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Stop and Frisk: From Slave-Catchers to NYPD, A Legal Commentary

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A Legal Commentary

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Today's "stop and frisk" practices stem from centuries of legal control of Africans in America. Colonial laws were drafted specifically to control Africans, enslaved and free. Slave catchers culled the woods in search of those Africans who dared escape. After slavery ended, "Black Codes" or criminal laws were enacted to ensnare African Americans, including the sinister convict-lease system that existed well into the twentieth century. The U.S. Supreme Court ruled to extend police authority to stop and frisk during the Civil Rights Movement.

Police abuse of stop and frisk has led to tens of millions of people detained and searched by police. In 2011 alone, 685,724 persons were stopped and searched by the New York City Police Department (NYPD). More than 4 million incidents of stop and frisk have taken place in New York City since 2002. African Americans have been disparately ensnared in this practice.[1] Black and Latino communities continue to be the primary targets of stop and frisk. Nearly nine out of ten victims of the practice in New York City are completely innocent.[2]

Abuse of stop and frisk is a civil rights issue as well as a criminal justice issue. As in *Brown v. Board of Education*, strategies developed to combat police abuse of stop and frisk authority must include the psychological consequences of this state-sanctioned intrusion. Legal arguments need to address how these debasing police practices are psychologically damaging to men, women, and children. As in the colonial times, the greatest burden is borne by African Americans.

Stop Sign

On Father's Day in 2012, thousands of New Yorkers from varied racial and ethnic backgrounds and different generations participated in a silent march from Harlem to Mayor Michael Bloomberg's home on the Upper East Side of Manhattan, protesting the city police department's wanton practice of stopping and frisking citizens, who have been predominantly black or Latino and innocent of any crime. The demonstrators charged the practice violates the Constitution's ban on unreasonable searches and its guarantee of equal protection under the law. The U.S. Supreme Court opened the legal door to stop and frisk policing in its 1968 decision in Terry v. Ohio*. Law professor Gloria Browne-Marshall believes that documenting the psychological impact on the victims could provide the basis for new court challenges.* © Katarzyna Gawin. Reprinted by permission.

I

History shows that economic motivations catapulted England into the New World. The Jamestown Colony in Virginia, formed in 1607, was the first permanent English settlement in North America. Seeking to compete with Spain and Portugal, England entered the slave trade out of economic concerns. The first Africans in Jamestown arrived in 1619, ahead of the Mayflower's landing in 1620. There were no slave laws at that time. English law controlled the status of European indentured servants. Lawmakers in the newly formed House of Burgesses were required to be landowners of good character, meaning of the higher British class. Chattel slavery had several motives. A need to create a self-sustaining profitable enterprise, along with a desire to propagate religious dogma and the lack of laws governing the treatment of non-Europeans, combined with naked avarice to create a dual legal system that placed Africans outside of the law's protection and the human family.[3]

Perpetual labor required perpetual watch over the laborers and grave punishments for anyone who protested. In the case involving John Punch, an African who ran away with two European indentured servants, the white servants received 30 lashes. Punch was given a lifetime of labor as punishment.[4] By 1656, Virginia enacted laws to reduce the status of all mulatto children to that of the mother. The law states:

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a Negro woman should be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe held bond or free only according to the condition of the mother, And that if any christian shall committ ffornication with a Negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.[5] [spelling as in original]

Slavery at birth became the law of the colonies, which meant being controlled from birth to the grave, generation after generation.

As greed extended the brutality of enslavement, suspicion of planned revolt led to laws further restricting African movement. African children lost the right to inherit freedom as well as wealth from their

English fathers. Laws stripped Africans of the right of self-defense. One had to stand still and accept the beatings, torture, and other indignities wrought by any white man, woman, or child. Africans could not move to defend their loved ones or escape without physical penalty. Africans were forced to work, for others, for free, under penalty of death. The movements of Africans were under watch. Europeans feared escape. But they feared African uprisings and planned retaliation even more.

