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Dear Courts: I, Too, Am a Reasonable Man

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Dear Courts:
I, Too, Am a Reasonable Man

Abstract

There has been an ongoing debate regarding police-on-Black violence since the dawn of the United States police force. At every stage, the criminal justice system has had a monumental impact on the plight of the Black American community. The historical roots of racism within the criminal justice system have had adverse effects on the Black American psyche. Emerging research suggests that the upsurge in reporting police-on-Black violence—including videos shot from pedestrian camera phones and uploaded to multimedia platforms and historical accounts of the agonizing treatment Black Americans have experienced beginning with Slave Patrols—has affected individualized behavior during interactions with police officers. This is crucial because courts analyze an individual's behavior at the sight of or in the presence of police officers when deciding whether or not a police officer had the requisite reasonable suspicion to stop an individual. Courts consider an individual's nervous or evasive behavior as a factor in favor of finding a police officer had justifiable reasonable suspicion to perform a stop. In doing so, courts use a race-neutral approach, which undoubtedly discounts the Black American historical experience. This race-neutral approach ignores the specific history of racism against Black Americans by failing to explore how the sordid history of racialized terror in the criminal justice system affects individualized behavior.

This article explores how the Supreme Court's creation of the reasonable suspicion standard facilitates, justifies, and perpetuates police violence against Black Americans. This article argues that this interpretation of the Fourth Amendment enables officers to manifest implicit biases and target Black Americans with little or no justification. The result is the current state of affairs, including unwarranted racial disparities at every stage of the criminal justice process. Accordingly, this article suggests that instead of using a race-neutral analysis of the law, the Supreme Court should recognize the significance of the Black experience in the United States and implement the use of race as a factor in analyzing whether or not an individual's behavior

expressed enough nervousness or evasiveness to constitute justifiable reasonable suspicion for a police officer to perform a stop.

TABLE OF CONTENTS

I. INTRODUCTION

I, too, sing America.

I am the darker brother.
They send me to eat in the kitchen
When company comes,
But I laugh,
And eat well,
And grow strong.

Tomorrow,
I'll be at the table
When company comes.
Nobody'll dare
Say to me,
"Eat in the kitchen,"
Then.

Besides,
They'll see how beautiful I am
And be ashamed—

I, too, am America.[1]

People of color in the United States—specifically Black Americans—have a profoundly unique relationship with the police force.[2] Since its inception, the police force has been tasked with enforcing laws that significantly marginalize the Black American community.[3] Foreseeably, this

1. Langston Hughes, *I, Too* (1926) *as contained in* David C. Ward, *What Langston Hughes' Powerful Poem "I, Too" Tells Us About America's Past and Present*, SMITHSONIAN MAG. (Sept. 22, 2016), https://www.smithsonianmag.com/smithsonian-institution/what-langston-hughes-powerful-poem-i-too-americas-past-present-180960552/.

2. *See, e.g.*, 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.

3. *See Segregation in the United States*, HIST. (May 16, 2019), https://www.history.com/topics/black-history/segregation-united-states. The police force was tasked with enforcing Black Codes, Jim Crow, segregation, etc. *See id.*; *see also* Hannah-Jones, *supra* note 2 ("Historically . . . the police

undertaking has caused a culture of skepticism, distrust, and fear of the police force amongst Black Americans.[4] That very culture of skepticism, distrust, and fear is being perpetuated under current precedent—particularly the Supreme Court's creation and assessment of Fourth Amendment "reasonable suspicion."[5] The Court created this intermediate level of suspicion in order to monitor initial encounters between police officers and citizens.[6] Unfortunately, this standard, along with implicit biases, has been a leading cause in perpetuating racial disparities in policing.[7] Although the Court analyzes an individual's behavior at the sight or in the presence of police officers (i.e., nervous or evasive behavior is a factor towards a police officer having justifiable, reasonable suspicion), the Court does not take into account the race of the individual and how that affects the individual's behavior (i.e., experiences that cause the individual to act nervous or evasive).[8] Instead, the Court administers a supposed "race-neutral" reasonable suspicion assessment evaluated in light of the "totality of the circumstances."[9]

The historical, social, and political context criminalizing Black Americans has adversely affected the Black American psyche.[10] This is especially true now at the height of multimedia platforms displaying and amplifying the racial disparities in policing, often using accounts and videos of excessive force victimizing Black Americans.[11] Evidence suggests this media saturation of police-on-Black violence has caused many Black Americans to react in nervous or evasive ways in the presence of police, behaviors spawning not from a consciousness of guilt, but from the basic

have defended and enforced racism and segregation—attacking civil rights protesters and disrupting strikes of black workers seeking to integrate workplaces and neighborhoods.").

4. *See* Hannah-Jones, *supra* note 2.

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

6. *See infra* note 58 and accompanying text.

7. *See* L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 83–84 (2017) (exploring the racial anxieties that police officers often exhibit when approaching Black Americans).

8. *See infra* Parts II, IV.

9. *See infra* Part III.

10. *See, e.g.*, Richardson, *supra* note 7, at 87 ("For many Black individuals, the constant stopping, questioning, and frisking of individuals within their communities is perceived as harassment, and foments distrust, anger, and other feelings not conducive to fostering good community-police relationships or perceptions of police legitimacy."); *infra* Part IV.

11. *See* John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, N.Y. TIMES (June 21, 2018) https://nyti.ms/2lp53eH.

human instincts of survival and self-preservation.[12] To mitigate the significant racial disparities in policing that exist, this Comment proposes that the Court take race specifically into account under its totality of the circumstances analysis.[13] This would create a more thorough review of the behavior factoring toward constituting "reasonable suspicion" and negate the inference of guilt that is associated with nervous or evasive behavior when pertaining to Black Americans.[14] In adopting this standard, the Court would be adopting a true totality of the circumstances assessment, one that does not ignore race as a significant part of the whole picture.[15]

Part II of this comment examines the history of the United States police force and its relationship with the Black American community.[16] Part III examines the evolution of the reasonable suspicion standard.[17] Part IV analyzes the impact of the Court's "race-neutral" approach to the reasonable suspicion standard, its effects on racial disparities in policing, and its psychological consequences on the Black American psyche.[18] Part V proposes that the Court adopt a true totality of the circumstances analysis and take race directly into account when assessing reasonable suspicion.[19] Part VI forecasts the impact of the Court adopting this comment's proposal to take race directly into account in the totality of the circumstances assessment.[20] Part VII concludes.[21]

II. BLACK AMERICA AND THE POLICE FORCE: A DAUNTING HISTORY

Both history and current affairs reveal that there has always been a rift between the police force and the Black American community.[22] Since its inception, the police force has been delegated with the enforcement of laws

12. *See supra* notes 10–11 and accompanying text; *infra* note 114 and accompanying text.
13. *See infra* Part V.
14. *See infra* Part V.
15. *See infra* Part V.
16. *See infra* Part II.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part V.
20. *See infra* Part VI.
21. *See infra* Part VII.
22. *See infra* notes 25–45 and accompanying text.

that marginalize Black Americans.[23] The police force enforced these laws harshly against Black Americans, creating and perpetuating a disconnect between the two.[24]

In 1838, the city of Boston established the first organized, publicly funded police force.[25] New York City and Chicago quickly followed, and "[b]y the 1880s all major U.S. cities had municipal police forces in place."[26] The police forces in northern states, typically located in large shipping and commercial centers, were established to protect "property and safeguard the transport of goods."[27] However, the development of the American police force in southern states followed a very different path.[28] Because the establishment of the police force was centered around protecting the economy, and the economy driving the southern states was the slavery system, "[t]he genesis of the modern police organization in the South [was] the 'Slave Patrol.'"[29]

> [The southern] Slave Patrols had three primary functions: (1) to chase down, apprehend, and return to their owners, runaway slaves; (2) to provide a form of organized terror to deter slave revolts; and, (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside of the law, if they violated any plantation rules.[30]

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23. *See infra* note 29 and accompanying text; *see also* ANGELA J. DAVIS ET AL., POLICING THE BLACK MAN, at xii (Angela J. Davis ed., Vintage Books 2018). Davis states:

> From the arrival of the first slaves in Jamestown in 1619 to the lynchings of the nineteenth and twentieth centuries to the present day—black boys and men have been unlawfully killed by those who were sworn to uphold the law and by vigilantes who took the law into their own hands.

Id.

24. *See infra* notes 25–45 and accompanying text.

25. Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), https://time.com/4779112/police-history-origins/.

26. *Id.*; *see also* Gary Potter, *The History of Policing in the United States*, E. KY. U. POLICE STUD. (June 25, 2013), https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1.

27. *See* Waxman, *supra* note 25; Potter, *supra* note 26.

28. *See* Potter, *supra* note 26.

29. Potter, *supra* note 26; *see also* Waxman, *supra* note 25.

30. Potter, *supra* note 26. The Slave Patrol was a police force dedicated to enforcing the idea that Africans—or Negros—"were an uncivilized lesser race . . . lacking in intelligence and laudable human qualities" who "were defined as three-fifths of a man, not a real, whole human being." MICHELLE ALEXANDER, THE NEW JIM CROW 1, 25–26 (2010). These slave patrols were tasked with analogous

Following the American Civil War, these southern Slave Patrols evolved into more modern police departments.[31] However, their purpose was largely unchanged, as they served primarily to control "freed slaves who were now laborers working in an agricultural caste system."[32] This modern police force functioned in a way that was analogous to the earlier Slave Patrols by enforcing the Black Codes, Jim Crow segregation laws, and the continuous disenfranchisement of the Black population.[33]

Immediately following the Civil War, formerly enslaved people became subjected to what were known as Black Codes.[34] The Black Codes limited how, when, and where Black Americans could work, dictated how much they would be paid, restricted their voting rights, dictated how and where they could travel, and limited where they could live and what type of property they could own.[35] The police force was tasked with enforcing and surveilling Black Americans to ensure compliance with the Black Codes, and they did so harshly.[36] Specifically, Black Americans who broke these laws were subject to arrests, beatings, and forced labor.[37] In 1868, after three years of being subjected to this treatment, the ratification of the Fourteenth Amendment made the Black Codes illegal by giving Black Americans the right to equal

practices of the modern police force today: (1) to chase down and apprehend "criminals"; (2) to maintain public order and safety; and (3) to enforce the law and prevent, detect, and investigate criminal activities. *Cf.* Hannah-Jones, *supra* note 2 (documenting personal accounts related to police efforts to detect crime, apprehend criminals, and maintain order).

