




2022

The Black Fourth Amendment

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Recommended Citation

Charisma Hunter, *The Black Fourth Amendment*, 80 WASH. & LEE L. REV. ONLINE 171 (2022), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol80/iss4/1>

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The Black Fourth Amendment

Charisma Hunter*

Abstract

Policing Black bodies serves at the forefront of the American policing system. Black bodies are subject to everlasting surveillance through institutions and everyday occurrences. From relaxing in a Starbucks to exercising, Black bodies are deemed criminals, surveilled, profiled, and subjected to perpetual implicit bias when participating in mundane activities. Black people should have the same protections as white people and should possess the ability to engage in everyday, commonplace, and routine activities.

The Fourth Amendment was not drafted with the intention of protecting Black bodies. In fact, Black bodies were considered three-fifths of a person at the drafting of the United States Constitution during the Constitutional Convention in 1787. During the period of Reconstruction in 1868, the Fourteenth Amendment was ratified to remedy racial injustices and to provide Black people with equal protection under the law.

The Supreme Court's jurisprudence on whether the Fourteenth Amendment's Due Process Clause selectively incorporates basic freedoms and rights outlined in the Bill of Rights is nearly incomprehensible. For example, the Supreme

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Court, in a piecemeal fashion, has found that the Due Process Clause of the Fourteenth Amendment should be construed to require police and the judiciary to acknowledge and respect basic rights found in the amendments, such as the Fourth and Eighth Amendments. Yet, for over fifty years after the ratification of the Reconstruction Amendments, the Court refused to acknowledge that the Due Process Clause was designed to protect the rights of individuals against the state.

The Black Fourth Amendment will repair and remedy the discriminatory policing of Black bodies. The Black Fourth Amendment will repair and remedy the Court's Fourth Amendment jurisprudence by creating a rebuttable presumption, making prosecutors and the state prove that the officer had an actual reasonable suspicion or probable cause basis to arrest a Black person, instead of mere subjective ideas and preconceived notions. Through this measure, the Black Fourth Amendment will carry out what the Fourteenth Amendment's enigmatic Due Process Clause was intended to do—to incorporate substantive due process rights, such as those rights outlined in the Fourth Amendment, and to guarantee equal protection to Black people through the Fourteenth Amendment's Equal Protection Clause.

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INTRODUCTION

“I can’t breathe.” Eric Garner was known as the “neighborhood peacemaker.”¹ On a hot summer day in Staten Island, an unarmed Black man, Eric Garner, was placed in an illegal chokehold by a police officer, losing consciousness.² New York Police Department Officers Daniel Pantaleo and Justin D’Amico were called to the scene because of a fight that Garner broke up.³ Pantaleo exchanged words with Garner regarding Garner’s illegal sale of cigarettes, and subsequently placed Garner in a chokehold.⁴ Garner pleaded “I can’t breathe” eleven times before he was pronounced dead.⁵ Despite video evidence recorded by bystanders, a Staten Island grand jury declined to indict Officer Pantaleo and, in the end, then-Attorney General Bill Barr decided to not seek a civil rights indictment against the officer.⁶ The Justice Department cited the lack of evidence provided to prove that Officer Pantaleo “willfully used excessive force to violate Mr. Garner’s rights.”⁷ In response, Reverend Al Sharpton spoke magniloquently about the American justice system: “Five years ago, Eric Garner was choked to death; today the federal government choked Lady Justice, and that is why we

1. *Eric Garner Dies in NYPD Chokehold*, HISTORY (July 15, 2020), <https://perma.cc/HJ9G-BLX8>.

2. *Id.*

3. *Id.*

4. *See id.* (noting that the chokehold maneuver is against NYPD rules).

5. *Id.*

6. *See* Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://perma.cc/PU4T-EHWG> (discussing the contentious debate over whether to bring civil rights charges against the officer who murdered Eric Garner).

7. *Id.*

are outraged.”⁸ Lady Justice’s capacity to administer equal justice for Black men has been restricted. The chokehold on Lady Justice and Black men continues to plague the United States.⁹

The United States makes itself known as the land of equal opportunity for everyone.¹⁰ In the Gettysburg Address, President Abraham Lincoln stated that the United States was dedicated to the idea that “all men are created equal.”¹¹ But the history of the United States and current statistics provide a different narrative. A 2016 study conducted by the Pew Research Center found that Black people earn significantly less income than white people and that the median net worth of household wealth for white people is thirteen times the net worth of Black people.¹² The incarceration rate of Black people is significantly higher than white people.¹³ This Note will discuss how the United States has inadequately addressed racial disparities and racist policing. In fact, the United States has exacerbated the problem through the Supreme Court’s jurisprudence.¹⁴

This Note particularly discusses the impact racist policing has on Black men.¹⁵ Particularly, this Note emphasizes the

8. *Id.*

9. See generally Nirej Sekhon, *The Chokehold*, 57 U. LOUISVILLE L. REV. 43 (2018) (discussing Paul Butler’s evocative work on “the Chokehold,” a metaphor for societal norms that disproportionately impact Black men).

10. But see Isabell V. Sawhill, *Still the Land of Opportunity?*, BROOKINGS (Mar. 1, 1999), <https://perma.cc/DM2B-5M2P> (questioning whether the United States deserves the reputation of being “the land of opportunity”).

11. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), <https://perma.cc/MA7T-YEDL>.

12. See *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RSCH. CTR. (June 27, 2016), <https://perma.cc/XJN4-EMYA> (providing statistics of racial disparities and racial divides in the United States).

13. See Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 12 (2011) (“The overwhelming majority of the increase in imprisonment has been poor people of color, with the most astonishing rates of incarceration found among black men.”).

14. See *infra* Part I.

15. Black women should not be forgotten. Black women have also fallen prey to racist policing and the carceral state. Officers who kill Black women with no accountability are similar to the officers who killed Eric Garner—they escape liability. See KIMBERLÉ CRENSHAW ET AL., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 1 (2015), <https://perma.cc/XM86->

implicit racism in the Supreme Court's jurisprudence when it applies the Fourth and Fourteenth Amendments. Part I comprehensively summarizes the spirit of the Fourth Amendment and its incorporation against the states through the Due Process Clause of the Fourteenth Amendment.¹⁶ Additionally, Part I discusses in detail the Equal Protection Clause of the Fourteenth Amendment and the intention of its writers: to prevent discrimination on the basis of race.¹⁷ Understanding the spirit of the Fourth Amendment and the implications of the Fourteenth Amendment is imperative for the execution of the Black Fourth Amendment.¹⁸ Part II begins by analyzing Supreme Court jurisprudence and the ways in which it reified race, placing race outside of legal analyses when it should be a factor in any Fourth Amendment inquiry.¹⁹ This Note specifically discusses the bleak reality that Black men are deemed criminals by virtue of their skin color. This reality has been made apparent by the anecdotes and news stories which discuss Black men being shot and killed for wearing black hoodies while the Supreme Court granted the Ku Klux Klan the right to wear their uniforms, Black men being seized and killed for being in a predominantly white neighborhood, and Black men being stopped and frisked for wearing designer shoes.²⁰ Part II further discusses the consequences of Black skin serving as a basis for reasonable suspicion, which include negative psychological impacts on the Black community, residential segregation, and mass incarceration.²¹ Part III discusses a solution to racist policing and the Court's inability to remedy it: to add an additional amendment to the U.S. Constitution, titled

9AF9 (PDF) ("The lack of meaningful accountability for the deaths of unarmed Black men also extended to deaths of unarmed Black women and girls in 2015."). Far too many Black women have been subject to racist policing and police brutality: Breonna Taylor, Tanisha Anderson, Atatiana Jefferson, Monique Jenee Deckard, and, unfortunately, the list goes on. See Yelena Dzhanova et al., *50 Black Women Have Been Killed by US Police Since 2015*, INSIDER (July 6, 2021), <https://perma.cc/9757-8DS2> (listing the names and tragic stories of Black women who had fatal encounters with police officers).

16. See *infra* Part I.

17. See *infra* Part I.A.

18. See *infra* Part III.

19. See *infra* Part II.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

the Black Fourth Amendment, making it a requirement for all courts to consider the subjective intent of police officers when they stop and frisk or search and seize Black men.²² In doing so, prosecutors and the state will have to overcome a rebuttable presumption that race and Black skin were used as a proxy for reasonable suspicion to stop and frisk or search and seize Black men, placing the burden on the state to prove otherwise. The Black Fourth Amendment would ensure that the Fourth Amendment and the Fourteenth Amendment work together to provide Black individuals equal protection under the law.

I. THE MEANING BEHIND THE FOURTH AMENDMENT

The Fourth Amendment provides that

[t]he 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.²³

Under the Fourth Amendment, “searches and seizures” affecting personal interests are only forbidden when they are deemed “unreasonable.”²⁴ Police officers are given an abundance of discretion, however, and are therefore granted the ability to conduct warrantless or subjective searches if the officer has probable cause that an individual is subject to criminality. Stops are likewise permitted if the officer has objectively reasonable grounds to believe that the person is armed and dangerous.²⁵ Substantive Fourth Amendment rules such as the situations in which officers can frisk an individual are supposed to be enforceable against police officers who violate them.²⁶ But “policing the police” by setting concrete standards for searches

22. See *infra* Part III.

23. U.S. CONST. amend. IV.

24. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974) (synthesizing Fourth Amendment jurisprudence and articulating its underlying meaning).

25. See *id.* at 360 (explaining the standards necessary for warrantless searches or stop and frisks).

26. *Id.*

and seizures and stop and frisks is a practice that the Supreme Court consistently avoids.²⁷

The Fourth Amendment was rarely cited in Supreme Court cases until the exclusionary rule became applicable to the states.²⁸ The exclusionary rule is a principle under the Fourth Amendment that prevents evidence unlawfully seized by police officers from being used against a criminal defendant in a trial.²⁹ *Boyd v. United States*³⁰ was the starting point for litigating under the Fourth Amendment, and the first Supreme Court case to give the exclusionary rule footing.³¹ In *Boyd*, the Court held that the certain materials were illegally obtained by the Federal government, and thus the admission of the materials into evidence was erroneous and unconstitutional.³² The Justices of the Court saw the exclusionary rule as a mechanism to maintain the Court's integrity and legitimacy.³³ Perhaps Justice Brandeis articulated the Court's stance in defending the exclusionary rule the best, noting that the admission of such unconstitutionally

27. See *id.* at 370 (noting that most judges avoid “policing the police” as it implies that judges are free to depart from their judiciary functions and apply their own notions to policy). Historically, the Court has engaged in “legislative default” in the regulation of police practices, despite Congress’s lack of effort in police reform. See Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 568–67 (1965) (discussing the deference courts give to legislatures in defining norms of police conduct).

28. See LaFave, *supra* note 27, at 580 (noting that more Fourth Amendment cases were litigated once the exclusionary rule was applicable to the states).

29. *Exclusionary Rule*, BRITANNICA (1998), <https://perma.cc/LA36-JGYW> (last updated Feb. 7, 2020).

30. 116 U.S. 616 (1886).

31. See Scott E. Sundby, *Everyman’s Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L 393, 402–03 (2013) (noting that the Supreme Court saw the exclusionary rule as a tool for enabling the judiciary to enforce the rule of law).

32. See *Boyd*, 116 U.S. at 639 (finding that evidence obtained unconstitutionally was erroneously admitted by the trial court); see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 728 n.515 (1999) (explaining that the exclusion of the evidence in *Boyd* extended to the void statute, and did not entirely articulate the modern day exclusionary rule).

33. See Sundby, *supra* note 31, at 403 (emphasizing that the Court believed that without the exclusionary rule the judicial branch would subject itself to the illegality of admitting unconstitutionally obtained evidence).

obtained evidence should be “denied in order to maintain respect for law” and to “preserve the judicial process from contamination.”³⁴ Justice Brandeis also pronounced that the government is “the potent, the omnipresent teacher,” and if the “teacher” becomes a lawbreaker then it “invites anarchy.”³⁵ Thus, the government must not be given the power to unconstitutionally obtain evidence in order to secure the conviction of a private criminal, as this would “bring terrible retribution.”³⁶

In *Weeks v. United States*,³⁷ the Court unanimously adopted the exclusionary rule in its entirety.³⁸ In *Weeks*, private documents were seized from Fremont Weeks’ private dwelling after police officers illegally searched his house without a search warrant.³⁹ The Court articulated that if private documents could be illegally seized and used in evidence, the protection of the Fourth Amendment, which declares the citizens’ right to be secure against searches and seizures, “might as well be stricken from the Constitution.”⁴⁰ Thus, the Court found that the private papers should be restored to Weeks, and that a “prejudicial error was committed.”⁴¹ Furthermore, the Court held that the Fourth Amendment did not apply to state and governmental actors.⁴²

The Supreme Court, however, later established that the right of privacy and the exclusionary rule are at the core of the

34. *Olmstead v. United States*, 277 U.S. 438, 471, 484 (1928) (Brandeis, J., dissenting); *see id.* at 485 (“But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.”).

35. *Id.* at 485.

36. *Id.*

37. 232 U.S. 383 (1914).

38. *See id.* at 392 (holding that the effect of the Fourth Amendment is to secure the people “against all unreasonable searches and seizures under the guise of law”).

39. *Id.* at 386.

40. *Id.* at 393; *see id.* (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”).

41. *Id.* at 398.

