Racial Biases within Stop and Frisk: The Product of Inherently Flawed Judicial Precedent

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The Fourth Amendment has been described as the Constitution's penultimate protection of individual liberty, second only to the First Amendment (Mason and Stephenson, 1999). It ensures an individual's fundamental right to privacy is upheld and protects one's right to travel freely without being arbitrarily accosted. The Fourth Amendment ensures an individual's person and property are protected from abusive and baseless government actions. Every search or seizure must be accompanied by either a specific warrant issued by a judge or probable cause, which is a reasonable, objective belief that crime is afoot (Kaplan, 1978). The warrant and probable cause requirements outlined by the Fourth Amendment were intended to allow individuals to live their lives free from unjust police intervention by requiring an officer to have clear, objectively defensible reasons for performing a search or a seizure. It contained the belief that every person had the right to walk down the street without having to fear being stopped by police without cause. This right, however, has effectively been stripped from millions of Americans living in inner cities due to the policy known as "stop and frisk." Stop and frisk has allowed officers to stop and sometimes search individuals with little or no justification (Fagan and Geller, 2015).

The Supreme Court officially sanctified stop and frisk in the 1968 case *Terry v. Ohio* (*Terry*, 1968). This landmark decision created a narrow exception to the general probable cause requirement, allowing the lesser standard of reasonable suspicion to be employed to justify a limited stop and search when an officer believed a suspect was armed and dangerous. The reasonable suspicion standard of evidence is low and has nullified important Fourth Amendment protections by allowing officers unprecedented discretion, allowing the officers to search anyone, at any time (Meares, 2015). What has followed is a policy whereby hundreds of thousands of innocent people have been subjected to the indignities of being arbitrarily stopped and searched (Fagan, n.d.). Furthermore, these searches have not been conducted equitably, but have instead disproportionately targeted African American men (Harris, 1994). Despite the increasing prevalence of this program and the controversy surrounding it, the Supreme Court has largely expanded, rather than restrained, the limitations originally placed upon this program under *Terry* (O'Brien, 2011).

The Court's subsequent decisions of stop and frisk have decreased procedural safeguards for defendants and allowed almost unfettered police discretion while at the same time refusing to address or remedy the inexcusable racial bias inherent within it (Thompson, 1999). The racial ramifications of this policy are not a byproduct of an otherwise fair and just set of decisions. Instead, the Court has at best actively ignored the clear discriminatory impacts to which a doctrine such as stop and frisk would inevitably lead (Kurland and Casper, 1975). Stop and frisk has inherent racial undertones which have been propagated rather

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than checked by the Supreme Court; it is a policy which relies on and leads to racism, and therefore cannot be remedied, only abolished.

Part I will focus on the procedural history of stop and frisk. It will examine the landmark decision which established the stop and frisk doctrine, *Terry v. Ohio*. This decision lowered the standard of evidence necessary to conduct a stop from probable cause to the lower standard of reasonable suspicion. It will demonstrate how there were inherent problems with *Terry*'s policy, which inevitably resulted in later abuses. The Court consistently failed to provide adequate parameters which would effectively limit the use of stop and frisk. As a result, abuses have been rampant, with many stops failing to meet even the very low standard supplied by the Court. This results in millions of innocent people being stopped and frisked each year based on little more than an officer's hunch or suspicion.

Part II will show how the almost unlimited discretion granted to officers under *Terry* has inevitably been abused. Because officers are offered no clear parameters regarding who to stop and frisk and are instead left to rely almost solely on their own judgment, implicit biases, which may be subconscious, have a profound effect on their decision-making. Racial stereotypes subtly influence an officer's decision regarding whom to stop and frisk. Several studies will demonstrate that implicit bias affects an individual's decisions, even when they have no conscious bias toward a certain group. These studies will also examine how an officer's implicit bias toward African Americans can cause him to focus on African American suspects when thinking about crime and can influence his perception of whether or not an individual is armed. When a wide level of discretion is granted to officers, implicit biases will influence an officer's decision.

Part III will provide case studies of how stop and frisk operates in four major cities: New York, Chicago, Philadelphia, and Los Angeles. It will examine data from those four cities to determine if the suppositions in Parts I and II are correct. More specifically, it will analyze whether reasonable suspicion is too low a standard which allows for many innocent people to be stopped and searched. It will also examine if the increased discretion granted by the Court has indeed resulted in racially discriminatory policing. It will attempt to determine if stop and frisk can be used in a legal and racially neutral manner or if its implementation always results in widespread abuses.

I. Stop and Frisk's Judicial Precedent

Terry v. Ohio

The Supreme Court established the initial parameters of stop and frisk in *Terry v. Ohio* (*Terry*, 1968). Although many police departments prior to this decision had used stop and frisk, its legal validity had been unestablished and untested. The Court was tasked with defining what constituted a stop and frisk (as opposed to a custodial arrest and full search), and if such a policy was subject to constraints under the Fourth Amendment. Established precedent and Constitutional interpretation regarding the Fourth Amendment had long held every search and/or seizure required probable cause, which requires that the officer possess a moderately high standard of proof that crime was afoot before

being justified to act (Laser, 1995). In *Terry*, the Supreme Court broke with presiding precedent as it ruled stop and frisk did fall within the Fourth Amendment's purview, but that the traditional Fourth Amendment protections did not apply. It lowered the requisite amount of suspicion necessary to perform a stop and frisk from probable cause to reasonable suspicion. They created a narrow caveat within established Fourth Amendment doctrine, allowing a certain type of search and seizure to be exempt from the heightened scrutiny applied to its doctrinal counterparts.

The Supreme Court needed to first define what constituted a stop and frisk and when it was justified. Although the practice existed prior to the *Terry* decision, its exact legal parameters had been unclear. In its prosecution, the state asserted that stop and frisk did not rise to the level of a search and seizure, and was, therefore, exempt from traditional Fourth Amendment protections. The Court categorically rejected this notion, stating it would be "sheer torture" of the English language to claim stop and frisk was anything other than a search and seizure (*Terry*, 1968). It clarified a search and seizure could occur short of a custodial arrest and comprehensive search. The Court defined these terms far more broadly, stating a seizure occurs whenever the police restrict an individual's freedom of movement, and a search occurs even when an officer restricts his investigation to a pat down of an individual's outer clothing. Under these expansive definitions, a stop and frisk certainly constitutes both a search and a seizure. In defining these terms more broadly, the Court encompassed a wide range of police action under the Fourth Amendment's protection.

After affirming that a stop and frisk is a constitutionally protected search and seizure, the Court then ruled that a stop and frisk was exempt from the usual Fourth Amendment protections. It held a stop could occur whenever an officer had reasonable suspicion crime was afoot. This suspicion had to be articulable: more than a "mere hunch", but less than probable cause (*Terry*, 1968). A frisk could subsequently occur only if the officer had further reasonable suspicion to believe the suspect was in possession of a weapon and was an imminent threat to the officer or others. In other words, a stop and frisk could occur only if an officer had reason to believe a suspect was armed and dangerous. This exception to the probable cause requirement was intentionally narrow in scope. It was never intended to replace the long held protections afforded to citizens under the Fourth Amendment; instead, it was intended to serve as a limited exception, justified by an officer's safety.

It is important to emphasize a frisk was only justifiable when it was being employed to search for weapons. The ideological basis for this expansion of police powers was that it must be limited to that which was necessary to ensure an officer's immediate safety. Therefore, a frisk "must be limited to that which is necessary for the discovery of weapons which may be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion" (*Terry*, 1968). A frisk was limited to a brief pat down of the suspect's external clothing, and could only be used to the extent necessary for immediately identifying weapons on his person. In *Terry's* companion case, *Sibron*, the Court ruled an officer could not put their hand inside the suspect's clothing, or continue to feel an object through

the clothing after determining it was not a weapon (*Sibron*, 1968). In this way, the Court sought to limit the intrusion as much as possible, while upholding the usual probable cause standard except in cases where they deemed it jeopardized the officer's safety.

This rather remarkable exception employed by the Court was justified via a balancing test. This test assessed the reasonableness of the officer's actions by "balancing the need to search (or seize) against the invasion which the search (or seizure) entailed" (*Terry*, 1968). The "need to search" in this case was supported by the police officer's broad interest in fighting crime, as well as his immediate significant interest concerning his own safety. The Court cited the substantial risk an officer undertook whenever he interacted with a suspect, and such interactions had the very real potential to turn deadly for the officer at any time. Due to this compelling interest, the Court accepted the general probable cause standards and allowed an officer to frisk for a weapon in order to guarantee his own safety, even when he did not have probable cause for an arrest. The Court weighed the officer's safety concerns against the "brief intrusion upon cherished personal liberty" which a frisk entailed (*Terry*, 1968). While it acknowledged such an intrusion was "far from inconsiderable", it found the officer's interest in securing his own safety, even before he had probable cause to make an arrest, was the more compelling interest.