In order to leave the watchful eye of the overseer or owner, Africans needed a certificate or pass. In 1680, the Virginia Colony passed Act X: "Whereas the frequent meetings of considerable numbers of Negro slaves under the pretense of feast and burials is judged of dangerous consequences [it is] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapons*, nor go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on.* And further, if any Negro lift his hand against any Christian he shall receive thirty lashes, and if he absent himself or lie out from his master's service and resist lawful apprehension, he may be killed and this law shall be published every six months."[6] [emphasis added]

The Declaration of Independence speaks of King George's tyranny. This seminal document, written by Thomas Jefferson, was dictated in the presence of enslaved Africans, including Jefferson's concubine, Sally Hemmings. Black women fared no better than the men. They were forced to work from predawn to after dusk—"from can't see to can't see"—and then service the plantation owners as sexual slaves, giving birth to their children without complaint. They too sought escape. Wanted posters appeared for both women and men, describing them in detail with hundreds of dollars in bounty for their capture and return. Overseers watched for discontented slaves or mumblings of freedom. Maltreatment was expected to be met with smiles, and pain with laughter. The harsh laws, however, reflected the underlying suspicions that Europeans long harbored about Africans. Fearing revenge, whites vigilantly prepared for African uprisings or escapes.

II

Slave catchers searched the woods for escaped Africans. Unless they carried a certificate allowing travel by night on a specific task,

an African found away from his or her plantation after nightfall was considered a runaway and prime for capture. Bounty hunters were hired by slaveholders and paid to travel to distant states in search of escaped human property.

Africans, however, continued to challenge their condition through word and deed. Free Africans petitioned the government with grievances on behalf of their enslaved brethren and themselves. Free Africans were susceptible to capture by bounty hunters who could sell them into slavery. The word of a free black man in a Southern court meant nothing under the law. Therefore, even free Africans in Massachusetts lived with the constant fear that while walking alone at night they might be attacked, dragged away, and sold at auction to a plantation owner in the Caribbean. Prince Hall presented a petition to the Massachusetts legislature protesting the enslavement of free Africans stolen from the streets of Boston: "What then are our lives and Lebeties worth if they may be taken a way in shuch a cruel & unjust manner as these…"[7] [spelling as in original]

Justice in the courts was circumscribed. As early as 1717, Africans were prohibited from testifying in court against any white person. In Maryland, the Assembly voted:

> That from and after the end of this present session of assembly, no Negro or mulatto slave, free Negro, or mulatto born of a white woman, during his time of servitude by law, or any Indian slave, or free Indian natives, of this or the neighbouring provinces, be admitted and received as good and valid evidence in law, in any matter or thing whatsoever depending before any court of record, or before any magistrate within this province, wherein any christian white person is concerned.[8]

The U.S. Constitution contains a Fugitive Slave Provision. The framers of the Constitution drafted in 1787 required the return of escaped servants and slaves under Article IV, Section 2: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party

to whom such Service or Labour may be due." Then, to further appease nervous slaveholders, Congress passed the Fugitive Slave Act of 1793.

III

In 1831, Nat Turner, an enslaved African preacher, led a slave uprising in Jerusalem, Virginia. Some 55 white men, women, and children of slaveholding families were murdered. Nationwide panic ensued. Laws governing the movement of free and enslaved Africans became more restrictive. Dozens of laws were enacted as fear of further uprisings fed paranoia around every aspect of African behavior. African religious services now required the presence of a white person. Toussaint L'Overture's successful routing of the French from Haiti in 1791 was believed to be behind the discontent of enslaved Africans in America. Laws provided harsher punishments for reading.[9] Free Africans were forced, as a condition of manumission, to leave the state where they had been in bondage under the Virginia's Removal Law of 1806, and under local laws in North Carolina and South Carolina. Removal was meant to limit arousing a desire for liberty in enslaved family members left behind.

In 1850, Congress passed another Fugitive Slave Act. That law placed liability for criminal complicity on anyone with knowledge of an escaped African. Hefty fines and jail time awaited white abolitionists who assisted in the "Underground Railroad" leading to escape in the North. In Pennsylvania, Africans were given an opportunity under law to gain their freedom. Margaret Morgan escaped to Philadelphia from Maryland. Her slaveholder hired a bounty hunter, Edward Prigg, to bring her back. Prigg attempted to subdue Margaret. The crowd intervened and saved her. Prigg was arrested for violating Pennsylvania's laws against bounty hunters. He appealed his conviction, allowing the Supreme Court to expand the fugitive slave provisions of the Constitution and federal law, ruling that they superseded the Pennsylvania law that protected escaped slaves. In 1842, the court ruled in *Prigg v. Pennsylvania* that Margaret Morgan must be returned to enslavement, and her children, born free in Pennsylvania, must be bound as slaves as well.[10]

In 1857, the Supreme Court ruled that Dred and Harriet Scott were not citizens. Nor were they free persons. According to the court's ruling in

Dred Scott v. Sanford, the Scotts' return to Missouri, a slave state, from the non-slave Illinois Territory, did not make them free.[11] Prior state cases had determined, however, that traveling to a free state, specifically Illinois or California, did render an enslaved person free under law.

