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## A Fourth Amendment Pathfinder: Stop-and-Frisk and Race

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## A Fourth Amendment Pathfinder

### Stop-and-Frisk and Race

Emily Pratt

#### Introduction: Topic & Purpose

The Fourth Amendment perpetuates a construction of race where non-whiteness, particularly Black or Brown identity, is associated with criminality.<sup>1</sup> The power of police over people of color has only expanded in the past century, as exemplified by the evolution of stop-and-frisk.<sup>2</sup> Stop-and-frisk has since become the most reached for tool in police officers' toolkits; a convenient legal justification for targeting and harassing Black and Brown communities.<sup>3</sup> The term itself invokes an image of Black men "spread eagle against a wall" as police officers pat them down head to toe.<sup>4</sup>

The Fourth Amendment provides the State its most important power: the power to seize.<sup>5</sup> It is, therefore, the part of the Constitution that is most responsible for the mass incarceration of Black Americans.<sup>6</sup> While "seizure" historically meant a custodial arrest, the Supreme Court's

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<sup>1</sup> See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 253-54 (2010).

<sup>2</sup> "Stop-and-frisk" refers to when police officers make an "on-the-street stop, interrogate, and pat down for weapons." *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

<sup>3</sup> *Terry* stops are the most common interaction that people have with the police, an interaction that often leads to violence and death. It is a method of instilling fear in communities of color. For example, a former police captain in Minneapolis testified that the city's police commissioner stated that "stop and frisk focused on young men of color because [he] 'wanted to instill fear in them, [that] every time they leave their home they could be stopped by the police.'" Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 64 (2014). An article in the New York Times revealed that in 2012, NYPD officers stopped and frisked people 685,724 times. Eighty-seven percent of those searches were searches of Black or Latino individuals.

<sup>4</sup> Butler, *The White Fourth Amendment*, at 246-47.

<sup>5</sup> U.S. Const. amend. IV.

<sup>6</sup> Butler, *The White Fourth Amendment* at 247. Black Americans are 13% of the U.S. population but represent 40% of the U.S. prison population. See *Prison Policy Initiative, infra*, for data on incarceration in the United States.

decision in *Terry v. Ohio* formally recognized a different kind of seizure: the stop.<sup>7</sup> The subsequent protective search for weapons, or frisk, constitutes a “brief” intrusion upon the sanctity of the person, so Chief Justice Warren argues, and is therefore justifiable where the frisking officer “has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”<sup>8</sup> In simple terms, all a police officer needs to stop-and-frisk a person is “reasonable articulable suspicion.”<sup>9</sup> An elusive term of art, the concept of reasonable suspicion is one that has plagued courts since *Terry* was decided. What separates mere hunches by police officers from reasonable suspicion? Does this practice merely justify racial profiling and harassment of communities of color by the police? How do courts handle the explicit and implicit biases of police officers, prosecutors, and even the general public when determining whether a stop-and-frisk was lawful?

This pathfinder explores the development of Fourth Amendment jurisprudence following the Supreme Court’s controversial decision in *Terry v. Ohio*. It examines race in the context of stop-and-frisk and delves into specific issues related to *Terry*, including the inherent problem in labeling a neighborhood a “high crime area,” and generalized lookout descriptions of people of color that officers often use to justify stops. It ends with an examination of critical race theory

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<sup>7</sup> *Terry v. Ohio*, 392 U.S. at 16-17.

<sup>8</sup> *Id.* at 26-27 (emphasis added). *But see id.* at 16-17 (“It is simply fantastic to urge that such a procedure [a stop and frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.”) The majority opinion seems to contradict itself in recognizing the “great indignity” of a stop-and-frisk, while simultaneously justifying its holding by pointing to the brevity of the intrusion.

<sup>9</sup> “Reasonable articulable suspicion” is an important term of art that comes from Justice Harlan’s concurrence. *Terry*, 392 U.S. at 31, 33 (J. Harlan, concurring). As with “probable cause,” the exact probability (20%? 30%?) or quantum of evidence that amounts to “reasonable articulable suspicion” has never been explicitly outlined and is determined on a case-by-case basis. It is, however, less evidence than probable cause. Courts have explained that a police officer must be able to *articulate* specific facts that give rise to their suspicion; a bare hunch or vague conclusions are not enough. *See e.g. Mayo v. United States*, 266 A.3d 244, 257 (2022) (internal citations omitted), *vacated on other grounds by Mayo v. United States*, 284 A.3d 403 (2022).

and current awareness sources and identifies advocacy organizations attempting to address discriminatory stop-and-frisk, police brutality, and mass incarceration. This area of law developed through the common law tradition and cases are highly fact specific. For that reason, this pathfinder restricts itself to Supreme Court and D.C. Court of Appeals decisions. This guide is intended to help those researching the Fourth Amendment examine it through a critical lens and distinguishes cases and secondary materials that analyze the many issues that stop-and-frisk raises for people of color in the United States. This guide should be particularly helpful for future criminal defense attorneys seeking to understanding the systemic racism effecting the disproportionate involvement of Black and Brown individuals<sup>10</sup> in the criminal justice system, focusing on the racism embedded within the law itself.

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<sup>10</sup> While many of the sources examined in this pathfinder analyze the experiences of Black and Latinx people in the United States, this is not to minimize the experiences of Asian, Middle Eastern, Native American, and other minority racial and ethnic groups and their interactions with the police and the criminal justice system. There is simply not enough space in this pathfinder to give justice to a thorough examination of the different lived experiences of these groups.

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## I. Primary Sources

### 1. The Fourth Amendment

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.<sup>11</sup>

### 2. Terry v. Ohio

The formative Fourth Amendment case is *Terry v. Ohio*, which legally authorized stop-and-frisk. Because it is so critical, researchers should start with the case rather than starting with secondary sources. *Terry* is easily found if researchers are not already familiar with it. Any subsequent case or secondary source addressing stop-and-frisk will refer to *Terry*. The case is examined in extreme depth below, as researchers cannot continue utilizing this pathfinder without a thorough understanding of the decision.

#### a. Facts

A police detective, McFadden, was in plain clothes patrolling downtown Cleveland one afternoon when his attention was drawn to two men, including John Terry. McFadden testified that he had been assigned to patrol the area for shoplifters and pickpockets for 30 years. He had never seen Terry and his companion before and stated they just “didn’t look right.” He saw both men walk up and down and look into the same store window about a dozen times. Terry and his

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<sup>11</sup> U.S. Const. amend. IV.

companion continued their pacing for about ten minutes before they walked away. At this point, McFadden was “thoroughly suspicious,” testifying that he suspected the two of “casing a job, a stick-up.” He followed them and saw them join another man. McFadden approached the three, identified himself as a police officer, and asked for their names. When they “mumbled something” in response, McFadden grabbed Terry, spun him around, and felt down the outside of his clothing. Feeling “what felt like a pistol,” he removed Terry’s jacket and took a revolver out from the inside pocket. He then ordered all three men to enter a nearby store and face the wall with their hands raised, where McFadden proceeded to frisk the other two men.<sup>12</sup>

b. Holding

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for 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.<sup>13</sup>

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<sup>12</sup> *Terry v. Ohio*, 392 U.S. 1, 5-7 (1968).

<sup>13</sup> 392 U.S. at 30.

c. Analysis

One of the most controversial decisions in recent Supreme Court history, and perhaps the most significant in defining the power of the police, an understanding of *Terry*'s holding, the contours of the decision, its concurrences, and Justice's Douglas' dissent, is essential for any person who seeks to understand modern Fourth Amendment jurisprudence. Case law on both the federal and state level has molded *Terry* into an area of law that has taken on a life of its own. The Supreme Court in *Terry* makes several things clear. First, a "stop" is a *seizure* within the meaning of the Fourth Amendment.<sup>14</sup> The Court explicitly rejected the idea that the encounter between McFadden and Terry was not a seizure. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person" regardless of whether the seizure ends in arrest and prosecution for crime.<sup>15</sup>

Second is the Court's evident reluctance to diminish police officers' power: "one general [governmental] interest of course is that of effective crime prevention and detection. . . a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause."<sup>16</sup> The majority finds it "legitimate" that McFadden approached Terry and began to question him; it glosses over whether it was appropriate to immediately detain and frisk Terry merely because nothing in Terry's "mumbled" response to McFadden dispelled his suspicions.<sup>17</sup> The Court does not address the fact that the officer did not ask them for their names a second time, ask them to speak up, or continue to question them prior to grabbing and forcibly frisking Terry. The Court

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<sup>14</sup> *Id.* at 16-17.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 28.



justifies its holding by pointing to the need of police officers to protect themselves and others from prospective violence. Yet here, there was no evidence that Terry was *armed*, even if one accepts McFadden’s assumption that Terry appeared to be casing the store.<sup>18</sup> The Court explains, in what appears to be a desperate leap, that Terry’s actions were “consistent with [the officer’s] hypothesis that these men were contemplating a daylight robbery – which, it is reasonable to assume, would be likely to involve the use of weapons.”<sup>19</sup> But even Justice Harlan, concurring, concludes that the officer “had no reason whatever to suppose that Terry might be armed, apart from the fact he suspected him of planning a violent crime.”<sup>20</sup>

As will become apparent to researchers, this is a complex issue that arises frequently in post-*Terry* decisions. Does a police officer need *separate* reasonable suspicion, beyond that which justified the stop, that a person is armed and presently dangerous to justify a frisk? The “and” in the holding seems to imply so.<sup>21</sup> Justice Harlan argues in his concurrence that if the stop is supported by reasonable articulable suspicion, the frisk follows “automatically.”<sup>22</sup> The majority declines to hold as such. One D.C. Court of Appeals case presented in this pathfinder examines this issue further.