42. *See id.*

Fourth Amendment⁴³ and are enforceable against the states through the Fourteenth Amendment's Due Process Clause.⁴⁴ Arguably, the incorporation of the Fourth Amendment through the Due Process Clause protects fundamental rights which may not be explicitly mentioned in the first eight amendments of the Bill of Rights because "due process is not delimited by the Bill of Rights."⁴⁵ Indeed, the Court recognized the problems of police incursions into the privacy of citizens.⁴⁶ But the Court in *Wolf* did not provide a method or an answer to enforce "such a basic right."⁴⁷ The Court stated:

How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.⁴⁸

The Court's unwillingness to provide a remedy for Black individuals to combat racist policing set the stage for the White Fourth Amendment.⁴⁹ Despite the lack of discussion of race in

43. See *Wolf v. Colorado*, 338 U.S. 25, 27–28, 30–33 (1949) (holding that the exclusionary rule itself was not an appropriate mechanism to enforce the Fourth Amendment against the states, yet the security of one's privacy against police intrusion is "implicit in the concept of liberty," and thus the Fourth Amendment is enforceable against the states through the Due Process Clause).

44. See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."); *Kerr v. California*, 374 U.S. 23, 30 (1963) (finding that the Fourth Amendment is enforceable against the states by the same standard which prohibits unreasonable search and seizures).

45. Robert L. Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 *FORDHAM L. REV.* 215, 229 (1975); see also *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (noting that the Due Process clause of the Fourteenth Amendment includes the incorporation of part of the Bill of Rights).

46. See *Wolf*, 338 U.S. at 28 (noting that state-sanctioned police incursions into privacy would run against the guarantees of the Fourteenth Amendment).

47. *Id.*

48. *Id.*

49. See Paul Butler, *The White Fourth Amendment*, 43 *TEX. TECH. L. REV.* 245, 245–46 (2010) [hereinafter Butler, *The White Fourth Amendment*]

the Court's Fourth Amendment jurisprudence, the White Fourth Amendment brings to bear the mass incarceration of Black people by granting a significant amount of discretion to police officers and prosecutors.⁵⁰ Additionally, the White Fourth Amendment reinforces the frame of mind of neighborhood security, police officers, and business owners—that Black men are inherently dangerous and prone to criminality, and white people are innocent.⁵¹

A. The Fourteenth Amendment Incorporates the Fourth Amendment

Slavery of Black people permeated the original Constitution, from its provisions stating that slaves were three-fifths of a person to the Fugitive Slave Clause.⁵² The thirty-ninth Congress fundamentally changed the Constitution by passing the Reconstruction Amendments, which were constructed to limit the judiciary's decisions that disproportionately affect people of color.⁵³ The second and third clauses of the Fourteenth Amendment state that “[no state shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵⁴

Supreme Court precedent discussing the incorporation of the first six amendments and the Eighth Amendment of the Bill of Rights by way of the Fourteenth Amendment is confusing and

(arguing that the Fourth Amendment protects “white only” space and expands the power of the police to work against people of color).

50. *See id.* at 247 (emphasizing that the Fourth Amendment accomplishes its racial projects partly by giving broad discretion to police and prosecutors).

51. *Id.*

52. U.S. CONST. art. I, § 2, cl. 3; art. IV, § 2, cl. 3.

53. *See* Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 852 (2021) (analyzing the balance of congressional and judicial powers granted by the Reconstruction Amendments); *see also* Scott v. Sandford, 60 U.S. 393, 454 (1857) (holding that Dred Scott was not a citizen “in the sense in which that word is used in the Constitution” and therefore lacked the privileges and immunities of citizenship, including the ability to sue in federal court).

54. U.S. CONST. amend. XIV, § 1.

incoherent.⁵⁵ However, the Supreme Court has interpreted the second sentence of the Fourteenth Amendment, the Due Process Clause, to incorporate most of the first eight amendments of the Bill of Rights against the states.⁵⁶ In *Mapp v. Ohio*,⁵⁷ the Court found that the Fourth Amendment right to be secure against invasions of privacy by state actors is enforceable against the states.⁵⁸ The Court essentially stated that virtually every right in the Bill of Rights is incorporated through the Fourteenth Amendment Due Process Clause:

[b]ecause [the Fourth Amendment right to privacy] is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.⁵⁹

In a more recent case, *Timbs v. Indiana*,⁶⁰ Justice Gorsuch had a similar understanding of incorporation,⁶¹ although he

55. *See generally, e.g.*, The Slaughter-House Cases, 83 U.S. 36 (1872) (limiting the protection of the Privileges and Immunities Clause of the Fourteenth Amendment to federal rights); *Wolf v. Colorado*, 338 U.S. 25 (1949) (limiting the Fourth Amendment exclusionary rule to the federal government); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

56. The Seventh Amendment is excluded. *See generally, e.g.*, *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause of the First Amendment); *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment freedom of speech and freedom of the press); *Near v. Minnesota*, 283 U.S. 697 (1931) (First Amendment prohibition on prior restraint); *Aguilar v. Texas*, 378 U.S. 108 (1964) (Fourth Amendment standard for obtaining a warrant), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983); *Hurtado v. California*, 110 U.S. 516 (1884) (refusing to extend the Indictment Clause of the Fifth Amendment); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment right to keep and bear arms); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Parker v. Gladden*, 385 U.S. 363 (1966) (Sixth Amendment right to trial by an impartial jury and Confrontation Clause); *Robinson v. California*, 370 U.S. 660 (1962) (Cruel and Unusual Punishment Clause of the Eighth Amendment).

57. 367 U.S. 643 (1961).

58. *Mapp*, 367 U.S. at 660.

59. *Id.*

60. 139 S. Ct. 682 (2019).

61. *See id.* at 691 (Gorsuch, J., concurring) (referring to Justice Thomas's argument that "the 'privileges or immunities of citizens of the United States'")

wrote that the appropriate vehicle for incorporation of the Bill of Rights against the States is the Privileges and Immunities Clause of the Fourteenth Amendment.⁶² Nonetheless, Justice Gorsuch found that the Fourteenth Amendment requires the states to respect the Eighth Amendment’s prohibition on excessive fines.⁶³

The history of the Equal Protection Clause of the Fourteenth Amendment portrays the constitutional change— “[i]t expanded legislative authority to pass statutes, the executive’s to regulate, and the judiciary’s to review.”⁶⁴ Through judicial review, the judiciary became the key for formulating equitable remedies for discrimination.⁶⁵ The Supreme Court began making structural changes in 1954, when it wrote its opinion in *Brown v. Board of Education*.⁶⁶

II. BLACKNESS AS THE BASIS FOR REASONABLE SUSPICION

*No right is held more sacred, or is more carefully guarded,
by the common law, than the right of every individual to the
possession and control of his own person, free from all
restraint or interference of others, unless by clear and
unquestionable authority of law.*

Justice Horace Gray⁶⁷

include, at minimum, the individual rights enumerated in the Bill of Rights” (citation omitted)).

62. *Id.*

63. *See id.* (explaining that, regardless of the vehicle for incorporation, the Eighth Amendment is applicable to the states through the Fourteenth Amendment).

64. Tthesis, *supra* note 53, at 873.

65. *Id.*; *see also* The Slaughter-House Cases, 83 U.S. 36, 80–82 (1872) (holding that a citizen’s “privileges and immunities,” protected under the Fourteenth Amendment against the states, were limited to the guarantees in the Constitution). Justice Miller, the drafter of the majority opinion, left it to the states to protect the “privileges and immunities” subject to Article IV of the Constitution and its nondiscrimination rule. *Id.* at 78–79. After the *Slaughter-House Cases*, the Court began using the Fourteenth Amendment as a basis for judicial scrutiny. WILLIAM A. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL, POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 32 (2015).

66. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (applying the Fourteenth Amendment’s Equal Protection Clause to hold that the “separate but equal” doctrine was unlawful).

67. *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1981).

The first question in the analysis of Fourth Amendment jurisprudence through the lens of policing is whether the Fourth Amendment is implicated by police conduct that constitutes a search or seizure.⁶⁸ If the Fourth Amendment is implicated by police conduct that constitutes a search or seizure, the second question is whether that search or seizure is reasonable, or whether there was probable cause to justify it.⁶⁹ A search is defined as conduct by officials that intrudes upon a person's *expectations of privacy*; therefore, the scope of the Fourth Amendment's protection extends to *any* area in which an individual has a *reasonable* expectation of privacy.⁷⁰ To justify a search, an officer must have probable cause that what is being searched has evidence of a crime, or "a reasonable ground for belief of guilt."⁷¹ Therefore, for there to be probable cause to justify an arrest or seizures of items, "facts and circumstances within the officer's knowledge" must be "sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."⁷²

In *Terry v. Ohio*,⁷³ the Supreme Court found that the Fourth Amendment was applicable to stops—brief detentions of individuals who are deemed suspicious—and to frisks—pat-downs of the individual to determine whether the individual is armed and dangerous.⁷⁴ In acknowledging that the Fourth Amendment applies to stop and frisks, the *Terry* Court

68. See Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1517 (discussing the trigger and justification questions used in Fourth Amendment jurisprudence).

69. *Id.*

70. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (discussing the two-fold rule in determining an individual's right to privacy).

71. *Brinegar v. United States*, 338 U.S. 160, 175 (1949); see *id.* at 175–78 (discussing the probable cause standard).

72. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); see also *Kremen v. United States*, 353 U.S. 346, 347 (1957) (discussing the standard when analyzing whether an item was seized).

73. 392 U.S. 1 (1968).

74. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 478–79 (2008).

articulated that the necessary level of suspicion for stop and frisks should be reasonable suspicion, a considerably lower standard than probable cause.⁷⁵

Under the reasonable suspicion standard for stop and frisks, when police conduct a stop they must have reasonable suspicion that the individual they stopped was engaged or engaging in criminal activity, and when police conduct a frisk, they must have reasonable suspicion that the individual accosted was armed and dangerous.⁷⁶ When the court makes the determination of whether the officer had reasonable suspicion to conduct a stop and frisk, the court looks to the “totality of the circumstances.”⁷⁷ Based on the totality of the circumstances, the detaining officer must have a “particularized and objective basis for suspecting the particular person stopped of criminal activity.”⁷⁸ In determining whether the officer had a particularized and objective basis for conducting the stop, courts consider the officer’s evidence and information which points to the particular individual they stopped and why they chose to stop that individual.⁷⁹ As discussed in detail below,⁸⁰ the issue with this inquiry set out by the Supreme Court is that it only examines whether the actions taken by the police officer are *objectively* justified based on the facts sufficient to amount to reasonable suspicion or probable cause.⁸¹ Therefore, courts decline to examine the actual motivations, or the *subjective* intent of the officer.⁸²

75. *Id.* at 479.

76. *See id.* (noting that the reasonable suspicion standard has not been precisely defined).

77. *See* United States v. Cortez, 449 U.S. 411, 417 (1981) (“But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.”).

78. *Id.* at 417–18.

79. *See id.* at 418 (discussing the evidence needed for a police officer to justify a stop).

80. *See infra* Part II.A.

81. *See* Maryland v. Pringle, 540 U.S. 366, 371 (2003) (noting that probable cause is fluid and incapable of precise definition, and thus depends on the facts drawn from the officer).

82. *See id.* at 366 (“[A] court must examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996))).

Historically, the Fourth Amendment has not been applied equally. There is a clear link between race and the Fourth Amendment—evidence of targeting minorities is apparent and provides solid information on individuals stopped by police officers on the basis of race.⁸³ However, as discussed below, the Supreme Court has historically separated racial concerns of the Fourth Amendment by focusing on the objective intent of police officers, despite race based targeting.⁸⁴ In sum, a Fourth Amendment analysis includes weighing a host of factors such as the exact text of the Fourth Amendment,⁸⁵ expectations of privacy,⁸⁶ and whether a suspect poses a threat to the public.⁸⁷ The various criteria play a role in discerning whether police officers have violated the Fourth Amendment, but the impact of race and implicit bias simply does not.⁸⁸ Therefore, determining whether a search or seizure is reasonable can disguise preconceived notions and assumptions about the criminality of Black people.⁸⁹

In *Terry v. Ohio*, the Supreme Court examined the authority of police officers to stop and frisk an individual based

83. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 362 (1998) (“[E]vidence of racial targeting provides concrete and objective information on the racial populations of motorists stopped by police officers. Absent a race-neutral explanation, this evidence shows that police officers are targeting black and other minority motorists in an arbitrary and biased fashion, in violation of the Fourth Amendment.”).

84. See *id.* (noting that the Court refuses to scrutinize race-based pretextual stops).

85. See *Hester v. United States*, 265 U.S. 57, 59 (1924) (concluding that the protection accorded by the Fourth Amendment to the people in their “persons, houses, papers, and effects” does not extend to open fields).

86. See *California v. Ciraolo*, 476 U.S. 207, 210 (1986) (contemplating objective criteria in discerning whether Ciraolo’s Fourth Amendment protections were violated); see also *Oliver v. United States*, 466 U.S. 170, 177 (1984) (“The Amendment does not protect the merely subjective expectation of privacy, but only those [expectations] that society is prepared to recognize as “reasonable.”” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967))).

87. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.”).