31. *See* Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENFORCEMENT MUSEUM (July 10, 2019), https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/.

32. Potter, *supra* note 26.

33. *See* Hansen, *supra* note 31 ("After the Civil War, Southern police departments often carried over aspects of the patrols . . . includ[ing] systematic surveillance, the enforcement of curfews, and even notions of who could become a police officer."); Waxman, *supra* note 25; Potter, *supra* note 26.

34. *See Black Codes*, HIST. (June 1, 2010), https://www.history.com/topics/black-history/black-codes. Enacted by nearly all southern states in 1865 and 1866, the "black codes were restrictive laws designed to limit the freedom of [Black] Americans and ensure their availability as a cheap labor force after slavery was abolished." *Id.*; s*ee also* Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, CHI. REP. (June 7, 2019), https://www.chicagoreporter.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops/.

35. *See Black Codes*, *supra* note 34; Hassett-Walker, *supra* note 34.

36. *See, e.g.*, *Black Codes*, *supra* note 34. Under these codes, many southern states required Black Americans "to sign yearly labor contracts; if they refused, they risked being arrested, fined and forced into unpaid labor." *Id.*

37. *See id.*

protection of the laws under the Constitution.[38]

Nevertheless, within two decades, segregation laws, better known as "Jim Crow laws," were enacted across southern and some northern states.[39] These laws subjugated Black Americans and denied their civil rights.[40] For approximately eighty years, Jim Crow laws mandated the separation of public spaces for Black and White Americans, which included schools, elevators, restaurants, building entrances, water fountains, libraries, cemeteries, and cashier windows.[41] Enforcing these laws was a key function of the police force, and Black Americans who violated social norms or broke those laws were often subjected to police brutality.[42] At the same time, the police force did not punish the perpetrators when Black Americans were murdered by mobs, "[n]or did the judicial system hold the police accountable for failing to intervene,"[43] despite the fact that lynchings were often held on courthouse lawns.[44] Jim Crow laws were enforced until 1968, merely fifty-two years ago.[45]

The history of the police force in America reveals that police officers have always been associated with the enforcement of laws that marginalize Black Americans.[46] The Slave Patrol, Black Codes, and Jim Crow laws were precursors to the current state of affairs, including discriminatory criminal laws and the modern-day over-policing of Black Americans.[47] While many other racial groups associate the police force in the United States with public

38. *See Black Codes*, *supra* note 34; Hassett-Walker, *supra* note 34.

39. *See Black Codes*, *supra* note 34; Hassett-Walker, *supra* note 34.

40. *See Black Codes*, *supra* note 34; Hassett-Walker, *supra* note 34.

41. *See Jim Crow Laws*, HIST. (Feb. 28, 2018), https://www.history.com/topics/early-20th-century-us/jim-crow-laws; Hassett-Walker, *supra* note 34.

42. *See* Hassett-Walker, *supra* note 34. Black Americans who broke the Jim Crow segregation laws, including protestors, endured fire hoses, police dogs, bombings, and beatings by white mobs, as well as by the police. *See* ALEXANDER, *supra* note 30, at 37.

43. *See* Hassett-Walker, *supra* note 34.

44. SHERRILYN IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 8–9 (Beacon Press, 2007).

45. *See Jim Crow Laws*, *supra* note 41. Often deemphasized is the proximity of the ending of the Jim Crow era to current times, as Jim Crow ended only fifty years ago. *Id.* Thus, many of the effects of Jim Crow are still fresh within the societal constructs of the police force as well as the minds of the American people. *Id.* ("Jim Crow laws were technically off the books, though that has not always guaranteed full integration or adherence to anti-racism laws throughout the United States.").

46. *See supra* notes 25–45 and accompanying text.

47. *See* Hassett-Walker, *supra* note 34 ("For the past five decades, the federal government has forbidden the use of racist regulations at the state and local level. Yet people of color are still more likely to be killed by the police than whites."); *see also infra* Section IV.A.

safety and welfare, for many Black Americans "law enforcement represents a legacy of reinforced inequality in the justice system and resistance to advancement—even under pressure from the civil rights movement and its legacy."[48] In the midst of the civil rights movement—a decade-long struggle by Black Americans to end legalized racial discrimination, disenfranchisement, and segregation in the United States enforced by the police force—the United States Supreme Court constructed the "reasonable suspicion" standard.[49] This standard allows law enforcement officers to use their discretion to engage with "suspects" so long as they have reasonable and articulable suspicion that criminal activity is afoot.[50] In practice, the reasonable suspicion standard has legitimized, legalized, and facilitated the "wholesale harassment" of Black Americans by the police force.[51]

III. THE EVOLUTION OF THE REASONABLE SUSPICION STANDARD

A. The Creation of the Reasonable Suspicion Standard and the Significance of Race

The Fourth Amendment protects the right of the people to be secure in their persons against unreasonable searches and seizures conducted by government officials.[52] The Fourth Amendment also provides that a search is unreasonable if not supported by probable cause.[53] Prior to 1968, to justify a stop and frisk, a police officer's belief that criminal behavior was afoot had to rise to the level of probable cause as stated in the Fourth Amendment.[54] In 1968, the *Terry* decision immensely lowered that standard.[55] In *Terry*, the

48. *See* Hassett-Walker, *supra* note 34.

49. *See Civil Rights Movement*, HIST. (Oct. 27, 2009), https://www.history.com/topics/black-history/civil-rights-movement; *see also infra* Part III.

50. *See infra* Part III.

51. *See* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537 (2017) [hereinafter Carbado, *From Stop and Frisk*]; *see also infra* Parts III, IV.

52. U.S. Const. amend. IV. ("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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

53. *Id.*

54. *See* Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry *Stops*, 6 MICH. J. RACE & L. 355, 356 (2001).

55. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968); Carpiniello, *supra* note 54, at 356.

Supreme Court held that if a police officer sees something suspicious that does not quite rise to the level of probable cause, an officer may temporarily detain a "suspect" for further investigation if what the officer sees establishes reasonable suspicion that criminal activity is afoot.[56] Additionally, if that police officer has reason to believe that the "suspect" is armed and dangerous, the officer is permitted by law to conduct a limited search for weapons for the purpose of ensuring his or her own safety.[57]

The Supreme Court created reasonable suspicion as an intermediate standard, less demanding than probable cause, to justify police seizures that amount to less than full-blown arrests.[58] The Court constructed this intermediate standard for several reasons.[59] First, the Court realized that many pre-arrest level encounters between citizens and police officers were unregulated by rules and standards and, accordingly, could not be reviewed.[60] Second, the Court found that the government's significant interest in crime prevention and detection would be furthered if it allowed investigatory stops and frisks.[61] Third, the Court found that the importance of maintaining officer safety outweighed the significantly intrusive nature of frisks.[62] Although reasonable suspicion is a court-constructed intermediate level of suspicion, the investigatory stops and frisks that it authorizes are still governed by the mandate of the Fourth Amendment because they are not voluntary encounters.[63] Unfortunately, reasonable suspicion has since been construed to give law enforcement officers extreme discretion, and as a consequence has caused an unjustifiably disproportionate impact on racial minorities and the

56. *See Terry*, 392 U.S. at 30. The officer may briefly stop the "suspect" in order to either confirm or dispel the suspicion. *See id.* at 28. The officer's reasonable suspicion must be supported by specific and articulable facts and a rational inference based on those facts. *Id.* at 21. "Reasonable suspicion is evaluated in light of the *totality of circumstances* and from the perspective of a reasonable person in the police officer's situation." Carpiniello, *supra* note 54, at 356 (emphasis added).

57. *See Terry*, 392 U.S. at 27 ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

58. *See Terry*, 392 U.S. at 10–11; Carbado, *From Stop and Frisk*, *supra* note 51, at 1521.

59. *See infra* notes 60–62 and accompanying text.

60. *See Terry*, 392 U.S. at 17 (noting that not creating this level of suspicion would "isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen").

61. *See id.* at 22–23.

62. *See id.* at 25–27.

63. *See id.* at 11.

poor.[64]

Often de-emphasized is "the broader racial backdrop" during the litigation of the *Terry* case—decided in 1968—that helped shape the development of the doctrine.[65] Throughout the 1960s "a number of 'race-riots' had occurred in American inner cities—including in Philadelphia, Harlem, Watts, Cleveland, Omaha, Chicago, Detroit, Baltimore, and Washington, D.C. among other places."[66] There were many factors contributing to "the tense relationship between the police and [Black] Americans, including the rampant utilization of stops and frisks, [which] played a causal role in every riot."[67] Other factors included: the Black Panther Party emerged and were policing the police;[68] Bloody Sunday (a march from Selma to Montgomery) was fresh in the public's mind;[69] Richard Nixon's

64. *See infra* Part IV.

65. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1528.

66. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1516.

67. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1516. Almost every instance was precipitated by a police incident, often the killing or beating of a Black American. Elizabeth Fiedler, *Remembering the 1964 Riots in North Philadelphia*, WHYY (Aug. 25, 2014), https://whyy.org/articles/remembering-the-1964-riots-in-north-philadelphia-photos/; *Harlem race riot of 1964*, ENCYC. BRITANNICA, https://www.britannica.com/event/Harlem-race-riot-of-1964 (last updated July 11, 2020); Jill A. Edy, *Watts Riots of 1965*, ENCYC. BRITANNICA, https://www.britannica.com/event/Watts-Riots-of-1965 (last updated Aug. 4, 2020); *Photos: March 1968 Omaha Race Riot*, OMAHA WORLD-HERALD (Mar. 4, 2018), https://www.omaha.com/photos-march-omaha-race-riot/collection_53e3cdb2-c5a8-5a6c-9755-dce062108dad.html; David Taylor & Sam Morris, *The Whole World is Watching: How the 1968 Chicago 'Police Riot' Shocked America and Divided the Nation*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2018/aug/19/the-whole-world-is-watching-chicago-police-riot-vietnam-war-regan (last visited Aug. 28, 2020); Traqina Quarks Emeka, *Detroit Riot of 1967*, ENCYC. BRITANNICA, https://www.britannica.com/event/Detroit-Riot-of-1967 (last updated July 16, 2020).

68. Garrett Albert Duncan, *Black Panther Party*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Black-Panther-Party (last visited Aug. 28, 2020). The Black Panther Party was founded in Oakland, California in 1966, for the original purpose of patrolling Black American neighborhoods "to protect residents from acts of police brutality." *Id.*

69. Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HIST. (Mar. 6, 2015), https://www.history.com/news/selmas-bloody-sunday-50-years-ago. "On 'Bloody Sunday,' March 7, 1965, some 600 civil rights marchers headed east out of Selma" while peacefully demonstrating for voting rights. *Alabama: The Selma-to-Montgomery March*, NAT'L PARK SERV., https://www.nps.gov/places/alabama-the-selmatomontgomery-march.htm (last updated Apr. 23, 2020). State and local police officers attacked the demonstrators with billy clubs and tear gas. *Id.* "The most shocking moment in the Selma campaign was a television phenomenon: news coverage of the beating and gassing of hundreds of peaceful marchers on the Edmund Pettus Bridge who'd planned a defiant walk to the Alabama state capitol in protest of the disenfranchisement of [B]lack voters." #*Selma50: What the Media and Hollywood Got Wrong About 'Bloody Sunday*,' NBC NEWS (Mar. 8, 2015, 3:23 AM), https://www.nbcnews.com/news/nbcblk/media-studies-selma-n319436.

1968 campaign for President was premised on an appeal to White Americans about the criminality of Black people;[70] and President John F. Kennedy, Malcolm X, Reverend Martin Luther King Jr., and Senator Robert Kennedy had all been assassinated.[71]

Race relations and racial profiling by the police force was so pivotal in the country at the time *Terry* was decided that the Court expressly addressed the issue in the majority opinion.[72] In acknowledging the aggressive utilization of stop-and-frisks in Black communities, Chief Justice Warren wrote: "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any

70. *See* ALEXANDER, *supra* note 30, at 44. Political strategists have "admitted that appealing to racial fears and antagonisms was central to th[e] [Southern] strategy" i.e., using law and order rhetoric to create a new majority among working class [W]hites based on appealing to racial fears. *Id.* at 43–44. "H.R. Haldeman, one of Nixon's key advisers, recalls that Nixon himself deliberately pursued a Southern Racial Strategy: '[President Nixon] emphasized that you have to face the fact that the whole problem is really the [B]lacks. The key is to devise a system that recognizes this while not appearing to.'" *Id.* Special counsel to President Nixon, John Ehrlichman, explained that the Nixon administration's campaign strategy of 1968 was "We'll go after the racists." *Id.* He believed that the "subliminal appeal to the anti-[B]lack voter was always present in Nixon's statements and speeches." *Id.* This is particularly important because politics and political polarization often affects the Supreme Court. *See, e.g.*, Trevor Burrus, *How Political Polarization Affects the Supreme Court*, CATO INST. (July 30, 2018), https://www.cato.org/publications/commentary/how-political-polarization-affects-supreme-court.

71. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1529 n.81. John F. Kennedy was assassinated on November 22, 1963, just past his first thousand days in office. *John F. Kennedy*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/john-f-kennedy/ (last visited Aug. 29, 2020). President Kennedy "took vigorous actions in the cause of equal rights," calling for Congress to pass new civil rights legislation. *Id.* Malcolm X was assassinated on February 21, 1965; his ideas and speeches contributed to the development of Black nationalist ideology and the Black Power movement. Lawrence A. Mamiya, *Malcolm X*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Malcolm-X (last visited Aug. 29, 2020). Dr. Martin Luther King, Jr. was assassinated on April 4, 1968 while standing on the balcony of his motel room in Memphis, Tennessee. *About Dr. King*, KING CTR., https://thekingcenter.org/about-dr-king/ (last visited Aug. 29, 2020); *Dr. Martin Luther King, Jr. is assassinated*, HIST., https://www.history.com/this-day-in-history/dr-king-is-assassinated (last visited Aug. 29, 2020). Senator Robert Kennedy was assassinated on June 5, 1968 "shortly after delivering a speech to celebrate his win in the California primary." *Robert Kennedy*, HIST., https://www.history.com/topics/1960s/robert-f-kennedy (last updated Aug. 28, 2018). Robert Kennedy fought against organized crime, worked for civil rights for Black Americans, advocated for the poor and racial minorities, and opposed escalation of the Vietnam War. *Id.*

72. Terry v. Ohio, 392 U.S. 1, 14–15, 14 n.11.

criminal trial."[73] With social upheaval happening across the country, and the prominence of race relations in the litigation itself, "Chief Justice Warren presumably knew that he had to say something about race."[74] Nevertheless, because the Warren Court framed the issue in *Terry* as being about suppression of evidence rather than police racial harassment, "the majority created the reasonable suspicion standard that allowed subjective assessments of suspects' behavior to substitute for the more demanding standard of probable cause."[75]

Presumably anticipating doctrinal shifts over time, the *Terry* Court declined to articulate clear standards for what behavior constituted reasonable suspicion.[76] However, in doing so, the Court deferred to the "professional experience" and judgment of the same officers it had just acknowledged were oftentimes misusing their authority,[77] which in turn perpetuated and legalized

73. *Id.* at 14–15 (footnote omitted). The racial backdrops of this litigation primed Chief Justice Warren to take up the question of race. Carbado, *From Stop and Frisk*, *supra* note 51, at 1528. There was an emerging political debate about the Supreme Court's civil rights jurisprudence, specifically concerning whether the Warren Court had gone too far too soon with respect to civil rights—particularly issues of criminal justice. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1529. Earl C. Dudley, clerk to Chief Justice Warren at the time of the decision, noted that underlying the decision was the political tension and escalating violence that was occurring at the time of the decision in 1967. *See* Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 892 (1998). For example, "[o]nly two months before *Terry* was handed down, there was a major outbreak of rioting in many cities, including Washington, D.C., in the wake of the assassination of Dr. Martin Luther King, Jr." *Id.*

74. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1530.

75. *See* Jeffrey Fagan, Terry *'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 56 (2016); *see also Terry*, 392 U.S. at 30 ("[T]he revolver seized from Terry was properly admitted in evidence against him."). Justice Douglas dissented in *Terry*, arguing that police should not be free to conduct warrantless searches whenever they suspect someone to be a criminal because not requiring the Fourth Amendment's warrant requirement risked opening the door to the same abuses that gave rise to the American Revolution. *Id.* at 38–39 (Douglas, J., dissenting).

76. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1533–34.

77. *Terry*, 392 U.S. at 14 n.11. A cited report from the President's Commission on Law Enforcement and Administration of Justice found that "in many communities, field interrogations are a major source of friction between the police and minority groups." *Id.* The report stated that "misuse 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." PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 184 (1967), https://www.ncjrs.gov/pdffiles1/Digitization/147374NCJRS.pdf. The Court recognized, and even cited, that stop and frisks of youths or minority group members is oftentimes "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." *Terry*, 392 U.S. at 14 n.11.

that very misuse.[78] Since the *Terry* decision, stops, interrogations, and searches of ordinary people conducting everyday activities such as walking home, driving, or riding the bus or train "have become commonplace—at least for people of color,"[79] resulting from the Court's lack of clarity as to what behaviors amount to reasonable suspicion.[80]

B. Modern Application of the Reasonable Suspicion Standard

Recognizing the lower courts' inability to determine uniform "reasonableness" by the year 2000,[81] the Court provided more guidance as to assessing the reasonableness of an officer's suspicion.[82] In *Illinois v. Wardlow*—a 5–4 decision—the Court closely considered flight as a factor and held that location, specifically a high crime neighborhood, plus evasion constitutes the requisite reasonable suspicion for justifying an investigatory stop-and-frisk.[83] In that case, Wardlow—a Black American man—fled at the sight of police vehicles "patrolling an area [in Chicago] known for heavy narcotics trafficking."[84] The Court emphasized that while ignoring the police is indicative of nothing, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[85] The Court reasoned that nervous or evasive behavior "is not necessarily indicative of wrongdoing, but it is

78. *See id.*; *infra* Part IV.

79. *See* ALEXANDER, *supra* note 30, at 63–64; *infra* Part IV.

80. *See infra* Part IV.

81. *See* Illinois v. Wardlow, 528 U.S. 119, 123 n.1 (2000).

82. *See Wardlow*, 528 U.S. at 119–20. Reasonable suspicion is typically generated by a collection of articulable facts available to the officers in each case. *Id*. at 119–20.

83. *Id.*

84. *Id.* at 121.