A year earlier, in 1856, Biddy Mason had won her freedom in this manner. She had been forced to walk behind the cattle of Robert Smith, a Mormon, from Mississippi to Utah and then California. Smith did not know that California was a free state, and Biddy became free upon crossing the border. Once she was made aware of her changed status, Biddy Mason successfully sued for her freedom in California state court and went on to become a successful businesswoman.

During the Civil War, President Abraham Lincoln grappled with the issue of how to manage enslaved Africans. They were needed as soldiers. They were not wanted as full citizens, however. In a letter to Horace Greeley, Lincoln wrote: "If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union."[12]

Less than sweeping emancipation still meant freedom for many. Lincoln's executive order, the Emancipation Proclamation, became effective on January 1, 1863. The order devastated the South. Africans sought freedom. Their absence undermined the plantation economy. While older slaves, the infirm, and women with small children remained behind, enslaved and free African men served in the Union Army. As in the Revolutionary War and the War of 1812, whites feared what freedom would mean once Africans became soldiers and gained knowledge about weaponry. Desperately needed as soldiers, the same men who had no right of self-defense were trained by white Union soldiers to shoot white Confederate soldiers. The bravery shown on the part of African soldiers as well as the inevitable demise of the institution of slavery led to ratification of the Thirteenth Amendment.

IV

The Thirteenth Amendment abolished slavery in 1865 with one exception: "Neither slavery nor involuntary servitude, *except as a*

punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." [emphasis added]

Prior to the assassination of Lincoln, discussions with his Secretary of State William H. Seward on the "Negro Problem" led to suggestions that Africans in America be resettled in colonies in Africa or Haiti. Colonization societies were created to discuss where to place the free Africans once slavery ended. The criminal justice system became the mechanism for continued social control of the African American.

Criminal laws referred to as "Black Codes" resulted in convictions that led to years of imprisonment with hard labor for such minor infractions as vagrancy and loitering. On March 17, 1866, a year after slavery was abolished, the Georgia legislature enacted the following example such a criminal law:

> All persons wandering or strolling about in idleness, who are able to work, and who have no property to support them; all persons leading an idle, immoral or profligate life, … and are able to work, and do not work; …and who have not some visible and known means of a fair, honest, and reputable livelihood; all persons having a fixed abode who have no visible property to support them, and who live by stealing or by trading in, bartering for, or buying stolen property; and all professional gamblers, living in idleness, shall be deemed and considered vagrants, and indicted as such…

The Georgia law goes on to address the punishment for conviction of these subjective crimes. The laws were applied disproportionately against the newly freed Africans, especially in the South. The authority to make an arrest under this statute was granted to any white person:

> and it shall be lawful for any person to arrest said vagrants, and have them bound over for trial to the next term of the County Court, and upon conviction they shall be fined or imprisoned, or sentenced to work on the public works or roads for not longer than a year, or shall, in the discretion of the Court, be bound out to some person for a time not longer than one year, upon such valuable consideration as the Court may prescribe…[13]

Once again, African American men, women, and children were arrested under these statutes. A letter or certificate was needed confirming gainful employment by a white person to avoid arrest on vagrancy or loitering. Drunkenness, gambling, and fighting resulted in imprisonment for blacks, leading to forced labor on the chain gangs. Reminiscent of the slave catchers, law enforcement officers would seek out blacks walking alone and arrest them on fabricated charges. Without an attorney and on the word of any white person, a conviction soon followed. The warden leased out the inmate's labor for profit. This convict-lease system allowed businesses and municipalities to utilize the labor of prisoners for less than the amount paid to civilian noninmate labor. Inmates could be worked harder and longer without any remuneration or legal consequences. The convict-lease system was pervasive enough to compel President Theodore Roosevelt to convene a commission to investigate.[14]

The Fourteenth Amendment of 1868 provided Africans with citizenship, privileges and immunities, equal protection, and due process rights. Freedom of movement, however, would still be restricted by terrorist organizations such as the Ku Klux Klan, Night Riders, and wayward white vigilantes. The federal government had sought to intervene with civil rights legislation that would protect African American rights when local law enforcement officers, prosecutors, and courts inevitably failed to do so.