88. Maclin, *supra* note 83, at 371.

89. See *id.* (noting that the reasonableness standard can cover unspoken fears about law enforcement and those “enmeshed in confrontations” with police officers).

on the officers' suspicion that the individual might be engaging in criminal activity.⁹⁰ In *Terry*, a Cleveland detective saw two Black men, John Terry and Richard Chilton, on a street corner and claimed that the two walked back and forth along the same route, stared into the same store window, and then congregated on a street corner with a third man.⁹¹ The detective followed and confronted the three men, believing that they were "casing a job, a stick-up," and after asking the suspects to identify themselves, subsequently spun Terry and patted him down.⁹² The detective found pistols in Terry and Chilton's overcoats.⁹³ Terry and Chilton were both charged with carrying concealed weapons.⁹⁴

At the motion to suppress, the prosecution argued that the weapons were seized following a search incident to a lawful arrest.⁹⁵ The trial court rejected the prosecution's argument but denied the defendants' motion to suppress the pistols, finding that the officer had "reasonable cause to believe that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action."⁹⁶ Chilton and Terry waived jury trial and pleaded not guilty, and the trial court adjudged them to be guilty, and the Court of Appeals for the Eighth Judicial District affirmed.⁹⁷ The Supreme Court of Ohio dismissed the defendants' appeal, finding that there was no "substantial constitutional question."⁹⁸ Terry appealed to the United States Supreme Court.⁹⁹ On appeal, the Court confronted the issue of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest" under the

90. See *Terry v. Ohio*, 392 U.S. 1, 27–28 (1968) (finding that a reasonable person would have believed Terry was engaging in suspicious behavior and thus the seizure was reasonable under the Fourth Amendment).

91. *Id.* at 5–6.

92. *Id.* at 6.

93. *Id.* at 7.

94. *Id.*

95. See *id.*

96. *Id.* at 7–8.

97. *Id.*

98. *Id.*

99. *Id.* at 5 n.2 (explaining that Chilton passed away following the grant of the writ of certiorari).

Fourth Amendment.¹⁰⁰ To decide whether the search and seizure were unreasonable, the Court had to determine (1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place.¹⁰¹

Using a flawed line of reasoning, the government argued that the right to investigate a citizen gives rise to the right to conduct a reasonable search of a citizen to protect the safety of police officers.¹⁰² Terry, on the other hand, argued that stop and frisks should be subject to probable cause.¹⁰³ Thus, according to Terry, it is unreasonable for an officer to search a suspect until the situation evolves to a point where there is probable cause to make an arrest.¹⁰⁴ Chief Justice Warren delivered the majority opinion of the Court, holding that a search is reasonable under the Fourth Amendment "where a police officer observes an unusual conduct which leads him reasonably to conclude in light of his experience that a criminal activity may be afoot and that the person whom he is dealing with may be armed and dangerous."¹⁰⁵ Accordingly, any weapons seized may be properly introduced into evidence.¹⁰⁶

Chief Justice Warren began his analysis by focusing on "the governmental interest which *allegedly* justifies official intrusion upon the constitutionally protected interests of the private citizen."¹⁰⁷ He further explained that there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or

100. *Id.* at 15.

101. *See id.* at 19 (noting that there is no question to whether the officer seized the petitioner and subjected him to a search—the inquiry was whether it was reasonable for the officer "to have interfered with petitioner's personal security as he did"); *see also* *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring) (arguing that the Court has historically "refused to permit the use of articles from a seizure which could not be strictly tied to and justified by the exigencies" that excused a prior warrantless search).

102. *Terry v. Ohio*, 392 U.S. 1, 22–23 (1968).

103. *Id.* at 25.

104. *Id.*

105. *Id.* at 30.

106. *Id.* at 30–31.

107. *Id.* at 21. (emphasis added).

seizure) entails.”¹⁰⁸ In justifying the intrusion of an individual’s person, the police officer must be able to point to articulable facts “taken together with rational inferences from those facts,” to reasonably warrant the intrusion.¹⁰⁹ The specific and articulable facts are weighed against an objective standard—one must ask whether “the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action was appropriate.”¹¹⁰ The Court emphasized that an officer should have discretion when they are justified in believing the individual whose suspicious behavior they are investigating is presently dangerous to the officer or others.¹¹¹ *Terry* thus established that officers are permitted to stop a person for questioning when they have reasonable suspicion that the person is presently dangerous, even if that suspicion does not amount to the probable cause necessary to effectuate an arrest.¹¹²

The Supreme Court has, maybe inadvertently, played a role in exacerbating racial discrimination. The narrative Chief Justice Warren articulated has served as an underlying basis for unreasonable search and seizures of Black people by setting

108. *Id.* at 21 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 534–35, 536–37 (1967)).

109. *Id.*; *see id.* (emphasizing that the Fourth Amendment becomes meaningful when it is assured that at some point the officers can be subjected to the neutral scrutiny of the judge who must evaluate the reasonableness of the search or seizure in light of the circumstances).

110. *Id.* at 22; *cf.* *Carroll v. United States*, 267 U.S. 132, 162 (1925) (finding that the officers were justified in their search and seizure as the facts and circumstances within their knowledge were sufficient to warrant a man of reasonable caution that liquor was being transported); *Beck v. State of Ohio*, 379 U.S. 89, 97 (1964) (concluding that the officer acting in good faith is not enough, as a subjective good faith test would evaporate the protections of the Fourth Amendment).

111. *See Terry v. Ohio*, 392 U.S. 1, 24 (1968) (reasoning that if the officer is justified in believing that the individual whose suspicious behavior he is investigating is presently dangerous, it would be unreasonable to deny the officer the power to take measures to determine whether the person is carrying a weapon).

112. *See Peter A. Lyle, Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L.J. 243, 252 (2001) (arguing that the Court’s reasoning creates problems for minority plaintiffs in civil rights actions as it ignores racial perceptions).

the stage for a “good faith” exception¹¹³—Black people are deemed suspicious, that is, *presently dangerous*, in everyday encounters by virtue of the color of their skin and having characteristics that are deemed inferior. Indeed, in *United States v. Leon*,¹¹⁴ the Burger Court concretely reflected the ideology of the Warren Court by modifying the exclusionary rule to permit the introduction of evidence so long as it was obtained in good faith.¹¹⁵ The *Leon* Court concluded that the “marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance . . . cannot justify the substantial costs of exclusion.”¹¹⁶ In doing so, the Court created an exception to the probable cause requirement—the search and seizure is valid so long as the police officer executed in a reasonable manner and in “good faith” of a facially valid warrant.¹¹⁷ This exception disproportionately affects Black people, given that the officer may have “good faith” that the Black individual is engaging in criminal activity, based on his pretextual ideals.¹¹⁸ In other words, being Black while engaging in typical activities creates a basis for reasonable suspicion and probable cause under the *Terry* regime.¹¹⁹

Chief Justice Warren himself acknowledged the prominent tension between Black communities and police officers even as

113. See Susan F. Mandiberg, *Twists in the Use of Warren Court Fourth Amendment Rhetoric: Searches, Reasonableness, Good Faith*, 51 U. PAC. L. REV. 789, 816 (2020) (describing the Court’s journey to a “good faith” exception to the Fourth Amendment through “the elimination of judicial integrity as a reason to exclude evidence obtained” unconstitutionally and “the combination of the . . . rationale of deterrence with the notion of an officer’s subjective good faith”).

114. 468 U.S. 897 (1984).

115. See *id.* at 920 (finding that in most cases involving a search and seizure, the police officer is not engaged in illegality).

116. *Id.* at 922.

117. *Id.*

118. See Brandon Garrett, Note, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1815 (2000) (emphasizing that a Black male engaging in typical activities such as walking down the street or driving his car faces a “greater likelihood of pretextual police stops”).

119. See *Terry*, 392 U.S. at 21 (“[I]n justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

he undervalued the exclusionary rule as a rights-protective deterrent tool.¹²⁰ In fact, he cited a 1967 report issued by the President's Commission on Law Enforcement and Administration of Justice which found that the misuse of interrogations increase as police departments adopt aggressive patrol strategies in which officers are encouraged to stop and question persons on the street whom they deem suspicious.¹²¹ He further reasoned that this exacerbated police-community tensions, particularly in situations where the stop and frisk of minorities is "motivated by the officers' perceived need to maintain the power image."¹²² Yet, he reasoned that no judicial opinion could "comprehend the protean variety of the street encounter."¹²³ The Chief Justice did not view this case as one that could be directly transformative for minorities in altering the White Fourth Amendment to work justly for them, but as one that would relax the vigorous application of the exclusionary rule.¹²⁴ Instead, Chief Justice Warren favored the procedural standard of the exclusionary rule that courts continue to embrace today: (1) the government finds incriminating evidence against the defendant, (2) prior to the trial, the defendant will move to exclude that evidence by invoking the exclusionary rule, and (3) the government will argue that the defendant's Fourth Amendment rights were not violated and, thus, the incriminating evidence should be admitted.¹²⁵ The Chief Justice asked the wrong question when addressing whether the exclusionary rule could be helpful in deterring racial

120. *See id.* at 14–15 ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.").

121. *Id.* at 14 n.11 (citing PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 183 (1967)).

122. *Id.* (internal quotation omitted).

123. *Id.* at 15.

124. *See id.* at 13 (discussing the limitations of the exclusionary rule and how it cannot be invoked to exclude evidence that was discovered during a legitimate police investigation); *see also* Butler, *The White Fourth Amendment*, *supra* note 49, at 246 (arguing that the Fourth Amendment is a project of some Supreme Court Justices—including Chief Justice Warren—to expand the power of police against people of color).

125. *See* Carbado, *supra* note 68, at 1530 (noting that the dominant rationale for the exclusionary rule has been deterrence of unconstitutional police behavior).

harassment.¹²⁶ As Devon Carbado correctly articulates, the question should have been “whether a reasonable suspicion standard would encourage [racial harassment policing].”¹²⁷

Perhaps focusing on the injustices that minorities face was too radical in the late 1960s—at the tail end of the Civil Rights Movement—and thus the Chief Justice worked his way around addressing the issue of policing minorities. Or perhaps, he found it easier, in fear of the other Justices disagreeing or societal backlash, to incorrectly place the policing of Black men in a category that reflects what the White Fourth Amendment was intended to be: a mechanism in which the factor of race is not a part of any Fourth Amendment analysis.¹²⁸ Or maybe the Supreme Court consistently favors discretion within the criminal legal system and sacrifices Black people in order to preserve that discretion.¹²⁹ Nonetheless, Chief Justice Warren created a deficient and partial legal regime that provides police officers with a constitutional mechanism under the Fourth Amendment to harass Black men.¹³⁰

A Black man stopping at a stop sign in a “high drug area” for more than twenty seconds is, under the White Fourth Amendment, a sufficient and valid basis of action used as pretext for pursuing investigatory agendas.¹³¹ In *Whren v. United States*,¹³² two police officers of the District of Columbia Metropolitan Police Department were patrolling southeast D.C.

126. See *id.* at 1532 (recalling that Chief Justice Warren believed that the exclusionary rule could do little to solve racial harassment because officers who harass minorities do not have an interest in gathering evidence).

127. *Id.*

128. See *id.* (critiquing the Chief Justice’s “wholesale harassment” argument for lacking nuance and being too narrow on racially harassing policing); see also Butler, *The White Fourth Amendment*, *supra* note 49, at 247 (explaining the character and intentions of the White Fourth Amendment).

129. See *McCleskey v. Kemp*, 481 U.S. 279, 290–91 (1987) (holding that a study indicating a discrepancy in the use of the death penalty correlated with race was not a constitutionally significant risk of racial bias, and thus Georgia’s capital sentencing process did not violate the Eighth Amendment).

130. Carbado, *supra* note 68, at 1525–26; see *id.* at 1533 (arguing that Chief Justice Warren made a special effort to implement a legal regime that gave officers a constitutional mechanism to engage in wholesale harassment).

131. *Whren v. United States*, 517 U.S. 806, 808 (1996).

132. 517 U.S. 806 (1996).

for drug activity.¹³³ The plainclothes officers, in an unmarked car, became suspicious when they passed a Nissan Pathfinder truck with temporary license plates which contained two Black “youthful” occupants at a stop sign.¹³⁴ The truck remained stopped at the intersection for more than twenty seconds, and when the police officers executed a U-turn in order to head towards the truck, the truck turned right “without signaling and sped off at an ‘unreasonable’ speed.”¹³⁵ When one of the officers went to the driver’s window, he observed plastic bags of what appeared to be crack cocaine in Whren’s hands.¹³⁶ Whren was subsequently arrested and charged with violating drug laws.¹³⁷

At the pretrial suppression hearing, Petitioners argued that (1) the stop was not justified by probable cause or reasonable suspicion that they were engaged in illegal drug activity, (2) the officers’ justification for approaching the vehicle was pretextual because Petitioners were Black, and (3) the officers made a decision on who to stop based on the race of the occupants.¹³⁸ The district court denied the suppression, and the Court of Appeals affirmed the convictions, finding that an officer’s subjective intent is irrelevant so long as a reasonable officer in the same circumstances *could have* stopped the vehicle.¹³⁹ At the Supreme Court, Whren argued that probable cause should not be enough to stop a vehicle, as police officers will be tempted to use traffic stops for other investigatory matters; in order to avoid this, he argued, the Fourth Amendment inquiry for traffic stops should be whether a reasonable officer would have made the stop for the reason alleged.¹⁴⁰ Chiefly, Whren argued that there is an inherent balancing test in any Fourth Amendment

133. *Id.* at 808.

134. *Id.*

135. *Id.*

136. *Id.* at 808–09.

137. *Id.* at 809.

138. *See id.* at 809–10.

139. *See id.* at 809 (quoting *Whren v United States*, 53 F.3d 371, 374–75 (D.C. Cir. 1995)).