85. *Id.* at 124–25. The Court then cited three cases to support this contention. *Id*. at 124. In *United States v. Brignoni-Ponce*, border patrol officers stopped the defendant's car because of the occupants' apparent Mexican descent. 422 U.S. 873, 875 (1975). The Court condemned the officers' behavior, stating that while "[t]he driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion," suspicion solely based on the race of a defendant is unreasonable. *Id.* at 885–86. In *Florida v. Rodriguez*, officers observed a defendant's unusual behavior once they were sighted. 469 U.S. 1, 6 (1984) (per curiam). The Court ruled that the "[r]espondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion." *Id.* In *United States v. Sokolow*, Drug Enforcement Administration agents began investigating the defendant after learning that he had paid cash for his $2,100 airline ticket to spend a short time in Miami. 490 U.S. 1, 4 (1989). The Court observed "that the suspect took an evasive or erratic path through [the] airport" which met "the test for showing 'ongoing criminal activity.'" *Id.* at 8.

certainly suggestive of such."[86] Additionally, the Court ruled that the occurrence of the stop in a "high crime area" is also a factor suggestive of wrongdoing.[87]

In Justice Stevens' dissent, joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens emphasized the importance of "looking to the totality of the circumstances—the whole picture."[88] Accordingly, many factors are necessarily relevant to this totality of the circumstances analysis, including: "the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person's behavior was otherwise unusual."[89] In *Wardlow*, the Court differentiated unprovoked flight from the right to go about one's business, and held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion" indicative of wrongdoing.[90] Notably, race and ethnicity are not taken into account under the Court's analysis.[91] Instead, the Court reiterates its

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

87. *Id.* This has "resulted in stops and frisks of residents of inner cities—primarily poor persons, [Black] Americans, and Hispanic Americans—far out of proportion to their numbers, and often without justification." David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677 (1994).

88. *Wardlow*, 528 U.S. at 126–27. The dissent reminds the Court that "'the relevant inquiry' concerning the inferences and conclusions a court draws 'is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'" *Id.* at 128 (quoting *Sokolow*, 490 U.S. at 10).

89. *Wardlow*, 528 U.S. at 129–30.

> In determining whether there is reasonable suspicion for a stop, the police may consider the time and location of the purported offense as well as information about the suspect's behavior, including flight, which may convey a consciousness of guilt, or furtive gestures, which may suggest the suspect has something to hide.

Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, *in* POLICING THE BLACK MAN 57, 85 (Angela J. Davis ed., Vintage Books 2018).

90. *Wardlow*, 528 U.S. at 124–25.

91. *See Wardlow*, 528 U.S. 119. Justice Stevens' dissent reminds the Court that in creating the flight factor, the preceding courts were valuing the archaic idea that "[t]he wicked flee when no man pursueth: but the righteous are as bold as a lion." *Id.* at 129 n.3 (Stevens, J., concurring in part and dissenting in part) (quoting *Proverbs* 28:1). Justice Stevens rejected reliance on this proverb because its "'ivory-towered analysis of the real world' fails to account for the experiences of many citizens of this country, particularly those who are minorities." *Id.* It is a proverb that "fails to capture the total reality of our world," which in turn, fails to capture the totality of the circumstances. *Id.*; *see also* Hickory v. United States, 160 U.S. 408, 420 (1896) stating:

> Our ancestors, observing that guilty persons usually fled from justice, adopted the hasty conclusion that it was only the guilty who did so, . . . so that under the old law a man who

commitment to the race-neutral standard for reasonable suspicion to justify a police stop.[92] In effect, this standard has subjected Black Americans "to a disproportionate number of stops" because, while purporting to be race-neutral, the standard has turned a blind eye to the unique relationship between Black Americans and the police force.[93]

In 2019, in *United States v. Brown*, the Ninth Circuit found that "officers lacked the requisite reasonable suspicion that criminal activity was afoot before stopping Brown."[94] Brown, a Black man who matched a description from an unreliable tip, ran away from a patrol car that had been silently following him before flashing its lights.[95] Specifically, after receiving "an anonymous tip that a Black man was carrying a gun," police officers began to tail Brown "for several blocks before turning on [the vehicle] patrol lights."[96] After "[s]eeing the lights and patrol car coming from behind him, Brown ran."[97] The officers "pursued Brown for one block before stopping him and ordering him to the ground at gunpoint," placing him in handcuffs, and searching him.[98] They found a firearm, "drugs, cash, and other items."[99]

The Ninth Circuit held that "[i]n evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race."[100] In analyzing Brown's flight as a factor, the court was especially "hesitant to allow flight to carry the day in authorizing the stop," especially "[g]iven [that] racial

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> fled to avoid being tried for felony forfeited all his goods, even though he were acquitted. . . . "In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely, that of a circumstance[—]a fact which it is always of importance to take into consideration, and combined with others may afford strong evidence of guilt, but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility."

Id.

92. *See* Carpiniello, *supra* note 54, at 355–57.

93. *See* Carpiniello, *supra* note 54, at 355; *infra* Part IV.

94. *See* United States v. Brown, 925 F.3d 1150, 1152 (9th Cir. 2019).

95. *Id.* at 1151–52.

96. *Id.* at 1152.

97. *Id.*

98. *Id.* at 1152–53.

99. *Id.* at 1153.

100. *Id.* at 1156. The court cited to its past decision in *Washington v. Lambert*, which "addressed at length 'the burden of aggressive and intrusive police action [that] falls disproportionately on African-American, and sometimes Latino, males' and observed that 'as a practical matter neither society nor our enforcement of the laws is yet color-blind." *See id.*; Washington v. Lambert, 98 F.3d 1181, 1187–88 (9th Cir. 1996).

dynamics in our society—along with a simple desire not to interact with police—offer an 'innocent' explanation of flight."[101] Furthermore, the Court noted "that uneven policing may reasonably affect [even innocent individuals'] reactions to law enforcement":

> [C]overage of racial disparities in policing has increased, amplifying awareness of these issues. This uptick in reporting is partly attributable to the availability of information and data on police practices. Although such data cannot replace the "commonsense judgments and inferences about human behavior" underlying the reasonable suspicion analysis, it can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise.[102]

Therefore, under *Brown*, the Ninth Circuit mandated that race must be considered—and not discounted—as a factor in a totality of the circumstances analysis of reasonable suspicion involving flight (namely, nervous or evasive behavior).[103] Echoing Justice Stevens' dissent in *Wardlow*, the court "recognized that flight can be a problematic factor in the reasonable suspicion analysis"[104] because many citizens—particularly in the Black American community—believe that it is essential to avoid interacting with the police force for their own health and safety.[105] The court recognized that this belief results from racial disparities in policing throughout history and the unveiling and amplification of those disparities through the use of oral traditions, research, and pervasive multimedia coverage and exposure, which have only increased as technology advances.[106]

101. *Brown*, 925 F.3d at 1157.

102. *Id.* at 1156 (footnote omitted) (citations omitted).

103. *Id.*

104. *Id.*

105. *See* Illinois v. Wardlow, 528 U.S. 119, 126–40 (2000) (Stevens, J., concurring in part and dissenting in part); *Brown*, 925 F.3d at 1156; *see also* Carpiniello, *supra* note 54, at 359–63 (analyzing the variety of legitimate and non-criminal reasons why a Black American would flee from the police including: violence avoidance, bystander violence, and skepticism toward police due to a lack of confidence in police officers as unbiased law enforcers); *infra* Section IV.A.

106. *See infra* Section IV.A.

IV. THE COURT'S "RACE-NEUTRAL" APPROACH TO REASONABLE SUSPICION AND ITS IMPACT ON BLACK AMERICANS

The Supreme Court is convinced that applying color-blind standards is a "moral requirement of society, particularly in the field of criminal law."[107] In the *Wardlow* case, the Court essentially held that "[r]ace-specific reasons for flight are irrelevant [in determining] reasonable suspicion."[108] Although the Supreme Court purportedly uses a color-blind approach when evaluating reasonable suspicion, race nonetheless "influences the Court's determination of reasonable suspicion as much as it does a suspect's decision to flee and an officer's decision to stop the suspect."[109]

In the seminal case, *Terry*—and many cases to follow—the Court recognized the direct correlation between race and the criminal justice system and acknowledged the racial disparities that exist in policing.[110] The Court also acknowledged and analyzed the quality and nature of police intrusion on an individual's rights while being subjected to a police frisk for weapons,[111] and admitted that a "limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[112] The Court continued, "[t]he protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person."[113] In those terms, because Black Americans have always been significantly more likely to be subjected to stop-and-frisks, this racial disparity throughout the history of policing has intruded upon the "cherished personal security" and the sanctity of Black Americans.[114]

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107. *See* Carpiniello, *supra* note 54, at 368.
108. *Wardlow*, 528 U.S. at 125–26; Carpiniello, *supra* note 54, at 369.
109. *See* Carpiniello, *supra* note 54, at 368.
110. *See* Terry v. Ohio, 392 U.S. 1, 14–15 (1968).
111. *Id.* at 24–25.
112. *Id.*
113. *Id.* at 26.
114. *Id.* at 125; *see supra* Part II; *infra* Part VI; *see, e.g.*, Darwin BondGraham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, GUARDIAN (Jan. 3, 2020), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force; Henry K. Lee, *Study Indicates Racial Profiling by Oakland Cops/ACLU Releases New Report*, SFGATE (May 12, 2001), https://www.sfgate.com/bayarea/article/Study-indicates-racial-profiling-by-Oakland-cops-2921498.php; *infra* note 155 and accompanying text. The NAACP Legal Defense and Education Fund filed an amicus brief when *Terry* reached the Supreme Court "in which they argued against lowering

