Blue Laws Matter:
Post-Jim Crow Police Power, Stop and Frisk, and the Agents that Populated the Carceral State

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ABSTRACT

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This thesis analyzes the legal history of the Supreme Court's Fourth Amendment case law as it relates to the police practice of Stop and Frisk which shifted drastically in 1968 with the creation of the "Terry Stop". From that decision, it analyzes the broader role that both the Judiciary and Law Enforcement, as fundamental American institutions, played in the creation of the Carceral State. This research draws on archival Supreme Court records to demonstrate that the decision to reinterpret the Fourth Amendment's prohibition on warrantless searches and seizures was made in full view of the politicization and racialization of crime. Further, it shows that the Supreme Court both faced and succumbed to the immense pressure that Law Enforcement, lobbyists, and the United States Department of Justice placed on it. In response, the Court created a semantic carveout of the Fourth Amendment that permitted the practice of racially motivated Stop and Frisk, and the confiscation of contraband found during such frisks as evidence of a crime. In doing so, the Court demonstrated its allegiance to Law Enforcement—in the face of significant evidence to the contrary—by continually dismissing arguments that police practices were motivated by negative stereotypes. In legalizing the Stop and Frisk in 1968, the Court empowered Law Enforcement to practices to gradually shift away from the racially motivated police harassment from the Vagrancy Regime of the Jim Crow era to a constitutionally permissible Stop and Frisk regime. This thesis situates the advent of that change in Police Power which brought about this new regime as a primordial cornerstone in the creation of the Carceral State which was characterized by police as the agents who gathered Black bodies from American streets into the justice system.

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INTRODUCTION

By the end of the Civil Rights Movement (1954 – 1968), it appeared that the social climate throughout the United States was on a linear path towards racial progress with the passing of the *Civil Rights Act* of 1964 and the *Voting Rights Act* of 1965.[1] However, the idea that linear racial progress would entirely change the oppression that was characteristic of the Jim Crow era is directly contradicted by the rise of the racially oppressive American Carceral State. This phenomenon of mass incarceration engendered a tremendous degree of doubt about the idea that social progress in America was on a linear trajectory in which the racial injustices of previous generations were being remedied through societal changes and legislation. The activist, Malcolm X, summarized the absence of true progress in America months before his assassination when he said:

> If you stick a knife in my back nine inches and pull it out six inches, there's no progress. If you pull it all the way out that's not progress. Progress is healing the wound that the blow made. And they haven't even pulled the knife out much less heal the wound. They won't *even admit the knife is there*.[2]

He argued that the beginning progress is a recognition of existence of systemic racism, by the segments of society who were most benefitted by it and, subsequently, an undertaking of various efforts to remedy the hurts caused by such systemic racism. For Malcolm X in 1964, the society

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1. For the purposes of this thesis, the time period characterizing the Civil Rights movement begins in 1954 with the Brown v. Board of Education decision and ends with the assassination of Dr. King and the presidential election of Richard Nixon in 1968. However, some scholars have also characterized the Civil Rights movement in a timeline ranging from the New Deal of the 1930s to the late twentieth century. Kevin Gaines, "The Historiography of the Struggle for Black Equality since 1945," in *A Companion to Post-1945 America*, edited by Jean-Christophe Agnew and Roy Rosenzweig, (Malden, MA: Blackwell, 2002), 214-216; Sundiata Keita Cha-Jua and Clarence Lang, "The 'Long Movement' as Vampire: Temporal and Spatial Fallacies in Recent Black Freedom Studies," *Journal of African American History* 92, No. 2 (2007): 283-284; Jacquelyn D. Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History* 91, No. 4 (2005): 1234-1235.

2. The Malcolm X & Dr. Betty Shabazz Memorial & Education Center, "If you Stick a Knife in Me," *YouTube*, March 1964, https://www.facebook.com/watch/?v=10159147606541532. (Emphasis Added).

that most benefitted from racism would not even admit to racism's existence, and, by association, its deleterious impacts upon Black Americans.

The temporal period in American social history following the Civil Rights movement (1968-1980) saw a regression of human rights with the rise of mass incarceration, which disproportionately impacted Black Americans. While many historians have written about mass incarceration and the systems of racial oppression it represented, this thesis examines the specific role that both Law Enforcement and the Judiciary —as American institutions—played in capturing Black bodies from the streets of America's urban landscape and transferring them into the prison eco-system. By 1968, one law enforcement practice became a key mechanism to target Black Americans—whether explicitly or implicitly—in order to prevent future non-violent crime or stop non-violent crime in progress: the Stop and Frisk. At the time, the policy of Stop and Frisk was not used universally throughout the United States; in fact, its application on a state-by-state basis was largely dependent on the statutory power given to Law Enforcement by individual state legislatures. As a policy, Stop and Frisk generally referred to a practice used by police officers patrolling public spaces in a vehicle or working the beat of public locations. In instances where a police officer identified behavior which they deemed suspicious—where the conceptualization of suspicion was not defined—they approached the person or persons involved and performed a Stop and Frisk. The Stop component of the practice involved stopping someone in a public space for temporary detention and investigative questioning based on a police officer's suspicions. The Frisk that often, but not always, accompanied this type of Stop, could vary from officer to officer, ranging from a pat down of the individual's outer clothing for weapons to a full-blown search of the individual's pockets and belongings typically reserved for an arrest. Consequently, the products of such a Frisk—known in some jurisdictions as the *Fruit of the Frisk*—would sometimes

be used as evidence of a crime, a practice that some argued circumvented the protections guaranteed by the Fourth Amendment. The purpose of such a Frisk was often inconsistent or inarticulable, with some officers stating that its purpose was to ensure that the individual did not have any weapon that could harm the officer while other officers claimed that it was a search for evidence following the observation of allegedly suspicious conduct.

The application of Stop and Frisk practices by police departments across the United States, especially those who worked in minority communities, also incited the potential for disproportionate application of the practice based on both explicit and subjective or implicit racial biases. While law enforcement often advocated for these practices as mechanisms necessary to prevent crime, victims of these abusive police tactics saw them as a device to pre-textually gather evidence in a way that circumvented the Constitutional protections guaranteed by the Fourth Amendment and made applicable to the states by the Fourteenth Amendment. As such, three cases were joined together by the Supreme Court for its October 1967 term so that the Court could weigh the Constitutional legitimacy of the Stop and Frisk practice against the Fourth Amendment's prohibition against unreasonable searches and seizures without a warrant. The three cases were *Sibron v. New York*, *Peters v. New York*, and *Terry v. Ohio*. Collectively these cases were known as the "Stop and Frisk Cases" and they posed the risk of legitimizing the practice of Stop and Frisk as a state sanctioned evidence gathering mechanism that would circumvent civil liberties and, in turn, make Law Enforcement officials the central agents of the rising Carceral State in a more sanitized form of policing suitable for the post-Jim Crow era.

This thesis demonstrates a fundamental shift in Constitutional law pertaining to Police Power and Law Enforcement tactics by the end of the 1960s which transitioned the racialization of policing from the explicit racism of the Jim Crow era tactics to the more disguised form of

racism of the post-Jim Crow era.[3] The focal point of this research is the fundamental legal principles that facilitated the transition from policing policies of the Jim Crow era, which the broader American public had condemned. The legal framework that permitted Law Enforcement policies to shift away from explicit racism to evidence gathering through implicit racial bias allowed for the continuance of abusive and systemic policies that had devastating impacts on the most vulnerable individuals in American society.

While this thesis analyzes the legal changes that facilitated this transition, it does so with an emphasis on the victims of these abusive policing practices to reflect how the role of Law Enforcement and the Judiciary—as two central American institutions—politicized crime and maintained the two-tiered justice system that prevailed under Jim Crow. The history of the law almost always exclusively focuses on the key actors involved in producing outcomes in the Supreme Court, notably the Justices or lawyers who routinely argued cases before the Court and made up an elite class of American academics and jurists. Instead, this thesis is focused on the law as a malleable tool of a society built on white supremacy that used the justice system to victimize undesirable minorities, while analyzing the actions of the system's most elite members. This approach is largely inspired by the words of writer James Baldwin, who—amongst many poignant statements—wrote in 1972:

> If one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the *unprotected* -those, precisely, who need the law's protection most! -and listens to their testimony. Ask any…black man, any poor person -ask the wretched how they fare in the halls of justice, and then you will know, not whether or not the country is just, but whether or not it has any love for

3. The concept of Police Power broadly does not have a specific definition, but it generally refers to the power of a state, derived from the Tenth Amendment, to "promote the health, peace, morals, education, and good order of the people." Kermit L. Hall, James W. Ely, and Joel B. Grossman, *The Oxford Companion to the Supreme Court of the United States* (New York, NY: Oxford University Press, 2005), 741-43.

> justice, or any concept of it. It is certain, in any case, that *ignorance, allied with power, is the most ferocious enemy justice can have*.[4]

This thesis argues that both Law Enforcement and the Judiciary, with a concrete knowledge of the ramifications that policing activities had on Black and other racialized Americans, ignored those impacts through their actions, and as such, it highlights the nexus between the post-Jim Crow era Police Power of Stop and Frisk and the lived experiences of Black Americans.

As a product of the shift in policing practices into the post-Jim Crow era, the Judiciary and Law Enforcement, as institutions, progressed into a mutually dependent relationship with one another. When cases involving the actions of police officers came before the courts, and most importantly, the Supreme Court, acquiescence to the demands of Law Enforcement granted the courts increased legitimacy in the eyes of the American public. In turn, when the Courts decided such cases in favor of Law Enforcement officials and their practices, the public was reassured that Law Enforcement was not a bad faith actor in American social life. Consequently, the two institutions developed an increasingly interdependent relationship with one another whereby each institution tacitly facilitated the legitimizing of the other through court decisions. This was especially true for cases involving Law Enforcement's role in combatting crime which had become increasingly politicized throughout the Civil Rights movement as Black Americans stood up to violent police conduct throughout the nation. Thus, the Courts were an integral component of the system of discrimination which pervaded many facets of American life leading to systemic racism in policing which evolved from the Jim Crow era to the post-Jim Crow era to align with changing social norms that increasingly condemned explicit racial discrimination.

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4. James Baldwin, *No Name in the Street* (New York, NY: Dial Press, 1972), 149. (Emphasis Added).

This thesis argues that the Supreme Court of the United States facilitated the evolution of race-based oppression by Law Enforcement in America from the Jim Crow era to the post-Jim Crow era through its decisions in the Stop and Frisk cases of 1968. Further, it argues that the Court traded in the civil liberties of Black Americans—through these decisions—in full awareness of the dangers posed by the institutional racism in Law Enforcement and of the imminent harm that would be foisted onto American minority communities of color. Through its archival research, this project reveals that the justices decided these legal cases while considering the political rhetoric surrounding crime on American streets in the lead up to the summer of 1968. In doing so, the justices, in a clear act of self-preservation, repeatedly disregarded the impact that Stop and Frisk had and would have on victims of police abuse, including those who were not engaged in criminal activity, in order to acquiesce to the public pressure of Law Enforcement. Consequently, the Court transitioned Police Power into a post-Jim Crow era that granted Law Enforcement the constitutional authority to profile citizens in public using a range of arbitrary factors including the influence of racial biases. And, on the basis of such arbitrarily based profiling, to perform pre-textual Stop and Frisks which resulted in a form of state-sanctioned evidence gathering with minimal constitutional restraints. Finally, this research demonstrates a nexus between the Court's 1968 jurisprudence regarding the constitutionality of Law Enforcement's Stop and Frisk practices and the advent of the American Carceral State where police were the vehicle through which Black Americans were abducted from the streets and transported into the carceral eco-system.[5]

5. The concept of the American Carceral State will be defined in the subsequent "Review of the Literature" and "Operational Definitions" sections of the introduction.

Review of the Literature

The post-Civil Rights era saw an expansive increase in the rate of incarceration of Black Americans, so much so that by the end of the twentieth century, the United States had a higher rate of incarceration than any other nation of the world at any time in recorded history.[6] Mass incarceration for non-violent drug offenses became widespread and racially disproportionate even though the rate of drug use and dealing was proportional among white and non-white demographics. Black males aged 20 to 29 had a one-in-four chance of being incarcerated by 1989, a one-in-three chance by 1995, and by 2000, Black Americans accounted for 62.7% of drug-related charges.[7] While the scope of this thesis deals with post-Civil Rights era mass incarceration, the racially disproportionate use of prisons to incarcerate Black individuals has been traced back to the founding era. In cities such as New York or Philadelphia, where slavery and racially segregated courts had been abolished, the prison population was primarily made up of urban Black people. The incarceration of emancipated Black individuals throughout the North also coincided with the creation of police departments in the early 19th century in tandem the night patrols in urban areas.[8]

The unprecedented phenomenon of mass incarceration has been characterized by scholars as the "Carceral State" or the "Prison Industrial Complex" to emphasize the systemic and institutional characteristics of the carceral ecosystem's racially oppressive nature. Further, the

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6. Elizabeth K Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016), 134-5; Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 2018), 14-15; Naomi Murakawa, *The First Civil Right: How Liberals Built Prisons America* (Oxford, UK: Oxford University Press, 2014), 71-75.

7. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, NY: New Press, 2010), 59-61; Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (New York, NY: Nation Books, 2016), 435-436.

8. Leslie Patrick-Stamp, "*Numbers That Are Not New: African Americans in the Country's First Prison, 1790-1835*," *The Pennsylvania Magazine of History and Biography*, Vol. 119 (1995), 99-101; Joseph F. Spillane and David B. Wolcott, *A History of Modern American Criminal Justice*, (Thousand Oaks, CA: Safe Publication, 2013), 12-14.

legislative changes made to the justice system beginning in the 1960s, which led to the emergence of mass incarceration, became contingent upon the ability of federal, state, and local law enforcement officials to capture, charge, and convict Black bodies in an expedient manner. Here the term "Black Bodies" is used to denote how agents of the State—particularly Law Enforcement and the Judiciary—often viewed and treated Black Americans with an absence of humanity within the context of populating the emerging carceral system. Consequently, the term "Black Bodies" will be used throughout this thesis to identify how the state viewed Black Americans.[9] The necessity to populate the growing, and increasingly privatized, prison system[10] depended entirely upon novel forms of surveillance by both police and non-police actors in a variety of social spaces including schools ("school-to-prison pipeline").[11] Further, state surveillance was followed by aggressive law enforcement tactics to apprehend vulnerable racialized Americans who were then made the subjects of fearfully intimidating "plea deal" powers by federal prosecutors.[12] Once imprisoned, convicts were predominantly deprived of their rights and were often treated as forced laborers in the prison ecosystem.[13] Moreover, burdensome legal restraints—integral to the broader Carceral State—remained with individuals after their release from prison because of the "felon

9. George Yancy, *Black Bodies, White Gazes: The Continuing Significance of Race in America* (Lanham, MD: Rowman & Littlefield, 2017), 1-4, 52, 171.

10. The rapid expansion of Mass Incarceration in the post-war era, especially throughout the War on Crime and the War on Drugs, created a need for private sector prisons to support the growing number of inmates. These prisons came to exist within a for-profit space that created a growing necessity for more and more convicts.

11. Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *The Journal of American History* 97, no. 3 (2010), 711; Donna Murch, "Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs," *The Journal of American History* 102, no. 1 (2015), 168, 171.

12. Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York, NY: Oxford University Press, 2007), 43-4.

13. Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, (Berkeley, CA: University of California Press, 2006), 25; Robert T. Chase, *We Are Not Slaves: State Violence, Coerced Labor, and Prisoners' Rights in Postwar America*, (Chapel Hill, NC: University of North Carolina Press, 2020), 21-3; Loïc J. D. Wacquant, *Prisons of Poverty* (Minneapolis, MN: University of Minnesota Press, 2009), 81-2.

label" foisted on formerly convicted individuals attempting to re-enter society. They faced legalized employment discrimination because of the restrictions to their democratic rights (e.g., voter registration, jury duty) and an increased likelihood of recidivism ("revolving prison door").[14] All of these aspects of the broader Carceral State system, however, hinged on the ability of Law Enforcement, as a national institution, to gather individuals from the streets who lacked previous interactions with the justice system into the Carceral process. Thus, law enforcement officials were the principal agents of the Carceral State because they facilitated the surveillance, capture, and transfer of Black bodies from neighborhoods across America to the prison system.

This research project identifies the concept, evolution, and execution of Police Power in American Constitutional law as the quintessential element of the emerging Carceral state characterized by the mass arrest of Black Americans. It analyzes the Judiciary's approach to interpreting and changing Constitutional law relating to Police Power under the Fourth Amendment, including the decisions of state trial courts, appellate courts, and the federal Courts, in a post-Jim Crow era social climate.

Throughout the Civil Rights Movement and towards the end of it in 1968, the *War on Crime* led Law Enforcement to adapt, evolve, and mutate forms of racial oppression that were characteristic of Jim Crow era policing practices. In response to this shift, the Judiciary demonstrated a deferential posture to Law Enforcement officials and police practices when assessing the Constitutional challenges to state Police Power. In doing so, the Judiciary often ignored or, at the very least, minimized the lived experiences of marginalized racial minorities in America, in particular the experiences of Black Americans. The Judiciary's treatment of Black

14. Jeff Manza and Christopher Uggen, *Locked out: Felon Disenfranchisement and American Democracy*, (Oxford, UK: Oxford University Press, 2006), 87, 127. Cassia Spohn and David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders," *Criminology* 40, no. 2 (2002), 349-351.

Americans in their resistance of police abuse resonates with Kris Manjapra's *Ghostlining*—a concept that he termed to characterize the action of "systemically ignor[ing] the meaning of [a people's] collective experience, generation after generation, century after century…[and] the cunning practice, adopted by whole societies, of 'unseeing' the plundered parts, and 'unhearing' the historical demands for reparative justice."[15] The institutions of Law Enforcement and the Judiciary—both collectively and individually—relied on colorblindness in decision-making which had the effect of ignoring the lived experiences of Black Americans, particularly with respect to their interactions with police. Judicial proceedings sought to ignore race as a way to demonstrate impartiality which in turn reinforced the communication of implicit ideas of racialization that had hitherto been overtly expressed in American political and social forums. In the context of this research, colorblind rhetoric refers to language that implied racialization by explicitly omitting distinction between racial categories based on color.

Beginning in the mid-1960s, the Federal government increasingly intervened in local and state law enforcement with the creation of various federal programs and agencies that were designed to assist localities with the law enforcement activities. The creation of the *Law Enforcement Administration*, the *Office of Law Enforcement Assistance*, the *Federal Bureau of Narcotics*, and the *Drug Enforcement Administration* represented efforts by the Federal government to influence local law enforcement. This increasing intervention by the Federal government into the law enforcement practices of state and local governments influenced state policing practices. Consequently, it inacted changes in the legal system that facilitated mass imprisonment and expanded its punitive nature to systemic aspects of American social life, which

15. Kris Manjapra, *Black Ghost of Empire: The Long Death of Slavery and the Failure of Emancipation*, (New York, NY: Scribner, 2022), 4.

has led recent scholarship to characterize the carceral system as a renewed form of race-based enslavement.[16]

The practice known as Stop and Frisk—where an officer Stops an individual in public for questioning whom the officer suspects of having committed, being the process of committing, or intent on committing a crime and is subsequently frisked by the officer—became prevalent throughout the United States in the late 20th century and turn of the millennium. Prior to the 1960s, the practice was only in its infancy because a Stop for investigatory purposes was considered a seizure under the Fourth Amendment and therefore could only be conducted when an officer possessed probable cause that a crime had been committed.[17] During the Jim Crow era, police officers selectively used broad laws that criminalized poverty, such as the crime of Vagrancy, to obtain probable cause for an arrest under the Fourth Amendment until these laws were struck down by the courts as overly broad.[18] Beginning in the mid-1960s, the practice of Stop and Frisk became more prevalent among law enforcement agencies in preventing imminent crime and combatting crime in progress as Vagrancy and similar laws could not be used to apprehend unwanted individuals anymore. A series of Supreme Court cases dealing with police treatment of citizens whom they encountered on the street removed some constitutional restraints on Law Enforcement and empowered them to undertake aggressive tactics that were often applied disproportionately to Black Americans and other minority communities. Beginning in 1960 with the decision in *Rios v. United States*, the Supreme Court legitimized informal stops on the street for investigatory

16. *See generally*, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*; Chase, *We Are Not Slaves: State Violence, Coerced Labor, and Prisoners' Rights in Postwar America*.

17. Russell L. Jones, "Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling," *Idaho Law Review* 54, no. 2 (2018): 515-516.

18. Risa L. Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York, NY: Oxford University Press, 2016), 6-7.

purposes by tacitly accepting that some temporary stops on the street for investigatory questions were not considered "arrests" (or seizures) for the purposes of the Fourth Amendment. The Court further eroded Fourth Amendment protections through the Stop and Frisk cases of 1968—which this thesis analyzes in detail—by creating a different standard of probable cause for Law Enforcement officials who interact with citizens on the street. These changes to the interpretation to the Fourth Amendment led to significant racial disparities when the practice of Stop and Frisk was used in policing because of the prevalence of racial bias.[19] The seeming approval of Stop and Frisk as a constitutionally acceptable practice by the Supreme Court occurred despite the significant warnings by *The National Advisory Committee on Civil Disorders* also known as *The Kerner Commission* which pointed to Stop and Frisk as a factor that contributed to the deterioration of police-community relationships. Further, the abuse of minority communities by police, which included the practice of Stop and Frisk, also led to numerous race riots in urban spaces throughout America in the 1960s.[20] Stop and Frisk was one major policy that aided Law Enforcement to search for evidence without probable cause. Consequently, the Stop and Frisk regime and the American Carceral State represented an evolution in racialized oppression that was distinct from the Jim Crow era, but at the same time a product of the foundation of racialized oppression on which America was built.[21]

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19. Jones, "Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling," 516-517; Rory Kramer and Brianna Remster, "Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops," *Law & Society Review* 52, no. 4 (2018): 966-67; Devon W. Carbado, "From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence," *UCLA Law Review* 64, no. 6 (2017): 1516-19; Elizabeth K Hinton, *America on Fire: The Untold History of Police Violence and Black Rebellion since the 1960s* (New York, NY: W. W. Norton & Company, 2021), 11, 16, 102, 206.

20. Nathaniel C. Sutton, "Lockstepping through Stop-and-Frisk: A Call to Independently Assess Terry v. Ohio under State Law," *Virginia Law Review* 107, no. 3 (2021): 643-45; Hinton, *America on Fire: The Untold History of Police Violence and Black Rebellion since the 1960s*, 102, 205-6.

21. Alon Confino, *Foundational Pasts: The Holocaust as Historical Understanding*, (New York, NY: Cambridge University Press, 2012), 8-10.

The literature commonly identifies comparisons between the Carceral State and previous systems of race-based oppression such as slavery or the Jim Crow era. While both concepts refer to distinct historical periods, scholars often compare the phenomenon of mass incarceration using these concepts outside of the historical periods in which they occurred to denote their severity. However, both slavery and Jim Crow refer to different realities in American history for Black Americans, and those realities fluctuated wildly depending upon the region of the United States in which they were occurring. As the rise of mass incarceration coincided with the end of the Civil Rights movement, historians have observed the congruencies in race-based oppression between the Jim Crow era of *De Jure* or *De Facto* segregation and post-Jim Crow era mass incarceration. Michelle Alexander, for instance, has argued that the federal laws and Supreme Court jurisprudence that led to the creation of the Carceral State represented a "New Jim Crow" distinct from the legalized racial oppression of the Jim Crow era because it was expressed in Colorblind terms. While Alexander uses the *Jim Crow* title as a colloquialism that invokes the memory of racialized oppression, Hinton argues that the Carceral State should be analyzed as a distinct form of racial oppression, not as a continuation of slavery or Jim Crow.[22] Although there is disagreement among historians and legal scholars regarding the proper terminology with which to characterize the race-based phenomenon of mass incarceration, there is broad consensus that mass incarceration is a novel iteration of American racial oppression anchored in both systemic and institutional racism, including the institutions of the Judiciary and Law Enforcement, which this project analyzes.

22. Alexander, *The New Jim Crow*, 3, 13-14; Hinton, *From the War on Poverty to the War on Drugs*, 10-11.

The most recent iteration of racialized oppression in American history—encapsulated in the concept of the "Carceral State"—has resulted in the creation of a social underclass[23] which the system staunchly restricted from upward mobility and economically constrained to "urban ghettoes".[24] However, this system of oppression was contingent upon the effectiveness of Law Enforcement to bring young Black bodies into the Carceral System and, most importantly, on the proclivity of the judicial system to empower Law Enforcement to do so. The Judiciary's approach to Law Enforcement, as an institution, and the constitutionality of the actions of Law Enforcement to facilitate the creation of this Carceral State is the focus of this research.

The historiography of the Carceral State covers the nature and the impacts of the carceral system which include the creation of an underclass, racial ghettoes, a marginalized populace, and an inferior class within American society. It primarily addresses the system of imprisonment and the results of that imprisonment which scholars often characterized as a continuation of Jim Crow or as a renewed form of slavery. However, the labels of Jim Crow, New Jim Crow, and Neo-Slavery are not as important as the consensus that exists among scholars regarding the racial oppression stemming from the Carceral State. On the other hand, the historiography identifies the beginning of the carceral process at criminal conviction rather than establishing the activities of Law Enforcement as the key component of the larger system. Thus, it neglects to discuss the legal

23. The term "underclass" is taken from Wacquant's work on the intersectionality between incarceration and poverty, referencing the socioeconomic class that is created within the broader ecosystem of the carceral state. However, it must be noted that there exists extensive criticism about the use of 'underclass' beginning in the 1960s to propagate negative sentiments about the poor. These criticisms highlight that the term wrongfully implies the existence of a socioeconomic system in which everyone has the same chances at attaining a status in the higher classes of American society. Likewise, scholars such as Hinton address the use of other neoliberal conceptualizations that infer negative connotations similar to 'underclass' including "criminal pathology" in reference to the perceived proclivity of crime in poorer classes of Americans. While it is important to situate the use of the term within the historiography, this research project will not make extensive use of term due to the preponderance of negative othering it implies.

24. Wacquant, *Prisons of Poverty*, 58-60; Massey and Denton, *American Apartheid*, 44-46; Chase, *We Are Not Slaves: State Violence, Coerced Labor, and Prisoners' Rights in Postwar America*, 31-33.

dimensions of the expanded police Law Enforcement powers—a crucial link of the carceral system—that look into the relationship that Law Enforcement had with the Judiciary, particularly the Supreme Court which shaped law enforcement practices for the post-Jim Crow era. This thesis addresses this gap in the literature through its analysis of the role Law Enforcement and the Judiciary within the broader Carceral State system.

Operational Definitions

This thesis employs the following concepts which are defined below:

The Carceral State refers to the phenomenon of the mass imprisonment of Black Americans throughout the United States which increased exponentially in the aftermath of the Jim Crow era. This phenomenon was not limited to mere imprisonment but refers to the entire prison eco-system surrounding incarceration encompassed within the broader vilification of Black Americans in the South and poverty in the urban ghettoes in the North through the *War on Poverty*, and eventually, the *War on Crime*. As mass incarceration disproportionately impacted Black Americans, scholars have argued that it is associated with a continuation of the stigmatization of Black Americans throughout history.[25]

Colorblindness is a socio-political ideology that became prevalent in the post-Civil Rights era which advocated that the most effective mechanism to combat racism was to ignore race altogether. This ideology also made its way into the Judiciary when cases involved the lived experiences of individuals of a minority racial group such as Black Americans. As a result, both the Judiciary and Law Enforcement used colorblind rhetoric that implied racialization but omitted explicit rhetoric that distinguished racial categories.[26]

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25. Loïc Wacquant, "From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US," *New Left Review*, no. 13 (2002): 41-42.

26. Douglas S. Reed, "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution," *RSF: The Russell Sage Foundation Journal of Social Sciences* 7, No. 1 (2021): 150-152; Victor E. Ray, Antonia

Systemic Racism refers to the conceptualization of policies, laws, and practices that pervade every facet of a society's organizational structure which lead to continued negative treatment of one or more groups within that society on the basis of race. Such negative treatment ranges from unfair disadvantages to intentionally harmful treatment that is motivated by the race of the targeted minority group. In addition to Systemic Racism, this thesis also uses the similar concept of *Institutional Racism* which refers to negative treatment or practices that are motivated by race embedded into specific institutions such as the Judiciary or Law Enforcement. Systemic racism refers to racism that pervades an entire society while Institutional Racism refers to racism built into a particular institution.[27]

Implicit Racial Bias refers to the unconscious mental processes that animate an individual's behavior, in particular, how physical traits and characteristics of people are associated with specific racial groups. The existence of implicit racial bias is often used as a non-threatening and palatable explanation for actions undertaken by law enforcement which are motivated by race. However, the existence of implicit racial bias does not eliminate the proclivity of explicit racism in police regardless of whether law enforcement officials deem its pre-eminence palatable or not.[28]

Methodology and Source Base Discussion

This original research expands on existing social history scholarship by adopting a legal history lens to examine Police Power and practices—specifically the practice of Stop and Frisk—as a means through which Law Enforcement could easily capture and incarcerate undesirable

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Randolph, Megan Underhill, and David Luke, "Critical Race Theory, Afro-Pessimism, and Racial Progress Narratives," *Sociology of Race and Ethnicity*, 3, No. 2 (2017): 150; Eduardo Bonilla-Silva, *Racism without Racists: Colorblind Racism and the Persistence of Racial Inequality in America*, Lanham, MD: Rowman & Littlefield, 2014), 17-18.