Problems Stemming from *Terry*

In *Terry*, Chief Justice Warren, the author of the majority opinion, was careful to specify that this expanded police power was limited to very specific circumstances. The Court's language suggests that stop and frisk would be used very sparingly, and only when an officer had particularized suspicion that they or others were in danger. In the abstract, much of this decision seems reasonable. It employs an objectively sound balancing test that attempts to protect an officer's safety while also ensuring an individual's right to privacy. In reality, this decision created a set of circumstances that were ripe for abuse. The main problems with this decision are twofold: the Court refused to define clearly the newly employed standard of reasonable suspicion and it acknowledged, but ignored, that these new police powers were likely to be employed to harass minority communities.

The Court was tasked with defining what constituted the requisite reasonable suspicion to justify a stop and frisk. The definition, which the Court provided, was rather vague and produced unclear real-world ramifications. In its majority opinion, the Court stated reasonable suspicion required the police to "be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (*Terry*, 1968). The factors that influence an officer's decision had to be more than a "mere hunch"; they had to point to empirical observations and rational conclusions drawn therefrom which would lead a reasonable person to believe a suspect was armed and potentially dangerous (*Terry*, 1968). Reasonable suspicion was intended to be an objective "reasonable person" standard, a standard that was supposed to serve officers in a myriad of circumstances.

Even as the Court outlined the evidentiary requirements of reasonable suspicion, it refused to clarify the specific factors which could justifiably be used

to constitute the requisite standard. It believed the multitude of unique situations and circumstances which comprise citizen-police encounters could not be succinctly restrained by the Court. Instead, it stated, the "limitations will have to be developed in the concrete factual circumstances of individual cases." (*Terry*, 1968). This lack of specificity supplied the police with extensive discretionary power. Without clear judicial guidelines, officers were largely able to create their own set of reasonable factors (Harris, 1994). Instead of creating means of proactively delineating a set of factors, which, individually or in tandem, could suffice for reasonable suspicion, the Court instead took a much more passive role. They allowed police departments and individual officers on the street, to establish their own criteria, which only became subject to judicial discretion when it was brought before the Court. This method was especially problematic regarding a practice such as stop and frisk, since the majority of those who experienced it were never arrested and therefore never had cause to bring such challenges (Alexander, 2010).

This decision left the onus on subsequent courts to decide which factors did and did not constitute reasonable suspicion in a piecemeal manner. It was only when a case was brought before a judge that the factors used by police received any sort of check. This system afforded police an enormous amount of discretionary power. Police were able to use any factors that they deemed reasonable in order to justify a stop and frisk, factors that would only be challenged if the defendant brought the issue before the Court. Obviously, there was an enormous incentive for law enforcement to define such requisite factors as liberally as possible. Writing for the majority in *Terry*, Warren himself admitted there was validity to the argument that an officer's "judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" (*Terry*, 1968). An officer had a compelling interest in using whichever tools were at their disposal to combat crime. Given vague parameters, which allowed officers to search a person based on less than the usual standard of probable cause, it was inevitable that officers would use this newly expanded police power as much as possible. It was the duty of the courts to ensure this policy was not abused and individual liberties were protected.

Under the ill-defined reasonable suspicion standard supplied by the Court, subsequent courts were either unwilling or unable to limit adequately the virtually unfettered discretion granted to police under the *Terry* decision. The *Terry* Court had created a precedent of deferring to an officer's judgement whenever weighing the reasonableness of their actions. Throughout its decision, the Court referenced the arresting officer's extensive experience on the police force to legitimize their decision to stop and frisk Terry and his codefendant. The Court implied that courts should defer to an officer's judgement when deciding whether a particular case meets the reasonable suspicion threshold. This implication by the Court opened the door for subsequent decisions which explicitly stated what the earlier Court had only implied (*United States v. Cortez*, 1981). This deference on the part of the Court served to expand further police discretion and to ebb away from personal privacy. Without judicial oversight, the limitations placed upon the scope of stop and frisk were virtually meaningless.

Perhaps the most troubling aspect of stop and frisk policy was the vague and ubiquitous set of factors which courts ruled sufficed to meet the standard of reasonable suspicion (Harris, 1994). As stated before, these factors were not outlined in an overarching doctrine but were instead decided piecemeal by the courts as specific situations arose. Although precedent as law is an established tradition of common law jurisprudence, the Warren Court's decision failed to create a sufficiently complete precedent, instead explicitly transferring to later courts the task of deciding which factors constituted reasonable suspicion. These later courts were often much less liberal than the Warren Court had been, permitting a number of factors to be used to constitute reasonable suspicion. These factors were difficult to define or counter, and could be distorted to apply to almost anyone at any time.

The factors, which the courts allowed to meet, partially or wholly, the reasonable suspicion standard, were so ill defined as to be virtually meaningless. In his analysis of the New York Police Department's stop and frisk program, Avdi Avdija composed a list of the most commonly cited reasons which officers employ to justify a stop and frisk (Avdija, 2014). The most commonly cited factor was a suspect's location in a high crime area, cited in over fifty percent of incidents (Avdija, 2014). However, in Jeffrey Fagan's report on the NYPD, he found that police employed the "high crime area" justification irrespective of the area's crime rates and it was cited even when the stops were conducted in areas with some of the lowest crime rates in the city (Fagan, n.d.). However, because of the unspecified nature of what constitutes a "high crime area", and because of the minimal judicial oversight to which this practice was subjected, police were able to misapply this justification with impunity. Fagan's findings imply that officers use vague and un-scrutinized factors, such as high crime area, to employ stops and frisks without the requisite articulable reasonable suspicion. Although said factor cannot be used singularly to justify a stop and frisk, its misuse is evidence of the abuse permeating said doctrine (*Brown*, 1979).

Subsequent Supreme Court Decisions, and the Expansion of *Terry*

Post *Terry*, a series of Court decisions delineated a series of factors that did or did not rise to the requisite reasonable suspicion standard. In *Brown v. Texas*, the Supreme Court unanimously ruled that a suspect's location in a high crime area was not enough to constitute reasonable suspicion without the presence of other suspicious factors (*Brown*, 1979). In this case, officers stopped Brown because he "looked suspicious" due to the fact that he was in an area known for drug crime, and the officers had never seen him before. The arresting officers failed to cite any specific or individualized reasons for the stop, which led the Court to conclude that said actions did not meet the requirements proposed under *Terry*. This case was fairly unusual, as the Court found that the officers had failed to meet even the very low threshold of reasonable suspicion. This was mainly due to the officers failing to cite any sort of plausible justification for their actions and having freely admitted they had neither seen Brown act suspiciously nor had they any reason to believe he was armed. Although the decision in this case was almost inevitable given the circumstances, it still provided a restriction,

however nominal, on the factors which could be used to form reasonable suspicion.

The restrictions which *Brown v. Texas* had created were mostly nullified by the subsequent case, *Illinois v. Wardlow* (*Illinois*, 2000). The defendant, Wardlow, had been standing in front of a building within a high crime neighborhood in Chicago. According to the officers, he had not been acting in a suspicious manner prior to seeing the police but had inexplicably fled upon seeing the patrol car. He was apprehended and frisked, at which point the officers located a gun. The Supreme Court overturned the appellate court's decision, and ruled that the officers had sufficient reasonable suspicion to perform a stop and frisk. While a suspect's location in a high crime area was not singularly sufficient to justify a stop and frisk, it could be used in conjunction with other factors. Furthermore, the Court held that flight or evasive action on the part of a suspect, taken in tandem with a suspect's location in a high crime area, constituted behavior suspicious enough to meet the reasonable suspicion standard. This was a significant expansion of the *Terry* doctrine.

As stated earlier, the "high crime area" standard has been widely utilized and abused by the sample police department (Fagan, n.d.). Wardlow allowed for this spurious standard to be used provided at least one other factor was cited as well. The other factors commonly used by police to justify stops and frisks are of an equally unspecifiable nature (Avdija, 2014). Factors such as "furtive movement", "individual wearing unseasonably warm clothing", or "time of day fits the crime incident" are all factors which police may legally cite in order to justify a stop and frisk (Avdija, 2014). Many of these factors are largely subjective, which not only significantly increases police discretion, but also imposes an undue burden on the defense. The accused are burdened with the nearly impossible task of disputing factors which are largely subjective and left to be determined at an officer's discretion. Such factors are so ill-defined and ubiquitous as to potentially allow for the stop and frisk of anyone, at any time. As such, the reasonable suspicion standard affords no meaningful protections or restrictions at all.

