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## Don't Make a Run for it: Illinois v. Wardlow in Light of Police Shootings and the Nature of Reasonable Suspicion

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

*Edith Perez*\*

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

Abstract

Fear and distrust of law enforcement have been longstanding in the Black community.<sup>3</sup> Those in power have fueled this fear and distrust through brutal beatings, harassment, and general discrimination.<sup>4</sup> The reasonable suspicion standard is problematic because it allows for unchecked biases to guide interactions between police officers and minorities, creating incentives to persecute. But today, a new tool exacerbates this problem and makes escaping the violence nearly impossible, deepening the contempt, and spreading its adverse effects: the media. Using a hierarchy of “if it bleeds it leads,” the capitalistic fear-based media targets the anxieties and biases of Americans, creating a more profound fear and distrust of law enforcement, all while simultaneously strengthening the fear and distrust of Black men.<sup>5</sup> The U.S. Supreme Court decision in *Illinois v. Wardlow* adds to the mix by allowing for the stop and frisk of individuals who run from police officers while present in “high crime” areas—a known proxy for minority neighborhoods.<sup>6</sup> A Black man’s flight is a result of racial profiling<sup>7</sup> and

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1. 528 U.S. 119 (2000).

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

3. See Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Feels the Police. Here’s Why*, PAC. STANDARD, <https://psmag.com/social-justice/why-black-america-fears-the-police> [<https://perma.cc/T9Z3-6FLV>] (May 8, 2018) (“For [B]lack Americans, policing is ‘the most enduring aspect of the struggle for civil rights,’ because it has always been a mechanism for racial control.”).

4. See *id.*

5. See Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, PSYCHOL. TODAY (June 7, 2011), <https://www.psychologytoday.com/us/blog/two-takes-depression/201106/if-it-bleeds-it-leads-understanding-fear-based-media> [<https://perma.cc/A8A2-RR46>] (describing fear-based media as “depicting categories of people as dangerous and replacing optimism with fatalistic thinking”).

6. See *Wardlow*, 528 U.S. at 123, 123 n.1 (2000); *infra* Section II.A (discussing high crime as a proxy for race).

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

media-bred fear of fatal encounters.<sup>8</sup> But the law has been slow to reflect the implications of these realities.

In the wake of highly publicized police shootings, the legal discussion is focused on holding officers accountable.<sup>9</sup> This Note begins by addressing the reasonable suspicion standard and the inordinate power it gives police officers over the bodies of Black men. Then the discussion will shift to how the reasonable suspicion standard has been unrealistic from the time of its creation in *Terry v. Ohio*.<sup>10</sup> Moving forward to *Wardlow*, this Note will discuss how, by allowing flight to be considered a factor for reasonable suspicion, *Wardlow* contributes to the bleakness of police contact with Black men and does not consider legitimate reasons for running. To that point, this Note will address how on the one hand, *Wardlow* is consistent with some Supreme Court precedent,<sup>11</sup> but on the other, its implications urge reassessment.<sup>12</sup>

This Note will ultimately explain how the media has changed the encounters between the police and minorities, in that it has harvested deeper contempt within minority communities and led to significant mental health issues within them—cultivating reasons to run.<sup>13</sup> At its core, this Note argues that the *Wardlow* decision is troubling; its holding relies on the loose concept of “high crime area” coupled with “unprovoked flight.”<sup>14</sup> Individuals who may be present in their own neighborhoods and avoiding contact with the police<sup>15</sup> are in constant states of seizure and subject to a stop and frisk without any other justification—a costly repercussion and an irreversible erosion of privacy.

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

9. See, e.g., Ciara McCarthy, *Philando Castile: Police Officer Charged with Manslaughter Over Shooting Death*, GUARDIAN (Nov. 16, 2016, 12:01 PM), <https://www.theguardian.com/us-news/2016/nov/16/philando-castile-shooting-manslaughter-police-jeronimo-yanez> [<https://perma.cc/93VH-48WQ>].

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

11. See *id.* at 1; *Whren v. United States*, 517 U.S. 806 (1996).

12. See *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980).

13. See Rick Jervis, *Who Are Police Protecting and Serving? Law Enforcement Has History of Violence Against Many Minority Groups*, USA TODAY (June 15, 2020, 3:20 PM), <https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/> [<https://perma.cc/B3VW-B5A4>] (describing how the history of violence against minorities has resulted in minority groups underusing and avoiding interactions with police).

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

15. At minimum, two Supreme Court Justices have at least implied that avoiding contact with the police is legal. See *Mendenhall*, 446 U.S. at 553–54 (Stewart, J., joined by Rehnquist, J.) (“Police officers enjoy ‘the liberty (again, possessed by every citizen) to address questions to other persons,’ although ‘ordinarily the person addressed has an equal right to ignore his interrogator and walk away.’”) (quoting *Terry*, 392 U.S. at 31–33 (Harlan, J., concurring)).

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I. INTRODUCTION TO “THE MOST COMMON NEGATIVE INTERACTION”<sup>16</sup>:  
THE STOP AND FRISK

To begin, as a practical matter, a Black man’s encounter with the police does not always result in fatal wounds. Instead, when subjected to a “stop and frisk,” his “life [is] interrupted”<sup>17</sup> and his body is felt all over. In *Terry v. Ohio*, Supreme Court diluted the standard for searches and seizures<sup>18</sup> when it found that reasonable suspicion, a much lesser standard than probable cause, was sufficient for a brief stop and search.<sup>19</sup> The officer in *Terry* was patrolling in plain clothes when he saw two men who “didn’t look right.”<sup>20</sup> The officer approached the men and eventually

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

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

18. See Sarah Walker, Note, *Arrest As an Invasion of the Right to Privacy: How Officer Gilroy’s Arrest of Shelwanda Riley for Violating the Fort Pierce Youth Protection Ordinance Violated Her Privacy Rights Under the Florida Constitution*, 19 U. FLA. J.L. & PUB. POL’Y 325, 336 (2008) (“Since *Terry*, the Court’s decisions have required a diminishing quantum of ‘reasonable suspicion’ to justify investigative detentions.”); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: THE POLICE 41 (5th ed. 2015)

19. 392 U.S. at 30.

20. *Id.* at 5.

grabbed one and patted the outsides of his body.<sup>21</sup> This is now known as the “stop and frisk.”<sup>22</sup> To uphold this, the Court established the reasonable suspicion standard: “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>23</sup> This requires less justification than probable cause and allows bias to seep through undetected.<sup>24</sup>

In 2014, a police officer who performed a stop and frisk on sixteen-year-old Darrin Manning squeezed the minor’s testicles so hard that one ruptured,<sup>25</sup> and in 2018, a grown man reported a police officer for fingering him.<sup>26</sup> The Supreme Court acknowledged that a stop and frisk “may inflict great indignity and arouse strong resentment.”<sup>27</sup> Yet, stop and frisk searches continue to be “the most common negative interaction[] that citizens have with the police.”<sup>28</sup> Police officers can abuse their discretion in choosing their targets and interpreting their actions. For example, officers are more likely to identify “Furtive Movements”<sup>29</sup> in their justification for stopping Black and Hispanic or

21. *Id.* at 6–7.

22. *Id.* at 10.

23. *Id.* at 21.