27. Bonilla-Silva, *Racism without Racists*, 20-22.

28. Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police* in Policing the Black Man: Arrest, Prosecution, and Imprisonment, Edited by Angela J. Davis, (New York, NY: Pantheon Books), 135-139.

individuals. It demonstrates the ability of two fundamental American institutions—Law Enforcement and the Judiciary—to work together to adapt existing policing practices to a post-Jim Crow social landscape that was fundamentally altered by the Civil Rights Movement. This research adopts a Critical Legal Theory and a Critical Race Theory framework—a critical approach to legal theory that repudiates what is thought the be the natural order of the law on the basis of race. In doing so, it examines how the law and constitutional protections, either empowering or restraining police powers, are malleable and thus susceptible to the influence of the white majority in America. Further, this framework demonstrates how the legal system facilitated a disguised form of racial segregation that ultimately challenges the belief that linear racial and social progress was achieved in the aftermath of the Civil Rights Movement.[29]

This thesis project includes extensive original archival research of court records for the three 1968 Stop and Frisk cases which were decided by the Supreme Court by drawing on collections held by the Library of Congress's Manuscript Division, the Law Library of Congress, and the National Archives and Records Administration. The Papers of several Supreme Court Justices were extensively consulted during the research process, with special attention given to the different drafts of each version of the Court's opinion, from the initial handwritten drafts produced shortly after oral arguments to the final drafts circulated for final approval by the end of the term. Additionally, the memos exchanged amongst the justices and between the justices and their clerks formed a key part of this archival research. An array of legal records pertaining to the cases were also consulted at the Law Library of Congress which included the Petitions for Certiorari, the Briefs of all parties involved in the cases, and the Amicus Curiae Briefs submitted to the Court by

29. Keith C. Culver, and Michael Giudice "Recent Developments: Feminist Jurisprudence, Critical Race Theory, and Legal Pluralism," in *Readings in the Philosophy of Law,* Edited by Keith Culver and Michael Giudice, 209-258. Peterborough, ON: Broadview Press, 2017.

parties in favor of the Appellants and the Respondents. Further, the case files held at the National Archives and Records Administration in Washington, D.C. were also consulted. These records included hundreds of state court documents from all three cases, including the testimony of the arresting officers and the appellate court records (petitions, briefs, and opinions) from the states of New York and Ohio. The transcripts and recordings of the oral arguments before the United States Supreme Court in all three cases were consulted at the College Park, Maryland, division of the National Archives and Records Administration. This research also incorporates state court and lower federal court records in the aftermath of the Stop and Frisk cases whereby criminal defendants challenged the admission of evidence obtained through a Stop and Frisk. The records of *The President's Commission on Civil Rights of 1946* and *The National Advisory Commission on Civil Disorders* of 1967 established by Presidents Harry Truman and Lyndon Johnson were also consulted through the Truman Presidential Library and the Library of Congress respectively.

Theoretical Frameworks

The framework for this research is anchored in Critical Legal Theory and Critical Race Theory (recently disseminated in American popular culture and political media as "CRT"). The legal theory framework of CRT used in this thesis should not be equated to its recent misuse in popular culture and conservative news media. As Adam Harris of *The Atlantic* has reported, CRT had received some public attention in the 1990s, when Bill Clinton nominated Lani Guinier—a law professor from the University of Pennsylvania—as the head of the Justice Department's Civil Rights Division. Additionally, it received a passing mention in a 2012 Fox News segment when the founder of the theory—Professor Derrick Bell—died, during the trial of George Zimmerman in 2014, and during two Fox News segments in 2019. On all of these occasions, neither conservative politicians nor Fox News took any interest in the theory, nor did they propagate

falsehoods about it as they have done since the 2020 murder of George Floyd.[30] As scholar Ibram X. Kendi has written, "Republican operatives have buried the actual definition" of CRT and "instead, [the] attacks on critical race theory are based on made up definitions and descriptors." Further to Kendi's argument, Reuters has reported that many Americans who were polled about CRT, claiming they were familiar with it, demonstrated that they embraced multiple misconceptions about it that have circulated through conservative media outlets when they were asked follow-up questions. For instance, such misconceptions among respondents included that CRT posits that "white people are inherently bad or evil" and that racial equality can only be achieved through "discriminating against white people", which are both false conceptualizations of CRT. Instead, CRT provides a framework to understand how race and American law interact and how the history of slavery, segregation, and discrimination is embedded into the legal system in relation to the pursuit of racial equality by Black Americans—a theoretical concept that is quite distinct from what is propagated in conservative media.[31]

The framework for this research is anchored within three themes of Critical Legal and Critical Race Theory: *Legal Indeterminacy*, *Material Determinism*, and *Critique of Liberalism*. Firstly, this research analyzes the Judiciary's treatment of Police Power with respect to communities of color throughout America's urban landscapes by adopting the concept of *Legal Indeterminacy*. This Critical Legal Theory concept argues that not every legal case has one correct outcome; instead, cases are decided when judges value the interests of one group over another and

30. Adam Harris, "The GOPs 'Critical Race Theory' Obsession: How Conservative Politicians and Pundits became Fixated on an Academic Approach," *The Atlantic*, May 7, 2021, https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/.

31. Ibram X. Kendi, "There is No Debate Over Critical Race Theory: Pundits and Politicians have Created their own Definition for the Term, and then set about Attacking it," *The Atlantic*, July 9, 2021, https://www.theatlantic.com/ideas/archive/2021/07/opponents-critical-race-theory-are-arguing-themselves/619391/; Chris Kahn, "Many Americans Embrace Falsehoods about Critical Race Theory," *Reuters*, July 15, 2021, https://www.reuters.com/world/us/many-americans-embrace-falsehoods-about-critical-race-theory-2021-07-15/.

interpret the facts of a case in favor of the party that aligns with their beliefs, thus demonstrating the malleability of the law. Secondly, the analysis of Police Power in this thesis—within the broader post-Civil Rights Movement context—is centered around the Material Determinism which is also known as the *Interest Convergence Thesis*. This theoretical framework argues that the material interests of white elites and the physical interests of working-class whites are advanced by racism, and as such, large portions of American society have little incentive to eradicate it. Further, moments of racial progress such as the successes of the Civil Rights Movement may have resulted from the self-interest of whites rather than a selfless desire to help Black Americans.[32] Finally, this project adopts the Critical Race Theory framework of the *Critique of Liberalism*, specifically with regards to the idea of colorblindness in relation to liberalism. Within this vein, Liberalism generally accepts the principles of judicial neutrality and colorblindness as an appropriate framework for addressing an injury incurred on the basis of one's race and assessing a remedy. However, the *Critique of Liberalism* framework in CRT scholarship rejects this notion in its most perverse forms because it has produced judicial decisions which refuse to take race into account thereby making judgements without seeing color. In its most extreme judicial form, colorblindness posits that it is wrong to even take note of race when correcting historical injuries and that only extreme racial harms that are collectively condemned by the entire society can be taken into account.[33] This research adopts the *Critique of Liberalism* framework in its analysis of the Stop and Frisk Supreme Court decisions by rejecting the notion of colorblindness that underpinned the outcomes and internal deliberations of those cases.

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32. Richard Delgado, *Critical Race Theory: An Introduction*, (New York, NY: New York University Press, 2012), 7, 9, 22-24; Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge*, (Philadelphia, PA: Temple University Press, 2013), 12-13.

33. Delgado, Critical Race Theory: An Introduction, 26-27; Delgado and Stefancic, Critical Race Theory: The Cutting Edge, 36-37.

Chapter Overview

In Chapter 1, *Policing during Jim Crow: The Vagrancy Regime*, the policing of Black communities in the United States within the legal framework of Jim Crow laws is assessed in order to identify the evolution of police practices that would come about in response to the Civil Rights Movement. Firstly, the Chapter addresses the selective enforcement of broad and non-specific crimes such as Vagrancy, Loitering, Public Indecency, etc., as a means through which police rounded up and captured unwanted individuals in public spaces. Secondly, the chapter analyzes two significant Presidential Commissions which were charged with investigating the treatment of Black Americans by law enforcement officials and agencies. These are the following: *The President's Commission on Civil Rights of 1946* and *The National Advisory Commission on Civil Disorders* of 1967. The former, established by President Truman through Executive Order 9808 in December 1946, published a report in 1947 entitled *To Secure These Rights*. The latter was established in July 1967 by President Lyndon B. Johnson through Executive Order 11365 to investigate the motivations of the race riots in the summer of 1967 that predominantly struck urban areas across the United States. This 1967 Commission became known as the *Kerner Commission* after its chair, the Governor of Illinois, Otto Kerner Jr. Both of these commissions were designed to provide the United States government with legislative recommendations pertaining to the advancement of Civil Rights and the policing of minority communities. This section analyzes aspects of the final reports of both Commissions as they pertained to the activities of Law Enforcement in minority urban communities throughout the United States as they both served as central factual documents which the Supreme Court used when deciding the three Stop and Frisk cases in 1968.

Chapter 2, *The Policing of Black Criminality: Intuition by Osmosis*, introduces the three Stop and Frisk cases which were decided by the Supreme Court in 1968. This chapter analyzes the

background of these cases, the state statutes that gave police officers differing degrees of Stop and Frisk powers, and the arguments made through the briefs submitted to the Supreme Court in advance of the Court's decision. The chapter demonstrates the inter-dependence that existed between the American institutions of Law Enforcement and the Judiciary which superseded the Warren Court's ability to protect the civil liberties of racialized Americans. The analysis of the Briefs submitted in the cases—particularly those submitted by the *Amicus Curiae*—reflect Law Enforcement's desire to use Stop and Frisk, even when based on the subjective bias of officers, to gather evidence of crime without probable cause. Conversely, Amicus briefs submitted to the Court in favor of the criminal defendants in these cases clearly reflected that several third parties warned the Court of the consequences of loosening Civil Liberties to allow officers to arbitrarily Stop and Frisk anyone in public spaces. The analysis of the background of each of the cases and the arguments submitted to the Court set up the analysis of the Court's internal deliberations and the eventual outcome of the cases which changed the trajectory of Constitutional law to the present day.

In Chapter 3, *The Supreme Court's 1968 "Stop and Frisk" Jurisprudence*, the internal deliberations and the official decision of the Court's Stop and Frisk cases are analyzed. This chapter argues that the drafts of Supreme Court opinions reveal that the justices internally acknowledged that the "Crime Problem", which animated their decision, was political in nature. Although the justices were presented with important evidence which demonstrated the existing harms that Stop and Frisk were already posing groups of Americans who were often targeted by police, the Court was not willing to curb Police Power in the face of demonstrable harm to racialized Americans. Further, this chapter argues that the internal deliberation process between the justices and the pressure to publish decisions with as much consensus as possible led to an

opinion that significantly empowered police abuse at the climax of the Civil Rights movement. Although the Court was plainly confronted with racial bias in police practices which had a direct relation with the incarceration of vulnerable minorities, the Justices were collectively unwilling to restrain such power which reflected the Court's vulnerability to public pressure. Inevitably, the Court's decision in these three cases reinvented the definition of probable cause under the Fourth Amendment and created legal framework necessary for Law Enforcement to facilitate the populating of the Carceral State with a disproportionate population of Black Americans—all under the banner of colorblind law and order.

In Chapter 4, *Driving while Black: The Extension of Stop and Frisk to Vehicular Patrol Stops*, the Supreme Court's 1996 *Whren v. United States* case, which extended the Terry Stop rule to individuals who are stopped for civil traffic violations, is analyzed. This chapter argues that the institution of the Judiciary further demonstrated its allegiance to Law Enforcement by extending their interpretation of the Fourth Amendment from the Terry case to vehicular stops made by police. This extension of the Terry Stop greatly amplified the ability of Law Enforcement to profile individuals for the purposes of gathering evidence. Whereas the Terry precedent had only applied Stop and Frisk to individuals in public spaces under suspicion of criminal violation, the Whren decision expanded that power to traffic stops for civil infractions which allowed officers to conduct evidence gathering with the pre-textual justification of a minor traffic violation.

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POLICING DURING JIM CROW: THE VAGRANCY REGIME

The Civil Rights movement of the 1950s and 1960s led to significant shifts in American social and legal history as it pertains to the actions of Law Enforcement towards Black communities. Police Powers during the Jim Crow era were often unrestrained and allowed for the selective enforcement of broad and non-specific laws informed by the explicit racist and bigoted views of individual officers. An entire regime of laws were put into place at the end of Reconstruction—targeting so-called vagrants—which criminalized poverty and was maliciously and selectively used to target Black Americans, amongst other minority groups in the United States. During this period, Law Enforcement officials were able to use these laws to harass, search, arrest, and incarcerate individuals for being "Vagrants" which was a crime whose definition could be adapted to different minority groups at the whims of each officer in different regions of the country. It was not until the late 1940s, and more so during the Civil Rights movement of the 1950s and 60s, that this Vagrancy regime was challenged and slowly defeated in Court proceedings—bolstered by the investigative work of several presidential commissions which investigate crime and rebellions in the inner cities of the United States.

The first of these commissions, established by President Truman in 1946 to investigate the state of civil rights in America, found that minority communities were often subjected to disproportionately harmful treatment within American society, including at the hands of Law Enforcement officials. However, the Committee's work relied heavily on the commitment of the Supreme Court of the United States—and the Judiciary more broadly—to be the impartial arbiter of the civil rights of Black Americans. Further, the Committee took no position on the Judiciary's past failures to safeguard the civil rights of Black Americans, nor did it recommend any other safeguards but the courts.

A second presidential commission, known as the Kerner Commission, was created in the summer of 1967, as a result of several fatal race riots, by President Johnson.[34] While the Commission was created to investigate the reasons behind the racial unrest in the inner cities of America, it also investigated and heavily criticized the harassment and discriminate treatment that Black Americans endured at the hands of Law Enforcement. Particularly, the investigation of the Kerner Commission revealed that policies of police harassment through overtly racist and bigoted application of Vagrancy laws were being replaced by the universal practice of Stop and Frisk, which was supposedly being applied to citizens without concern for the race of the individual—a concept that would become known as colorblindness.

As such, this chapter argues that the institution of Law Enforcement was evolving, from its Jim Crow practices of overt racism through the selective enforcement of Vagrancy laws to the colorblind tactics of the Stop and Frisk. The evolution of Law Enforcement's practices came about through a need to preserve its institutional legitimacy by adhering to the crime prevention demands of white society at the same time as the pressure brought by the Civil Rights Movement to combat explicitly racist policing practices.

Policing the Unwanted: Broadly Defined and Selectively Applied Vagrancy Laws

The 1960s was a transformative period for the American institution of Law Enforcement because of the powers that it both lost and gained. Between Reconstruction's end in 1876 and the Civil Rights movement in the 1950s and 1960s, Law Enforcement officials and agencies relied on

34. The episodes of civil unrest that occurred throughout the 1960s in Black communities have often been characterized as 'riots'. As Elizabeth Hinton argues, this word was applied to associate these episodes of violence with 'Blackness' whereas most instances of mass criminality were perpetrated by white vigilantes who were hostile to racial integration and engaged in violence to police the activities of Black people. While the term riots will be referenced because of its widespread use throughout the crime commission reports, the only appropriate way to understand them, according to Hinton, is as rebellions "against a broader system that had entrenched unequal conditions and anti-Black violence over generations." Hinton, *America on Fire*, 5-9.

the nearly unlimited discretion of Vagrancy laws that permitted them to circumvent the Fourth Amendment's prohibition on unreasonable searches and seizures without probable cause. Risa Goluboff has argued that the regime of Vagrancy laws—that were constitutionally permissible until the mid-1960s—gave the police almost unlimited discretion because of the breadth and ambiguity in their application.[35] As a result, Vagrancy laws almost always provided Law Enforcement officials with the ability to justify the search of a person and their arrest on Vagrancy charges, especially for persons found in public without a "proper" justification to satisfy an arresting officer. The power afforded to police through these laws was so extreme that in 1965, Justice Potter Steward wrote in *Shuttlesworth v. Birmingham* that a Birmingham city ordinance said that "a person may stand on a public sidewalk in Birmingham *only at the whim of any police officer*" and "the constitutional vice of so broad a provision needs no demonstration."[36] Consequently, Vagrancy laws provided the police with a tool to apprehend nearly anyone they wanted for questioning, searches, and even incarceration on the basis that their presence in a public space demonstrated that they were a vagrant. While these laws were used for an array of purposes, such as the harassment and criminalization of the poor or non-conforming individuals such as homophiles, they were also tools that permitted Law Enforcement to selectively target, harass, and apprehend racial minorities. When analyzed in the broader context of the rampant racialization of Black Americans during the Jim Crow era, these laws reflected an essential aspect of the explicit racism that Black Americans endured at the hands of white police officers.

As opposed to most laws throughout the United States that criminalized specific conduct or actions, Vagrancy laws made it a crime to be a certain type of person within American society.

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35. Goluboff, *Vagrant Nation*, 2-4

36. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). (Emphasis Added).

They also criminalized the social status of a person, especially when the circumstances of a person were closely aligned with the stereotypes of poverty. By the early twentieth century, navigating Vagrancy laws in different states became a common part of the lives of many people deemed "other" in American society. For instance, working-class and immigrant families and their children learned not to leave their homes without carrying cash so that they could dispute a Vagrancy allegation or arrest. Gay and lesbian Americans educated each other about how Vagrancy laws could be adapted to criminalize their sexual orientation and turned into "lewd" style Vagrancy charges if they were not wearing three items of clothing belonging to their own sex (i.e., gender). Civil Rights workers venturing into the south were provided with documentation that attested to their "reputable" standing within their own communities to avoid Vagrancy charges. Finally, Black newspapers warned their readership that Vagrancy charges were likely to result from any behavior which police could associate with their race.[37] Essentially, Vagrancy laws most often criminalized individuals who were unwanted or unwelcome in American society and, in the context of this research, police selectively used them to harass, search, and apprehend Black Americans on the basis of explicitly racist intentions.

By the 1960s, the regime of Vagrancy laws that permitted the wholesale harassment of various minority groups in the United States began to be dismantled by the courts, with some cases going all the way to the Supreme Court of the United States before the Vagrancy laws were invalidated.[38] When these laws were slowly dismantled, it represented a period of disempowerment of Law Enforcement powers that police relied on for decades in both genuine enforcement of criminal law and illegitimate harassment of Black Americans. Indeed, it created a

37. Goluboff, *Vagrant Nation*, 2-6.

38. *See Generally*, Goluboff, *Vagrant Nation*.

power vacuum that forced Law Enforcement, as institutions, to find other ways through which they could—constitutionally—profile, search, and apprehend Black individuals, amongst others. At the same time, the overt racism emblematic of the Vagrancy regime was becoming less acceptable to the broader American public as the Civil Rights movement exposed some of the most egregious treatment that Black Americans endured at the hands of police officers, especially throughout the south. Thus, policing was slowly evolving, with the help of the Judiciary, to a post-Jim Crow landscape where the Vagrancy regime would be phased out and replaced with a Stop and Frisk regime that operated with the allure of colorblindness.

Presidential Commissions Investigating Civil Rights

Towards the end of the Jim Crow era, two American presidents established commissions to study the state of civil rights and crime prevention in the United States. The first of these commissions was the *President's Committee on Civil Rights* which was established by President Harry S. Truman on December 5, 1946, through Executive Order 9808. The second was the *National Advisory Commission on Civil Disorders* or *Kerner Commission*, established by President Lyndon B. Johnson on July 29, 1967, through Executive Order 11365.

The President's Committee on Civil Rights, 1946

President Truman's Executive Order 9808 defined the social context which precipitated the creation of the Committee on Civil Rights by stating that the:

> Preservation of civil rights…[was] essential to domestic tranquility, national security, the general welfare, and the continued existence of our free institutions.
>
> The action of individuals who take the law into their own hands and inflict summary punishment and wreak personal vengeance is subversive of our democratic system of law enforcement and public criminal justice and gravely threatens our form of government.

It is *essential that all possible steps be taken to safeguard our civil rights*.[39]

Although the Committee's investigatory work encompassed many aspects of American life impacted by discrimination on the basis of race, it had a significant focus on the power of Law Enforcement at different levels of government to protect the civil rights of Americans. The Executive Order specifically identified Law Enforcement as an institution to safeguard civil rights, despite its tendencies to the contrary, when it stated, "the Committee is authorized…to determine whether and in what respect current law-enforcement measures and the authority possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of people."[40] On the basis of this mandate, the Presidential Committee on Civil Rights conducted an examination of the state of civil rights in the United States and produced a final report and recommendations to the President in December 1947.

The findings of the President's Committee on Civil Rights provided an integral snapshot on the treatment of Black Americans by Law Enforcement during the Jim Crow era, and it would serve as an evidentiary document that would be used by the Supreme Court in their adjudication of Police Power in the Stop and Frisk cases (analyzed in Chapters 2 & 3). The work and findings of the Committee represented an important moment in American social history as the civil rights of Black Americans became a focal point for activists following the service of Black Americans in the Second World War.[41] In its report, the Committee defined four essential freedoms which together represented the civil rights of all Americans that the committee was charged with investigating. These four rights were: The Right to Safety and Security of the Person; the Right to

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39. Harry S. Truman. *Executive Order 9808*. Truman Library. https://www.trumanlibrary.gov/library/ executive-orders/9808/executive-order-9808. (Emphasis Added).

40. Truman. *Executive Order 9808*. Truman Library. https://www.trumanlibrary.gov/library/ executive-orders/9808/executive-order-9808.

41. Murakawa, *The First Civil Right: How Liberals Built Prisons America*, 8-12.

Citizenship and its Privileges; The Right to Freedom of Conscience and Expression; and The Right to Equal Opportunity. The first of these four freedoms—the Right to Safety and Security of the Person—directly related to the treatment of Black Americans by Law Enforcement in the Jim Crow era. The Committee defined this right, in part, stating:

> Freedom can exist only where the citizen is assured that his person is secure against bondage, lawless violence, and arbitrary arrest and punishment…Moreover, to be free, men must be subject to discipline by society only for commission of offenses clearly defined by law…Where the administration of justice is discriminatory, no man can be sure of security…*Where a society permits private and arbitrary violence to be done to its members*, its own integrity is inevitably corrupted. It cannot permit human beings to be imprisoned or killed in the absence of due process of law without degrading its entire fabric.[42]

The Committee further noted that they observed a stark distinction between the ideals of American heritage of freedom and equality and the practice of it stating, "the record shows that at varying times in American history the gulf between ideals and practice has been wide."[43] Indeed, the gulf that the Committee was alluding to, between the values of American freedom and the reality of it for all, was in part a reflection on the treatment of Black Americans by Law Enforcement throughout the Jim Crow South. The Vagrancy regime, as one example, demonstrated that the Right to Safety and Security of the Person, as defined by the Committee, was virtually non-existent for Black Americans during the Jim Crow era.

The Committee's analysis of the Right of Safety and Security of the Person also addressed several issues that were impacting minorities in the 1940s such as police brutality, involuntary servitude, and the forced relocation of Japanese Americans. The Committee identified and criticized the Law Enforcement practices that were emblematic of the Jim Crow era and described

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42. United States and Charles Erwin, *To Secure These Rights: The Report of the President's committee on Civil Rights*, 1947, (New York, NY: Simon and Schuster), 6. (Emphasis Added).

43. United States and Erwin, *To Secure These Rights*, 9.

earlier in the chapter. However, the Committee relied heavily on the Federal Judiciary as a counterweight to discriminatory police practices citing the Supreme Court's decision in *Chambers v. Florida* (1940), when the Court "set aside the conviction by the state court of four young Negroes on the ground that it should have rejected confessions extorted from the accused."[44] Further, the Commission also cited the Court's seeming view of certain arbitrary Law Enforcement activities from *Chambers v. Florida* in which the Court said "Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish *manufactured crime* dictatorially is the handmaid of tyranny." In that decision, the Court also stated—as quoted by the Committee—that "under our constitutional system, courts stand…as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."[45] While the Committee recognized the unjust treatment that American minorities suffered at the hands of police, it also placed a tremendous degree of trust in the Federal Judiciary to remedy such injustice by identifying the Supreme Court's self-stated mandate in Chambers. In that decision, the Court stated, "No higher duty, no more solemn responsibility, rests upon this Court, than that of *translating into living law and maintaining* this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution of whatever race, creed, or persuasion."[46] Nonetheless, the Committee also recognized, albeit in a more tacit manner, that "different standards of justice" had been allowed to exist in the United States leading minority groups not to

44. United States and Erwin, *To Secure These Rights*, 28.

45. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) quoted in United States and Erwin, *To Secure These Rights*, 28. (Emphasis added).

46. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) quoted in United States and Erwin, *To Secure These Rights*, 28. (Emphasis added).

look on the courts as a source of refuge but as a source of rampant public prejudices.[47]

The Committee's analysis of the Right of Safety and Security of the Person also touched on another important aspect of Jim Crow era policing which significantly and disproportionately impacted Black Americans—involuntary servitude. As an array of scholars have noted, the Thirteenth Amendment to the United States Constitution—ratified on December 6, 1865—outlawed slavery throughout the nation "*except* as a punishment for crime whereof the party shall have been duly convicted".[48] The broader Carceral System in the Jim Crow era—which was and remains intricately connected to the institution of Law Enforcement—also posed a risk of harm to Black Americans as they were often the targets of laws that criminalized the appearance of poverty such as the Vagrancy laws. The President's Committee on Civil Rights acknowledged as much in its findings on involuntary servitude stating, "Slavery…in its traditional form has disappeared. But the temptation to force poor and defenseless persons, by one device or another, into a condition of virtual slavery, still exists." The Committee identified the links between involuntary servitude and poverty —albeit without making the obvious racial connection to American minority groups—to demonstrate how imprisonment for poverty or coupled with poverty made Black Americans the target of such systems of oppression. Its report also situated the role of some of Law Enforcement officials in these practices:

> More direct is the practice whereby sheriffs in some areas free prisoners into the custody of local entrepreneurs who pay fines or post bonds. The prisoners then work for their 'benefactors' under threat of returning to jail. *Sometimes the original charge against the prisoners is trumped up for the purpose of securing labor by this means*. In still other instances persons have been held in peonage by sheer force

47. United States and Erwin, *To Secure These Rights*, 28-29.

48. U.S. Constitution. Amend. XIII, sec. 2 (Emphasis added); Michelle Goodwin, "The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration," *Cornell Law Review* 104, No. 4 (2018): 928-930. While there is division among scholars regarding the classification of involuntary servitude following the ratification of the 13th Amendment, including servitude which occurs lawfully in a carceral setting, as slavery or another form of oppression, a loophole for a form of involuntary servitude as punishment for a crime in the United States Constitution continues to exist to this day.

> or by threats of prosecution for debt…
>
> Where large numbers of people are frightened, uneducated, and underprivileged, the dangers of involuntary servitude remain. *If economic conditions deteriorate, a more general recurrence of peonage may be anticipated*.[49]

Indeed, the Committee's findings on the state of civil rights with regards to involuntary servitude demonstrated how Law Enforcement in the Jim Crow era could use its Police Power to target Black bodies and bring them into the carceral system even before the advent of the modern 'Carceral State' system.

The President's Committee on Civil Rights investigated various facets of racialization in American society, especially as it pertained to racial segregation in public services, education, public transportation, employment, and in the governing of the District of Columbia. The Committee's final report included thirty-five recommendations to the President, Congress, and state legislatures. The Committee made several recommendations that directly pertained to Law Enforcement at the federal, state, and local levels as a result of its findings. In particular, the Committee recommended the creation of a Civil Rights section of the Department of Justice, a specialized Civil Rights unit within the Federal Bureau of Investigation ("FBI"), and a permanent Commission on Civil Rights. The latter, the Committee argued, should be established by Executive Order or "preferably by Act of Congress" along with "the creation of a Joint Standing Committee on Civil Rights in Congress." Recommending the establishment of a permanent Civil Rights Commission, the Committee noted that "in a democratic society, the systemic, critical review of social needs and public policy is a fundamental necessity…this is especially true of a field like civil rights."[50] The Committee's recommendation on a permanent commission on Civil Rights was

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49. United States and Erwin, *To Secure These Rights*, 30. (Emphasis Added).

50. United States and Erwin, *To Secure These Rights*, 153-155.

also anchored in their discovery that proper data regarding the treatment of minorities throughout the nation was inconsistent, at best. Further, the Committee also recommended that state and local police forces be subjected to increased professionalization. The Committee observed that "Police training programs…should be oriented so as to indoctrinate officers with an awareness of civil rights problems." The Committee added that "proper treatment by police of those who are arrested and incarcerated in local jails should be stressed…supplemented by salaries that will attract and hold competent personnel."[51] While it is notable that the Committee recognized that state and local Law Enforcement conduct was often unprofessional, and that such conduct harmed the civil rights of those arrested and incarcerated, the Committee made no official recommendations beyond these observations. The lack of recommendations was emblematic of the limits of federal power—in the Jim Crow era—to remedy injustices that stemmed from issues controlled by the state, such as Police Power. While the lack of federal power did not itself compel the Committee to withhold recommendations, it is likely that the intrusion of the Federal government into state affairs cause the committee to temper the tone of its statements regarding state and local police power.

In its final recommendation, the President's Committee appealed to both the Executive and Legislative branches of the United States government to mount a public information campaign on civil rights. The Committee urged "a long term campaign of public education to inform the people of the civil rights to which they are entitled and which they owe to one another." The Committee called on all levels of government to complete "the job of driving home to the public the nature of our heritage, the justification of civil rights and the need to end prejudice." While this type of undertaking would be difficult to conduct in some state and local jurisdictions where racism was prevalent, the Committee urged at a minimum that the federal government conduct an "internal

51. United States and Erwin, *To Secure These Rights*, 155.

civil rights campaign" for its two million employees.[52] The need for a public information campaign to inform the American public about the nation's heritage on civil rights demonstrated that a significant portion of the American population was unaware of the racial injustice occurring in America at that time. While a massive public information campaign, such as the Committee recommended, was never mounted, the Civil Rights movement of the 1950s and 1960s brought an awareness of racial injustice to the American people and with it, another study on the violence associated with policing practices.