Post-*Terry* courts consistently expanded the parameter of stop and frisk. One of the most significant cases of said expansion was the "totality of circumstances" doctrine introduced by the Supreme Court in *United States v. Cortez* (*United States v. Cortez*, 1981). In *Cortez*, the Court definitively declared it would not provide a clear definition of what constituted the requisite reasonable suspicion to perform a stop and frisk, instead relying on the totality of circumstances, or the "whole picture", when judging if an officer's actions had been reasonable. This "whole picture" could include several individually innocent factors which only rose to the level of reasonable suspicion when they were combined. Not only did *Cortez* dramatically expand stop and frisk doctrine, but it also established precedent for future decisions, such as *Illinois v. Wardlow*, which expanded said policy even further.

Cortez not only failed to provide sufficient guidelines for stop and frisk, but in its majority decision, the Court also established the precedent of ceding to the officer's discretion when determining reasonableness. Because an officer has extensive training and experience, "a trained officer draws inferences and makes

deductions – inferences and deductions that might well elude an untrained person" (*United States v. Cortez*, 1981). In this way, the Court subtly replaced the "reasonable person" standard with the "reasonable officer" standard. The Court instructed that an officer's judgement should be relied upon even when a reasonable, but untrained, person may not have deemed the situation suspicious. *Cortez* sent the message that, due to an officer's special and particularized knowledge of crime, subsequent courts should defer to their judgement when weighing the reasonableness of a *Terry* stop.

Once again, the decisions reached by the Court in *Cortez* seem objectively reasonable. In the abstract, it appeared to simply allow an officer to utilize all available information, or the "whole picture", when making the decision whether or not to perform a stop. Similarly, recognizing that an officer has more experience in detecting criminality than a lay person, and allowing extra experience to weigh in an officer's favor when judging the reasonableness of his conduct, also seems objectively fair. But, as in *Terry*, the problem with this decision lies in its application. Burger admits that defining reasonable suspicion has proved an "elusive concept" for the courts, but then proceeds to define it in an equally obtuse manner via the totality of circumstances doctrine (*United States v. Cortez*, 1981). The decision simultaneously increases police discretion while decreasing judicial oversight. Instead of mandating police be able to produce one or two specific, concrete factors to justify a stop, the Court instead allowed officers to choose from a number of unspecified and arbitrary factors to justify their actions. As long as officers cited the right set of factors, they were able to perform *Terry* stops almost completely unchecked by the courts (Meares, 2015).

While not explicitly expanding stop and frisk doctrine, *Minnesota v. Dickerson* did potentially create enormous incentives for officers to utilize stop and frisk more widely (Minnesota, 1993). The circumstances in *Dickerson* were similar to the circumstances in *Wardlow v. Illinois*, Dickerson was in a high crime area and turned to walk away upon seeing the officers. He was ordered to stop, at which point the officers performed a frisk searching for weapons. No weapons were found, but the officer did feel a lump in Dickerson's pocket, which after several seconds of feeling it, the officer identified as cocaine. The question before the Court was whether an officer was permitted to seize contraband found during a protective search for weapons.

The unanimous decision of the Court was yes, an officer may seize contraband found during a protective search. It established the "plain feel" doctrine, which stated that as long as the officer's initial search for weapons was valid, any contraband found therefrom was admissible. It would not instruct officers to ignore evidence found during a lawful search. However, contraband was only admissible when "its incriminating character is immediately apparent," the officer had to be able to immediately identify the object as contraband upon touching it (Minnesota, 1993). A search could not be extended beyond that which was necessary to identify a weapon and an officer could not extend the search to determine if an object was contraband. Therefore, although justifying the seizure of contraband under the plain feel doctrine, the Court also found that the search conducted by the officers in *Dickerson* had been improper, as the officer had

continued to "mash" the object in Dickerson's pocket, even after determining it was not a weapon. Nonetheless, the introduction of the plain feel doctrine presented an enormous potential for abuse by potentially admitting stop and frisk to be used as a tool in the War on Drugs.

Although a full analysis of the War on Drugs is beyond the scope of this analysis, a brief synopsis will be included here to exhibit how it has contributed to the rampant abuses conducted via stop and frisk. The War on Drugs led to an explosive rise in the nation's prison population. In 1980, shortly after the War on Drugs had been declared, there were 41,100 people incarcerated in the United States for drug offenses. Today, that number is over half a million. The United States has the highest per capita incarceration rate in the world, a fact which is largely due to the unprecedented arrest levels which were disproportionately high compared with the crime rates. Since the War on Drugs began in the 1970s, more than thirty-one million people have been arrested for drug offenses (Alexander, 2010).

The astronomical increase in drug arrests was largely unrelated to the crime rate. Even as crime rates have steadily declined, the number of incarcerated individuals continues to grow (Alexander, 2010). Instead, the War on Drugs had been largely sustained by the public's unfounded perception of crime, caused by the fear mongering rhetoric used by politicians and the media, as well as the creation of federal programs which incentivized drug crime arrests (Free, 2003). The federal government provided powerful incentives for state and local police departments to focus on drug crime. In 1988, Congress created the Byrne program, which allocated millions of dollars' worth of funding to states who engaged in the War on Drugs. The Pentagon also provided tens of millions of dollars' worth of military equipment to departments invested in fighting drug crime. Because of civil forfeiture laws amended by Congress in the 1980s, state and local police departments were now able to keep up to eighty percent of the property they seized from drug crimes (Alexander, 2010). This included cars, houses, money, and any other property which was seized from suspected drug dealers (Dunn, 2014). It is estimated that between 1988 and 1992 alone, over one billion dollars in assets had been seized via civil forfeiture (Alexander, 2010). The more drug offenders arrested, the more funding and assets a department would receive. Such programs created billions of dollars' worth of incentives for police departments to engage in widespread drug arrests.

By allowing contraband to be seized during a stop and frisk, the Court inevitably intertwined stop and frisk with the War on Drugs. The police have a powerful incentive to apprehend as many alleged drug dealers and users as possible. Legally, officers must rely on either consent searches or probable cause in order to conduct a search for drugs. However, an officer can utilize the much lower standard of reasonable suspicion, as long as he claims the initial search was for weapons. Because the standard for reasonable suspicion is so low, and because the incentives to search for drugs are so high, it was almost inevitable stop and frisk would be misused to conduct drug searches.

The final case to be analyzed, *Whren v. United States*, did not directly relate to stop and frisk, although its holding had an undoubted impact on said doctrine (*Whren*, 1996). In a unanimous decision by the Court, *Whren* condoned

the use of "pretext stops" by police. Pretext stop refers to the police practice of stopping an individual, usually for a minor offense, and using said offense as a "pretext" in order to investigate the individual for another, unrelated crime. In *Whren*, an officer had observed the suspect driving in an area known for drug use. He had observed the individual acting suspiciously, and when the defendant failed to use a turn signal, the officer used the traffic violation to justify the stop. The officer admitted he had suspected the defendant of possessing drugs, and had therefore used the traffic violation as a pretext in order to investigate further. The Court ruled that such a pretext stop was permissible, as long as the reason for initiating the stop was valid. Since the defendant had committed a traffic violation in failing to use his turn signal, the underlying stop by the officer was valid, and he was therefore justified in using said stop as a pretext to investigate the drug crime. The intention of the officer in conducting the stop was irrelevant, the Court ruled, as long as the stop itself was valid.

The explicit sanctification of pretext stops by the Court has troubling implications for stop and frisk. Under *Terry*, the Court held that a stop and frisk could only be performed to look for weapons when an officer had reason to believe that a crime had been or would be committed and had reason to fear for his safety. Under *Whren*, however, an officer would now be justified in performing a frisk to search for anything, not just weapons, provided that he possessed the requisite reasonable suspicion to perform a weapons search. Here is where the incredibly low standard of reasonable suspicion becomes truly problematic. Because the standard which allows police to search for weapons is so incredibly low, and is based on a totality of undefined circumstances, police now essentially have the ability to search for anything at any time (Jonas, 1989). The probable cause standard meant to protect citizens from unreasonable searches becomes virtually meaningless when pretext searches may be used based on the much lower standard of reasonable suspicion.

When observed in their totality, the preceding set of cases merge to form an unreasonably low standard regarding stop and frisk. Beginning with *Terry*, the Court consistently failed to develop adequately strict parameters to curtail the newly expanded police discretion granted via stop and frisk doctrine. The underlying issue throughout remained the fact the Supreme Court refused to clearly define the standard of reasonable suspicion, instead leaving the onus on subsequent courts to decide if a particular case had sufficiently met the standard. Eventually, the Burger Court decided on the totality of circumstances doctrine, which effectively expanded, instead of limited, police discretion. Police were now able to choose from a number of individually innocent, difficult to define factors, which they could combine to form the requisite suspicion (Avdija, 2014). The fluidity and vagueness of said factors allowed police almost unfettered discretion in deciding who to stop and frisk (Harris, 1994). These factors offered no substantial guidelines which officers could follow, but instead were so indefinite as to be able to be fitted to almost any circumstance. The limitations placed on stop and frisk were in essence, no limitations at all.