Powerful Supreme Court dissents can be important persuasive tools for researchers. In *Terry*, Justice Douglas was the lonely dissenter. “It is a mystery” he states, “how that ‘search’ and that ‘seizure’ can be constitutional by Fourth Amendment standards, unless there was

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<sup>18</sup> As Justice Douglas points out, “if loitering” had been the crime Terry had been charged with, there would have been probable cause. But the crime was carrying a concealed weapon, and there was no basis for believing Officer McFadden had probable cause to believe Terry was committing that offense. *Terry v. Ohio*, 392 U.S. 1, 35-36 (1968) (J. Douglas, dissenting).

<sup>19</sup> *Terry*, 392 U.S. at 28.

<sup>20</sup> 392 U.S. at 33 (J. Harlan, concurring).

<sup>21</sup> “. . . criminal activity is afoot *and* that the persons with whom he is dealing may be armed and presently dangerous. . .” *Id.* at 30.

<sup>22</sup> *Id.* at 33-34 (J. Harlan, concurring).

‘probable cause.’”<sup>23</sup> He points out that had Officer McFadden gone to a magistrate judge to secure a warrant, he would have been denied, as there was no basis to believe that Terry was carrying a concealed weapon. He passionately argued that to give police officers more power than magistrate judges was a “long step down a totalitarian path.”<sup>24</sup> Methods of using dissents to further research are explained *infra* beginning on page 18.

d. *Terry* and race

The majority opinion in *Terry* omits any mention of race, including the race of Mr. Terry (who was Black) and the police officer who stopped him (who was White), except for a single, offhand, comment: “The wholesale harassment by certain elements of the police community, of which minority groups, particularly [the Black community], frequently complain, will not be stopped by the exclusion of any evidence from a criminal trial.”<sup>25</sup> *Terry* was decided in 1968, only four years after the passage of the Civil Rights Act.<sup>26</sup> The NAACP felt so strongly about the issues presented in *Terry* that it not only filed an *amicus* brief but wanted to be heard in oral argument.<sup>27</sup> The Supreme Court was well aware of both the racial implications of *Terry* and the racism occurring the United States in other areas of society at the time it issued the opinion. The Court could have acknowledged those issues; their omission should not be considered a mere oversight, but rather a deliberate attempt to ignore, if not even *empower*, racial profiling by the police in the United States. A later section of this pathfinder on critical race theory discusses *Terry*’s role in “a historical lineage of racial subordination of African-Americans.”<sup>28</sup>

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<sup>23</sup> *Id.* at 35 (J. Douglas, dissenting).

<sup>24</sup> *Terry v. Ohio*, 392 U.S. 1, 38 (1968).

<sup>25</sup> *Id.* at 14.

<sup>26</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>27</sup> Butler, Stop and Frisk and Torture-Lite at 60. The Supreme Court denied that request. *Id.*

<sup>28</sup> *Id.* at 66-69.

Researchers can access the briefs filed on *Terry*'s behalf by the N.A.A.C.P. Legal Defense and Educational Defense Fund<sup>29</sup> and the ACLU<sup>30</sup> as well as the briefs filed by the United States,<sup>31</sup> the Attorney General of the State of New York,<sup>32</sup> the National District Attorneys' Association,<sup>33</sup> and Americans for Effective Law Enforcement<sup>34</sup> on behalf of the respondent, the State of Ohio. These briefs highlight the different perspectives and areas of concern for each respective organization, whether it is abuse and discrimination against people of color, or prevention of crime and public safety. These briefs, and briefs filed in other key Supreme Court and D.C. cases analyzed below, can lead researchers to interest organizations, decisions and secondary sources that provide useful information and insights on stop-and-frisk.

The goal of this pathfinder is to empower researchers to conduct research into *Terry* and Fourth Amendment jurisprudence while thinking about how the law itself perpetuates the profound inequities experienced by people of color in our criminal justice system. Even where a case such as *Terry* does not address issues of race – and they often do not – it is imperative that students conduct independent research to understand the context within which the case exists. The law does not exist in a vacuum, and neither should research.

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<sup>29</sup> Br. for the N.A.A.C.P. Legal Defense and Educational Fund, Inc. as *Amicus Curiae*, *Sibron v. New York*, 392 U.S. 40 (1968) (*Sibron v. New York* was decided at the same time as *Terry* and raised the same issue: the constitutionality of stop-and-frisk. As a result, the two cases, and one other, were consolidated).

<sup>30</sup> Br. for the American Civil Liberties Union, *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>31</sup> Br. for the United States, *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>32</sup> Br. Attorney General of the State of New York as *Amicus Curiae*, *Sibron v. New York*, 392 U.S. 40 (1968).

<sup>33</sup> Br. of National District Attorney Ass'n, *Amicus Curiae*, *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>34</sup> Br. of Americans for Effective Law Enforcement as *Amicus Curiae*, *Terry v. Ohio*, 392 U.S. 1 (1968).

### 3. Case Law

#### a. Finding relevant case law

*Terry v. Ohio* is the foundation for understanding modern Fourth Amendment jurisprudence. However, it has been cited in over 48,000 cases.<sup>35</sup> Using citing references and relevant Key Numbers and Headnotes is helpful, but only with appropriate filters. Relevant Key Numbers on Westlaw include 349k1064 (what constitutes reasonable or articulable suspicion in general [for a stop]), 349k1490 (frisk; pat-down), and 349k1490(4) (reasonable or articulable suspicion; reasonable belief [for frisk, pat-down]). On Lexis, HN16<sup>36</sup> and HN18<sup>37</sup> are the most helpful. Each headnote has its topic and subtopics listed above it; the topics are hyperlinked and have several functions when selected.<sup>38</sup> On Lexis, there is a panel on the right side of the main case document which has a “Topic Summaries” section. There are eleven Lexis topic summary reports related to *Terry*, including one on Stop & Frisk, which is the most helpful for researchers using this pathfinder. The reports provide definitions, seminal cases, and secondary sources.

As a starting point, researchers should review subsequent Supreme Court cases that build on *Terry*. Even then, there are 171 cases,<sup>39</sup> which may be overwhelming and time-consuming to review. The brief note below each case in the citing decisions list, or the synopsis or case summary at the start of each case once opened should help identify the depth to which the case examined, broadened, or narrowed *Terry*. The level of treatment may also help a researcher

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<sup>35</sup> Westlaw lists over 48,000, while Lexis lists over 50,000 citing decisions.

<sup>36</sup> HN16: Criminal Law & Procedure → . . . → Warrantless Searches → Stop & Frisk → General Overview.

<sup>37</sup> *Id.*

<sup>38</sup> A researcher can create an alert for a topic, which is especially helpful for novel issues or emerging areas of law and is addressed in the current awareness section of this pathfinder.

<sup>39</sup> On Lexis, it is 178.

narrow the results.<sup>40</sup> However, it might be easier for researchers to start with the secondary sources identified in Section II of this pathfinder to find critical Supreme Court cases and then read each respective opinion.

As a final note, a researcher should not be afraid to *broaden* their search to cases that examine formal arrests and probable cause. Because the line between a stop and arrest is so muddy,<sup>41</sup> an examination of issues related to race within the context of probable cause under the Fourth Amendment is crucial. Attorneys who represent those accused of crimes often – and should – make the argument that a *Terry* stop was in fact a *de facto* arrest and that there was neither probable cause nor reasonable suspicion at any point from the accused’s initial contact with the police through custodial arrest.

Select Supreme Court cases are discussed below.<sup>42</sup> The cases chosen for this section have profoundly affected people of color, highlighting issues of over-policing in minority communities and institutionalized discrimination within our society. Going forward there will surely be more Supreme Court cases on these issues. Section IV of this pathfinder instructs researchers on how to stay updated on evolving areas of the law.

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<sup>40</sup> On Westlaw, researchers should avoid starting with “mentioned by,” and should focus their attention on “distinguished by,” “examined by,” and “discussed by” cases, which are typically listed at the top of citing references results. On Lexis, after filtering for Supreme Court decisions only, a researcher can use the “analysis” filter to filter for level of analysis.

<sup>41</sup> Often, it is the frisk during the *Terry* stop that provides the evidence that is probable cause for an arrest.

<sup>42</sup> This is a non-exhaustive list. Other Supreme Court cases include *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (applying *Terry* to traffic stops); *Dunaway v. New York*, 442 U.S. 200 (1979) (all arrests must be based on probable cause; a person may not be detained and questioned in a custodial manner on reasonable suspicion, even if the police do not *formally* place the person under arrest); *Florida v. J.L.*, 529 U.S. 266 (2000) (police officers may *not* stop-and-frisk someone based solely on an anonymous tip merely describing the person); *Arizona v. Johnson*, 555 U.S. 323 (2009) (officers may frisk a passenger during a traffic stop if they have reasonable suspicion they are armed and dangerous); *Heien v. North Carolina*, 574 U.S. 54 (2014) (a mistake of law can still give rise to reasonable suspicion); *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (reasonable suspicion can be based on “reasonable inferences” drawn from known facts).

b. Supreme Court

i. Whren v. United States<sup>43</sup>

In *Whren*, the Supreme Court held that a police officer's subjective intentions are irrelevant when determining whether a *Terry* stop was reasonable. "Subjective intentions play no role in the ordinary, probable-cause Fourth Amendment analysis."<sup>44</sup>

On June 10, 1993, D.C. police officers were patrolling a "high drug area" of the city when they noticed a truck with young, Black occupants. The truck made a series of minor traffic violations, including turning without signaling and driving at an "unreasonable" speed. The officers stopped the car and upon approaching the driver's side window saw large plastic bags with what appeared to be crack cocaine in Whren's hands. At the pretrial suppression hearing, Whren argued that the reason the officers approached the car was pretextual, and that officers were really looking for evidence of narcotics because they suspected Whren of drug-dealing.<sup>45</sup> But the Supreme Court held that the Fourth Amendment analysis is one of objective reasonableness. An ulterior motive does not serve to strip an officer of their legal justification: "subjective intent alone. . . does not make otherwise lawful conduct illegal or unconstitutional."<sup>46</sup>

The case upheld what Whren reasoned was so troubling: the ability of police officers to use traffic stops to investigate other crimes for which they have no probable cause or reasonable suspicion.<sup>47</sup> It permits racial profiling, as the Court made it clear that officers' subjective intentions regarding a person's race are not to be considered. Under the Fourth Amendment,

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<sup>43</sup> 517 U.S. 806 (1996).