The National Advisory Commission on Civil Disorders, 1967

Nearly twenty years after the President's Committee on Civil Rights submitted its findings to the Truman administration, President Lyndon B. Johnson signed *Executive Order 11365: Establishing a National Advisory Commission on Civil Disorders* on July 29, 1967. The Executive Order was precipitated by a series of rebellions[53] by the inner-city Black communities of Detroit and Chicago throughout the United States in the Summer of 1967 as well as other disturbances throughout the 1960s.[54] Thus, the Executive Order was established to "investigate and make recommendations with respect to the origins of the recent major civil disorders…including the basic causes and factors leading to such disorders." While the primary function of the Commission seemed to target the factors in the Black community that led to the so-called "race riots", the role of Law Enforcement was also a factor—albeit ancillary—to be investigated. As such, the Executive Order also mandated the Commission to investigate "the development of methods and techniques for averting or controlling [civil] disorders…[and] the training of state and local law

52. United States and Erwin, *To Secure These Rights,* 173.

53. *Supra* note 33.

54. Hinton, *American on Fire*, 8-10.

enforcement…in dealing with potential or actual riot situations."[55] Despite the reference—in the Commission's mandate—to Law Enforcement, the catalyst for the Commission's work was the violent confrontations that were occurring between Black inner city communities (known at the time as "Ghettoes") and Law Enforcement.[56] However, the work of the Commission exposed significant abuses that American minority communities, particularly Black Americans, endured by Law Enforcement. As such, the Commission findings and recommendations—which were largely ignored by legislators—represented a bellwether for advocates of civil rights making arguments to the Supreme Court in the Stop and Frisk cases.

The Kerner Commission produced its final report in March of 1968 while the Stop and Frisk cases were pending before the Supreme Court. The Commission's primary conclusion, disseminated in print nationwide, was encapsulated in a single sentence: "Our Nation is moving toward two societies, one black, one white—separate and unequal." The report added that the "reaction to last summer's disorders has quickened the movement and deepened the division…discrimination and segregation have long permeated much of American life; they now threaten the future of every American."[57] Further, the Commission noted the systemic and institutional nature of the injustices that occurred in the "ghetto" and the role that of white society within them. The Commission wrote "What white Americans have never fully understood—but

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55. Lyndon B. Johnson, Executive Order 11365—Establishing a National Advisory Commission on Civil Disorders, The American Presidency Project, https://www.presidency.ucsb.edu/node/306428.

56. The primary sources and archival material used throughout this thesis commonly refer to "Negro" and "Ghetto" to describe Black persons and the disproportionately impoverished communities they lived in throughout the American landscape. At the time of writing, these respective terms are viewed as derogatory, and as such, the author will not use these terms out of respect unless they appear in a direct quotation. Instead, the terms "urban" or "inner city" will be used in replacement of "Ghetto" and "Black" will be used to replace "Negro". As Ben Martin argues, until the mid-1960s the term 'Negro' was considered a term of respect, but it was eventually replaced by younger activists with the term 'Black'. Ben L. Martin, "From Negro to Black to African American: The Power of Names and Naming," *Political Science Quarterly* 106, No. 1 (1991): 85, 90.

57. National Advisory Commission on Civil Disorders, *Kerner Commission Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967*, United States Department of Justice: Office of Justice Programs, 1.

what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." A dynamic—the Commission warned—that if continued, would result in the "continuing polarization of the American community and, ultimately, the destruction of basic democratic values."[58] The Commission's statement about White society's complicity in the formation and maintenance of impoverished inner-city communities was also reflected in the Supreme Court membership at this point with eight of out nine Justices being white, with Thurgood Marshall as the first and only Black Justice on the Court. While the Commission's report addressed a series of issues in American minority communities such as employment, health and social services, the formation of "racial ghettoes", and the administration of justice in such communities, this research will focus on the Commission's investigation into the practices of Law Enforcement. The Commission's findings became a key factual resource used in the Stop and Frisk cases by the parties and the Court which will be analyzed in detail in chapters 2 and 3.

As the police practices of the Jim Crow era were occurring across the United States in the time leading up to the Commission's investigation, it is predictable that the Commission found widespread abusive practices enacted by Law Enforcement in inner city communities. In particular, the Commission found that Black Americans in urban settings were subjected to aggravation through physical and verbal abuse at the hands of police officers. The Commission concluded:

> In nearly every city surveyed, the Commission heard complaints of harassment of interracial couples, dispersal of social street gatherings and *the stopping of Negroes on foot or in cars without objective basis*. These, together with *contemptuous and degrading verbal abuse*, have great impact in the ghetto.

58. National Advisory Commission on Civil Disorders, *Kerner Commission Report*, 1-2.

> In a number of cities, the Commission heard complaints of abuse from Negro adults of all social and economic classes. Particular resentment is aroused by harassing Negro men in the company of white women—often their light-skinned Negro wives.[59]

The arbitrary practices described by the Commission reflected the often-abusive conduct—both verbal and physical—of Law Enforcement officials towards Black Americans both during the Jim Crow era and throughout the Civil Rights movement. Further, it also demonstrated the selective use of Policing Power by Law Enforcement officials in Black communities when identical policing practices produced different outcomes than in white neighborhoods. The Kerner Commission acknowledged that while some officers may have been motivated by "malicious or discriminatory intent," others "simply fail[ed] to understand the effects of their actions because of their limited knowledge of the Negro community". Nonetheless, the Kerner Commission concurred with the conclusion of the *President's Commission on Law Enforcement and Administration of Justice* when it noted "[w]hatever the actual extent of such conduct… 'all such behavior is obviously and totally reprehensible, and when it is directed against minority-group citizens, it is particularly likely to lead, for quite obvious reasons, to bitterness in the community."[60] The findings of the Commission relating to the discriminatory intent or ignorance of Law Enforcement officials in Black communities demonstrated that implicit racial bias existed—and was likely prevalent—in

59. National Advisory Commission on Civil Disorders, *Kerner Commission Report*, 159. (Emphasis Added).

60. The *President's Commission on Law Enforcement and Administration of Justice*, which was established by President Johnson on July 23, 1965, is not as famous as the Kerner Commission. However, it conducted an extensive investigation and published a report that discussed "crime in America, juvenile delinquency, the police, the courts, corrections, organized crime, narcotics and drug abuse, drunkenness offenses, gun control, science and technology, and research as an instrument for reform." The work of the President's Commission on Law Enforcement was used as a baseline by the Kerner Commission in its investigative work and in its findings, as seen here. President's Commission on Law Enforcement and Administration of Justice, *Challenge of Crime in a Free Society* (1967), United States Department of Justice: Office of Justice Programs; National Advisory Commission on Civil Disorders, *Kerner Commission Report*, 159.

the conduct of officers in Black communities and substantially extended itself to Stop and Frisk, as this thesis argues.

The Kerner Commission's investigation and final report also demonstrated how Jim Crow era policing practices, specifically pre-emptive patrolling, were becoming more aggressive. When the changes in these practices are considered in conjunction with the changes to Constitutional law that would occur through the Supreme Court's Stop and Frisk jurisprudence in 1968, it is clear that the racialized *Modus Operandi* of Jim Crow era policing practices merely adapted to a social fabric that had been fundamentally changed by the Civil Rights movement. The Commission concluded that "many departments have adopted patrol practices which…have replaced *harassment by individual patrolmen with harassment by entire departments*." The Commission identified these new practices as "'aggressive preventive patrol' [which]…involve a large number of police-citizen contacts initiated by police rather than in response to a call for help." These aggressive preventive patrols included:

> Utilizing a roving task force which moves into high-crime districts without prior notice and conducts *intensive, often discriminate, street stops and searches*. A number of obviously suspicious persons are stopped. But so also are persons whom the beat patrolman would know are respected members of the community. Such task forces are often deliberately moved from place to place making it impossible for its members to know the people with whom they come in contact.
>
> In some cities, aggressive patrol is not limited to special task forces. The beat patrolman himself is expected to participate and to *file a minimum number of "stop-and-frisk" or field interrogation reports* for each tour of duty. This pressure to produce, or a lack of familiarity with the neighborhood and its people, may lead to widespread use of these techniques without adequate differentiation between genuinely suspicious behavior and behavior which is suspicious to a particular officer merely because it is unfamiliar.
>
> Police administrators, pressed by public concern about crime, have instituted such patrol practices often without weighing their tension-creating effects and the resulting relationship to civil disorder.[61]

61. National Advisory Commission on Civil Disorders, *Kerner Commission Report*, 159. (Emphasis Added).

The Commission's work highlights that before the Court ruled on the Stop and Frisk cases, it was clear that these practices often discriminated, motivated by department quotas, and aggravated by public pressure to alleviate crime at the height of the "War on Crime".[62] Consequently, the Stop and Frisk regime that would replace the Vagrancy regime clearly became an evidentiary fishing expedition based on the suspicions of officers informed by their own biases rather than soberly constructed Law Enforcement techniques and practices. As this thesis argues, the transition to these policies, joined with the novel Constitutional power afforded to Law Enforcement agencies through the Stop and Frisk cases, permitted police officers to become the central agents in apprehending Black bodies to be brought into the carceral system.

Notwithstanding this eventual outcome, the Kerner Commission's recommendations regarding policing of urban neighborhoods—largely ignored by legislators—demonstrated a direct correlation with the "race riots" (i.e., rebellions) that had occurred in the summer of 1967. The Commission stated that "Police misconduct—whether described as brutality, harassment, verbal abuse or discourtesy—cannot be tolerated…it is inconsistent with the basic responsibility and function of a police force in a democracy." Consequently, eliminating misconduct by officers in urban neighborhoods required "care in selecting police for ghetto areas, for there the police responsibility is particularly sensitive [and] demanding…the highest caliber of personnel is required if police are to overcome feelings within the ghetto community of inadequate protection and unfair, discriminatory treatment."[63] In contrast to the recommendations for the caliber of officers who should be working in Black communities, the Commission found that the existing data demonstrated that the worst officers were often assigned to minority group neighborhoods.

62. Murakawa, *The First Civil Right: How Liberals Built Prisons America*, 11-12.

63. National Advisory Commission on Civil Disorders, *Kerner Commission Report*, 160.

Moreover, the Commission also warned that while many officers strongly believed that Stop and Frisk policies constituted a positive practice for crime prevention, their employment should be the "product of a *deliberate* balancing" of the positive and negative outcomes of their use. Fundamentally, the Commission urged that the tensions between police and minority group communities pertained to Law Enforcement philosophy which should be reconsidered in light of crime prevention and community impact needs.[64] Regardless of the recommendations of the Commission, the institution of Law Enforcement would transition its policies and practices to a system of post-Jim Crow racial subjugation from the overt racialization of the Jim Crow era with the assistance of the Supreme Court's changes to constitutional law governing Police Power.

When the Civil Rights movement brought the injustices that Black Americans were enduring at the hands of Law Enforcement to the forefront of American social life, the Vagrancy regime that characterized police harassment was slowly replaced with the practice of Stop and Frisk. During the Jim Crow era, policing practices were able to selectively enforce the broad and non-specific Vagrancy laws for the harassment of different minority groups throughout the United States, including Black Americans. However, the overt and explicit racism that often, but not always, informed such harassment, became less palatable to the broader American public as Civil Rights activists brought attention to racially motivated abuse by police. Further, the Presidential Commissions of the 1940s and 1960s also revealed the tactics of Law Enforcement officials in minority and inner-city communities that had caused harm to Black Americans when they interacted with police. As a result, the changing social climate throughout the United States put pressure on Law Enforcement to change the ways in which its officers dealt with Black Americans because the explicit forms of racial injustice that were common in the Jim Crow era had become

64. National Advisory Commission on Civil Disorders, *Kerner Commission Report*.

less acceptable. However, this change did not necessarily correlate directly into social progress for American minority communities.

As the Kerner commission determined in its findings about on-the-street interactions between Law Enforcement officials and citizens, the Vagrancy regime was slowly being replaced with the practice of Stop and Frisk which was employed by officers in a harsh and discriminate manner throughout the United States, especially in minority communities. The use of the Stop and Frisk on the grounds of mere suspicion of criminality provided Law Enforcement with the allure that these tactics were being employed in a race neutral manner—a colorblind approach which was distinct from the racially explicit application of the Vagrancy law regime. Thus, while the Civil Rights movement brought about progress with regards to certain social issues—most notably concerning voting rights through the passing of the 1965 Voting Rights Act—the institution of Law Enforcement reacted to the pressure brought about by this movement by evolving its racialized practices to fit a post-Civil Rights movement social landscape. The means to achieve profound social progress with regards to Law Enforcement's treatment of Black communities was presented in the Kerner Commission's recommendations for the recruitment of high caliber officers to work in inner-city communities. Rather than following these recommendations, Law Enforcement prioritized the Stop and Frisk policies which the Kerner Commission criticized—as such policies should be weighed against the negative outcomes they produce. And, with the dismantling of the Vagrancy regime of the Jim Crow era, Law Enforcement turned to its frequent partner, the Judiciary—the same year that the Kerner Commission produced its findings—for the codification into Constitutional law of a new regime—the Stop and Frisk regime.

2

THE POLICING OF BLACK CRIMINALITY: INTUITION BY OSMOSIS

In 1968, the Supreme Court of the United States ("the Court")—under significant pressure by Law Enforcement—made profound changes to Police Power and transitioned that institution's power to a post-Jim Crow form of policing that no longer depended on the use of selectively informed and broadly defined laws under the Vagrancy regime. This chapter argues that the institution of the Judiciary was presented with an opportunity—at the height of the Civil Rights movement—to reinforce the civil liberties of Americans, particularly Black Americans, through three inter-related cases pertaining to the constitutionality of Stop and Frisk practices. The arguments and eventual outcome of these cases demonstrate the interdependent relationship that the institutions of the American Judiciary and Law Enforcement had with each other as well as the institutionalized racism that was embedded within each. It further shows how the outcome in these cases created a roadmap for the law enforcement to adapt Jim Crow policing practices to a post-Jim Crow social landscape. The first three sections of the chapter explain the background, lower court decisions, and legal implications of the three Stop and Frisk cases that were decided together. The final section, *Semantic Wizardry: The Stop and Frisk Arguments to Bypass the Fourth Amendment*, analyzes the Petitions, Briefs, and Amicus Briefs submitted to the Court in these three cases. It demonstrates how the Court was given ample warning about how a decision in favor of Law Enforcement would impact minority communities throughout the United States from a diverse arrangement of advocacy groups. Further, the analysis also reflects the zealousness of Law Enforcement organizations and their allies in pursuit of greater Police Power in the post-Jim Crow era which, as discussed earlier, led to strong increases in mass incarceration throughout the United States.

At the height of the Civil Rights Movement in 1968, the Supreme Court agreed to hear three case appeals which were colloquially known at the time as the "Stop and Frisk Cases". *Sibron v. New York*, *Peters v. New York*, and *Terry v. Ohio*, all concerned Constitutional challenges to the legality of the policing practice of Stop and Frisk, whereby an officer would stop a civilian in public for questioning and subsequently frisk them without probable cause that the target had, were, or were going to commit a crime. Prior to 1968, the Court had held that warrantless searches under the Fourth Amendment were permissible only when the knowledge possessed by the officer at the time of the encounter constituted probable cause for an arrest; in such cases, searches incident to an arrest were constitutionally permissible.[65] However, in each of these three cases the defendants were searched by Law Enforcement on the grounds that they were behaving suspiciously by police officers observing them. When the searches turned up illegal narcotics, tools necessary for a burglary, or illegally possessed firearms, the individuals were subsequently arrested on probable cause that they were going to commit a crime. In each case, the standard of probable cause for an arrest was only attained through initial searches conducted through a Stop and Frisk rather than by a search incident to an arrest which were justified by each officer on the grounds that the victims of the search were behaving with reasonable suspicion. Thus, the tactics employed by the officers in these cases appeared to be in conflict with the text of the Fourth Amendment, which reads:

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65. Prior to the Court's ruling in *Terry v. Ohio* in 1968, Law Enforcement officials could only search a person in two circumstances: where they obtained a search warrant from a judge on the standard of probable cause or during an arrest—known as a "Search Incident to an Arrest". In both of these circumstances, police had to provide the same amount of evidence as they would have to provide a judge to obtain a warrant in order to establish probable cause. "Probable cause for making an arrest turns on 'whether at the moment [of arrest] the facts and circumstances withing [the officers'] knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." The standard is considered objective because it is subject to after-the-fact judicial review on the basis that a judge or other "reasonable person" would agree that "enough evidence exists to support [the] police officer's determination." David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 2 vols. (New York, NY: W.W. Norton, 2011), 893-894.

> The *right* of the people to be *secure in their persons*, houses, papers, and effects, against *unreasonable searches* and *seizures*, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[66]

In these state trials, the counsel for each defendant filed a *Motion to Suppress* the evidence obtained from these searches on the grounds that they violated the Fourth Amendment rights of each of the defendants.[67] But the trial courts in New York and Ohio denied each motion, and a conviction for each defendant was obtained solely upon the evidence obtained through the Stop and Frisk performed by Law Enforcement. The adjudication of these three cases by the Court represented the final step in the appellate process following the trial courts' denial of the motion to suppress and each state's appellate process. They presented the Court with the opportunity to place reasonable restrictions on the overly zealous nature of police practices which consistently profiled citizens in public on the basis of their race amongst other factors, as had occurred throughout the Jim Crow era through the selective enforcement of the Vagrancy Regime laws (e.g., vagrancy, loitering, drunkenness, and public indecency laws, etc.). By failing to do so, the Court empowered Law Enforcement as the captors of Black bodies for the populating of the emerging Carceral State.

In the Terry, Sibron, and Peters cases, the Court engaged with the semantics of the conflicting terminology of reasonable suspicion versus probable cause when measuring the constitutionality of a Stop and Frisk with the Fourth Amendment's prohibition on unreasonable searches and seizures. For the purposes of evaluating the constitutionality of the Stop and Frisk

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66. U.S. Const. Amend. IV. (Emphasis Added).

67. The Motion to Supress is a pre-trial motion submitted to the Court on behalf of a defendant in a criminal proceeding with the objective of excluding evidence from the trial. The Motion to Suppress must be founded on an argument that the targeted evidence was obtained in violation of the United States Constitution, a state constitution, or other relevant statute. This motion is distinct from the *Motion of Limine* which seeks the exclusion of evidence founded on federal or state rules of evidence rather than a constitutional or statutory protection. In the cases studied here, the *Motion to Suppress* was grounded in an argument that the evidence was allegedly gathered in violation of the defendants' Fourth Amendment protections against unreasonable searches and seizures without probable cause.

practice under the Fourth Amendment, both concepts were evaluated separately where the stop was determined to be a form of seizure and the frisk—however limited or extensive—was determined to be a search. In *Terry v. Ohio* (1968), Justice William O. Douglas dissenting stated "I agree that petitioner was 'seized' within the meaning of the Fourth Amendment. I also agree that frisking the petitioner … was a 'search'".[68] Thus, in these three cases the Fourth Amendment's prohibition on unreasonable searches and seizures was assessed separately for both the stop or seizure and the frisk or search using the Fourth Amendment's constitutional standard of probable cause.

The Stop-and-Frisk cases that were being considered by the Court, and the broader case law they would create, had the potential either to tremendously improve or to exacerbate harsh lived experiences of so many Black Americans in their interactions with police. Although the Court often opted to ignore this reality in its public statements (i.e., the Court's opinions and statements during oral arguments), internally the Justices were staunchly aware of the propensity of Law Enforcement to push the boundaries of legality in police tactics and of the impact that expanding Police Power would likely have on interactions with the Black Community. In an internal memorandum to the Chief Justice on March 14, 1968, Justice Brennan wrote:

> I've become acutely concerned that the mere fact of our affirmance in Terry will be taken by the police all over the country as *our license* to them to carry on, indeed *widely expand*, present *"aggressive surveillance" techniques* which the press tells us are being deliberately employed in Miami, Chicago, Detroit and other ghetto cities … IT will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police.[69]

68. *Terry v. Ohio*, 392 U.S. 1, 35 (1968).

69. Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box I:168, Folder 8, The Papers of William Brennan, Manuscript Division, Library of Congress, Washington, D.C. (Emphasis Added).

Indeed, the Justices were keenly aware of the potential harm that would be inflicted on the Black community should the Court acquiesce to Law Enforcement's vigorous desire to Stop and Frisk individuals who were behaving—in the view of police—suspiciously, on a standard of less than probable cause as laid out in the Fourth Amendment. In a February 9th draft of the Majority Opinion in *Terry v. Ohio*, Chief Justice Warren included an expansive explanatory footnote referencing the Task Force Report of the *Presidential Commission on Law Enforcement and Administration of Justice*'s ("Kerner Commission") findings that "'field interrogations are a major source of friction between the police and minority groups.'"[70] The majority draft also noted that a severe exacerbating factor in police-community tensions occurred when the "Stop and Frisk" of a member of a minority group was "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by *humiliating* anyone who attempt[ed] to undermine police control."[71] While the Court acknowledged the impact of aggressive policing practices towards the Black community—albeit buried in a footnote—the majority, nonetheless ignoring these lived experiences of Black Americans, and ceded their role as a guardian of the Constitution to the interests of Law Enforcement.

The Court's reasoning in these three cases often focused on the breadth of the *Exclusionary Rule* to act as the sole remedy to deter improper police conduct. The Exclusionary rule, originating in the *Weeks v. United States* (1914) case, espoused the principle that evidence obtained in violation of a defendant's constitutional rights may not be used against them in a trial. It is applied through a *Motion to Suppress* filed before or during a trial which asks the trial judge to rule on

70. Terry v. Ohio (1968), Majority Opinion Draft, February 9, 1968, Box 119, Folder 9, The Papers of Byron White, Manuscript Division, Library of Congress, Washington, D.C.

71. Terry v. Ohio (1968), Majority Opinion Draft, February 9, 1968, Box 119, Folder 9. Id., at Footnote 12. (Emphasis added).

whether specific evidence was obtained unconstitutionally, and should therefore be made inadmissible.[72] However, up until 1960, the *Exclusionary Rule* remained unincorporated until the Court's 5 – 4 decision in *Elkins v. United States* which ruled that the Fourth and Fourteenth Amendment prohibitions against unreasonable searches were equivalent, thereby extending the rule to trials under state jurisdiction.[73] Further, in *Mapp v. Ohio* (1961) the next term, the Court determined that the states were required to implement the Exclusionary Rule because of the absence of comparable state level remedies.[74] Importantly, many of the Justices who made up the majority in Elkins and Mapp were recalcitrant when confronted with the potential for police abuse that could come from the Terry, Sibron, and Peters cases. One member of those majorities, Justice William O. Douglas, noted as much in his dissent in Terry: "We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again."[75] The departure of the majority from its previous case law on the Fourth Amendment, the Exclusionary Rule, and the reasonableness of searches was rightly reflected by Justice Douglas as an endowment of Police Power that—unbeknownst to him at the time—would aid in the population of the Carceral State.

Sibron v. New York (1968)

Nelson Sibron was convicted in a New York State trial court of unlawful possession of

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72. Hall, Ely, and Grossman, *The Oxford Companion to the Supreme Court of the United States*, 305-07.

73. The *Doctrine of Incorporation* refers to a set of legal principles in which the first ten Amendments to the United States Constitution (known as the Bill of Rights) are made applicable to states on the basis of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Not all of the first ten amendments are incorporated (e.g., Amend. III & VII) and not all are fully incorporated (e.g., Amend. V's right to an indictment by a grand jury and Amend. VI's right to a jury composed of residents of a crime's location).

For the purposes of this research, the Fourth Amendment's freedom from an unreasonable search or seizure was incorporated in *Mapp v. Ohio*, 367 U.S. 643 (1961) and its warrant requirements were incorporated in *Aguilar v. Texas*, 378 U.S. 108 (1964).

74. Hall, Ely, and Grossman, *The Oxford Companion to the Supreme Court of the United States,* 306.

75. *Terry v. Ohio*, 392 U.S. 1, 36 (1968).

heroin under New York Public Health Law §3305. Although the prosecutors originally charged Sibron with a felony under New York Pen. Law §§1751 & 1751-a, the trial judge reduced the sentence to a misdemeanor when the prosecution filed a motion that acknowledged that they had initially charged a felony when the quantity of heroin mandated only a misdemeanor charge.[76] As a result, Sibron was convicted under the misdemeanor charge and sentenced to 6 months in jail. The criminal case against Sibron was dependent upon testimony received from Brooklyn Patrolman, Anthony Martin, who seized heroin from Sibron's person which the state alleged was consistent with New York's "Stop and Frisk" law. The statute in question, New York Code Crim. Proc. §180-a, stated:

> 1. A police officer may stop any person abroad in a public place whom he *reasonably suspects* is committing, has committed or is about to commit a felony … and may demand of him his name, address and an explanation of his actions.

The second part of the statute, which refers to the frisk component, states:

> 2. When a police officer has stopped a person for questioning pursuant to this section and *reasonably suspects* that he is in danger of life or limb, *he may search such person for a dangerous weapon*. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.[77]

On its face, this statute used language that seems to set a legal standard of "reasonable suspicion" to justify a stop (or search) and a frisk (or seizure) rather than the standard of "probable cause" as defined by the Fourth Amendment to the Constitution. Indeed, the friction between the language

76. "Jurisdictional Statement: Nelson Sibron v. The People of the State of New York, on Appeal from the Court of Appeals of the State of New York [Case 63]," Oct. 6, 1966; U.S. Supreme Court Appellate Case Files, Record Group 267; Box 7729, Folder 2, National Archives and Records Administration at Washington, D.C.

77. New York Code Crim. Proc. §180-a. (Emphasis Added).

of the New York State statute and the Court's Fourth Amendment case law on this matter contributed to its decision to hear the case on appeal in 1967.[78]

On March 9, 1965, Officer Martin was patrolling in uniform when he continually observed Sibron during the hours of 4:00 P.M. through midnight during which time, the officer testified that "he saw Sibron in conversation with six or eight persons whom he … knew from past experience to be narcotics addicts."[79] Additionally, the officer observed Sibron enter a restaurant late in the evening and speak with three more individuals whom the officer alleged were "known addicts". However, the officer testified that he did not overhear any of the conversations between Sibron and these individuals, nor did he see any item pass between Sibron and them. This was the only information that the officer possessed when he decided to approach Sibron under New York statute 180-a's "reasonable suspicion" standard. Indeed, the tactics employed by this officer were reflective of the general conduct of police officers engaging in profiling of citizens in public spaces, whether it be on the basis of race, gender, sexual identity, association, or other characteristics.[80] Further, the repeated usage of the label 'known addicts', which was never defined during the court proceedings, to justify the general surveillance of individuals also reflects the abusive conduct that police engaged in by othering the most vulnerable with stigmatizing labels. Taken independently, these tactics may seem to be a justifiable method to discover criminal activity before it takes place. However, as this thesis argues, the pairing of these profiling tactics

78. Prior to the grant of Certiorari by the Supreme Court of the United States, the case was heard on appeal by the Appellate Division of the New York Supreme Court who affirmed the conviction without releasing an opinion, and then subsequently by the New York Court of Appeals who also affirmed without an opinion. However, Judges Fuld and Van Voorhis released separate dissenting opinions in the case.

79. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 42 (1968).

80. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (Oxford, UK: Oxford University Press, 2004), 228, 389, 412; Gloria J. Browne-Marshall, *Race, Law, and American Society*: *1607 to Present*, (New York, NY: Routledge, 2013), 62-63; Peter Irons, *A People's History of the Supreme Court: The Men and Women whose Cases and Decisions have Shaped Our Constitution*, (New York, NY: Penguin Books, 2006), 418-419; Goluboff, *Vagrant Nation*, 112-114.

with the power to search for weapons on the standard of reasonable suspicion that the officer may be in danger, empowers police to create a pre-textual justification to search citizens whom they profile without probable cause thereby conferring on them a label of criminality, and by association, guilt.

As the New York Statute intimates, if a search of a citizen turned up any items that do not pose a danger to the officer but are nonetheless illegal, they can be confiscated by the officer and used for further questioning and ultimately as probable cause for arresting that individual. Indeed, this is exactly what occurred in Sibron's case as the officer approached him in the restaurant and told him to go outside. Once there, the officer told Sibron, "you know what I am after," then "thrust his hand into [Sibron's] pocket, discovering several glassine envelopes, which, it turned out, contained heroin."[81] During the state trial, the District Attorney put forward a theory that seeing as the officer observed Sibron in conversation with several known addicts over an eight-hour period, he possessed probable cause (or reasonable suspicion under the New York Statute) to believe that Sibron possessed narcotics. However, in a draft opinion of the case, Chief Justice Warren writing for the majority defined probable cause as the ability of "the police [to] act without warrants, [when it] is reasonably justified in light of particular facts known to the police officer and reasonable inferences drawn from those facts."[82] On the basis of this definition of probable cause, Officer Martin would not have possessed enough "facts known to police" nor would his inferences about Sibron have been reasonably drawn; thus, the search would have been clearly unlawful. However, this precise definition of probable cause put forward by Warren was ultimately

81. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 42.

82. Sibron v. New York; Peters v. New York (1968), Terry v. Ohio (1968) Warren Majority Opinion, February 9, 1961, Box 401, Folder 11, The Papers of Hugo Black, Manuscript Division, Library of Congress, Washington, D.C., 12.

omitted from the Court's final opinion in light of its superseding decision in *Terry v. Ohio* which the Court released the same day. The fact that the officer, and subsequently the prosecutor, anchored their justification for the Stop and Frisk solely on the idea that Sibron was talking to individuals whom the officer believed to be addicts, reflects a broader pattern of police profiling that could only have been prevented with a strong reinforcement of the Fourth Amendment's prohibition on unreasonable searches and seizures. Furthermore, Warren's abandonment of the draft definition of Probable Cause—which would have protected individuals like Sibron—reflects the Court's firm relationship with American Law Enforcement and displays its constant acquiescence to Police Power as an institution.