As long as officers cited the correct factors, it was likely that a stop and frisk would be upheld (if it was challenged at all). This has led to a situation in some major cities where officers need simply to check off boxes next to a list of

factors in order for the stop to be deemed legal (Fagan and Geller, 2015). This practice has led to accusations that police in these districts will stop first, and determine the requisite reasonable suspicion later. That the factors cited conform to the individual stop is rarely checked by either the officer's supervisor or by the courts. This lack of oversight is inevitable given the vague, essentially unverifiable, nature of such factors, as well as the fact that few stop and frisks result in an arrest and therefore never have the chance to be scrutinized by a judge. Even when a judge is able to review said factors, such inquiry generally poses little benefit to the accused. The inferences and observations made by the officer are given deference by the judge, as precedent holds that an officer's training and experience allows him to reasonably detect suspicion where an average person may not. Therefore, judges should cede to an officer's discretion if they are in doubt about the reasonableness of his conduct. Vague doctrines and minimal judicial oversight have allowed police to largely bypass the probable cause requirement and conduct stops and frisks based on reasonable suspicion virtually unrestrained.

The primary object of the police is crime prevention and control. That they would use almost every means available to them to do so is a forgone conclusion. This is why police discretion is checked with policy, and police actions are reviewed and restrained by courts. However, the *Terry* doctrine had failed to sufficiently check or restrain police conduct in regard to stop and frisk. Instead, it has created powerful incentives, such as the plain feel doctrine, to utilize stop and frisk as much as possible to combat crime. *Terry* and its subsequent cases have inevitably created the abusive practices observed today in which millions of people are stopped and frisked for little to no cause (Cole, 1999). It was a doctrine doomed to be abused from the outset due to its unspecified nature. What is occurring today in many major cities throughout the U.S. is not an aberration or perversion of a fundamentally sound doctrine, it is said doctrine's inevitable conclusion.

II. The Racial Ramifications of Stop and Frisk

The Racism Inherent in *Terry*

Even before *Terry v. Ohio* had been decided, its racial ramifications were of concern. When *Terry* reached the Supreme Court, the NAACP Legal Defense and Education Fund filed an amicus brief with the Court, in which they argued against lowering the probable cause standard to one subject to less scrutiny (Kurland and Casper, 1975). The brief purported to represent the "everyman", or the numerous innocent people who had already been subjected to the indignity of a stop and frisk. It feared an even lower standard of suspicion would result in even more innocent people being harassed. This harassment, the NAACP contended, was not spread equally, but was instead unfairly perpetrated against African Americans and those living in the inner city. The Fourth Amendment was intended to protect "unpopular and underprivileged" groups such as African Americans, and to lower its protections would inevitably lead to discriminatory policing against such groups (Kurland and Casper, 1975).

The NAACP contended African Americans were disproportionately subjected to stop and frisks, and this was due to racial bias on the part of the police and not because higher levels of criminality. It cited studies which had shown that African Americans were more likely to be illegally frisked than whites, and that "observers in on-view encounters judged frisk necessary for the officer's protection *less often* when Negroes than whites were searched" (Kurland and Casper, 1975). Although relatively few studies existed on this subject at the time, the NAACP argued that their findings confirmed that stop and frisk had been utilized in a racially biased manner.

The NAACP strongly argued against the Court's acceptance of stop and frisk, stating, "[t]he essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers" (Kurland and Casper, 1975). Such unchecked discretion, the NAACP argued, would inevitably have racial connotations. In the racially charged context of the 1960s, when police violence against peaceful Civil Rights protesters was rampant, it is hard to argue against such an assertion. With the benefit of hindsight, it is obvious that many officers harbored racist sentiments, which would inevitably lead to discrimination if left unchecked (Schwartz, 1995).

In its decision in *Terry*, the Warren Court both agreed with, and rejected, the arguments posed by the NAACP. It admitted racial harassment was likely to occur as a result of their ruling, but held that the courts were powerless to proactively stop such abuses. The Court referenced race in its decision only once, when it stated, "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 criminal trial" (Terry, 1968). The exclusionary rule, which the same Court had developed several years earlier, excluded any evidence obtained illegally from being used during a trial (O'Brien, 2011). According to the same Court, it served as the only effective deterrent to police misconduct regarding the Fourth Amendment. Despite admitting to such measures' general effectiveness, the Court refused to apply similar guidelines to stop and frisk (Thompson, 1999).

While the Court acknowledged the lower level of scrutiny inherent within stops and frisks would likely lead to discriminatory policing, it maintained that such discrimination could not be proactively deterred by the Court and any attempt to do so would only serve to impede legitimate policing (Terry, 1968). It refused to entirely ban the policy of stop and frisk simply because it was sometimes utilized in an improper manner. Furthermore, it held that application of the exclusionary rule only served as an effective deterrent when an officer's primary motive was to obtain a conviction. Because racially biased police harassment was generally perpetrated for reasons other than pursuing prosecution and was instead conducted "in the interest of serving some other goal," application of the exclusionary rule would be wholly ineffective in countering police misconduct (Terry, 1968). In other words, placing an outright ban on stop and frisk would do nothing to prevent some segments of the police from unfairly targeting and persecuting minorities, because such harassment would occur with or without the Court's sanctification of said policy. All that such

a ban would accomplish, the Court held, would be to endanger "good" officer's lives by preventing them from legally ascertaining that the suspect was unarmed.

Although the Court refused to take proactive measures to prevent abusive discriminatory policing, it maintained that it was the duty of judges to condemn such cases when they were brought before the court. It held that such abuses could not be checked via policy, and could only be effectively dealt with after an individual instance of police misconduct had occurred. This method of scrutiny has proven to be entirely ineffective in combating racially motivated stops and frisks. In the rare event that a stop and frisk resulted in an arrest, the officer needed only to advance some of the vague, racially neutral justifications for why the stop and frisk was performed in order for his actions to be deemed unbiased. Unless an officer freely admitted race was the sole reason for performing a stop, it was incredibly unlikely a judge would rule racial bias had existed (Alexander, 2010). It is not until said policy is viewed in its entirety that the serious racial ramifications become clear.

The Court was remarkably unconcerned about the possible racial implications which would inevitably stem from the increased police discretion afforded by stop and frisk. It agreed with the NAACP's contention that an increased level of police discretion would also result in an increase in the harassment which minorities received from "certain elements" of the police force. It viewed such harassment as unfortunate, but inevitable and as an issue which the judicial system was unequipped to adequately prevent. But what the sanctification of stop and frisk did was not just to allow a few "bad" officers to continue to abuse their discretion. Instead, it created a system whereby entire inner city police departments were able to stop and harass large swaths of minority communities with little to no judicial oversight. The narrative espoused by the Court that individual officers and police departments would "police" themselves and choose to exercise the drastically expanded police power afforded through stop and frisk strictly within the narrow confines established by the Court proved to be wholly misguided.

The Warren Court recognized (albeit briefly) that their new decision would have racial ramifications. However, they failed to predict these ramifications would not be the product of individual officers abusing their authority but would instead be built into a system which would stop and frisk certain "types" of people en masse as a matter of policy (Meares, 2015). Following *Terry*, stop and frisk became institutionalized within numerous police departments across the country. Policies were created whereby officers were instructed to "blanket certain areas and 'stop the right people'" (Editorial Board N.Y. Times, 2013). Officers were instructed to stop people they deemed to look "suspicious", even if they did not have a specific reason to believe that crime was afoot. The incredible level of police discretion permitted under *Terry* was not just abused by individual officers, but was employed by entire police departments. This abuse was overwhelmingly targeted toward minority communities (Eterno, 2012).

In its *Terry* decision, the Court created a system whereby individual and institutional racism was able to flourish. It presented individual officers with an almost unparalleled level of discretion allowing them to conduct stop and frisks based on vague parameters with minimal judicial oversight. The fact that this

discretion would often be utilized in a discriminatory manner was inevitable given the undercurrent of racism still present within American society. Racism was not only present in an individual officer's decision of whom to stop and frisk, however, but was also present in police department's decisions on which neighborhoods to target. Numerous studies will exhibit the implicit racism present within individuals as well as a system of racism within the criminal justice system. Due to said factors, the level of discretion afforded by the Courts was inevitably used in a racially discriminatory manner.

Implicit Bias and Its Impact on Decision-making

The almost unfettered level of discretion afforded to officers under stop and frisk has inevitably led to racially discriminatory policing given the current racial climate. Despite the progress made in combating explicit forms of racial discrimination, implicit forms of racial bias still remain widely prevalent. Unlike explicit biases, which individuals are aware they hold, implicit biases are held at a subconscious level with the biased individual often unaware that he holds such beliefs. They are the "evaluations and beliefs that are automatically activated by the mere presence (actual or symbolic) of the attitude object" (Fletcher, 2001). In other words, a person experiences these biases automatically upon encountering the subject of said bias, which causes him to act in a discriminatory manner toward said subject, often without conscious awareness that he is doing so (Fletcher, 2001).