24. Another problem with *Terry* lies in allowing evidence to be seized and introduced against individuals searched without probable cause. Under *Terry*’s reasoning, officer safety concerns warrant the search, but the seizure, and inapplicability of the exclusionary rule, are not supported by that same concern. The Court underestimated the value of removing the incentive for officers to engage in frequent stop and frisk searches. If officers were only allowed to search and seize for their own safety, and not for the commencement of a criminal case, stop and frisk searches would actually reflect the stated purpose of *Terry* stops. In turn, allowing the introduction of evidence against individuals incentivizes more frequent frisks and allows for police officers to harass minority groups, particularly the Black community. A reconsideration of *Wardlow*, as argued below, will not decrease the incentive to stop and frisk but will make the intrusions more scrutinized at the inception, which will ensure that searches are in fact “reasonable” under the Fourth Amendment and not a product of officer bias.

25. See Sebastian Murdock, *Darrin Manning, Pa. Teen, Allegedly Has Testicle Ruptured by Cop*, HUFF POST (Jan. 23, 2014, 12:40 PM), [https://www.huffpost.com/entry/darrin-manning-testicle-rupture\\_n\\_4651700](https://www.huffpost.com/entry/darrin-manning-testicle-rupture_n_4651700) [<https://perma.cc/R5CM-WEHQ>]; see also Joaquin Sapien et al., *Over a Dozen Black and Latino Men Accused a Cop of Humiliating, Invasive Strip Searches. The NYPD Kept Promoting Him*, PROPUBLICA (Sept. 10, 2020, 5:00 AM), <https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him> [<https://perma.cc/BFX2-SE4S>].

26. See Maria Perez, *Police Officer Sued for Inappropriate Stop and Frisk, ACLU Lawsuit Alleges*, NEWSWEEK (June 20, 2018), <https://www.newsweek.com/police-officer-sued-inappropriate-stop-frisk-aclu-washington-dc-1034950> [<https://perma.cc/7YQ3-WU93>].

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

28. BUTLER, *supra* note 16.

29. Furtive movements have been described in myriad ways by different officers at the same police department. One would offer examples of someone’s “changing direction, walking in a certain way, [a]cting a little suspicious.” Another would explain it as someone “hanging out in front of [a] building . . . and then making a quick movement.” *Floyd v. City of New York*, 959 F.

Latino people than for white people.<sup>30</sup> As a result, minorities are disproportionately stopped and frisked.<sup>31</sup> Stop and frisk searches are day-to-day interactions that cause widespread detriment and are often conducted in a racially biased manner.<sup>32</sup> *Wardlow*, as discussed below, allows for a broader and more fluid application of the reasonable suspicion analysis.

In *Floyd v. City of New York*,<sup>33</sup> Black and Hispanic people argued that the New York Police Department's (NYPD) use of the stop and frisk was unconstitutional given that officers stopped them because of their race.<sup>34</sup>

Supp. 2d 540, 561 (S.D.N.Y. 2013) (internal quotations omitted). See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78 (2015) ("The term 'furtive movements' can be used to refer to an almost-infinite number of actions that an officer might find suspicious. This factor is vague in its meaning and subjective in its interpretation.").

30. *Floyd*, 959 F. Supp. 2d at 661 n.760 (stating that, "officers are more likely to check Furtive Movements as the basis for stopping [B]lacks and Hispanics than for whites").

31. *NYCLU Releases Report Analyzing NYPD Stop-And-Frisk Data*, NYCLU (Mar. 14, 2019), <https://www.nyclu.org/en/press-releases/nyclu-releases-report-analyzing-nypd-stop-and-frisk-data> [<https://perma.cc/DU4Z-6EP9>] ("Young [B]lack and Latino males between the ages of 14 and 24 account for only five percent of the city's population, compared with 38 percent of reported stops. Young [B]lack and Latino males were innocent 80 percent of the time.").

32. See *Floyd*, 959 F. Supp. 2d at 562 (finding the city of New York liable for the constitutional violations and stating that the city "acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks"). The Second Circuit removed Judge Scheindlin for having the appearance of partiality and stayed the imposition of the remedies she mandated. *Ligon v. City of New York*, 736 F.3d 118, 121 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). Some argue that Judge Scheindlin's opinion was based heavily on, and deeply supported by, the data discussed. See *CCR Disappointed by Appeals Court's Refusal to Hear Judge Reassigned from Stop-and-Frisk Case*, CTR. FOR CONST. RTS. (Nov. 14, 2013), <https://cjrjustice.org/home/press-center/press-releases/ccr-disappointed-appeals-court-s-refusal-hear-judge-reassigned-stop> [<https://perma.cc/MQF2-NZ38>].

33. 959 F. Supp. 2d at 556.

34. *Id.* The following facts were uncontested by the parties:

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million Terry stops.
- The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.
- 52% of all stops were followed by a protective frisk for weapons. A weapon was found in 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.
- 8% of all stops led to a search into the stopped person's clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not. In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not.

The parties did not contest that “[i]n 52% of the 4.4 million stops, the person stopped was [B]lack, in 31% the person was Hispanic, and in 10% the person was white.”<sup>35</sup> Further, a liability expert testified that Black and Hispanic people “are overly stopped even after controlling for police deployment to high crime areas.”<sup>36</sup> The court noted that minorities are treated differently than white people, whether in the decision to stop, frisk, or arrest, regardless of location, behavior, or weapons found during the search.<sup>37</sup>

Now that the reasonable suspicion groundwork is laid out, *Wardlow*’s further dilution of the Fourth Amendment may be more apparent.

## II. ILLINOIS V. WARDLOW AND ITS COLOR-BLIND<sup>38</sup> APPROACH

In a 5-4 decision, the Supreme Court held that an officer’s actions “did not violate the Fourth Amendment” when he stopped an individual who fled from a “high crime” area.<sup>39</sup> Officers were patrolling an area they deemed to be “heavy” in drug trafficking when they observed Wardlow standing next to a building with an “opaque bag” in his hand.<sup>40</sup> Allegedly, Wardlow looked in the direction of the officers and fled through an alley, prompting the officers to chase him and conduct a *Terry* stop.<sup>41</sup> An officer arrested Wardlow after squeezing the opaque bag, feeling the shape of a gun, and discovering a .38 caliber handgun.<sup>42</sup> The officer pointed to the

- 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.
- In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white.
- In 2010, New York City’s resident population was roughly 23% [B]lack, 29% Hispanic, and 33% white.
- In 23% of the stops of [Black people], and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.
- Weapons were seized in 1.0% of the stops of [Black people], 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.
- Contraband other than weapons was seized in 1.8% of the stops of [Black people], 1.7% of the stops of Hispanics, and 2.3% of the stops of whites. . . .

*Id.* at 558–59.

35. *Id.*

36. *Id.* at 587.

37. *See id.*; *supra* note 32 (discussing Judge Scheindlin).

38. *See* Keven Jay Kercher, *Criminal Law—Search and Seizure: The Investigative Stop: What Happens When We Run?*, 77 N.D. L. REV. 123, 140–41 (2001); *Wardlow*, 528 U.S. at 119 (citing Reply Brief for Petitioner at 16, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036) (arguing for a color-blind approach to applying the Fourth Amendment)).

39. *Wardlow*, 528 U.S. at 119.

40. *Id.* at 121–22.

41. *Id.* at 122.