While profiling citizens in public spaces was one tactic used by police officers to determine which citizens they would stop for questioning and likely frisk during that questioning, it was by no means the only factor. During Sibron's state criminal trial, the officer testified that once he was outside the restaurant with the defendant, "Sibron 'mumbled' something" which the officer surmised was a contributing factor not only to the suspicion of Sibron's behavior but to his presumed criminality as well.[83] Indeed, the fact that any citizen's first reaction to being stopped in the street by a police officer—often without cause—was to mumble was likely a sign of fear and not guilt. The use of mumbling as a factor contributing to the standard of probable cause or reasonable suspicion was problematic and also cited in Terry. Consequently, Justice Warren's clerk pointed to the obviously dubious nature of this behavior as an element contributing to probable cause in a January 1968 memo; "the mumbling by the suspects that emerges as an element which tipped the balance in favor of the existence of probable cause and which was the catalyst in

83. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 42 (1968).

cloaking the search with legality under the Fourth Amendment."[84] Thus, it was clear to the Justices that arbitrary elements such as mumbling in the presence of an officer cloaked illegal searches with Constitutional legitimacy. As such, the Court had the capacity to preclude the use of subjective factors such as mumbling in the determination of probable cause to prevent, as the clerk wrote, "the meaning of probable cause [to] be diluted in applying that legal standard to other fact situations."[85] However, the Court's reluctance to prevent the use of such arbitrary factors—much less question their use at all—demonstrated the degree with which they recoiled at the chance of restraining the abusive state practices linked to Police Power.

Peters v. New York (1968)

The case *Peters v. New York* (1968) was later consolidated with the *Sibron v. New York* (1968) case by the New York Court of Appeals as both cases were heard on appeal after the New York State Trial Court's denial of the Motion to Suppress.[86] However, the facts and the results in the cases differ significantly. John Francis Peters was convicted of the crime of possessing burglary tools with evidence of an intent to use them to commit a crime. As Sibron had done in his case, Peters filed a pretrial *Motion to Suppress* the discovery of the tools from being admitted in the evidentiary record, arguing that they were obtained in violation of his Fourth Amendment rights. When the motion was denied by the trial judge, Peters plead guilty to preserve his right to appeal the denial of the motion to suppress.[87] At around 1 P.M. on July 10, 1964, New York Police

84. Memorandum to the Chief from Charles H. Wilson Jr. Regarding the Stop and Frisk Cases, January 29, 1968, Box 624, Folder 4, The Papers of Earl Warren, Manuscript Division, Library of Congress, Washington, D.C.

85. Memorandum to the Chief from Charles H. Wilson Jr. Regarding the Stop and Frisk Cases, January 29, 1968, Box 624, Folder 4.

86. In New York State, the first level appeal of a criminal case is to the New York Supreme Court Appellate Division. Once the case is either rejected by or decided on by the New York Supreme Court Appellate Division, a case can then be appealed to highest state court, the New York Court of Appeals. Generally, cases that present a federal question, such as Sibron and Peters, can then be appealed to the Supreme Court of the United States.

87. As a general matter, when a judge presiding over a state criminal trial denies a Motion to Suppress, the defendant may waive their right to a jury trial when there is an intent to appeal the denial of that motion. This is

Department ("NYPD") Officer, Samuel Lasky, was at his home in Mount Vernon, New York, which sat outside of the NYPD's jurisdiction. The officer was exiting his shower when he heard a noise at his door. Upon approaching his door to investigate the noise, his telephone rang. He then returned to his door and through the peephole, he "saw 'a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway'"[88] The officer immediately concluded that he was witnessing a burglary about to take place seeing as he did not recognize (through the peephole) either man as a tenant of the 120-unit building which he had resided in for 12 years. He called the police, put on civilian clothing, and armed himself with his service revolver before exiting his apartment to pursue the two men down a flight and a half of stairs. In accordance with the definition of reasonable suspicion under New York State's statute §180-a, the officer grabbed Peters by the collar—seizing him at gunpoint, under the definition of a Fourth Amendment seizure—and questioned him. Peters claimed to be visiting a girlfriend who he would not name because he claimed she was married. The officer then "patted Peters down for weapons, and discovered a hard object … [that] did not feel like a gun, but … might have been a knife," which he then removed from Peters' person and discovered that it was an envelope with burglar's tools.[89] The discovery of these tools subsequently provided the officer with probable cause to arrest Peters, and by association, probable cause for a full search incident to an arrest. Based on these facts, the New York State Trial Court found that prior to seizing Peters, Officer Lasky possessed "reasonable suspicion" to stop and question Peters under §180-a. Additionally, the Trial Court "found that

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generally done to preserve the defendant's ability to have a jury trial in the event that the appellate level court grants to Motion to Suppress where the trial court did not. In such a case, the objectivity of the potential jury is preserved as the evidence is never heard by them. However, this tactic also brings with it a high degree of risk because the right to a trial by jury is waived in perpetuity if the appellate court affirms the decision of the trial court.

88. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 47 (1968).

89. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 48 (1968).

Peters' response was 'clearly unsatisfactory,' and that 'under the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky himself was armed.'"[90] Unlike in the Sibron and Terry cases, the irony in the Peters case was that Officer Lasky seized the defendant at gun point and subsequently justified the frisk that would reveal burglar tools as a safety frisk. Thus, this case would seem to condone a safety frisk justified by the officer reasonably fearing for their life even when the officer, not the suspect, is being held at gunpoint. As with Sibron's case, the denial of the motion to suppress was appealed to and affirmed by the Appellate Division of the Supreme Court of New York, and then subsequently affirmed on appeal by the Court of Appeals of New York without a majority opinion with the exception of Judges Fudd and Van Voorhis who filled separate dissenting opinions.

At its core, the Peters case questioned whether the New York statute §180-a used to legalize the Stop and Frisk of Peters, leading to the subsequent obtention of probable cause for arrest, infringed upon the Fourth Amendment's prohibition of unreasonable searches and seizures. The appellants in these conjoined cases, Sibron and Peters, both petitioned the Supreme Court to consider New York statute §180-a facially unconstitutional and unconstitutional in its application to the *Motion to Suppress* that each defendant filed in their respective State trials.[91] The Court acknowledged that "it is impossible to tell how the term 'reasonable suspicion' is being used and how, if at all, it is meant to differ from the reasoning process which we denominate 'probable

90. Sibron v. New York; Peters v. New York, 392 U.S. 40, 49 (1968); for the purposes of NY Law §180-a, the trial court found that the hallway of the apartment building was a "public place" within the meaning of the statute.

91. The Sibron and Peters cases presented both Facial and As-Applied challenges to New York Law §180-a. A facial challenge refers to a legal challenge whereby by an appellant alleges that a statute is unconstitutional in all of its applications and should therefore be voided by the Court. In contrast, an As-Applied challenge argues that the application of a statute was unconstitutional. Sibron and Peters argued that the New York Stop and Frisk statute was unconstitutional both facially and as-applied to each of them.

cause.'"[92] The Court was fully aware that the New York Statute's legislative language—empowering police officers to Stop and Frisk on a standard of reasonable suspicion alone—was immensely broad. And although the Court itself stated that the 'reasonable suspicion' standard was immeasurable and incomparable to the probable cause standard, it refused to consider a facial challenge to the statute's constitutionality. Using some of the strongest language in the opinion, Warren wrote:

> We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible."[93]

In so stating, the Court refused to consider whether New York State statute §180-a was facially unconstitutional which left the Court only to consider the constitutionality of its application to the facts in Peters and Sibron, and for lower courts in future cases to decide the same on a case-by-case basis. Opting to remove the burden from police officers to properly define the justification for a Constitutional warrantless search, and by association, their actions, the Court instead placed that burden on individual victims of police abuse—who are often intentionally profiled because they are from economically disadvantaged communities—to seek a remedy from the courts on a case-by-case basis. To permit such a wholesale abuse of minorities and leave the resulting injury to be remedied only at great expense to groups of Americans who are disproportionately poorer reveals the degree with which the Court and Law Enforcement were in a mutually co-dependent relationship. Further, the Court's abdication of its role to judicially review such a broad statute, to guard the civil rights and liberties of Americans, and its facilitation of Law Enforcement's apprehension of Black bodies through these cases will be discussed in greater detail below.

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92. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 51 (1968).

93. *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 59 (1968).

Terry v. Ohio (1968)

The third and final case that was a part of the Stop and Frisk cases of 1968 was *Terry v. Ohio*—a case on writ of certiorari from the Supreme Court of Ohio. The appellant in the case was John W. Terry, who—like Peters and Sibron—was surveilled in public by a Cleveland Police Detective Martin McFadden, who then stopped him for questioning and frisked him for a weapon without probable cause that a crime had been committed.[94] When the officer found a weapon on Terry, and his companion Richard Chilton, which was a violation of Ohio Rev. Code § 2923.01 (1953) banning concealed or open carry of a firearm in the state, the officer confiscated the weapons and arrested both Terry and Chilton.[95] Prior to his state trial, Terry's counsel filed a *Motion to Suppress* the discovery of the firearm and bullets using the *Exclusionary Rule*, just as the counsels for Peters and Sibron had done in New York State. It was during the hearing to consider the *Motion to Suppress* that Detective McFadden testified to his frame of mind which animated his decision to surveil, apprehend, and search Terry and Chilton. McFadden noted that on October 31, 1963, while patrolling downtown Cleveland in plain clothes, "his *attention was attracted by two men* … he had never seen the two men before and he was unable to say precisely what first drew his eye to them." Additionally, McFadden justified this decision to surveil the men by citing his 39 years of experience as a police officer and 35 years as a detective—a law

94. As was the case in Sibron v. New York and Peters v. New York, an eventual distinction is made by the Court with regards to its probable cause doctrine. Prior to the issuance of the opinion in Terry, the probable cause standard always signified probable cause that a crime was being committed, about to be committed, or had been committed. It was only after Terry that the Court drew a distinction between this standard and a lesser standard of probable cause that the life of the officer was in danger which thereby justified a constitutional search equivalent to a pat down. All references to the standard of probable cause prior to the discussion of the outcome in Terry refers to the former standard of probable cause.

95. On June 17, 1967, Richard D. Chilton was shot three times and killed during the attempted robbery of a drug store in Columbus, Ohio. As a result, he was removed from the appeal to the Supreme Court of the United States in the case as the Court does not hear cases posthumously. James T. Cox, "Bullets Write Finish to Chilton Case," *Cleveland Plain Dealer*, June 18, 1967. Cleveland State University Engaged Scholarship Archive, https://engagedscholarship.csuohio.edu/terryvohio_newspa per/16.

enforcement career which would have begun in 1924. When reflecting on his long-developed practice to "stand and watch people or walk and watch people at many intervals of the day," McFadden surmised simply that "in this case when I looked over they *didn't look right* to me."[96] Officer McFadden's testimony reflects the arbitrary nature with which police officers justified following and surveilling individuals in public spaces, especially in Black communities or "Ghettoes" which were often deemed "high crime areas" simply because of the race of the majority of the inhabitants. The pivotal fact that was omitted from the Court's decision and most of the Court record (i.e., Briefs, court documents, and oral arguments, etc.) was that Terry and Chilton were Black men—a fact that should have warranted additional scrutiny on McFadden's motivation when he testified that his attention was attracted by the men for a reason that he was unable to justify under oath. Also, the lack of reasonable justification in McFadden's testimony for following Terry reflects a broader pattern of police surveillance practices towards Black Americans.

Officer McFadden also testified that he observed Terry and Chilton walking down the street separately and stopping in front of the same store window to look inside. According to the officer, both individuals did this in an alternating fashion at least ten to twelve times with an "elaborately casual" demeanor which led him to suspect that they were "'casing a job, a stick-up' … and he considered it his duty as a police officer to investigate."[97] McFadden's observation about the demeanor of two black men in public highlights the ways in which police work was informed by racial biases and linked to the Jim Crow era practices whereby Blackness in public aroused

96. *Terry v. Ohio*, 392 U.S. 1, 5 (1968). (Emphasis Added); John Woodall Terry Jr. Criminal Record No. 79491, December 23, 1963, Criminal Record Bureau, Criminal Court Building, U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.; Motion to Suppress, September 22, 1964, No. 79491, State of Ohio v. John W. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

97. *Terry v. Ohio*, 392 U.S. 1, 6 (1968).

suspicion. Up until that point, the two Black men had gained McFadden's attention for a reason that McFadden did not know (or would not say under oath at the state trial). Further, in McFadden's own words, they kept his attention because they 'didn't look right', and eventually walked around with an 'elaborately casual' demeanor while looking into a store window. Yet McFadden reasoned that based on his observations alone—and his ensuing inferences about the Black men—up until that point, he was justified in stopping them for questioning on the street. Further, McFadden then determined that since he suspected the two men were going to engage in a daytime robbery, it logically followed that they must have been armed. On the basis of this series of assumptions, which very obviously were rooted in the appearance of these two Black men, McFadden decided to Frisk Terry and Chilton using a pat down procedure—which constituted the search that revealed the illegally possessed weapon.[98]

While the Terry case would focus on the need for Law Enforcement to protect themselves by searching for weapons where there is a reasonable belief that they are in danger, there is no evidence in the record to suggest McFadden believed that he was in danger.[99] When Terry and Chilton filed a pre-trial *Motion to Suppress*, the issue of probable cause and the type of search McFadden conducted became a central consideration of that trial court. The prosecution argued that the searches of Terry and Chilton, which turned up weapons, were lawful because the series

98. The use of the term pat down in this context refers to a search of the exterior clothing with the objective of determining if the individual who has been stopped (or seized) possessed any weapon(s) that could pose a threat to the life of the officer. The pat down as a type of search is essential to the analysis in the Stop and Frisk cases as the Court's opinion contrasts this search with a full body search that is incident to an arrest where there is probable cause that a crime has been committed.

99. Sound Recording 267.664, "Oral Arguments in Terry v. Ohio [Case 67]," Dec. 12, 1967, Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267, National Archives of College Park, College Park, MD; "Stipulation of Fact and Evidence: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180, March 12, 1965," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

of inferences made by McFadden amounted to probable cause that a crime was going to be committed. As such, the initial discovery of the firearm had been made through a lawful Stop and Frisk and not a search "incident to an arrest".[100] However, the trial court rejected this argument outright stating that it "'would be stretching the facts beyond reasonable comprehension' to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons."[101] Despite the trial court's finding that there did not exist probable cause to arrest Terry and Chilton, the court nonetheless sided with the prosecution demonstrating the significant degree of deference afforded to police officers even in the presence of significant evidence to the contrary.

Notwithstanding the trial court's warranted rejection of the argument that McFadden's series of assumptions constituted probable cause of a crime, it deferred to Law Enforcement by determining that McFadden had the right to pat down the suspects' outer clothing because "he had reasonable cause to believe [the men] might be armed."[102] The dichotomy created between the constitutional right of Terry and Chilton and the mere potential that an officer may be harmed demonstrates that the Judiciary placed more value on the lives of officers than the lives of Black Americans who were adversely impacted by Stop and Frisk. While the Supreme Court had never, until 1968, recognized a warrantless search on a standard less than probable cause that a crime had been committed to be lawful, the trial court nonetheless created a new constitutional standard to

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100. The Search Incident to Arrest Doctrine is based on a common-law rule which permits a full search of the person of an individual under lawful arrest as an incident to the arrest. *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Agnello v. United States*, 269 U.S. 20, 30 (1925).

A search incident to arrest is a full search of the person during initial detainment while a frisk for the purposes of this research is defined as a pat down of the outer garments of the individual.

101. "Opinion of the Court: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.; *Terry v. Ohio* 392 U.S. 1, 8 (1968).

102. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

appease the demands of Law Enforcement. Despite the Fourth Amendment's prohibition against warrantless searches and seizures except for probable cause, the trial court reasoned that there was a distinction to be made between "an investigatory 'stop' and an arrest, and between a 'frisk' of the outer clothing for weapons and a full-blown search for evidence of a crime."[103] As the Court would subsequently do, the trial court failed to address the issue of a frisk of the outer clothing that could likely turn up a non-lethal illegal item (e.g., contraband or narcotics). As this thesis will show, the ability of police officers to frisk citizens whom they profile in public spaces, and to subsequently enter into evidence whatever was found through that frisk, created the pretext needed for officers to act on arbitrary assumptions—often rooted in racial bias—about a variety of non-threatening material such as illegal narcotics or stolen items.

As a matter of criminal procedure, Terry waived his right to a jury trial in order to submit his pre-trial *Motion to Suppress*. Once it was denied, he entered a not guilty plea, and he was pronounced guilty by the judge. His counsel filed an appeal before Ohio's Eighth Judicial District Court of Appeals who affirmed the trial court's denial of the Motion to Suppress and, by association, his conviction by the trial court judge. A subsequent appeal to the Supreme Court of Ohio was dismissed on the grounds that the case lacked a "substantial constitutional question".[104] Terry's case was granted the Writ of Certiorari by the Supreme Court because the case presented

103. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

104. State v. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966); Motion to Suppress, September 22, 1964, No. 79491, State of Ohio v. John W. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.; Notice of Appeal, October 20, 1964, No. 79491, State of Ohio v. John W. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.; "Defendant May Waive Jury Trial", (N.D.), No. 79491, Court of Common Pleas, Criminal Branch, *State of Ohio v. John W. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966), U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

a constitutional question about whether the admission of the firearm into evidence violated Terry's Fourth Amendment rights.[105]

Taken together, *Terry v. Ohio*, *Sibron v. New York*, and *Peters v. New York*—known collectively as the Stop and Frisk Cases—reflect an abdication by the Supreme Court of its Article III duty to act as a defender of the rights of the American people and a check and balance on government empowerment of Law Enforcement to curtail the rights of minorities. Further, these decisions represent a departure from the Court's case law relating to the *Exclusionary Rule* and the legal doctrine of *Stare Decisis*.[106] Instead, a majority—but not a totality—of the Supreme Court Justices chose to dismiss the findings of the Kerner Commission and to be the authors of a significantly weakened Fourth Amendment. Thus, the Court was the chief architect of a Constitutionally approved Stop and Frisk regime that empowered law enforcement to act as the state's indispensable mechanism in the transfer of Black bodies from public spaces to prisons, thereby populating what scholars have defined as the "Carceral State".[107]

Semantic Wizardry: The Stop and Frisk Arguments to Bypass the Fourth Amendment

The three "Stop-and-Frisk" cases represented a profound historical moment in clarifying constitutional parameters of Police Power for the Supreme Court. As such, numerous organizations sought the permission of the parties in each case to file Amicus briefs on behalf of the Appellants

105. "Order Allowing Certiorari: John W. Terry et al., v. Ohio, No. 1161, October Term, 1966," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

106. The Legal Doctrine of Stare Decisis refers to the principle that courts adhere to previous decisions (often referred to as Precedent) when making decisions. For the Supreme Court, the doctrine applies to their own previous decisions which have "Binding Authority", while the decisions of lower courts have "Persuasive Authority" in the judicial decision-making process. The Supreme Court can, however, overrule precedent when a majority of justices feels that previous decisions are badly reasoned or unworkable.

107. For the purposes of this research, the "Carceral State" is defined as the unprecedented phenomenon of mass incarceration which has been characterized by scholars as the "Carceral State" or the "Prison Industrial Complex" to emphasize the systemic and institutional characteristics of the carceral ecosystem's racially oppressive nature.

(Sibron, Peters, and/or Terry) or the Respondents (the states of Ohio and/or New York) in one or more of the cases.[108] In particular, the Terry case raised the intersecting issues of Police Power and the treatment of racial minorities by Law Enforcement. As such, the National Association for the Advancement of Colored Peoples ("NAACP"), the American Civil Liberties Union of Ohio ("Ohio ACLU"), and the American Civil Liberties Union ("ACLU") all obtained the leave by the State of Ohio to file Amicus briefs on behalf of Terry.[109] In contrast, the National District Attorney's Association ("NDAA"), the association Americans for Effective Law Enforcement ("AELE"), and the United States Department of Justice on behalf of the United States government all filed Amicus briefs in support of the State of Ohio. In their brief, the Ohio ACLU identified the importance of constitutional protections for Americans who interact with Law Enforcement stating, "[n]owhere, however, is the relationship between the accused and prosecutorial government more critical than at the very inception of the criminal process—at the point of arrest and accompanying search—an area traditionally safeguarded by the protections of the Fourth Amendment."[110] The dilution of these protections by the Supreme Court posed the risk of empowering Law Enforcement with the ability to profile citizens in public spaces and legitimizing the use of the Frisk for the protection

108. According to the Rule 42(2) of the Supreme Court, "A brief of an amicus curiae in cases before the court on the merits may be filed only after order or the court or when accompanied by written consent of all parties to the case". All of the parties who filed briefs as amicus curiae in the Terry, Sibron, and/or Peters cases were able to do so because they obtained leave of all parties involved. "Rules of the Supreme Court of the United States". Adopted June 12, 1967. Effective October 2, 1967. Library of the Supreme Court of the United States. Washington, D.C.

109. "Letter to Americans for Effective Law Enforcement Inc.: Permission to File a Brief of Amicus, July 28, 1967," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.; "Letter to American Civil Liberties Union: Permission to File a Brief of Amicus, N.D.," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.; "Letter to National Association for the Advancement of Colored People: Permission to File a Brief of Amicus, N.D.," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.; "Letter to the American Civil Liberties Union of Ohio: Permission to File a Brief of Amicus, N.D.," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.

110. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 2.

of the officer as a mechanism to gather evidence against individuals whom society deems as unwanted.

In the briefs submitted to the Court in Terry, both the counsel for the Appellant and the Amici who filed briefs on the Appellant's behalf, noted the historical tendencies that Law Enforcement officials have had in profiling individuals, especially Black Americans. For instance, the NAACP cited stories from two of its Black members in interracial marriages—in Los Angeles and Detroit—who experienced repeated stops by law enforcement in public and were sometimes taken to the police station because their association with a Caucasian person was deemed suspicious.[111] The profiling of Black Americans, especially those who were observed in the company of white Americans was highlighted by the *Kerner Commission* which stated in its report: "field interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile … members of minority groups were often stopped, particularly if found in groups, in the company of white people, or at night in white neighborhoods."[112] Likewise, the NAACP alluded to the relationship between racial profiling and the Stop and Frisk power in its brief, arguing:

> The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged…the essence of stop and frisk doctrine is the *sanctioning of judicially uncontrolled and uncontrollable discretion* by law enforcement officers. History, and not in this century alone, has taught that such discretion comes inevitably to be used as an *instrument of oppression* of the unpopular … the [Fourth] Amendment protects the unpopular, the Negro, and all

111. "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 1.

112. National Advisory Commission on Civil Disorders, *Kerner Commission Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967*, United States Department of Justice: Office of Justice Programs. Quoted in "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 2.

> our citizens alike, from subjection to the oppressive police discretion which stop and frisk embodies.[113]

The pervasiveness of racial profiling by Law Enforcement prior to and during a Stop and Frisk was evident in the Terry case as several Amici and the Appellant's counsel repeatedly pointed out.

Throughout the briefs and during oral arguments, the Court was repeatedly reminded of the obvious race-based motivations that animated Officer McFadden's initial public surveillance of both Terry and Chilton. During oral arguments, Mr. Stokes—counsel for Terry—reminded the Justices that the trial court's record demonstrated that McFadden first indicated that he noticed "two negro males" from about 300-400 feet away. The officer further justified his suspicion by noting that it was broad daylight in a downtown business area of Cleveland and that both Terry and Chilton were not behaving as the others in the area were. When the officer was asked under oath what attracted his attention to them, he stated "well to tell you the truth, *I didn't like them*". However, when pressed further, he modified his response to: "I was attracted to their actions up there on 14th street."[114] In its Brief supporting Terry, the Ohio ACLU also quoted from the transcript of Officer McFadden's testimony which revealed that upon first glance of Terry and Chilton, McFadden stated "that he 'didn't like them' or 'their actions', that he 'was just attracted to them and surmised that there was something going on,' and that he did not know whether, if he saw them engaged in the identical conduct again he would have had any cause for suspicion."[115]

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113. "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 3-4. (Emphasis added).

114. Sound Recording 267.664, "Oral Arguments in Terry v. Ohio [Case 67]," Dec. 12, 1967; Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267; National Archives of College Park, College Park, MD. (Emphasis added).

115. "Stipulation of Fact and Evidence: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180, March 12, 1965," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C. Quoted in "Brief for American Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 4; "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 7, 6.

The police officer's suspicions were evidently informed by an implicit racial bias that conferred upon Terry and Chilton a label of criminality in the eyes of the officer from the moment he noticed their appearance. Citing the 1947 Report from Truman's *President's Committee on Civil Rights*, the NAACP noted: "Where lawless police forces exist, their activities may impair the civil rights of any citizen. In one place the brunt of illegal police activity may fall on suspected vagrants … and in another on unpopular racial and religious minorities, such as Negroes … wherever unfettered police lawlessness exists, civil rights may be vulnerable to the prejudices of the region … and to the caprice of individual policemen."[116] The dangers posed by "unfettered police lawlessness" were not only evident with the racial distinctions that initiated McFadden's surveillance of Terry and Chilton, but they were also demonstrated in his subsequent motivations to conduct the Stop and Frisk and to arrest them.

The State of Ohio and the Amici who argued in favor of Ohio anchored much of their justification in McFadden's actions on the number of years of experience he had as a police officer. In its Brief, the State of Ohio immediately described Officer McFadden as "a Cleveland detective with 39 years' and 4 months' police experience" on the police force.[117] However, in their brief, Terry's counsel pointed to the obvious flaw in such an argument, stating that McFadden "testified under inquiry by the [trial] Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never arrested anybody casing a place."[118] Ohio's reliance on McFadden's experience—an argument that clearly lacked

116. United States and Charles Erwin, *To Secure These Rights: The Report of the President's committee on Civil Rights*, 1947, (New York, NY: Simon and Schuster). Quoted in "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 4.

117. "Brief for the Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 4.

118. "Brief for the Petitioner, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 7.

merit in this case—demonstrates how the actions of police officers have often received an air of legitimacy and deference when being scrutinized by the judiciary. Although McFadden admitted under oath that he had never stopped anyone for "casing a place" in 39 years on the same beat, the Court never acknowledged that the experience argument—as the justification for McFadden's suspicion of Terry and Chilton—presented by Ohio was essentially moot. This argument further shed light on the motivations discussed above which compelled McFadden to follow Terry and Chilton and then subsequently Stop and Frisk them for weapons. This fact, a significant flaw in McFadden's conduct, weakened the case that Ohio was making to justify the intrusion upon Terry and Chilton. In fact, Justice Marshall quickly identified this very point during Ohio's oral arguments on December 12, 1967, when he asked Mr. Reuben M. Payne, Ohio's Assistant Prosecuting Attorney, "where did [Officer McFadden] get his expertise about someone about to commit a robbery?" Mr. Payne responded: "I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years I am quite sure that, even if by *osmosis*, some knowledge would have to come to him of the various degrees of crimes." Justice Marshall responded in a sarcastic tone "Intuition by osmosis" and the Court erupted with laughter.[119] Despite this obvious flaw in Ohio's arguments, the Court never took up the issue of mere intuition replacing any kind of reasoned determination of suspicion thereby demonstrating the legitimacy that the Judiciary granted to illogical and often racially motivated Law Enforcement practices solely on the basis of policing as an institution. Further, in their Brief, Terry's counsel pointed to McFadden's statements about the arrest of Chilton and Katz who were stopped with Terry to further demonstrate how

119. Sound Recording 267.664, "Oral Arguments in Terry v. Ohio [Case 67]," Dec. 12, 1967; Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267; National Archives of College Park, College Park, MD. (Emphasis Added).

Officer McFadden was behaving in an extralegal manner which was legitimized only because of the institution of policing. In the trial court, McFadden was asked:

> Q: What were Chilton and Katz being arrested for?
> A. Association.
> Q. Is that your complete answer, sir?
> A. Well, they were found in company with a man with a revolver.
> Q. So then at that point they were being arrested for association?
> A. Yes.
> Q. Do you know of any charge under Ohio Law entitled 'Association'?
> A. As far as I know, I don't know.[120]

Through the elements of the record brought up by Terry's counsel and the questioning by Justice Marshall, McFadden's actions clearly reflected what the 1947 Presidential Committee on Civil Rights called "unfettered police lawlessness" which captured Terry and brought him and Chilton in the broader carceral system motivated, at least in part, by their race. In hearing this appeal, the Supreme Court was presented with an opportunity to sanction what the Kerner Commission dubbed "judicially uncontrolled discretion by law enforcement" but it chose instead to endorse it.[121]

The Stop-and-Frisk cases presented the Court with an opportunity to interpret the Fourth Amendment in a manner that reinforced the protections for Americans against unfettered police lawlessness which was undoubtedly a key component of Jim Crow-era policing practices. The Court was firmly notified about these practices by both the ACLU and the Ohio ACLU, who as Amici, wrote "it cannot be doubted that for many years, state police officers have been stopping and frisking suspects, without their consent, without a search warrant or probable cause, and *using*

120. "Brief for the Petitioner, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

121. National Advisory Commission on Civil Disorders, *Kerner Commission Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967*, United States Department of Justice: Office of Justice Programs, 189.

the yield of such searches to convict them of crimes."[122] These practices, which often disproportionately targeted minority groups such as Black Americans, clearly demonstrate that the Stop and Frisk risked becoming a Constitutionally legitimized state-sanctioned evidence gathering mechanism based on whims of individual officers. In the Terry case, AELE argued that "the [police] officer involved [in a stop] must have the power to act *reasonably* to protect himself from attack, or to prevent the suspect's escape, during the course of detention or inquiry."[123] However, as all the other Amici who filed briefs in support of the State of Ohio in Terry had failed to do, AELE failed to define a standard for the breadth of reasonableness of the officer's conduct. Indeed, the Ohio ACLU repeatedly highlighted the arbitrariness of a police officer's judgement with respect to whether the target of a Stop and Frisk possesses a weapon. Citing the Ohio State Court of Appeals' ruling in Terry, the Ohio ACLU wrote "'[P]olice officers seem unanimous in stating that frisking is done for self-protection and not as [a] mere evidentiary fishing expedition.' To make distinctions in constitutional treatment turn upon a *police officer's subjective motive*—whether in fact he seeks a weapon or other evidence—is to disregard constitutional history and make a shamble of Fourth Amendment protections."[124] Despite the Ohio Appeals Court's stark conclusion about the subjective motivations of police officers, both that court, and eventually, the Supreme Court disregarded the possibility that the Stop and Frisk allowed police officers to engage in "fishing expeditions" at the expense of the civil liberties of law abiding citizens. The lower court decisions in all three of the Stop and Frisk cases generally demonstrate an immensely deferential

122. "Brief for American Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 9; "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 9. (Emphasis Added).