Within American society, there has existed a pervasive stereotype which equates African Americans with violence and criminal behavior. Such stereotypes have been broadcast in the modern era via politicians, who have utilized divisive rhetoric to equate African Americans with violent and drug crimes, and the media, which disproportionately portrays black men as dangerous criminals (Alexander, 2010). The propagation of such stereotypes has resulted in many individuals holding racially biased beliefs, often without conscious awareness of doing so. This implicit bias extends (but is certainly not limited) to police officers, and unconsciously affects their judgement and discretion (Eberhardt, 2004). The presence of such implicit biases present a strong argument for limiting individual officer's discretionary power.

Because implicit biases are unconscious beliefs, researchers cannot uncover those using conventional methods and questionnaires. Instead, they "capture unintentional and unconscious racial biases by observing people's decisions and actions" (Ghandnoosh, 2014). An individual can react in a biased manner without holding any overt prejudices (Fletcher, 2001). A survey conducted in 1995 asked respondents to "envision a drug user", and then asked those surveyed what race they had pictured the imagined drug user being. Ninety-five percent of the respondents reported picturing a drug user who was black (Alexander, 2010). Another study conducted on non-black college students involved showing the students pictures of either a white or a black face and then asking them to identify if the picture of the object under the face was a gun or a tool. When the students were presented with a black face, they were able to identify the weapon more quickly than when presented with a white face, but were also more likely to misidentify the tool as a weapon as well. Respondents in

these surveys had similar reactions, even when they did not consider themselves to hold racist beliefs (Payne, 2001). These studies present just two of the numerous examples which demonstrate the persistence of racial stereotypes concerning black criminality in the United States.

The Role of Implicit Bias on an Officer's Decision-making

Implicit bias research conducted on police officers has shown that they are not immune to the negative racial beliefs which permeate American society. Studies have indicated such biases have a considerable impact on discretionary choices officers make. As is true with the general population, officers have a proclivity toward associating African Americans with criminality. A study performed by Eberhardt et al. presented officers with a set of white faces and a set of black faces and asked them to identify who "looked criminal" (Eberhardt, 2004). The study concluded, "officers not only viewed more Black faces than White faces as criminal, but also viewed those Black faces rated as the most stereotypically Black (e.g. those faces with wide noses, thick lips, or dark skin) as the most criminal of all" (Eberhardt, 2004). The more stereotypically "black" a face looked, the more it was associated with criminality (Eberhardt, 2004). This seems to imply a powerful association between African Americans and criminality in the minds of many police officers.

A subsequent study conducted by Eberhardt arrived at a similar conclusion. In this study, police officers were asked to think about violent crime and then showed them pictures of white and black faces. When officers were thus primed to imagine crime, they were much more likely to focus on the black faces than the white faces. Furthermore, when an officer was later asked to recall a black male image, and misremembered it, he generally ascribed more stereotypically black features to the image than had been present (Ghandnoosh, 2014). These findings demonstrate that officers are prone to associating blackness with criminality and to overwhelming focus on African American subjects when thinking about crime. Such findings have troubling implications for on the street police stops where an individual officer's discretion is virtually unchecked.

The impact of implicit racial bias in a police officer's discretionary role is most apparent in statistics concerning lethal use of force. A study by Correll et al. examined if racial bias affects an officer's decision concerning whether to shoot an armed or unarmed suspect (Correll, 2007). Its goal was to determine if officers were more likely, less likely, or equally likely to shoot an unarmed black suspect as compared to untrained members of the general population. In doing so, it hoped to both determine if racial bias impacted an officer's decision to use lethal force and how such a decision compared to those made by regular citizens. Participants played a video game in which they were shown a picture of either an African American or a white male, who was holding either a weapon or a non-weapon item. They were given less than a second to determine if the suspect was armed and to decide whether or not to shoot according to that assessment. The study recorded both the time it took a participant to make the shoot/don't shoot decision, and the accuracy of such decision once it was made.

The study found that both police officers and citizens spent a longer time deciding whether or not to shoot when the image presented was "stereotype-incongruent" (Correll, 2007). Images of unarmed black men and of armed white men did not correspond to the pervading societal stereotype regarding the criminality of such groups. While both officers and non-officers were able to act quickly when an image confirmed racial stereotypes (i.e. armed black man and unarmed white man), the reaction time of both groups was significantly slower when responding to images which defied conventional racial beliefs. This discrepancy in reaction times indicates a possible racial bias within both groups. It suggests the participants were able to react almost reflexively when presented with an image which confirmed racial stereotypes, but they were forced to pause and think when responding to images which did not conform to such stereotypes. It belies an underlying expectation of criminality within one group (i.e. black men) and an expectation of non-criminality within another (i.e. white men).

While the delayed reaction time for stereotype incongruent images was similar for both offices and non-officers, these groups differed in their decisions to shoot. Average citizens were considered "trigger happy" in that they were much more likely than officers to shoot an unarmed target, especially if the individual in the image was black. Police on the other hand, were much less likely to shoot an unarmed target and exhibited no racial discrepancies in the targets they chose to shoot. In other words, they were no more likely to shoot an unarmed black man than to shoot an unarmed white man. These findings are surprising, in that the delay exhibited when officers had to make decisions regarding racially incongruent images generally correlates with incorrect, racially biased decisions being made. While the study found both groups were subject to racially stereotypical beliefs, it found that average citizens, not police, were the only group susceptible of acting on such bias. The study surmised that an officer's training allowed him to overcome his latent biases and to react in a racially neutral manner.

The final conclusions derived from the Collins et al. study are somewhat disputed by statistics regarding lethal use of force by police. Statistics concerning the use of lethal force and a suspect's race reveal a strong discretionary bias on the part of the police officer. A study conducted by the University of Louisville and University of South Carolina analyzed the 990 fatal shootings by police officers which occurred in 2015. It concluded that unarmed black people were proportionally seven times more likely to shot by police than unarmed white people and approximately forty percent of all unarmed people killed by police were African American. Even when controlling for multiple other variables such as if a suspect suffered from mental illness and whether the suspect was attacking the police at the time of the shooting, unarmed African Americans were still twice as likely as unarmed white men to be fatally shot by police. Furthermore, those black individuals who were killed by police were less likely than white individuals to have been attacking the officer. The authors of this study attribute these discrepancies to racial bias (Editorial Board N.Y. Times, 2013).

This study attempted to control for the non-racial factors which are sometimes employed in an attempt to create a racially neutral narrative to explain such discrepancies (e.g. black men are more likely to be fatally shot

because they are more likely to be in high crime areas, because they are more likely to assault officers, etc.). In doing so, the researchers attempted to prove racial biases had an impact on an officer's decision concerning when to use lethal force. According to one of the researchers, "the only thing that was significant in predicting whether someone shot and killed by police was unarmed was whether or not they were black" (Lowery, 2016). Such statistics seem to belie the assertion that while officers still experience implicit biases, they are able to overcome them and act in a racially neutral manner due to their training. Such statistics clearly demonstrate an officer's discretion is influenced by the racial stereotypes which permeate American society.

Stop and frisk policy provides officers with virtually no concrete guidelines. Instead, officers are granted virtually unfettered discretion regarding which individuals they choose to engage with in on the street encounters. Despite repeated assertions by the Court that the suspicion requisite to performing a stop must be articulable, in reality any number of vague, unspecified factors may be employed to justify said stop. Because the discretion granted to police is so expansive and because the Court has provided so few parameters and checks to curtail it, it is inevitable that biases would impact officer's decisions regarding who to stop.

No one is immune to the constant cultural and societal influences to which individuals within a society are subjected. Unfortunately, America has a darkly racist past, the remnants of which persist today. The stereotypes and biases created by such a legacy are hard to escape and they influence an individual's perceptions and judgements on both the conscious and unconscious level. Police officers are not immune to such influences although their effects on officers may be much more serious given the degree of power entrusted to them. Sufficient checks placed upon officer's discretion can greatly reduce the potential ramifications of such bias by providing officers with racially neutral practices and tools upon which to rely, instead of simply their own personal judgements. Stop and frisk precedent fails to do this but instead provides officers with an enormous amount of power and then fails to provide any meaningful check to ensure the policy is utilized fairly.

Institutional Racism

This is not meant to imply that individual officers are solely responsible for the stark racial disparities observed in stop and frisk's implementation. An institutionally racist criminal justice system is also a major contributor to the harassment many African Americans face at the hands of police. For example, many major cities institute a policy whereby officers are concentrated in areas with a high proportion of African American residents and are instructed to "stop the right people" (Editorial Board N.Y. Times, 2013). Stop and frisk is usually not employed by police departments in majority white neighborhoods, even when these areas have high crime rates. Instead, it is consistently employed within minority communities (Editorial Board N.Y. Times, 2013).