140. Whren accepted that the officer had probable cause to believe that the traffic codes were violated. *Id.* at 810. Whren argued, however, that “in the unique context of civil traffic regulations” probable cause is insufficient since traffic is “so minutely regulated that total compliance” with the traffic laws would be nearly impossible and the police officer will almost always have an ulterior motive. *Id.*

analysis, which requires the Court to “weigh the governmental and individual interests implicated in a traffic stop.”¹⁴¹ As Justice Scalia, writing for the majority, reliably morphed Whren’s argument, he stated that the real question for the Court, if up to the Petitioners, would be “whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.”¹⁴² But, according to the majority opinion, if probable cause exists, this balancing test should be utilized only when the search or seizure in question was conducted in an “extraordinary manner.”¹⁴³ Thus, the power of police is broadened, and an officer has the power to stop anyone who commits a traffic violation, arrest them without violating any constitutional guarantees, and then conduct a search of the car and its occupants.¹⁴⁴

The *Whren* Court first noted that the constitutional basis for objecting to discriminatory application of laws falls under the Equal Protection Clause of the Fourteenth Amendment and not the Fourth Amendment.¹⁴⁵ The Court went on to state that the Fourth Amendment analysis applied by courts has no elements of subjectivity and is so fundamentally objective that where

141. *Id.* at 816.

142. *Id.* at 814; *see id.* (criticizing Petitioner’s proposed standard for an officer’s reasonable suspicion, finding that although the standard did not use the term “pretext,” it was designed to combat only the perceived “danger” of the pretextual stop).

143. *Id.* at 818 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Winston v. Lee*, 470 U.S. 753 (1985)).

144. *See* M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 117 (2009) (emphasizing the methods in which the Court has broadened police authority to stop and search motorists who are typically Black and the far-reaching implications of *Whren*).

145. *Whren v. United States*, 571 U.S. 806, 813 (1996). Proving an equal protection claim, however, is nearly impossible in the criminal context. *See* Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong, and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1085, 1105 (1998) (discussing Justice Scalia’s relegation of questions of racial bias to the Equal Protection Clause and how police bias may not be concrete enough to satisfy equal protection requirements under the Court’s jurisprudence, anyway). But, as discussed below, *see infra* Part III, courts should incorporate equal protection principles into the Fourth Amendment reasonableness analysis, which would allow courts to consider the pretextual motives of police officers.

there a legitimate search or seizure occurred, it can never be invalidated, even if there is a possibility that the search or seizure was motivated by racial animus.¹⁴⁶ Thus, the Court asks whether the circumstances, viewed objectively, justify the action in question.¹⁴⁷ Accordingly, the Court has concluded that “the Fourth Amendment regulates conduct rather than thoughts,” and “promotes evenhanded, uniform enforcement of the law.”¹⁴⁸

The unanimous decision written by Justice Scalia for the *Whren* Court constructed a smooth pathway for police officers and prosecutors to disguise their pretextual and subjective conceptions of Black men. Therefore, a police officer’s subjective decision to target Black men does not affect the legality of the investigation or litigation, so long as the officer had a sufficient basis for the initial stop.¹⁴⁹ *Whren* bars courts from considering the ulterior mindset of the police officer.¹⁵⁰ Thereby, the *Whren* Court effectively proclaimed that despite the incorporation of the Equal Protection Clause of the Fourteenth Amendment and its intended protections of people of color, the Fourth Amendment could not be used as a tool to combat racial injustice.¹⁵¹ Thus, courts no longer ask whether police officers conducted a traffic stop because they believed the occupants of the car are involved in a crime—if a driver committed any traffic violation, no matter how little, the inquiry stops there.¹⁵² Traffic violations are omnipresent. As a result, an officer can create any

146. See *Whren*, 517 U.S. at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

147. *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

148. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (first citing *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); and then citing *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004)).

149. Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1111 (2000).

150. *Whren*, 517 U.S. at 813.

151. See Butler, *The White Fourth Amendment*, *supra* note 49, at 250 (critiquing the Court’s unwillingness to provide a framework for the Fourth Amendment to be used as a tool to ensure racial justice).

152. See David A. Harris, Essay, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997) (noting that a further inquiry would require lower courts to engage in a post hoc Fourth Amendment judgment based on the mindset of a reasonable officer).

reason to support his agenda.¹⁵³ Driving while Black thus becomes a crime, and the simplest of traffic violations may be exacerbated when committed by a Black male.¹⁵⁴ Indeed, the police officers do the work that the justice systems begs them to do—Black males make up a large portion of those who are prosecuted and incarcerated in the United States.¹⁵⁵ Once again, police use Black skin as a proxy, deeming the Black male to have an aptitude for criminality and thus targeting *all* Blacks because there are *some* criminals.¹⁵⁶

Police exercise their discretion granted by the Court by conflating criminality with Black people. Doing virtually anything while being Black can and will be deemed suspicious by police officers and community members—Black men and women, as a societal and legal matter, are *presently dangerous*.¹⁵⁷ According to the ACLU of New York, in 2019, there were 13,459 stops conducted in New York City.¹⁵⁸ Black people made up 59% of those stops, whereas white people made up 9%; over 90 percent of the reported stops were of Black or Latino people.¹⁵⁹ Yet, according to the study, Black and Latino

153. See *id.* (“Fairly read, *Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost anytime, anywhere, virtually at the whim of the police.”); Butler, *The White Fourth Amendment*, *supra* note 49, at 250 (“Therefore, the Fourth Amendment allows police officers to stop and arrest every black man on the street or in their vehicle and refuse to stop any whites, provided that the officer has probable cause of some violation, no matter how minor.”).

154. See Harris, *supra* note 152, at 546 (discussing the prominence of police officers stopping Black men just to see what they can find); see, also Michael Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST., March 29, 1996, at A1 (discussing the “driving while black” terminology).

155. See MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995), <https://perma.cc/GM67-SDQE> (PDF) (providing that one in three of Black men were under criminal justice supervision).

156. See Harris, *supra* note 152, at 572 (articulating that under such a view, all Black people become criminals and suspects the moment they step outside their homes).

157. See Butler, *The White Fourth Amendment*, *supra* note 49, at 254 (“The Fourth Amendment constructs black as criminal by making it easier for the police to investigate and arrest black people.”).

158. *Stop and Frisk in the de Blasio Era*, ACLU OF N.Y. (Mar. 14, 2019).

159. *Id.*

males only account for five percent of New York City's population.¹⁶⁰ Importantly, 66% of the stops of Black people led to frisks, of which over 93% resulted in no weapon being found.¹⁶¹ This data is unsurprising and points to the systemic problem of officers engaging in racial profiling.¹⁶²

Consider *United States v. Robinson*,¹⁶³ a case arising out of West Virginia, where gun laws are lenient.¹⁶⁴ An unidentified community member informed the Ranson, West Virginia Police Department that he had “witnessed a [B]lack male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket” while in the parking lot of a 7-Eleven in a high crime area.¹⁶⁵ The community member also stated that the Camry was being driven by a white woman, and had “just left” the parking lot.¹⁶⁶ An officer immediately left the station to respond to the call, as, according to an officer's testimony, “Anytime you hear . . . 7-Eleven, your radar goes up a notch.”¹⁶⁷ The responding officer observed a blue-green Toyota Camry that

160. *Id.*

161. *See id.* (finding that Black and Latino people were more likely to be frisked and were less likely to be found with a weapon).

162. *See* Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. C.R. & SOC. JUST. 25, 41 (2011) (discussing the burdens racial profiling places on minorities).

163. 846 F.3d 694 (4th Cir. 2017) (en banc).

164. *See Strictest Gun Laws by State 2022*, WORLD POPULATION REV., <https://perma.cc/55JN-YST5> (giving West Virginia an “F” on its gun laws in comparison to other states).

165. *Robinson*, 846 F.3d at 696 (modification in original). Once a neighborhood is characterized as “high crime,” law enforcement agencies are granted wider latitude in conducting searches and seizures under the Fourth Amendment. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)

But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a ‘high crime area’ among the relevant contextual considerations in a *Terry* analysis.

166. *Robinson*, 846 F.3d. at 696.

167. *Id.*

matched the description.¹⁶⁸ As he tailed the car, he noticed that the suspect was not wearing a seatbelt and subsequently effected a traffic stop.¹⁶⁹

The officer approached the vehicle with his weapon drawn and proceeded to ask Robinson, who notably was the passenger of the vehicle, for his identification card.¹⁷⁰ Reckoning with the fact that Robinson was a Black male, the officer immediately regretted asking for Robinson's identity, as he believed doing so was "probably not a good idea" because "[t]his guy might have a gun[,] [and] I'm asking him to get into his pocket to get his I.D."¹⁷¹ The captain of the police department arrived shortly after this encounter and asked Robinson if he had any weapons on him.¹⁷² Robinson did not verbally respond to the captain's question, and instead, in the words of the officer, "gave [him] a weird look' or, more specifically, an "oh, crap" look[.]"¹⁷³ The captain deduced that the non-verbal conduct equaled criminality.¹⁷⁴ He then directed Robinson to put his hands on top of the car, subsequently performed a frisk for weapons, and then recovered a loaded gun from Robinson's pants.¹⁷⁵ The captain stated that he recognized Robinson as a convicted felon and arrested him.¹⁷⁶ Robinson was charged with the illegal possession of firearm by a felon.¹⁷⁷

The majority opinion in *Robinson* correctly notes that guns are inherently dangerous and pose a great safety risk to police officers.¹⁷⁸ But, in applying the framework set out in *Terry*, the majority failed to address the real question, which is "whether a

168. *Id.* at 697.

169. *Id.*

170. *Id.*

171. *Id.* (modifications in original).

172. *Id.*

173. *Id.* (second modification in original).

174. *See id.* ("[The captain] took the look to mean, 'I don't want to lie to you, but I'm not going to tell you anything [either].'" (second modification in original)).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 698.

person carrying a gun is a danger to the police or others.”¹⁷⁹ The conflation of whether the person carrying the gun is dangerous and the gun being inherently dangerous is unsurprising.¹⁸⁰ For the majority opinion and for the police officers, the Black person is inherently dangerous, and thus the police officers had adequate reasonable suspicion to stop and frisk Robinson.¹⁸¹

Consider the dissenting opinion in *Robinson*, written by Judge Harris and joined by Chief Judge Gregory, Judge Motz, and Senior Judge Davis.¹⁸² The dissenters created the pathway that Chief Justice Warren failed to create in *Terry*.¹⁸³ The dissenters rightly observed that in states such as West Virginia where laws on public possession of guns are lenient, someone carrying a concealed firearm does not mean that they are engaged in criminal activity.¹⁸⁴ In other words, because someone is *armed* does not mean that they are *therefore dangerous*.¹⁸⁵ The “armed and dangerous” standard should not be treated as a unitary concept, for the logic of the *Terry* stop and frisk doctrine is “premised on an independent role for dangerousness: Whether a person in possession, of, say, a screwdriver is deemed ‘armed’ under *Terry* depends entirely on whether there is a separate

179. *Id.* at 708 (Harris, J., dissenting) (emphasis added) (citing *Terry v. Ohio*, 392 U.S. 1, 24 (1968)).

180. See Kevin Cokley, Opinion, *Some Police Automatically Fear Black Men. De-Escalation Training Won't Solve That*, USA TODAY (Apr. 23, 2021), <https://perma.cc/UQW9-C4SA> (“Police violence against unarmed Black people is as predictable as the rising and setting of the sun.”).

181. *United States v. Robinson*, 846 F.3d 694, 702 (4th Cir. 2017).

182. *Id.* at 707 (Harris, J., dissenting).

183. See *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (maintaining that if a police officer believes that an individual is suspicious, the officer should have the power to take necessary measures to determine whether the individual is carrying a weapon).

184. See *Robinson*, 846 F.3d at 707 (Harris, J., dissenting); see also *United States v. Black*, 707 F.3d 531, 539–40 (4th Cir. 2013) (concluding that in a state that legalizes the public carry of firearms, public possession of a gun is no longer “suspicious” and thus a *Terry* stop is prohibited); *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1131–33 (6th Cir. 2015) (same); *United States v. Leo*, 792 F.3d 742, 749–50, 751–52 (7th Cir. 2015) (rejecting the search of a Black man’s backpack on suspicion that it contained a gun when state law permits licensed concealed carry).

185. See *Robinson*, 846 F.3d at 709 (Harris J., dissenting) (“According to the majority[,] if the police have reasonable suspicion that a suspect is ‘armed,’ then they necessarily have reasonable suspicion that he is ‘dangerous,’ as well, justifying a frisk under *Terry*’s ‘armed and dangerous’ standard.”).

reason to believe he or she is also ‘dangerous’ and thus might use that screwdriver as a weapon.”¹⁸⁶ Giving police officers a wide margin of discretion to frisk individuals who are legally armed means that they will likely target whom they deem to be dangerous by virtue, thus posing a threat to the individual’s Fourth Amendment rights.¹⁸⁷ The dissenting opinion accurately accentuates the problem for such a standard given the facts of the case.¹⁸⁸ It outlines the underlying problem of the facts that the majority refused to acknowledge—Robinson was stopped so that the police could investigate the tip they received about a Black male in a high-crime neighborhood, not because he was engaging in criminal activity that could lead someone to believe that he was dangerous.¹⁸⁹

Clearly, the problem lies in the standard by which the officer is permitted to conduct a *Terry* stop and frisk: when the officer *reasonably suspects* that the person they have stopped is armed, then the officer’s conduct is “warranted in the belief that his safety [is] in danger.”¹⁹⁰ Chief Justice Warren failed to realize that Fourth Amendment jurisprudence extends farther than the exclusion of evidence. Fourth Amendment jurisprudence extends to the everyday lives of Black men and families living in inner cities of the United States, as well as immigration arrests.¹⁹¹ The exclusionary rule does not effectively do its job of protecting the constitutional rights and autonomy of Black men.

186. *Id.* at 710–11.