42. *Id.*

“high crime area” and the fact that Wardlow ran as the specific, articulable facts needed for reasonable suspicion.<sup>43</sup>

The Illinois Supreme Court rejected the argument that flight in a high crime area supported a finding of reasonable suspicion because the “‘high crime area’ factor was not sufficient standing alone to justify a *Terry* stop.”<sup>44</sup> The court held the stop, search, and arrest invalid.<sup>45</sup> The Supreme Court of the United States disagreed, stating that although a high crime area standing alone is insufficient, it gave the officers reasonable suspicion when coupled with flight.<sup>46</sup>

Justice Stevens dissented in part and detailed the defects in this reasoning, stating that individuals fleeing from a high crime area arguably may have more innocent motivations for doing so, making an inference of guilt less appropriate.<sup>47</sup> Remarkably, Justice Stevens also acknowledged that minorities have their own innocent reasons for running, such as the belief that “contact with the police can itself be dangerous.”<sup>48</sup> He further stated that these fears are known to officers and “are validated by law enforcement investigations into their own practices.”<sup>49</sup>

Still, the Court opined that “[unprovoked] flight . . . is the consummate act of evasion,”<sup>50</sup> notably citing “commonsense judgments and inferences about human behavior.”<sup>51</sup> But the absence of racial discussions in the opinion illustrated a flaw: by disregarding why and how the behavior of Black men take on a special form when they are in the presence of law enforcement,<sup>52</sup> commonsense judgments are facile in that community.

43. *Id.* at 119.

44. *Id.* at 123.

45. *Wardlow*, 528 U.S. at 123.

46. *Id.* at 119, 123–24.

47. *Id.* at 138–39 (Stevens, J., dissenting in part and concurring in part) (stating that the officer simply testified, “He looked in our direction.”).

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

49. *Id.* at 133. In a footnote, Justice Stevens elaborated that the Chief of the Washington, D.C., Metropolitan Police Department stated that “sizeable percentages of Americans today—especially Americans of color—still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day-to-day application.” *Id.* at 133 n.9.

50. *Wardlow*, 528 U.S. at 124. The Court cited *United States v. Brignoni-Ponce* although that case regarded unauthorized immigrants evading officers at the border for fear of detection. *See* 422 U.S. 873 (1975). Individuals flee from the border because of their possible illegal status; this provide a more obvious inference that flight is an act of evasion—the lack of citizenship will become immediately obvious when the individual fails to provide identification upon request. In cases where individuals run from officers, absent other articulable facts, the assumption that the individual has or is in the process of committing a crime is necessarily overbroad because the reason for running is not as clear as individuals running from the border.

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

52. *Wardlow*, 528 U.S. at 132 n.7 (Stevens, J., dissenting in part and concurring in part) (citing Jean Johnson et al., *Americans’ Views on Crime and Law Enforcement: A Look at Recent Survey Findings*, NAT’L INST. JUST. J. 133, 138 (Sept. 1997) (“reporting study by the Joint Center



### A. *Adverse Effects on Minorities in Particular*

One part of *Wardlow* is the “high crime area” aspect.<sup>53</sup> The *Wardlow* Court held that running from the police while in a “high crime area” creates reasonable suspicion for a stop.<sup>54</sup> The phrase “high crime” has been recognized as a proxy for race<sup>55</sup> and this becomes apparent upon recognizing that virtually all search and seizure cases lack a discussion of what an officer meant by “high crime.”<sup>56</sup>

Officers are not immune to racial biases.<sup>57</sup> By not inquiring further into the intentions of police officers to discover whether their actions amount to racial animus, the judiciary may be placing bias beyond the reach of the law.<sup>58</sup> The phrase “high-crime area” has essentially become a term of art and “[t]he neighborhoods typically described as high in crime are disproportionately urban, nonwhite, and poor.”<sup>59</sup> One judge has noted the unfortunate implications of the phrase: “[t]his teenager lives with his mother about a mile from where he was arrested. In other words, he was in a ‘high-crime neighborhood’ because it is his home.”<sup>60</sup> A person of color is also deemed suspicious simply when present in a white neighborhood,<sup>61</sup> so where are these individuals to go in order to be left

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for Political and Economic Studies in April 1996, which found that 43% of African-Americans consider ‘police brutality and harassment of African-Americans a serious problem’”).

53. *See id.*

54. *See id.*

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

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

57. *See infra* Part III (discussing, in part, the history of race in America); *cf.* Mark W. Bennet, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 396 (“[C]ommentators ‘almost universally agree’ that racial disparities are pervasive in the U.S. criminal justice system.”) (citing Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 872 n.1 (2015)).

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

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

60. C.E.L. v. State, 995 So. 2d 558, 563 (Fla. 2d Dist. Ct. App. 2008), *approved*, 24 So. 3d 1181 (Fla. 2009).

61. *See* P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> [https://perma.cc/6TM6-FLKY] (citing PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (“You’re required to justify your existence and your presence in a white space.

alone? To remedy this issue, “courts must begin taking seriously the requirement that the term be based on objective, quantifiable—statistical or otherwise—settled data.”<sup>62</sup>

### B. *Consistency with Other Supreme Court Precedent*

Like the objective justifications found in *Terry*—whether a reasonable officer would have feared for his safety<sup>63</sup>—*Wardlow* builds on past Supreme Court decisions. In *Whren v. United States*,<sup>64</sup> the Court held that where there is probable cause to detain a person temporarily for a traffic violation, that seizure does not violate the Fourth Amendment even though the underlying motivation for the stop might have been some other matter.<sup>65</sup> Shielding officers under this objective standard allows them to continue seizing individuals in a racially biased manner without any discussion as to whether the stop was motivated by race. The Court acknowledged this concern but simply stated that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>66</sup>

Similar to *Terry* and *Whren*, *Wardlow* builds on these decisions and assesses reasonable suspicion without discussing the officer’s motivations for the initial pursuit or the individual’s motivations for running. Such a combination results in disparate application of stop and frisk searches.

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

The other part of *Wardlow*, and the main focus of this Note, is flight. *Wardlow*’s reasoning regarding flight becomes more problematic considering other Supreme Court decisions, like *Mendenhall*. Two drug agents approached Mendenhall in an airport because they thought she might be carrying drugs.<sup>68</sup> Mendenhall’s ticket was issued to another name so the agents asked whether she would accompany them to an office for questioning.<sup>69</sup> Mendenhall agreed, later consenting to a search that

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It makes you feel like less of a citizen and less of a human being. It’s impossible to overstate the adverse consequences.”)).

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

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

64. 517 U.S. 806 (1996).

65. *See id.* at 813.

66. *Id.* at 813.

67. 446 U.S. 544 (1980).

68. *Id.* at 547–48.

69. *Id.*

revealed drugs.<sup>70</sup> Despite the authoritative presence of the agents and their focus on Mendenhall, the Court found that she was free to leave at any point during the encounter because a “reasonable person would have believed that he was [free to leave].”<sup>71</sup> Essentially, the Court held that “[a] person has been ‘seized’ within the meaning of the Fourth Amendment only if . . . a reasonable person would have believed that he was not free to leave.”<sup>72</sup>

Under the “free to leave” logic developed in *Mendenhall*, Black men would live in perpetual states of seizure in their own neighborhoods should *Wardlow* be taken to its logical conclusion.<sup>73</sup> Because a Black man’s flight from police, especially in a “high crime” area, supports a finding of reasonable suspicion, a Black man can never truly be “free to leave.”<sup>74</sup> He would always be subject to pursuit and detention should he try to evade the police. This result is unjust, legally unsound, and it should not stand.