Supreme Court rulings, however, narrowed this federal legislation in what became known as the *Civil Rights Cases*.[15] In those cases, the court decided African Americans could be denied access to theaters, restaurants, hotels, and cabs, by private citizens, without violating federal civil rights law. By 1896, the court chose to sanction segregationist laws. When the Supreme Court ruled against Homer Plessy and upheld Louisiana's Separate Car Act, the entire European-American nation had been given license to limit the freedom of African Americans. Louisiana had argued in the case of *Plessy v. Ferguson* that placing the races together would lead to violence. The court agreed.

Plessy's doctrine of "separate but equal" in social settings was based on a state's inherent police power, the power and duty to maintain order. Instead of punishing those who would commit violence,

the court chose to limit the freedoms of the victims of this predicted violence.[16] Restricting the freedom of black Americans would guarantee order and peace. It became the purview of law enforcement—white police, sheriffs, and deputies—to ensure that blacks complied with *Plessy's* mandate.

V

Vigilantism constantly threatened black movement beyond accepted bounds. In *U.S. v. Shipp*, the Supreme Court intervened to attempt to save the life of Ed Johnson, a black man falsely accused of raping a white woman in Chattanooga, Tennessee, in 1906.[17] The sheriff, Joseph Shipp, allowed a vigilante crowd to enter the jail housing Ed Johnson. The lynch mob hung him from a bridge after shooting him several times. Before he was murdered, Johnson told the mob he was innocent. A note was pinned to his dead body with a message directed to the Supreme Court: "To Justice Harlan: Come get your nigger now."[18]

Lynchings epitomized demonstrations of power to punish interlopers who dared challenge social custom or spatial terrain. Lynchings sent a message reinforcing boundaries: Thou shalt not trespass. The consequence was murder, most vile. Assault, castration, amputation, torture, and rape preceded hanging, burning alive, or shooting. As in the lynching of Sam Hose in 1899, pieces of his charred body were saved as souvenirs or sold to the highest bidder. "Those unable to obtain the ghastly relics directly, paid more fortunate possessors extravagant sums for them."[19] The message to stay in the confines of one's place was clear.

The Scottsboro Boys barely escaped a lynch mob. This infamous case grew from nine black youths traveling on the Southern Railroad through Alabama in search of work in Tennessee. Their paths crossed with two white prostitutes and their male companions who were illegally occupying the same railroad freight car. A fight ensued. The boys prevailed and threw the white males from the train. In retaliation, they contacted the train station at the next town and falsely accused the boys of raping the women. A lynch mob met the train carrying the black boys. They were taken to Scottsboro, Alabama, and tried for what was then a capital crime— without legal representation. Their conviction and death sentences were appealed. The Supreme Court

overturned their death sentences, ruling in *Powell v. Alabama* that all capital cases require assistance of counsel.[20]

In addition to lynch mobs, Night Riders limited the movement of blacks. Opportunity in the North drew millions of African Americans from the drudgery of underpaid labor and sharecropping and the constant threat of terrorism. The road north, however, was beset with peril. Night Riders, like slave catchers, were white men who patrolled the roads and woods in search of black men, women, and young people to terrorize them, with impunity. For blacks traveling at night during the Jim Crow segregationist era, encountering Night Riders was a life or death experience. Night Riders were civilians acting as a makeshift community watch, using violence to keep the social order by patrolling the boundaries around the designated black areas. African Americans confronted by Night Riders were forced to explain their reason for walking or driving on any particular road at night. An unsatisfactory response could lead to deadly consequences.

Night Riders would turn back any blacks seeking opportunities in the North. Freedom of choice was regarded as beyond African Americans. They were restricted, by a social norm established under slavery and maintained by segregationist laws, to a life of oppression in the South. Their low-cost labor was a necessary part of the southern economy. That labor pool would be preserved by force. A watchful eye was kept on the movements of blacks who might be considering an escape to the North. Although freedom to travel within the United States is a fundamental legal right, it was yet another freedom placed beyond the reach of African Americans due to legalized racial prejudice.