<sup>44</sup> *Id.* at 813.

<sup>45</sup> It is uncontested that the officers did not have either probable cause or reasonable suspicion to believe Whren was drug dealing when they first ordered the car to stop. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 810.

officers may stop every Black man who commits a minor violation as long as they have probable cause, even if the same officers ignore every White person committing the same violation.<sup>48</sup> As it is nearly impossible to avoid all traffic violations, officers have plenty of opportunity to use them as a pretext to investigate those they suspect of criminal activity. These suspicions are often motivated by racial bias and assumptions based on a person's presence in certain neighborhoods.<sup>49</sup>

*Whren* not only permits racial profiling under the Fourth Amendment but also contributes to the creation of dangerous situations that lead to police shootings. Under *Whren*, officers can stop a car under the pretext of a minor violation while suspecting the occupants of involvement in a more serious crime. These suspicions, as explained above, often stem from nothing more than preconceptions about the occupants based on their race, appearance, and location of the stop. Officers then approach these cars with undue vigilance and fear. Under these conditions, officers may and often do escalate simple traffic stops into violent situations, leading to tragedies such as the death of Philando Castile. Philando Castile was shot and killed by a police officer who had stopped Mr. Castile for a "broken taillight." Evidence at trial revealed that the officer, who was charged but acquitted of second-degree manslaughter, stopped Mr. Castile because he believed Mr. Castile matched the description of a suspect in a robbery, specifically due to his "wide-set nose."<sup>50</sup> Within a few minutes, a simple traffic stop ended Mr. Castile's life. The officer who killed Mr. Castile approached the car believing Mr. Castile to be a suspect in an armed robbery, despite having no probable cause or even reasonable suspicion. This unfounded

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<sup>48</sup> Butler, *The White Fourth Amendment*, at 250.

<sup>49</sup> See *Mayo, infra*, for a discussion of "high crime areas."

<sup>50</sup> See Smith, Mitch "Minnesota Officer Acquitted in Killing of Philando Castile" *New York Times* (June 16, 2017); Nelson, Tim "Philando Castile Traffic Stop Shooting Footage Released" *NPR* (June 21, 2017).

belief likely contributed to the officer's agitation and fear, and ultimately his decision to kill Mr. Castile.

*Using Whren to further research.* As with *Terry*, there are several, over 10,000, citing decisions for *Whren*. Researchers should use relevant Lexis Headnotes and Westlaw Key Numbers to narrow results.<sup>51</sup> In D.C., *Whren* has been cited in 30 cases, including in several *en banc* decisions and dissenting opinions. The filings in *Whren*, specifically the briefs of *amici curiae* for both Mr. Whren and the United States, which includes the ACLU, the National Association of Criminal Defense Lawyers, and the California District Attorneys Association, may also be helpful in identifying other cases and various organizations' positions on pretextual stops.

As a final note, researchers who plan to practice in or have an interest in jurisdictions outside of D.C. should note that several states have declined to follow *Whren* on state law grounds.<sup>52</sup>

ii. Illinois v. Wardlow<sup>53</sup>

In *Illinois v. Wardlow*, the Court examined whether Wardlow's "unprovoked flight" from the police and presence in a "high crime area" in Chicago gave officers reasonable suspicion to stop and frisk him. The Court, in a markedly contentious decision, answered yes.

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<sup>51</sup> Such as Lexis HN6, Westlaw HN2 & HN6, and Westlaw Key Numbers 349K1099 ("what constitutes reasonable or articulable suspicion in general" for traffic stops) and 349k1106 ("intent and motive; pretext" for traffic stops)

<sup>52</sup> See, e.g. *State v. Ochoa*, 206 P.3d 143, 146 (N.M. Ct. App. 2008) (pretextual traffic stops violate the New Mexico Constitution) *cert quashed*, *State v. Ochoa*, 225 P.3d 794 (N.M. 2009); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999) (pretextual traffic stops are made without authority of law under State Constitution and are therefore prohibited).

<sup>53</sup> 528 U.S. 119 (2000).



On September 9, 1995, police officers in a four-car caravan were driving in an area “known for heavy narcotics trafficking” to investigate drug dealing. One officer saw Wardlow standing next to a building holding an opaque bag. Wardlow looked to the direction of the officers and fled. He was cornered and stopped by the police, who frisked him. They found a gun in the bag he was carrying<sup>54</sup> and arrested him.

The Court reasoned that though a person’s presence in a high crime area “standing *alone* is not enough to support a reasonable particularized suspicion,” the fact that a stop occurred in a high crime area is a “relevant contextual consideration” in a *Terry* analysis.<sup>55</sup> The Court held that Wardlow’s unprovoked flight was sufficient, along with his presence in a high crime area, to arouse suspicion. “Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight – wherever it occurs – is the consummate act of evasion: while not necessarily indicative of wrongdoing, [it] is certainly suggestive of such.”<sup>56</sup>

An argument raised by both Wardlow and *amici*<sup>57</sup> in the case was that prior Supreme Court cases, namely *Florida v. Royer*, held that people have a right to ignore the police and go about their business.<sup>58</sup> Any “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”<sup>59</sup> Nonetheless, the *Wardlow* Court argued that their holding is “entirely consistent” with prior decisions, because

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<sup>54</sup> The officer first squeezed the bag Wardlow was carrying and felt a “heavy, hard object similar to the shape of gun.” 528 U.S. at 122. It was only then that the officer could legally open the bag, as a frisk does not allow an officer to look inside of bags or pockets unless they feel what they reasonably believe is a weapon.

<sup>55</sup> *Id.* at 124.

<sup>56</sup> *Id.* (internal citations omitted).

<sup>57</sup> *Amici* for Mr. Wardlow included the ACLU, the National Association of Criminal Defense Lawyers, the NAACP Legal Defense & Educational Fund, and the Rutherford Institute. The State of Illinois had several *amici*, including the United States and 17 other states. Again, as noted previously in this pathfinder, *amici* filings can help a researcher understand the issues, identify important prior decisions, and find relevant interest organizations.

<sup>58</sup> *Florida v. Royer*, 460 U.S. 491 (1983).

<sup>59</sup> *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

“unprovoked flight is not a mere refusal to cooperate.”<sup>60</sup> While the Court acknowledged that there are innocent reasons for flight from the police, it stated that *Terry* allows officers to detain people who are exhibiting behavior that is “ambiguous” and *may be innocent* so that officers can resolve the ambiguity: “*Terry* accepts the risk that officers may stop innocent people.”

*Wardlow* raises as many questions as it claims to answer. What is “unprovoked” flight and how is it distinguished from flight provoked by the behavior of police officers? Arguably, *Wardlow* was provoked, as his flight was a reaction to the presence of several police officers patrolling his neighborhood looking to make arrests. The case begs us to consider the troubled relationship that people of color have with the police: a relationship marked by discrimination, disproportionate rates of arrests, violence, and death. And further, what about the reality faced by those who live in these so-called “high crime areas,” where the constant presence of police officers roving and looking to make arrests creates an environment of suspicion and fear? In that context, do those in high crime areas not have *more* of a reason to instinctively flee at the sight of the police? Does it not make more sense to flee in areas where police activity is heightened, rather than in areas deemed “low crime”?<sup>61</sup>

Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, boldly confronted these issues in his dissent.<sup>62</sup> He recognized the racial implications involved and explained that “some citizens, particularly minorities and those residing in high crime areas” might flee because they

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<sup>60</sup> *Wardlow, supra*, at 125.

<sup>61</sup> “[B]ecause many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguable makes an inference of guilt *less* appropriate, rather than more so.” *Id.* at 139 (Stevens, J., concurring in part, dissenting in part).

<sup>62</sup> Justice Stevens concurred in part and dissented in part. He only concurred in the Court’s decision to reject a *per se* rule on either side, that flight is *always* or is *never* justification for a *Terry* stop. Beyond that, Justice Stevens finds that there was no reasonable suspicion to stop *Wardlow*. *Id.* at 126-140 (Stevens, J., concurring in part, dissenting in part).

believe “contact with the police can itself be dangerous,” citing police brutality, discriminatory stop-and-frisk practices, humiliating and invasive body searches, abusive interrogations, and more. The decision of Black and Brown people to flee from the police is, therefore, “neither ‘aberrant’ nor ‘abnormal’” but in fact may be a rational response – a survival instinct -- to a history of mistreatment by the police.

For researchers interested in the intersection of the Fourth Amendment and critical race theory, the dissent is a powerful and persuasive tool that has been cited often in both secondary sources and subsequent cases. On Lexis, the “issue trail” tool can be used to identify cases in other jurisdictions that have cited specific portions of the dissent that address the racial implications of *Wardlow*.<sup>63</sup> The questions raised by *Wardlow* are ones that other courts and academics have attempted and will continue to grapple with. Methods to stay updated on these issues are addressed in the current awareness section of this pathfinder.

### c. District of Columbia

Relevant D.C. cases can be identified using both *Terry* citing references and the relevant Key Numbers and Headnotes identified above. For example, Key Number 349k1490(4) (reasonable or articulable suspicion; reasonable belief) and filtering for D.C. (*not* federal) results in only 43 headnotes. There are more than 300 D.C. cases that cite *Terry*, so search terms should be used to identify cases that examine the issue of race in the context of seizures under the Fourth Amendment. For example, a researcher may want to filter using search terms where it is

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<sup>63</sup> Justice Stevens dissent is cited in several appellate opinions. *See, e.g. United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019). It was cited in a notable D.C. case, *Henson v. United States*, 55 A.3d 859 (D.C. 2012) (Blackburne-Rigsby, J., concurring) (cautioning against a strict application of the “dual factors” of unprovoked flight and high crime area as amounting to reasonable suspicion, given the fact that people of color and those living in high crime areas often believe the police are dangerous, concerns which have a “particular resonance in the District of Columbia and other urban areas.”)

likely that the issue of race may be relevant, such as “eyewitness,” “description,” “lookout,” “identification” or even simply “bias.” As mentioned above, a researcher may also want to examine cases that consider probable cause and formal arrests, not just reasonable suspicion.