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

*Wardlow* is concerning given the nature of reasonable suspicion and its tension with precedent. But why is *Wardlow* particularly problematic today? A discussion of the interactions between Black men and the police in America warrants an initial acknowledgment that these interactions historically have not been race-neutral. History evidences the disparity in treatment of minorities, first bred by power and violence, then by bias.<sup>75</sup>

Violence against Black people<sup>76</sup> was memorialized with lynchings. Graphic images depict deformed bodies hanging from trees and wide-eyed white children at their feet, smiling.<sup>77</sup> “[S]anctioned by law enforcement and elected officials,” more than 4,400 lives were lost during the violent practice.<sup>78</sup> Excused by many as a retaliation on serial rapes of

70. *Id.* at 548–49.

71. *Id.* at 554.

72. *Mendenhall*, 446 U.S. at 545.

73. *See id.*

74. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

75. *See, e.g.,* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG., <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> [<https://perma.cc/5JAP-F37X>] (May 29, 2020).

76. *See* William Y. Chin, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 UNIV. MIAMI RACE & SOC. JUST. L. REV. 31, 57 (2013) (stating that, “Whites have conducted a long-term, sustained campaign against [B]lacks that endures to this day”).

77. *See* Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575, 607 (2016).

78. Jennifer Rae Taylor, *A History of Tolerance for Violence Has Laid the Groundwork for Injustice Today*, 44 HUM. RTS. 5, 6 (2019), <https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/hr-v44n1.pdf> [<https://perma.cc/ZS58-UZK9>].

white women, lynchings were perpetrated as a form of terrorism in order to enforce racial hierarchy.<sup>79</sup> There is an American tradition of “unprovoked killing of Black men” and it “is an old and deep wound that many people in the African American community still grieve.”<sup>80</sup> Today, this animosity is not only present in violent interactions,<sup>81</sup> but it has propelled into bias that transcends generations. Unsurprisingly, developmental research suggests that racism, bias, and prejudices are “transmitted from one generation to the next.”<sup>82</sup> Police officers are not immune to bias; research has consistently shown “that police use greater force, including lethal force, with minority suspects than with White suspects.”<sup>83</sup>

Police violence is a leading cause of death for young Black men, killing them at a rate twice as high as it kills young white men.<sup>84</sup> About 1 in 1,000 Black teens and men can expect to die when interacting with police officers; “[t]hat’s better odds of being killed by police than you have of winning a lot of scratch-off lottery games.”<sup>85</sup> Moreover, Black Americans are five times more likely to be killed while unarmed.<sup>86</sup> These events have spillover effects on the mental health of Black communities.<sup>87</sup> These effects cause Black men to run in the presence of police officers.

79. *Id.*; see Leland Ware, *Brown at 50: School Desegregation from Reconstruction to Resegregation*, 16 U. FLA. J.L. & PUB. POL’Y 267, 269 (2005) (“Lynching, violence, and other forms of intimidation were used to impose white supremacy.”).

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

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

82. See Bart Duriez & Bart Soenens, *The Intergenerational Transmission of Racism: The Role of Right-Wing Authoritarianism and Social Dominance Orientation*, 43 J. RSCH. PERSONALITY 906, 906 (2009), <http://doi.org/10.1016/j.jrp.2009.05.014> [<https://perma.cc/D4HA-AUB6>] (detailing how racism and prejudice dispositions transmit from one generation to the next as a result of “fundamental intergenerational transmission of ideology”).

83. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007); L. Song Richardson & Philip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 123 (2014) (finding that “[B]lack suspects are more likely to be brutalized than white suspects despite engaging in identical behaviors” and finding that “officers are more likely to believe that the use of force against a [B]lack suspect is both reasonable and necessary”).

84. Amina Khan, *Getting Killed by Police is a Leading Cause of Death for Young [B]lack Men in America*, L.A. TIMES (Aug. 19, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men> [<https://perma.cc/UDD5-2QHP>].

85. *Id.*

86. Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of [B]lack Americans: A Population-based, Quasi-experimental Study*, 392 LANCET 302, 302 (2018), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2818%2931130-9> [<https://perma.cc/8GJC-BTDE>].

87. *Id.*

Studies reveal that police aggression towards Black men is fueled by America's historical, irrational fear of Black men.<sup>88</sup> A study found that "Black boys as young as [ten] may not be viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty[,] and face police violence if accused of a crime."<sup>89</sup>

Although the reality that officers brutally harass, beat, and shoot Black people is traumatizing enough for those in the Black community, seeing the images blasted throughout media outlets makes the effect more impactful.<sup>90</sup>

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

Needless to say, law enforcement work environments are among some of the riskiest.<sup>91</sup> And Black Americans can mentally and emotionally compartmentalize warranted shootings and those that involve irrational killings of unarmed Black men.<sup>92</sup> But justified interactions are not the topic of conversation in the area of police practices,<sup>93</sup> much less in the

88. See Colin Holbrook et al., *Looming Large in Others' Eyes: Racial Stereotypes Illuminate Dual Adaptations for Representing Threat Versus Prestige as Physical Size*, 37 *EVOLUTION & HUM. BEHAV.* 67, 68–69 (2016); Steven W. Thrasher, *Tamir Rice Was Killed by White America's Irrational Fear of Black Boys*, *GUARDIAN* (Dec. 29, 2015), <https://www.theguardian.com/commentisfree/2015/dec/29/tamir-rice-killed-by-white-americas-irrational-fear-black-boys> [<https://perma.cc/VJ5C-8P X9>].

89. *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds: Police Likelier to Use Force Against [B]lack Children When Officers 'Dehumanize' [B]lacks*, *Study Says*, *AM. PSYCHOL. ASS'N* (Mar. 6, 2014), <https://www.apa.org/news/press/releases/2014/03/black-boys-older> [<https://perma.cc/ZPA9-3ZF3>]; see *Tennessee v. Garner*, 471 U.S. 1, 3–4, 4 n.2 (1985) (referencing officer who described the defendant as 17 or 18 and about 5'5" or 5'7" when in fact he was 15 and 5'4"). See generally Tom Jacobs, *Black Male Faces More Likely to be Seen as Threatening*, *PAC. STANDARD* (June 14, 2017), <https://psmag.com/economics/black-male-faces-3571> [<https://perma.cc/SW5K-SJ7T>] (study found that white people are more likely to perceive a Black male's facial expressions as threatening).

90. See *Trauma After Gun Violence*, *VANTAGE POINT: BEHAV. HEALTH & TRAUMA HEALING*, <https://vantagepointrecovery.com/trauma-gun-violence/> [<https://perma.cc/J6PZ-X9 EU>] (stating that people who are in the middle of a traumatic experience can have their daily lives affected by their fear, pain and anxiety. "Senseless violence and shocking events can shatter our assumptions that we live in a safe world.").

91. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 n.27 (S.D.N.Y. 2013) (citing *CHARLES OGLETREE, THE PRESUMPTION OF GUILT* 125 (2012) ("[P]olice work diligently every day . . . They work for relatively low pay for the risks that they take . . .").