Brown v. Board of Education was critical to the advancement of African Americans.[21] This decision, penned by Chief Justice Earl Warren, did much more than require the desegregation of public schools. At the same time, this case was a rallying point for those who sought to control black progress. As *Plessy*-based segregation laws met consistent defeat before the Supreme Court, a grassroots campaign began to strengthen local law enforcement and municipal criminal laws. The war against segregation was fought in every southern locale. It was a war of attrition. The local police became the frontline defense against blacks leaving their position of oppression.

Blacks in segregated communities accessed other communities for school and jobs through public transportation. The Montgomery Bus Boycott, sparked by segregated public accommodations, raised the issue of harassment of black bus passengers on those public buses and their subsequent arrest for disorderly conduct. The boycott came only months after fourteen-year-old Emmett Till had been abducted and brutally murdered for allegedly speaking directly to a white woman while visiting relatives in Money, Mississippi. Rosa Parks refused to relinquish her seat on the bus, and the black women of Montgomery formed the boycott as a response to Parks's arrest.[22] The now famous boycott lasted from December 5, 1955, to December 21, 1956. In refusing to ride the buses, the community dealt a financial blow to the bus company and the segregationist laws separating passengers by race on public transportation.

It was *Gayle v. Browder*, an appeal heard before the U.S. Supreme Court that dealt those laws their death blow.[23] Aurelia Browder, Susie McDonald, Claudette Colvin, and Mary Louise Smith appealed their arrests and convictions for violating the local law that required blacks to give their seat on the bus to any white person requesting it. Rosa Parks refused to give up her seat. Yet, months before Mrs. Parks, these women had committed a similar act of civil disobedience. Their case against Mayor William Gayle was championed by civil rights attorney Fred Gray and would defeat segregation on the Montgomery buses and bring an end to the boycott.

VI

While black movement was restricted by law, social tradition, and terrorism in the South, in the North, black Americans were penned into specific urban areas by restrictive covenants. The deed or lease restricted occupancy of a home from certain racial groups. Private contracts restricted owners of a home from selling to nonwhites. In 1948, the Supreme Court decided *Shelley v. Kramer*, a case involving a restrictive covenant containing the following language:

> No part of said property…shall be…occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time

> [fifty years] against occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian [Asian] race.

The Supreme Court had ruled decades earlier in *Buchanan v. Warley* (1917) that the government cannot enforce private or public racial discrimination. Therefore, the restrictive covenant in *Shelley v. Kramer* could not be enforced in state or federal court. Restrictive covenants were defeated. Racial discrimination in housing, however, endured. Housing discrimination would relegate people of color into designated communities, the boundaries of which formed an invisible border between themselves and the outside world.

The progress under *Shelley v. Kramer* may have been more symbolic than practical. But the response was quite real. Laws were enacted to better control urban populations. Police powers were extended after *Mapp v. Ohio* led to the application of the exclusionary rule to the states.[24] As civil rights protests escalated in the South, Dollree Mapp made constitutional law history in the North. Ohio police broke into Ms. Mapp's home looking for a suspect. They searched without a warrant. She resisted. They manhandled the black woman, finally handcuffing her to a chair. Finding no suspect or evidence, they broke open her tenant's truck, which revealed pornography. It did not belong to her. She was arrested, however, and convicted for violating Ohio's statute against possession of pornography.

Mapp appealed. The Fourth Amendment protects against unreasonable police searches:

> 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 issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In 1961, the U.S. Supreme Court applied the exclusionary rule to the states, thereby expanding protections against police abuses. Evidence seized by state law enforcement, without a warrant, would be excluded from trial. Heretofore, the exclusionary rule had been applied to federal police; the states could choose how and when to apply it, if at

all. *Mapp v. Ohio* changed local policing across the country. Their free reign of unconstitutional searches and seizures was over. Although the *Mapp* case is taught in all law schools, few law students are aware of Dolree Mapp's race or gender.