Several important D.C. Court of Appeals cases are discussed below.

i. *Mayo v. United States*<sup>64</sup>

It is essential to first address that *Mayo* was later vacated in October of 2022, when the D.C. Court of Appeals granted rehearing *en banc*. However, *Mayo* is still extraordinarily helpful for researchers: it summarizes the state of *Terry* jurisprudence in D.C., defines the reasonable articulable suspicion standard, and cites and analyzes several key D.C. Court of Appeals decisions. While the Court has yet to issue an opinion after rehearing, the new decision is likely to have a huge impact – either positive or negative – on the Black community in D.C. In *Mayo*, the Court tackled the controversial question raised in *Illinois v. Wardlow*: when does a person’s presence in a “high crime” area, and their flight from the police, give rise to reasonable articulable suspicion? Some might argue that *Wardlow* answers that question; certainly, Judge McLeese believes it has.<sup>65</sup> However, the majority opinion in *Mayo* reveals that the issues of “flight” and “high crime area” are complex areas of law that researchers should monitor closely. Moreover, *Mayo* tackles what the Supreme Court avoided addressing in both *Terry* and *Wardlow*: the relationship that Landon Mayo, as a Black man, has with the police. Future researchers should focus on this case because it analyzes the real-life dimensions of how the Fourth

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<sup>64</sup> 266 A.3d 244 (2022), *vacated, rehearing en banc granted by Mayo v. United States*, 284 A.3d 403 (2022).

<sup>65</sup> See 266 A.3d at 274, 279 (McLeese, J., dissenting).

Amendment affects people of color differently. The current awareness section of this pathfinder guides researchers on how to stay updated on developments related to *Mayo*.

On October 26, 2016, Landon Mayo, just 19 years old, was hanging out with some others<sup>66</sup> in an alley in the Kenilworth neighborhood when a group of police officers from the Metropolitan Police Department's Gun Recovery Unit (GRU)<sup>67</sup> pulled up in an unmarked car. There were three GRU officers in the car, wearing tactical vests and police badges, and, unknown to Mayo, a second GRU car at the other end of the alley. The officer who testified at the suppression hearing said that GRU officers were in the Kenilworth area<sup>68</sup> because it was an area where they had previously recovered weapons<sup>69</sup> and narcotics. He testified that after pulling into the alley, he instantly focused on Mayo. Mayo "immediately disengaged" from the group and moved to speak with a man further down the alley. Mayo's back was turned to the officers; they could not see his hands. Inexplicably, the officer testified that Mayo was "making slight adjustments with his front waistband." Mayo again started to move further down the alley. It was at this moment that the GRU officers decided to act; they followed Mayo, flanking him.<sup>70</sup> One officer called out "Hey, we just want to talk. We just want to talk to you. Do you have any guns?" Mayo began running. One officer dove to tackle him and managed to get a hand on Mayo's foot. He tripped, but managed to get away; however, he was soon caught by the GRU

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<sup>66</sup> *At least* five others, none of whom apparently attracted the attention of GRU officers. GRU officers were unable to describe anything the others were doing. *See* 266 A.3d at 251, n.4.

<sup>67</sup> The GRU has been the subject of public outcry and investigation, detailed *infra* starting on page 21.

<sup>68</sup> He could not define the "Kenilworth area" that he referred to by specific boundaries; he just "kind of gestured to" an area of Northeast D.C. on a map. *Mayo*, 266 A.3d at 250.

<sup>69</sup> The officer testified that they had recovered approximately 10 guns from that area in the past three years, that it was "one of the. . . higher amounts of guns that [the GRU] recovered compared to other parts of the city." *Id.* at 251.

<sup>70</sup> The officer explained that he flanked Mr. Mayo to "prevent any escape route." *Id.*

officers in the second car.<sup>71</sup> The officers found a gun and marijuana nearby that they alleged Mayo dropped when he fled.

In a decision that takes a decided step away from the Supreme Court’s holding in *Wardlow*, the D.C. Court of Appeals found that GRU officers did not have reasonable articulable suspicion to stop Landon Mayo.<sup>72</sup> The Court first explained that “even a brief, restraining stop of a person [a *Terry*] stop is unreasonable. . . without a reasonable suspicion supported by specific and articulable facts.” Reasonable suspicion is not “toothless” and an officer’s “inchoate and unparticularized suspicion or hunch of criminal activity” is not enough, nor is a “subjective good faith belief” that the person stopped has been engaging in criminal activity. The Court then turned to the facts of Mayo’s case, addressing first what officers “observed” Mayo doing as they pulled into the alley, Mayo’s flight, and finally, Mayo’s presence in a purported “high crime area.”

Officers testified that they singled out Mayo because he “disengaged,” or walked away when the squad car arrived, but a defense witness stated that everyone in the alley knew what the GRU was there to do and that the group started to disperse as a result. The D.C.C.A. found that Mayo, or the group’s collective dispersal, did not add much to the reasonable suspicion analysis.<sup>73</sup> And despite the assertion that Mayo made “slight adjustments with his front

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<sup>71</sup> A defense investigator measured Mr. Mayo’s flight, which only totaled 700 feet. *Id.* at 252, n.7.

<sup>72</sup> The court also found that Mr. Mayo was seized the moment he was tackled by GRU officers, though he managed to get away. *Mayo v. United States*, 266 A.3d 244, 255-56 (2022), *vacated, rehearing en banc granted by Mayo v. United States*, 284 A.3d 403 (2022). *Torres v. Madrid* was decided by the Supreme Court while Mr. Mayo’s appeal was pending, and in *Torres*, the Supreme Court made clear that “the application of [any] physical force to the body of a person with intent to restraint is a seizure even if the person does not submit and is not subdued.” 141 S. Ct. 989, 1003 (2021). Applying *Torres* to *Mayo*, the officer’s dive-tackle to stop Mr. Mayo, in which he managed to grab Mr. Mayo’s foot and trip him, is a seizure.

<sup>73</sup> The court also notes that, notwithstanding the testimony of the defense witness, a person’s “attempt to exercise his right not to participate in an encounter” with police officers does not bolster a showing of reasonable articulable suspicion. *Mayo*, 284 A.3d at 258.

waistband,” officers could not actually *see* his hands; all they could see was his back and the “shoulder shrugs” he allegedly made.<sup>74</sup> The Court explained that these shrugs were capable of too many innocent explanations to give cause for a *Terry* stop.<sup>75</sup>

The Court then addresses Mayo’s flight. “Any assessment of the import of flight cannot ignore the foundational Fourth Amendment principle that ‘approached individuals are free to refuse to speak with officers or avoid them altogether.’” Despite the suggestion in *Wardlow* that “headlong flight” is “suggestive” of wrongdoing, flight is not automatically suspicious because “leaving a scene hastily may be inspired by innocent fear or a legitimate desire to avoid contact with the police.” The D.C. Court of Appeals, in contrast to the Supreme Court, thoroughly recognizes and addresses the implications of interactions between police and people of color. “There are many reasons an innocent person, *particularly an innocent person in highly policed community of color*, might run from the police: ‘an individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, a fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons.’”<sup>76</sup> The D.C.C.A. also finds that the GRU officers in fact *provoked* Mayo’s flight with actions that would be startling or frightening to an ordinary person.<sup>77</sup> “Who among us would not have been uneasy if a squad of police suddenly appeared, partially surrounded us on a street at night, and began interrogating us as a criminal suspect?”<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> “This court has repeatedly held that hand movements that have been directedly observed and are consistent with mundane behavior do not meaningfully contribute to reasonable articulable suspicion.” *Id.* at 259. Further, the police did not see the front of Mr. Mayo’s body, did not see any bulge in his clothing, and only saw Mr. Mayo’s movements from the back. The GRU did not stop in the alley because there was an “issue” with guns; they were not called about a gun or a shooting. *See id.* at 252-53.

<sup>76</sup> *Id.* at 260-61.

<sup>77</sup> *Id.* at 263.

<sup>78</sup> *Id.* at 264.

The opinion cites several cases that examine the fear a person, particularly a young Black person, would feel when approached by the police, and how that fear could provoke flight or submit.<sup>79</sup> Researchers using this pathfinder should leverage these cases as resources in analyzing the Fourth Amendment through critical race theory.

The Court finally turns to the issue of Mayo's presence in an alleged "high crime area."<sup>80</sup> While "locational evidence about criminal activity can be a relevant consideration in a *Terry* analysis," the evidence must be "sufficiently particularized and objectively substantiated."<sup>81</sup> "It is necessary to remind *again* that thousands of citizens live and go about their legitimate day-to-day activities in areas which surface in court testimony as being high crime neighborhoods." Researchers, again, should refer to the many cases that *Mayo* relies on in explaining that the designation "high crime area" must be more than a vague or conclusory designation.<sup>82</sup>

For students who aim to go into criminal defense, these cases can help advocate for clients who have been targeted by law enforcement for mere presence in a high crime area, conduct effective cross-examination of police officers, and make arguments in favor of

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<sup>79</sup> See, e.g. *Dozier*, 220 A.3d 933, 942 (D.C. 2019); *Pridgen*, 134 A.3d 297, 299, 303 & n.17 (D.C. 2016); *Miles*, 181 A.3d 633, 644 (D.C. 2018).

<sup>80</sup> What makes an area a "high crime area," distinguishes it from a "low crime" or "average crime" area, and what quantum of evidence is required to make that determination, is notably absent from the analysis in *Wardlow*.