Police intrusion upon the sanctity of Black Americans, along with the increase in the reporting of these instances, has organically and unsurprisingly created a culture of fear, skepticism, and resentment towards the police force, resulting in the spawn of survival mechanisms including police avoidance.[115] Many Black Americans do not feel safe in the presence of police officers, and the amplification of police practices—particularly negative practices—and violence displayed on multimedia platforms perpetuates that culture of fear, skepticism, and resentment, causing individuals to react in nervous or evasive ways before or during an interaction.[116] This nervous or evasive behavior, analyzed in *Wardlow*, might not seem reasonable to individuals living outside of the Black experience, but to individuals living within it, it is reasonable, practical, and sometimes advisable.[117] As a means of self-preservation, which is regarded as a basic instinct in human beings,[118] Black Americans often avoid the police to avoid police misconduct—which is more likely to affect Black Americans—and bystander violence.[119]

By using a race-neutral reasonableness standard in assessing whether a police officer has the justifiable reasonable suspicion to stop and frisk a citizen, the courts undermine the significance of race and the profoundly different experience/relationship that Black Americans have had with the

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the probable cause standard to one subject to less scrutiny. The brief purposed to represent the 'everyman,' or the numerous innocent people who had already been subjected to the indignity of a stop and frisk." Thomas Stack, *Racial Biases within Stop and Frisk: The Product of Inherently Flawed Judicial Precedent*, 4 RAMAPO J. OF L. & SOC'Y 3, 13 (2018), https://www.ramapo.edu/law-journal/files/2018/09/Stack-FINAL-1.pdf (citation omitted). Moreover, the NAACP contended that Black Americans were subject to stop and frisk at a disproportionate rate largely due to the racial bias that is prevalent in the police force. *Id.*

115. *See* United States v. Brown, 925 F.3d 1150, 1152 (9th Cir. 2019) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence." (quoting Illinois v. Wardlow, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part))). This culture of fear, skepticism, and resentment stems partly from the "annoying," "frightening," and "humiliating" experience of being stopped and frisked at disproportionate rates since the inception of the stop and frisk. *Terry*, 392 U.S. at 125; *see supra* note 114 and accompanying text.

116. *See infra* Section IV.A.

117. *See infra* Section IV.A.

118. *Self-Preservation Instinct*, AM. PSYCHOLOGY ASS'N DICTIONARY OF PSYCHOLOGY, https://dictionary.apa.org/self-preservation-instinct (last visited Aug. 29, 2020).

119. *See infra* Part IV; Carpiniello, *supra* note 54, at 358–60.

police force since its inception.[120] Evading police officers is not always a decision; many times it is a reaction related to the sociological experience of the Black American community as a means of survival.[121] It can also be an educated decision from an innocent person who knows and understands the history of the police force and underlying biases within society, including municipal police departments.[122] Racial disparities in policing, as well as videos circulated through multimedia, induce Black Americans to "anticipate biased treatment and therefore exhibit resistant behavior, such as flight. When police react to flight with harsh treatment, they reinforce existing perceptions of racial bias."[123]

A. Racial Disparities in Policing and Their Psychological Effects on Black Americans

Today, significant racial disparities remain in the United States criminal justice system, stemming in part from the disparities in policing.[124] "In 2016, [B]lack Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."[125] Black youth made up 35% of juveniles arrested that year, despite accounting for 15% of all U.S. children.[126] While many attempt to link this crime rate to race and the function

120. *See* Carpiniello, *supra* note 54, at 358 ("[T]he current reasonable police officer standard for *Terry* stops fails to recognize the unique Black perspective on police encounters. As such, it perpetuates racial discrimination by re-enforcing existing racial hierarchies while maintaining a façade of race-neutrality.").

121. *See infra* Part IV.A.

122. *See* Carpiniello, *supra* note 54, at 360 ("Black men perceive the police as a controlling force that functions only to enforce the social, economic, and political interests of Whites rather than as their protectors."); *see also infra* Part IV.A.

123. Carpiniello, *supra* note 54, at 362.

124. *See* Harris, *supra* note 87, at 680 ("[Black] Americans are vastly overrepresented in prisons and jails relative to their numbers in the general population."). In 2014, Black Americans constituted 34% of the total correctional population in America—2.3 million out of 6.8 million. *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited March 20, 2020). Moreover, Black Americans "are incarcerated at more than 5 times the rate of" White Americans. *Id.* Additionally, Black American children represent "32% of children who are arrested, 42% of children who are detained, and 52% of children whose cases are judicially waived to criminal court." *Id.* "As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime." *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (April 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

125. THE SENTENCING PROJECT, *supra* note 124.

126. *Id.*

of concentrated urban poverty—which is more common among Black Americans than any other racial group— "[W]hite Americans overestimate the proportion of crime committed by [Black Americans, and] overlook the fact that communities of color are disproportionately victims of crime, and discount the prevalence of bias in the criminal justice system," including in police practices.[127] The reality is that "[m]ore [Black] American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began."[128] Both the War on Drugs and "Stop, Question, and Frisk" policing policies have created a higher level of police contact with Black Americans, which consequently has led to higher levels of police contact with innocent people and corresponding higher levels of arrests for drug crimes.[129]

127. *Id*. Once pulled over, [B]lack drivers are "three times [more] likely [than] [W]hites to be searched" and "twice as likely as [W]hites to be arrested." *Id.* "These patterns hold even though police officers generally have a lower 'contraband hit rate' when they search [B]lack versus [W]hite drivers." *Id*.

128. *See* ALEXANDER, *supra* note 30, at 180.

129. *See* THE SENTENCING PROJECT, *supra* note 124; ALEXANDER, *supra* note 30, at 62–63. For instance, "[M]ore than one in four people arrested for drug violations in 2015 was [B]lack [despite the fact that] drug use rates do not differ substantially by race and ethnicity and drug users generally purchase drugs from people of the same race or ethnicity." THE SENTENCING PROJECT, *supra* note 124. According to Judge Shira A. Scheindlin, in 2013, New York's highest officials had "turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner," which led Judge Scheindlin to declare the city's stop-and-frisk tactic unconstitutional as it was "broadly target[ing] male residents of neighborhoods populated by low-income people of color." *Id*. The New York Civil Liberties Union analyzed the New York Police Department's stop and frisk data and found that 41.6% of all stops were of "[B]lack and Latino males between the ages of 14 and 24," while they only made up 4.7% of the population in New York. *New NYCLU Report Finds NYPD Stop-And-Frisk Practices Ineffective, Reveals Depth of Racial Disparities*, N.Y. CIVIL LIBERTIES UNION (May 9, 2012), https://www.nyclu.org/en/press-releases/new-nyclu-report-finds-nypd-stop-and-frisk-practices-ineffective-reveals-depth-racial. No crime had been committed in 90 percent of those stops and "[t]he number of stops of young [B]lack men exceeded the entire city' population of young [B]lack men" by 9,720. *Id*. In Los Angeles, between 2003 and 2004 (the most recent results provided by the LAPD), "[Black] Americans were stopped by police at a rate of 4,500 stops per 10,000, as compared to only 1,750 per 10,000 non-minority residents. . . . Once stopped, [Black] Americans were 127% more likely to be frisked than were stopped [W]hites." Thomas Stack, *Racial Biases within Stop and Frisk: The Product of Inherently Flawed Judicial Precedent*, RAMAPO J. OF L. & SOC'Y 3, 21–22 (Sept. 21, 2018), https://www.ramapo.edu/law-journal/files/2018/09/Stack-FINAL-1.pdf.

> This evidence suggests that [B]lack Americans are stopped and frisked based on a lower threshold of evidence than [W]hite Americans. [Black] Americans are significantly more likely to be subjected to a frisk once stopped; a factor which cannot be ameliorated by racially neutral justifications such as a higher yield rate. Such factors have led [scholars] to conclude that [Black] Americans are "over-stopped, over-frisked, and over-arrested,"

Today, Black Americans are killed by the police at a disproportionately high rate, which, thanks to cell phone videos, social network postings, online petitions and articles, and the twenty-four hour news cycle, is being exposed worldwide as a major social problem in the United States.[130] Prior to 2017, there was no effort to keep official statistics about these incidents.[131] It was not until the Department of Justice, in response to criticism, "introduced a pilot program designed to gather national data on use of force by police" that such tracking began.[132] National newspapers such as *The Guardian* and *The Washington Post* now have websites counting the number of people killed by law enforcement officers.[133] In 2016 alone, 962 people were killed by police in the United States; of that number, 223 (twenty-three percent) were Black men, despite making up approximately six percent of the national population.[134]

Furthermore, Black Americans—men in particular—are twenty-one times more likely to be killed by police officers than White men are.[135] From 2010 to 2012, the 1,217 deadly police shootings "show that [B]lacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million [W]hite males in that age range died at the hands of police."[136] These disparities are not only present in policing, but they are also very present in the system the police officers enforce.[137] This system includes: pretrial,

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due to their race.

Id. at 22. Similar empirical studies were done in major cities all over the United States including Philadelphia, Chicago, and New York City. *See id.* at 22–27. These studies were all done in more recent years and all yielded similar results. *Id.*

130. *See infra* note 131 and accompanying text.

131. Katheryn Russell-Brown, *Making Implicit Bias Explicit*, *in* POLICING THE BLACK MAN 135, 136 (Angela J. Davis ed., Vintage Books 2018).

132. *Id.*

133. Jessie D. McKinnon & Claudette E. Bennett, *We the People: Blacks in the United States*, U.S. CENSUS BUREAU (Aug. 2005), https://www.census.gov/prod/2005pubs/censr-25.pdf; *see also Fatal Force*, WASH. POST (Jan. 22, 2020), https://www.washingtonpost.com/graphics/national/police-shootings-2016/.

134. *See id.*; Jesse. D. McKinnon & Claudette E. Bennett, *We The People: Blacks in the United States*, CENSUS 2000 SPECIAL REPORTS, 1 (August 2005), https://www.census.gov/prod/2005pubs/censr-25.pdf; *see also Fatal Force*, WASH. POST, *supra* note 133.

135. Ryan Gabrielson, Eric Sagara, & Ryann Grochowski Jones, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), https://www.propublica.org/article/deadly-force-in-black-and-white.