123. "Brief for Americans for Effective Law Enforcement as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 6-7. (Emphasis Added).

124. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 24-5.

attitude towards Law Enforcement by the Judiciary which further empowered police with evidence gathering powers—camouflaged as self-protection—that bypassed Fourth Amendment protections. Indeed, the Ohio ACLU, noting the ways in which the courts change constitutional standards by changing terminology, labelled this act "Semantic Wizardry" as "the 'stop' was transformed into a sub-arrest or non-arrest, to which none of the constitutional requirements of arrest applied".[125]

In approaching the Stop and Frisk cases with a broad and forward-looking perspective, it is clear that the decisions to be rendered by the Court risked creating Constitutional law in which a casual "Stop" for investigative purposes with the accompanying "Frisk" for protection of the officer created a regime in which the practice of Stop and Frisk became a lawful pre-textual practice for evidence gathering predominantly anchored upon the subjective prejudices and implicit racial biases of individual officers. In Terry specifically, Terry's Counsel and the Amici who filed in favor of the Appellant argued to the Court that not only was a Stop and Frisk without probable cause—in their view—unconstitutional, but the fruits of such a frisk should not be admissible as evidence nor substantiate probable cause for an arrest.[126] Likewise, in their Brief to the Court, the Appellant urged the Court to address the Semantic Wizardry of the standard of reasonable suspicion stating, "[i]t would seem necessary for this Court to rule that the establishment of *lesser standards to escape the dictates of the Fourth Amendment* will not be

125. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 10.

126. *See Generally*: "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."; "Brief for American Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."; "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."; "Brief for the Petitioner, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

tolerated."[127] Likewise, the Ohio ACLU also argued that the Court had an obligation not to "*emasculate* the exclusionary rule for the *convenience* of the police force … as a matter of practical, as well as moral, necessity," adding that "those of us who are not as convinced that the police will use their vast power with such unanimous *bona fides* … must disassociate ourselves from [a] rosy view of law enforcement" in light of the Court's previous decisions concluding that "'history shows that the police acting on their own cannot be trusted'." They subsequently reasoned that if the Court did not reinforce the Exclusionary Rule "a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches and seizures may be evaded and the exclusionary rule of *Mapp v. Ohio*, to a large extent, written off the books."[128] Further, in its Amicus brief the ACLU relied on the words of Judge Van Voorhis of the New York Court of Appeals who authored a dissent in both the *Sibron* and *Peters* cases:

> The power to frisk … depends to a large extent upon the *subjective operations of the mind of the officer* … but the sponsors of exceptional constitutional treatment for such frisk urge that society's *substantial interest in protecting the lives of its law enforcement* authorities in the course of their investigation of crime *compel relaxation of settled constitutional principles* to achieve this important societal purpose.
>
> Upon closer inspection, however, the argument disintegrates entirely. For … as a practical matter, the use in evidence of the yield of the searches made in violation of clear Fourth Amendment principles would provide *great incentive* for police officers, *under the guise of self-protection*, to make general searches of the person … which the exclusionary rule was designed to protect.[129]

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127. "Brief for the Petitioner, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]." (Emphasis added).

128. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 38. (Emphasis Added).

In Mapp v. Ohio (1961), the Supreme Court decided in a 6-3 ruling that the protection against unreasonable searches and seizures contained within the Fourth Amendment to the United States Constitution was applicable to the states through the Doctrine of Incorporation (supra note 9). Consequently, evidence unconstitutionally obtained for use in a state criminal prosecution should be excluded thereby making the Exclusionary Rule from the 1914 case Weeks v. United States applicable to the states.

129. *People v. Peters*, 18 N.Y. 2d at 246, 605 and 254 N.Y. Supp. 2d at 13. Quoted in "Brief for American Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 11, 26-27. (Emphasis added).

These arguments clearly reflect an obvious risk—if not a guaranteed outcome—that such a Stop and Frisk regime where Law Enforcement officials could stop any target on the street based on subjective motives, frisk their target for weapons, and subsequently any fruit of that frisk as probable cause for an arrest. A Stop and Frisk regime such as this would inevitably convert the practice into a pre-textual mechanism to target individuals deemed suspicious, such as Black Americans—amongst other minorities—in a post-Jim Crow policing environment.

The Respondent's in Terry, and the Amici who filed briefs supporting him, repeatedly made arguments which plainly identified the deferential treatment that Law Enforcement often received from the Judiciary. This treatment of Police Power by the Court was not only reflected in the Court's internal deliberations and final opinion, but it was evident in the aggressive posture taken by the State of Ohio in its briefs to the Court. Before the Court had agreed to hear the case, the State of Ohio wrote in opposition to the granting of the Writ of Certiorari by using the blanket term 'criminals' to characterize the misuse of civil liberties by an undefined group to shield deviants from the law. As it argued, "it is our position that the shield of these rights should be used [to protect law-abiding citizens] and not as a weapon by those who in zealous application who would misuse, misinterpret, or abuse them." By creating a binary between "criminals" on the one hand and "law-abiding citizens" on the other, the Respondent appealed to the deference often given to Law Enforcement when performing a crime fighting function. Further, they failed to acknowledge the pervasiveness of abuse inflicted by Law Enforcement on the Black community

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In the New York Court of Appeals case, the majority did not publish an opinion outlining the reasons for their findings. Although the decision in this case was on the merits rather than an application for emergency relief, the Judiciary has a long history of producing decisions without justifications, which legal scholar Stephen Vladeck, has recently argued produces "unusually rigid ideological homogeneity". While Vladeck's assessment pertains to the Supreme Court, his argument about anti-democratic nature of judicial opinions without reasoning remain particularly relevant to New York Court of Appeals' treatment of the Sibron and Peters' cases. Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, (New York, NY: Hachette Book Group, 2023) *14*-17.

in America and making criminals out of law-abiding citizens as the Presidential Commissions, discussed in Chapter, 1 have shown.[130] Rather than shielding criminals—as the Respondent alleged—civil liberties were designed to shield citizens from abuse perpetrated by the state—most often through the state's Police Power. In essence, the Respondent characterized Terry's appeal in terms of a request for an absolutist interpretation of the Fourth Amendment stating, "no right under the Constitution is so absolute or self-operating that it can be permitted to conduct a bleeding operation on the very society which has given it birth and nourishment."[131] This supposed dichotomy, as laid out by the Respondent, clearly portrayed the systemic advantages that were conferred upon white Americans and often withheld from Black Americans. By arguing that a complete interpretation of the Fourth Amendment protected criminals and conducted a "bleeding operation" on the white aristocratic society that gave birth to the Constitution, the Respondents were clearly, and likely inadvertently, portraying the ways in which the justice system was two-tiered and constructed to marginalize Black Americans. Instead of an absolutist argument, the Appellant was merely asking the Court to recognize the obvious abuse of police power that occurred when officers were permitted to use a Stop and Frisk technique as a pre-textual mechanism to obtain evidence from individuals they perceived as criminals solely on the basis of the implicit biases of officers, including implicit racial bias.

The arguments brought to the Court by the Respondent and the three Amici Curiae supporting them reflected a range of perspectives regarding the degree to which the Stop and Frisk

130. The Stop and Frisk procedure posed a particular risk because the systemic nature of racism in America could lead one encounter with police—regardless of the commission of crime—to turn a law-abiding citizen into a lifelong felon. A single Stop and Frisk of a Black American who was profile by police could lead to an arrest which in turn could lead to pressure to accept a plea deal for a lesser offence, even for an innocent individual. Once accepted, such a plea deal would lead to a prison sentence and often lifelong felon label which deprived the individual of voting rights and permitted employment discrimination on the basis of that prior conviction.

131. "Brief in Opposition to the Petition of Certiorari, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 5.

had and would continue to act as a pre-textual mechanism to allow Law Enforcement to search suspects without probable cause and subsequently use any contraband that was found as probable cause for an arrest and a full search incident to an arrest. For instance, AELE put forward a nuanced argument that stopped short of implying that the fruit of a protective frisk could amount to probable cause for an arrest. In contrast, the brief for the United States made the intentions of Stop and Frisk policies clear: to evade the Fourth Amendment's prohibition on searches without probable cause. The United States wrote "[w]e urge that such a limited detention need not be regarded as an arrest, and that therefore the basis for such detention need not satisfy the standard of probable cause."[132] In arguing that a stop in public for questioning was a limited detention and not an arrest for the purposes of the Fourth Amendment, the United States was demonstrating one facet of a multi-tiered strategy to thoroughly protect Stop and Frisk from constitutional scrutiny of any kind. The strategy, however, did not cease at the arrest component because the United States added "[i]f a right of limited detention does exist" as they had just argued, "[then] we suggest further that a law enforcement officer has the right to pat down the suspect's outer clothing in order to determine whether he possesses a weapon, assuming that this step appears *reasonably necessary* for the detaining officer's self-protection."[133] In a similar manner to the Respondent and the other Amici Curiae supporting them, the United States did not define reasonableness or "reasonably necessary" for the purposes of such a protective frisk which clearly demonstrated the degree to which they sought a broad Police Power through which nearly any Stop and Frisk was reasonable. As the Kerner Commission had already concluded—findings which the Court would later reiterate in the

132. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 2.

133. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 2-3. (Emphasis added).

Terry decision—Law Enforcement officials in so-called "Ghetto" communities often used their power to exert dominance over marginalized and minority community members. If such practices were paired with a Stop and Frisk policy that had an undefined reasonableness standard, the results would prove disproportionately disastrous for Black communities across America. Through these cases, the institution of Law Enforcement was relying on the Judiciary as an institution to further its interests through a decision that curtailed the constitutional rights of citizens who were approached by police officers on the street thereby demonstrating the interdependent relationship the institutions had with one another.

The United States' Brief repeatedly attempted to paint Law Enforcement in an extremely positive light without acknowledging the deficiencies in police conduct—that the Lyndon B. Johnson Administration had found—which warranted significant curtailment through the reinforcement of constitutional protections. The United States repeatedly used terminology that painted police officers in a sympathetic light to bolster their arguments with reminders of the societal function that Law Enforcement fulfilled—a strategy that often garnered the support and acquiescence by the Judiciary. Further, the terms of police and Law Enforcement, which were commonly referred to by all of the other parties in these cases were replaced with the terms "Peace Officer" and "Watchmen" to exemplify how Law Enforcement, as a social construct, was the key to creating a peaceful community and public security.[134] The United States did this particularly when dissecting the Fourth Amendment from an original intent perspective by providing the Court with an analysis of policing practices in England and colonial America. The US argued that "the particular evil which concerned the advocates of the Bill of Rights was the abuse represented by

134. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

the general warrant…there is no indication that normal law enforcement techniques of the period were regarded as within its prohibitions."[135] Not only did the argument brought by the United States in its brief ignore the 50 years of jurisprudence from the Court, it also entirely disregarded the ties that colonial era policing had with the enforcement of slavery and the return of fugitive slaves. Instead, the United States appealed to the history of Police Power as a noble and honorable "system of *watchmen* dating back to the Norman kings…[who] had a role akin to the *peacekeeping* functions of a police department."[136] Furthermore, the United States relied on an 150-year old case in the Court of Common Pleas (1810) to not only explicitly justify the permissiveness of Stop and Frisk, but to imply that arbitrary detention by "peace-keeping officers" was also lawful. The US argued:

> As pointed out in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 319 (1942) … watchmen were deemed to have the power to detain persons, at least at night, until they could account for their presence. This power was recognized in *Lawrence v. Hedger*, 3 Taunt. 13 (Common Pleas 1810), involving an action for false imprisonment by an individual who had been walking through the streets of London at night when stopped by a watchman. The plaintiff was taken by the watchman to a watch-house where the defendant, a parish officer, asked him his name and the reason for carrying his bundle at night. Not satisfied with the replies, the defendant committed plaintiff to prison for the night. The court found for the defendant … that the suspicion for detaining plaintiff was not groundless, and that "it is highly necessary that they [watchmen] should have such a power of detention."[137]

The United States concluded, "there is no reason to believe that similar authority was not commonly exercised by peace-keeping officers in the colonies.[138] Astonishingly, the United States

135. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 5-6.

136. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 6-7. (Emphasis Added).

137. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 7.

138. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 7.

seemed to be advocating not only for an interpretation of the Fourth Amendment that excluded Stop and Frisk practices from its protection, an argument which it anchored in colonial police practices that allowed the arbitrary detention of Americans on the grounds that they did not have an adequate reason to be out in public. The United States' argument in favor of arbitrary detention was eerily emblematic of the Jim Crow-era policing practices that permitted the arbitrary detention of minorities for broad and non-specific crimes such as Vagrancy, as discussed in the previous chapter. In fact, such an argument by the Federal government reflects the degree to which practices of racial profiling that were commonplace in colonial-era and Jim Crow-era policing, were being sanitized and transplanted onto the Stop and Frisk practice so that they could be used as pre-text for heretofore constitutionally impermissible searches. This remaking of racialized Jim Crow policing practices reflected the Court's intimate relationship with Law Enforcement.

Throughout the Civil Rights movement, various iterations of state supported violence inflicted upon Black people were captured and circulated by the media which created a public backlash to such obvious forms of racialization in policing. Thus, the concept of pre-textual stops which camouflaged both explicit racism in policing and the implicit racial biases that informed the actions of individual officers became commonplace. Michelle Alexander refers to this concept through the manner with which police justified stopping a disproportionate number of Black Americans for minor traffic violations to support a search of a vehicle which subsequently yielded the discovery of illegal contraband.[139] While the idea of pre-textual stops had not been fully developed at the time of the Stop and Frisk cases, the argument that a weakening of Fourth Amendment jurisprudence could lead to pre-text stops was being made. In Terry, the Ohio ACLU clearly pointed to this risk by saying "the use in evidence of the yield of searches made in violation

139. *See generally*, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

of clear Fourth Amendment principle would provide great incentive to police officers, under the guise of self-protection, to make general searches of the person, thus frustrating the great purposes of the Fourth Amendment which the exclusionary rule was designed to protect."[140] The apparent transition in policing from Jim Crow-era tactics of racialization to Stop and Frisk practices as a pre-text for racially profiled searches for evidence, which was represented by these three cases, was plainly evident to the Ohio ACLU. In its brief, it added "never, until the 'stop and frisk' cases…has there been any claim that an officer may protect an *invalid* arrest or evidence for which he was *not* entitled to search."[141] These three cases, thus, represented a significant threat to the social progress achieved throughout the Civil Rights movement of the 1950s and 1960s, which led the Amicus Curiae to make every effort possible to provide information to the Court about the impact that Stop and Frisk posed to minorities across the nation.

The potential negative ramifications of the Stop and Frisk cases, especially the Terry case, were profound enough that the NAACP took the extraordinary step to request that the Court allow them to participate in oral arguments. It argued that "these cases present issues of such significance and complexity that [the NAACP] may provide assistance to the Court not otherwise available."[142] The NAACP further highlighted the historical moment within which these cases were occurring, arguing that they "arise at a time when the nation is beset by civil disturbance of the most serious character which have some relationship to the issues involved in these cases." Within the context of the Civil Rights movement, which the NAACP pointed to, it demonstrated a direct link to Black

140. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 31.

141. "Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 33.

142. "Motion for Leave to Participate in Oral Argument, Sibron v. New York, 392 U.S. 40 (1968) [No. 63], Peters v. New York, 392 U.S. 40 (1968) [No. 74], Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 1.

Americans arguing that the case concerned "an extension of the discretionary authority of police to intervene in the affairs of citizens…employed by the police most frequently against the inhabitanta [sic] of our inner cities-racial minorities and the under-privileged."[143] While these arguments were already made in one form or another by the Amicus Curiae briefs of the NAACP, the Ohio ACLU, and the ACLU, in addition to the briefs of the Appellants, the NAACP clearly recognized the importance of this case and the need to represent the interests of law-abiding Black Americans. Earlier in the 1960s, the Court had allowed an amicus to participate in oral arguments for cases concerning police treatment of minorities in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Gideon v. Wainright*, 372 U.S. 335 (1963).[144] In both of those cases, Amici Curiae were granted leave to participate in oral arguments, and as such, the decisions reached by the Court reflected a significant curtailment of overreaching and abusive police practices. However, despite this precedent and the wide-ranging potential impacts of the Court's decision in the Stop and Frisk cases, the Court issued an order on November 13, 1967, which denied to NAACP motion to participate in oral arguments. The order simply stated that "the motion…for leave to participate in the oral argument, as amicus curiae, is denied. Mr. Justice Marshall took no part in the consideration or decision of this motion."[145] The Court's refusal to allow the NAACP to participate

143. "Motion for Leave to Participate in Oral Argument, Sibron v. New York, 392 U.S. 40 (1968) [No. 63], Peters v. New York, 392 U.S. 40 (1968) [No. 74], Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 1-2.

144. In *Miranda v. Arizona* (1966), the Court ruled that the Fifth Amendment precluded prosecutors from using statements made during interrogations when an individual is in police custody unless it can be demonstrated that the defendant was advised of their right to consult an attorney prior to and during questioning, their right against self-incrimination, and that these rights were understood and waived only on a voluntarily basis. This decision led to the popularization of the term "Miranda warnings" or "Mirandization" in law enforcement.

In *Gideon v. Wainwright* (1963), the Court ruled that the Sixth Amendment right to counsel, for individuals who could not obtain counsel independently, was applicable to the States because of the Fourteenth Amendment (known as the Doctrine of Incorporation, Id. at Footnote 9). Prior to this decision, a public defendant was only deemed a right under the Sixth Amendment for federal cases.

145. "RE: SIBRON v. NEW YORK, No. 63; TERRY, ET AL. v. OHIO, No. 67; PETERS v. NEW YORK, No. 74; Oct. Term 1967," (November 13, 1967), U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.

in oral arguments was published without a rationale from the majority or any indication about which justices, if any, would have allowed the organization's motion to proceed. Therefore, with such limited information, it can only be concluded that the Court—in light of the information presented to it by the NAACP—failed to recognize the potential for harm to Black Americans and the proclivity of Law Enforcement to target minority communities which was represented by these three cases.

The three Stop and Frisk cases of 1968 came before the Court at a pivotal moment in American social history and tested the Court's ability to withstand vehement pressure from a seminal American institution— Law Enforcement. The cases brought before the Court two distinct forms of Stop and Frisk: one which in New York State was authorized by statute and another in Ohio which was a customary practice of the Cleveland Police Department without specific statutory power. They also presented the Court with intersecting marginalized communities represented as the victims of the practice: Terry and Chilton as Black men who were surveilled in public, Peters who was frisked at gun point by an off-duty officer outside his jurisdiction, and Sibron who was targeted for a frisk because of his association with supposed drug addicts. The cases also attracted the attention of powerful Civil Rights groups across the United States in support of the appellants, on the one hand, and Law Enforcement advocacy groups as well as various different levels of government in favor of the respondents. As a whole, the cases constituted a bellwether for the Court's willingness to uphold the civil liberties of even the most unwanted Americans, and thus, curtailing the power of the institution of Law Enforcement which the majority of white middle class America held in high esteem. The outcome of the Stop and Frisk

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The letter specifies that Justice Marshall took no part in the decision which is likely due to a recusal as Marshall was, prior to his nomination to the Court, the lead counsel and director for the NAACP's Legal Defense Fund (LDF).

cases, which will be analyzed in Chapter 3, call into to question whether the advancements of the Civil Rights movement of the 1950s and 1960s—which include the Civil Rights Act of 1964 and the Voting Rights Act of 1965—represented true linear racial progress or a moment of divergence in which the interests of Blacks and working-class whites momentarily aligned.[146]

146. *See generally*, Delgado and Stefancic, *Critical Race Theory*.

3

THE SUPREME COURT'S 1968 "STOP AND FRISK" JURISPRUDENCE

This chapter analyzes the Supreme Court's decision in the Sibron, Peters, and Terry cases using the Court's official opinions in the cases, internal court records, and documents located in the papers of the Supreme Court Justices involved in the decisions. The chapter argues that the publicly available court records (i.e., Briefs, petitions, oral arguments, etc.) and the internal records only made available decades later reflect a high degree of judicial deference to the institution and practices of Law Enforcement. Internal memoranda exchanged between the justices and drafts of the Court's opinions show that the decisions made in favor of Law Enforcement were arrived at with an awareness of the political nature of the "War on Crime". The first section of this chapter, *Reasoned Suspicion: The Emergence of the Terry Stop and Frisk Regime*, analyzes the majority's opinion and internal deliberations to demonstrate how the drafting process compelled Chief Justice Warren to produce an opinion that highly favored Law Enforcement officials at the expense of vulnerable citizens. The second section of the chapter, *The Lone Dissent in the Face of the "Hydraulic Pressures" of Law Enforcement*, analyzes the dissenting opinion of Justice William O. Douglas who filed the only dissent in the Terry case. The section argues that although Justice Douglas' dissent had little legal impact, his courage in authoring it in the face of vociferous police advocacy for the opposite outcome reflects the relatively newfound severity of the influence that Law Enforcement had on judicial decisions.

The consideration of the Stop and Frisk cases by the Supreme Court represented a pivotal moment for the history of the Court and its impact on American social history for the post-Civil Rights era. The Sibron, Peters, and Terry cases brought an opportunity before the Judiciary to send a clear rebuke to American Law Enforcement agencies nationwide by solidifying the progress of the Civil Rights Movement. By 1968, the other two branches of the United States government—

the Executive Branch and the Congress—had been involved in the passage of groundbreaking legislation to extend American values of life, liberty, and the pursuit of happiness to Black Americans. These included the Civil Rights Act of 1964 and the Voting Rights Act of 1965 which to this day are remembered as landmarks of the Civil Rights Movement of the 1950s and 1960s. In *Terry v. Ohio*, the over-zealous and racially motivated practices of Law Enforcement—practices which were in plain view of the public throughout the Civil Rights Movement—were at risk of being curtailed by a civil liberty enshrined into the United States Constitution, at a time when Black Americans were still enslaved. The Supreme Court was an institution with a controversial history when dealing with the civil liberties and humanity of Black Americans. In the 1857 *Dred Scott v. Sanford* decision, the Court determined that the rights and privileges of American citizenship did not extend to individuals of Black African descent. In 1896, it subsequently ruled in *Plessey v. Ferguson*, that race based segregation did not inherently violate the United States Constitution. However, during the first decade of the Civil Rights Movement the Court was instrumental in ending racial segregation with its unanimous decision in *Brown v. Board of Education of Topeka* (1954).[147] By 1968, the Supreme Court—and the institution of the Judiciary more broadly—found itself at the pinnacle of that same Civil Rights Movement with the opportunity to restrain the powers of Law Enforcement which had played a key role in the oppression of Black Americans throughout the Jim Crow era.

The Terry case was a bellwether for litigious resistance to police abuse of innocent Black Americans throughout the United States. This was the case not only because of the binding precedent it would set on criminal cases involving dubiously obtained evidence by law

147. Kermit L. Hall, James W. Ely, and Joel B. Grossman, *The Oxford Companion to the Supreme Court of the United States*, 741-43.

enforcement, but because of the diverse group of Amici that filed Briefs in support of Terry and the people these groups represented. Perhaps most poignant was the NAACP's summary of its role in the case:

> In the litigation now before the Court—as is usual in cases where police practices are challenged—two parties are represented. Law enforcement officials…[who] ask the Court to broaden police powers. Criminal defendants caught with the goods through what…appears to be at least shrewd…[and] constitutionally questionable police work ask the Court to declare that work illegal.
>
> Other parties intimately affected by the issues before the Court are not represented. *The many thousands of our citizens who have been or may be stopped and frisked yearly, only to be released when the police find them innocent of any crime, are not represented*. The records of their cases are not before the Court and cannot be brought here. *Yet it is they*, far more than those charged with crime, *who will bear the consequences of the rules of constitutional law which this Court establishes*.[148]

The NAACP brought to the Court the consequences that the Terry case would cause for Black Americans and with its decision in the case, the Court had the opportunity to protect those innocent Americans. But, unlike previous decisions that placed the rights of Black Americans against racial segregation or voter disenfranchisement, the Terry case positioned criminal defendants (including Black criminal defendants) against the institution of Law Enforcement which had a historical interdependent relationship with the American Judiciary. Despite the progress of the Civil Rights Movement and the momentum it created amongst Black activists and their white allies, through Terry the Court was not willing to challenge an institution as old—and perhaps as revered as the judiciary itself—Law Enforcement.

Reasoned Suspicion: The Emergence of the Terry Stop and Frisk Regime

The Court released its opinions in the three Stop and Frisk cases on June 10, 1968, with relative unanimity amongst the Justices in the majority. In Terry, for instance, seven justices joined

148. "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 5-6.

with Chief Justice Earl Warren to make up the majority which included two concurring opinions authored by Justices Byron R. White and John Marshall Harlan II. However, the process of achieving such unanimity, which tended to give decisions more legitimacy, is often cumbersome and political.[149] In Terry, the first draft of Warren's majority opinion was circulated on February 9, 1968, and it contained large sections that were eventually cut out of the official opinion of the Court. A component of the content that was struck from the opinion was language that tied the concept of 'privacy' to the Fourth Amendment, which Justice Black vehemently disagreed with. In response to Warren's February 9th draft, Black wrote a concurring opinion on February 14, 1968, and circulated it to the other justices on February 19, 1968, which strongly criticized the majority's use of the word privacy—a word which is not found in the text of the Fourth Amendment.[150] It is difficult to surmise whether Black fully intended to publish this concurrence alongside the official opinion, or whether his strong language was merely intended to persuade Warren to curtail his statements about privacy. However, since Warren, as Chief Justice, would have been more concerned with the Court's reputation than the other justices, Black's prospective concurrence led Warren to omit all references to privacy in Terry.[151]

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149. As a general matter of procedure, after oral arguments for a case are heard, the Justices meet during a conference day to deliberate, and eventually, vote on the general outcome of the case. During those conference days, the Justices meet in private without any staff present and no official records document what occurred during these meetings. Once it is clear that the majority of the Justices are in favor of the appellant or the respondent, the opinion is assigned to the most senior justice in the majority. The same applies for the dissent. That senior justice can then delegate the opinion to a less senior justice if he (or eventually she) chooses. The Justice who authors the opinion then circulates a draft of the opinion to all the members of the Court, including any justices who expressed their intent to file a concurring or dissenting opinion. Depending on the size of the majority, Justices can object to the scope of the opinion by asking for changes, threatening to join the dissent, or to file a concurring opinion that criticizes the majority's reasoning while arriving at the same conclusion.

150. Terry v. Ohio (1968), Black Concurrence Draft, February 14, 1968, Box 401, Folder 11, The Papers of Hugo Black, Manuscript Division, Library of Congress, Washington, D.C.

151. Terry v. Ohio (1968), Justice Black Concurrence Draft, February 19, 1968, Box 624, Folder 4, The Papers of Earl Warren, Manuscript Division, Library of Congress, Washington, D.C; Terry v. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11, The Papers of Hugo Black, Manuscript Division, Library of Congress, Washington, D.C.

The Court's official opinion in Terry significantly curtailed the ability of the Fourth Amendment to protect Americans—especially Black Americans who were most targeted by police—from warrantless and unreasonable searches and seizures by Law Enforcement practices that predominantly originate with racial profiling. However, the initial draft of the opinion, if published, would have undoubtedly created the opportunity for the lower courts to constrain police abuse during incidents of Stop and Frisk by using of the concept of privacy to litigiously fight abusive law enforcement practices. In his February 9, 1968, draft, Warren characterized the Fourth Amendment as the "inestimable right of the personal security *and privacy* [that] belongs as much to the citizen on the streets … as to the homeowner closeted in his study to dispose of his personal affairs." Further, Warren added in a subsequent footnote that "the Fourth Amendment governs *all* intrusions by agents of the public upon *reasonable expectations of privacy* and personal security."[152] In Black's concurrence draft, he argued that as the Fourth Amendment's "language does not indicate a design to protect a person's 'privacy' from unreasonable searches or seizures"; he only viewed its "design to provide a limited protection". Indeed, the Court—as Black noted—had anchored previous decisions with a protection of privacy reasoning using the Fourth or Fourteenth Amendments. For instance, in 1965, the Court held that restrictions on access to contraceptives violated the Fourteenth Amendment by invading the privacy of individuals. In 1967, the Court also held that police surveillance through eavesdropping without a warrant violated the Fourth Amendment privacy rights of Americans.[153] Black's opposition to the use of privacy as a concept built into the spirit of the Fourth and Fourteenth Amendments clearly

152. Terry v. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11. (Emphasis added).

153. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

demonstrated his opposition to the rights of individuals which were protected by these two aforementioned decisions.