<sup>81</sup> For example, trial courts should give weight to high crime area testimony depending on the detail provided, including, for example, "whether geographic boundaries are precisely drawn, whether verifiable data (not just anecdotal reports) for the time period of the stop is provided, and whether there is a nexus between documented criminal activity in the area and the police's observations." *Mayo v. United States*, 266 A.3d 244, 267 (2022), *vacated, rehearing en banc granted by Mayo v. United States*, 284 A.3d 403 (2022).

<sup>82</sup> E.g., *Dozier*, 220 A.3d at 943 n.12; *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975); *Smith v. United*, 558 A.2d 312, 316 (D.C. 1989); *Robinson v. United States*, 76 A.3d 329, 340 (D.C. 2013). C.f. *Newman v. United States*, 258 A.3d 162, 165 (D.C. 2021) (testimony that neighborhood "w[as] known for a lot of gun violence and drugs" supported a finding of reasonable suspicion, but defendant did not challenge locational information in appeal); *Henson*, 55 A.3d at 868 (one factor which supported reasonable articulable suspicion was that the stop occurred in "one of the higher crime areas" but defendant did not challenge testimony on appeal); *James v. United States*, 829 A.2d 963, 964-966 (D.C. 2003) (testimony that area was "high crime, violent crime . . . high narcotics, . . . high everything" but only argument on appeal was on defendant's movements while in car); *Cousart v. United States*, 618 A.2d 96, 97, 100 (D.C. 1992) (en banc) (stop occurred in "high drug area" but the issue was not raised in appeal); *Shelton v. United States*, 929 A.2d 420, 426-27 (D.C. 2007).



suppression.<sup>83</sup> Researchers should also use these materials to understand the profound implications of labeling a neighborhood a “high crime area” because the label is disproportionately applied to Black and Brown communities, perpetuating harmful stereotypes that associate people of color with criminality. Those interested in prosecution also have an interest in preventing racial discrimination and building trust with communities they aim to serve.

*Real life considerations: the Gun Recovery Unit and the D.C. Metropolitan Police.*

Researchers should, once again, consider the broader context of a case. The law is deeply intertwined with larger social dynamics. Here, a detailed examination of the GRU helps us understand *Mayo*.

The ACLU-DC released a statement calling on the D.C. Council to disband the “unaccountable and dangerous Gun Recovery Unit,” citing a “clear pattern of abuse and acting with impunity.”<sup>84</sup> In 2017, a photo revealed GRU officers posing behind a skull-and-crossbones flag. The skull is punctured with a bullet hole and the flag has a banner that reads “Vest Up One in Chamber.”<sup>85</sup> Another officer wore a T-Shirt with a grim reaper and white supremacist symbol on it to court; the T-Shirt also has the words “Seventh District” (referring to the area MPD patrols in Southeast D.C.) and the words “let me see that waistband jo.”<sup>86</sup> The GRU and other

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<sup>83</sup> See *Mayo*, 266 A.3d at 266 (“Our abiding concern is that residents of certain neighborhoods in the District of Columbia may be more likely to be suspected of engaging in criminal activity simply because of where they live or frequent.”) (internal citations and quotation marks omitted).

<sup>84</sup>“ACLU-D.C. Calls on the D.C. Council to Disband the Metropolitan Police Department’s Gun Recovery Unit,” ACLU (Feb. 1, 2023), accessed at <https://www.acludc.org/en/press-releases/aclu-dc-calls-dc-council-disband-metropolitan-police-departments-gun-recovery-unit>.

<sup>85</sup> Rachel Kurzius, “MPD is Now Investigating Another Violent Logo Worn by Police Officers,” DCist (Aug. 15, 2017).

<sup>86</sup> Keith Alexander & Peter Hermann, “Controversial police T-shirt leads to dismissal in D.C. gun case.” The Washington Post (Aug. 5, 2017), [https://www.washingtonpost.com/local/public-safety/controversial-police-t-shirt-leads-to-dismissal-in-dc-gun-case/2017/08/05/0cf3d63c-7908-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/local/public-safety/controversial-police-t-shirt-leads-to-dismissal-in-dc-gun-case/2017/08/05/0cf3d63c-7908-11e7-8f39-eeb7d3a2d304_story.html).

teams with the Metropolitan Police Department have been the subject of investigation.<sup>87</sup>

Considering these facts, Mayo's flight from the GRU no longer seems suspicious at all, but instead appears to be a rational reaction after being approached by officers with a history of abusive behavior.

ii. *Maye v. United States*.<sup>88</sup>

In *Maye*, the D.C. Court of Appeals held that where purported "consent" for a search was obtained during an unlawful *Terry* stop, the consent obtained was the fruit of an illegal search.

On January 10, 2013, in the evening, uniformed patrol officers in a marked police car arrived at a block in a "high crime" area in Southeast D.C. where a group of about eight people, including Maye, were standing near a parked car. The group was not doing anything that appeared illegal, but the officers pulled up near the group and parked their car. It is here that the two versions of the encounter differ. The officers involved testified to the following: they immediately noticed Maye "manipulating his waistband" with one hand and Maye then put his hand into his pocket. One officer approached Maye and noticed what looked like a typical "folding knife" clipped inside the same pocket.<sup>89</sup> The officer then asked Maye if he could speak to him, which Maye said something to the effect of "sure, what's up?" The officer then said, "while I'm speaking with you, would you mind taking your hand out of your pocket," to which

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<sup>87</sup> See Keith Alexander & Omari Daniels, "Fallout grows from internal probe of D.C. police violent crime squad," *The Washington Post* (Mar. 13, 2023); *c.f.* Patrick Madden, "D.C.'s Aggressive Confiscation of Illegal Guns Leaves Residents Feeling Targeted" NPR (Oct. 24, 2018) <https://www.npr.org/2018/10/24/659980871/d-c-s-aggressive-confiscation-of-illegal-guns-leaves-residents-feeling-targeted>. In *Mayo*, a defense witness testified that "when the GRU comes in the neighborhood, we already know what they are coming for." Understanding the GRU's reputation for abuse within communities in D.C. makes Mayo's decision to flee even more understandable.

<sup>88</sup> 632 A.2d 638 (D.C. 2021).

<sup>89</sup> The officer testified he neither felt threatened by the knife or suspected the knife was illegal in any respect. Another officer and a witness testified they could not remember seeing Maye with the knife. *Id.* at 642.

Maye complied. The officer finally asked, “do you mind if I pat you down for officer safety for any weapons?” to which Maye replied “sure, that’s fine.” The officer felt a “bulge” near Maye’s waistband which he “immediately recognized as narcotics” and recovered a bag of cocaine.

A witness for the defense, however, testified to the following: the officers pulled up to the group, got out of their patrol car, and asked “who lives here?” One officer immediately went to Maye and grabbed him, while the rest of the group was directed to put their hands on the car.<sup>90</sup>

The Court easily concluded that there was no reasonable suspicion despite conflicting testimony.<sup>91</sup> “There is nothing suspicious about gathering with a small group of friends outside in the evening.” Maye’s hand movements were deemed to be innocuous, and the pocketknife, which the officer did not believe to be illegal, added little to the reasonable suspicion analysis. The case hinged on whether Maye was seized under *Terry* prior to his alleged consent to the search. If so, the seizure was unlawful due to lack of reasonable suspicion, tainting any purported consent given by Maye. If not, then Maye’s consent was valid, at least in the eyes of the Fourth Amendment.<sup>92</sup> The Court ultimately remanded the case, finding it could not answer the question of whether Maye had been seized prior to giving consent based on the record before it. However, it directed the trial court to vacate Maye’s conviction if it found Maye had been seized, and further explained the Fourth Amendment principles guiding its decision. It focused on the inconsistencies in whether the officers had directed just Maye – or the entire group – to place their hands on the car in a position to be pat-down. “Suffice it to say that a reasonable person in

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<sup>90</sup> It was somewhere between a request and a command. *Id.* at 643.

<sup>91</sup> *Id.* at 644.

<sup>92</sup> Whether any person really feels “free” to ignore or refuse a police officer’s questions is an entirely different question. *See id.* at 650 (“to determine whether Maye was seized at the time he agreed to a search, we ask whether a reasonable person in Maye’s shoes would have felt ‘free to . . . terminate the encounter’ with the officers.”)

Maye’s shoes might think it material, when assessing whether they are free to terminate the police encounter, if seven of their friends have likewise been directed to assume the position and then complied.”

*Maye* is an important case for several propositions. First, an unlawful *Terry* stop taints any alleged consent given later.<sup>93</sup> Second, and critically, the question of whether a frisk is constitutional is a *separate* question from whether the initial stop was constitutional.<sup>94</sup> While stop-and-frisk is often referred to as *one* action, researchers should understand that D.C., at least, has clarified that they are two distinct yet connected acts warranting two distinct inquiries. That a stop was justified does automatically not make a pat-down justified, because a frisk is an *additional* invasion, one that is more intrusive than the initial stop. Finally, *Maye* once again reminds researchers that presence in a high crime area is not a substitute for specific and articulable suspicion. “In short, individuals are allowed to carry pocketknives – and adjust their waistbands, including in high crime areas – without forfeiting their Fourth Amendment rights to be free from seizures and searches absent more particularized suspicion.”<sup>95</sup>

iii. Narrowing in on the issues: race, eyewitness identifications, and lookout descriptions.

Within the context of stop-and-frisk, eyewitness identification and lookout descriptions raise specific issues of racial bias. Eyewitness identification is notoriously unreliable; even more

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<sup>93</sup> See also *T.W. v. United States*, 292 A.3d 790 (D.C. 2023) (“consent” given by young man who was illegally seized by MPD officers was the fruit of an illegal seizure).

<sup>94</sup> “And if, in the course of that stop, the officer further has reasonable articulable suspicion that the person detained is armed and dangerous, the officer *may also* conduct a protective frisk for weapons.” *Maye*, 260 A.3d 628, 645 (D.C. 2021) (citing *Robinson v. United States*, 76 A.3d 329, 336 (D.C. 2013)). See also *Mayes v. United States*, 632 A.2d 856, 861 (D.C. 1995) (“ . . . not all stops call for a frisk. . . .”) (internal citations omitted).