136. *Id.*; *see* WASH. POST, *supra* note 133 (reporting that eighteen unarmed Black men were shot and killed by the police in the U.S. in 2016).

137. *See infra* note 138.

sentencing, parole, and post-prison/collateral consequences.[138] There are stark racial disparities that exist at every step of the criminal process from arrest through the sentencing process.[139] Witnessing, hearing, and seeing these statistics and practices replayed—whether it be in person or through stories and media accounts—is known to have traumatic psychological effects on the community enduring these systemic hardships.[140]

1. Transgenerational Effects

There has been a great deal of emerging research exploring "how historical and cultural traumas affect survivors' children for generations."[141] These transgenerational effects extend far beyond just psychological; they are also "familial, social, cultural, neurobiological, and possibly even genetic."[142] Specifically, "while direct studies on intergenerational effects may be sparse, it's not difficult to spot such impacts in current generations of [Black] Americans."[143] One of the most prevalent examples evidencing the existence of transgenerational trauma within the Black American community is the dread that Black American parents face when talking to their sons about potential police encounters.[144] Because Black Americans are more likely to have family members with personal experiences of being verbally or physically abused by the police and are more likely to have such experiences themselves, "it is no surprise that [B]lack families have been proactive in transmitting norms on dealing with law enforcement."[145] These lessons

138. *See* THE SENTENCING PROJECT, *supra* note 124. "[Black] Americans were incarcerated in local jails at a rate 3.5 times that of non-Hispanic [W]hites in 2016." *Id.* Nationally, the imprisonment rate for Black Americans adults is 5.9 times the rate of white adults and is at far higher rates in some states. *Id.* "Nearly half (48%) of the 206,000 people serving life and 'virtual life' prison sentences are [Black] Americans." *Id.* As revealed by *The New York Times*, "comparable in-prison conduct—a major determinant of parole decisions—may result in divergent prison disciplinary records for [Black Americans] versus [W]hites." *Id.* "In 2010, 8% of all adults in the United States had a felony conviction on their record[; however,] [a]mong [B]lack American men, the rate was one in three (33%)." *Id.*

139. *See* THE SENTENCING PROJECT, *supra* note 124.

140. *See infra* Parts IV.A.1, IV.A.2.

141. Tori DeAngelis, *The Legacy of Trauma*, 50 AM. PSYCHOL. ASS'N No. 2 (Feb. 2019), https://www.apa.org/monitor/2019/02/legacy-trauma.

142. *Id.*

143. *Id.*

144. *See id.* ("It's traumatizing for parents and it's traumatizing for kids.").

145. *See* Henning, *supra* note 89, at 64.

typically resemble the following:

> And you know now, if you did not before, that the police departments of your country have been endowed with the authority to destroy your body. It does not matter if the destruction is the result of an unfortunate overreaction. It does not matter if it originates in a misunderstanding. It does not matter if the destruction springs from a foolish policy.[146]

This trauma is deemed by Dr. Alfiee Breland-Noble, director of the African American Knowledge Optimized for Mindfully Healthy Adolescents Project (AAKOMA) at Georgetown University to be a "'shared stress'—the feeling that you have to manage everything within your own community because you don't know what you'll encounter in society at large."[147]

According to Dr. Noble, "[t]here is a sense among [Black] Americans and other marginalized people that our stressors are unique to us and not necessarily shared by people outside our groups. . . . So, we share stories of our lived experiences that help set the stage for how our loved ones encounter the world."[148] These shared stories and experiences often "lead to general distrust of others outside the group[, especially] those from historically oppressive groups" such as the police force.[149] The combination of historically oppressive treatment of Black Americans by the police force in the United States, the distrust and skepticism of the police force by Black Americans,[150] and the uptick in reporting of racial disparities in policing—including viral videos of police using excessive force—has a significant impact on the behaviors of Black Americans when interacting with police

146. Ta-Nehisi Coates, *Letter to My Son: Excerpts from* Between the World and Me, THE ATLANTIC (July 4, 2015), https://www.theatlantic.com/politics/archive/2015/07/tanehisi-coates-between-the-world-and-me/397619/. Other instructions include: "always keep your hands where they can see them"; "avoid sudden movements"; "behave in a courteous and respectful manner toward officers"; and "[d]on't do nothing, don't say nothing smart." Henning, *supra* note 89, at 64.

147. *See* DeAngelis, *supra* note 141.

148. *Id*. The Black American community shares this wisdom to younger generations as a means of passing down survival tactics for moving through a society which has marginalized them—often brutally—in hopes that the younger generation will find a way to survive it (i.e. self-preservation). *See id.*

149. DeAngelis, *supra* note 141.

150. *See supra* Part IV. This is a distrust that the Court recognizes and acknowledges. *See supra* Parts IV.A, IV.A.1.

officers.[151]

2. Media's Influence on Black Americans' Perception of the Police Force

In August 2019, the Los Angeles Times reported that "[g]etting killed by police is a leading cause of death for young black men in America."[152] Seeing a headline like this can have devastating effects on Black Americans.[153] However, the media does not only report these disparities through articles.[154] In 1991, a bystander caught four Los Angeles policemen on camera savagely beating Rodney King, a Black American man.[155] The "graphic video of the attack was broadcast into homes across the nation and worldwide."[156] After the trial, the police officers were acquitted and "[f]ury over the acquittal—stoked by years of racial and economic inequality in the city—spilled over into the streets, resulting in five days of rioting in Los Angeles."[157] This event ignited a national conversation about the police use of force and racial disparities in policing—a conversation that very much continues today.[158] According to Jody David Armour, a law professor at the University of Southern California, "[t]here was ocular proof of what happened. It seemed compelling. . . . And yet, we saw a verdict that told us we couldn't trust our lying eyes. That what we thought was open and shut was really 'a reasonable

151. *See infra* Part IV.A.2. Given the history and current affairs, including an uptick in reporting and the media's amplification of racial disparities, for Black Americans, being nervous or evasive before or during an interaction with police officers is oftentimes both normal and reasonable and not suggestive of any wrongdoing. *See supra* Parts II, IV.A.

152. Amina Khan, *Getting Killed by Police is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men. Currently, "1 in 1,000 black men and boys in America can expect to die at the hands of police." *Id.* "That 1-in-1,000 number struck us as quite high. . . . That's better odds of being killed by police than you have of winning a lot of scratch-off lottery games." *Id*.

153. *See supra* Parts IV.A, IV.A.1. It can cause trauma, strike fear, and affect the psyche in drastic ways. *See supra* Parts IV.A, IV.A.1.

154. *See infra* notes 155–156 and accompanying text.

155. Anjuli Sastry & Karen Grigsby Bates, *When L.A. Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.

156. *Id.*

157. *Id.*

158. *Id.*

expression of police control' toward a black motorist."[159] The shock and disbelief of the verdict led to five days of extreme civil unrest, during which Black Americans took to the streets; however, "that shocking, grainy video of [Rodney's] beating would be just the first of a long line of police brutality videos to go viral.. . . Ain't nothing changed but the year it is."[160]

Many videos of police violence against Black Americans gained significant media attention and went viral.[161] These videos are available all over social media, able to be watched frame by frame, in slow motion or fast-forwarded.[162] While these videos work to refute police accounts, reveal crucial facts that are often withheld from families of victims and juries, and also spark campaigns for justice and reform,[163] they also "are so pervasive, they inflict a unique harm on viewers, particularly [Black] Americans, who see themselves and those they love in these fatal encounters."[164]

Social scientists have been studying "linked fate" in the Black American community.[165] One study has revealed that in the Black American community, "individual life chances are recognized as inextricably tied to the race as a whole."[166] Put differently, when Black Americans watch a video that exhibits "police violence against another black person, they see themselves or their loved ones in that person's place [and realize] that the same fateful encounter could very well happen to them.".[167] This interpretation has been

159. *Id.*

160. *Id.*

161. 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. These videos included Delrawn Small, an unarmed black man shot and killed by a police officer; Alton Sterling, who "died after police in Louisiana tackled and shot him outside the convenience store where he was selling CDs"; and Philando Castile, who "was shot and killed by police in Minnesota during a traffic stop." *Id.* More recently, George Floyd, an unarmed Black man, died after a police officer restrained him by pressing his knee to Floyd's neck until his last breath. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

162. Gregory, *supra* note 161. "With the ubiquity of smartphones and dash and body cameras, there is ample footage to expose police violence and grab the nation's attention. In a virtuallyunlimited digital space, the images spread fast and far." *Id.*

163. *See* Gregory, *supra* note 161.

164. *See* Gregory, *supra* note 161.

165. *See* Gregory, *supra* note 161; DeAngelis, *supra* note 141.

166. See Gregory, *supra* note 161; *see also* DeAngelis, *supra* note 141.

167. Gregory, *supra* note 161; *see also* DeAngelis, *supra* note 141.

proven to induce "stress, fear, frustration, anger, and anxiety, . . . [as well as] eating and sleeping disorders, high blood pressure, and heart problems."[168] Videos like these have been proven to make viewers "start to think differently about their world," specifically that:

> They feel their future is limited, while any symbol of the police can impart a sense of fear and dread. These images "remind them of the cheapness of [B]lack life." . . . This feeling deepens when these videos showing violent [B]lack death are treated by the media as death porn or perverse entertainment. "To just have [B]lack bodies laying out on the street . . . like roadkill for everybody to see—this is dehumanizing and traumatic."[169]

Watching footage of Black Americans repeatedly being subjected to police violence can make "viewers so piercingly aware of police violence that they instinctively disengage from the police rather than risk facing them."[170] The videos themselves are not the only source of trauma for Black Americans; comments from social media users in response to these videos also reinforce this trauma, which is "compounded when videos reveal what seems to be a clear case of excessive or unnecessary police force, only for the officers involved to not face charges or be acquitted, routinely by a mostly [W]hite jury."[171]

The media influences perceptions of law enforcement when individuals lack any personal experience with the police.[172] Multimedia depictions of police corruption and violence have brought widespread awareness that implicit racial bias is still alive and well within police departments.[173] In fact, new technologies have allowed America to chronicle these videos that show, "in soul-wrenching detail, the ease with which a [Black] life can be

168. Gregory, *supra* note 161*; see also* DeAngelis, *supra* note 141.

169. Gregory, *supra* note 161.

170. *See* Gregory, *supra* note 161.