By 1968, the tide had changed. Civil disobedience was replaced by urban unrest as rioting captured television news. Blacks grew tired of accepting police abuse and economic hardship. The 1960s bore witness to the assassinations of President John Kennedy, his brother Robert Kennedy, Malcolm X, and Martin Luther King Jr., and a war in Vietnam. In Cleveland, things had changed. Officer Martin McFadden had been on the police force for more than 30 years. He was working a plain-clothes pickpocket detail in the downtown area. John W. Terry and several other men were seen walking to a store window, looking inside, and returning to a corner to talk.

Officer McFadden would testify that he believed that the men planned to rob the store. Probable cause is required before a person can be seized and searched by police. A search warrant is required. McFadden believed he had no time to seek out a warrant. He chose to act. Upon seizing and searching Terry, McFadden found a gun on him. Terry and his friend Richard Chilton were arrested and convicted of possessing a concealed weapon. Terry appealed his conviction. Based on *Mapp*, the gun should have been excluded from trial because it was seized without a warrant. The U.S. Supreme Court, however, ruled that circumstances now required police to have the ability to decide to act based on "reasonable suspicion." This suspicion allows immediate action even when no crime has been committed. It was not a crime to walk on the sidewalk several times, look into a store window, or talk to associates on the corner.

In *Terry v. Ohio*, the court justified a need to extend police power in urban communities based on the changing times. Thus, police were imbued with the power to stop and frisk. Chief Justice Warren wrote on behalf of the court:

> We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—

> issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.
>
> On the one hand, it is frequently argued 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. For this purpose, it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[25]

Even during this early period of stop and frisk, arguments were presented that the practice increased racial tensions between police and the black community. The *Terry* decision includes this pivotal passage in a footnote:

> The President's Commission on Law Enforcement and Administration of Justice found that, "[i]n many communities, field interrogations are a major source of friction

between the police and minority groups.[26] It was reported that the friction caused by "[m]isuse of field interrogations" increases as more police departments adopt "aggressive patrol," in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.

While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, it cannot help but be a severely exacerbating factor in police-community tensions. *This is particularly true in situations where the "stop and frisk" of youths or minority group members is motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.*[27] [emphasis added]

Police were given the power to stop a person based on reasonable suspicion on imminent danger to the officer or the public. Reasonable suspicion has morphed into stopping any person, male or female, for any reason.

VII

The psychological harm of stop and frisk should be examined as a legal challenge. Legal challenges to the rampant abuse of stop and frisk authority include Fourteenth Amendment claims of disparate treatment as well as procedural charges of poor officer training. An additional measure would borrow from the arguments made in *Brown v. Board of Education*. Kenneth and Mamie Clark were psychologists who worked on the socio-legal aspect of the *Brown* challenge to *Plessy v. Ferguson*.

Kenneth Clark was an educator, a professor at City College of New York, and first black president of the American Psychological Association. Mamie Clark was the first black woman to earn a doctorate in psychology from Columbia University. They testified as to the harm segregation caused black children. Their "doll test" demonstrated how

black children imbued the white doll with positive attributes, while seeing the black doll in negative terms.

Chief Justice Earl Warren wrote in *Brown*: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." That type of emotional damage is taking place every day when a person is humiliated by a stop and frisk search. The person is publicly shamed. Their body is assaulted by touching in private areas while standing in public sight. They could be made to lie face down on the sidewalk or stand facing away from the officer and vulnerable to attack. Men, women, and children are detained, touched, and demeaned in this manner.

Victims of stop and frisk should come forward. Their stories need to be recorded. Psychologists trained to detect the symptoms of posttraumatic stress disorder are needed to work with attorneys to build a case around the emotional effect on people whom police target for stop and frisk searches. In *Terry v. Ohio*, the Supreme Court recognized "that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[28]

Yet the court finds the "crux of this [*Terry v. Ohio*] case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but, rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.... [T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."[29]

The *Terry* stop and frisk worsened after the adoption of CompStat.[30] It is a quantitative measure of police productivity and community safety based on the number and types of arrests. The New

York Police Department (NYPD) led in the adoption of CompStat. The department, however, has also become the focus of accusations that numbers of serious crimes are manipulated downward in an attempt to make the city appear safer and increased arrests for low-level offenses to show high police productivity.[31] Cops on the street are under pressure to make arrests. Promotions, requested vacation days, and coveted shifts are part of the bargain as "dollars for collars" motivates officers to increase arrests.