92. See Alexander Tsai et al., *Antwon Rose's Killing by Police Affects [B]lacks' Mental Health Across the Country*, *STAT* (June 27, 2018), <https://www.statnews.com/2018/06/27/when-police-officers-kill-unarmed-blacks-it-affects-blacks-mental-health-across-the-country/> [<https://perma.cc/YA4-FLJS>] (significant mental health effects were found among Black people as a result of police killings of unarmed but not of armed Black Americans).

93. See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 *WM. & MARY BILL RTS. J.* 677, 685 (1998) (stating that "the Fourth Amendment goal of regulating the use and abuse of government power" was "a goal the Court in *Terry* cited when it reaffirmed the

media. This assessment focuses on what impact unlawful police conduct—or police conduct portrayed as unlawful in the media—has on the behavior of Black men.

The media's determination to focus on the police is sometimes commendable as a positive effort to hold the police officers accountable.<sup>94</sup> Mentioning race in the headlines also sparks pensive inquiry into the motivation for the shootings.<sup>95</sup> Although some shootings have led to convictions,<sup>96</sup> many have led to acquittals.<sup>97</sup> Many officers never faced a trier of fact for their fatal shootings at all.<sup>98</sup> But regardless of whether officers are being consistently held accountable or not, the images of police officers emptying their magazines on Black teenagers<sup>99</sup> have left an unaccounted-for impact in the legal system.

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judiciary's 'traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security'") (footnotes omitted).

94. See Nina Feldman, *Police Release Name of Detective Who Shot Unarmed Man in Kensington*, WHY (May 21, 2019), <https://why.org/articles/police-shooting-of-harmless-unarmed-man-in-kensington-raises-questions/> [<https://perma.cc/23AN-2Q77>]. *But see* Daniel Politi, *Cleveland Paper Thinks You Should Know Tamir Rice's Father Has Abused Women*, SLATE (Nov. 28, 2014), <https://slate.com/news-and-politics/2014/11/cleveland-paper-defends-publishing-details-about-tamir-rices-parents-criminal-background.html> [<https://perma.cc/KUA7-G7KR>]. *See also* Kenya Downs, *When [B]lack Death Goes Viral, It Can Trigger PTSD-Like Trauma*, PBS NEWS (July 22, 2016, 8:04 PM), <https://www.pbs.org/newshour/nation/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma> [<https://perma.cc/RCA5-4ZYN>] (Former attorney April Reign points out that national media outlets refuse to air graphic footages, citing respect for families as the basis but are openly willing to post police shootings of [B]lacks, calling it "selective censorship").

95. See Stephon Clark, *US Police Not Charged for Killing Unarmed [B]lack Man*, BBC NEWS (Mar. 3, 2019), <https://www.bbc.com/news/world-us-canada-47430090> [<https://perma.cc/2BQT-83G7>].

96. See Associated Press, *Ex-Minneapolis Police Officer Sentenced to 12 ½ Years in Shooting of Unarmed 911 Caller*, WALL ST. J. (June 7, 2019, 2:03 PM), <https://www.wsj.com/articles/ex-minneapolis-police-officer-sentenced-to-12-years-in-shooting-of-unarmed-911-caller-11559930601> [<https://perma.cc/R6G4-L373>].

97. See Amanda Sakuma, *East Pittsburgh Police Officer Acquitted in Shooting Death of 17-year-old Antwon Rose*, VOX (Mar. 23, 2019, 11:13 AM), <https://www.vox.com/policy-and-politics/2019/3/23/18278470/police-officer-acquitted-antwon-rose-unarmed-shooting> [<https://perma.cc/7MXX-FD6D>]; Associated Press, *Former Texas cop who shot unarmed man acquitted of assault*, AP NEWS (July 22, 2019), <https://www.apnews.com/6508c0bafa92421e87cdb9bb1c59c7eb> [<https://perma.cc/PEH5-HE8X>].

98. See *infra* notes 108 & 141.

99. See *infra* note 125.

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

These recent<sup>100</sup> incidents were selected from the tragically vast collection of highly publicized police shootings because they were recorded and resulted in the death of a Black person. These criteria are preferable, first because the likelihood of a shooting receiving national attention is high when caught on camera, and second, the killing is harder to deny when the incident is recorded. These are but a sample of the incidents that Black youth grow up enduring.

Given the data about young Black boys being perceived as older,<sup>101</sup> it is unsurprising that after twelve-year-old Tamir Rice was shot, an officer identified him as “[B]lack male, maybe [twenty].”<sup>102</sup> In November 2014, officers responded to a 911 call reporting someone, “probably a juvenile,” waving a gun around that was “probably fake.”<sup>103</sup> Surveillance footage captured Officer Loehmann hopping out of his cruiser and, within two seconds, shooting the Black child twice from close range while the child was sitting.<sup>104</sup> After pressure from the public, and a written request from the Rice family, the surveillance footage was released for all of America to see,<sup>105</sup> including other Black men, teens, and children. Two responding officers administered first aid to Rice almost four minutes after he had been shot because the officers on the scene did not.<sup>106</sup> Rice died hours

100. The shooting of Oscar Grant in Fruitvale Station meets the criteria for discussion but happened more than ten years ago. See Jemima Kiss, *Fatal Police Shooting Posted on YouTube*, GUARDIAN (Jan. 9, 2009), <https://www.theguardian.com/technology/2009/jan/09/subway-killing-video-footage> [https://perma.cc/B2BF-657B].

101. See *supra* note 89.

102. See German Lopez, *Police Thought 12-Year-Old Tamir Rice Was 20 When They Shot Him. This Isn't Uncommon*, VOX (Nov. 26, 2014, 6:10 PM), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police> [https://perma.cc/X6PV-SCYB].

103. See Jennifer Schuessler, *911 Operator in Tamir Rice Case Receives 8-Day Suspension*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/tamir-rice-911-operator-suspended.html> [https://perma.cc/8RQB-8SAB] (stating that the 911 operator who took the call was disciplined by the city's police chief after failing to relay the “probably a juvenile” and “probably fake” gun information to responding officers).

104. Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events That Led to the 12-Year-Old's Death*, CLEVELAND (Jan. 11, 2010), [https://www.cleveland.com/court-justice/2017/01/tamir\\_rice\\_shooting\\_a\\_breakdow.html](https://www.cleveland.com/court-justice/2017/01/tamir_rice_shooting_a_breakdow.html) [https://perma.cc/78JE-4Y7E].

105. Ryllie Danylko, *Protests Break Out in Cleveland Over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND (Jan. 12, 2019), [https://www.cleveland.com/metro/2014/11/protests\\_break\\_out\\_in\\_cleveland.html](https://www.cleveland.com/metro/2014/11/protests_break_out_in_cleveland.html) [https://perma.cc/8HWY-RLST].