<sup>95</sup> *Maye*, 260 A.3d at 648.

so when it involves cross-racial identification.<sup>96</sup> Yet eyewitnesses give descriptions of alleged suspects to the police all the time, descriptions that are made into “lookouts” and disseminated among the police, who use the lookouts to stop those “matching” the description on the street.

The Fourth Amendment, and our society, constructs Black as criminal.<sup>97</sup> Black people are often identified as suspects in crimes when they are mere bystanders, and generalized descriptions of Black “suspects” often rely upon stereotypical features. When a Black person is identified as a possible suspect, that mere fact is often used as justification to stop-and-frisk any Black person that happens to be in the area.

The following two D.C.C.A. cases illustrate the implications of police officers using generic lookout descriptions of Black men to stop-and frisk indiscriminately. *In re T.L.L.*<sup>98</sup> and *In re A.S.*<sup>99</sup> address *Terry* stops where police officers stopped young Black men based on generalized descriptions. In *T.L.L.*, a man who had been robbed at gunpoint gave the following description to police: “the second guy [allegedly T.L.L.] . . . he was maybe about four foot something. . . just so young looking, maybe about 15, 16, and just clear cut face.”<sup>100</sup> A lookout, disseminated between police officers, was of “a black male in his early teens to late teens, with dark brown complexion, wearing dark-colored clothing.”<sup>101</sup> An officer went to a home in N.E. D.C. where “possible suspects” were located. There, she found four or five young men<sup>102</sup> hanging out on the stoop. The young men tried to run inside, but T.L.L. was seized. The

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<sup>96</sup> See generally Barry Scheck *et al*, “Seeing Things” in *Actual Innocence* (Doubleday 2000).

<sup>97</sup> Paul Butler, *The White Fourth Amendment*, 43 *TEX. TECH L. REV.* 245, 253-54 (2010).

<sup>98</sup> 729 A.2d 334, 340 (D.C. 1999).

<sup>99</sup> 614 A.2d 534, 540 (D.C. 1992).

<sup>100</sup> *In re T.L.L.* 729 A.2d 334, 337 (D.C. 1999).

<sup>101</sup> There was no attempt during the suppression hearing or at trial to explain the discrepancies between the description provided by the complaining witness and the one shared between officers. *Id.* at 340, n.5.

<sup>102</sup> Or maybe even as many as ten to fifteen, see *id.* at 342.

complainant was brought to the house where a “show-up” identification was performed, and he identified T.L.L.<sup>103</sup>

The Court found there was no reasonable suspicion based on a description that was so general it could have “fit many if not most young Black men.” The officers detained *at least five*, and perhaps as many as *ten* young men based on two very general descriptions.<sup>104</sup> A description that is altogether lacking in particularity and without other supporting facts cannot possibly justify a *Terry* stop.<sup>105</sup>

In *A.S.*, the D.C. Court of Appeals addressed similar facts. In *A.S.*, a lookout description described “five subjects, standing on the corner, all of them dressed alike” who were involved in the sale of drugs, and described them as “black male[s], with a blue jacket, gray sweatshirt, dark jeans with black skull cap.”<sup>106</sup> Other officers, receiving the lookout, approached *three* youths who fit the description, including the clothing, and seized all three. An officer later explained that “for *years*” young men have dressed alike in areas of the city, and that officers just “do a stop since everyone fits the description in cases like these.”<sup>107</sup> The Court held that the seizures were illegal. “It is clear that the kind of dragnet seizure of three youths who resembled a generalized

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<sup>103</sup> *Id.* at 377. A show-up identification is an identification procedure where, unlike in a lineup or photo array, the suspect is presented singly to the complainant. *See generally*, Michael D. Cicchini & Joseph G. Easton, Reforming the Law on Show-Up Identifications, 100 J. Crim. L. & Criminology 2 (2010) (on the unreliability of show-up identification procedures).

<sup>104</sup> The court noted no information on the suspects height, weight, facial hair, distinctive characteristics. 729 A.2d at 340.

<sup>105</sup> *Id.* Note that the court also addresses *T.L.L.*'s alleged “flight” from the police into the house, relevant to prior cases in this pathfinder. The court finds that the fact that an entire group of five to fifteen young men ran into an apartment meant that the arrival of the approach “led the innocent as well as the possibly guilty to try to make themselves scarce,” and reminded that those who entirely innocent do sometimes flee the scene of a crime. *Id.* at 341-42.

<sup>106</sup> It did not contain any information about height, weight, build, facial hair, features, or any further information about the other young men standing on the corner. Whether they were described as “young” or not is contested, but regardless all five men on the corner, and the three later stopped, could not have been described as anything other than “young.” *See In re A.S.*, 614 A.2d, 534 541, n. 10 (D.C. 1992).

<sup>107</sup> *Id.* at 538 & n.5.

description cannot be squared with the long-standing requirement for particularized, individualized suspicion.”<sup>108</sup>

As one young man put it, “when you’re young and you’re black, no matter how you look, you fit the description.”<sup>109</sup> Generalized descriptions of Black people that are used by the police to conduct “dragnet” seizures cannot possibly be justified, whether the police are “investigating” a crime or not. *In re T.L.L.* and *In re A.S.* should provide a starting point for researchers to explore the discriminatory impact of the use of generalized descriptions provided by eyewitnesses.

## II. Secondary Sources

### 1. Research Guides

Those who are unfamiliar with stop-and-frisk should start with research guides on criminal procedure and the Fourth Amendment. These guides are designed with students in mind; they point student researchers in the direction of helpful sources and synthesize concepts or materials.

Georgetown Law Library has a Criminal Law and Justice Research Guide.<sup>110</sup> It is publicly available and current as of August 2021. The most helpful section of the guide is the one on secondary sources, which identifies key texts and treatises as well as strategies and sources for finding relevant case law. The guide is comprehensive and detailed; however, it is extremely broad, covering all aspects of criminal law, criminal procedure, and the rules of evidence. For

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<sup>108</sup> *Id.* at 540.

<sup>109</sup> Julie Dressner & Edwin Martinez, “The Scars of Stop-and-Frisk” *New York Times* (June 12, 2012) (telling the story of Tyquan Brehon in Brooklyn who, prior to his 18<sup>th</sup> birthday, was unjustifiably stopped and detained more than 60 times).

<sup>110</sup> Georgetown Law Criminal Law and Justice Research Guide (last updated Sept. 2021), found at [https://guides.ll.georgetown.edu/crim\\_justice](https://guides.ll.georgetown.edu/crim_justice).

researchers utilizing this guide, they will need to sift through a copious amount of information to find materials that focus on the Fourth Amendment.

More research guides are available through Nova Southeastern University Shepard Broad College of Law<sup>111</sup>, University of Minnesota Law School<sup>112</sup>, and Pace University.<sup>113</sup> There are many others; nearly every law school has a research guide that generally covers criminal procedure and criminal law. The three listed above concentrate on Fourth Amendment search and seizure. Nova's guide is less helpful as it focuses on Florida case law, but it does provide a few major treatises. University of Minnesota's guide is much more detailed, providing sources on fascinating sub-topics such as digital privacy and the Fourth Amendment applied to DUI cases. Pace's entire guide focuses on searches and seizures of automobiles. *Terry* and the reasonable suspicion analysis as applied to traffic stops is both a common and complex issue for practitioners.

## 2. Treatises

There are several treatises that are helpful in understanding search and seizure under the Fourth Amendment. These can be found through research guides, or through a search on Westlaw and Lexis. On Westlaw, secondary sources can be accessed from the homepage and filtered by topic, which in this case would be "criminal law." From there, a researcher can filter by title, if they know it, or they can filter by publication type, "texts & treatises." On Lexis, under "Content" on the homepage, "Secondary Materials: Treatises & Guides" should be selected and

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<sup>111</sup> NSU Panza Maurer Law Library, Criminal Law Field Placement Clinic Resource Guide: The 4th Amendment: Search and Seizure (last updated Feb. 16, 2023) at <https://libguides.nova.edu/c.php?g=1275856&p=9379767>

<sup>112</sup> University of Minnesota Law School Law Library, Fourth Amendment: Search and Seizure Law (last updated May 2, 2024), at <https://libguides.law.umn.edu/c.php?g=125765&p=2906919#s-lg-box-8922487>.

<sup>113</sup> Pace University Elisabeth Haub School of Law, Student Project: Searches and Seizures of Automobiles: Getting Started (last updated May 13, 2019) at <https://libraryguides.law.pace.edu/c.php?g=794732&p=5682745>.



then filtered for practice area. Materials can also be filtered by jurisdiction. The major Fourth Amendment treatise is analyzed below.<sup>114</sup>

a. Search & Seizure: A Treatise on the Fourth Amendment.<sup>115</sup>

Search & Seizure is a major treatise on all aspects of the Fourth Amendment, and is updated annually, so it remains current. It is available on Westlaw or in print. Chapter 9, “Stop and Frisk and Similar Lesser Intrusions” is the best starting point for researchers. It takes the reader through the facts and decision of *Terry* and two cases decided at the same time: *Sibron*<sup>116</sup> and *Peters*. In *Sibron*, the Court held that when a police officer reached into Sibron’s pocket and pulled out envelopes of heroin, it was not justifiable under a “stop-and-frisk” theory because the “frisk” for heroin was not a self-protective search for weapons. *Sibron*, while not referred to as often as later Supreme Court decisions, began the long line of federal and state decisions emphasizing that a frisk is a self-protective, pat-down of a person’s outer clothing for weapons *only*. While evidence discovered during a pat-down<sup>117</sup> may or may not be admissible depending on the specific facts, a frisk cannot be used to search for evidence of a crime. It then takes the reader through the law that developed after *Terry*: what quantum of evidence is required to show “reasonable suspicion”? How long may a *Terry* stop last? When does an officer’s use of force, show of force, or claim of authority make the seizure an arrest beyond a *Terry* stop?