With its decision in *Minnesota v. Dickerson*, the Court irreversibly linked stop and frisk to the War on Drugs, since contraband found during a protective frisk was ruled admissible against the defendant (*Minnesota*, 1993). As stated

earlier, police departments had incredible financial incentives to apprehend as many drug users and dealers as possible and stop and frisk became a powerful tool which permitted officers to perform searches based on less than the usual standard of probable cause (Alexander, 2010). This policy had enormous racial repercussions and was the major catalyst for the explosion in incarceration rates following its inception in 1970s (Free, 2003).

Reagan-era propaganda and rhetoric inundated the media with portrayals of drug users as young, dangerous African American males. These images, coupled with enormous police discretion regarding which individuals and locations to target, can help to explain the fact that even though white youth are the most likely demographic to sell and use drugs, three-fourths of all people imprisoned for drug crimes are minorities. In fact, a Department of Justice analysis of police departments in Seattle found that officers would often ignore white drug dealers operating in the open in favor of apprehending black dealers; even when the individuals operated in the same neighborhood and were selling the same drugs. Not only are African Americans more likely to be arrested for drug crimes, but they are also less likely to receive favorable plea bargains than white defendants and they are disproportionately waived from state to federal court systems, where the penalties are more severe. Even legislation regarding drug use can result in racially discriminatory outcomes, as crack cocaine (a drug associated with black users) was once sentenced at a 100:1 ratio with powder cocaine (a drug associated with white users), even though they are essentially the same substance (Alexander, 2010). These factors are a major reason why the incarceration rate for African American males is so disproportionately high.

Both institutional and individual biases have contributed to the racially discriminatory nature of stop and frisk. The systematic targeting of certain neighborhoods to the exclusion of others, combined with the incredible incentives presented to police departments to apprehend as many drug users as possible, are both major factors which have resulted in African American individuals and communities being overwhelmingly subjected to widespread stop and frisks. Firm legislative restrictions and comprehensive judicial oversight are both necessary to combat these institutionalized methods of racial discrimination. However, individual racial bias on the part of police officers also plays an important role and is perhaps easier to remedy than complex systematic discrimination. The undefined parameters and vague factors which form stop and frisk policy has created a system whereby individual biases are able to flourish. Granting officers the ability to stop anyone, provided they supply a perfunctory explanation composed of any number of un-particularized, individually innocent factors, and then hindering any judicial oversight of said officer's actions, has necessarily led to racially abusive policing.

III. Empirical Case Studies of Stop and Frisk in Major Cities

The prior sections have demonstrated the potential abuses inherent within current stop and frisk doctrine. The lack of concrete restrictions on police action, coupled with the realities of individual and institutionalized biases, has created a system whereby African Americans are disproportionately targeted and harassed.

Terry stops have resulted in significant and widespread Fourth Amendment abuses within African American communities. The following section will analyze how stop and frisk has been utilized in four major U.S. cities: Los Angeles, Philadelphia, Chicago, and New York, in order to provide empirical evidence of said policy's racially discriminatory outcomes. Such abuses are not simply hypothetical, but are the daily reality for millions of minorities residing in urban areas. Stop and frisk has been utilized not as a policy of individualized suspicion, but as a system of widespread harassment. The following data will provide evidence that stop and frisk is both over utilized and conducted in a discriminatory manner.

Los Angeles

In October 2008, Yale Law Professor Ian Ayres and research assistant Jonathan Borowsky released a report entitled "A Study of Racially Disparate Outcomes in the Los Angeles Police Department" (Ayres, 2008). The report, prepared for the ACLU of Southern California, analyzed the more than 810,000 vehicle and pedestrian stops conducted by the LAPD from 2003-2004. Although the data is over ten years old, it is the most recent results which have been provided by the LAPD. The report analyzed field data reports (FDRs), which officers are required to complete after every stop is performed. FDRs provide information such as the race of the suspect, whether the suspect was frisked, and if said frisk resulted in weapons or contraband being found. The report investigated if minority suspects were more likely to be stopped, if they were more likely to be frisked following a stop, and if they were more likely than white suspects to be found with contraband.

Ayers attempted to determine if African Americans were more likely to be subjected to stops and frisks than whites, and if a racial discrepancy did exist if it was due to bias or legitimate policing (e.g. higher crime rates for one racial group than the other). Although this study does not include only street encounters, but also motor vehicle stops, it does provide important information regarding stop and frisks. African Americans were significantly more likely to be stopped and frisked than whites, even when controlling for non-race variables. Furthermore African Americans who were stopped and frisked were significantly less likely to be found in possession of contraband, which disputes the assertion that the racial disparity in stops is due to a racial disparity in crime.

African 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. Even controlling for non-racial variables, an enormous disparity regarding stop rates between races still existed. Controlling for violent and property crime rates within each Los Angeles district, African Americans were still subjected to 3,400 more stops per 10,000 people than whites. This disparity was not due to a greater police presence, which would logically result in more stops, in minority neighborhoods either. In fact, African Americans were most likely to be stopped in areas in which they constituted a minority (less than one-third of the population.). Disproportionate stops cannot be sufficiently explained by racially neutral factors but may instead be the product of racially-biased policing.

Once stopped, African Americans were 127% more likely to be frisked than were stopped whites. Some have attempted to explain that African Americans are more likely to be frisked not because of racial bias, but because they are more likely than whites to be in possession of contraband. This assertion is disputed by the current statistics. When frisked, African Americans were 42% less likely to be found with a weapon, 25% less likely to be found in possession of drugs, and 33% less likely to be found with any other contraband. Furthermore, stopped African Americans were 21% more likely to be subjected to a "no-action" stop, or a stop which did not result in an arrest or citation. This evidence suggests that black Americans are stopped and frisked based on a lower threshold of evidence than white Americans. African 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 Ayers to conclude that African Americans are "over-stopped, over-frisked, and over-arrested" due to their race.

Philadelphia

In 2010, the ACLU filed a federal lawsuit alleging that thousands of people, mostly minorities, are illegally stopped and frisked annually by the Philadelphia Police Department. As part of a settlement, Philadelphia agreed to collect information regarding each stop and frisk, to be reviewed by an independent monitor appointed by the court, and to retrain officers in the use of stop and frisk (ACLU of Pennsylvania, 2016). The ACLU has analyzed the most recent data, collected in 2015, to determine if stop and frisk continues to be used in a racially discriminatory manner. Despite the city implementing new training policies, stop and frisk continues to be performed in an illegal and discriminatory manner.

The report divides 2015 into a first and second quarter, and utilizes benchmarks agreed upon by both parties to determine if a stop and frisk was conducted with the requisite reasonable suspicion. In the first quarter, 33% of all stops and 42% of all frisks failed to meet the minimum reasonable suspicion threshold and were thus illegal. The second quarter was inexplicably much worse with 62% of all stops and 53% of all frisks failing to meet the standard. This is especially troubling given that by 2015 the Philadelphia Police Department had instituted all of the corrective measures which it had agreed to in the settlement. These measures included additional training for officers and more effective internal supervision. Despite the implementation of these measures, a large proportion of stop and frisks continued to be conducted illegally.

The ACLU analyzed 2,380 stops conducted by officers during the first quarter of 2015; the total number of stops in 2015 was over 200,000. Of these stops analyzed, 2,338 resulted in no contraband being found. Frisks were only recorded in 13.6% of the cases, but there is evidence that officers are failing to report a number of frisks which they had conducted. For example, no frisk was recorded in 35% of the cases where the stated justification for the stop was an officer's suspicion that the suspect was in possession of a gun. The report concluded, "it is simply not plausible to suggest that frisks are not conducted in

these situations" (ACLU of Pennsylvania, 2016). There is evidence police are failing to record when unsuccessful frisks are conducted.

Of the frisks that are recorded, officers tend to cite spurious justifications that result in a very low success rate in detecting weapons. Many of these justifications, such as loitering or "obstructing the sidewalk", have been rejected by the courts but continue to be used by officers. In total, only six guns were recovered under stop and frisk during this period, a "hit rate" of 0.25%. Moreover, 95% of stops resulted in the recovery of no contraband at all (ACLU of Pennsylvania, 2016). The incredibly low success rate strongly indicates that officers do not have adequate reasonable suspicion to stop and frisk the vast majority of the individuals they do. It suggests officers rarely have articulable suspicion a suspect is armed and dangerous, which is the only condition under which a frisk can legally be performed. Despite the city's purported efforts to improve their implementation of this policy, officers have continued to use it illegally.