106. Police inactivity is not uncommon in shootings. See David Hunn & Kim Bell, *Why Was Michael Brown's Body Left There for Hours?*, STL TODAY (Sept. 14, 2014), [https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article\\_0b73ec58-c6a1-516e-882f-74d18a4246e0.html](https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html) [https://perma.cc/JS78-VNGX] (discussing how Michael Brown's body was left on the street for four hours).

later.<sup>107</sup> A grand jury decided not to indict the shooting officer.<sup>108</sup> To add “insult to homicide” two years later, the city’s attorney sued the Rice family for an unpaid \$500 medical bill that included \$450 for ambulance services and \$10 for “mileage.”<sup>109</sup>

In 2016, over three million Facebook users watched police officers shoot Philando Castile while his girlfriend and her four-year-old daughter were in the car.<sup>110</sup> When the officer stopped Castile for a broken tail light, Castile let him know that he had a firearm.<sup>111</sup> The officer said “[d]on’t pull it out” to which Philando replied, “I’m not pulling it out.”<sup>112</sup> But the officer was already drawing his weapon, and in a matter of seconds, he fired seven bullets into the car, five of which hit Castile.<sup>113</sup> Castile’s moans can be heard in the video as he sits and bleeds out with his seatbelt still on.<sup>114</sup> A second video recorded by Castile’s girlfriend, with over a million views, shows him bleeding out in his last moments, gasping for air, with his white shirt quickly dampening red and a gun still aimed at him.<sup>115</sup> The officer handcuffed Castile’s girlfriend and placed her in the back of his police car with her daughter.<sup>116</sup> Because she cried and screamed in shock, her four-year-old daughter, who also just witnessed the shooting, said: “It’s O.K., Mommy,” “I’m right here with you,”

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107. Caroline Bankoff, *Cops Who Shot Tamir Rice Didn’t Bother to Give Him First Aid*, N.Y. INTELLIGENCER (Nov. 29, 2014), <http://nymag.com/intelligencer/2014/11/cops-who-shot-tamir-rice-didnt-give-first-aid.html> [<https://perma.cc/K4TC-MCQB>].

108. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/Y2Q9-39CK>].

109. Sam Levin, *Tamir Rice: Cleveland Says Family Owes \$500 for EMS After Fatal Police Shooting*, GUARDIAN (Feb. 10, 2016, 9:09 PM), <https://www.theguardian.com/us-news/2016/feb/10/tamir-rice-shooting-cleveland-police-emergency-medical-expenses> [<https://perma.cc/38QL-EYUF>].

110. Issie Lapowsky, *For Philando Castile, Social Media Was the Only 911*, WIRED (July 7, 2016, 1:08 PM), <https://www.wired.com/2016/07/philando-castile-social-media-911/> [<https://perma.cc/CTU6-CMLW>].

111. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017, 10:14 AM), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html> [<https://perma.cc/8AKW-FP9D>].

112. *Id.*

113. *Id.*

114. CNN, *Combined Videos Show Fatal Castile Shooting*, YOUTUBE (June 22, 2017), [https://youtu.be/85Y\\_yOm9IhA?t=118](https://youtu.be/85Y_yOm9IhA?t=118) [<https://perma.cc/T283-PF87>].

115. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YOUTUBE (July 7, 2016), <https://www.youtube.com/watch?v=PEjipYKbOOU> [<https://perma.cc/UVN9-TGU9>].

116. Yousur Al-Hlou, *Philando Castile, Diamond Reynolds, and a Nightmare Caught on Video*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/video/us/10000005181340/philando-castile-diamond-reynolds-and-a-nightmare-caught-on-video.html> [<https://perma.cc/ZL98-H3XX>].



“Mom . . . because I don’t want you to get [shot],” and “I’m scared.”<sup>117</sup> The officer was acquitted.<sup>118</sup>

Laquan McDonald was seventeen years old when he was shot sixteen times on the night of October 20, 2014.<sup>119</sup> In a police report, Officer Van Dyke stated that the teen advanced on him, “swinging the knife in an aggressive, exaggerated manner,” so the officer shot once; the police department ruled the shooting justifiable and did not take further action.<sup>120</sup> A whistleblower later disclosed that a dashcam video contradicted the officer’s account and public pressure resulted in the release of the footage.<sup>121</sup> The video showed McDonald walking straight when the officers arrived in front of him; McDonald continued walking but began breaking right, away from the officers.<sup>122</sup> Despite this, Van Dyke fired the first shot, and McDonald spun and fell to the ground.<sup>123</sup> The lifeless body endured additional shots, suffering wounds to “his scalp, neck, left chest, right chest, left elbow, left forearm, right upper arm, right hand, right upper leg, left upper back and right lower back.”<sup>124</sup> “[O]nly two of the wounds can be linked to the time McDonald was standing.”<sup>125</sup> Although McDonald never moved on the ground, Van Dyke emptied his chamber and even reloaded.<sup>126</sup> The video was shared and watched on many platforms; one post was viewed more than 4.3 million times.<sup>127</sup> Because the killing was depicted as racially charged, the

117. *Id.*

118. *Id.*

119. Dan Good, *Chicago Police Officer Jason Van Dyke Emptied His Pistol and Reloaded as Teen Laquan McDonald Lay on Ground During Barrage; Cop Charged with Murder for Firing 16 Times*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077> [<https://perma.cc/GF3P-86MC>]. For record purposes, unlike the previous incidents, the victim here was carrying a knife at the time of the shooting.

120. Sophia Tareen, *Chicago Cops’ Versions of Laquan McDonald Killing at Odds with Video*, HERALD NEWS (Dec. 5, 2015), <https://www.theherald-news.com/2015/12/05/chicago-cops-versions-of-laquan-mcdonald-killing-at-odds-with-video/ane9zn/?page=1> [<https://perma.cc/ER8D-LGLH>].

121. Curtis Black, *How Chicago Tried to Cover Up an Execution*, CHI. REP. (Nov. 24, 2015), <https://www.chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/> [<https://perma.cc/MAT6-SURV>].

122. *Chicago Dashcam Video Shows Police Killing of Laquan McDonald—Video*, GUARDIAN (Nov. 24, 2015), <https://www.theguardian.com/us-news/video/2015/nov/24/chicago-officials-release-video-showing-police-killing-of-laquan-mcdonald-video> [<https://perma.cc/X5EU-BWFU>].

123. *Id.*

124. Good, *supra* note 119.

125. *Id.*

126. *Id.*

127. Block Club Chicago, *Dashcam Video of Officer Jason Van Dyke Shooting Laquan McDonald*, YOUTUBE (Nov. 24, 2015), [https://www.youtube.com/watch?v=Ix2N6\\_jLAgA](https://www.youtube.com/watch?v=Ix2N6_jLAgA) [<https://perma.cc/8XKP-MBNY>].

McDonald murder has been characterized as a modern-day lynching.<sup>128</sup> McDonald's body "was not dangling from a poplar tree, but it was indeed strange fruit."<sup>129</sup> Van Dyke was found guilty of second-degree murder and sixteen counts of aggravated battery.<sup>130</sup> He was sentenced to six years and nine months in prison.<sup>131</sup>

The deaths of Black persons at the hands of police alone are significant. But many of the recordings also capture the inhumane post-death treatment of the victims by law enforcement. Bodycam footage continues after the killing, and in each incident described above, officers did not check on the victim for vital signs and some ambulance calls were delayed—as if they had not taken a human life.<sup>132</sup> For example, after a white police officer shot Michael Brown, his body laid uncovered for at least ten minutes for spectators to see.<sup>133</sup> Then he was left on the street, albeit covered, for four hours.<sup>134</sup> Many believe these displays were likely left for deterrence purposes.<sup>135</sup> Also, during unarmed Eric Harris's last moments after he was shot, body camera footage shows him face-down on the ground bleeding and crying out, "I'm losing my breath."<sup>136</sup> Tulsa County Sheriff's Deputy Joseph Byars responded, "fuck your breath."<sup>137</sup> Harris's family issued a statement: "Perhaps the most disturbing aspect of all of this is the inhumane and malicious treatment of Eric after he was

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128. Shaun King, *Death of Laquan McDonald at the Hands of Chicago Officer Jason Van Dyke is Modern Day Lynching*, DAILY NEWS (Nov. 24, 2015, 8:51 PM), <https://www.nydailynews.com/news/national/shaun-king-laquan-mcdonald-death-modern-day-lynching-article-1.2446023> [<https://perma.cc/KS3D-YEGT>]; KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 35–52 (2d ed. 2009).