171. *See* Gregory, *supra* note 161.

172. ANDREW SHELDON FRANKLIN, ROBERT KELVIN PERKINS, MORGAN D. KIRBY & KIJANA P. RICHMOND, *The Influence of Police Related Media, Victimization, and Satisfaction of African American College Students' Perceptions of Police*, FRONTIERS IN SOC. (Sept. 10, 2019), https://www.frontiersin.org/articles/10.3389/fsoc.2019.00065/full.

173. *See id.*

extinguished."[174] Many of these incidents captured on video occur because the Supreme Court's interpretation of the Fourth Amendment regarding stop and frisks and the reasonable suspicion standard allows police officers to force engagements with Black Americans with little or no justification.[175] This overexposes Black Americans to the possibility of violence.[176] In order to not further perpetuate these racial disparities in policing at such an alarming rate, a recalibration of the reasonable suspicion analysis must be established to account for the profoundly distinct experience Black Americans have always faced with the police force.[177]

V. A TRUE TOTALITY OF THE CIRCUMSTANCES ASSESSMENT

Prior to 2019, courts consistently analyzed reasonable suspicion without taking race directly into account.[178] This is particularly harmful when assessing "nervous or evasive" behavior in the presence of or at the sight of officers, and yet utilizing the behavior as a factor to conclude that reasonable suspicion exists.[179] That assessment of reasonable suspicion discounts the Black American experience because it does not account for what history has taught Black Americans about the police force and how that affects their behavior in the presence of or at the sight of police officers.[180] Instead, the race-neutral analysis justifies, legitimizes, and perpetuates the racial

174. Gregory, *supra* note 161. Historically, soul-wrenching images were gathered to help support "legal reforms against racial discrimination and state violence against [Black] American people. In the 1890s, Ida B. Wells documented lynchings across the United States, publishing statistics and details of several dozen of the killings in pamphlets." *Id.* "During the Civil Rights Movement[], photographers captured images of [Black protestors] being attacked by police dogs," beaten, clubbed, fire-hosed, spat on, etc. *Id.* In the wake of these excessive police brutality videos depicting the shootings/deaths of many unarmed Black Americans, the Supreme Court should use these videos and racial disparity accounts as support for the necessity of legal reform, as the Ninth Circuit has in *United States v. Brown*. 925 F.3d 1150 (9th Cir. 2019).

175. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 127–29 (2017); *see also* Carpiniello, *supra* note 54, at 356–57 (noting Fourth Amendment law allows the police "to force interactions with [Black] Americans").

176. Carbado, *supra* note 175, at 128–29.

177. *See infra* Part VI.

178. *See* Illinois v. Wardlow, 528 U.S. 119, 137 (2000); United States v. Brignoni-Ponce, 422 U.S. 873, 884–86 (1975); Florida v. Rodriguez, 469 U.S. 1, 5 (1984); Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also supra* note 85 and accompanying text.

179. *See* Wardlow, 528 U.S. at 137.

180. *See supra* Parts III, IV.

disparities in policing that are prevalent today.[181] To mitigate this racial disparity, the Supreme Court should adopt the Ninth Circuit's analysis of reasonable suspicion in *Brown*, and consider the race of the "suspect" in cases involving nervous or evasive behavior in the assessment of reasonable suspicion.[182] Otherwise, the reasonable suspicion standard will continue to facilitate and justify "the 'wholesale harassment' of [B]lack communities" recognized in the majority opinion in *Terry*.[183]

A. Race in the Assessment of Reasonable Suspicion

In order for courts to play a role in mitigating perpetuated racial disparities in policing, courts cannot ignore race as a factor in their policies.[184] The courts must be rigorous in reviewing police stops, arrests, and other physically aggressive encounters with civilians—Black Americans in particular—otherwise, the courts become complicit in affirming the aggressive tactics used by the police.[185] Courts have stated themselves that civilians have a right to avoid the police and go about their business.[186] Yet, these same courts often undermine that notion by finding that because a suspect is engaged in some type of nervous or evasive behavior, the individual must be manifesting a consciousness of guilt.[187]

The Supreme Court has recognized that "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."[188] When race is assessed in the analysis of reasonable suspicion, the link between flight and consciousness of guilt becomes slight.[189] A Black American's nervous or evasive behavior in the presence of the police

181. *See supra* Part IV.

182. *See* United States v. Brown, 925 F.3d 1150, 1156–57 (9th Cir. 2019); *see also supra* Parts III, IV.

183. *See* Carbado, *From Stop and Frisk*, *supra* note 51, at 1537.

184. *See supra* Parts III, IV.

185. *See supra* Part IV.

186. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 497–98 (1983); *see also* Smith v. United States, 558 A.2d 312, 316 (D.C. 1989).

187. *See* Henning, *supra* note 89 at 85; *see infra* notes 188192 and accompanying text.

188. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

189. *See, e.g.*, United States v. Brown, 925 F.3d 1150, 1156–57 (9th Cir. 2019); *see also Wardlow*, 528 U.S. at 128–29 (Stevens, J., concurring) (noting there are numerous reasons an innocent person may flee from a police officer); *see also supra* Part IV (describing how the Black American experience causes flight from the police even when innocent).

is just as likely to be a protective measure to avoid police violence as it is to result from consciousness of guilt.[190] Black Americans who live in a society where police-on-Black violence has always been commonplace have many reasons to be nervous or exhibit evasive behavior in the presence of or at the sight of the police.[191] When courts take race directly into account in a Fourth Amendment reasonable suspicion assessment, as the Ninth Circuit did in *Brown*, it should significantly negate any inference that a Black American's nervous or evasive behavior with police officers manifests a consciousness of guilt; more importantly, it shows Black Americans that the courts see their experience, and that it is not irrelevant, but it matters.[192]

B. Recalibrating the Assessment of Fourth Amendment Reasonable Suspicion

When assessing Fourth Amendment reasonable suspicion, the courts should consider the race of the individual as a factor, especially when analyzing the individual's behavior.[193] The Supreme Court has mandated, in evaluating whether reasonable suspicion exists, the necessity of examining the "totality of the circumstances—the whole picture."[194] However, the Court has found that race-specific reasons for flight are not relevant in determining reasonable suspicion.[195] By discounting Black Americans' race-specific reasons for nervous or evasive behavior, the Court is using only a limited—or convenient—totality of the circumstances analysis, because oftentimes those race-specific reasons are a significant part of "the whole picture."[196] This race-specific analysis would force the Court to account for—and not disregard—the distinctly unique experience of Black Americans in interacting

190. *See* California v. Hodari D., 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting) (recognizing that the idea that only the guilty flee fails to account for minority citizens and capture the total reality of our world). This point was reiterated in *Wardlow*. *See Wardlow*, 528 U.S. at 129 n.3 (Stevens, J., dissenting).

191. *See supra* Parts II, III.B.

192. *See infra* Part V.B.

193. *See infra* notes 194–197.

194. *Wardlow*, 528 U.S. at 126–27 (Stevens, J., dissenting); *see supra* note 88 and accompanying text.

195. *See Wardlow*, 528 U.S. at 125–26 (holding that potential innocent reasons for flight in general are not enough to constitute a Fourth Amendment violation).

196. *See supra* Parts II, IV.

with police officers.[197]

In *Brown*, had the court disregarded the race of the "suspect" in its assessment of reasonable suspicion, flight would have "carr[ied] the day in authorizing a stop."[198] However, the court rightfully recognized that Brown was a Black American man and in analyzing that fact, the court considered his motivation as a fleeing Black person and analyzed whether or not that could be seen as reasonable—i.e., it asked how a reasonable Black American would react under the circumstances.[199] Race is an important factor in this analysis because Black Americans have "unique reactions to police encounters based on the reality of their experience on the streets of America."[200] When courts consider how race might have influenced a Black American's attitude towards a police encounter, the court becomes not only more understanding, but also more aware of the cultural differences which promulgate disparate treatment in society.[201] Using a color-blind analysis in evaluating whether reasonable suspicion exists in a certain instance ignores and dehumanizes the Black American experience and how that experience predictably causes Black Americans to react uniquely—albeit reasonably, in light of that experience—when interacting with the police.[202]

This proposal, calling for the recalibration of the reasonable suspicion assessment, is not proposing that Black Americans be treated differently when encountering the police.[203] Rather, this Comment proposes that the Court take particularized observations of an individual into account and consider those observations within the norms of that individual's community; more importantly, it asks the Court not to discount that experience.[204] A true totality of the circumstances analysis must look at the whole picture.[205] A race-specific analysis in the assessment of reasonable suspicion would ensure that

197. *See* Carpiniello, *supra* note 54, at 369; *see also* United States v. Brown, 925 F.3d 1150, 1156–57 (2019) (accounting for the fact that the defendant was a Black American—and how that might have an effect on his behavior—significantly negated the inference that the defendant engaged in flight because he was guilty).

198. *Brown*, 925 F.3d at 1156–57.

199. *Id.*

200. Carpiniello, *supra* note 54, at 378.

201. *See supra* Parts II, IV.

202. *See supra* Part V.

203. *See infra* notes 204–210.

204. *See* Carpiniello, supra note 54 at 378.