187. *See id.* at 712 (“Allowing police officers making stops to frisk anyone thought to be armed, in a state where the carrying of guns is widely permitted, ‘creates a serious and recurring threat to the privacy of countless individuals.’” (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009))).

188. *Id.* at 712.

189. *See id.* (highlighting that Robinson’s gun possession was *presumptively lawful*, yet the police stopped him precisely because they had a hunch that his possession was unlawful).

190. *Terry*, 392 U.S. at 27 (“[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”).

191. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10362, IMMIGRATION ARRESTS IN THE INTERIOR OF THE UNITED STATES: A PRIMER 2–3 (2021) (articulating that the Fourth Amendment protects against unreasonable searches and seizures in immigration-related arrests and detentions).

The well-known adage that “there must be in-groups whom the law protects but does not bind, alongside out-groups whom the law binds but does not protect,” unfortunately, has manifested itself as reality for Black people.¹⁹² The following subsections explore Supreme Court jurisprudence and racist policing in greater detail.

A. *Anything While Black Suggests Criminality*

Black people are constantly subjected to instances of being summarily judged whenever they step into the sphere of traditional white spaces.¹⁹³ Black people cannot enjoy sightseeing without finding themselves in the lens of a sight.¹⁹⁴ White people often call the police on Black people for participating in normal, everyday activities. One explanation for this could be that white people become confused when Black people occupy white spaces that were traditionally off-limits to people of color.¹⁹⁵ Thus, the Black person who is engaging in everyday tasks or utilizing traditional white spaces is presumed to be out of place, and to only be there because of “crime, violence, or impoverished opportunistic gain.”¹⁹⁶

This preconceived notion and unconscious apprehension has existed since slavery, and is exacerbated by Black people taking up more space in privileged and powerful spaces.¹⁹⁷ As Elijah Anderson firmly articulates, “When black people do appear in such places, white people subconsciously or explicitly want to banish them to a place I have called the ‘iconic ghetto’ A lag between the rapidity of black progress and white acceptance of that progress is responsible for this

192. Fred Clark, *Rights for Me but Not for Thee*, PATHEOS: SLACKTIVIST (Oct. 23, 2019), <https://perma.cc/73XF-TGKY>.

193. See Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. F. 213, 214 (emphasizing the “seemingly never-ending” occurrences of Black people being subjected to vigilante and police detentions when charged with not complying with “informal, unarticulated norms”).

194. Gunsight, BRITANNICA (1998), <https://perma.cc/Q3TX-9TM7>.

195. See Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 948 (2019).

196. *Id.*

197. See *id.* (articulating the continual tension between Black people taking up white spaces and white people being unnerved by it).

impulse.”¹⁹⁸ Black people are deemed criminals when relaxing in a Starbucks, sleeping in a common area of a university, going to the gym, eating in restaurants—the list goes on.¹⁹⁹ Patrons call the police because the Black person is taking up white space. Such communications with police officers can be deemed “racialized police calls” as they “function to expose innocent Black individuals to increased interaction with law enforcement and the associated emotional, psychological, and physiological ill-effects.”²⁰⁰ Americans who fear Black people because of their preconceived notions rely on the police to ensure public spaces remain segregated and that the color line is distinctively drawn.²⁰¹ But when courts analyze the “totality of the circumstances” in a Fourth Amendment inquiry, the courts neglects to factor in the implicit biases of police officers, and therefore officers are permitted to impute suspicious characteristics to actions that are normally not suspicious, until they are combined with the fact that a Black person is engaging in them.²⁰²

198. See Elijah Anderson, *Black Americans Are Asserting Their Rights in “White Spaces.” That’s When Whites Call 911*, VOX (Aug. 10, 2018), <https://perma.cc/EUL4-4EU4> (explaining the sociology of living while Black).

199. Elizabeth Dias et al., *Philadelphia Starbucks Arrests, Outrageous to Some, Are Everyday Life for Others*, N.Y. TIMES (Apr. 17, 2018), <https://perma.cc/E6AQ-KF5P>; Brandon Griggs, *A Black Yale Graduate Student Took a Nap in Her Dorm’s Common Room. So A White Student Called the Police*, CNN (May 12, 2018), <https://perma.cc/LKD5-EYSP>; Rachel Siegel, *LA Fitness Employees Called 911 on Two Black Men They Said Didn’t Pay. They Had.*, WASH. POST (Apr. 20, 2018), <https://perma.cc/U7J5-RZ2F>; Breanna Edwards, *#EatingOutWhileBlack: Subway Employee Calls 911 on Black Family Because She Thought They Would Rob Her*, THE ROOT (July 5, 2018) <https://perma.cc/LM6V-RVXU>.

200. See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 344 (2019).

201. See Fields, *supra* note 195, at 949 (arguing that racially fearful Americans turn to the police to enforce an “invisible color line”).

202. See Aaron H. Mendelsohn, *Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. L. & CRIMINOLOGY 930, 946 (1998) (discussing the issues of the totality of the circumstances analysis and how it gives police officers more discretion).

1. The Hoodie, Racial Optics, and Its Association with Urbanism and Reasonable Suspicion

Clothing can serve as an emotional medium that facilitates individuality, autonomy, and association with racial groups.²⁰³ Moreover, clothing such as the hoodie may serve as “an alibi for racial colonial optics as a surrogate for flesh.”²⁰⁴ The hoodie alone, an inanimate object made up of sewn pieces of fabric, thus furnishes the unbounded police officer with enough suspicion to stop, frisk, detain, and kill the Black individual whose sovereignty is undermined by means of that hoodie.²⁰⁵ Subjectively, the hoodie constitutes a knowledge of the dangerousness of the Black individual, threatening the lives of those who engage in personal autonomy and wear that specific assortment of sewn pieces of fabric.²⁰⁶

The hoodie thus comes to life and becomes an *animate* object that acts as a proxy to stop, frisk, detain, and even kill Black individuals.²⁰⁷ Indeed, the hoodie has been stigmatized and deemed a “staple of the criminal class,” making it a “proxy for racial profiling or any other exercise of enmity.”²⁰⁸ But for some who are isolated from the detrimental impact the hoodie has had on the policing of Black individuals, the hoodie is inanimate and is a “stupid, classic, innocuous, functional,

203. See George Lazaroiu, *Communicative Functions of Smart Clothing*, 4 CONTEMP. READINGS L. & SOC. JUST. 162, 165 (2012) (describing clothing as “our second skin and an extension of our body” which facilitates social interaction).

204. See Mimi Thi Nguyen, *The Hoodie as Sign, Screen, Expectation, and Force*, 40 SIGNS: J. WOMEN IN CULTURE & SOC’Y 791, 792 (2015) (noting that clothing may be used to legitimate forms of violence).

205. See *id.* (explaining that clothes can animate or overcome susceptible bodies, “compelling others to act against them”).

206. See *id.* at 792–93 (“[F]iguration of the hoodie as an animate thing demonstrates some of the operations of power that deem some bodies criminally other—because they are black, and therefore threatening—and available to state violence.”).

207. See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 13–14 (2014), <https://perma.cc/T6SN-YXTK> (PDF) (discussing a story about a biracial, Black young man who was stopped and frisked because he looked “suspicious wearing a hoodie over his head”).

208. Troy Patterson, *The Politics of the Hoodie*, N.Y. TIMES (Mar. 2, 2016), <https://perma.cc/M65R-XWGY> (“The person itching to confirm a general bias against hip-hop kids . . . imputes crooked character to the clothing itself.”).

cuddly, universal” piece of clothing.²⁰⁹ Roxane Gay, for example, believes that the hoodie is “besides the point.”²¹⁰

Those who share a similar viewpoint to Gay’s are missing an integral piece of the problem. The hoodie “constellates historical-racial schema,” reinforcing the conflation between the Black individual and the now-animate object.²¹¹ Hoodies should not disproportionately insinuate criminality. “The Hoodie Effect,” a social bias similar to the “turban effect” that was widespread after 9/11, has thus emerged as a political and social justice statement.²¹²

The hoodie was not “besides the point” in the slaying of the innocent 17-year-old, Trayvon Martin.²¹³ George Zimmerman murdered Trayvon Martin in “self-defense” on the basis that Trayvon was a “suspicious” person wearing a “dark hoodie.”²¹⁴ Imani Perry of Princeton University’s Center for African American Studies precisely stated the problem:

Because of the pervasive and trenchant racial stereotypes associated with black young people, especially males, their styles are often singled out for criticism, as signs of criminality and misdeeds But in truth this is simply another form of stigmatization against the person underneath the clothing, and only superficially has anything to do with the clothing.²¹⁵

Perhaps Trayvon Martin would still be alive today if he was not wearing a hoodie—or, more importantly, if society had not

209. Nguyen, *supra* note 204, at 793–94 (critiquing the classification of the hoodie as being an “immoderate jumble of qualities” and “ultimately inert thing”).

210. *Id.* at 794 (citation omitted); *see id.* (critiquing Gay’s analogy of the hoodie as similar to what a woman was wearing when she was raped).

211. *Id.*

212. *See* Douglas L. Keene & Rita R. Handrich, *The ‘Hoodie Effect’: George, Trayvon, and How It Might Have Happened*, 24 JURY EXPERT 17, 22 (2012) (“The hoodie has become a sociopolitical statement seen in Congress, at rallies protesting Trayvon Martin’s death, among professional athletes, and in churches.”).

213. *See* Emanuella Grinberg, *Hoodie’s Evolution from Fashion Mainstay to Symbol of Injustice*, CNN, <https://perma.cc/S28J-JS5F> (last updated Mar. 27, 2012, 3:10 PM) (articulating the social stigma carried with the hoodie).

214. *Id.*

215. *Id.*

stigmatized the hoodie and associated it with the criminality of Black men and urbanism.

2. Strange Fruit in Our Neighborhood²¹⁶

The death of Ahmaud Arbery is a modern-day lynching, and his Blackness was deemed a property tort.²¹⁷ Ahmaud Arbery, a twenty-five-year-old Black man, went jogging in a suburban neighborhood in Georgia on a Sunday afternoon.²¹⁸ On that afternoon, three armed white men, Gregory McMichael, Travis McMichael, and William Bryan, saw Arbery in the neighborhood and hunted him down as if he were prey.²¹⁹ The three white men were entrusted by the Glynn County Police Department to respond to trespasses in the area, and the police department armed them with a revolver and a 12-gauge shotgun “to stand in as law enforcement and to respond to recent neighborhood trespasses ‘day or night.’”²²⁰ The homeowner who Arbery was accused of stealing from stated that he did not believe that Arbery stole anything from his property, nor did he file any prior police reports.²²¹ Predictably, the white killers who racially

216. See Karen Juanita Carrillo, *How Billie Holiday’s ‘Strange Fruit’ Confronted an Ugly Era of Lynchings*, HISTORY (Mar. 1, 2021), <https://perma.cc/8U6V-K25K> (discussing the meaning behind the lyrics of “Strange Fruit” and how it paints a picture of the American South, where “political and psychological terror” continues to reign over African American communities).

217. See Bill Hutchinson, *Ahmaud Arbery Murder Case May Evoke Georgia’s History on Race: Experts*, ABC NEWS (Oct. 17, 2021), <https://perma.cc/2WS4-YWWT> (quoting the statement of Benjamin Crump that the killing of Arbery was a “modern day lynching”); Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 870 (2020) (describing the core principles of property law and how those principles are used to police Black people).

218. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Nov. 24, 2021), <https://perma.cc/L9EW-WRZG> (last updated Aug. 8, 2022).

219. See Aaron Keller, *Ahmaud Arbery’s Family Files Federal Civil Rights Lawsuit Exactly One Year After He Was Shot and Killed*, L. & CRIME (Feb. 23, 2021), <https://perma.cc/8DX8-9LQ4> (recounting the events that led to Arbery’s murder).

220. *Id.*

221. Tony Thomas, *Homeowner Doesn’t Believe Ahmaud Arbery Stole Anything Before Shooting*, WSB-TV ATL. (May 13, 2020, 6:44 AM), <https://perma.cc/AQ6M-AP25>.

profiled Arbery had a “gut feeling” that he was responsible for prior thefts throughout the neighborhood, based on the fact that he was a Black man jogging in a white neighborhood.²²²

Running has been one of the most favored American pastimes since the late 1960s.²²³ On its face, it is one of the most egalitarian exercises one could engage in.²²⁴ But, as in Ahmaud Arbery’s case, Black runners are not guaranteed the same protections as their white counterparts.²²⁵ Black people are seen as the exact opposite of the ideal, “yuppie” white jogger.²²⁶ Black people, of course, are thus subject to increased surveillance and heightened suspicion—jogging while Black denotes criminality, and thus the Black jogger is subject to a stop and frisk.²²⁷

Generations of white people have expected the “ghettoization” of Black men, given their portrayal in entertainment outlets.²²⁸ Rapper J. Cole articulated this notion in an assemblage of rhymes in his song “Neighbors.”²²⁹ He explicitly discusses that existing as a Black man gives rise to criminality and suspicion, particularly in white suburban neighborhoods. J. Cole states:

I can’t sleep ‘cause I’m paranoid
Black in a white man territory
Cops bust in with the army guns
No evidence of the harm we done²³⁰

222. Keller, *supra* note 219.

223. See Natalia Mehlman Petrzela, *Jogging Has Always Excluded Black People*, N.Y. TIMES (May 12, 2020), <https://perma.cc/F2M4-7B5M> (outlining the historical discrimination of leisure jogging).

224. *Id.*

225. See *id.* (emphasizing that the “new national pastime” did not universally deliver its promises).

226. See *id.* (“By the 1980s, jogging had become known as a ‘yuppie’ affectation, like eating croissants, owning a fancy juicer, and working on Wall Street.”).

