FOURTH AMENDMENT BALANCING AND ITS DISPARATE IMPACT

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INTRODUCTION

Nathaniel Pickett.[1] Walter Scott.[2] George Floyd.[3]

These three Black men were each killed by police officers during the course of routine police stops. Nathaniel Pickett was stopped while walking home.[4] Walter Scott was pulled over for an alleged broken taillight.[5] George Floyd was arrested for allegedly using a counterfeit $20 bill.[6] None of these actions warranted a death sentence. And yet, these men were killed.

The deaths of Nathaniel Pickett, Walter Scott, and George Floyd expose the extent of power and control the law gives police officers over Black bodies. Fourth Amendment law facilitates these kinds of deadly encounters by empowering police officers to force interactions with people based on lower levels of

1. Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/C8UB-HW7C] (telling the story of Nathaniel Pickett, who was shot and killed by a police officer who believed Mr. Pickett was trespassing).

2. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?searchResultPosition=33 [https://perma.cc/A4RR-7R4T] (telling the story of Walter Scott, a Black man shot and killed by the police after he was pulled over for a broken taillight).

3. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/LZ26-S8GB] (telling the story of George Floyd, a Black man killed by a police officer outside a convenience store).

4. Thompson, *supra* note 1.

5. Schmidt & Apuzzo, *supra* note 2.

6. Hill, Tiefenthäler, Triebert, Jordan, Willis, & Stein, *supra* note 3.

individualized suspicion.[7] Often, the Supreme Court justifies these types of police practices based on the government's interest in crime detection and prevention without understanding the true impact its decisions will have on marginalized communities of color, specifically on Black communities.[8] The Court weighs competing Fourth Amendment interests in a way that favors the government's interests over those of an accused person. The Court tends to characterize the interests at stake as those of a single person versus those of the government. In doing so, it perpetuates the idea that race is linked to crime, while failing to acknowledge the ways in which entire Black communities, and so many other historically marginalized communities of color, are targeted by police practices that use race as a proxy for criminality.

The Court's characterization of competing Fourth Amendment interests results in a balancing test skewed in favor of the government. To determine whether police conduct without a warrant is "reasonable" under the Fourth Amendment, the Supreme Court balances the government's interest in intruding upon an individual's privacy against the individual's interest in freedom from the intrusion.[9] Because the Court casts the interests at stake as diametrically opposed, minimizing the interests of the individual while maximizing those of the government, nearly every time the Court balances these interests, the government wins.[10]

Too often, the Court understands the interests at stake in Fourth Amendment cases as purely adversarial.[11] It fails to consider that the government has just as much of an interest in protecting individual liberties as it does in detecting and controlling crime and maintaining public safety. Likewise, the Court also fails to consider that the individual has just as much of an interest in living in a safe community as they do in precluding any search or seizure taken against them. By failing to recognize that public safety interests, such as freedom from race-based policing, overlap with both the government and the individual's interests, the Court entirely collapses the public's interest in safety into their analysis of the

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7. *See* Terry v. Ohio, 392 U.S. 1, 22 (1968) (explaining that the government's interest in "effective crime prevention and detection" justifies a police officer stopping an individual to investigate a possible crime, even when the officer does not have probable cause to arrest that person); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) [hereinafter *From Stopping to Killing*] ("Because every encounter police officers have with African Americans is a potential killing field, it is crucial that we understand how Fourth Amendment law effectively 'pushes' police officers to target African Americans and 'pulls' African Americans into contact with the police.").

8. *See* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 16–17 (2013); *infra* Part II.

9. *See* Baradaran, *supra* note 8, at 11–12.

10. *See id.* at 15–17; Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 n.113 (2002) [hereinafter *(E)racing the Fourth Amendment*]; Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1466.

11. *See (E)racing the Fourth Amendment*, *supra* note 10, at 969 n.113; Reinert, *supra* note 10, at 1466; *infra* Part II.

government's interest. The right to freedom from race-based policing is a public safety interest that should unite both sides of the balancing test.

When the government is favored to win each balancing test, Fourth Amendment protections erode. Black communities feel this erosion acutely.[12] In *Terry v. Ohio*, the Court sanctioned stop-and-frisk.[13] In *Whren v. United States*, the Court blessed pretextual traffic stops.[14] In *Atwater v. City of Lago Vista*, the Court allowed full arrests for low-level offenses.[15] Each of these cases have had devastating effects on Black communities and other communities of color. At best, these cases facilitate police-citizen interactions that are consistent annoyances. At worst, these cases have increased the likelihood of fatal interactions between Black people and the police.[16] By favoring the government and ignoring the liberty interests of Black communities, the Court creates less safe communities.

In place of this deficient balancing test, the Court should instead adopt strict scrutiny review in Fourth Amendment cases, which would allow courts to consider the overlap in the interests, while also correcting for the analysis favoring the government. Strict scrutiny review requires that the government have a compelling justification for intruding on fundamental rights and that the intrusion be done in the narrowest manner. Applying strict scrutiny in Fourth Amendment cases acknowledges that the public and the individual may share interests and requires the government to carefully justify any intrusions on Fourth Amendment rights. In this way, strict scrutiny can add nuance to the current balancing analysis and correct the existing bias in favor of the government.[17]

This note will proceed in three parts. Part I will explain how and when the Supreme Court balances interests to determine what government action is "reasonable" under the Fourth Amendment. Part II will look at specific cases where the Supreme Court balanced interests and demonstrate that the Court characterized the interests at stake in a way that allowed the government to win

12. Black communities experience disproportionate contact with law enforcement and are often targets of law enforcement tactics such as stop-and-frisk, which can easily facilitate racial bias and police brutality. See *infra* Part II for a discussion of how Black communities are targeted by law enforcement practices, such as stop-and-frisk, the way in which law enforcement officers are empowered by "colorblind" Fourth Amendment jurisprudence, and how this negatively impacts Black communities. Part II traces the negative effects of three Fourth Amendment cases, which include: fostering mistrust in law enforcement and the legal system; increased risk of anxiety and depression correlated with negative police interactions; and lower educational achievement, decreased voter turnout, financial strain, and possible family separation, among other effects.

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

14. Whren v. United States, 517 U.S. 806, 810, 813 (1996). *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021) (showing empirically that decisions like *Whren* may increase racial profiling in police officers).

15. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

16. *See From Stopping to Killing*, *supra* note 7, at 129, 164–65 (using hypothetical examples to demonstrate how ordinary, lawful interactions between Black people and police can turn violent and even deadly); Rushin & Edwards, *supra* note 14, at 698; *infra* Part II.

17. *See* Baradaran, *surpa* note 8, at 15; *infra* Part II.

the balancing almost every time. It will draw from Critical Race Theory to describe the negative impact that these select decisions have had specifically on Black communities. Part III will offer some suggestions to ensure the balancing analysis gives proper weight to individual Fourth Amendment liberties.

I.
THE SUPREME COURT'S INTEREST BALANCING ANALYSIS

Since the 1960s, the Supreme Court has held that "reasonableness" is the "touchstone of the Fourth Amendment."[18] In situations where a police officer does not have a warrant, the Court will not automatically deem that officer's conduct unconstitutional, but it will conduct a balancing analysis to determine whether such conduct was "reasonable" under the Fourth Amendment.[19] To determine what conduct is "reasonable," the Court balances the government's interests at stake against the individual's interest in freedom from government intrusion.[20] This Part will explain the Court's balancing analysis and explore some critiques of it, such as those based on race.

A. The Supreme Court's Balancing Analysis

While historically the Fourth Amendment required that a police officer have probable cause and a warrant to stop or search someone, since the 1960s, the Court has focused more on whether an officer's conduct is "reasonable" given the

18. *See* David Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) [hereinafter *Factors for Reasonable Suspicion*]; Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1392 & n.13 (2003). *See, e.g.*, United States v. Knights, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))); Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (applying a balancing analysis like that in *Terry v. Ohio* to determine reasonableness).

19. *See* Reinert, *supra* note 10, at 1469–71 (describing how before *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968), "reasonable" meant police conduct that complied with the warrant requirement of the Fourth Amendment, whereas after, "reasonable" came to mean acceptable in light of the totality of the circumstances and became central to the Fourth Amendment analysis where a warrant was not present in a case).

20. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995) ("[W]here there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (footnote omitted) (quoting Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 619 (1989))); Baradaran, *supra* note 9, at 12*; see also* Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

circumstances.[21] *Terry v. Ohio*, which sanctioned stop-and-frisk practices, was one of the first cases in which the Court ushered in this new way of thinking about the Fourth Amendment.[22] It assessed the degree of intrusion in light of the necessity of the intrusion to accomplish a legitimate purpose.[23] *Terry*'s introduction of "reasonableness" as central to Fourth Amendment analysis, plus a host of warrant exceptions, over time made the warrant requirement of the Fourth Amendment less important and truly cemented "reasonableness" as a "touchstone" of the Fourth Amendment.[24]

Reasonableness, as part of Fourth Amendment analysis, involves balancing interests. When the Supreme Court evaluates whether warrantless police conduct is reasonable under the Fourth Amendment, the Court "assess[es], on the one hand, the degree to which [the government action] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[25] In *Terry v. Ohio*, the Court balanced (1) an officer's need to interrupt a potential daytime robbery against the interest of the men stopped in avoiding the interruption, and (2) the officer's need to ensure his

21. *See* Urbonya, *supra* note 18, at 1391–92 ("Consequently, the Fourth Amendment reasonableness question became more contextual and less focused on warrants.").

22. *See id.* at 1392–96 (explaining that the Supreme Court used a new rhetorical framing when deciding *Terry* which created something in between a probable cause plus a warrant and a warrant exception, namely reasonable suspicion and an ever-since expanding understanding of "reasonableness").

23. *See* Reinert, *supra* note 10, at 1468–69 (crediting *Camara* and *Terry* with beginning the Court's shift away from the Warrants Clause to an assessment of overall reasonableness).

24. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held the 'touchstone of the Fourth Amendment is reasonableness.'" (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))); Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 543–48 (1997) (explaining how exceptions to the warrant requirement made the warrant requirement less relevant over time); Urbonya, *supra* note 18, at 1391–92 ("Consequently, the Fourth Amendment reasonableness question became more contextual and less focused on warrants."). Some warrant exceptions include:

exigent circumstances, *see* Mincey v. Arizona, 437 U.S. 385, 393–94 (1978);

plain view, *see* Arizona v. Hicks, 480 U.S. 321, 326 (1987);

searches incident to lawful arrest, *see* United States v. Robinson, 414 U.S. 218, 234–35 (1973);

automobiles and containers in those cars, *see* California v. Acevedo, 500 U.S. 565, 580 (1991);

consent, *see* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973);

stop-and-frisk, *see Terry*, 392 U.S. at 30–31; and

administrative searches, *see* Indianapolis v. Edmond, 531 U.S. 32, 41 (2000).

25. *See Houghton*, 526 U.S. at 300; *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 652–53 ("[W]here there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (footnote omitted) (quoting *Skinner*, 489 U.S. at 619)).

personal safety against the men's interest in avoiding an invasive search.[26] In *Whren v. United States*, the Court balanced the government's need to enforce traffic laws, despite a pretextual purpose, against the individual's interest in avoiding contact with the police.[27] In *Atwater v. City of Lago Vista*, a majority balanced the government's need for a bright-line rule against the individual's interest in not facing arrest for a minor offense.[28]

Though *Terry* began a trend of balancing interests in Fourth Amendment reasonableness cases, it is not always clear cut when the Court should balance interests.[29] Sometimes the Court balances when the common law is not clear; sometimes it does not and creates a bright-line rule or uses a traditional warrant-exception analysis.[30] Sometimes the Court balances even when an officer has probable cause; sometimes it does not.[31] The general test for when to balance is adapted from *Carroll v. United States*, a 1925 case about a warrantless traffic stop.[32] In theory, the Court examines whether common law, or the Fourth Amendment when adopted, would characterize an officer's conduct as unlawful.[33] If the answer is not clear, the Court balances the interests at stake.[34]

Although it is unclear when the Court should balance interests rather than going through a traditional warrant-exception analysis, what is clear is that when

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26. *See Terry*, 392 U.S. at 20–21 ("In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for 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 seizure) entails.'" (quoting Camara v. Municipal Court, 387 U.S. 523, 534–35, 536–37 (1967))).

27. Whren v. United States, 517 U.S. 806, 818 (1996). To be clear, the balancing analysis portion of *Whren* is not necessarily what *Whren* is typically cited for. *Whren* is an example of the Court trying to set limits on when balancing needs to happen. The balancing portion of the opinion is nonetheless important and will be discussed in more detail in Part II.B.