129. *Id.*

130. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019, 7:22 PM), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> [<https://perma.cc/5ABR-HRLA>].

131. *Id.*

132. VIOLENCE: AN AMERICAN TRADITION (HBO 1995), <https://www.youtube.com/watch?v=lQOSyDSCpf0> [<https://perma.cc/8Y75-N4PJ>] (stating that the depictions of the victims as being less than human facilitates acts of violence against them).

133. Hunn & Bell, *supra* note 106.

134. *Id.*

135. *Lynching in America*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/emmett-lynching-america/> [<https://perma.cc/VA6H-DFW2>] (last visited Mar. 26, 2022) ("Lynching, an act of terror meant to spread fear among [B]lacks, served the broad social purpose of maintaining white supremacy in the economic, social and political spheres.").

136. Carlos Miller, *Oklahoma Sheriff Glanz Resigns After "Fuck Your Breath"*, PINAC NEWS (Oct. 4, 2015), <https://pinacnews.com/index.php/2015/10/04/oklahoma-sheriff-glanz-resigns-after-fuck-your-breath/> [<https://perma.cc/M3L8-7JXD>].

137. *Id.*

shot.”<sup>138</sup> One YouTube account shows the video of Harris was viewed more than 2.7 million times.<sup>139</sup>

Seeing an unarmed individual killed by the very force that swears to ensure public safety becomes more alarming when the lack of empathy bleeds through after an execution. In plain terms, “[t]here’s a heightened sense of fear and anxiety when you feel like you can’t trust the people who’ve been put in charge to keep you safe. Instead, you see them killing people who look like you.”<sup>140</sup>

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

In this digital age, images of police violence are more widespread than those of lynchings, police dogs attacking civil rights protestors, and Rodney King’s brutal beating.<sup>141</sup> The breadth is extensive, and the impact is profound. Although police distrust is commonplace in Black communities, given the secondhand exposure from the media, it is unsurprising that the Black youth distrusts police. A report found that “[l]ess than half of black youth (44.2 percent) trust the police, compared with 71.5 percent of white youth, 59.6 percent of Latino youth, and 76.1 percent of Asian American youth.”<sup>142</sup>

The difference today is not the feeling of apprehension and the general distrust of police but rather how and to what degree police behavior impacts communities of color.<sup>143</sup> Black people mistreated by officers can develop post-traumatic stress disorder (PTSD), which can amplify the apprehension and fear when they see another Black man or child killed by a police officer.<sup>144</sup> Even those who have not been personally targeted

138. CBS This Morning, *Tulsa Police Release Video Of Accidental Shooting: “I Shot Him. I’m Sorry.”*, YOUTUBE (Apr. 13, 2015), [https://www.youtube.com/watch?v=3Eb\\_fDe3III](https://www.youtube.com/watch?v=3Eb_fDe3III) [<https://perma.cc/SX4Y-XJ6Q>].

139. *Id.*

140. Kenya Downs, *When [B]lack Death Goes Viral, It Can Trigger PTSD-Like Trauma*, PBS NEWSHOUR (July 22, 2016, 8:04 PM), <https://www.pbs.org/newshour/nation/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma> [<https://perma.cc/28NF-GX3J>].

141. See Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, NEW REPUBLIC (Feb. 13, 2019), <https://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice> [<https://perma.cc/SGB8-3C24>].

142. Jann Ingmire, *Young People of Color Mistrust Police, Report Finds*, UCHI. NEWS (Aug. 18, 2014), <https://news.uchicago.edu/story/young-people-color-mistrust-police-and-legal-system-report-finds> [<https://perma.cc/75DB-ATT3>].

143. Gregory, *supra* note 141 (stating that “repeated footage [of police violence] can also make some viewers so piercingly aware of police violence that they instinctively disengage from the police rather than risk facing them.”).

144. See Imani J. Jackson, *The Trauma of Police Brutality: Column*, USA TODAY (Sept. 2, 2016), <https://www.usatoday.com/story/opinion/policing/spotlight/2016/09/02/trauma-police-brutality-column/89019122/> [<https://perma.cc/V6EV-R2NC>].

by police brutality experience secondhand effects through media exposure.<sup>145</sup> This phenomenon is known as “vicarious trauma.”<sup>146</sup> Bottom line, when an unarmed Black individual is killed by police officers, especially if the killing appears senseless, the death is suffered greatly by the Black community watching.<sup>147</sup>

A study revealed that “police killings of unarmed [B]lack Americans are responsible for more than 50 million additional days of poor mental health per year among [B]lack Americans.”<sup>148</sup> No significant impacts on the mental health of Black Americans were found when police killed white Americans or armed Black Americans.<sup>149</sup>

Since viewers of police violence, especially those who look like the victim, may develop PTSD from the images, it is noteworthy to acknowledge the effects that PTSD has on the fight-or-flight-response. Fight or flight “prepares the human body to deal with the threat, either by running away or confronting the threat.”<sup>150</sup> The problem with this response is that “[t]he threshold for triggering threat-based hyperarousal is lowered so that any stressor, large or small, can trigger the fight-or-flight response.”<sup>151</sup> This suggests that when a Black man is in the presence of police officers, PTSD-like trauma may work together with the individual’s fight-or-flight response.<sup>152</sup>

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

146. Downs, *supra* note 140.

147. *See* Bor et al., *supra* note 86, at 307.

148. Tsai et al., *supra* note 92.

149. *Id.* This study also found no significant mental health effects among white Americans when police killed unarmed Black Americans. *Id.* This is unsurprising because Black people and white people have enduring differences in their perceptions of how well police officers do their jobs. *See* John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/3QMF-3NZX>] (showing in a 2017 survey that Black people gave officers an average rating of 47 and believed the system was biased and whites gave officers an average rating of 72 and thought the system was fine); Brentin Mock, *What New Research Says About Race and Police Shootings*, CityLab, BLOOMBERG (Aug. 6, 2019, 2:28 PM), <https://www.bloomberg.com/news/articles/2019-08-06/race-and-police-shootings-what-new-research-says> [<https://perma.cc/6PC5-2ZGS>]. This dangerous disconnection impedes any significant improvement in the disparate treatment of Black Americans by police.

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

151. *Id.* at 861.

152. For a discussion on earlier theories of unique black interactions, see Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C.L. REV. 731, 755 (1996) (discussing the criminal defense of “[B]lack rage” where defendants presented the expert testimony “to the effect that they possessed a character trait known as [B]lack rage, which

The Black man's distinct interaction with the police is heavily documented, yet the justice system has not recognized its significance. Minorities often run because "contact with the police can itself be dangerous."<sup>153</sup> Continuing to allow flight to support a reasonable suspicion determination will instigate more fatal interactions.