227. See *id.* (arguing that jogging has never been an “equal-opportunity endeavor”); see also Jacey Fortin, *On Ahmaud Arbery’s Birthday, Thousands Say #IRunWithMaud*, N.Y. TIMES (May 8, 2020), <https://perma.cc/N57R-PDGL> (providing an anecdote of a Black runner who runs with identification in her pocket in case she is ever stopped, even in her own neighborhood).

228. See Fields, *supra* note 201, at 947 (discussing “Iconic Ghettos” and “White Spaces”).

229. J. COLE, *Neighbors*, on 4 YOUR EYEZ ONLY (Dreamville Records 2016).

230. *Id.*

As J. Cole articulates, Black men, such as Arbery, are perceived as a threat despite a lack of any incriminating evidence.²³¹ Arbery's presence was viewed as a criminal threat and the white men argued that if Arbery would have complied once they stopped him, he would still be alive.²³² The three killers, however, stopped and killed Arbery based on their "reasonable" suspicion that he was a criminal threat, or, in other words, *armed and dangerous*.²³³ Through the history of the White Fourth Amendment, such actions seemed to be justified.²³⁴

3. Designer Shoes Serve as a Basis for Reasonable Suspicion

Racial profiling of Black men does not exist solely in the South. Salehe Bembury, a Black Versace executive, was stopped and searched by a Beverly Hills police officer after jaywalking.²³⁵ The police officer searched Bembury's Versace store bag, which contained a pair of shoes from the store, and proceeded to ask Bembury why he was crossing the road.²³⁶ The police officer then asked Bembury for his identification and requested he put his arms behind his back during the search.²³⁷ Given that

231. See Fausset, *supra* note 218 (discussing the prosecutor's arguments that Arbery posed no imminent threat to the three men and that they had no reason to believe he had committed a crime, giving them no legal right to chase him through the suburban neighborhood).

232. See Cat Brooks, Opinion, *Ahmaud Arbery's Murderers Would be Free if it Wasn't for Black Lives Matter Protests*, S.F. CHRON. (Nov. 24, 2021), <https://perma.cc/TCY4-7DUR> (last updated Nov. 27, 2021 11:27 PM) (rationalizing that today, when Black people do not comply with the "whims" of white people, there are "severe physical assaults, threats of or actual calls to the police, and . . . murder").

233. See Keller, *supra* note 219 (noting that the defendants had a "gut feeling" that Ahmaud was responsible for prior thefts); see also *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (noting that if a police officer believes that he is dealing with an armed and dangerous individual, he need not have probable cause to arrest the individual for a crime in order to perform a search for weapons).

234. See Butler, *The White Fourth Amendment*, *supra* note 49, at 253 (reasoning that the Fourth Amendment creates criminals and helps to define Blacks by constructing Blacks as criminal, making it easier for the police to arrest and investigate Black people).

235. Priya Elan, *Versace Executive Accuses Los Angeles Police of Racial Profiling*, THE GUARDIAN (Oct. 10, 2020), <https://perma.cc/4GKV-837E>.

236. *Id.*

237. *Id.*

jaywalking is illegal in Beverly Hills, the police officers were within their discretion to stop him.²³⁸ Yet, the police officers had little reason to be suspicious that Bembury was engaging in any illegal activity or that he was a threat to the public and thus had no grounds to search him.²³⁹ In the video that Bembury posted on his Instagram while being searched, the police officer alleged that Bembury was “making a completely different narrative” when Bembury accused the police officer of searching him because he was Black and carrying a designer bag.²⁴⁰ The police department released bodycam footage of the incident and cited heavy traffic in the area for their actions.²⁴¹ It is evident, however, that this is not an explanation for why Bembury was frisked—instead, Bembury’s Black skin insinuated criminality.

4. The KKK Uniform Remains Crimeless While the Black Man Wearing a Hoodie Is an Authorized Target

Young white men have the privilege to engage in personal autonomy without fearing the repercussions of police violence. They have the privilege to embrace their identity by adopting hillbilly attire, skinhead attire, frat-boy attire—you name it.²⁴² This is clearly not the case for Black men.²⁴³ For some Black individuals, seeing a white man with a shaved head and a Confederate flag hanging from his pickup truck can result in a degree of apprehension.²⁴⁴ Yet, for police officers, white men engaging in such dress or expression means that they are embracing their culture, or, exercising their First Amendment right to freedom of expression.²⁴⁵ As Robin Givhan accurately points out, the difference lies in the fact that Black individuals

238. Tod Perry, *Beverly Hills Police Frisked Versace Executive Salehe Bembury for Holding One of His Company’s Own Bags*, UPWORTHY (Oct. 5, 2020), <https://perma.cc/3XDQ-2CHG>.

239. *Id.*

240. Elan, *supra* note 235.

241. Perry, *supra* note 238.

242. See Robin Givhan, *Trayvon, Hoodies and America’s Fears*, DAILY BEAST (Mar. 20, 2012, 12:39 PM), <https://perma.cc/3P4R-8NJP> (last updated Jul. 13, 2017, 1:37 PM) (emphasizing that white men have the privilege to “take solace in the protective shells of stereotypes”).

243. *Id.*

244. *Id.*

245. *Id.*

have been systemically dehumanized and prejudiced in the ways in which they can freely express themselves through dress.²⁴⁶

The founder of Facebook and entrepreneur Mark Zuckerberg, for example, has embraced the hoodie so he can “make as few decisions as possible about anything except how to best serve [the] community.”²⁴⁷ According to style gurus, Zuckerberg wore the hoodie for a meeting on Wall Street to say, “The West Coast techies truly fuel this economy, and you will now live by our rules (and our dress codes).”²⁴⁸ It has been noted that “[t]he very potency of dress as a form of communication, resistance, and survival for marginalized groups has made it a compelling tool for maintaining social hierarchy throughout history.”²⁴⁹ Yet Black individuals such as Trayvon Martin do not get the privilege to decide which message they want to send—their message has been made for them at through the hands of systemic racism.²⁵⁰ Jason J. Campbell properly scrutinized the role racism plays in the hoodie: “African American males cannot conduct themselves in the same way that young white males

246. See *Givhan*, *supra* note 242. (“There is no legacy of racism and systemic dehumanization that holds white men hostage to their body language, their patois, and their wardrobes. There is no tradition of corrupt institutional fear among police officers and sheriffs whose prejudices feed the communities that turn to them for protection.”).

247. Jake Woolf, *Mark Zuckerberg Humblebragged About Only Owning Gray Tees and Hoodies*, GQ (Jan. 25, 2016), <https://perma.cc/CJ7F-D3VU>.

248. Eduardo Munoz, *How a Hoodie Sent a Signal to the Suits*, NBC NEWS (May 11, 2012), <https://perma.cc/49D2-HWJ2>.

249. Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy through Dress*, 87 N.Y.U. L. REV. 859, 874 (2012).

250. See Ta-Nehisi Coates, *Letter to My Son*, THE ATL., (July 4, 2015) <https://perma.cc/DMF8-YUEZ>

Always remember that Trayvon Martin was a boy, that Tamir Rice was a particular boy, that Jordan Davis was a boy, like you. When you hear these names think of all the wealth poured into them. Think of . . . all the shared knowledge and capacity of a black family injected into that vessel of flesh and bone. And think of how that vessel was taken, shattered on the concrete, and all its holy contents, all that had gone into each of them, was sent flowing back down to the earth.

can.”²⁵¹ Similarly, Michael Skolnik stated that he, as a white male, would never have the same fate as Trayvon Martin.²⁵² Skolnik acknowledged that wearing a black hoodie would never make him suspicious or, in other words, presently dangerous.²⁵³ Rhode Island State Senator Cynthia Mendes referred to dress codes as “colonization language,” “remind[ing] everyone who is in power. It has always started with what you tell them to do with their bodies.”²⁵⁴

Courts have gone so far to say that the white robes, masks, and hoods worn by the members of the Ku Klux Klan (KKK) were “expressive in the way that wearing a uniform is expressive, identifying the wearer with other wearers of the same uniform, and with the ideology or purpose of the group.”²⁵⁵ The distinctive KKK white uniform, which includes KKK insignia, was first used to create a ghost-like appearance to assist members in playing pranks.²⁵⁶ These so-called pranks transformed into nocturnal visits to the dwellings of Blacks, harassing and intimidating them.²⁵⁷ And although the KKK uniforms were created for the sole purpose of terrorizing Black

251. James Eng, *Trayvon Martin Case: Is Young, Black and Wearing a Hoodie a Recipe for Disaster?*, NBC NEWS (Mar. 22, 2012), <https://perma.cc/9XV7-EMKT>.

252. *Id.*

253. *See id.*

Even if I have a black hoodie, a pair of jeans and white sneakers on . . . in fact, that is what I wore yesterday . . . I still will never look suspicious. No matter how much the hoodie covers my face or how baggy my jeans are, I will never look out of place to you. . . . I will never look suspicious to you, because of one thing and one thing only. The color of my skin.

254. Philip Marcelo, *Are Dress Codes Racist and Sexist? Legislators are Increasingly Pushing Back on Them as More Women and People of Color Get Elected*, CHI. TRIB. (Mar. 25, 2021), <https://perma.cc/ZB4N-9AJF>.

255. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 (2004); *see id.* (finding that “[t]he mask that the members of the American Knights seek to wear in public demonstrations does not convey a message independently of the robe and hood”).

256. WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 33 (1987).

257. *Id.* at 36–37.

individuals and their allies, the prominent KKK mask was not considered to convey a message by itself.²⁵⁸

The Court's justification gives more power to white supremacist policing and KKK in the Police Department.²⁵⁹ Law enforcement has acknowledged the killings of Black people, yet law enforcement continually allows the killing of Blacks to occur without officers being prosecuted.²⁶⁰ Thus, law enforcement entities are aware of the blatant, conscious, racism that plague our criminal justice system, as the white supremacists within the police departments are those who deliberately go into Black communities to do harm.²⁶¹ White supremacists permeate the police force from the top down and encourage new officers to act in a hostile manner towards Black people, despite not having reasonable suspicion or a reason to do so. For example, police officer Tod Shaw of Louisville, Kentucky told a police recruit that it was okay to shoot Black kids if they were caught smoking marijuana: "If black, shoot them."²⁶²

Such bigoted ideals infiltrate the police force and alarmingly—but unsurprisingly—disproportionately impact Black people, as Black people do not have the law as a shield from hatred and violence.²⁶³ As a result, a study has found that

258. See *Kerik*, 365 F.3d at 206 (concluding that the masks add "no expressive force to the message portrayed" by the entire KKK outfit).

259. See Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 214 (2019) (noting that since 2006, the FBI has been on notice about white supremacist groups infiltrating police departments); see also Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years Ago. Has Anything Changed?*, PBS NEWS HOUR (Oct. 21, 2016, 4:10 PM), <https://perma.cc/6HCN-38TC> ("In the 2006 bulletin, the FBI detailed the threat of white nationalists and skinheads infiltrating police in order to disrupt investigations against fellow members and recruit other supremacists."); *Florida Town Stunned by News of Police Department's KKK Ties*, TAMPA BAY TIMES (July 21, 2014), <https://perma.cc/2DAK-XBTL>.

260. See Madison Parks, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN, <https://perma.cc/2VYE-3TUE> (last updated Oct. 3, 2018, 4:41 PM) (providing data on officer convictions for murders or manslaughter charges for on-duty shootings).

261. Johnson, *supra* note 259, at 217.

262. Ralph Ellis, *Former Kentucky Police Official Allegedly Sent Racist Messages to Recruit*, CNN (Jan. 22, 2018, 10:25 PM), <https://perma.cc/V62G-WK8L>.

263. Johnson, *supra* note 259, at 227.

Black victims of police killings are overrepresented.²⁶⁴ Yet, according to the study, white victims were more likely to be armed and posed a greater threat to the safety of police officers.²⁶⁵ But that does not matter. According to such bigoted ideals, Black skin is harmful in and of itself, approximating someone who is armed and *presently dangerous*.

B. The Consequences of Blackness Serving as a Basis for Reasonable Suspicion

Fourth Amendment jurisprudence cannot be separated from the individual and collective costs it has had on Black communities.²⁶⁶ This Subpart specifically discusses (1) the psychological impact, (2) residential segregation, and (3) mass incarceration.

1. The Psychological Impact

As Chief Justice Warren outlined in *Terry*, the search of an individual's body is a "serious intrusion of the sanctity of the person."²⁶⁷ The Chief Justice correctly noted that such an intrusion of one's person "may inflict great indignity and arouse strong resentment."²⁶⁸ Police officers disrespect the autonomy and dignity of the Black individual, which is a felonizing process that weighs heavily on the mental health and psyche of the Black individual.²⁶⁹ Black individuals tend to experience an increase in stress and anxiety when seeing and interacting with

264. See Reed T. DeAngelis, *Systemic Racism in Police Killings: New Evidence from the Mapping Police Violence Database, 2013–2021*, RACE & JUST.: ONLINEFIRST, Oct. 19, 2021, at 1, 2.

265. *Id.* at 8.

266. See Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2429 (2017) (articulating that the costs of stop and frisks "cannot be properly understood . . . once . . . detached from the historical origins of concentrated poverty").

267. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

268. *Id.* at 17.

