boston Police Department report that documented a pattern of racial profiling of Black males in the city of Boston.<sup>149</sup> The legal director of the ACLU of Massachusetts described this ruling as “powerful” because a state’s highest court acknowledged that a Black man’s unique encounter with police officers matters under the law.<sup>150</sup> While *Wardlow* incites confrontation, *Warren* acknowledges that the decision to flee from the

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144. *Id.* at 123 n.1 (majority opinion).

145. Keven Jay Kercher, *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, 141 (2001).

146. Zeninjor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR NEWS (Sept. 20, 2016), <https://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police> [<https://perma.cc/3G7M-9BFE>].

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

148. *Warren*, 58 N.E.3d at 342. See *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BPD NEWS (Oct. 8, 2016), <https://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results> [<https://perma.cc/7W52-DHY6>] (approximately 205,000 reports by Boston police officers revealed that Black men were more likely to be targeted for stops, frisks, searches, and interrogations).

149. *Warren*, 58 N.E.3d at 342.

150. Enwemeka, *supra* note 146.

police may be entirely motivated by “the desire to avoid the recurring indignity of being racially profiled.”<sup>151</sup>

Although it has been the most provocative decision, *Warren* is far from “powerful.” *Wardlow* is still controlling in the federal system and in states that have adopted Fourth Amendment interpretations from the United States Supreme Court.<sup>152</sup> Courts are required to follow *Wardlow* even if they “question the wisdom of that precedent or the public policy behind the law.”<sup>153</sup> However, the *Warren* decision is still important because it takes into account well-established social data. Interestingly, it also provides a more stringent standard for reasonable suspicion than the Court in *Wardlow*, alleviating some of the concerns of the dilution of the Fourth Amendment.<sup>154</sup>

In *Wardlow*, the police officers were patrolling an area designated as “high crime,” a designation that may not have been based on actual crime statistics.<sup>155</sup> The defendant’s presence in this area was deemed relevant, but the court stated that presence, standing alone, is insufficient to support particularized suspicion.<sup>156</sup> In contrast, in *Warren*, a crime was actually reported and officers were on the lookout for suspects, some of whom were Black, who were wearing particular clothing.<sup>157</sup> Additionally, the defendants in *Warren* were approached by the officer because of the proximity of their location to the crime scene.<sup>158</sup> After the police officer rolled down the window of his cruiser and yelled “[h]ey guys, wait a minute,” the defendants made eye contact with the officer, turned around, and jogged to the park.<sup>159</sup> One of the defendants fled again after being approached by another officer on the other side of the park.<sup>160</sup> The court in *Warren* found that since the police officers did not have reasonable suspicion before the flight,<sup>161</sup> the defendants could legally choose to walk away and avoid contact with the police.<sup>162</sup> In *Wardlow*, even though the

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151. *Warren*, 58 N.E.3d at 342.

152. *E.g.*, *Tracey v. State*, 152 So. 3d 504, 508 (Fla. 2014) (explaining that when deciding search and seizure issues, Florida is “bound to follow United States Supreme Court precedent”) (citing FLA. CONST. art. I, § 12).

153. *See C.E.L. v. State*, 24 So. 3d 1181, 1182–83 (stating that courts are bound “even if [they] question the wisdom of that precedent or the public policy behind the law”).

154. *Walker*, *supra* note 17; *MILLER & WRIGHT*, *supra* note 24.

155. *See* MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURE: THE POLICE* 65 (EDITORS, 5th ed. 2015) (“The government typically does not support the assertion with any statistical analysis of reported crimes, but bases the claim on the impressions of the officer about neighborhoods.”).

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

157. *Warren*, 58 N.E.3d at 336.

158. *Id.*

159. *Id.*

160. *Id.* at 338.

161. *Id.*

162. *Warren*, 58 N.E.3d at 341.

Court acknowledged that presence in a “high crime” area was insufficient stand-alone evidence to support reasonable suspicion, the Court and the officers overstated the implications of flight to justify the particularized suspicion.<sup>163</sup>

#### V. IMPORTANCE OF RECONSIDERING *WARDLOW* AND THE ULTIMATE OBJECT OF THE DISCUSSION

Notably, the Court in *Wardlow* placed a disclaimer in its opinion, stating that:

In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.<sup>164</sup>

Arguably, the data may have been unavailable the year the Court issued the decision, but luckily, the data is readily available today. Further, unlike the years before the *Wardlow* decision, both federal and state courts today acknowledge the implications police interactions have on the reaction of members of minority communities.<sup>165</sup> However, even if the Court does not want to accept the available data,<sup>166</sup> its “commonsense judgment” standard should not stand in the face of what society has already begun to realize. Nevertheless, some courts feel bound to follow the *Wardlow* precedent that clearly gives weight to flight in the reasonable suspicion determination, without regard to the reality of race.<sup>167</sup>

In addition to recognizing what society and other courts have already recognized—that flight should not be a factor in assessing reasonable suspicion—the Court will signify that it will not sanction states’ unequal application of the law through its law enforcement agencies. The Fourteenth Amendment provides equal protection of the law for all, including Black communities “for whose protection the amendment was

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163. See *Wardlow*, 528 U.S. at 124 (“[I]t was also *Wardlow*’s unprovoked flight that aroused the officers’ suspicion.”).