28. Atwater v. City of Lago Vista, 532 U.S. 318, 347, 354 (2001); *id.* at 361–62 (O'Connor, J., dissenting).

29. *See* Urbonya, *supra* note 18, at 1426; Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1182–83 (1988).

30. *See Atwater*, 532 U.S. at 354, 363 (demonstrating conflicting interpretations between the majority and the dissent of when a Court should balance interests). In *Atwater*, the majority creates a bright-line rule that says police officers can arrest for any misdemeanor committed in their presence, even when the law allows punishment as lenient as a fine. The dissent applied a balancing analysis rather than creating a bright-line rule. For further examples of the tension between a warrant-exception analysis and a reasonableness analysis, compare Urbonya, *supra* note 18, at 1392 n.12 with *id.* at 1392 n.13; *see also supra* note 25 (listing traditional exceptions to the Fourth Amendment's requirement that a search or seizure requires a warrant).

31. *See Whren*, 517 U.S. at 818 (demonstrating an attempt to limit when a full balancing analysis should be required); Urbonya, *supra* note 18, at 1426.

32. *See* Urbonya, *supra* note 18, at 1427–28 (citing Carroll v. United States, 267 U.S. 132 (1925)).

33. *See id.*

34. *See id.*

the Court balances interests, the government wins the majority of the time.[35] Professor Shima Baradaran explains in her article *Rebalancing the Fourth Amendment* that between 1990 and 2012, when this type of balancing analysis was used in Fourth Amendment cases, the government's interest won almost 80% of the time.[36] The persuasiveness of the government's interest may turn on how the interest is characterized, but in many cases, interests like the need for effective law enforcement easily became inflated and overshadowed the individual's interest in privacy.[37] The inconsistent nature of when the Court chooses to balance and the typical characterization of the interests at stake further state power at the expense of the individual.[38]

B. Critiques of the Balancing Analysis

For decades now, legal scholars have sharply critiqued the interest balancing analysis used by the Supreme Court to determine what constitutes "reasonable" police conduct under the Fourth Amendment.[39] The main criticism is that the Court's balancing is inappropriately biased in favor of the government, which weakens Fourth Amendment protections. However, these critiques, a few of which are explained in this section, fail to consider the role race plays in defining criminality and thus how race impacts the balancing analysis.

Professor Nadine Strossen argues that the Court's current balancing analysis inappropriately pits fundamental rights against the government's need for intrusion and that this analysis is not rigorous enough for something as important as a fundamental right.[40] Often, this balancing test fails to consider the cost of the community's collective security, which is ironic because law enforcement is supposed to protect the community.[41] Public safety is at stake just as much when

35. Baradaran, *supra* note 8, at 20. *See* Urbonya, *supra* note 18, at 1417–18 (arguing that the Court uses different rhetorical framings of Fourth Amendment issues in order to expand the power of the government to intrude upon Fourth Amendment liberties).

36. Baradaran, *supra* note 8, at 15.

37. *Id.* at 16–17.

38. *See* Urbonya, *supra* note 18, at 1417–18 (explaining how the Supreme Court uses rhetorical framing to "further[] the government's ability to investigate while significantly limiting the individual's interest in liberty, privacy, personal security, and property"); Baradaran, *supra* note 8, at 15–16; Strossen, *supra* note 29, at 1183; Reinert, *supra* note 10, at 1473–75.

39. *See, e.g.*, Baradaran, *supra* note 8, at 15–16; Strossen, *supra* note 29, at 1183; Reinert, *supra* note 10, at 1473–75; Urbonya, *supra* note 18, at 1418.

40. Strossen, *supra* note 29, at 1184–87 (arguing that a balancing test for a constitutional right is generally a bad idea because balancing tests can lack uniform methodology and consistency and "devalue fundamental rights by evaluating potential infringements with a relatively low level of scrutiny").

41. *Id.* at 1199. Professor Strossen points out that while law enforcement is meant to protect the community, officers' unrestrained use of power can actually compromise community safety. Some members of the community feel less safe around law enforcement because of how law enforcement officers have wielded their power in the community.

the police unreasonably search or seize as when crime happens in the neighborhood.[42]

Professor Kathryn Urbonya argues that it is not clear when the Court should balance interests. The Court uses an inconsistent rhetorical framing for its balancing analysis that results in "generally furthering police powers at the expense of an individual's interest in liberty, privacy, personal security, and property."[43] How the Court balances seems to turn on its characterization of the facts and interests at stake.[44] Urbonya argues that the Court's lack of uniformity signals a desire to side with the police over a commitment to any "fixed" conception of the Fourth Amendment.[45]

Professor Alexander Reinert argues that the current balancing analysis often collapses the public's interest with the government's interest.[46] Considering the public may have interests on either side of the balancing can result in a less adversarial balancing analysis.[47] In other words, because the public's interests are not inherently in tension with those of the individual, the public's interest can be the bridge between the state's and the individual's interests.[48] However, because the Court has such a narrow understanding of the public's interests in Fourth Amendment protections, the Justices perform a balancing analysis that only serves the interests of the state.[49] The Court fails to consider competing interests the public may hold and considers only those public interests that support the government's interest in detecting and preventing crime. Therefore, even as more members of the public are pulled into the criminal legal system, police stop-and-search interactions do not become any more objectionable.[50] The Court's balancing analysis creates a world that aggrandizes law enforcement power and downplays the frequency and seriousness of Fourth Amendment intrusions.[51]

These critiques, while salient, fail to capture the full extent to which the Court's balancing approach exacerbates issue of race. As a result, the solutions they offer are only partial solutions. Even where scholars acknowledge the role race plays in an under-protective Fourth Amendment, their analysis often casts the

42. *Id.*

43. Urbonya, *supra* note 18, at 1417–18.

44. *See id.* at 1426.

45. *Id.* at 1440.

46. Reinert, *supra* note 10, at 1475; *see, e.g.*, Tennessee v. Garner, 471 U.S. 1, 25–26 (1985) (O'Connor, J., dissenting) (arguing that whether the seizure by deadly force was reasonable requires considering the "public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual").

47. Reinert, *supra* note 10, at 1466.

48. *See id.*

49. *Id.* at 1501–02.