269. See Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615, 679 (2016).

the police.²⁷⁰ As Camille Nelson articulates, “[R]acial discrimination is abusive. Its dire consequences are debilitating, destructive, and disabling.”²⁷¹ Fear of racism is enough to trigger the body’s stress-responses.²⁷² Unsurprisingly, Black individuals are targeted more than white individuals.²⁷³ When there is a disparity as great as social injustice which affects the health and wellbeing of communities, the associated costs and risks become intergenerational and are hard to deconstruct.²⁷⁴

2. Residential Segregation

Segregated housing is the most visible indication of deeply rooted racism in the United States.²⁷⁵ Residential segregation did not happen overnight. In the early 1900s, the African American population began to grow, which alarmed white people and resulted in community riots.²⁷⁶ From 1910 to 1920, white people began to seek a residential apartheid and started using institutionalized methods of keeping Black people out of their neighborhoods.²⁷⁷ Racially discriminatory covenants were implemented, and neighborhood associations took great effort to prevent Black people from living and taking up space in white communities.²⁷⁸

270. See Joscha Legewie & Jeffrey A. Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 AM. SOCIO. REV. 220, 224 (2019).

271. Nelson, *supra* note 269, at 681.

272. See Jason Silverstein, *How Racism Is Bad for Our Bodies*, THE ATL., (Mar. 12, 2013), <https://perma.cc/PU2K-4JJJ>.

273. See *id.* (“In 70 of 76 precincts, greater than 50 percent of stops targeted blacks and Latinos.”).

274. See *id.* (noting that social injustice is passed down through generations).

275. See William M. Wiecek, *The United States Supreme Court and Residential Segregation: “Slavery Unwilling to Die”*, 3 J.L. PROP. & SOC’Y 35, 36 (2017) (“Segregated housing provides the matrix for all other social ills afflicting African-Americans in the United States, and is the principal cause of racial inequality in the United States today.”).

276. See Natasha M. Trifun, *Residential Segregation After the Fair Housing Act*, 36 HUM. RTS. 14, 15 (2009).

277. See *id.*

278. See *id.* (“These associations used various methods to achieve their goal, such as lobbying city councils for zoning restrictions, but their most important function was implementing racially restrictive covenants to prevent property owners from transferring their property to African Americans.”); see

In 1910, Baltimore adopted a racial segregation ordinance prohibiting Black people from living in a house on the same block of white families.²⁷⁹ Although there was a Supreme Court decision which held that racially restrictive covenants were unconstitutional,²⁸⁰ states continued to enforce them.²⁸¹

Black people who live in public housing have limited Fourth Amendment guarantees.²⁸² For example, in the late 1980s, the Chicago Housing Authority began conducting surprise raids at public housing developments with the goal of scouring buildings for drugs and weapons.²⁸³ In one raid, around 450 apartments were searched, and within minutes, every Black person who walked through the area was stopped and searched.²⁸⁴ Unsurprisingly, a Black woman who was carrying a bag filled with laundry was stopped and patted down by guards who emptied her bag of laundry onto the ground, finding no contraband.²⁸⁵ This is acceptable under the Fourth Amendment,

also Thompson v. Dep't of Hous. & Urb. Dev., 348 F.Supp.2d 398, 452 (D. Md. 2005) (holding that the defendants did not violate the Equal Protection Clause of the Fourteenth Amendment and thus did not violate Title VI).

279. Wiecek, *supra* note 275, at 45.

280. See Buchanan v. Warley, 245 U.S. 60, 82 (1917) (“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and in direct violation of the fundamental law enacted in the Fourteenth Amendment . . .”). *But see* Corrigan v. Buckley, 271 U.S. 323, 330–31 (1926) (finding that a racially restrictive covenant was not a violation of the Fourteenth Amendment).

281. See *Permalee v. Morris*, 188 N.W. 330, 330 (Mich. 1922) (noting that the Fourteenth Amendment “could not have been intended to abolish the distinction based upon color” and thus upholding the covenant (quoting *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896))).

282. See Charles Hellman, Note, *Secure in Their Houses? Fourth Amendment Rights at Public Housing Projects*, 40 N.Y. L. SCH. L. REV. 189, 196 (1995) (discussing “Operation Clean Sweep,” implemented by the Chicago Housing Authority to police public housing projects and supported by President George H.W. Bush). See generally, e.g., Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621 (1993); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

283. Sharman Stein & William Recktenwald, *65 Seized in Sweep at CHA Homes*, CHICAGO TRIB. (Apr. 7, 1992, 12:00 AM), <https://perma.cc/6DLL-ESWU>.

284. *Id.*

285. *Id.*

though, as public housing residents have weak and limited Fourth Amendment protections, which therefore results in criminalization of low-income communities.²⁸⁶

The scale of stop and frisks that occur in Black neighborhoods leave their occupants feeling that “they are living under siege.”²⁸⁷ Black people who live in highly patrolled neighborhoods are treated as a “permanent under-caste,” as they cannot enjoy a leisurely walk, a neighborhood gathering, or a breath of fresh air without being subject to police harassment.²⁸⁸ A hostile police presence is “so frequent” that it is expected.²⁸⁹ Interviewees from a study conducted by the Center for Constitutional Rights stated, “I feel like we’re not in a free country when you can’t walk down the street. You got to be questioned about where you’re going and what you’re doing,” and “I have always felt the need to carry my ID because if I didn’t carry my ID in my own neighborhood, I would basically be putting myself [at risk] of being picked up and accused of doing sex work.”²⁹⁰ Other interviewees expressed that they felt as if they were trapped inside their apartments because leaving their apartments meant that they would be subject to police harassment.²⁹¹ The aggressive policing of Black neighborhoods is simply militaristic and only serves the purpose of stopping and frisking innocent Black people, keeping them in the unyielding chokehold.²⁹²

Racial separateness allows relationships to be formed around racial lines. When Black people cross those racial lines and take up white space, police become suspicious that the Black person is committing a crime and, under our Fourth Amendment jurisprudence, the police officer has the power to

286. See Sarah Miller, *The Criminalization of Public Housing Residents*, GEO. J. ON POVERTY L. & POLY ONLINE (Mar. 29, 2020), <https://perma.cc/4BSC-72Z9> (discussing Fourth Amendment safeguards for public housing residents).

287. CTR. FOR CONST. RTS., STOP AND FRISK: THE HUMAN IMPACT 17 (2012), <https://perma.cc/Q7CN-32DN> (PDF).

288. See *id.* at 17–18 (discussing the stories of Black people who are consistently harassed by police in their neighborhoods).

289. See *id.* at 17 (“We expect them to jump out of a car. We expect them to just come out the staircase and scare the hell out of you. We expect it.”).

290. *Id.* at 17–18.

291. *Id.*

292. See *id.* at 19 (discussing a conversation in which an interviewee stated that the NYPD is seen as “occupying army”).

conduct a stop based on that suspicion.²⁹³ *Terry* gives authorization to police officers to stop based on their reasonable suspicion, despite not having an articulable reason for doing so.²⁹⁴

In *Shelley v. Kraemer*,²⁹⁵ the Supreme Court held that neither federal or state courts could enforce racist covenants to evict Black homeowners.²⁹⁶ The defendants in *Shelley* argued that the racially-restrictive property covenant was neutral and, since state courts were prepared to enforce covenants restricting white people from the ownership of property covered by particular agreements, “enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.”²⁹⁷ Chief Justice Vinson quickly dismissed that argument by critiquing the defendants’ failure to provide any case in which the a court had been asked to “enforce a covenant excluding members of the white majority from ownership” of property.²⁹⁸ The Court ultimately expanded the protections of the Fourteenth Amendment.²⁹⁹ The Supreme Court declared that the concern of the Fourteenth Amendment was to establish equality of basic civil rights and to preserve those rights from racial discriminatory action on behalf of the states.³⁰⁰ In reading *Shelley*, one might conclude that there are no longer racially divided neighborhoods. But the effect of *Shelley* only did so much, as white people found other means to push Black people out of their neighborhoods.³⁰¹

293. See I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.–C.L. L. REV. 43, 61 (2009) (discussing the deference given to police officers through Fourth Amendment jurisprudence).

294. *Id.* at 63; see *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (“In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people.”).

295. 334 U.S. 1 (1948).

296. *Id.* at 23.

297. *Id.* at 21–22.

298. *Id.* at 22.

299. *Id.* at 22–23.

300. *Id.* at 23.

301. See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 715 (1993) (discussing gentrification of neighborhoods).

3. Mass Incarceration and Modern Slavery

Mass incarceration and racist policing are undoubtedly intertwined. Antiracist disciplinary traditions have created and perpetuated the racist carceral system, as the “Thirteenth Amendment permits slavery of incarcerated persons and in turn, state and federal prisons force prisoners into the modern labor conditions of slavery.”³⁰² Furthermore what defines the tradition of the racist carceral system is the police officer’s boundless ability to incapacitate Black individuals and engage in “habitual surveillance.”³⁰³ Police officers have characterized Black people as “internal enemies” and “volatile threats” to established social order.³⁰⁴ Since the beginning of the criminalization and incarceration of Black people and their descendants, police officers have utilized practices that target Black people, enhancing and furthering spatial and social control.³⁰⁵

As discussed earlier, instead of placing a limit or providing a racially-conscious framework to policing, the Supreme Court has determined that the breadth and scope of Fourth Amendment searches and seizures depends on reasonableness in the eyes of police officers.³⁰⁶ The Supreme Court has gone so far as to grant police officers “nearly unlimited arrest power.”³⁰⁷ In *Atwater v. City of Lago Vista*,³⁰⁸ the Court concluded that an officer’s authority to make an arrest of a woman without a

302. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 952 (2019).

303. See Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historic Overview*, 4 ANN. REV. OF CRIMINOLOGY 261, 263 (2021) (“Policing and criminalization practices have worked in tandem historically to monitor and contain people of color and low-income groups within and beyond US borders.”).

304. *Id.*

305. *Id.*

306. See Tahir Duckett, *The Hidden Constitutional Costs of the Carceral System*, THE ATL. (June 23, 2020), <https://perma.cc/4TRF-2SWH> (“[I]n criminal law, courts have repeatedly narrow the scope of the Constitution’s protections over the past 50 years—the time period coinciding with the rise of mass incarceration—without requiring the government to prove that these limitations are justified.”).

307. *Id.*

308. 532 U.S. 318 (2000).

warrant for a misdemeanor was consistent with common law.³⁰⁹ In setting this precedent, the Court once again limited constitutional guarantees while giving police officers an abundance of latitude and self-governance. As Tahir Duckett forcefully states, “Courts must stop permitting municipalities to hide the costs of policing by levying them upon black communities instead of upon police departments and city budgets.”³¹⁰ Courts continually place the burden on Black backs, showing deference to budgets and a complete disregard to Black life and autonomy. Police reform can only do so much when the courts are reinforcing racist policing.³¹¹ It starts with the courts and the legislature to acknowledge the issues and strip the capricious, racially-motivated limitations from constitutional guarantees.³¹²

Mass incarceration is part of a societal system and framework built on the backs of Black men from which they cannot escape.³¹³ Mass incarceration furthers Black male oppression through aggressive and groundless policing. Furthermore, it places Black males in what Paul Butler calls *the chokehold*.³¹⁴ Butler efficaciously argues that law enforcement entities use their discretion as officers to police Black men, which contributes to the amount of Black men in prison and, thus, mass incarceration.³¹⁵ In doing so, Butler articulates that the Chokehold characterizes every Black man, no matter his

309. *See id.* at 354 (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

310. Duckett, *supra* note 306.

311. *Id.*

312. *Id.*

313. *See Goodwin, supra* note 302, at 954 (discussing the nation’s reliance on racist policing and the carceral system as a means to maintain racial and social hierarchies).

314. *See* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN AND WOMEN IN AMERICA* 12 (2017) [hereinafter BUTLER, *CHOKEHOLD*] (describing the Chokehold and how it continually polices Black people); *see also* *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) (Marshall, J., dissenting) (vividly describing a police chokehold). Justice Thurgood Marshall boldly criticized the Los Angeles chokehold policy. *Id.* He provided imagery of the brutal chokehold: “His face turns blue and he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.” *Id.* at 118.

315. BUTLER, *CHOKEHOLD, supra* note 314.

wealth or social status, as a “thug.”³¹⁶ Butler then argues that the policing of Black men in the framework of the chokehold is a device which is deeply rooted in slavery and the continuance of Black men serving about subordinates subordinate.³¹⁷

As Michele Goodwin articulates, mass incarceration and the American prison system is the “market in policed bodies.”³¹⁸

Incarceration successfully masks slavery and it does so cunningly through the unrelenting vestiges of racial bigotry, finely tuned fear, and stereotypes. Viewed in this light, prison is not about disproportionate and racialized policing and the exploitation of labor, but rather community safety. Despite rates of criminality mapping similarly between Blacks, Whites, and Latinos, most white Americans presume that Blacks are more dangerous, prone to criminality, and likely to commit more crimes.³¹⁹

In sum, mass incarceration in the United States is deeply racialized, resembling Antebellum slavery and its control of Black bodies.³²⁰

III. THE BLACK FOURTH AMENDMENT

Racial fear and stereotyping are entwined and embedded in the American social sphere—individual actors, by themselves, cannot fix the issue of epidemic racial fear, as racism is so deeply ingrained in the American unconscious mind and cherished concepts.³²¹ But the courts, Congress, and the American people can transform and reconstruct the Fourth Amendment and its hazy, inherently racist jurisprudence instead of reinforcing the emphasis it places on the objective standard in the

316. *Id.* at 5.

317. *Id.* at 6.

318. Goodwin, *supra* note 302, at 957.

319. *Id.* at 957–58.

320. *Id.* at 960.