There is evidence stop and frisk is not only used illegally, but it is often used discriminatorily as well. Minorities constituted 77.06% of the stops and 88.96% of the frisks. In the vast majority of districts, African Americans were stopped at a disproportionately high rate compared to their statistical proportion of the population, even in majority white neighborhoods. For example, although African Americans only accounted for 7% of residents in one Philadelphia district, they composed 59% of all the stops within that area. The report controlled for multiple non-racial variables, such as age, sex, and location's crime rates, to determine if these discrepancies could be attributed to factors other than race. It found that, even controlling for other variables, approximately 962 more black individuals than white individuals were stopped per every 10,000 people (ACLU of Pennsylvania, 2016). Philadelphia has a policy of virtually unchecked, illegal stops and frisks, to which African Americans are disproportionately subjected.

Chicago

The city of Chicago began collecting data on *Terry* stops following a 2003 lawsuit filed by the ACLU that challenged the constitutionality of the city's stop and frisk program (ACLU of Illinois, 2015). In its 2015 analysis of Chicago's stop and frisk data, the ACLU found that it was so insufficient as to make any attempt at scrutiny impossible. Under its current policy, Chicago police officers are required to fill out a "contact card" any time they make a stop. These cards are not required when the stop results in an arrest or citation and they do not record when a frisk occurs subsequent to a stop. They simply record the officer's justification for the stop, which is then supposed to be reviewed by their superior. The collection of data is further complicated by the fact that, prior to 2014, officers completed contact cards for both voluntary and involuntary police stops and encounters without providing any differentiation between the two. Such insufficiencies have made any analysis nearly impossible.

The ACLU analyzed 250 randomly selected contact cards from 2012-2013 as well as data from the first four months of contact cards recorded in 2014. The latter data set is especially important as it only records involuntary police stops.

Officers are required to record legally sufficient justifications for why the stop was performed on these cards and each stop is to be reviewed by their superior to ensure that it was legally performed. However, the ACLU's analysis found that over half of the contact cards analyzed did not meet the minimum standard of reasonable suspicion and were therefore illegal. In these cases, officers either cited legally insufficient reasons for the stop (e.g. associating with others who were suspicious) or they provided such incomplete information as to render it impossible to determine if the stop was justified or not (e.g. only citing that the person "looked suspicious"). Furthermore, the ACLU found that none of these cases resulted in any officer being referred for further training, which implies that the method of supervision is ineffective in remedying these issues (ACLU of Illinois, 2016).

Despite incomplete record keeping, it has been determined that the city of Chicago proportionally performs the most stop and frisks of any city within the United States. From the period of May 1, 2014 to August 31, 2014, over 250,000 stops which did not result in an arrest occurred. Of these stops 72% of the suspects were black Americans, although they only compose 32% of Chicago's population. Only 9% of those stopped were white. Minority neighborhoods were also found to contain the most per-capita stops within Chicago. Even in predominantly white areas, African Americans were still stopped at a disproportionately high rate. For example, although African Americans were only 1% of the population within the Jefferson Park district, they composed 15% of the stops (ACLU of Illinois, 2016). Such data is remarkably similar to the data derived from Philadelphia and implies that racial bias may affect an officer's decision regarding whom to stop.

The data provided by the Chicago Police Department ("CPD") is wholly insufficient and hinders any meaningful analysis being performed regarding stop and frisk's effectiveness or its racial disparities. There is absolutely no information regarding the total number of stops being performed and absolutely no reports of frisks being conducted at all. The only information provided by the CPD is the number of stops performed which did not result in any further police action; a number which is startlingly high. Given this sparsity of data, it is impossible to determine the percentage of stop and frisks in which a weapon is discovered, which is essential to determining the policy's legality. If these stops rarely uncover weapons, it suggests that the reasonable suspicion standard supplied by the Court is not being adhered to and that this policy is therefore being utilized illegally. Furthermore, it is also impossible to compare the percentage of frisked African Americans found with weapons, to the percentage of frisked white Americans found with weapons. If African Americans are significantly more likely to be stopped and frisked, but significantly less likely than whites to be found with weapons, it suggests that racial profiling, not high crime rates, may be responsible for this disparity. Any type of meaningful analysis is impossible, however, given the sparsity of data provided by the CPD.

In addition to the fact that the CPD had to be taken to court to provide any data whatsoever on their stop and frisk policy, it also appears that they then provided the least amount of data possible. They have refused to collect any meaningful statistics regarding this practice and have refused to make the

information they do have publicly accessible. Even when it is apparent that officers are conducting stops based on less than reasonable suspicion, no action has been taken to correct this behavior. It is clear the Chicago Police Department is satisfied with the way stop and frisks are currently being conducted and they have no intention of taking any meaningful steps to correct its rampant abuses. Since none of the 250,000 cases here reported will ever make it to court, officers are able to continue to act with almost no judicial oversight.

Despite the lack of any meaningful statistics, the information provided still suggests that this policy's implementation is racially biased. African Americans are stopped at a disproportionately high rate, even in neighborhoods which are predominantly white. This supposition is supported by a report recently released by Chicago's Police Accountability Task Force which was created by Mayor Rahm Emanuel to investigate the accusations of rampant racial bias and police misconduct levied against the CPD. It found that African Americans were continuously "stopped without justification, verbally and physically abused, and in some instances arrested, and then detained without counsel…" and very little was done within the police department to remedy this. African Americans were also disproportionately tasered, shot, and illegally stopped. This report lends considerable credence to the claim stop and frisk is used to harass minority communities.

Although the evidence of racial disparity in stop rates is less definitive than in other cities, Chicago starkly highlights the potential widespread abuses perpetrated through this policy. Enormous numbers of people are stopped, frisked, and never arrested. Many of these stops are performed based on less than reasonable suspicion and are therefore illegal. There is also evidence that stop and frisks have been conducted in a racially biased manner and used to disproportionately harass African Americans. The CPD has been alerted to and even brought to court over these issues, yet it has refused to take any substantial steps to remedy these widespread abuses. Chicago is a clear example of the abuses inherent within stop and frisk doctrine. It has not been used on the basis of individualized suspicion, but instead has been utilized as a policy to search huge portions of the population with impunity. The Police Department is unwilling, and the courts are largely unable, to remedy these issues.

New York City

The New York City Police Department ("NYPD") began releasing data regarding their stop and frisk policies as part of a settlement of the class action lawsuit *Daniels, et al. v. the City of New York* in 2003 (*Daniels*, 2001). *Daniels* claimed that officers repeatedly performed stops without the requisite reasonable suspicion, in violation of the Fourth Amendment, and that these stops illegally targeted African Americans, in violation of the Fourteenth Amendment. After the city's motion to dismiss was denied, they reached a settlement with the plaintiffs which included writing an anti-racial profiling policy as well as performing audits on officers who performed stop and frisks, the results of which were to be submitted to the Center for Constitutional Rights for review (Daniels, 2012). Officers were also required to complete a UF250 form subsequent to each stop made (Daniels, 2012). These forms allowed officers to check one or more boxes

citing the circumstances which led to the stop (e.g. suspicious bulge, furtive movement), as well as the suspect's race, if a frisk was performed, and if the stop resulted in any further police action (Daniels, 2012). Each of these cards was then to be reviewed by a superior, who was to ensure that the patrol officer had reasonable suspicion to perform the stop (Daniels, 2012).

Despite these purported changes, a class action lawsuit was once again brought against the NYPD in the case of *Floyd et al. v. City of New York* in 2011 (Floyd, 2013). *Floyd* once again claimed that the NYPD's stop and frisk policy had violated the Fourth and Fourteenth Amendments. The Honorable Shira A. Scheindlin, the same District Judge who had decided the *Daniels* case, found that the NYPD was liable for both performing stops without reasonable suspicion and for unjustifiably targeting African Americans, in violation of the Fourth and Fourteenth Amendments respectively. Judge Scheindlin ordered a number of remedies be instituted, including additional training for police officers, and to begin providing some officers with body cameras. The city appealed, which the Circuit Court granted, instituting a stay on the proposed remedies and remanding the case back to the District Court to be tried by a new Judge (Floyd, 2016). However, under the new New York City Mayor, Bill de Blasio, the city has dropped its appeal and significantly limited the use of the stop and frisk program.

A key witness for the plaintiffs was Jeffrey Fagan, a Law Professor at Columbia University. He analyzed data from 2,805,721 UF250 forms from 2004-2009 (Fagen, n.d.). Stop rates consistently rose each year, with 313,047 stops conducted in 2004 to 573,394 stops conducted in 2009. Of these stops, 150,000 did not meet the reasonable suspicion threshold and another 544,252 stops did not provide enough information to determine if the stop was constitutional. Over fifty percent of the stops cited "high crime area" as one of the justifications for the stop, even in areas that had lower than average crime rates. Furthermore, nearly half the stops also cited "furtive movement" as a factor, which is deemed to be an incredibly vague and difficult to define category. Despite the enormous number of people stopped, only 5.37% resulted in an arrest and guns were found only 0.15% of the time. *These rates are lower than the success rates at random checkpoints*.