This resource does not merely explain the current state of the law but also analyzes the law from a multitude of perspectives. For example, it cites repeatedly to both criticisms of

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<sup>114</sup> Others include Wayne LaFave et al, *Criminal Procedure* 4th Ed. (West 2024), David S. Rudenstein *et al.*, *Criminal Constitutional Law* (Lexis 2023), and John Wesley Hall, *Search and Seizure* (Lexis 2023).

<sup>115</sup> Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* 6th Ed. (West Mar. 2024).

<sup>116</sup> 392 U.S. 40 (1968).

<sup>117</sup> For example, if a police officer feels “a gun” and pulls it out, and it is not a gun but in fact a bag of drugs, a court may uphold the search if the officer can articulate facts that show they **reasonably believed** the bag was a gun.

*Terry*,<sup>118</sup> and to those that endorse *Terry* and believe in the police power to stop-and-frisk as a method of crime reduction.<sup>119</sup> For example, in § 9.1(d), the author notes the difficulty of placing police conduct into two closed boxes: arrests, for which there must be probable, cause, and not-arrests, in which police have no right to impose *any* sort of intrusion on the individual. This was petitioner *Terry*'s main contention: that since the officer who stopped him admittedly had no probable cause for an arrest, there was no evidence to justify any other intrusion (this was also Justice Douglas' opinion expressed in his dissent).<sup>120</sup> The author points out that the Court's decision to skirt around the issue is "unfortunate" but then goes on comment approvingly on the reasonableness analysis and balancing test the Court uses to come to its decision.<sup>121</sup> It cites to sources that argue that there exists statistical evidence of the power of stop-and-frisk as a method of preventing crime, and to sources that, on the other hand, argue that *Terry* stops have "little value-added as a criminal control measure."<sup>122</sup>

In the following section, 9.1(e), the treatise addresses the "hard realities" of *Terry*: the issue of race.<sup>123</sup> In it, the treatise analyzes the many critiques of *Terry* that argue it condones and authorizes racial profiling and harassment of Black and Brown communities. It also explains the arguments made by those who approve of the Supreme Court's recognition of stop-and-frisk power. However, researchers should be wary of relying too much upon the opinions expressed by

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<sup>118</sup> Such as Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST.J. CRIM. L. 73, 74 (2017) (asserting that *Terry* leads to unjustified racial disparities in stop-and-frisk practices and that the only way to prevent them is to eliminate stop-and-frisk altogether).

<sup>119</sup> See e.g. *Search and Seizure*, § 9.1(e) at n. 53.

<sup>120</sup> *Search and Seizure*, § 9.1(d) Is probable cause required?

<sup>121</sup> The balancing test is that of the "interest of the public [and government] in crime prevention and detection" versus the interest of "the individual in privacy and security. *Id.* In short, the Court finds that *Terry* stops are justifiable on less than probable cause because the stop-and-frisk is a "lesser" intrusion.

<sup>122</sup> Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2402 (2017).

<sup>123</sup> *Id.*

the treatise and should make sure to come to their own conclusions. A treatise cannot take the place of an in-depth reading of seminal Supreme Court and D.C. cases. For example, § 9.1(e) which examines the issue of racial profiling in the context of *Terry* states, “argument along these lines [that stop and frisk is utilized by the police to harass people of color] was forcefully presented to the Supreme Court, and it is apparently from the opinion in *Terry* that this was a matter of great concern to the Court.”<sup>124</sup> Yet *Terry* mentions race in but one single line. And Chief Justice Warren dismissed those concerned with racial discrimination by explaining that the exclusionary rule has limitations and is ineffective in some contexts as a deterrent; presumably, ineffective as a deterrent to racial profiling. To many, this was the Court’s way of completely brushing aside the very complex and difficult issue of racism withing policing.

The treatise delves into Fourth Amendment law beyond *Terry* and can help researchers understand other important aspects of criminal procedure. Researchers should have a grasp on related concepts such as plain view and plain touch doctrine, exigent circumstances, and the protective sweeps to truly understand stop-and-frisk. As a final note, it is crucial that researchers evaluate sources, including even this pathfinder, and considered authors’ perspectives and biases. Wayne LaFave, like everyone else, comes with his own experiences which inform his work.

Overall, *Search & Seizure* is an excellent starting point for researchers. The treatise has been cited in cases across the country, including in some of the D.C. Court of Appeals cases referenced in this pathfinder. For researchers who feel overwhelmed and are unsure where to start, *Search & Seizure* is an excellent guide on all aspects of the Fourth Amendment.

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<sup>124</sup> *Id.*

### 3. A.L.R Annotations

There are hundreds of A.L.R. annotations that examine the various dimensions of stop-and-frisk. They serve as valuable insights to researchers, outlining discrete issues and citing hundreds of cases. Relevant annotations can be found using the Supreme Court and D.C. Court of Appeals cases above, or by running a tailored search on Westlaw or Lexis. These annotations are helpful because *Terry* analysis is incredibly fact-specific; minute details such as body language, odors, and time of day can influence a court's decision. Three annotations are explored below: one addresses racial profiling, while the others highlight specific factual issues that commonly appear in cases involving stop-and-frisk.

*Racial Profiling by Law Enforcement Officers in Connection with Traffic Stops as Infringement of Federal Constitutional Rights or Federal Civil Rights Statutes.*<sup>125</sup>

This incredibly expansive A.L.R. annotation addresses the various constitutional claims that a person who has been subjected to racial profiling during a traffic stop may pursue. For this pathfinder, § 8, Fourth Amendment – Sufficient evidence of racial profiling, generally, and § 9, Fourth Amendment – Insufficient evidence of racial profiling, are the most helpful sections. The annotation also explores the viability of constitutional claims against police officers where the motorist in fact matched the description of a criminal suspect,<sup>126</sup> and examines the influence of an officer's knowledge of a motorist's race prior to making the stop on the reasonable suspicion analysis.

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<sup>125</sup> Kimberly Winbush, Annotation, *Racial Profiling by Law Enforcement Officers in Connection with Traffic Stops as Infringement of Federal Constitutional Rights or Federal Civil Rights Statutes*, 91 A.L.R. 2d 1 (2024).

<sup>126</sup> See, *supra*, starting on page 27 on eyewitness identifications and lookout descriptions.

*Search and Seizure: “furtive” movement or gesture as justifying police search.*<sup>127</sup>

A certain gesture with one’s hands may add to reasonable suspicion. In *Maye*, for example, the court addressed whether Maye’s action of adjusting his waistband and placing his hand into his pocket added to the reasonable suspicion analysis, ultimately finding that the gestures were capable of too many innocent explanations to support a *Terry* stop. This annotation examines all the cases in which a court found or failed to find that police officers had reasonable suspicion after viewing a “furtive” gesture, either on its own or in combination of other factors.

*Propriety of a stop and search by law enforcement officers based solely on drug courier profile.*<sup>128</sup>

This annotation explores cases in which courts considered whether a suspect’s match to a drug courier profile provided reasonable articulable suspicion for a *Terry* stop. It addresses inconsistencies in how courts have analyzed a “drug courier profile,”<sup>129</sup> and how it provides opportunity for police officers to use the impermissible grounds of race or gender as grounds of a stop under the guise of a person “matching” a drug courier profile.

### III. Critical Race Theory

Critical race theory is the lens through which this pathfinder is written. It is an approach to the law and legal institutions that examines their intersection with race, on the premise that

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<sup>127</sup> Jeffrey F. Ghent, Annotation, *Search and Seizure: “furtive” movement or gesture as justifying police search*, 45 A.L.R. 3d 581 (2023).

<sup>128</sup> Kimberly Winbush, Annotation, *Propriety of stop and search by law enforcement officers based solely on drug courier profile*, 37 A.L.R.5th 1 (2022).

<sup>129</sup> For example, “being either the first or last to deplane, buying either a one-way or round-trip ticket, taking either a nonstop flight or changing airlines, traveling either alone or with a companion, and acting unusually nervous or peculiarly calm are all supposedly indicative of drug smuggling.” *Id.* at 14.

racism is not just a matter of individual prejudice but a deeply ingrained feature of our society. It aims to understand racism in the law within the broader perspectives of racism within our society: in history, economics, group and self-interest, and even emotions and the unconscious.<sup>130</sup> In the United States, the law was created to and continues to reinforce the interests of the historically privileged: White people. The Fourth Amendment in particular reinforces this dynamic. “The Fourth Amendment constructs black as criminal by making it easier for police to investigate and arrest black people. It is self-reinforcing because those statistics [of arrests] are then used to demonstrate that blacks, are, in fact, criminals. It turns out there is an important relationship between looking for things and finding things.”

Intersectionality is an important aspect of critical race theory, recognizing that everyone has multiple overlapping identities, such as their race, gender, and sexuality, and that an individual’s lived experience is different based on their multiple overlapping identities.<sup>131</sup> While this pathfinder cannot comprehensively address all intersectional elements of the Fourth Amendment and race, such as the different ways in which Black men and Black women are profiled and harassed by law enforcement, researchers should take an intersectional approach when attempting to understand the Fourth Amendment through the lens of critical race theory.

A selection of works is identified below. To get started with critical race theory (CRT), researchers can use Harvard Law’s Critical Legal Studies research guide.<sup>132</sup> It explains the history and development of CRT beginning with Derrick Bell, lists search terms that can be used

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<sup>130</sup> See generally Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* at 3 (2017)

<sup>131</sup> See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex, Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Policies*, 1989 *University of Chicago Legal Forum* 139 (1989).

<sup>132</sup> Critical Legal Studies Research Guide, Harvard Law School Library (last updated Apr. 12, 2024), available at <https://guides.library.harvard.edu/law/critical-legal-studies#s-lg-box-20336838>.

on Westlaw, Lexis, or HeinOnline, and distinguishes several articles, some of which are discussed below. It also identifies specialty journals which researchers may find helpful: the National Black Law Journal and the Georgetown Journal of Law and Modern Critical Race Perspectives, to name a few.