Black used his concurrence draft to take aim at the use of the word privacy with respect to the Fourth Amendment in an effort to challenge the majority's use of it in Terry. He defined it as "one of the broadest words in the English language" adding that "the judicial addition of the word 'privacy' to the words of the Fourth Amendment thus leaves the courts freedom to expand it."[154] Indeed, the phrases "the inestimable right to privacy" and the "reasonable expectation of privacy" found in Warren's initial draft created a foundation with which victims of police abuse could mount a legal defense in the lower courts—an idea that Black evidently staunchly opposed. In fact, Black used his concurring draft to accuse the Court of having given itself tremendously broad power to hold laws unconstitutional through its use of 'privacy'. He argued that the Court knowingly changed the meaning of the Fourth Amendment thereby "making a constitutional change courts are vested with no power to make."[155] Evidently, the tone and tenor of Black's concurrence gave the Chief Justice pause, leading to the removal of all iterations of the word and phrases associated with 'privacy' when a subsequent draft of the majority opinion was circulated on May 31, 1968.[156] As a result, Black likely retracted his concurrence and joined with the majority in the decision in Terry, an action which reflected the internal jockeying that often occurred when the Court deliberates on its decisions.[157]

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154. Terry v. Ohio (1968), Justice Black Concurrence Draft, February 19, 1968, Box 624, Folder 4.

155. Terry v. Ohio (1968), Justice Black Concurrence Draft, February 19, 1968, Box 624, Folder 4.

156. Terry v. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9, The Papers of Byron White, Manuscript Division, Library of Congress, Washington, D.C.

157. It cannot be determined with absolute certainty that Black retracted his concurrence for this very reason. All of the obtainable evidence points to the fact that Black first produced and circulated his concurrence to the conference of justices in an attempt to sway the majority to remove the privacy language in the first draft of Terry and then subsequently retracted the threatened concurrence draft when the changes to the majority's draft were made. Scholars have used this methodology to analyze the internal workings of the Court in light of the lack of legal safeguards to preserve the Supreme Court's archival records. *See generally* "A Note on Supreme Court Procedure" in

When the Chief Justice circulated a revised draft of Terry on May 31, 1968, a significant amount of the text from the February 9, 1968, draft had been eliminated, rewritten, or amended. The justification for the ruling in Terry now hinged significantly on the limitations of the Exclusionary Rule to act as a deterrent for unlawful searches by Law Enforcement officials. Now the majority forcefully proclaimed that "Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the Constitutional rights of citizens permitting unhindered governmental use of the fruits of such invasions." The majority added that "a ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence."[158] However, the Court did exactly the opposite through its ruling in Terry, which it then applied to the Peters and Sibron cases as precedent, by creating an exemption to the Fourth Amendment that allowed for a limited search on the probable cause that the officer's life was in danger rather than probable cause of a crime being committed. The Court essentially changed the Constitutional standard by engaging in their own "semantic wizardry" and using their own logic, legitimized the conduct of racially motivated Stop and Frisk while claiming they were doing the opposite. Further, the Court arrived at this decision having been thoroughly advised, through the Amicus briefs in favor of Terry, Sibron, and/or Peters, of the realities that minority communities already faced in their interactions with police--claims which were bolstered by the conclusions of the Presidential Commissions analyzed in Chapter 1. However, it decided to sidestep the lived experiences and impact on these communities by relying heavily on a theory that the Exclusionary Rule, as a judicial remedy, was insufficient to fully curb police abuse. Indeed, it

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Michael J. Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right*, (New York, NY: Simon & Schuster, 2016), 9-10.

158. Terry v. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9; Terry v. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11, The Papers of Thurgood Marshall, Manuscript Division, Library of Congress, Washington, D.C.

reasoned that "a rigid and unthinking application of the exclusionary rule, in futile protest against the practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."[159] Essentially, the majority was using the Exclusionary Rule's inability to curb all police abuse as a scapegoat in its refusal to allow it to prevent some or most police abuse and at the same time highlighting—as indicated in Chapter 2—that the lives of police officers were worth more than those of Black Americans.

The Court was not only fully aware of the abusive practices by police in terms of searches and seizures built upon stereotypical pretext, but it also was keenly aware of the racialized applications of these abusive practices when it decided to authorize them further regardless of their impacts on the citizenry. Indeed, the Court stated, "[t]he 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."[160] The Court hinged its reasoning for declining to intervene by arguing that since the Exclusionary Rule would not stop "the wholesale harassment…by the police community," it should not act as a safeguard of the Constitutional protections of minorities. Notwithstanding this obfuscation of its role, the majority further added "our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies."[161] Yet, the reality was that the Justices did not believe that the Court should be remedying the injustices of police abuses which was made clear when Justice Brennan wrote to the Chief Justice that "critics of police abuses ought to be told that they should turn to other

159. Terry v. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9; Terry v. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11.

160. Terry v. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9; Terry v. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11.

161. Terry v. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11: 12.

agencies of government for the cure".[162] Further, a clerk for Justice Brennan reasoned that even if the Court ruled in favor of Terry, "police will of course be moved to arrest on a technicality (e.g., drunkenness, vagrancy, loitering, jay-walking, being a suspicious person, etc.) to justify an incident search in cases where a frisk is thought necessary but the officer feels he lacks cause to arrest for a weapons violation."[163] In a subsequent memorandum to the Chief, Brennan reasoned that arrests made on technicalities such as vagrancy, loitering, etc. "would be more tolerable [abuses] than those I apprehend may follow our legitimating of frisks on the basis of suspicious circumstances."[164] These internal observations clearly demonstrate a tacit awareness of the abusive conduct of Law Enforcement in the face of constitutional restrictions of Police Power which was also echoed by Justice Abe Fortas who wrote to the Chief "I wonder if the detailed description of what the cops can getaway [sic] with may not incite them to greater use of the latitude described."[165] Despite these acknowledgments in internal memoranda and the staunch warnings by the Amici who filed briefs in favor of the appellants, the Court nonetheless opted to empower police to conduct warrantless safety searches knowing full well that the decision would signal to Law Enforcement that they could push the boundaries of the reasonableness of such searches.

Throughout the drafting process of the Stop and Frisk case decisions, particularly the Terry case, the rhetoric employed by the Court's majority reflects a deferential acquiescence to the role

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162. Memo to the Chief Justice from Brennan, January 30, 1968, Box I:168, Folder 8, The Papers of William Brennan, Manuscript Division, Library of Congress, Washington, D.C.

163. Memo to Brennan (N.D.), Box I:168, Folder 8, The Papers of William Brennan, Manuscript Division, Library of Congress, Washington, D.C.

164. Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box 624, Folder 3, The Papers of Earl Warren, Manuscript Division, Library of Congress, Washington, D.C; Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box I:168, Folder 8.

165. Memorandum to the Chief from Justice Fortas (N.D.), Box 624, Folder 3, The Papers of Earl Warren, Manuscript Division, Library of Congress, Washington, D.C.

and political power of Law Enforcement in American society that was not conferred upon prospective victims of police abuse in minority communities. In the Chief Justice's initial draft from February 9th, 1968, a significant extract of the opinion was devoted to language that would appease Law Enforcement and its allies such as the Amicus group *Americans for Effective Law Enforcement*. Although these statements were removed from the opinion during subsequent edits, they nonetheless reflect the deferential perspective that the Court's majority afforded to police. The draft contained numerous references to the lives and sacrifices of police officers while not mentioning the lives of the victims of police abuse, especially those in Black communities who were often targeted by police as the Kerner Commission, which the Court itself cited extensively in footnote 12 of Terry, concluded.[166] In the February draft, Warren referred to police officers as "reasonable and prudent men" to make a distinction between police officers who make decisions in the field and "legal technicians" who only make theoretical decisions. Warren further argued:

> A police officer is not required to sacrifice his life on the altar of a doctrinaire judicial scholasticism which ignores the deadly realities of criminal investigation and law enforcement.
>
> The law enforcement agencies of our federal, state, and local governments play an indispensable and sometimes little understood role in the preservation of our constitutional liberties. Without the safety and security created by their efforts, the conditions for meaningful enjoyment of the rights of personal security and privacy would simply not exist. To insist, as this Court constantly has, that the police observe limitations imposed by the Constitution in the name of individual liberty is not to derogate the value of community security or the role of the police in safeguarding that security. Nor is it to require that police officers take unnecessary risks in the performance of their duties. *American criminals have a long tradition of armed violence*…virtually all of the deaths and a substantial portion of the injuries [to law enforcement] are inflicted with guns and knives.
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> In view of these facts, *we cannot blind ourselves to the need for law enforcement officers to protect themselves* and other prospective victims of violence in situations

166. Terry v. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11; Terry v. Ohio (1968), Majority Opinion Draft, February 9, 1968, Box 119, Folder 9.

where they may lack probable cause for an arrest.[167]

Although the vast majority of these statements were removed from the eventual opinion, the Court's initial willingness to recognize the potential for harm posed to police officers by "criminals" on the one hand, but then to completely neglect to recognize the tangible harm posed to Black Americans through the legalization of Stop and Frisk laws, on the other, further reflects the Court's abdication of its role to preserve Constitutional protections. In light of the internal deliberations uncovered through this research, the Justices were under no illusion that Law Enforcement officials were the only party at risk of harm as the majority's opinion and drafts imply. To the contrary, previously referenced memoranda by Justice Brennan, his clerk, and Justice Fortas all demonstrate an awareness of the realities that Black Americans faced from police surveillance. Further, the majority's eventual opinion which alluded to the frequent complaints of the Black community in terms of police abuse and the extensive footnote referencing the Kerner Commission further show that these statements exalting Law Enforcement reflected the extensive value placed on police and, in contrast, the label of criminality systematically attributed to Blackness. The outcome of these Stop and Frisk cases was particularly important for advocates against police abuse and for visible minorities like the Black community because of the presumption of criminality that was so often associated with Blackness. Indeed, the draft opinion circulated in February foisted onto victims of police abuse a label of criminality as seen in Justice Warren's statement "American criminals have a long tradition of armed violence".[168] In this statement, Warren does not contextualize any further to explain what is meant by 'criminal', nor the scope of the term 'armed violence' in the context of the Terry case in which the appellant was

167. Terry v. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11.

168. Terry v. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11.

Black, nor does the opinion cite any empirical data about the historical record of armed criminal violence. Further, Justice Brennan went so far as to acknowledge the political roots of the 'criminality' narrative in an internal memo stating that aggressive police surveillance was "happening, of course, in response to the 'crime in the streets' alarums being sounded in this election year in the Congress, the White House and every Governor's office."[169] In doing so, Brennan all but acknowledged that the justices were not only aware of politics in their decision-making, but that the crime problem of the 1960s that had permeated into the minds of Americans was, at least partially, a rhetorical construct to aid politicians in their re-election campaigns.[170] Nonetheless, Warren still went on to praise the work of police officers and create a dichotomous narrative that placed protecting police against protecting criminals with an awareness of the political roots of such a narrative. In doing so, Warren completely omitted the impact that searches and seizures based on undefined 'suspicious behavior' would have on individuals who had nothing on their person and were not involved in any criminal activity—the victims of racially motivated frisks.

The Court's decisions in the Stop and Frisk cases also fits into a pattern of surveillance and apprehension of Black Americans by police throughout American history because it shifted the ways in which police surveilled minority communities. Prior to these cases being decided, law enforcement used broad non-specific laws under the Vagrancy Regime (e.g., vagrancy, loitering, etc.) to arrest individuals and perform searches incident to arrest aimed at either discovering or simply harassing Black Americans.[171] However, the precedent laid out in Terry created a legal

169. Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box I:168, Folder 8.

170. Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics*, (Baton Rouge, LA: Louisiana State University Press, 2000), 183-186.

171. Goluboff, *Vagrant Nation*, 8-11.

structure that allowed officers to perform an outer-garment search of individuals they had profiled in public and subsequently stopped for "investigatory questioning". The Court described this outer-garment search as a "*reasonable search* for weapons for the protection of the officer, where he has reason to believe that he is dealing with an armed and dangerous individual". The standard the Court created differed from the standard of probable cause for a crime because it was merely probable cause to believe that the safety of the officer or unnamed others are in danger which no specific test to identify reasonableness. While the Court claimed to not want to engage in a war of semantics or, as the Ohio ACLU argued, "Semantic Wizardry", that is exactly what it did in changing the constitutional definition of probable cause under the Fourth Amendment to authorize to extension of police power while seeming to honor the text of the Constitution. Thus, the Court argued that "the sole justification of the search…is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments *for the assault of the police officer*."[172] However, this type of search, which the court described in Terry's case as one where McFadden "did not place his hands in [Terry's] pockets or under the outer surface of [his] garments until he had felt weapons," may lead to the discovery of other materials that would not have posed a danger to the officer, but having been found constitute probable cause that a crime has been committed. Justice Brennan observed this possibility when he wrote in a memorandum to the Chief: "The opinion does not suggest the answer if instead of weapons the frisk had turned up burglar tools, narcotics or the like…I say this because I am not sure the settled law that an arrest on probable cause supports an incidental search which turns up contraband should be applied to the situation of contraband

172. Terry v. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11: 25, 27; Terry v. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9. (Emphasis Added).

turned up by a 'stop' and 'frisk' supported by probable cause."[173] Thus, in Brennan's view the outcome in Terry led to the very real possibility that contraband could be uncovered through a 'safety search' which could then be used by police as probable cause to arrest an individual for illegal possession. Although Brennan went on to note that he would likely conclude that such evidence would be inadmissible, the majority's opinion makes no explicit reference to this possibility which in turn provided police with enough maneuverability to use a safety search as pre-text to frisk an individual they presumed possessed narcotics.[174] In fact, Brennan's seeming caution at the possibility that a frisk could uncover materials that do not pose a threat to the officer was undercut by the Court's decision in the Peters case. Although the officer uncovered burglar tools through a Stop and Frisk and not a weapon which threatened his safety, the Court's opinion in that case nonetheless upheld the trial court's denial of the Motion to Suppress. As a result, the criminal conviction of Peters which clearly demonstrated that Justice Brennan's skepticism surrounding the discovery of burglar tools or narcotics.

Although Justice Brennan brought up this possibility internally with the Chief Justice, which would not have been known to historians until his papers eventually became accessible, this point was also brought up during oral arguments in the Sibron and Peters cases. In the Sibron case, Gretchen White Oberman—representing Sibron—argued the very point that Justice Brennan acknowledged internally. She argued that the type of protective search that the New York statute was enabling "permits the officer to seize any item possessed illegally upon the person of the individual searched. It can then be … put into evidence in a criminal case."[175] Ms. Oberman

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173. Memo to the Chief Justice from Brennan, January 30, 1968, Box I:168, Folder 8: 5.

174. Memo to the Chief Justice from Brennan, January 30, 1968, Box I:168, Folder 8.

175. Sound Recording 267.663, "Oral Arguments in Sibron v. New York [Case 63]," Dec. 11, 1967; Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267; National Archives of College Park, College Park, MD.

distinguished this type of search, which she referred to as "state mandated evidence gathering", and a protective frisk for the purposes of self-protection of the officer. Oberman's arguments highlight the tremendous discretion that this case risked providing to police officers, despite the pre-condition of "reasonableness" which the Court ascribed to a Stop and Frisk. In fact, Judge Van Voorhis of the New York Court of Appeals noted as much in his dissent writing "we are letting the police officer do things in his almost *unlimited* discretion"—a strong remark which Ms. Oberman cited to the Court during oral arguments.[176] Indeed, the Court was allowing—through its decision in Terry which it then applied as precedent in Sibron and Peters—an officer to conduct a protective frisk on the basis that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety…was in danger."[177] However, as Ms. Oberman pointed out during oral arguments, "the only search resulting in evidence that can be introduced in a criminal prosecution that is reasonable is a search made upon probable cause."[178] Despite the public warnings brought by Ms. Oberman, the internal musings of Justice Brennan, and the Amici, the Court nonetheless opted to ignore the historical record of the propensity for police to push the boundaries of their power and provided them with even more power in performing—and abusing—a Stop and Frisk.

While the majority in Terry reasoned that their approval of Stop and Frisk continued to place limitations on Law Enforcement against abuses that were very much known to them, their opinion did not create a judicial test but merely placed two vaguely phrased limitations that were

176. *People v. Sibron*, 18 N.Y.2d 603, 605 (N.Y. 1966), 272 N.Y.2d 374, 219 N.E.2d 196.

177. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

178. Sound Recording 267.663, "Oral Arguments in Sibron v. New York [Case 63]," Dec. 11, 1967, Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267, National Archives of College Park, College Park, MD; Sound Recording 267.664, "Oral Arguments in Sibron v. New York [Case 63]," Dec. 12, 1967, Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments, Record Group 267, National Archives of College Park, College Park, MD.

entirely subjected to the interpretation of state courts and lower federal courts.[179] Firstly, the majority reasoned that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with *rational inferences* from those facts, reasonably warrant that intrusion."[180] Moreover, this vague standard was framed within the question: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[181] However, despite the majority's awareness of the abuses conducted at the hands of Law Enforcement, especially in Black communities, they did not create a concrete judicial standard for determining whether "reasonable inferences" made by Law Enforcement —particularly when considering the existence of implicit racial bias in policing—were valid.[182] The majority merely resolved that it did not need to develop "the limitations which the Fourth Amendment places upon a protective seizure and search for weapons…these limitations will have to be developed in the concrete and factual circumstances of individual cases."[183] In doing so, the Court left the door open to abuse of the Stop and Frisk in the lower and state courts when a Motion to Suppress is brought by a defendant as well as the potential for significant inconsistencies by state courts in the application of this vague reasonable inference standard.

Despite the majority's unwillingness to take a more significant stand against the proclivity

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179. In the process of resolving matters of jurisprudence in the lower courts, the Supreme Court has often relied on "Judicial Tests" to guide the analysis of lower court judges. For instance, the most common standard legal test is the "But-For" test which is employed to answer standards questions of causation, that is, whether "the relevant, legally proscribed conduct was a necessary condition of the outcome." Peter Cane, *Responsibility in Law and Morality*, (Oxford, UK: Hart Publishing, 2002), 120-121.

180. *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968). (Emphasis Added).

181. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

182. Katheryn Russell-Brown, "Making Implicit Bias Explicit: Black Men and the Police" in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, Edited by Angela J. Davis, (New York, NY: Pantheon Books), 135-139.

183. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

of police abuse within the Stop and Frisk context, they nonetheless repeatedly expressed an awareness of the severity of the impacts of a public Stop and Frisk. The majority first characterized it as a "procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised." They called it a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." When discussing the nature and quality of the police intrusion, the majority characterized it as "a limited search of the outer clothing for weapons" and as a "severe, though brief intrusion upon cherished personal security." They then added "it *must surely* be an *annoying*, *frightening*, and *perhaps humiliating* experience."[184] The language used by the Court to characterize the severity of the Stop and Frisk demonstrates an awareness by the majority of the social and mental impacts of these types of police intrusions. Yet, when the lived experiences of the victims of police abuse through Stop and Frisk were placed on a balancing scale with the potential for harm to police officers, the majority ceded a key constitutional protection to Law Enforcement. Moreover, the majority did this while trying to craft its decision in a manner that provided the allusion to the public that the individual rights of Americans were not significantly restricted. It concluded, "we *merely* hold today that … a [police officer] is entitled for the protection of himself and others in the area to conduct a *carefully limited* search of the *outer clothing* of such persons in an attempt to discover weapons which might be used to assault him."[185] Despite the use of terms such as 'carefully limited' and 'outer clothing' in an attempt to convey that their decision would not seriously harm victims of police abuse, the majority relied on these semantics to project a false sense of moderation through vague limitations when in fact their

184. *Terry v. Ohio*, 392 U.S. 1, 13-14, 22 (1968). (Emphasis Added).

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

decision left the definition of such terms to be determined by lower courts. Although Warren wrote that the Court was not going to engage in semantics over the verbiage of Stop and Frisk, the majority did just that when it created an arbitrary distinction between a Frisk of the outer garments and a full-blown search incident to an arrest thereby creating a Constitutional standard for state-sanctioned evidence gathering in the absence of probable cause for an arrest.

The Lone Dissent and the "Hydraulic Pressures" of Law Enforcement

While the Terry case had a substantial majority in support of a carveout of the Fourth Amendment for a Stop and Frisk, the decision was not unanimous because Justice William O. Douglas wrote a strong dissent which explored many of the flaws in the majority's reasoning. In his dissent, Justice Douglas continually pointed to the majority's reasoning in Terry as a departure from the Court's longstanding case law on the Fourth Amendment which allowed police officers to effect warrantless arrests or searches "only when the *facts* within their *personal knowledge* would satisfy the constitutional standard of *probable cause*." However, Douglas went on to argue that with Terry, the Court was holding that "the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action."[186] The heightened power that the Terry decision provided not only stood in stark contrast to the Court's prior decisions, but also to the Court's prior statements about the institution of Law Enforcement. As Douglas noted in a footnote, the Court stated in *Brinegar v. United States* [1949] "these long standing-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from *unfounded charges* of crime."[187] In that same case, the Court reasoned that the standard of probable cause to make an arrest was the best compromise between the often

186. *Terry v. Ohio*, 392 U.S. 1, 37, 36 (1968). (Emphasis Added).

187. *Terry v. Ohio*, 392 U.S. 1, 36 (1968).

competing interests of citizens and Law Enforcement officials. They stated that "requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of officers' whim or caprice."[188] Yet in Terry, the Court not only further endowed Law Enforcement with a constitutional power that the Court in Brinegar argued would leave citizens "vulnerable to the capriciousness of law enforcement," but it also failed to recognize the deleterious impacts that Stop and Frisk would have on law abiding citizens who were often the victims of police profiling.

As previously demonstrated, both the majority opinion in Terry and internal memoranda between the Justices, demonstrate that the members of the Court knew about the proclivities of Law Enforcement to push the boundaries of the law, especially with respect to racial minorities in America. In its opinion, the Court nonetheless opted to cede the rights of the people to be safe from warrantless searches and seizures which Douglas starkly denounced as a "long step down the totalitarian path."[189] While the majority tried to lay out, with painstaking detail, how an officer might reasonably suspect that an individual he approaches may pose him a risk of harm, Douglas plainly and repeatedly denounced this in his own words and by substantiating his arguments with the Court's prior decisions. Douglas argued that "only [probable cause] draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge."[190] Thus, the Justice was arguing that the standard laid out by the majority for an officer to determine that he has probable cause to believe his life is in danger would really only be based on the whims, inklings, or suspicions of officers. Likewise, as the Court had read in the

188. *Brinegar v. United States*, 338 U.S. 160, 176 (1949), Quoted in Terry v. Ohio, 392 U.S. 1, 36 (1968), Douglas dissenting.

189. *Terry v. Ohio*, 392 U.S. 1, 38 (1968).

190. *Terry v. Ohio*, 392 U.S. 1, 38 (1968).

briefs submitted by the NAACP, the Ohio ACLU, and the national ACLU, and throughout oral arguments by the lawyers representing Sibron, Peters, and Terry, Law Enforcement abuses would expand under such a meaningless standard.

Finally, Justice Douglas plainly identified the pressure that the Court was being subjected to during the case to abridge the rights of Americans in favor of the needs of Law Enforcement—pressure that he plainly accuses the majority of succumbing to. The majority continually justified their acquiescence to the demands of Law Enforcement on the volume of criminality occurring throughout the country even though Brennan privately acknowledged that the crime problem was a political fabrication exacerbated by politicians running for election in 1968. However, Douglas addressed the tension between Fourth Amendment protections and the argument regarding the severity of criminality in the nation arguing that giving police greater power than a judge might be a desirable step to handle "modern forms of lawlessness." However, he also accused the majority of usurping the power of a constitutional amendment through their decision, stating that if this step was taken, "it should be the deliberate choice of the people through a constitutional amendment." Until the Fourth Amendment was rewritten, Douglas argued, "the person and the effects of the individual are *beyond the reach* of all government agencies until there are *reasonable grounds* to believe (probable cause) that a criminal venture has been launched or is about to be launched."[191]

Despite Douglas' stinging dissent in Terry, the majority's position—an outcome heavily sought by Law Enforcement—became law and created a binding precedent on lower courts and state courts for future criminal cases involving evidence obtained through a Stop and Frisk. This led Douglas to conclude his dissent by openly stating the pressures that Terry placed on the Court: "There have been powerful hydraulic pressures throughout our history that bear heavily on the

191. *Terry v. Ohio*, 392 U.S. 1, 39 (1968). (Emphasis Added).

Court to *water down* constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today."[192] While Douglas' dissent did not change the law, it provided a key lifeline, in the aftermath of Terry, for defense lawyers to advocate for their clients in the lower courts. Further, the dissent stood as a historical record to demonstrate that the Court's decision should not be merely dismissed as a mere product of the era in which it occurred because Justice Douglas arrived at a decision that clearly reflected the perils that the case could cause.

The cases of Sibron, Peters, and Terry reflected the Court's departure from its previous case law on the Fourth Amendment, which largely protected the rights of citizens in the face of police abuse. In affirming the convictions of Peters and Terry, the Court's majority put into place a Stop and Frisk regime, which they knew had the potential—and indeed the likelihood—of engendering the profiling, stopping, and frisking of Americans for illegal but not lethal items. The petitions, Amicus briefs, oral arguments, and decisions in these three cases took place at the height of the Civil Rights movement—at a time when the Court was fully aware of the treatment that Black and other marginalized Americans faced at the hands of Law Enforcement. Moreover, the majority cannot be acquitted of having in its possession, at the time of its decision, the findings of the Kerner Commission, the Truman Commission, as well as the multiplicity of media reports concerning the often-brutal behavior of beat officers in so-called "urban ghettoes". In full view of the harm facing minorities of color, the majority bowed to what Justice Douglas referred to as "hydraulic pressures" to curb constitutional guarantees in favor of Law Enforcement. While it can be expected that Law Enforcement organizations and the associations that lobbied on their behalf placed pressure on the Court to re-imagine Fourth Amendment protections, the United States

192. *Terry v. Ohio*, 392 U.S. 1, 39 (1968).

Department of Justice was also a key player in the pressure campaign. As discussed in Chapter 2, the brief of the United States to the Court made the true intentions of Stop and Frisk policies abundantly clear when it wrote: "when the type of frisk which we regard as lawful—a patting down for weapons—does reveal the existence of weapons, we see no sound reason why the weapon so discovered may not be introduced in evidence." While this statement clearly demonstrates how a Stop and Frisk could be initiated through racist perceptions of officers, the United States brief went on to argue: "At the moment the peace officer uncovers, pursuant to a frisk, an item which the suspect unlawfully possesses, a crime is bring committed in the officer's presence. It would be irrational to prohibit prosecution of that offense, merely because in the first instance the suspect was detained—lawfully—on less than probable cause…[because] police have the responsibility to detect crime."[193] Clearly, the Court was under significant pressure when even the United States Department of Justice was advocating for such a brazen interpretation of the Fourth Amendment that would—very obviously—deprive many Americans, particularly racialized minorities of the ability to be safe from abusive police conduct.

Indeed, throughout the waves of petitions, the oral arguments, and in drafting these opinions, the vast majority of the Court demonstrated a sympathetic view towards Law Enforcement and an antithetical view towards the undefined concept of the "criminal"—a term which was always laced with implications of Black criminality. However, those Americans who would be victimized by abusive police practices through profiling and repeated unwarranted searches because of their blackness, the ones whom the NAACP sought to protect through its brief, and the ones who would lead a 'reasonable' officer to be afraid of harm to themselves, was

193. "Brief for the United States as Amici Curiae Supporting Respondent, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]," 16-17.

completely ignored from the majority's calculus. In fact, the Court's action of receding civil liberties in favor of Police Power demonstrated the strong and favorable position that Law Enforcement had in the eyes of those who held the levers of American political power and through popular opinion. Indeed, the Court's decision to favor Law Enforcement in this case reflected the interdependent relationship the two institutions had. Further, the decision also reinforced the Court's legitimacy as an institution in the eyes of the American public because of the way in which the public more broadly had a sympathetic view towards Law Enforcement as a social construct within American life. Justice Brennan all but admitted to this when he acknowledged that the crime problem—as conceived of in the eyes of a majority of Americans in 1968—was crafted by politicians of all parties in order to contribute to their re-elections. However, these internal deliberations remained hidden from the general public until the papers of Justice Brennan were archived. In contrast, all the public knew at the time was that the majority slightly weakened the Fourth Amendment protections for the purposes of protecting the lives of police officers who were in danger because they were fighting the crime problem. The lives of innocent Black Americans at risk of harm by the decision were not mentioned by the Court, nor by the lone dissenting justice. In doing this, the Judiciary decided that in a zero-sum game where police are on one side and Black Americans are on the other, the lives of police deserved protection at the expense of Black Americans.