These stops disproportionately affect minorities. In 2011 alone, 84% of the 685,742 stops made targeted minority residents. Fagan found that race was the single most determinant factor in predicting who would be stopped and frisked. Race was even more important than crime rates when determining which individuals would be stopped. Even when adjusting for the police presence and crime rates within a certain neighborhood, it was concluded that most stops were concentrated in minority neighborhoods and not in white areas. Even in areas where the population was over fifty percent white, African Americans were still more likely to be stopped. This led Fagan to conclude that "the NYPD's stop and frisk program is about race, not crime". Force was 14% more likely to be used against black suspects than against white suspects, and black suspects were also significantly less likely to be found in possession of contraband.

African Americans were stopped at disproportionately high rates, were more likely to have force used against them during a stop, and were less likely to be found in possession of contraband. Officers also testified that they were forced

by the department to meet a quota regarding the number of stops performed, as well as the number of summonses issued or arrests made. Officers who failed to meet these quotas were disciplined and berated by their superiors. Precincts were expected to exceed their quotas yearly, which may account for why stop rates consistently climbed throughout the 2000s. According to one officer working in a high crime area "the Constitution has been thrown out the window when it comes to stops". This was the culture created under police commissioner Raymond Kelly and it led to the rampant abuses under stop and frisk.

The NYPD's stop and frisk policy is significant as it marks the first time that a District Court has definitively ruled such a policy as unconstitutional. New York's stop and frisk program highlights the issues which can result from it being utilized in an institutionalized fashion. The police department used stop and frisk as a tool to increase their arrest and citation rates. It is a program which allows officers to commit stops with almost no judicial oversight or concrete limitations, which makes it ripe for abuse by departments who intend to combat crime through whatever means possible. Officers were compelled to perform as many stops as possible, regardless of constitutional limitations. The weak guidelines regarding stop and frisk established by the Courts allowed a policy wherein millions of innocent people were stopped and harassed. The NYPD institutionally exploited the weak evidentiary requirements of stop and frisk, often performing frisks based on less than reasonable suspicion. A policy wherein random people were stopped and frisked for guns would likely have been more effective in combating gun crime.

Conclusion

Although Los Angeles, Philadelphia, Chicago, and New York are a diverse set of cities, with different demographics and crime rates, they all present similar problems with regard to the application of stop and frisk. Cities are often extremely reluctant to provide any meaningful data regarding their stop and frisk usage and will usually only do so as the result of a lawsuit. Whenever data is available, it consistently demonstrates that a significant number of stops are performed without the requisite reasonable suspicion. Officers consistently utilize vague or insufficient justifications to account for the stop, which are rarely scrutinized by a superior. Stop and frisk has not been used based on individual suspicion, but instead has been used as a convenient pretext to stop millions of people who they would be unable to legally stop otherwise. There is significant evidence that frisks are usually performed for reasons other than as a protective pat down when an officer reasonably believes a suspect is armed. Given the fact that in most cities frisks discover a weapon less than one percent of the time, it seems evident that the weapons justification is simply used as a pretext to justify said frisk. Judicial oversight is rarely applied, which allows officers and police departments to perform these stops with virtual impunity.

Throughout the sample cities, stops and frisks are not only often performed illegally, but discriminatorily as well. All of the cities analyzed have disproportionately high stop rates for African Americans, which cannot be sufficiently accounted for by crime rates or other non-racial variables. African American neighborhoods are consistently more likely to be targeted than white

ones, even when crime rates between the two are comparable. Often frisks of African Americans are less productive than frisks of white Americans, which contradicts that greater frisk rates are explained by greater rates of criminality. In each of these cities, it has been contended that stop and frisk is used as a policy to harass minorities. African Americans are more likely than any other group to be stopped, frisked, and arrested.

IV. Conclusion

Stop and frisk, as defined by the Courts, was a policy which was inherently flawed and inevitably abused. The Court was clear to delineate when a stop and frisk could legally be employed, but was not able to adequately define the parameters of what constituted reasonable suspicion. Instead, the Court in *Terry* shifted the burden to subsequent Courts, ruling that factors could only be deemed reasonable or unreasonable when specific cases were brought before the Court. This allowed officers to utilize almost any factor, provided that it had not been explicitly banned by the Court. Later decisions only served to expand this discretion even further, by refusing to clarify what would constitute reasonable suspicion, instead ruling that it was to be defined by a "totality of circumstances". This allowed officers to combine many different, individually innocent factors, in order to meet the low threshold of evidence. These factors were often vague and ubiquitous, and could be used to apply to almost anyone. Even factors which were not sufficient in and of themselves, such as location in a high crime area, could be combined with other factors to meet the standard. This allowed police almost unfettered discretion regarding who to stop and frisk.

Officer's discretion was further expanded by the Court's habit of deferring to an officer's judgement whenever attempting to gauge the reasonableness of a stop. Stop and frisk cases were rarely subjected to a judge's scrutiny, since the majority of stops do not result in an arrest and are therefore never brought before a judge. Of the cases which are heard, the Supreme Court has consistently instructed lower courts to yield to the officer's judgment if possible. Officers have extensive experience, the Court reasoned, which allows them to detect suspicious activity out of circumstances which may seem innocuous to the average person. Therefore, judges should be aware of this and defer to an officer's judgement when possible. This makes the work of the defense even more difficult if they wish to dispute the validity of a stop. Suspects are already tasked with refuting vague criteria which often cannot be either proven or disproven (e.g. that they were moving "furtively"). This pattern of deferring to an officer's judgement makes it almost impossible to successfully raise a challenge against a stop. Without judicial oversight to ensure that officers are complying with the constitutional limitations on stop and frisk imposed by the Court, it was inevitable that widespread abuses would occur.

These abuses disproportionately affect members of the African American community. Officers are granted extensive discretion regarding who to stop and frisk. In *Terry*, the Court was aware that such abuses would inevitably stem from this expanded discretion. Without any clear parameters guiding whom to stop, officers inevitably will be influenced by their implicit biases. Although explicit

racism has been officially condemned, it is the unfortunate reality that many people still hold implicit biases which connect African Americans with criminality. These biases affect an officer's decision regarding who to stop, even if he or she is not aware of it. This is why clear policy and judicial oversight is essential in order to limit such abuses. Police departments also have used stop and frisk on a widespread scale as a convenient means of bypassing the usual Fourth Amendment protections regarding searches and seizures. Police departments have intentionally targeted minority communities, have incentivized officers to make as many stops as possible, and have ignored clear racial abuses. The abuses perpetrated under stop and frisk have not been equally dispersed across communities, but have instead been targeted towards African Americans.

The policy issues and potential abuses present within stop and frisk doctrine are not simply hypothetical, but have been proven to occur wherever stop and frisk has been implemented. Cities where stop and frisk has been employed show that it has been used as a policy to harass millions of people, not as a practice resulting from an officer's individualized suspicion. A large percentage of stops performed do not have the requisite reasonable suspicion and are therefore illegal. It is also extremely likely that the majority of frisks are not performed due to an officer's suspicion that a suspect is armed, given that less than one percent of frisks result in a weapon being found. Stops and frisks are also utilized in a racially discriminatory manner, unfairly targeting African Americans. Even adjusting for crime rates and locations, African Americans are stopped at a disproportionately high rate. There is also evidence that they are over-frisked, since the majority of frisks are conducted against them, even though African Americans are often less likely than white Americans to be found in possession of contraband. These abuses are not simply hypothetical, but are instead the direct result of a faulty stop and frisk doctrine.

The balancing test originally employed by the Courts in *Terry*, which balanced an officer's need for safety against the limited intrusion of a frisk, has become meaningless given this new development. Officers are not utilizing frisks to ensure their safety, but are instead using them as a convenient exception to the usual probable cause requirements. Furthermore, frisks are not just being performed against individuals, but against entire communities. The Court failed to predict the extent to which these expanded police powers would be used. Millions of people are stopped annually, and statistics show that less than one percent of these stops are actually necessary to ensure the officer's safety. In light of stop and frisk's real-world implementation, the balancing test no longer seems reasonable. The reasonable suspicion standard is simply too low to provide any adequate protection to minorities in the inner city who bear the brunt of these stops. Instead, the Court must return to the probable cause standard, which was necessary for all street stops before the *Terry* decision. This standard will provide adequate protection for suspects by requiring an officer to have an actual, concrete basis for performing a stop; a basis which an officer must be able to support before a judge. Raising the standard of evidence will protect millions of people from being illegally frisked, without unduly endangering officers. It is the only reasonable solution which will ensure the Fourth Amendment is upheld.

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