205. *See* United States v. Brown, 925 F.3d 1150, 1156–57 (9th Cir. 2019).

the Black American experience is seen and accounted for.[206] Black Americans are disproportionately targeted by the police and burdened with concerns of police surveillance, social control, and violence.[207] Multimedia platforms, from social networks to the twenty-four hour news cycle, reinforce the idea that race exposes Black Americans to these concerns.[208] Making race one of the contextual factors in a reasonable suspicion assessment would account for the individual's reasonable perception of the police, beyond the mere analysis of the individual's behavior.[209] This true totality of the circumstances analysis will make reviewing police stops, arrests, and other physically aggressive encounters with civilians more rigorous; this, in turn, will mitigate disproportionate policing in America while also working to heal Black American culture from the traumatizing effects that this history of disproportionate policing has caused.[210]

VI. THE IMPACT OF ASSESSING RACE

Judicial reform of the reasonable suspicion assessment of the Fourth Amendment would require the courts to consider the race of the suspect in interpreting the suspect's behavior.[211] This would negate the inference of consciousness of guilt that is usually associated with nervous or evasive behavior in the presence of police officers.[212]

Evidence has repeatedly shown that police departments such as the NYPD ha[ve] employed stop-and-frisk practices to engage in prophylactic racial profiling."[213] Black Americans are overrepresented in jails and prisons

206. *See, e.g.*, *id.* at 1156, 1159.

207. *See supra* Part IV.2.

208. *See supra* Part IV.

209. *See, e.g.*, *Brown*, 925 F.3d at 1156, 1159.

210. *See supra* Parts III, IV.

211. *See* Henning, *supra* note 89, at 85. This new assessment is of particular importance when the Court is analyzing the behaviors of the suspect and concludes that nervous or evasive behavior weighs in favor of finding justifiable, reasonable suspicion. *See supra* Part V.

212. *See* Henning, *supra* note 89, at 85. For example, "[a] [B]lack child's flight from the police is [a] clear example of how race and age might negate inference of guilt." *Id.* at 86. "Flight may be imminently reasonable for an adolescent who is impulsive and often does not engage in the same commonsense judgments and behaviors as adults. . . . When we add race to adolescent indiscretions, the link between flight and consciousness of guilt becomes even more tenuous." *Id.*

213. Carbado, *From Stop and Frisk*, *supra* note 51, at 1537. From January 2004 to June 2012, the NYPD "conducted over 4.4 million Terry stops. . . . Blacks and Latinos were the subjects of 83 percent

relative to numbers in the general population.[214] Racial disparities in policing present irrefutable evidence that police officers are much more likely to stop a Black American.[215] This practice has, in effect, created the justified belief that because Black Americans are more frequent targets of police stops, and thus, more frequent targets of undesirable treatment by the police force, they are more likely to be nervous or evasive at the sight of or during an interaction with the police force.[216] Black Americans try to avoid the police, who have a legacy of extreme actions, including harassment and beatings.[217] The Court's use of a more rigorous standard—taking race into account in the contextual analysis of reasonable suspicion—would have a positive impact on the racial disparities in policing as well as work to heal relations between Black Americans and the police force.[218]

Mitigating or negating the inference that a Black American's nervous or evasive behavior manifests a consciousness of guilt would have the effect of limiting police contact with the Black American community—likely reducing it down to as much contact as police have with any other racial group.[219] This recalibration of the reasonable suspicion assessment would lead to a reduction of police violence, arrests, and incarceration among Black Americans.[220] That reduction would show Black Americans that the law recognizes their unique experience and, at the very least, takes it into consideration.[221] A true totality

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of the 4.4 million stops. . . . The NYPD frisked 52 percent of the people they stopped. Police found weapons on 1.0 percent of the [B]lacks they frisked . . . . [T]he NYPD did not find weapons on 98.5 percent of the roughly 2.3 million people they frisked." *Id.* at 1538.

214. THE SENTENCING PROJECT, *supra* note 124; *see supra* Part IV.

215. *See supra* Part IV.

216. *See supra* Parts II, IV.

217. *See supra* Part IV.A.

218. *See* Russell-Brown, *supra* note 131, at 137–38. Because this is a more rigorous standard, it would hold officers accountable in justifying their articulable reasonable suspicion with less of the implicit bias that "influences individual actors within the justice system." *Id.* "[Implicit bias] has been identified as an inroad to understanding racial disparity that persists across the justice system continuum, including arrest, bail decisions, prosecutorial charging decisions, jury selection, sentencing, and parole." *Id.*

219. *See, e.g.*, Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 70–85 (2015) (analyzing the specific stop circumstances and the percentage of stops based on each factor in the reasonable suspicion assessment).

220. *See supra* Part IV.

221. Illinois v. Wardlow, 528 U.S. 119, 126–27 (2000). The totality of the circumstances analysis is set to provide the full picture. *Id.* However, not analyzing the race of a person who decides or

of the circumstances analysis reflects upon the whole picture—every detail of the situation—and how that may affect what transpired.[222] Thus, a true totality of the circumstance analysis takes race into account.[223]

Similarly, public policy decisions appear to be "race-neutral" on the surface; however, many of them undoubtedly have racially biased outcomes due to policymakers' failure to analyze the unintended impacts of policies that were developed in the name of "public safety."[224] An example would be the drug-free school zone laws.[225] While these policies were adopted with the goal of deterring drug sales on school grounds, in general, there are harsher penalties for drug offenses committed within a designated school zone.[226] "One of the many problems with such policies is that individuals can be subjected to these penalties even if they had no knowledge that they were within the school zone district."[227] Policymakers often presuppose the "heavy-handed law enforcement approach is the only, or most effective, means of responding" to violations in communities of color; however, such policies "implicitly reject[] policy responses that might prioritize creating economic opportunity, improving educational outcomes, expanding substance abuse treatment centers, or other measures."[228]

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unconsciously acts in a nervous or evasive way is leaving out part of that picture. *See id.*; *supra* Parts III, VI.

222. *Wardlow*, 528 U.S. at 126–127. This very reason is why the "state of mind" of the defendant is very important in criminal cases because it affects the defendant's responsibility for a crime. Criminal Resource Manual, *Culpable States of Mind*, DEP'T OF JUSTICE ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-1510-culpable-states-mind-18-usc-1028 (last visited Aug. 29, 2020). Assessing race in the totality of the circumstances analysis explores the state of mind of a Black American who exhibits nervous or evasive behavior and works to understand its reasonableness in light of the whole picture. *See also supra* Part IV.A.

223. *See supra* Parts III, IV, –V.

224. Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, *in* POLICING THE BLACK MAN 31, 46 (Angela J. Davis ed. 2017). "Many of these effects can be seen in policies adopted through the war on drugs in recent decades. At the level of policing, a wealth of evidence, generally acknowledged by law enforcement leadership, has documented that drug law enforcement has disproportionately focused on communities of color." *Id.*

225. *Id.* at 48–49.

226. *Id.*

227. *Id*. at 49.

228. *Id*. One example is the mandatory penalties for crack cocaine offenses that were enacted by Congress in 1986.

> [L]egislation was adopted in record time, with virtually no discussion about approaches to the problem other than harsh penalties. Here, too, the racial imagery was inescapable. As portrayed on the cover of news magazines and other media, "the problem" was identified

VII. CONCLUSION

The Fourth Amendment is often lauded as one of the Constitution's greatest protections of individual liberty[229]: it codifies the belief that individuals are allowed—as a fundamental right—to live their lives free from unreasonable police intervention.[230] Inherent in that belief is the idea that an individual should be able to walk down the street without fear of being stopped by the police without cause.[231] That protection of individual liberty, however, "has been stripped from millions of Americans" due to the Court's creation of the overly lax reasonable suspicion standard, and its failure to recognize and account for the Black American experience.[232]

The Ninth Circuit correctly recognized that the nervous or evasive behavior of a Black American in the presence of or at the sight of a police officer does not always suggest that the person has something to hide.[233] The court did not discount the race of the "suspect," and, by taking race into account, the court recognized that Black Americans have many reasons—drawn from inferences and common sense judgments—to act in a nervous or evasive way in the presence of the police.[234] It recognized that the history of the police force's aggressive tactics in marginalizing Black Americans, along with the increase in the reporting of these tactics via multimedia platforms such as the twenty-four hour news cycle, newspaper articles, and social media, have created not only a culture of fear, distrust, and resentment toward the police force among Black Americans, but also have had an effect on the Black American psyche.[235] These effects include transgenerational trauma and the idea of a linked fate, which understandably caused Black Americans to feel nervous or to exude evasive behaviors in the presence of or at the sight of police officers because that was how history and current affairs advised them

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> as one of [B]lack men using and selling crack. As a consequence, the penalties adopted for crack cocaine offenses—80 percent of which were applied to [Black] Americans—were far more punitive than those for powder cocaine, a drug more widely used by whites and Latinos.

Id.

229. Henning, *supra* note 89, at 85.
230. Henning, *supra* note 89, at 85.
231. Henning, *supra* note 89, at 85.
232. Henning, *supra* note 89, at 85.
233. *See supra* notes 88–100 and accompanying text.
234. *See supra* Part III.B.
235. *See supra* Parts II, IV, V.

to act.[236]

The Supreme Court should adopt the more rigorous standard of assessing race in its totality of the circumstances analysis of reasonable suspicion.[237] This new standard would mitigate the policing disparities in America today and work to slowly mend the relationship between Black Americans and the police force.[238] The Court should also acknowledge the distinct experience that Black Americans face with regard to the police force and recognize its relevance to the American criminal justice system.[239] In sum, the Black American experience must be seen by the American criminal justice system, starting with the courts.[240]

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236. *See supra* Parts II, IV.
237. *See supra* Parts V–VI.
238. *See supra* Parts V–VI.
239. *See supra* Parts II, III, IV–V.
240. *See supra* Parts II, IV.

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