At a time when the American public was becoming sensitized to the harms inflicted on Black Americans through abusive policing practices—especially throughout the south—Law Enforcement officials were handed the perfect opportunity to re-brand post-Jim Crow era policing through a new colorblind Stop and Frisk regime. Whereas the selective enforcement of broad and non-specific laws of the Vagrancy Regime to target Black Americans was becoming less palatable

to the Judiciary and the general public, this new Stop and Frisk regime permitted Law Enforcement to continue its abusive practices—all in the name of keeping police officers safe from Black Criminality. However, just as Justice Brennan surmised, the new probable cause standard for harm (rather than for probable cause for the commission of a crime), led to what Ms. Oberman called "state-mandated evidence gathering". Prior to Terry, a police officer who suspected someone of the crime of buying or selling drugs, for instance, needed probable cause to believe that the crime had or was going to be committed. However, in a post-Terry world, police officers need only stop that same American because his or her actions, as observed by the officer, led to the undefined standard of "reasonable inference" that the officer is in danger. This would then justify a pat-down style search of the outer garments on the indeterminate factor that the individual posed a risk to the officer. If contraband would be found through this process, it would constitute probable cause for an arrest and the evidence would be admissible in a criminal trial against that person. In his dissent, Justice Douglas termed this a "new regime" when he argued "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a *new regime*."[194] However, as the Court's lone dissenter, Justice Douglas' words carried little legal weight. Rather, they merely showed that the majority was acting as a facilitator of Police Power that would—whether knowingly or not—empower Law Enforcement to continue to act as agents that facilitated the displacement of Black bodies from urban centers to prisons all across America in the post-Jim Crow era. While some may argue that the Justices comprising the majority in these 1968 decisions were merely a product of the historical period in which they lived, the dissenting opinion of Justice Douglas, in the same

194. *Terry v. Ohio*, 392 U.S. 1, 39 (1968). (Emphasis Added).

cases, demonstrates that the majority could have also seen the institutional abuse that would emanate from the Terry decision.

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DRIVING WHILE BLACK: THE EXTENSION OF STOP AND FRISK TO VEHICULAR PATROL STOPS

When the Terry v. Ohio decision was handed down by the Supreme Court in the summer of 1968, it quickly became a foundational principle that was applied in an array of state court and lower federal court cases when adjudicating the constitutionality of the evidence obtained in a criminal trial under the Fourth Amendment. The use of that Supreme Court precedent quickly became known as the "Terry Stop", allowing the admission of evidence discovered through a Stop and Frisk where the officer conducted a pat down after reasonably suspecting that their life was in danger by approaching an individual in public for a brief detention for investigative questioning. For the first three decades of its existence, the Terry Stop principle applied to any Stop and Frisk conducted by an officer where an individual's public conduct created "reasonable suspicion" or "probable cause" that a crime had been, was in progress, or was going to be committed.[195] Thus, the Terry Stop provided Law Enforcement with amplified Police Powers to search for and apprehend "criminals" before alleged crimes were committed, which included the racially disproportionate police activities of the "War on Drugs".

While the Terry Stop provided Law Enforcement increased powers when surveilling individuals who were in public spaces and suspected of criminal activity, the rule did not apply to individuals in their homes or their vehicles until a subsequent Supreme Court ruling in 1996. In *Whren v. United States*, the Supreme Court—which had become much more conservative in its decisions, under Chief Justice William H. Rehnquist, than the Warren Court in 1968—extended

195. As of 1996, the Supreme Court's jurisprudence had not resolved the conflict between the concepts of reasonable suspicion and probable cause that had arisen during the arguments of the Stop and Frisk cases of 1968.

the Terry Stop to vehicular traffic stops.[196] This decision greatly amplified the reach of the Terry Stop's state-mandated evidence gathering techniques by allowing Law Enforcement to conduct a Stop and Frisk following a traffic stop rather than after observing an activity that aroused reasonable suspicion or probable cause for the commission of a crime. Further, the decision extended the Stop and Frisk's reach because the process could now begin with reasonable suspicion that a civil infraction—notably a traffic violation—had been committed rather than a criminal infraction. Moreover, the Warren Court's reluctance, in 1968, to acknowledge John Terry's race was replaced with a vehement refusal to consider the race of the petitioners while explicitly acknowledging their race. Thus, this chapter argues that—three decades after Terry—the Court once again demonstrated its allegiance with the institution of Law Enforcement by further expanding Police Power under the Fourth Amendment at the height of the Carceral State. Further, this chapter also contends that the conservative leaning Court rebuffed the impact of the racialization of minorities through Law Enforcement by first acknowledging the race of the victims of the Stop and Frisk and then dismissing the impacts of race through colorblind reasoning. Taken within the broader context of this research, the nature and substance of this case calls into question the notion that the United States was on a curb of linear racial progress from the dismantling of the Vagrancy Law regime to the Civil Rights movement through to the extension of Stop and Frisk regime to vehicular stops for civil infractions.

196. The Warren Court era ended with the retirement of Chief Justice Earl Warren in 1969. The two following eras of the Court, led by Chief Justices Warren Burger (1969-1986) and William Rehnquist (1986-2005) were defined by increasingly conservative outcomes. While the Burger court did not overturn the precedents set by the Warren court, which conservatives staunchly opposed, it did hollow out many of the equal protections on which Warren Court decisions were based. This process was exacerbated with the Rehnquist Court with the rise of Reagan-era conservative discourse of the late 1980s. *Whren v. United States*, 517 U.S. 806 (1996); Graetz and Greenhouse, *The Burger Court and the Rise of the Judicial Right*, 8; Sean Wilentz, *The Age of Reagan: A History, 1974-2008* (New York, NY: Harper, 2008), 5-7.

Whren v. United States (1996): Case Background

The Supreme Court case, *Whren v. United States*, was heard on appeal following a grant of Certiorari after a trial in the Federal District Court for the District of Columbia and an appeal to the United States Circuit Court of Appeals ("USCCA") for the District of Columbia. The case involved two Black men—Michael Whren and James Brown—who were stopped on June 10, 1993, by plainclothes officers of the District of Columbia Metropolitan Police Department ("DCMPD") who were part of a "Vice Unit" responsible for patrolling for illegal drug activity. Whren and Brown were "driving a Nissan Pathfinder with temporary tags through the streets of Southeast Washington, D.C." As was the circumstance for the Stop and Frisk cases in 1968, the Court's majority opinion described the background of the case with a significant degree of bias towards their perspective. The Court's opinion described the area of Washington, D.C. as a "high drug area" and the Pathfinder as a "truck" echoing the racial stereotypes and the criminalization of blackness necessary to support their dismissal of racialization. In the eyes of the Court, the suspicions of the plainclothes police officers from the DCMPD were aroused as they observed the truck "waiting at a stop sign at an intersection for an *unusually long time*; the truck then turned suddenly, without signaling and sped off at an '*unreasonable' speed*."[197] The characterization of the actions of Whren and Brown by the unanimous Court seem eerily similar to the manner with which the actions of defendant Nelson Sibron were characterized when he associated himself with "known addicts". When the pain clothes offices approached the vehicle, they noticed that Whren had plastic bags that appeared to be crack cocaine. Both Whren and Brown were arrested and tried on federal drug charges.[198]

197. *Whren v. United States*, 517 U.S. 806 (1996). (Emphasis Added).

198. It is important to note that this took place in the District of Columbia which is not a state. As such, the defendants were subjected to federal drug charges rather than state drug charges. Further, while other defendants may have possessed additional civil rights protections under state constitutions where the offense would have taken place,

Prior to the trial in the Federal District Court for the District of Columbia, the defendants submitted a *Motion to Suppress* the evidence obtained from the search of vehicle pursuant to the traffic stop arguing that it represented a search and seizure that lacked probable cause and was thus a violation of the Fourth Amendment. The motion was denied by the District Court and that decision was later affirmed by the USCCA for the District of Columbia. As a result of the admission of evidence, Whren and Brown were convicted on the federal drug charges.[199] Thus, the Supreme Court heard the case on appeal from the D.C. appeals court to consider whether the traffic stop conducted by the officers constituted an unreasonable search and seizure under the Fourth Amendment.

Patrolling for Evidence: The Traffic Patrol Stop and Frisk

The DCMPD have argued that the traffic stop was conducted for the alleged traffic violations, which were described by the Court as being parked for an "unusually long time" and then leaving at an "unreasonable speed". However, as the American Civil Liberties Union argued in its Amicus brief, DCMPD policy stated that "officers 'who are not in uniform or are in unmarked vehicles may take traffic enforcement only in the case of a violation that is so grave as to pose an immediate threat to the safety of others'". The ACLU added that neither the District Court nor the Appellate court disputed that "no such threat existed in this case."[200] As the ACLU noted, petitioners Whren and Brown argued that the supposed traffic violations were used as pretext to "allow plain clothes vice officers to stop the car for a drug search without probable cause or

residents of the District of Columbia did not have any protections beyond those in the United States federal constitution.

199. *Whren v. United States*, 517 U.S. 806 (1996).

200. Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, *Whren v. United States*, 517 U.S. 806 (1996) [No. 95-5841].

reasonable suspicion."[201] Indeed, the plain clothes officers belonged to a specialized unit of the DCMPD that was responsible for enforcing drug laws and it is not beyond reason to believe that the alleged traffic violations of being suspiciously parked and then leaving at an unreasonable speed were motivated by suspicions of drug use. However, the Supreme Court unanimously rejected this claim when Antonin Scalia, a staunchly conservative Justice appointed by President Ronald Reagan, wrote on behalf of the Court: "The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective."[202] Indeed, the Court acknowledged the argument that the:

> petitioners claim that, because the police may be *tempted* to use *commonly occurring traffic violations as means of investigating violations of other laws*, the Fourth Amendment test for traffic stops should be whether a reasonable officer would have stopped the car for the purpose of enforcing the traffic at issue. However, this Court's cases foreclose the argument that ulterior motives can invalidate police conduct.[203]

In making such a bold statement, the Court completely refuted the possibility that lower courts could consider the ulterior motives of police officers when making decisions about the reasonableness of traffic stops. Despite the Court's bold statement completely disregarding the existence of pre-textual stops—especially those that are motivated by racial bias—the use of traffic violations to facilitate the process of state-mandated evidence gathering, however, did exist.

In addition to the general existence of pre-textual stops by Law Enforcement, those

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201. Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, *Whren v. United States*, 517 U.S. 806 (1996) [No. 95-5841].

202. *Whren v. United States*, 517 U.S. 806, 806-807 (1996).

203. *Whren v. United States*, 517 U.S. 806, 806-807 (1996).

motivated by race were also prevalent during this time.[204] While the Warren Court in 1968 was reluctant to even acknowledge the race of Terry and Chilton or the mere possibility that subjective racial biases may have—and likely did—play a role in officer behavior, the Rehnquist Court was much bolder in both its acknowledgement and dismissal of race as an operating factor in police conduct. Unlike the Stop and Frisk cases of 1968 which did not acknowledge the race of Terry, Chilton, Peters, or Sibron, Scalia plainly stated that the petitioners were "both black." But this acknowledgement cannot be considered racial progress because the ensuing pages of the Court's opinion plainly reject any acknowledgement of the racial motivations of police officers charged with enforcing drug laws nor the legacy of white supremacy embedded within Law Enforcement. Had the Court truly progressed towards a more equitable treatment of race in its jurisprudence since the 1968 Stop and Frisk cases, it would have crafted a decision that took into account the racialization of criminality that occurred through Law Enforcement's Stop and Frisk initiatives. As the literature referenced earlier in this thesis has demonstrated, the enforcement of drug laws in the post-war era has been disproportionately applied to Black Americans despite an equal portion of drug dealing and using among whites and non-whites. But despite these facts, the Court nonetheless starkly refuted the idea that the subjective intentions of officers be considered when determining whether the traffic stop was reasonable. Indeed, the Court plainly asserted that the "individual officer's subjective good faith" should be "the touchstone of 'reasonableness'"[205] Further, the Court was completely aware of the disproportionate impacts of selective traffic violation enforcement being used as pre-text to stop individuals who were suspected of drug violations because of racialized stereotypes. Both petitioners and the ACLU, who filed an Amicus

204. Alexander, *The New Jim Crow*, 141-142.

205. *Whren v. United States*, 517 U.S. 806, 810 (1996).

Curiae brief to the Court, presented evidence to the Court that demonstrated the often-obvious race-based motivations that informed the actions of police officers who performed traffic stops.[206] Moreover, they also argued that "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible" and "a police officer will almost invariably be able to catch any given motorist in a technical violation." The petitioner argued that "this creates the temptation to use *traffic stops* as a *means of investigation other law violations*, as to which no probable cause or even articulable suspicion exists."[207] This was an argument that Whren and Brown presented to both the District Court and USCCA in D.C., and it was not disputed by either of those courts. While the traffic stop conducted by the officers may have been intended as legitimate, the opinion of the Court completely obfuscates the possibility that the officers may have been motivated by the search for evidence at the same time. The existence of a legitimate traffic stop and a state-mandate evidence gathering expedition are not mutually exclusive, but the Court's willful ignorance of this shut the door on any consideration on subjective motivations by the lower courts.

The unanimous outcome of this case and the way with which it was brought before the Court on appeal further demonstrates the way in which the Judiciary and Law Enforcement were aligned as institutions—and how that allegiance grew more significant with the rise of Reagan-era conservativism and colorblind rhetoric. From a procedural standpoint, the Supreme Court's opinion did not change the outcome of the decision made by the USCCA for D.C. seeing as the Court merely affirmed the lower court's decision. Further, the case did not have any concurring or

206 . Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, *Whren v. United States*, 517 U.S. 806 (1996) [No. 95-5841]; Sound Recording 267.991. "Oral Arguments in Whren v. United States [Case 95-8541]." Apr. 17, 1996. Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments. Record Group 267. National Archives of College Park, College Park, Maryland.

207. *Whren v. United States*, 517 U.S. 806, 810 (1996).

dissenting opinions which signals that there was likely unanimity among the few justices who agreed to hear the case.[208] In some of its cases, the Court has decided to overturn the decision of the lower courts, they have clarified a question of law and remanded the case to the lower courts for reconsideration, or they may have simply remanded the case back to the lower court altogether for reconsideration. But in *Whren v. United States*, they merely affirmed the decision of the appellate court to deny the motion to suppress and as a result, they affirmed the conviction of Whren and Brown which was reached by the District Court. Had the Court not agreed to hear the case, the outcome for Whren and Brown would have been the same, but having heard the case and settled a question of Fourth Amendment Constitutional Law, the Court extended the principle of Whren and Brown's case to thousands of subsequent defendants. Thus, it is more likely that the justices who agreed to have the case heard before the full Court decided to grant certiorari so that the Court could further strengthen Police Power pertaining to the Fourth Amendment's scope during traffic stops. This unanimous decision by the Court reinforced Police Power for the "war on drugs" and, as such, further demonstrated the close relationship that both institutions have with one another.

Nearly thirty years after the consequential Stop and Frisk cases of 1968, which resulted in legalizing state-mandated evidence gathering when a police officers had reasonable suspicion that an individual was involved in a crime, the Supreme Court expanded the Terry Stop to include reasonable suspicion for civil traffic violations. While the Fourth Amendment's text reads in part,

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208. At the time of writing, many archival sources from the Justices were not available for consultation. The papers of Justices Anthony M. Kennedy, Sandra Day O'Connor, Stephen G. Breyer, David H. Souter, and Clarence Thomas are unavailable as they are still living (Thomas is still an active Justice). While late Justices John Paul Stevens and Ruth Bader Ginsburg have donated their papers to the Library of Congress, Antonin G. Scalia to Harvard, and Rehnquist to Stanford, however, these collections are relatively recent donations and most of the material is publicly available, particularly with regards to the papers of Scalia and Rehnquist. Access to the papers of the justices covering their time on the Supreme Court is determined by each justice's estate and governed by the Court itself—as opposed to the National Archives and Records Administration which governs the records of the Congress and Executive branch—pursuant to the *Judiciary Act of 1789*, September 24, 1789, 1 Stat. 73.

"the *right* of the people to be *secure* in their persons, houses, papers, and effects," in fact, the Whren decision ensured that Black Americans did not in fact have the right to be secure in their persons because the Terry Stop precedent now applied to traffic violations.[209] Moreover, the Court's opinion in this case demonstrate a true aggression to the lived experiences of Black Americans and the criminalization by police of Black bodies. Now that the Terry Stop rule could be applied to suspicion of a crime or civil infraction in a vehicle, Law Enforcement possessed even more power than it previously did to profile Black citizens—and other visible minorities—both in public spaces and in their vehicles in order to conduct state-mandate evidence gathering. Whereas the Terry Stop had previously only applied to individuals out and about in public spaces, the Whren decision ensured that the Terry Stop could now expose countless more Americans to abusive and nearly unrestrained police power. Furthermore, the Court further amplified Police Power by stating that the subjective intentions of an officer could never be questioned which further restrained the ability of lower courts to act as a check on unrestrained Police Power in the adjudication of claims that would never make it to the Supreme Court. Indeed, the Whren decision demonstrated that the Court was tightly aligned with Law Enforcement and that claims of racialization by police in criminal due process would not fall on welcoming ears at the Supreme Court of the United States.

209. U.S. Constitution. Amend. XIII, sec. 2.

EPILOGUE

Stop, Frisk, Incarcerate: The Prosecutor's Role in Populating the Carceral State

Although the Court provided Law Enforcement with a considerable increase in Police Powers between 1968 and 1996, which correlated directly to a significant decrease in the civil liberties protecting Americans against unjustified searches and seizures, the prosecutor also played a key role in the transfer of bodies from American streets to the prison system. Thus, Law Enforcement officials caught Black bodies from the streets using an array of practices which included the Stop and Frisk and then handed them over to the prosecutor who was responsible to ensure that a conviction—and by association, incarceration—was achieved. Consequently, both the police officer and the prosecutor formed a pipeline from America's inner cities and urban communities to the prison system, and thus, the Carceral State. While this research predominantly focuses on the overarching role of Police Power through the search and seizure of citizens on the streets and in their vehicles, the power of the prosecutor—at both the state and federal levels—is essential in understanding the mass transfer of Black bodies.

While the American prosecutor could wield significant power in all criminal proceedings, this epilogue is limited to the powers that prosecutors had with respect to non-violent offenses that came from the state-mandated evidence gathering which occurred during the Stop and Frisk. These powers generally fell into two categories: the prosecutorial power linked to charging crimes; and the plea-bargaining system. First, the Charging Power of the prosecutor was entirely discretionary and was subjected to the whims of individual prosecutors and the oversight of their immediate superiors. Further, the decision to charge a crime was only subjected to the legal standard of Probable Cause, as opposed to the standard of beyond a reasonable doubt for conviction. Second, the Plea Bargaining system allowed a defendant to waive their right to a trial by jury by pleading guilty to a certain offense in exchange for the dismissal of other charges or the recommendation,

by the prosecutor, for a more lenient prison sentence. This epilogue suggests that once Law Enforcement found incriminating evidence through the Stop and Frisk, prosecutors then wielded their charging and plea-bargaining powers to ensure that the bodies captured by Law Enforcement were transferred to the prison system—thereby ensuring the completion of the street to prison pipeline. Consequently, Law Enforcement and the American Prosecutor acted as agents of the Carceral State that facilitated the transfer of disproportionately Black bodies from the streets to the prison system.

The Charging Power and the Grand Jury

Although the power of the prosecutor to charge a crime fluctuates depending on the jurisdiction (i.e., county, state, or federal level), the general discretionary nature of the charging power allows the prosecutor to place a label of criminality on would be defendants—many of whom have already been injured through the state-mandated procedure of Stop and Frisk. The charging power itself was exercised differently depending on the jurisdiction where the alleged crime took place depending on the federal, state, or local laws which governed the prosecutors charging power. For instance, for crimes that fell under federal jurisdiction—as well as some state jurisdictions—the prosecutor had to convene a grand jury where the evidence would be presented by prosecutors so that the grand jury could determine whether or not to bring charges by a general vote of the grand jurors. In the Federal jurisdiction, the Fifth Amendment requires that the grand jury process be used for all felonies charged by the Department of Justice since the Supreme Court's ruling in *Hurtado v. California* in 1884; twenty-three states and the District of Columbia use the grand jury process some but not all criminal cases.[210] Although it would seem that the

210. The grand jury process for felony indictment is mandatory at the federal level and guaranteed by the Fifth Amendment. However, the grand jury requirement of the Fifth Amendment is not incorporated to the states, *supra note 71*.

grand jury process allowed victims of abusive police practices to be treated fairly by a panel of their peers, in reality, the process was far from fair and opened potential defendants to all manner of implicit racial bias.

In a similar manner to the Stop and Frisk with Law Enforcement, the general parameters of the grand jury process have been defined through a series of rulings by the Supreme Court which have favored the prosecutor's power to charge and have left victims of the carceral system, particularly minorities, with few constitutional protections. As indicated earlier, the legal standard used to charge a crime is that of probable cause, meaning that the grand jurors must find that it is more probable than not probable that a crime was committed. The grand jury process was considered secret, and as such, the defendant and/or their lawyer were not permitted to be present while the evidence was presented by the prosecutor. Thus, unlike the process that would play out in a court proceeding, the evidence presented to a grand jury by prosecutors was not subject to a cross-examination which could reveal flaws in the presentation of the prosecutor. Moreover, these advantages for the prosecutor were merely the tip of the iceberg as the prosecutor could also selectively present evidence to the grand jury to ensure that an indictment was returned even where it is unlikely that there was enough evidence to obtain a conviction on a standard of proof beyond a reasonable doubt during trial. For instance, in grand juries at the federal level and in most state jurisdictions which use the process, the prosecution is not required to present exculpatory evidence in its possession to a grand jury—an existing rule that was reinforced by the Supreme Court in

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The states of Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia require the approval of a grand jury indictment for a felony to be charged. However, these rules apply differently to felonies across different states where some states allow for a prosecutor to charge minor felonies along with misdemeanors. *Hurtado v. California*, 110 U.S. 516, 534-535 (1884); *See Generally*, Susan Brenner and Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice*, 2 vols, (Eagen, MN: Thomson West, 2022).

1992 when it determined that prosecutors were not constitutionally required to disclose exculpatory evidence to grand juries.[211] In addition to the withholding of exculpatory evidence, a prosecutor was also permitted to present hearsay evidence obtained outside of grand jury interviews to the grand jury for the purposes of securing an indictment even though hearsay evidence was generally not allowed at trial unless the trial court permitted it on an exceptional basis. Further, the Supreme Court also ruled in *Costello v. United States* in 1956 that hearsay testimony given in front of the grand jury was admissible evidence for the purposes of obtaining an indictment even though it could not be used as evidence in the trial.[212] Whether by the intentional omission of evidence or through the flaws in the presentation of the evidence to the grand jury, the prosecutor was able to wield their charging power to ensure that those who were victims of police abuse faced nearly insurmountable barriers in the judicial process. Further, it created a sense of desperation in the defendant that crafted a fertile environment in which the prosecutor could convince defendants to accept abusive plea bargains.

In the states that did not require the prosecutor to go through the grand jury process in order to make a charging decision, local prosecutors had complete discretion over their decisions to charge individuals who were apprehended by police. In such cases, the prosecutors merely had to show the trial courts—which often demonstrated deference to prosecutors—that there was probable cause that an alleged crime was committed. The Supreme Court has reinforced the prosecutor's discretionary charging power in its case law and it has also placed significant barriers on the ability of defendants to mount legal challenges to prosecutorial discretion that seemingly violated their constitutional rights. The unrestricted discretionary charging power of the

211. *United States v. Williams*, 504 U.S. 36, 36-37 (1992); Davis, *Arbitrary Justice*, 28.

212. *Costello v. United States*, 350 U.S. 359, 362-365 (1956); Davis, *Arbitrary Justice*, 28-30.

prosecutor, understood within the broader context of the rising Carceral State, was easily translated into racially disproportionate prosecutions where charging decisions were made under the influence of implicit racial bias, if not explicit racial animus. As much was clear in *United States v. Armstrong*, a case that was adjudicated by the Supreme Court where the defendant provided evidence that there were the same number of white drug dealers and users as there were from minority communities despite minority dealers and users being more likely to be prosecuted. Notwithstanding the evidence presented to the Court in Armstrong, the Court ruled that although prosecutorial discretion was subjected to "constitutional restraints", a defendant had to provide "clear evidence" that the prosecutor violated the constitutional rights of the defendant—a standard of evidence that was likely insurmountable for most, if not all, defendants.[213] As such, the Judiciary demonstrated that it was aligned with both Law Enforcement and government prosecutors in the process of apprehending Black bodies and ensuring their transfer into the prison system.

Whether a prospective defendant is charged by a prosecutor directly or through a grand jury indictment, overcharging is often also used as a tool to overburden defendant, create the perception of guilt, and even to coerce a defendant into a plea deal (the latter will be addressed specifically later in the epilogue). As indicated above, the legal standard for making a charging decision and the legal standard for obtaining a conviction are very different. The former is probable cause which requires the evidence to show that it is more probable than not that the crime was committed. The latter standard is guilt beyond a reasonable doubt which, in the case of jury trial, needs to be reached by twelve jurors unanimously—an outcome that was difficult to obtain. Further, in the case of indictments reached by virtue of a grand jury, hearsay evidence is allowed in the grand jury whereas exculpatory evidence can lawfully be withheld which in turn can lead to

213. *United States v. Armstrong*, 517 U.S. 456, 458-461 (1996); Davis, *Arbitrary Justice*, 39.

easily obtained charging decisions. As Angela Davis, a legal scholar and former public defender, argues that prosecutors often overcharge defendants for two reasons: first, overcharging provided the prosecutor with greater bargaining power for a plea deal negotiation and, second, because overcharging provided prosecutors with a "psychological advantage" whereby a jury is presented with a long list of charges that most often lead to a conviction on at least one charge.[214] In this manner, when the charging power of the prosecutor is considered in tandem with the increased Police Power afforded to Law Enforcement through the Terry Stop decision, and later extended to civil traffic stops through *Whren*, the prosecutor and their charging power meant that the prosecutor acted as a partner to Law Enforcement in the pipeline of Black bodies from the streets to the prison system.

The Plea Bargain

While many Americans may believe that those who are swept up by the justice system—in practices such as Stop and Frisk—will undoubtedly "have their day in court", it is more likely than not that these perspectives are framed by television shows and movies rather than reality. From a statistical perspective, most criminal cases were resolved through *Plea Bargaining*, which was one of the most pervasive practices in the criminal justice system, without it, the criminal justice system would not be able to function properly. At the same time, if the system of plea bargaining were abolished, it was also likely that many defendants—especially those who were innocent—would not be so easily convicted. As Plea Bargaining occurs outside of the courtroom, it is not subject to any judicial restraints which is why it was paired so easily with the prosecutor's ability to overcharge a defendant with crimes that it cannot necessarily prove beyond a reasonable doubt. The plea bargain usually takes place directly between a prosecutor and a defendant, and in

214. *See Generally*, Davis, *Arbitrary Justice*; Alexander, *The New Jim Crow*.

many cases, the defendant agreed to a plea deal without proper legal representation.[215] Generally, a defendant would agree to cede their constitutional right to a jury trial and plead guilty to one or more charges in exchange for a promise, by the prosecutor, to either dismiss some charges, ask the sentencing court or judge for a more lenient sentence, or both of these options. The idea of a jury trial and a long list of charges often scares defendants into accepting a plea bargain for lesser charges, even in cases where defendants had not actually committed the crime they were accused of. In such cases, the prosecutor's ability to overcharge a defendant aided the prosecutor in securing a guilty verdict—without ever going to trial—on the very charge the prosecutor was able to prove in the first place.

The abusive potential of Plea deals was made worse beginning in the early 1980s with the passing of mandatory minimum sentences attached to certain crimes, which was later compounded with the advent of three strike policies.[216] While prosecutors were able to abuse the plea-bargaining system prior to the installation of mandatory minimum sentences, the impact of such abuse was exacerbated with mandatory minimums because prosecutors could, and often did, offer them only to crimes that carried minimum prison sentences. As Angela Davis argues, mandatory minimums removed judicial discretion from judges who could have weighed the circumstances of a defendant's individual case before making a sentencing decision.[217] However, with the combination of plea deals and mandatory minimum sentences, the prosecutor could use their

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216. Three-Strike Laws were very closely associated with mandatory minimum sentences as they targeted repeat offenders. Under these laws, individuals who were arrested and took a plea deal would be considered as having two strikes. An additional conviction for any crime, including petty theft, would mean the defendant hit the three-strikes and as a result would receive an exceptionally punitive mandatory sentence for all the crimes under the three strikes policy. As Alexander notes, sentences for three strike laws run consecutively (and not concurrently) which often translated into a life sentence for non-violent offenders stealing to provide for their basic needs. Alexander, *The New Jim Crow*, 87-88, 91.

217. Davis, *Arbitrary Justice*, 56-58.

discretion to manipulate the process and ensure that a victim of Stop and Frisk pleads guilty to a charge that carries a minimum sentence—all without ever seeing a trial.

When considered within the broader context of the Carceral State, the prosecutors nearly unfettered discretion, their charging power, the arbitrary nature of grand juries, the plea-bargaining system, and mandatory minimum sentences all ensured that victims of the Stop and Frisk were successfully transferred to the prison system after their initial arrest by police. Further, as discussed in the charging power section, previous cases have cited evidence of a disparity in charging white and non-white defendants despite an equal proportion of drug use and dealing. This demonstrates that, at a minimum, an implicit racial bias—if not direct explicit racist sentiments—animated the decisions of prosecutors in their treatment of criminal defendants. In this way, the process that began with expanding Police Power through the re-invention of Fourth Amendment jurisprudence, leading to an increase in the pre-textual profiling of Black Americans subsequently correlated into more convictions through the unrestrained power of the prosecutor's charging and plea deal powers. Thus, Law Enforcement and the Prosecutor were agents that formed a unit to bring Black bodies—amongst other minorities and poorer whites—from the streets to the prison system, and in doing so, dammed the victims of extensive Police Power to all the lifelong and systemic consequences of the Carceral State.