Police targeted urban teenagers, minorities, and the poor. Those defendants would find it difficult to challenge the word of the officer. Under current NYPD practices, officers who detain and search can arrest for criminal trespass or issue a summons for a court appearance for trespass or loitering. Although the detained person must appear in court, the officer need only deliver a written statement of the event. There is no Sixth Amendment right to confront witnesses or accusers in these cases.

From 2009 to 2011, NYPD arrested more than 16,000 people on criminal trespass charges in public housing, according to a report filed as part of the federal litigation over the arrests. The Legal Aid Society of New York City and the New York Civil Liberties Union sued New York City over false criminal trespass arrests in public housing. The suspiciously high number of trespass violations, especially near public housing, led Jeannette Rucker, a bureau chief of the Bronx District Attorney's office, to refuse to prosecute trespass violations unless the officer testified in person.

On January 8, 2013, a federal judge ruled the city's "Operation Clean Halls" policy unconstitutional. Under the policy, NYPD officers could question and arrest anyone suspected of loitering or trespassing in any of the thousands of private apartment buildings participating in the program.[32] Officers so routinely violated the constitutional rights of people stopped under the program that the court found their practices had risen to a level of deliberate indifference.

Videotaping police abuse of "stop and frisk" authority can be effective evidence at trial and act as a deterrent. In a case of alleged police retaliation, however, the New York American Civil Liberties Union filed a case on behalf of a young woman arrested for video-

taping police who had detained and frisked three teens.[33] Using her smartphone, Ms. Hadiyah Charles videotaped two NYPD officers questioning black teens who were simply fixing a bicycle on a public sidewalk in the Bedford-Stuyvesant section of Brooklyn. Officers allegedly shoved, then handcuffed, and arrested Ms. Charles, holding her in a jail cell for 90 minutes for allegedly videotaping their actions.[34]

Under the *Terry* decision, "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary, and its fruits must be excluded from evidence in criminal trials."[35] Yet, the overbearing conduct of police is evident. Of the nearly 685,724 persons stopped and searched by police in New York City in 2011, fewer than 1 percent were arrested for any crime, leaving more than half a million people publicly humiliated and manhandled by police officers.

At a town hall meeting on stop and frisk held at John Jay College (City University of New York), a black man, in his late sixties, dressed in a jacket and tie, rose to speak. It was late in the day. The room was hot and crowded. He walked slowly, head high, to the microphone and spoke about how the New York City police officers approached him and asked for identification. His questions about why the police stopped him were met with impatient remarks about "fitting the description." Seconds later, he recounted, a police turned him around, kicked his legs open wide, and began patting him down. Our room grew quiet. Trembling with the memory of this humiliation, the man's voice caught with emotion. He said, "They treated me like they were saying, 'You ain't nothing but a nigger.'" Then, they let him go.

VIII

As African Americans made progress, legal and social forces were used to maintain control of them and their forward movement. From slave catchers, to Night Riders, to Southern sheriffs, the methods of control bear a similar theme. The U.S. Supreme Court has given modern police officers wide authority to stop and search persons whom they suspect of imminent criminal involvement. Not surprisingly, the abuse of this authority has fallen disproportionately on African

Americans. Although the Supreme Court spoke briefly of the damaged community relations, emotional harm, and abuse of power, as in *Brown v. Board*, challenges to stop and frisk must include the psychological damage this public humiliation inflicts on millions of innocent people.

EDITOR'S NOTE: As this issue of the *Trotter Review* was going to press, a federal judge in New York ruled the city's stop and frisk practices unconstitutional and ordered changes in how they are carried out. U.S. District Judge Shira A. Scheindlin held on August 12, 2013, that the New York Police Department had pursued a "policy of indirect racial profiling" against blacks and Latinos, violating the Fourth Amendment ban on unreasonable searches and Fourteenth Amendment guarantee of equal protection under the law. Scheindlin called for federal monitoring of changes, including cameras to be worn on the bodies of some officers. New York Mayor Michael Bloomberg and Police Commissioner Raymond Kelly condemned the Scheindlin's ruling and asserted that what Bloomberg called "stop, question, frisk" had reduced crime, including in communities of color. Bloomberg said the city would appeal the court order, at least delaying any changes in New York's policing practices.