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

Before *Wardlow*, state courts disagreed about whether "unprovoked flight" was sufficient grounds to constitute reasonable suspicion.<sup>154</sup> Since *Wardlow*, "flight and [the term] 'high crime area' have gained weight as important factors in determining whether reasonable suspicion of a crime exists."<sup>155</sup> However, some courts have applied a case-by-case, totality of the circumstances test.<sup>156</sup>

The most direct challenge to *Wardlow* came from the Supreme Court of Massachusetts.<sup>157</sup> In *Commonwealth v. Warren*,<sup>158</sup> an officer was driving around minutes after a burglary looking for suspects who matched the description.<sup>159</sup> He came across two Black individuals close to the scene wearing clothes that vaguely matched the description.<sup>160</sup> When the officer attempted to talk to the individuals, they turned around and jogged away; this prompted a second encounter minutes later, where one individual, the defendant, again ran away, but his companion stood by.<sup>161</sup> The officer chased the defendant and eventually apprehended him.<sup>162</sup>

The court found that the police officers lacked reasonable suspicion<sup>163</sup> and ultimately stated: "the finding that [B]lack males in Boston are disproportionately and repeatedly targeted for [field interrogation and observation] . . . suggests a reason for flight totally unrelated to

'apparently causes [Black people] to react in a certain way against white police officers because [B]lacks judge the actions of a police officer in a manner different from others, thereby allegedly rendering reasonable their actions in this specific case'').

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

154. *Id.* at 123 n.1.

155. KevenJay Kercher, *Criminal Law—Search and Seizure: The Investigative Stop: What Happens When We Run?*, 77 N.D. L. REV. 123, 141 (2001).

156. See discussion *infra* Section III.C.

157. Zeninjor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR NEWS (Sept. 20, 2016), <https://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police> [<https://perma.cc/9S25-W7P7>].

158. 58 N.E.3d 333 (Mass. 2016).

159. *Id.* at 336 (providing the description of the suspects as three black males, one with dark clothing, one with a black hoodie, and another with a red hoodie).

160. *Id.* at 337.

161. *Id.*

162. *Id.*

163. *Id.* at 341–42.

consciousness of guilt.”<sup>164</sup> The *Warren* decision is important because it considers well-established social data. The court found that since the police officers did not have reasonable suspicion before the flight,<sup>165</sup> the defendant could legally choose to walk away and avoid contact with the police.<sup>166</sup>

While *Wardlow* incites confrontation, *Warren* acknowledges that the decision to run from the police may be entirely motivated by “the desire to avoid the recurring indignity of being racially profiled.”<sup>167</sup>

## V. CONCLUSION

Many reasons warrant a reexamination of *Wardlow*. *Terry* stops provide a virtually unchecked incentive for officers to stop and frisk minorities in accordance with their biases: the introduction of evidence without a search based on probable cause.<sup>168</sup> *Mendenhall* established that an individual is not seized if a reasonable person would feel free to leave.<sup>169</sup> Under *Wardlow*, if an individual is in their poor, urban home that can be characterized as “high crime,” they cannot run from the police. They are not free to leave. Are they in a constant state of seizure in the presence of officers? The last concern, and the main concern, is the most recently developed. Black people must cope with seeing members of their community constantly killed on national television. Whether these events are truly prevalent or justified, the media does not discriminate in its repetitive broadcasting of tragic events. The portrayed killers? Those who are sworn to protect everyone. A Black individual who has been frisked without justification also holds certain emotions when a police officer is near.<sup>170</sup> The Black man’s interaction with the police is a unique one.<sup>171</sup> History and recent events show this.

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164. *Warren*, 58 N.E. 3d at 342–43 (cautioning judges assessing reasonable suspicion to consider the report’s findings when they weigh flight as a factor regarding Black men in the city of Boston). See *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BPD NEWS (Oct. 8, 2016), <https://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results> [<https://perma.cc/J9VF-WW2X>] (finding that Black men are more likely to be targeted for stops, frisks, searches, and interrogations based on approximately 205,000 reports by Boston police officers).

165. *Warren*, 58 N.E.3d at 337–38

166. *Id.* at 341.

167. *Id.* at 342; Enwemeka, *supra* note 157 (calling the *Warren* decision “powerful”).

168. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); see *supra* note 24.

169. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

170. See Hannah-Jones, *supra* note 3.

171. RUSSELL-BROWN, *supra* note 58, at 53 (stating that Black men are more likely to feel as though the system does not work or works against them and white men are more likely to feel as though the system is working perfectly fine).

Both federal and state courts today acknowledge the implications police interactions have on members of minority communities.<sup>172</sup> If the Supreme Court were to recognize the data and make a “commonsense judgment,”<sup>173</sup> it would see that there are many elements at play when officers interact with the community, including race.<sup>174</sup> Allowing flight to be a considerable factor in reasonable suspicion determinations is a strong weapon against the Black community, where officers have maintained fear through their discriminatory practices. And in the worst situations, Black men who run might have their lives taken. A finding that flight is not a considerable factor would also urge courts to be more skeptical of officers who arbitrarily label an area as a “high crime” neighborhood to bolster the reasonable suspicion assessment.<sup>175</sup> This healthy skepticism will force law enforcement agencies to justify areas they target based on available crime data and not just on areas they choose to over-police.

Last, a Supreme Court decision that flight is not a cognizable factor in reasonable suspicion is unlikely to impede law enforcement from doing their job. If an officer has reasonable suspicion for stopping an individual, the officer can pursue that individual. Reasonable suspicion is valid if fostered by the person’s location—other than the “high crime” proxy—behavior,<sup>176</sup> or other information available to the officer, like tips or an ongoing investigation. But if there are no facts warranting a stop, under *Mendenhall*, persons should be free to avoid the police in any method they deem appropriate for their safety, including flight.

The holding in *Wardlow* should be reversed to give way to a more comprehensive interpretation of human behavior—whether it be the behavior of Black men or racially biased officers—and an acknowledgment of the media-bred fear of police officers.

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172. See, e.g., *Warren*, 58 N.E.3d at 342; *C.E.L. v. State*, 995 So. 2d 558, 563 (Fla. 2d DCA 2008) (en banc), *approved*, 24 So. 3d 1181, 1182 (Fla. 2009) (stating it was bound to follow precedent “even if [it] question[ed] the wisdom of that precedent or the public policy behind the law”); *United States v. Navedo*, 694 F.3d 463, 471 (3d Cir. 2012); *United States v. Brown*, 925 F.3d 1150, 1151 (9th Cir. 2019) (stating that the defendant was a Black man who “had the misfortune of deciding to avoid contact with the police”). *But see C.E.L. v. State*, 24 So. 3d 1181, 1182 (Fla. 2009) (“This Court is obligated to . . . follow the Fourth Amendment precedent laid out by the United States Supreme Court, even if we question the wisdom of that precedent or the public policy behind the law.”).

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

174. See *Jackson*, *supra* note 144; *Downs*, *supra* note 140; *Tsai et al.*, *supra* note 92; *Bor et al.*, *supra* note 86; *Gramlich*, *supra* note 149; *Mock*, *supra* note 149.

175. See *Katz*, *supra* note 55, at 429 (stating that the phrase “high crime neighborhood” is often a proxy for race); see also *C.E.L. v. State*, 24 So. 3d at 1190 (Pariente, J., concurring) (“[Juvenile defendant] was in this ‘high-crime neighborhood’ because it was his home.”).

176. See *supra* note 55.