50. *Id.*

51. *See id.*

racially disparate effects as byproducts more than as directly-intended results.[52] Critical Race Theory (CRT) allows us to understand the ways race has been baked into the criminal legal system and Fourth Amendment jurisprudence.

C. Critiques of the Court's Treatment of Race in Criminal Legal Jurisprudence

CRT was born out of a desire for legal academia to be more thoughtful about the role race plays in the legal system.[53] One of the goals of CRT is to "develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination."[54] Much of CRT thus exposes the ways in which the legal system keeps those with power in power at the expense of the most marginalized.[55] It also sheds light on the Black experience, while keeping in mind that intersecting identities create unique life experiences.[56]

CRT exposes the continued subordination of Black people in America. For example, it not only describes the way antidiscrimination laws have helped decrease overt racism, but also how these laws cannot reach the less visible forms of racism that we accept as daily norms.[57] It implores us to challenge these norms and resist all forms of subordination.[58] CRT scholars have written extensively on

52. *See, e.g.*, *id.* at 1486–87. Professor Reinert's article touches briefly on the ways in which the current Fourth Amendment balancing analysis may contribute to communities of color feeling alienated from society as a part of his broader argument that the public's interest does not always match the government's interest. This article specifically brings the experiences of Black communities to the forefront arguing that Black communities and other communities of color are being actively harmed by a Fourth Amendment jurisprudence that is not sensitive to the experiences of people of color in America. Professor Reinert's argument about race is salient and powerful, but is ultimately in service of his broader point. The purpose of this article, however, is to analyze Fourth Amendment balancing through the Black experience in America.

53. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–66 (1988) (explaining the ways in which the Critical Legal Studies movement does not fully understand and therefore does not fully respond to the issue of racial subordination in America); *see also (E)racing the Fourth Amendment*, *supra* note 10, at 967–68 (analyzing how the Supreme Court through Fourth Amendment jurisprudence constructs race and legitimates racial inequality); Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019) (theorizing about the role race might play in a future American society).

54. Capers, *supra* note 53, at 23–24 (quoting Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991)).

55. *Id.* at 24–25.

56. *Id.* at 25–26.

57. *See* Crenshaw, *supra* note 53, at 1380.

58. Capers, *supra* note 53, at 23–24. Subordination unfortunately comes in many forms, e.g., race; sex; gender; gender identity and expression; class; ethnicity; national origin; etc.

the criminal legal system and its treatment of Black and Brown communities.[59] This article focuses on CRT scholarship that addresses the Black experience with the Fourth Amendment.

The Fourth Amendment ostensibly protects individuals against "unreasonable searches and seizures" by the government.[60] However, in reality, "African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence."[61] Devon Carbado, in his seminal article, *(E)racing the Fourth Amendment*, exposes the Fourth Amendment's promises as largely illusory for the Black community.[62] Carbado attributes the problems with the Fourth Amendment to how the Court constructs and reifies race.[63] The Court often takes a "colorblind," or seemingly race-neutral, approach when it analyzes Fourth Amendment cases.[64] This approach is not informed by the on-the-ground realities of interactions between the Black community and law enforcement.[65] The Court seemingly believes racialized policing is something overt in which only "bad cops" partake, rather than understanding that racialized policing is a systemic practice in which all police officers are involved, no matter how well-meaning they may be.[66] The Court's attempt at neutrality comes at the expense of Black people's sense of self and safety.

Although there are many critiques of the Court's balancing analysis, and many critiques of the Court's criminal legal jurisprudence for its disparate impact

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59. *See, e.g.*, Capers, *supra* note 53 (imagining a future society where all forms of racial subordination have been eradicated and policing is no longer racially discriminatory); Cynthia Lee, *(E)racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 95 (2014) (analogizing the colorblind approach to the law that Devon Carbado criticizes in *(E)racing the Fourth Amendment* and the colorblind handling of the trial of George Zimmerman for the killing of Trayvon Martin); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011) (arguing courts should pay closer attention to the role implicit bias plays in police decision-making); Darrell D. Jackson, *Profiling the Police: Flipping 20 Years of* Whren *on its Head*, 85 UMKC L. REV. 671, 674 (2017) (arguing individuals should be able to profile police officers as a means of keeping their communities safe much like police officers racially profile entire communities); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 118 (2014) (examining the role unconscious bias and "self-threats" play in perpetuating racial violence and subordination); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (examining the role race should play in whether a Black juror chooses to convict or acquit a Black criminal defendant).

60. U.S. CONST. amend. IV.

61. *From Stopping to Killing*, *supra* note 7, at 129. The Black community has never enjoyed the protections of the Founding spirit of the Fourth Amendment. *Cf.* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 991–98 (1999) (arguing that the Framers intended the Fourth Amendment to protect unpopular minority groups and that the Court's treatment of issues of race goes against this original intent).

62. *(E)racing the Fourth Amendment*, *supra* note 10, at 969.

63. *See id.* at 965–66.

64. *See id.* at 968.

65. *See id.*

66. *See id.* at 968–69.

on Black communities,[67] scholars have not sufficiently brought these ideas together. Carbado does so briefly in a footnote in *(E)racing the Fourth Amendment*, where he argues that the interest balancing analysis is too simplistic.[68] When the interests of the state are balanced against those of the individual, the purely adversarial framing ignores potential overlapping interests.[69] More specifically, Carbado explains the individual has an interest in both effective law enforcement and the right to be secure from unnecessary government intrusion.[70] Part II of this note will bring together critiques of balancing with a CRT perspective, proving out the promise of Carbado's footnote. By adopting a characterization of state interests that is not fully representative of the communities of interest that make up the state, the Supreme Court has slipped into a skewed interest balancing analysis that perpetuates racialized narratives of crime. This creates a Fourth Amendment that is less protective of Black communities.

67. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017), (arguing that criminal legal jurisprudence lays out limits for police conduct, but at the same time creates a world where communities of color often feel under-protected and at times oppressed by law enforcement and estranged from the state); Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 692–93 (2018) (arguing that many criminal procedure cases are decided against the "background" of the meaning of race and race relations, even when the accused person is white); Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 13–14 (2011) (arguing that Fourth Amendment law, and specifically *Terry v. Ohio*, has enabled racial profiling to "flourish," which has a negative impact on the equality of citizenship for Black and Brown people); *(E)racing the Fourth Amendment*, *supra* note 10, at 967–68 (arguing that Fourth Amendment jurisprudence reifies race in a way that affirms and replicates racial inequality in policing); *From Stopping to Killing*, *supra* note 7, at 131–49 (demonstrating through hypotheticals how the Fourth Amendment gives law enforcement officers broad power to racially profile and to force interactions based on race); Baradaran, *supra* note 8, at 13–14 (highlighting that there is no Fourth Amendment remedy for racial profiling and that the Supreme Court's Equal Protection jurisprudence makes seeking a Fourteenth Amendment remedy for racial profiling very difficult); Garth Davies & Jeffrey Fagan, *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 460 (2000) (explaining that most courts have long tolerated police officers inferring criminality from the race of a suspect so long as race is not the sole rationale for police contact and the police officer is not intending to harass the suspect); Thompson, *supra* note 61, at 983 (arguing that Supreme Court Fourth Amendment jurisprudence intentionally scrubs race from decisions, "imagin[ing] a world in which some officers are wholly unaffected by racial considerations and in which even biased officers may make objectively valid judgments that courts can sustain despite the underlying racial motivations of the officer").

68. *(E)racing the Fourth Amendment*, *supra* note 10, at 969 n.113 (arguing that even as the balancing test claims to compare the need for effective law enforcement with the cost of a loss in privacy, it does not account for the social reality that "people of color experience more privacy losses and less effective law enforcement than white[]" people).

69. *See id.*

70. *See id.*

II.
A CRITICAL RACE PERSPECTIVE ON BALANCING

When the Court balances interests to determine whether police conduct is "reasonable" under the Fourth Amendment, the balancing can easily start off skewed in favor of the government because the individual asserting constitutional rights stands accused of a crime.[71] The Court therefore has a tendency to treat the individual's interests as narrow and confined to the case at hand. [72] The Court, however, has no problem appreciating the greater impact its decision might have on the government's interests and thus often describes the government's interests using sweeping, broad terms.[73] This seriously minimizes the individual's interests and allows the government's interests to dominate the analysis.[74]

To make the balancing fairer, the Court should consider the alignment between the interests at play. The accused person is a citizen with constitutional rights, and the government should value protecting those rights. Furthermore, an accused person's liberty interests before the Court implicate the liberty interests of the rest of the community. By ignoring alignment between the interests, the Court fails to consider the broader impact its decisions may have on communities and gets the balancing wrong.[75]

The Court's skewed balancing has a particularly deleterious impact on Black communities. When the Court performs its balancing analysis in the name of public safety, it often has the opposite effect; it makes the community—and Black communities in particular—less safe.[76] In many cases, Fourth Amendment jurisprudence perpetuates the cycle of over-policing and under-protecting that so many communities of color experience.[77] There are often other societal costs that come along with this, such as a lack of faith in the criminal legal system; a lack of desire to participate in civic life, such as in voting; and less economic

71. *See* Baradaran, *supra* note 8, at 4.

72. *See id.* at 5, 20–21.

73. *See id.* at 17, 20–21; Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 439 (1988).

74. *See* Baradaran, *supra* note 8, at 17, 20–21; Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 297–98 (2016).

75. *See* Reinert, *supra* note 10, at 1487 (arguing that individual experiences with law enforcement affect entire communities, especially in communities of color); Baradaran, *supra* note 8, at 20–21, 22 (arguing that judges overestimate risks and thus inflate the government's interest in the balancing analysis to the detriment of the individual); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 669 (1988) ("[T]he Court has adopted a 'police perspective' analysis when deciding fourth amendment issues. The police perspective has several characteristics. First, the Court is often unable (or unwilling) to appreciate the implications of its rulings for persons not immediately involved in the cases before it.").

76. See *infra* Parts II.A., II.B., and II.C., which give examples and discuss the effects of Fourth Amendment balancing.

77. *See (E)racing the Fourth Amendment*, *supra* note 10, at 969.

opportunity.[78] The discretion in the Fourth Amendment balancing analysis aggrandizes the power of law enforcement in policing Black and Brown communities and reinforces racialized narratives of crime.[79]

This Part will focus on three "Fourth Amendment" cases in which the Supreme Court does a form of interest balancing that has had a lasting negative impact on Black communities. It will look at the way the Court characterizes the respective interests and what it finds persuasive. This Part will then examine the effects of each case on Black communities. The government is tasked with the challenge of maintaining public safety while respecting and safeguarding individual liberties. In these instances, and so many others, the government fails at both.

A. Terry v. Ohio

In *Terry v. Ohio*, the Supreme Court legitimized an escalating police tactic intended to help police officers facilitate investigations short of an arrest when they lack probable cause.[80] In 1963, Officer McFadden, a police officer with 39 years of experience, noticed three men seemingly about to commit a robbery.[81] Officer McFadden approached the men and introduced himself as a police officer.[82] Almost immediately, he then grabbed Terry, spun him around, and searched him by patting him down.[83] After feeling a pistol in Terry's pocket, Officer McFadden ordered the three men into a nearby store, removed the pistol from Terry's pocket, and searched the other two men.[84] John Terry and Richard Chilton, both Black men, were carrying guns.[85] Carl Katz, a white man, was

78. *See, e.g.*, Amanda Geller & Jeffrey Fagan, *Police Contact and the Legal Socialization of Urban Teens*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 26, 27 (2019) [hereinafter *Police Contact and Legal Socialization*] (finding a relationship between police interactions and cynicism about the legal system); Woo Chang Kang & Christopher T. Dawes, THE ELECTORAL EFFECT OF STOP-AND-FRISK 13 (2017). https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Electoral%20Effect%20of%20Stop-and-Frisk.pdf [https://perma.cc/ES36-9BJM] (finding that the NYPD's practice of stop-and-frisk had a negative impact on voter turnout); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 974 (2020) (describing some of the economic consequences of an arrest).

79. *See* Baradaran, *supra* note 8, at 20–21; Urbonya, *supra* note 18, at 1418.

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

81. *Id.* at 5–6.

82. *Id.* at 6–7.

83. *Id.* at 7.