Post-Jim Crow Police Power

The Supreme Court's decision in the Stop and Frisk cases, particularly with the creation of the "Terry Stop", fundamentally shifted the history of Fourth Amendment Constitutional Law, and with it, the legacy of the Civil Rights Movement. With the slow but steady demise of the Vagrancy Regime and the criminalization of poverty, the Court was presented with an opportunity to reinforce the strides which had been achieved through the Congress and the Executive branches of government throughout the 1950s and 1960s. Instead, the Court's adjudication of the cases—including the internal deliberations that were analyzed in Chapter 3—provide a clear example of Manjapra's *Ghostlining*, whereby the collective history and lived experiences of Black Americans were disregarded in the service of the institution of Law Enforcement. In doing so, the Court demonstrated that it, as an institution, was closely aligned with that of Law Enforcement, and that the law as interpreted by the Court is a malleable tool that can be molded to fit the needs of groups in American society that have influence over the Judiciary—in this case, Law Enforcement. Indeed, the Ghostlining that was occurring in the Supreme Court was reflective of Malcolm X's 1964 statement likening progress to pulling the knife out of the back of Black Americans where they were still trying to get white Americans to admit that the knife is there.

The cases analyzed in this thesis, Sibron v. New York, Peters v. New York, Terry v. Ohio, and Whren v. United States, all demonstrate the pervasiveness of institutional racism that was prevalent in Law Enforcement. Further, all three Presidential Commission's which were analyzed in Chapter 1 reveal, to differing degrees, the pervasiveness of police abuse in Black communities throughout the United States. In particular, the Kerner Commission's findings demonstrated the degree to which the behavior of police officer in urban communities was a catalyst to the tensions that existed between the community and police officers. The conduct of Officer McFadden in the Terry case specifically demonstrates the manner with which institutional racism pervaded through

Law Enforcement into the Judiciary. Chapter 2 presented ample evidence that demonstrated the racial bias animating Officer McFadden's suspicions of Terry and Chilton from their physical appearance to their general conduct on the street. The interview of Officer McFadden conducted by the trial court during the Motion to Suppress hearing fully demonstrated the extent with which police officers often abused their authority. In the Terry case, McFadden surveilled both Terry and Chilton, alleging, that "they didn't look right", and then searched Terry and Chilton for weapons on the basis that he suspected them of intending to commit a crime that he had never arrested any other individual over his 39-year career. Additionally, McFadden also claimed to arrest Chilton for 'association' which was not a crime under Ohio State Law. Instead of recognizing the clear overreach by McFadden in this case, the trial court opted to side with Law Enforcement by creating a novel constitutional interpretation of the Fourth Amendment which further demonstrates both the institutional racism that existed in both institutions, and the systemic nature of racism between institutions at this time in American history.

The Terry decision was not the only case which demonstrated the pervasiveness of police officers abusing their powers while patrolling for crime. For instance, the manner with which Officer Martin, in the Sibron case, took up the concept of associating with 'known addicts' to justify the eight-hour surveillance of Nelson Sibron demonstrates how Law Enforcement was empowered to create narratives of criminality. This also reflects that police officers often saw private citizens in broad categories rather than as individuals with their own lived experiences. Throughout the Sibron case, neither Officer Martin nor the State of New York—as indicated in Chapter 2—ever justified to the trial court what was meant by the term 'known addicts' or how Martin knew they were (and continued to be) addicts. Yet, the Supreme Court nonetheless reiterated this as fact in when it handed down its majority opinion in the Sibron case. This point

was further exacerbated in the Peters case where Officer Lasky, who was both off-duty and outside of NYPD jurisdiction, chased two individuals down the hallway of his apartment building after briefly observing them through the peephole of his apartment door. When Officer Lasky stopped Peters at gunpoint and performed a frisk, the fruits of that frisk were admitted into evidence even though there the burglar tools arguably did not risk harm to the Officer who had his gun pointed at Peters. Despite these facts which were plainly brought before the Court, the majority nonetheless opted to reinterpret the meaning of the Fourth Amendment to allow police conduct similar to these three cases to occur throughout the nation. In doing so, the Court made itself and its jurisprudence an integral part of the rising Carceral State as its redefined Police Power and cloaked the racially motivated Stop and Frisk with Constitutional legitimacy from 1968 to the present-day, thereby aiding Law Enforcement to gather predominantly Black bodies for incarceration.

As the Truman administration's Commission had cited in its 1947 report on Civil Rights, the Supreme Court said in 1940 that the ability of governments to punish arbitrary crime, throughout history, is the "handmaid of tyranny", yet that is exactly what the Court empowered Law Enforcement to do through the Terry Stop. In doing so, the Court demonstrated its allegiance to Law Enforcement and its advocates, such as the AELE, plus its reluctance to restrain the abusive practices of police officers throughout the nation. By creating the Terry Stop—which allowed the Stop and Frisk when a police officer reasonably believed they were at risk of harm—the Court placed the burden of obtaining a remedy on the targets of police abuse. Those individuals who were disproportionately Black and poor were burdened by the Court's decision to obtain competent legal representation that would be able to successfully challenge the confiscation of evidence through the motion to suppress. As police abuse was often targeted at minority communities and Black Americans who lived in the poorest neighborhoods, the financial burden of obtaining

competent counsel was exacerbated. It was for comparable circumstances that the President's Committee on Civil Rights had found in 1947 that Black Americans were much less likely to view the courts as a haven of refuge.

The Stop and Frisk cases not only demonstrated the Court's proclivity to side with Law Enforcement, it also revealed the degree of institutional racism that existed within the United States Department of Justice. The Brief filed as Amicus Curiae in favor of the State of Ohio in the Terry case by the DOJ repeatedly ignored the findings of the President's Committee on Civil Rights and the Kerner Commission in its arguments about police conduct in Black communities. Instead, the DOJ carefully chose language that cast Law Enforcement in a uniquely positive light using terms such as the "Peace Officer" and the "Watchman" to highlight the protective role of Law Enforcement. Taken within the broader context of the Civil Rights Movement and the rebellions which occurred in Detroit and Chicago in 1967, the arguments of the DOJ clearly elicited sentiments of protection from Black criminality. Further, the DOJ's brief in the Terry cases also advocated for colonial era arbitrary detention laws and practices as a justification for the racially motivated arbitrary application of the Stop and Frisk practice throughout the nation. While the Department should have been focused on the fair administration of justice—including preventing what the President's Committee called unfettered police lawlessness—it instead favored the most invasive view of Stop and Frisk that was tantamount to state-sanctioned evidence gathering initiated through racial profiling. Thus, rather than submitting a brief in defense of the civil rights of a marginalized group of Americans who had consistently been the target of police lawlessness throughout history, the Department of Justice adopted a view of Black criminality and supported an invasive interpretation of the Fruit of the Frisk doctrine in support of Law Enforcement.

The Court's decision in the Stop and Frisk cases made it complicit in the creation of the Carceral State because the change in Police Power delivered to Law Enforcement the ability to search for evidence under reasonable suspicion rather than probable cause. The Court's opinion which delivered this increased power to Law Enforcement laid out the case as a dichotomy between allowing the Stop and Frisk on the one hand and condoning the killing of police officers on the other. As the NAACP argued in its brief to the Court, this false dichotomy ignored the harm that was inflicted on countless Americans who were not involved in any crimes. Further, the dichotomy presented by the Court also acted as a pretense to allow Law Enforcement to confiscate illicit materials in the process of obtaining probable cause for a crime under the guise that this was necessary to protect the lives of police officers. However, as Sibron's counsel clearly pointed out to the Court during oral arguments, police officers should have the ability to perform a frisk for their safety when there is a reasonable belief that they are in danger, however, the fruits of such a frisk should not be admissible as evidence nor should they provide probable cause for a full search incident to arrest. Nevertheless, the Court ignored this argument—which would have likely restrained the abuse that would come from the Stop and Frisk, instead chosing to fully endorse the justification that the only way to curb the risk to the lives of police officers in their interactions with individuals on the street was to significantly weaken the protections afforded to every American under the Fourth Amendment.

The findings of this research project demonstrate that the members of the Court faced a tremendous degree of pressure by Law Enforcement groups advocating for an expansion of Police Power through the Stop and Frisk cases. Such pressure was clearly demonstrated throughout the archival materials analyzed in the cases and Justice Douglas also explicitly pointed to what he called "hydraulic pressures" by Law Enforcement on the Court in the adjudication of the cases.

Throughout the adjudication of these cases, the internal memoranda and drafts of the majority opinion reveal a lack of resolve in the face of such staunch pressure by Law Enforcement. Although the Court—as the third Branch of the United States government—was supposed to act as a check and balance against abuse, it did no such thing in this case which was evidenced when Justice Brennan wrote in a memo that "critics of police abuses ought to be told that they should turn to other agencies of government for the cure."[218] In writing this, Brennan clearly demonstrated that when the civil rights of Americans—particularly Black Americans—were measured against the lives of Law Enforcement officials, the Court was not willing to issue a remedy for the injustices experienced by the Black community.

This inaction on the part of the Court stands in stark contrast from the findings of the President's Committee on Civil Rights which relied on the Judiciary to be the restraining force against police lawlessness. Thus, through both the pressure placed on it by Law Enforcement and the unwillingness of some justices in the majority to stand up for racialized communities, the Court transitioned Law Enforcement's Police Power to a Stop and Frisk regime that facilitated the creation of the Carceral State. While public policy proposals for a massive overhaul of the Carceral State and the policing practices that undergird it are beyond the scope of this thesis, it does seem that there are two possible solutions to injustice perpetrated against Black Americans through the carceral system. The first involves a massive rethinking of the Supreme Court's power to review laws and set unbinding precedent in Constitutional Law that can arguably only be undone through unlikely constitutional amendments. The second involves the bold and novel use of legislative powers by the United States Congress in curtailing abusive police practices and protecting the

218. Memo to the Chief Justice from Brennan, January 30, 1968, Box I:168, Folder 8, The Papers of William Brennan, Manuscript Division, Library of Congress, Washington, D.C.

rights of minorities, including Black Americans. The latter also seems unlikely given the current legislative disfunction of the United States Congress, especially in the Senate where the 60-vote filibuster often curtails or dilutes meaningful progressive legislative initiatives.[219]

The Judiciary's close ties with Law Enforcement were clearly displayed in the Stop and Frisk cases and the constitutional law that was created through the Terry Stop that would empower police officers to apprehend individuals throughout the post-Civil Rights era. This inter-dependent relationship was strengthened in the aftermath of the Stop and Frisk cases, and it was on full display when a unanimous Court decided the Whren case in 1996. For the 28 years of its existence, the Terry Stop had legitimized the profiling of Black citizens in public for the purposes of conducting a Stop and Frisk for individuals who were deemed under suspicion of being involved in criminal activity. In Whren, however, the Court further expanded Law Enforcement's ability to profile Black citizens by broadening the scope of the Stop and Frisk to civil infractions which included any traffic violations that officers on patrol notice on the street. In that case, two Black men were stopped by police because officers were suspicious of their driving conduct and noticed a potential traffic violation. However, when the officers found contraband on the individuals in the vehicle, it became the justification for a full search incident to an arrest and a conviction on drug charges; thus, the fruit of the frisk doctrine was extended to encompass the traffic stop as well. In essence, even though the Court never explicitly endorsed the doctrine of the Fruit of the Frisk, the jurisprudence on the constitutionality of the Stop and Frisk fully approved of that doctrine allowing the racially motivated surveillance of Black Americans which in turn empowered police to institute a Stop and Frisk regime. The inescapable legacy of the Stop and Frisk cases, the Terry Stop, and

219. Emmet J. Bondurant, "The Senate Filibuster: The Politics of Obstruction," *Harvard Journal on Legislation* 48, no. 2 (2011): 467-468.

the Whren decision is that the fruit of the Court's jurisprudence came to be in a mutually dependent relationship with Law Enforcement. Consequently, this legacy legitimized what the 1947 Truman Commission's deemed *unfettered police lawlessness* through the apprehension of Black bodies, and the construction of the contemporary Carceral State.

BIBLIOGRAPHY

Primary Sources

Agnello v. United States, 269 U.S. 20, 30 (1925).

Baldwin, James. *No Name in the Street.* New York, NY: Dial Press, 1972.

Berger v. New York, 388 U.S. 41 (1967).

Brinegar v. United States, 338 US 160 (1949).

Brinegar v. United States, 338 U.S. 160, 176 (1949). Quoted in Terry v. Ohio, 392 U.S. 1, 36 (1968). Douglas dissenting.

Carroll v. United States, 267 U.S. 132, 158 (1925).

Chambers v. Florida, 309 U.S. 227, 241 (1940).

Chambers v. Florida, 309 U.S. 227, 241 (1940). Quoted in United States and Erwin, To Secure These Rights.

Costello v. United States, 350 U.S. 350 (1956).

Gideon v. Wainwright, 372 U.S. 335 (1963).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Katz v. United States, 389 U.S. 347 (1967).

Miranda v. Arizona, 384 U.S. 436 (1966).

New York Code Crim. Proc. §180-a.

People v. Peters, 18 N.Y. 2d at 246, 605 and 254 N.Y. Supp. 2d.

People v. Sibron, 18 N.Y.2d 603, 605 (N.Y. 1966), 272 N.Y.2d 374, 219 N.E.2d 196.

Peters v. New York, 392 U.S. 40 (1968).

President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society (1967), United States Department of Justice: Office of Justice Programs.

Sibron v. New York, 392 U.S. 40 (1968).

Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965).

Terry v. Ohio, 392 U.S. 1, 27 (1968).

The Malcolm X & Dr. Betty Shabazz Memorial & Education Center, "If you Stick a Knife in Me," *YouTube*, March 1964, https://www.facebook.com/watch/?v=10159147606541532.

Weeks v. United States, 232 U.S. 383, 392 (1914).

Whren v. United States, 517 U.S. 806 (1996).

United States and Charles Erwin. *To Secure These Rights: The Report of the President's committee on Civil Rights*. New York, NY: Simon and Schuster. 1947.

United States and Charles Erwin. *To Secure These Rights: The Report of the President's committee on Civil Rights*. New York, NY: Simon and Schuster, 1947. Quoted in "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants. Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

United States Constitution Amendment IV, Sec 2.

United States Constitution Amendment XIII, Sec. 2.

United States v. Armstrong, 517 U.S. 456 (1996).

United States v. Williams. 504 U.S. 36 (1992).

Archival Sources

Brief for American Civil Liberties Union as Amici Curiae Supporting Appelants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief for American Civil Liberties Union of Ohio as Amici Curiae Supporting Appelants, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief for Americans for Effective Law Enforcement as Amici Curiae Supporting Respondant, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners. *Whren v. United States*. 517 U.S. 806 (1996) [No. 95-5841].

Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appelants, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief for the Petitioner, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief for the Respondant, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief for the United States as Amici Curiae Supporting Respondant, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Brief in Opposition to the Petition of Certiorari, Terry V. Ohio, 392 U.S. 1 (1968) [No. 67].

Cox, James T. "Bullets Write Finish to Chilton Case." *Cleveland Plain Dealer*. June 18, 1967. Cleveland State University Engaged Scholarship Archive. https://engagedscholarship.csuohio.edu/terryvohio_newspa per/16.

"Defendant May Waive Jury Trial". (N.D.) No. 79491. Court of Common Pleas. Criminal Branch. *State of Ohio v. John W. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.

Johnson, Lyndon B. Executive Order 11365—Establishing a National Advisory Commission on Civil Disorders. The University of California Santa Barbara Archives. The American Presidency Project. https://www.presidency.ucsb.edu/node/306428.

John Woodall Terry Jr. Criminal Record No. 79491, December 23, 1963, Criminal Record Bureau, Criminal Court Building, U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.

Jurisdictional Statement: Nelson Sibron v. The People of the State of New York, on Appeal from the Court of Appeals of the State of New York [Case 63]. Oct. 6, 1966. U.S. Supreme Court Appellate Case Files, Record Group 267; Box 7729, Folder 2, National Archives and Records Administration at Washington, D.C.

"Letter to American Civil Liberties Union: Permission to File a Brief of Amicus, N.D." U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7734. Folder 1. National Archives and Records Administration at Washington, D.C.

"Letter to the American Civil Liberties Union of Ohio: Permission to File a Brief of Amicus, N.D." U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7734. Folder 1. National Archives and Records Administration at Washington, D.C.

"Letter to Americans for Effective Law Enforcement Inc.: Permission to File a Brief of Amicus, July 28, 1967." U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7734. Folder 1. National Archives and Records Administration at Washington, D.C.

"Letter to National Association for the Advancement of Colored People: Permission to File a Brief of Amicus, N.D." U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7734. Folder 1. National Archives and Records Administration at Washington, D.C.

Memo to Brennan (N.D.). Box I:168. Folder 8. The Papers of William Brennan. Manuscript Division, Library of Congress, Washington, D.C.

Memo to the Chief Justice from Brennan. January 30, 1968. Box I:168. Folder 8. The Papers of William Brennan. Manuscript Division, Library of Congress, Washington, D.C.

Memorandum to the Chief from Charles H. Wilson Jr. Regarding the Stop and Frisk Cases. January 29, 1968. Box 624. Folder 4. The Papers of Earl Warren. Manuscript Division, Library of Congress, Washington, D.C.

Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box 624, Folder 3. The Papers of Earl Warren. Manuscript Division, Library of Congress, Washington, D.C.

Memorandum to the Chief from Justice Brennan Regarding the Stop and Frisk Cases, March 14, 1968, Box I:168, Folder 8. The Papers of William Brennan. Manuscript Division, Library of Congress, Washington, D.C.

Memorandum to the Chief from Justice Fortas (N.D.), Box 624, Folder 3. The Papers of Earl Warren. Manuscript Division, Library of Congress, Washington, D.C.

"Motion for Leave to Participate in Oral Argument, Sibron V. New York, 392 U.S. 40 (1968) [No. 63], Peters V. New York, 392 U.S. 40 (1968) [No. 74], Terry V. Ohio, 392 U.S. 1 (1968) [No. 67]." U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

Motion to Suppress. September 22, 1964. No. 79491. *State of Ohio v. John W. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.

National Advisory Commission on Civil Disorders, *Kerner Commission Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967*, United States Department of Justice: Office of Justice Programs

National Advisory Commission on Civil Disorders, *Kerner Commission Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967*, United States Department of Justice: Office of Justice Programs. Quoted in "Brief for National Association for the Advancement of Colored People Legal Defense Fund as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

Notice of Appeal. October 20, 1964. No. 79491. *State of Ohio v. John W. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files, Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.

"Opinion of the Court: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

"Order Allowing Certiorari: John W. Terry at al., v. Ohio, No. 1161, October Term, 1966," U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

People v. Peters, 18 N.Y. 2d at 246, 605 and 254 N.Y. Supp. 2d at 13. Quoted in "Brief for American Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio,

392 U.S. 1 (1968) [No. 67].” U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

“RE: SIBRON v. NEW YORK, No. 63; TERRY, ET AL. v. OHIO, No. 67; PETERS v. NEW YORK, No. 74; Oct. Term 1967,” (November 13, 1967), U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7734, Folder 1, National Archives and Records Administration at Washington, D.C.

“Rules of the Supreme Court of the United States”. Adopted June 12, 1967. Effective October 2, 1967. Library of the Supreme Court of the United States. Washington, D.C.

Sound Recording 267.663. “Oral Arguments in Sibron v. New York [Case 63].” Dec. 11, 1967. Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments. Record Group 267. National Archives of College Park, College Park, Maryland.

Sound Recording 267.664. “Oral Arguments in Terry v. Ohio [Case 67].” Dec. 12, 1967. Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments. Record Group 267. National Archives of College Park, College Park, Maryland.

Sound Recording 267.664. “Oral Arguments in Peters v. New York [Case 74].” Dec. 12, 1967. Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments. Record Group 267. National Archives of College Park, College Park, MD.

Sound Recording 267.991. “Oral Arguments in Whren v. United States [Case 95-8541].” Apr. 17, 1996. Records of the Supreme Court of the United States, Black Series – Sound Recordings of Oral Arguments. Record Group 267. National Archives of College Park, College Park, Maryland.

Sibron v. New York; Peters V. New York (1968), Terry v. Ohio (1968) Warren Majority Opinion Draft, February 9, 1961, Box 401, Folder 11. The Papers of Hugo Black. Manuscript Division, Library of Congress, Washington, D.C.

State v. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). U.S. Supreme Court Appellate Case Files, Record Group 267, Box 7733, Folder 2, National Archives and Records Administration at Washington, D.C.

“Stipulation of Fact and Evidence: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180, March 12, 1965.” U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C.

“Stipulation of Fact and Evidence: The State of Ohio v. John W. Terry, in the Court of Appeals, Eight Judicial District of Ohio, Cuyahoga County, No. 27180, March 12, 1965.” U.S. Supreme Court Appellate Case Files. Record Group 267. Box 7733. Folder 2. National Archives and Records Administration at Washington, D.C. Quoted in “Brief for American

Civil Liberties Union as Amici Curiae Supporting Appellants, Terry v. Ohio, 392 U.S. 1 (1968) [No. 67]."

Terry V. Ohio (1968), Black Concurrence Draft, February 14, 1968, Box 401, Folder 11. The Papers of Hugo Black. Manuscript Division, Library of Congress, Washington, D.C.

Terry V. Ohio (1968), Justice Black Concurrence Draft, February 19, 1968, Box 624, Folder 4. The Papers of Earl Warren. Manuscript Division, Library of Congress, Washington, D.C.

Terry V. Ohio (1968), Majority Opinion Draft, February 9, 1968, Box 119, Folder 9. The Papers of Byron White. Manuscript Division, Library of Congress, Washington, D.C.

Terry V. Ohio (1968), Majority Opinion Draft, May 31, 1968, Box 119, Folder 9. The Papers of Byron White. Manuscript Division, Library of Congress, Washington, D.C.

Terry V. Ohio (1968), Warren Majority Opinion Draft, February 9, 1968, Box 401, Folder 11. The Papers of Hugo Black. Manuscript Division, Library of Congress, Washington, D.C.

Terry V. Ohio (1968), Warren Majority Opinion Draft, May 31, 1968, Box 43, Folder 11. The Papers of Thurgood Marshall. Manuscript Division, Library of Congress, Washington, D.C.

Truman, Harry S. *Executive Order 9808*. Truman Presidential Library. https://www.trumanlibra ry.gov/library/executive-orders/9808/executive-order-9808.

Secondary Sources

Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness.* New York: New Press, 2010.

Bondurant, Emmet J. "The Senate Filibuster: The Politics of Obstruction." *Harvard Journal on Legislation* 48, no. 2 (2011): 467–513.

Bonilla-Silva, Eduardo. *Racism without Racists: Colorblind Racism and the Persistence of Racial Inequality in America*. Lanham, MD: Rowman & Littlefield, 2014.

Browne-Marshall, Gloria J. *Race, Law, and American Society*: *1607 to Present*. New York, NY: Routledge, 2013.

Cane, Peter. *Responsibility in Law and Morality*. Oxford, UK: Hart Publishing, 2002.

Carbado, Devon W. "From Stop and Frisk to Shoot and Kill: Terry V. Ohio's Pathway to Police Violence." *UCLA Law Review* 64, no. 6 (2017): 1508-52.\

Carter, Dan T. *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics*. Baton Rouge, LA: Louisiana State University Press, 2000.

Cha-Jua, Sundiata Keita, and Clarence Lang. "The 'Long Movement' as Vampire: Temporal and Spatial Fallacies in Recent Black Freedom Studies." *Journal of African American History*92.2 (2007): 265–288.

Chase, Robert T. *We Are Not Slaves: State Violence Coerced Labor and Prisoners' Rights in Postwar America*. Chapel Hill, NC: University of North Carolina Press, 2020.

Confino, Alon. *Foundational Pasts: The Holocaust as Historical Understanding*. New York, NY: Cambridge University Press, 2012.

Culver, Keith C. and Michael Giudice. "Recent Developments: Feminist Jurisprudence, Critical Race Theory, and Legal Pluralism." In *Readings in the Philosophy of Law,* Edited by Keith Culver and Michael Giudice, 209-258. Peterborough, ON: Broadview Press, 2017.

Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. New York, NY: Oxford University Press, 2007.

Delgado, Richard. *Critical Race Theory: An Introduction.* New York, NY: New York University Press, 2012.

Delgado, Richard, and Jean Stefancic. *Critical Race Theory: The Cutting Edge.* Philadelphia, PA: Temple University Press, 2013.

Gaines, Kevin. "The Historiography of the Struggle for Black Equality since 1945." In *A Companion to Post-1945 America*. Edited by Jean-Christophe Agnew and Roy Rosenzweig. (Malden, MA: Blackwell, 2002), 211–234.

Gilmore, Ruth Wilson. *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*. Berkeley, CA: University of California Press, 2006.

Goluboff, Risa Lauren. *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s.* New York, NY: Oxford University Press, 2016.

Goodwin, Michele. "The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration." *Cornell Law Review* 104, No. 4 (2018): 899-990.

Graetz, Michael J. and Linda Greenhouse. *The Burger Court and the Rise of the Judicial Right*. New York, NY: Simon & Schuster, 2016.

Hall, Jacquelyn D. "The Long Civil Rights Movement and the Political Uses of the Past." *The Journal of American History* 91, No. 4 (2005): 1233–1263.

Hall, Kermit L., James W. Ely, and Joel B. Grossman. *The Oxford Companion to the Supreme Court of the United States.* New York, NY: Oxford University Press, 2005.

Harris, Adam. "The GOPs 'Critical Race Theory' Obsession: How Conservative Politicians and Pundits became Fixated on an Academic Approach." *The Atlantic*. May 7, 2021.

https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/.

Hinton, Elizabeth K. *America on Fire: The Untold History of Police Violence and Black Rebellion since the 1960s*. New York, NY: W. W. Norton & Company, 2021.

———. *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*. Cambridge, MA: Harvard University Press, 2016.

Irons, Peter. *A People's History of the Supreme Court: The Men and Women whose Cases and Decisions have Shaped Our Constitution*. New York, NY: Penguin Books, 2006.

Jones, Russell L. "Terry V. Ohio: Its Failure, Immoral Progeny, and Racial Profiling." *Idaho Law Review* 54, no. 2 (2018): 511-41.

Kahn, Chris. "Many Americans Embrace Falsehoods about Critical Race Theory." *Reuters*. July 15, 2021. https://www.reuters.com/world/us/many-americans-embrace-falsehoods-about-critical-race-theory-2021-07-15/.

Kendi, Ibram X. *Stamped from the Beginning: The Definitive History of Racist Ideas in America*. New York, NY, 2016.

———. "There is No Debate Over Critical Race Theory: Pundits and Politicians have Created their own Definition for the Term, and then set about Attacking it." *The Atlantic*. July 9, 2021. https://www.theatlantic.com/ideas/archive/2021/07/opponents-critical-race-theory-are-arguing-themselves/619391/.

Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. Oxford, UK: Oxford University Press, 2004.

Kramer, Rory, and Brianna Remster. "Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops." *Law & Society Review* 52, no. 4 (2018): 960-93.

Manjapra, Kris. *Black Ghost of Empire: The Long Death of Slavery and the Failure of Emancipation.* First Scribner hardcover edition. ed. New York, NY: Scribner, 2022.

Manza, Jeff and Christopher Uggen. *Locked Out: Felon Disemfranchisement and American Democracy*. Oxford, UK: Oxford University Press, 2006.

Martin, Ben L. "From Negro to Black to African American: The Power of Names and Naming." *Political Science Quarterly* 106, No. 1 (1991): 83-107.

Massey, Douglas S. and Nancy A. Denton. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, MA: Harvard University Press, 2018.

Murakawa, Naomi. *The First Civil Right: How Liberals Built Prisons in America*. Oxford, UK: Oxford University Press, 2014.

Murch, Donna. "Crack in Los Angeles: Crisis, Militarization, and Blakc Response to the Late Twentieth-Century War on Drugs." *The Journal of American History* 102, no. 1 (2015), 162-173.

O'Brien, David M. *Constitutional Law and Politics: Civil Rights and Civil Liberties*. 2 vols. New York, NY: W.W. Norton, 2011.

Patrick-Stamp, Leslie. "*Numbers That Are Not New: African Americans in the Country's First Prison, 1790-1835*." *The Pennsylvania Magazine of History and Biography*, Vol. 119 (1995), 99-101.

Ray, Victor E., Antonia Randolph, Megan Underhill, and David Luke, "Critical Race Theory, Afro-Pessimism, and Racial Progress Narratives," *Sociology of Race and Ethnicity*, 3, No. 2 (2017): 147-158.

Reed, Douglas S. "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7, No. 1 (2021): 148-165.

Russell-Brown, Katheryn. "Making Implicit Bias Explicit: Black Men and the Police." in *Policing the Black Man: Arrest, Prosecution, and Imprisonement*. Edited by Angela J. Davis. New York, NY: Pantheon Books, 135-160.

Spohn, Cassia and David Holleran. "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* 40, no. 2 (2002), 328-358.

Sutton, Nathaniel C. "Lockstepping through Stop-and-Frisk: A Call to Independently Assess Terry V. Ohio under State Law." *Virginia Law Review* 107, no. 3 (2021): 639-81.

Spillane, Joseph F. and David B. Wolcott. *A History of Modern American Criminal Justice*, (Thousand Oaks, CA: Safe Publication), 2013.

Thompson, Heather A. "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History." *The Journal of American History* 97, no. 3 (2010), 703-734.

Vladeck, Stephen. *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. New York, NY: Hachette Book Group, 2023.

Wacquant, Loïc J. D. *Prisons of Poverty*. Minneapolis, MN: University of Minnesota Press, 2009.

———. "From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US." *New Left Review*. No. 13 (2002): 41-60.

Wilentz, Sean. *The Age of Reagan: A History, 1974-2008*. New York, NY: Harper, 2008.

Yancy, George. *Black Bodies, White Gazes: The Continuing Significance of Race in America.* Lanham, MD: Rowman & Littlefield, 2017.