321. See Fields, *supra* note 195, at 949 (claiming that racist tropes are so ingrained that no amount of bias awareness training will rid the epidemic of racial fear); see also Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 111 (2002) (maintaining that attitudes and stereotypes are unconscious and outside the ability to exert full conscious control).

reasonableness analyses of the Fourth Amendment.³²² The Fourth Amendment should be construed as the Black Fourth Amendment vis-à-vis the Fourteenth Amendment's Equal Protection and Due Process Clauses. The Black Fourth Amendment will guarantee Black people the same rights and protections that white people are given by doing what the Equal Protection Clause intended it to do: to prevent the states from denying any person in their jurisdictions "equal protections of the laws."³²³

As Paul Butler notes, the problem is that "the system is working the way it is supposed to."³²⁴ Inhumane prisons, police brutality, and criminal processes were developed for Black people.³²⁵ The Supreme Court is well aware that in expanding police powers, Black men will suffer the consequences. But the Court is intentional in the precedent it sets, despite its failure to mention race in its decisions that clearly have an impact on people of color.³²⁶

322. See generally *Florida v. Jimeno*, 500 U.S. 248 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). States are taking initiative by including race and ethnicity in Fourth Amendment analyses. The Supreme Court of Washington state unanimously held that race must be considered when determining the legality of police stops and seizures. *State v. Sum*, 511 P.3d 92 (Wash. 2022). The Washington Supreme Court based its decision on the fact that a provision in the Washington Constitution which is analogous to the U.S. Constitution's Fourth Amendment. Article 1, § 7 of the Washington Constitution is more stringent than the Fourth Amendment and provides greater protections by using the "objective observer" test, where the objective observer is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington." *Id.* at 97.

323. See U.S. CONST. amend. XIV ("[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . ."); see also Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice—And We Must Keep It That Way*, ACLU (July 9, 2018), <https://perma.cc/NU5N-Y9C9> ("The 14th Amendment was enacted with the intent to support a series of race-conscious programs that were created at the time to aid Blacks newly emancipated by the 13th Amendment.").

324. Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1458 (2018).

325. See BUTLER, CHOKEHOLD, *supra* note 314.

326. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 324 (2001) (discussing how petitioner was erroneously jailed for not wearing a seatbelt, which was upheld by the Court, and thus expanding police power).

As discussed in Part II, “the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”³²⁷ Congress had a clear understanding that segregation and other issues were inconsistent with equality in American society.³²⁸ For example, in *Plessy v. Ferguson*,³²⁹ the Supreme Court dismissed and refused to acknowledge its power in combating societal racism by abandoning the original idea of the Equal Protection Clause.³³⁰ The Supreme Court, however, discussed the cornerstone for equal protection rights for individuals in *Yick Wo v. Hopkins*.³³¹ In *Yick Wo*, the Court pronounced:

For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.³³²

Yet, even when the Supreme Court acknowledges the significance of the incorporation of the Equal Protection Clause, it still fails to set forth any practical method to tackle the racial implications in the laws of the United States. For example, in *Shelley*, Chief Justice Vinson, writing for the majority, directly addressed the spirit of the Equal Protection Clause.³³³ The Chief Justice discussed the historical context of the Fourteenth Amendment, stating that “[w]hatever else the framers sought to achieve . . . the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from

327. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also* Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 61 (2020) (noting that prior to drafting the Fourteenth Amendment, a committee heard testimony from businessmen who expressed that Black people felt as if they did not have redress in the courts).

328. *See R.R. Co. v. Brown*, 84 U.S. 445, 453 (1873) (discussing Congress’ intentions in passing legislation in the belief that discrimination was unjust).

329. 163 U.S. 537 (1896).

330. *See id.* at 544 (arguing that the Fourteenth Amendment was not passed to abolish distinctions based on color).

331. 118 U.S. 356 (1886).

332. *Id.* at 370.

333. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

discriminatory action on the part of the States based on considerations of race or color.”³³⁴ Yet, this decision was superfluous and ineffective, as white regimes continually enforce tools to prevent Black people from existing in traditionally white spaces.

In *Whren*, the Supreme Court created space to challenge the invidious intent and motives of law enforcement—but only under the Fourteenth Amendment, and not the Fourth Amendment.³³⁵ While it narrowed claims that can be brought under the Fourth Amendment, the Court provided latitude for the Equal Protection Clause to work as it was intended to: “the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”³³⁶ However, proving a race-based violation of one’s constitutional rights is overwhelmingly challenging, despite there not being “a shortage of anecdotal evidence regarding the use of race” when police conduct stops.³³⁷ A claimant must overcome an evidentiary hurdle when bringing a claim of race-based violation of the Equal Protection Clause by proving that “the federal prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose’” and “that similarly situated individuals of a difference race were not prosecuted.”³³⁸ This standard required by the Court is nearly impossible to meet, and “the net result of the Court’s holding in *Whren* is that a traffic stop later deemed unconstitutional under the Equal

334. *Id.*

335. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (providing the constitutional basis to bring claims alleging racially-influenced traffic stops).

336. *Id.*

337. Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 591 n.42 (1998); *see* Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 17 (1977) (noting that the Fourteenth Amendment’s fate was inauspicious as its existence was suppressed by the judiciary, despite the Framers’ intent).

338. *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996) (citing *Oyler v. Boles*, 368 U.S. 448, 506 (1962)); *see Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

Protection Clause can still be deemed ‘reasonable’ under the Fourth Amendment.”³³⁹

Furthermore, in *Washington v. Davis*,³⁴⁰ the Supreme Court went so far as to acknowledge that discriminatory impact and the “total or seriously disproportionate exclusion” of Black people demonstrates unconstitutionality because of the difficulty of explaining discrimination without discussing race.³⁴¹ But, for the *Davis* Court, that did not matter because of Supreme Court’s jurisprudence.³⁴² According to the Supreme Court, a law, which may be neutral on its face, is not invalid under the Equal Protection Clause simply because of its disproportionate impact on a particular race.³⁴³ Additionally, in *McCleskey v. Kemp*,³⁴⁴ Justice Powell made a point to praise constitutional guarantees, noting that although the criminal justice system has imperfections, constitutional guarantees can be met when the criminal justice system is surrounded with “safeguards” to make the justice system “as fair as possible.”³⁴⁵ Justice Powell completely disregarded the societal injustices right in front of his face. He concluded that although the study at issue in *McCleskey* indicated a discrepancy which showed a correlation to race, such a discrepancy did not constitute a systemic defect.³⁴⁶

The Black Fourth Amendment will encapsulate the antiracist understanding of the Fourth Amendment, as informed by the Fourteenth Amendment’s Equal Protection Clause and the contemporary understanding of Black freedom, since racist policing runs counter to the Equal Protection

339. Darmer, *supra* note 144, at 118; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 135 (1999).

340. 426 U.S. 229 (1976).

341. *Id.* at 242.

342. *See id.* (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

343. *See id.* at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, with regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.” (emphasis in original)).

344. 481 U.S. 279 (1987).

345. *Id.* at 313.

346. *Id.*

Clause.³⁴⁷ Therefore, a separate judicial rule, statute, or amendment should take place of the Fourth Amendment. Specifically, the amendment should *explicitly* state that race *must* be considered when assessing the officer's subjective intentions for why they conducted a seizure, as racist stereotypes are completely ineradicable from any search and seizure analysis.³⁴⁸ For the human brain to process information quickly, it utilizes classifications such as race to store the particular information.³⁴⁹ Therefore, when an officer is determining whether an individual is engaging in criminal activity, the officer quite obviously relies on the mental classification that Black men are criminals and inherently dangerous.

Furthermore, the Black Fourth Amendment should create a rebuttable presumption, forcing prosecutors and the state to prove that race was *not* a factor when searching and seizing Black individuals. In creating the rebuttable presumption, the burden will be on the prosecution and state, who will have to produce evidence pointing to their intentions when violently seizing Black men. This rebuttable presumption will run counter to and combat the Supreme Court's jurisprudence, which has set out that discriminatory impact alone is not enough to establish a violation of the Fourteenth Amendment's Equal Protection Clause.³⁵⁰ The Black Fourth Amendment

347. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1048 (2010).

348. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (explaining that district courts must carefully examine the testimony of police officers where it seems as if the officer is citing an area as "high-crime" as a proxy for targeting minorities); see also *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting that officers may make inferences from their experiences and training when conducting a stop); *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985) (discussing the details of the encounter between the officer and decedent, while leaving out any reference to the decedent's race).

349. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–92 (1999) (discussing the findings of social scientists and cognitive psychologists regarding the process of grouping information based on characteristics of individuals).

350. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

would guarantee that the Fourth and Fourteenth Amendments work together to deconstruct barriers erected by the Supreme Court when alleging that race animosity was a factor in the officers reasoning for the seizure.³⁵¹

Consider the Supreme Court's analysis in *Terry*, where it wrote an opinion that was close to being devoid of any reference to race.³⁵² But in cases such as *United States v. Brignoni-Ponce*³⁵³ and *United States v. Martinez-Fuerte*,³⁵⁴ the Court explicitly addresses race.³⁵⁵ Yet the Court directly addressed race in these cases because of the calculus that plays into catching undocumented immigrants at the border instead of addressing the inherent racism that plagues policing in the United States. Indisputably, the Court has addressed race in a reasonable suspicion analysis and it is therefore not unprecedented to more forcibly incorporate race in the reasonable suspicion analysis. With the Black Fourth Amendment, the Supreme Court *must* consider the racist implications of the Fourth Amendment embedded in its jurisprudence instead of handpicking when it wants to incorporate a race-conscious analysis.

More narrowly, the reasonable suspicion standard under the Fourth Amendment is one that is malleable and ductile.³⁵⁶ The Supreme Court has resisted defining the exact contours of the standard.³⁵⁷ Therefore, reasonableness has historically reflected political ideals as well as unconscious fears and notions, remaining unquantified and subject to police discretion.

351. See Charles R. Lawrence II, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–21 (1987) (criticizing the pitfalls of the Supreme Court's holding in *Davis*).

352. As discussed earlier, race was only mentioned in a footnote. See *supra* notes 120–123 and accompanying text.

353. 422 U.S. 873 (1975).

354. 428 U.S. 543 (1976).

355. See *id.* at 547 (noting that the passengers were Mexican); *Brignoni-Ponce*, 422 U.S. at 885 (same).

356. RANDALL KENNEDY, RACE, CRIME AND LAW 145 (1997).

357. See *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (“Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible. . . . [T]he standards are ‘not readily, or even usefully, reduced to a neat set of legal rules.’ . . . They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.” (quoting *Illinois v. Gates*, 424 U.S. 213, 232 (1983))).

Because of the shaky ground of reasonableness under the Fourth Amendment, the Court should create a standard reflecting the Black Fourth Amendment. The Court should consider the stark realities of police terror that troubles Black communities and consider and apply the rebuttable presumption standard that recognizes the disproportionate impact policing has on Black individuals.³⁵⁸ In doing so, the Court would reinforce the intentions of the Fourteenth Amendment and its incorporation of the Fourth Amendment—to provide Black individuals with the protection and guarantees of the Fourth Amendment. The Court should pay close attention to the harsh reality of American society: that police continually target Black men, grounding their reasonable suspicion in skin color.³⁵⁹

If the Supreme Court can adopt the exclusionary rule as it did in *Weeks v. United States*—despite the exclusionary rule not being explicitly in the Fourth Amendment—and continually apply it to deter misconduct among police officers, then, perhaps, it could adopt a rule that enacts and implements a racially-conscious amendment titled the Black Fourth Amendment.³⁶⁰

CONCLUSION

“Daily the Negro is coming more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression.”³⁶¹ There has not been a time in United States history where Black individuals have received the same protections and guarantees of white individuals. Despite the intentions of the Fourteenth Amendment’s Equal Protection Clause—to ensure that policies and laws are antiracist—courts have erroneously applied it and, ultimately, have failed to use it

358. Maclin, *supra* note 83, at 372.

359. *See supra* Part II.

360. *See* Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (applying the exclusionary rule); *see also* Byars v. United States, 273 U.S. 28, 29–30 (1927) (emphasizing that if a search is made in violation of the Constitution, then it is not made lawful by what is discovered from the search).

361. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 106 (1903).

as a mechanism to combat racist policing.³⁶² Black skin continues to serve as a proxy for police officers to stop and frisk or search and seize Black individuals.³⁶³ Working with the Fourteenth Amendment's Equal Protection Clause, the Black Fourth Amendment will serve as the catalyst for ensuring Black individuals have protection from "back-end" racist policing when police officers use race as a factor when determining that someone is suspicious.³⁶⁴

The United States is not the land of equal protection—it is merely the land of laws that aspire to protect minorities but are void of racial conscious disquisition, such as the Fourth Amendment. Consequently, police officers have the discretion to stop Black individuals by deeming them criminals, making it easier to arrest them. The current Fourth Amendment sits idly and frankly runs afoul of the battle against racist policing as the subjective intent of police officers is left out of the inquiry set out by the courts.³⁶⁵ The Supreme Court and Congress bear the responsibility of reframing the Fourth Amendment to be an antiracist amendment that recognizes racist policing and accomplishes what the Fourteenth Amendment was intended to do: secure equal protection and due process to Black individuals, as well as the rest of the extended liberties and rights granted by the Bill of Rights.³⁶⁶ The Black Fourth Amendment will accomplish this by confronting the racist policing endemic in the United States, and by valuing the humanity of Black life.

362. See Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 253 (2021) (criticizing the court's interpretation of the Equal Protection Clause).

363. See *supra* Part II.

364. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathway to Police Violence*, 105 CALIF. L. REV. 125, 127 (2017) (discussing the methods in which the Fourth Amendment permits police violence).

365. See *supra* Part III.

366. See Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 999 (2020) (maintaining that the intent of the Equal Protection Clause was to ensure that Black people have equal protection of the laws).