84. *Id.* Officer McFadden asked their names and the men mumbled in response. Officer McFadden then almost immediately frisked them. He did not attempt to ask any further questions or ask the men to leave. *Id.*

85. *Id.* Thompson, *supra* note 61, at 964 (citing State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387 app. at 1408 (1998) (John Q. Barrett ed.)).

unarmed.[86] Officer McFadden arrested all three men, and Terry and Chilton were subsequently charged with carrying concealed weapons.[87] Terry and Chilton argued that the evidence of the guns found on them should be suppressed because it was the fruit of an illegal search and seizure.[88] The Supreme Court held that if an officer has reasonable suspicion that a crime is underway and that the individual suspected of committing the crime is armed and dangerous, the officer can temporarily detain the person and frisk the outside of their clothing to search for weapons to protect the safety of the officer and any persons nearby.[89] *Terry* was one of the earliest cases to use a balancing analysis to determine what is "reasonable" under the Fourth Amendment.[90]

In evaluating whether the stop of Terry and Chilton was "reasonable," the Court balanced the government's interest in detecting and preventing crime against the individual's interest in not being stopped.[91] The Court reasoned that Officer McFadden's stopping of the three men was part of his job to investigate crime.[92] Indeed, it concluded that not stopping the three men would have been "poor police work."[93] The Court did not afford the same level of discussion to the individual's interest in not being stopped.[94] Justice Harlan in his concurrence characterized Terry's actions as "forcing an encounter" between Terry and Officer McFadden.[95] The Court relied heavily on Officer McFadden's experience in concluding that the stop was reasonable.[96] Thus, the Court held that the government's interests outweighed those of Terry and Chilton.

In evaluating whether the frisk of Terry and Chilton was "reasonable," the Court balanced Officer McFadden's interest in his own safety against the individual's interest in not having their person searched.[97] The Court stated that it would be unreasonable to request that an officer take unnecessary safety risks; namely, it would be unreasonable to deny an officer the authority to determine

86. *Terry*, 392 U.S. at 7; Thompson, *supra* note 61, at 964 (citing State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387 app. at 1408 (1998) (John Q. Barrett ed.)).

87. *Terry*, 392 U.S. at 7.

88. *See id.* at 7–8.

89. *Id.* at 30–31.

90. *See Factors for Reasonable Suspicion*, *supra* note 18, at 661.

91. *See Terry*, 392 U.S. at 20–21 ("In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for 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 seizure] entails.'" (quoting Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534–537 (1967))).

92. *Terry*, 392 U.S. at 22–23.

93. *Id.* at 23.

94. *See id.* at 24–25.

95. *See id.* at 34 (Harlan, J., concurring).

96. *See id.* at 28 (majority opinion).

97. *See id.* at 20–21, 23–25.

whether a stopped person is armed and dangerous.[98] The majority cited an FBI report about police officers killed or injured in the field, from which they concluded that the volume of injuries and deaths justified giving police search power to protect themselves.[99] When describing the individual's interest, the majority admitted that a frisk can be "severe, though brief . . . annoying, frightening, and perhaps humiliating."[100] This was the extent of the discussion of the individual's interest. There was no further factual analysis as with the government's interests.[101] The majority justified the frisk based on the limited nature of the search.[102] It said that an officer must limit a frisk to a search for weapons, and, as such, a frisk is less intrusive than a full search, though still intrusive.[103] Ultimately, the majority concluded that an officer has "a narrowly drawn authority" to conduct a reasonable search for weapons in the interest of their personal safety so long as the officer has reason to believe that a stopped person might be armed and dangerous.[104]

The interests characterized in *Terry* were purely adversarial. The Court did not look for any kind of overlap between the Fourth Amendment interests. For example, it did not consider the government's interest in ensuring that individuals feel safe from unwanted intrusions.[105] The practice of stop-and-frisk had long been used to harass and surveil Black communities.[106] Additionally, a government report cited in *Terry* detailed the realities of racialized policing at the time and its negative effects.[107] While the Court signaled that it understood racially

98. *Id.* at 23–24.

99. *Id.* at 24 n.21.

100. *Id.* at 24–25.

101. *See generally id.*

102. *Id.* at 25–26, 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

103. *Id.* at 26 ("The protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.").

104. *Id.* at 27.

105. *See generally id.*

106. *See* David Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 308–09 (1999) [hereinafter *Stories, Statistics, and the Law*]; Brief for NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae Supporting Petitioners-Appellants at 61, *Terry*, 392 U.S. 1 (No. 67); NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 10 (2014) [hereinafter BORN SUSPECT], https://www.prisonpolicy.org/scans/naacp/Born_Suspect_Report_final_web.pdf [https://perma.cc/Y3LQ-7DEX]. For personal stories of New Yorkers who have been stopped and frisked, see BORN SUSPECT, *supra*, at 13–16.

107. *See Terry*, 392 U.S. at 14 n.11 ("'[I]n many communities, field interrogations are a major source of friction between the police and minority groups' . . .. It was reported that the friction caused by '[m]isuse of field interrogations' increases 'as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" (quoting PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. JUST., TASK FORCE REPORT: THE POLICE 183–84 (1967))).

discriminatory policing was happening in some places,[108] it failed to grasp the depth of the problem.

To Black communities, stop-and-frisk has always felt like a tool designed to monitor and control. In its amicus brief in *Terry*, the NAACP Legal Defense Fund wrote:

> Whatever its conveniences and benefits to a narrow view of law-enforcement, stop-and-frisk carries with it an intense danger of inciting destructive community conflict. To arm the police with an inherently vague and standardless power to detain and search, especially where that power cannot effectively be regulated, contributes to the belief which many Negroes undeniably have that police suspicion is mainly suspicion of them, and police oppression their main lot in life.[109]

While it may seem like Officer McFadden leveraged his many years of police experience to prevent a potential robbery from happening,[110] the broader impact of *Terry* has not necessarily resulted in a drop in crime.[111] In New York City, for example, data shows no statistical relationship between stop-and-frisk as a practice and rates of violent or property crime.[112] Rather, *Terry* has jeopardized Fourth Amendment rights, putting them in a limbo where they are not respected. As the *Terry* Court stated, stop-and-frisks are not only invasive, but they can induce fear and humiliation.[113] This fear and humiliation has a chilling effect on a community's freedom, leaving the community alienated from broader society.[114] For Black communities, this is just another chapter in the ongoing history of the law being used to entrench white privilege and intimidate and control

108. *See id.* at 14–15 (acknowledging that police tactics can be used to harass but failing to rule in a way that addresses abusive policing based on race).

109. Brief for NAACP Legal Defense & Education Fund, *supra* note 106, at 68–69.

110. *See Terry*, 392 U.S. at 23.