164. *Id.* at 124–25 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

165. See *Warren*, 58 N.E.3d at 342; *United States v. Brown*, 925 F.3d 1150, 1156–57 (9th Cir. 2019).

166. See *supra* notes 87, 127, 129, 133, 139–40 and accompanying text.

167. See *C.E.L. v. State*, 995 So. 2d 558, 563 (Fla. Dist. Ct. App. 2008) (en banc), *approved*, 24 So. 3d 1181, 1182 (Fla. 2009) (“This Court is obligated to . . . follow the Fourth Amendment precedent laid out by the United States Supreme Court, even if we question the wisdom of that precedent or the public policy behind the law.”).

primarily designed, that no discrimination shall be made against them by law because of their color.”<sup>168</sup> Allowing flight to be a considerable factor in reasonable suspicion determinations is a strong weapon against the Black community, where police officers have perpetuated concerns and fears through their discriminatory practices. “[T]hese concerns and fears are known to the police officers themselves[] and are confirmed by law enforcement investigations into their own practices.”<sup>169</sup>

Further, a finding that flight is not a considerable factor would urge courts to be more skeptical of police officers who subjectively label an area as a “high crime” neighborhood to bolster their reasonable suspicion requirement. Since “high crime” has been recognized as a proxy for race,<sup>170</sup> this healthy skepticism will force law enforcement agencies to justify their target selection based on available crime data and not just on areas they choose to over-police. Optimally, a finding that Black men fleeing from police officers is legally justified—in light of the intense coverage of police misconduct—this can urge local police officers to begin building relationships with Black communities, regaining, or building trust with those they have sworn to protect.

Lastly, a Supreme Court decision that flight is not a cognizable factor in reasonable suspicion will be unlikely to impede law enforcement from doing their job. If an officer has reasonable suspicion for stopping an individual, the officer can pursue that individual. Reasonable suspicion would be valid if fostered by the individual’s location, behavior,<sup>171</sup> or other information available to the officer, like tips or a previous or ongoing investigation. But if there is no sufficient reasonable suspicion, under *Mendenhall*, individuals should be free to avoid interaction with the police in any method they deem appropriate for their safety, including flight.

#### A. *Other Problems with the Reasonable Suspicion Doctrine as it Stands Today*

An additional problem with *Terry* and stop and frisk searches procedures lies in the resulting allowance of evidence to be seized and introduced against individuals whom officers searched without probable cause. If the purpose of a *Terry* pat-down, as the Court stated, is for officer safety,<sup>172</sup> the determination of probable cause to introduce

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168. *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).

169. *Wardlow*, 528 U.S. at 133 (Stevens, J., dissenting in part and concurring in part).

170. *See Katz*, *supra* note 58, at 429 (stating that the phrase “high crime neighborhood” is often a proxy for race); *see also* C.E.L., 24 So. 3d at 1190 (Fla. 2009) (Pariente, J., concurring) (“[Juvenile defendant] was in this ‘high-crime neighborhood’ because it was his home.”).

171. In terms of discussing “furtive movements,” this is another issue that is outside the scope of this Article.

172. *Terry*, 392 U.S. at 30.

evidence and charges against an individual seems unsupported. The Court was concerned that this decision “would constitute . . . an encouragement of [] substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in ‘the often competitive enterprise of ferreting out crime.’”<sup>173</sup> Under this reasoning, officer safety concerns warrant the search, but the seizure, and inapplicability of the exclusionary rule, is not supported by that same concern. The Court, however, then stated that the “harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, *will not be stopped* by the exclusion of any evidence from any criminal trial.”<sup>174</sup>

The Court underestimated the value of removing the incentive for police officers to engage in frequent stops and frisks. If officers were only allowed to search and seize for their own safety, and not for the commencement of a criminal case, stops and frisks would actually reflect the stated purpose of *Terry* stops. In turn, allowing the introduction of evidence against individuals incentivizes more frequent frisks and allows for police officers to harass minority groups, particularly the Black community. A reconsideration of *Wardlow* will not decrease the incentive to stop and frisk searches but will make the intrusions more scrutinized at the inception, which will ensure that searches are in fact “reasonable” under the Fourth Amendment and not a product of police officer bias.

### CONCLUSION

These two realities, the prevalence and exhibition of police shootings in the media, and the pervasive stops and frisks that many Black men experience at least once in their life, should be explored, and have their implications acknowledged by the courts and society. Millions of Black youth watch videos of police shooting unarmed Blacks and this causes adverse mental effects, influencing how Black men interact with the police. Much more frequently, a Black individual who has been frisked without a warrant holds certain reactions when a police officer is in the vicinity.<sup>175</sup> The Black man’s interaction with the police is a unique one.<sup>176</sup> Both history and recent events support this fact.

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173. *Id.* at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

174. *Id.* at 14–15 (emphasis added).

175. See Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Fears the Police. Here’s Why.*, PAC. STANDARD (May 8, 2018), <https://psmag.com/social-justice/why-black-america-fears-the-police> [<https://perma.cc/WQ6F-A2EX>] ([Black witnesses to a shooting] “feared what could happen if police came rushing into a group of people who, by virtue of our skin color, might be mistaken for suspects.”).

176. RUSSELL-BROWN, *supra* note 116, at 53 (stating that Black men are more likely to feel as though the system does not work or works against them and white men are more likely to feel as though the system is working perfectly fine).

In accordance with the Court's basis of "commonsense judgments" that led to its *Wardlow* decision, if the Court were to take a stance in accord with the data of racial bias, mental health, excessive stops and frisks, and the baseless term of "high crime," the Court should likely conclude that a reasonable person in a Black man's shoes would not feel free to leave and avoid contact with the police. When Black men avoid encounters with police officers, it is often used against them to execute excessive stop and frisk searches. In the worst situations, Black men who flee for their lives might have their lives taken, since their flight could be perceived as a "consummate act of evasion."<sup>177</sup> The holding in *Wardlow* should be reversed to give way to a more comprehensive interpretation of human behavior—whether it be the behavior of Black men or racially biased officers—and an acknowledgment of the media-bred fear of police officers.

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