Notes

1 *Africans in America* and *Blacks in America* are phrases used interchangeably before the Fourteenth Amendment granted full citizenship rights. Following this period, *African Americans, Blacks,* and *Black Americans* will be used by the writer. *White, White Americans,* and *European Americans* are used interchangeably.

2 http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices (viewed Sept. 30, 2012).

3 Browne-Marshall, G. *Race, Law, and American Society: 1607 to Present*. New York: Routledge, 2007.

4 Tunnicliff-Catterall, H. ed. *Judicial Cases Concerning American Slavery and the Negro*, 5 vols. (1926; reprint, New York: Octagon Books, 1968; KF4545.S5 C3 1968), 1:77; See A. L. Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period*. New York: Oxford University Press, 1980.

5 Act XII, Laws of Virginia, December 1662 (Hening, Statutes at Large, 2: 170).

6 *In the Matter of Color*, p. 39.

7 Aptheker, H. *A Documentary History of the Negro People in the United States: From Colonial Times through the Civil War.* New York: Citadel Press (1951), p. 20; *Race, Law, and American Society*, p. 84.

8 Laws of Maryland, chap. XIII (May 1717), p. 140.

9 Browne-Marshall, G., Education chapter, *Race, Law, and American Society: 1607 to Present* (2d). New York: Routledge, 2013. p. 20.

10 *Prigg v. Pennsylvania*, 41 U.S. 539 (1942).

11 *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

12 Letter from Abraham Lincoln to Horace Greeley, August 22, 1862.

13 Georgia Act No. 240, Amending the 4435th Section of the Penal Code. Approved March 12, 1866.

14 Blackmon, D. *Slavery by Another Name*: *The Enslavement of Black Americans from the Civil War to World War II.* New York: Anchor, 2009.

15 *Civil Rights Cases*, 109 U.S. 3 (1883).

16 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

17 *U.S. v. Shipp*, 203 U.S. 563 (1906).

18 *Race, Law, and American Society*, 175; *Chattanooga Times*, God Bless You All-I Am Innocent, March 20, 1906.

19 *Race, Law, and American Society*, p. 173.

20 *Powell v. Alabama*, 287 U.S. 45 (1932).

21 *Brown v. Board of Education*, 347 U.S. 483 (1954).

22 V. Crawford, V., J. Rouse, and B. Woods, *Women in the Civil Rights Movement: Trailblazers & Torchbearers 1941-1965*. Bloomington: Indiana University Press, 1990; F. Gray, *Bus Ride to Justice: The Life and Works of Fred Gray*. Montgomery: New South Books, 2002; G. Browne-Marshall, *Black Women and the Law*. (Forthcoming).

23 *Browder v. Gayle*, 352 U.S. 903 (1956).

24 *Mapp v. Ohio*, 367 U.S. 1081 (1961).

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

26 President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967).

27 Tiffany, , L, D. McIntyre D. Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment, 186 (1967), 40-48.

28 *Terry v. Ohio*, 392 U.S. 1, 17-18.

29 *Terry v. Ohio*, 392 U.S. 1, 17-18.

30 Silverman, E. and Eterno, J. *The Crime Numbers Game: Management by Manipulation*. New York: CRC Press/Taylor and Francis, 2012. (In the mid-1990s, the NYPD created a performance management strategy known as CompStat. It consisted of computerized data, crime analysis, and advanced crime mapping coupled with middle management accountability and crime strategy meetings with high-ranking decision makers. While initially credited with a dramatic reduction in crime, questions quickly arose as to the reliability of the data.)

31 Silverman, E. and Eterno, J. *The Crime Numbers Game: Management by Manipulation*. New York: CRC Press/Taylor and Francis, 2012.

32 *Ligon v. City of New York*, S.D.N.Y., No. 12 CV 2274 (2013) (Restraining order granted in case challenging the NYPD's aggressive patrolling of private apartment buildings).

33 *Charles v. City of New York*, E.D.N.Y., Index No. CV 12 6180 (2012) (Challenging unlawful arrest of NYC resident for filming stop-and-frisk encounter).

34 http://www.nyclu.org/case/charles-v-city-of-new-york-challenging-unlawful-arrest-of-nyc-resident-filming-stop-and-frisk-e (retrieved February 23, 2013)

35 *Terry v. Ohio*, 392 U.S. 1, 15.