111. *See* JAMES CULLEN & AMES GRAWERT, BRENNAN CTR. FOR JUST., FACT SHEET: STOP AND FRISK'S EFFECT ON CRIME IN NEW YORK CITY (2016), https://www.brennancenter.org/media/5670/download [https://perma.cc/24DQ-U9BF] (showing graphically that the decline in certain crimes continued even as the number of persons stopped and frisked declined, suggesting that stop-and-frisk was not the main cause of falling crime rates).

112. *Id.*

113. *Terry*, 392 U.S. at 24–25.

114. *See, e.g.*, Emily Badger, *The Lasting Effects of Stop-and-Frisk in Bloomberg's New York*, N.Y. TIMES: THE UPSHOT (Nov. 30, 2020), https://www.nytimes.com/2020/03/02/upshot/stop-and-frisk-bloomberg.html [https://perma.cc/B6XP-HBT2]; Bell, *supra* note 67 (arguing that alienation and estrangement are better concepts than mistrust for diagnosing and addressing the often strained relationship between low-income communities of color and the police).

Black people.[115] Since *Terry*, the practice of stop-and-frisk has too often proved to be arbitrary and standardless.[116]

Reasonable suspicion is a difficult standard to discern. Cast in the most generous light, *Terry* struck an important balance between the right to be left alone and the need for police investigation. This balance, however, hung on the amorphous concept of "reasonable suspicion."[117] Reasonable suspicion must be more than a hunch, but is a lower standard than probable cause.[118] There is little agreement on any definition more specific than that.[119] Because it is so ill-defined, there is a lot of slippage in the concept. For example, many courts permit police stops when a person is in a high-crime area and behaves in a way that an officer perceives as evasive, even if an innocuous alternative explanation exists for the suspect's behavior.[120] This has resulted in members of low-income communities of color being disproportionately stopped, not necessarily for their behavior, but because of where they live.[121] Even if *Terry* successfully struck a careful balance between the individual and the government's interests, its progeny quickly made clear that any suggestion of criminal activity, and even innocent activity that could be interpreted as criminal activity, gives police license to initiate a *Terry* stop.[122]

The New York City Police Department's (NYPD) policy of stop-and-frisk, held unconstitutional in 2013, is an excellent example of both the pervasiveness of stop-and-frisk and the difficulty in determining reasonable suspicion.[123] From January of 2004 to June of 2012, the NYPD conducted more than 4.4 million *Terry* stops.[124] In 2011, at the height of stop-and-frisk in New York City, the NYPD

115. *See, e.g.*, WILLIAM H. CHAFE, RAYMOND GAVINS, & ROBERT KORSTAD, REMEMBERING JIM CROW (2001) (compiling first-hand accounts of persons who lived under Jim Crow laws meant to exclude and subordinate Black people in the South); Crenshaw, *supra* note 53 (critiquing antidiscrimination law for eliminating formal racism, but allowing more subtle forms of subordination buttressed by the law to exist and even thrive).

116. *See infra* notes 123–135 (describing the pervasiveness of stop-and-frisk in New York City as a practice, especially in communities of color, but the very low rate of discovering weapons or taking further actions, such as an arrest, in stop-and-frisk encounters). A federal judge found New York City's use of stop-and-frisk to be unconstitutional because it was tainted by the use of race as a proxy for crime rendering too many of these encounters not truly supported by reasonable suspicion. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 560, 561–62, 663 (S.D.N.Y. 2013).

117. *See Terry*, 392 U.S. at 27; Thompson, *supra* note 61, at 963 n.19.

118. *See* Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 52–53 (2016).

119. *See id.* at 54.

120. *See Factors for Reasonable Suspicion*, *supra* note 18, at 660.

121. *See id.* at 680–81 (explaining that Black and Brown persons living in low-income neighborhoods are "caught in a vicious cycle" where they are stopped and frisked disproportionately by the police, which makes them want to avoid police, but that by trying to avoid the police, the police have greater authority to stop them).

122. *See* Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 578 (1991).

123. *See* BORN SUSPECT, *supra* note 106, at 13–16 (detailing the ways in which stop-and-frisk in New York City negatively impacted different BIPOC and LGBTQ communities); Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013)

124. *Floyd*, 959 F. Supp. 2d at 558.

conducted approximately 685,000 stops.[125] Of the 4.4 million *Terry* stops, 52% were followed by a frisk for weapons.[126] Police found a weapon in about 1.5% of these frisks.[127] Of the 4.4 million stops, 88% resulted in no further law enforcement action.[128] In 52% of the 4.4 million stops, the person stopped was Black, even though Black people made up under 25% of New York City's resident population at the time.[129] In 31% of stops, the person was Hispanic; Hispanics made up just under 30% of the resident population.[130] In 10% of stops, the person was white, although white people made up over 30% of the resident population.[131] While the numbers of investigatory pedestrian stops increased over the study, this increase did not correspond to an increase in crime detection.[132] In 2013, in *Floyd v. City of New York*, a federal judge held the NYPD's practice of stop-and-frisk unconstitutional because officers were engaging in stops that were not based on reasonable suspicion.[133] The Court also found that the NYPD had a practice of using race as a proxy for crime.[134] Although the stop-and-frisk numbers have declined dramatically since the *Floyd* decision, the racially disparate impact of the practice remains.[135]

The practice of stop-and-frisk, and its often racially disparate impact, can foster mistrust between individuals and the government and make people feel less safe in their communities. In a study of adolescents across twenty major cities, researchers found a strong relationship between interactions with police and cynicism about policing and the ability of the law to protect.[136] People in communities in New York City, where stop-and-frisk is prevalent, report that they

125. *Id.*; BORN SUSPECT, *supra* note 106, at 11; N.Y.C.L. UNION, STOP-AND-FRISK DATA, https://www.nyclu.org/en/stop-and-frisk-data [https://perma.cc/9RNS-S8A7] (last visited Sept. 18, 2022).

126. *Floyd*, 959 F. Supp. 2d at 558.

127. *Id.*

128. *Id.* at 558–59. Of the other 12%, half resulted in arrests and the other half in summonses. *Id.* at 558.

129. *Id.* at 559.