Paul Butler,<sup>133</sup> one of the most frequently consulted legal scholars on race and criminal justice, and whose work is referenced many times in this pathfinder, has published several law review articles applying CRT to the Fourth Amendment, including “A White Fourth Amendment” and “Stop and Frisk & Torture Lite: Police Terror of Minority Communities.”<sup>134</sup> In Stop and Frisk and Torture-Lite, Butler describes how the decision in *Terry* fits “into a historical lineage of racial subordination of African-Americans.”<sup>135</sup> He argues that the power given to the police in *Terry* to stop-and-frisk is a legal mechanism that serves the larger purpose of keeping people of color “in their place,” much as slavery and Jim Crow laws did prior to 1968.<sup>136</sup> In “A White Fourth Amendment,” Butler traces Fourth Amendment jurisprudence, including *Terry*, *Whren*, and *Wardlow*, discussed above, and how each case aims to reinforce the association of people of color with criminality. Paul Butler’s book, *Chokehold*, has garnered praise for its prose and depth.<sup>137</sup> It compares the criminal justice system in the United States to a literal chokehold violently subduing and oppressing Black men.<sup>138</sup> It describes how the law constructs Black men as “thugs,” then controls them and tortures them, and why the system, which was created as a chokehold, cannot be reformed, but must be disrupted. Chapter 3, “Sex and Torture: The Police

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<sup>133</sup> Paul Butler, Faculty Profile, Georgetown Law, found at <https://www.law.georgetown.edu/faculty/paul-butler/>.

<sup>134</sup> Paul Butler, A White Fourth Amendment, 43 TEX. TECH. L. REV. 245 (2010); Paul Butler, Stop and Frisk and Torture-Lite: Police Terror of Minority Communities, 12 OHIO ST. J. CRIM. L. 57, 64 (2014).

<sup>135</sup> Butler, Stop and Frisk and Torture-Lite at 66-69.

<sup>136</sup> *Id.*

<sup>137</sup> Paul Butler, *Chokehold: Policing Back Men* (The New Press 2017)

<sup>138</sup> Referencing a dangerous police tactic to subdue people that has killed people, including Eric Garner.

and Black Male Bodies” dives into stop-and-frisk and its role in enforcing the “chokehold.” It is a deeply moving and compelling work that draws from Paul Butler’s own experiences both as a Black man and as a prosecutor in D.C.

Another noted legal scholar, Angela J. Davis, explores the many ways that the criminal justice system at every stage impacts the lives of Black men in her influential work *Policing the Black Man: Arrest, Prosecution, and Imprisonment*.<sup>139</sup> The book is an emotional, thought-provoking exploration that begins with the historical roots of racism in the United States and ends with an examination of modern-day police killings of unarmed Black men. It not only addresses stop-and-frisk but delves into other aspects of the criminal justice system and the dynamics that serve to keep Black men trapped in the criminal justice system, such as prosecutorial discretion and the collateral consequences of incarceration.

#### IV. Current Awareness Sources

To stay updated on developments in Fourth Amendment law and stop-and-frisk, researchers should start by setting up alerts using the cases identified above. The Daily Washington Law Reporter can be used to set up alerts; further, Lexis allows researchers to create alerts based on Shepard’s reports, search terms, sources, and topics. Westlaw also allows researchers to set up notifications that will alert with a specific KeyCite or citation. One can also set up email alerts from organizations such as the Public Defender Service of D.C., the National Association of Criminal Defense Lawyers, the National Association of Public Defenders, or the Black Public Defenders Association, or follow them on social media. Other interest organizations include the NAACP, ACLU, Brennan Center for Justice, Southern Poverty Law Center, the

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<sup>139</sup> Angela J. Davis, Ed., *Policing the Black Man: Arrest, Prosecution, and Imprisonment* (Pantheon Books, 2017)



Sentencing Project, the Mexican American Legal Defense and Education Fund, and Asian Americans Advancing Justice. These organizations regularly publish reports and press releases for interested students and practitioners.

### *The Importance of Data*

Researchers should not overlook statistics as an important source of information. Stop-and-frisk, on its face, is a “neutral” practice; it is in its application that it is discriminatory. If a police officer is motivated by racial animus during their stop, they are unlikely to admit it, at least in a court of law. Those without explicit biases often have implicit ones; and nonetheless, police officers without biases still participate in racist systems and practices.<sup>140</sup> The Supreme Court made it clear in *Whren* that the subjective motivations and biases of police officers, while not irrelevant, do not call for the exclusion of evidence under the Fourth Amendment if their actions were objectively reasonable.<sup>141</sup> It is for these many reasons that it is so difficult to argue that a single incident of stop-and-frisk was motivated by racial discrimination. However, *data* tells a different story: it tells the story of police practices that target and harass people of color. Further, the Supreme Court did note in *Whren* that racial profiling would violate the Equal Protection Clause: “We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. . . the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause.”<sup>142</sup> Statistics are an important tool in bringing constitutional claims against state and local

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<sup>140</sup> Butler, Stop and Frisk and Torture-Lite at 68.

<sup>141</sup> A defense attorney can and should inquire into the motivations of a police officer. Improper motivations can be a factor that leads a court to determine there was no reasonable suspicion or probable cause. But if there *is* reasonable suspicion of *an* offense, then whether an officer was motivated by bias or was profiling does not make the stop or frisk unlawful. *Whren*, 517 U.S. at 813.

<sup>142</sup> *Id.*

governments.<sup>143</sup> Criminal defense attorneys can also use statistics while advocating for their clients. While the Fourth Amendment establishes objective reasonableness as test for evaluating stops, data that reveals racial disparities in police practices can significantly challenge the credibility of officers who have stop-and-frisked defendants. Legal advocacy goes beyond the strict confines of the courtroom. Advocates have a duty to shed light on racism underlying their clients' arrests, and documenting racist incidents and practices not only protects their clients' rights in the courtroom but may help protect them within the community.

The ACLU of D.C. has recent stop-and-frisk data on their website and researchers can readily access data from other jurisdictions from many of the interest organizations listed above.<sup>144</sup> The Prison Policy Initiative has collected a vast number of resources on race and the criminal justice system, offering nationwide and state-specific data along with data visualization tools.<sup>145</sup> Their collection of briefings and reports includes “What ‘Stop-and-Frisk’ Really Means: Discrimination and Use of Force.”<sup>146</sup> For researchers that want to delve further into racial discrimination in our criminal justice system beyond stop-and-frisk, there are also extensive reports on mass incarceration, bail reform, sentencing enhancement zones, and collateral consequences of crimes. The Initiative does not solely focus on race but also explores the

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<sup>143</sup> In the landmark case *Floyd v. City of New York*, a federal judge found that the New York Police Department had violated the Fourth and Fourteenth Amendments through its racially discriminatory stop-and-frisk practices. See *Floyd v. City of New York*, 959 F. Supp. 540 (S.D.N.Y. 2013). Many of the factual findings in the 198-page opinion were based in statistics. While *Floyd* was seen as an incredible win for communities of color, it has not had a perfect outcome. While the number of stop-and-frisks in New York have reduced dramatically (from 685,724 in 2012 to 16,971 in 2023), those stopped are still disproportionately Black or Latino (87% in 2012 to 89% in 2023). See Stop-and-Frisk Data, NYCLU (Mar. 14, 2019) accessed at <https://www.nyclu.org/data/stop-and-frisk-data>.

<sup>144</sup> See Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data, ACLU-DC (June 16, 2020) accessed at [https://www.acludc.org/sites/default/files/2020\\_06\\_15\\_aclu\\_stops\\_report\\_final.pdf](https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf).

<sup>145</sup> See Race and ethnicity, Prison Policy Initiative (last updated Apr. 16, 2024), [https://www.prisonpolicy.org/research/race\\_and\\_ethnicity/#:~:text=Percent%20of%20people%20in%20prison,who%20are%20Black%3A%2048%25%20%2B](https://www.prisonpolicy.org/research/race_and_ethnicity/#:~:text=Percent%20of%20people%20in%20prison,who%20are%20Black%3A%2048%25%20%2B).

<sup>146</sup> Rose Lenehan, What “Stop-and-Frisk” Really Means: Discrimination & Use of Force, Prison Policy Initiative (Aug. 17, 2017), available at <https://www.prisonpolicy.org/reports/stopandfrisk.html>.

intersection between the criminal justice system and other factors like gender, poverty, HIV status, and more. Other interest organizations and government agencies have compiled significant data on stop-and-frisk practices within different jurisdictions.<sup>147</sup>

## V. Conclusion

Stop-and-frisk has had a lasting impact on Black and Brown communities. It has contributed to mass incarceration and lead to violence and death at the hands of police officers. It has also profoundly affected the relationship between people of color have with the criminal justice system, their trust in the police, their sense of safety in their own neighborhoods, and their mental and emotional wellbeing.<sup>148</sup> Using this pathfinder, a person can effectively research Fourth Amendment search and seizure post-*Terry* and critically assess the law to understand the impact that it has on people of color. The law cannot be separated from the reality of its application and from the institutionalized racism that exists across our society. Those who aim to work in the criminal justice system need to understand this dynamic surrounding the Fourth Amendment to effectively advocate for people of color who are disproportionately stopped, frisked, arrested, and incarcerated.

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<sup>147</sup> See e.g. Report on Stop and Frisk in Chicago, ACLU of Illinois (Mar. 2015), [https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU\\_StopandFrisk\\_6.pdf](https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf); Report, Investigation of the Ferguson Police Department, United States Department of Justice Civil Rights Division (Mar. 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf); Racial and Identity Profiling Advisory Board 2023 Annual Report, State of California (Jan. 2023), <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>.

<sup>148</sup> See Julie Dressner & Edwin Martinez “The Scars of Stop-and-Frisk” New York Times (June 12, 2012) (telling the story of a young Black man in Brooklyn who, prior to his 18<sup>th</sup> birthday, was unjustifiably stopped and often detained more than 60 times).