130. *Id.*

131. *Id.*

132. While the number of *Terry* stops increased over time, the number of arrests or summonses issued during *Terry* stops did not increase. In 2002, about 82% of stops led to no arrest or summons. In 2011, about 88% of stops led to no arrest or summons. BORN SUSPECT, *supra* note 106, at 11.

133. *See Floyd*, 959 F. Supp. 2d at 560, 561–62.

134. *See id.* at 663 ("Plaintiffs have readily established that the NYPD implements its policies regarding stop-and-frisk in a manner that intentionally discriminates based on race. While it is a closer call, I also conclude that the use of race is sufficiently integral to the policy of targeting 'the right people' that the policy depends on express racial classifications.").

135. In 2019, the NYPD recorded 13,459 stops, as compared to 685,724 recorded in 2011. N.Y.C.L. UNION, *supra* note 125. Despite the decline in overall numbers, since 2011, the proportion of Black people stopped has hovered steadily between 52 and 59%, and the proportion of Latinx people stopped has hovered steadily between 27 and 34%. *Id.*

136. *See Police Contact and Legal Socialization*, *supra* note 78, at 27.

expect to be harassed by the police.[137] These same people also report that police presence does not make them feel safer; it has the opposite effect.[138] When Black people and other people of color are continually exposed to a type of policing they perceive to be unfair or unjust, mistrust and disillusionment with legal structures sets in.[139]

Increased interactions with police officers also make people more likely to experience "stress responses and depressive symptoms."[140] Stop-and-frisk encounters can be "far more intrusive than the phrase 'pat-down of the outer clothing' suggests."[141] Frisks can be fear-inducing and traumatizing.[142] A 2014 study showed that young men between the ages of 18 and 26 who had multiple interactions with NYPD officers largely reported symptoms of anxiety and trauma connected to their experiences.[143] The more interactions a participant had with the NYPD, and the more intrusive the encounters were, the more serious symptoms of anxiety and lower perception of fairness appeared in that participant's responses.[144]

Stop-and-frisk has negatively impacted the educational development of young Black children. Studies on the impact of stop-and-frisk on children in New

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137. CTR. FOR CONST. RTS., THE HUMAN IMPACT REPORT: THE STORIES BEHIND THE NUMBERS, THE EFFECTS ON OUR COMMUNITIES 17 (2012) [hereinafter THE HUMAN IMPACT REPORT].

138. *Id.* at 20. While crime has gone down steadily over time in New York City, this cannot necessarily be attributed to stop-and-frisk. BORN SUSPECT, *supra* note 106, at 12. Even as stop-and-frisk numbers have declined, crime rates have continued to decline, suggesting that stop-and-frisk was not the driver of decreasing crime rates. *Id. See also* Cullen & Grawert, *supra* note 111, at 1, 2 (showing graphically that the decline in crime continued even as the number of persons stopped and frisked declined, suggesting that stop-and-frisk was not the main cause of falling crime rates).

139. *See* Susan A. Bandes, Marie Pryor, Erin M. Kerrison, & Phillip Atiba Goff, *The Mismeasure of* Terry *Stops: Assessing the Psychological & Emotional Harms of Stop & Frisk to Individuals & Communities*, 37 BEHAV. SCI. L. 176, 184 (2019) [hereinafter *The Mismeasure of* Terry *Stops*]; *see also* CHARLES R. EPP, STEVEN MAYNARD-MOODY, & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE & CITIZENSHIP 3 (2014) [hereinafter PULLED OVER] (explaining that Black people distrust the police at higher rates than white people). This mistrust can be compounded by other historical examples of federal, state, and local governments failing the Black community. For example, early on the in COVID-19 pandemic, the New York Times reported that COVID-19 vaccination rates among young Black people in New York City were low. The newspaper interviewed young Black New Yorkers to find out what was holding them back from getting vaccinated. A common thread among the reasons given was mistrust of the government for the history of how it has treated Black people. One person stated that they feel more threatened by the prospect of a police officer mistreating them than they do by COVID-19. Joseph Goldstein & Matthew Sedacca, *Why Only 28 Percent of Young Black New Yorkers Are Vaccinated*, N.Y. TIMES (Aug. 12, 2021), https://www.nytimes.com/2021/08/12/nyregion/covid-vaccine-black-young-new-yorkers.html [https://perma.cc/R3M7-EC54].

140. Amanda Geller, Jeffrey Fagan, Tom Tyler, & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, AM. J. PUB. HEALTH, Dec. 2014, at 2321, 2321.

141. The *Terry* Court acknowledged this. *The Mismeasure of* Terry *Stops*, *supra* note 139, at 180. *See* Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968).

142. *See The Mismeasure of* Terry *Stops*, *supra* note 139, at 180 (arguing that not enough attention has been paid to the psychological effects of stop-and-frisk).

143. Geller, Fagan, Tyler, & Link, *supra* note 140, at 2324–25.

144. *Id.*

York City schools show that increased contact with the police can have lasting negative effects on educational achievement.[145] One study showed that increased interactions with the NYPD correspond with lower test scores for Black boys in school.[146] The effects were greatest on boys aged 13–15.[147] Another study of middle school students showed that increased contact with the police increased the likelihood that Black students would drop out of high school, not enroll in college, or drop out of college.[148]

Increased police interactions can also result in lower voter turnout in Black communities. In a study published in 2017, researchers looked at electoral participation in the 2010 and 2014 federal midterm elections in New York City neighborhoods targeted by police for stop-and-frisk.[149] The study found that stop-and-frisk can have a negative impact on voter participation.[150] Participants who identified as Black, male, and older were the most likely to see a drop in voter turnout as a result of more aggressive police tactics.[151] Because the study was limited to registered voters, it did not capture the effect stop-and-frisk likely had in discouraging people from registering to vote in the first place.[152]

Communities that are targeted by police departments for stop-and-frisk expect harassment.[153] By ignoring the disparate experience of stop-and-frisk, the law creates a space where Black people have little protection against escalating police investigative tactics.[154] As a practice, stop-and-frisk increases the likelihood of a violent encounter with the police because it greatly increases the

145. *See* Joscha Legewie & Jeffrey Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 AM. SOCIO. REV. 220, 231, 239 (2019); *see also* Andrew Bacher-Hicks & Elijah De La Campa, Social Costs of Proactive Policing: The Impact of NYC's Stop and Frisk Program on Educational Attainment 27 (Feb. 26, 2020) (unpublished manuscript) (on file with author).

146. *See* Legewie & Fagan, *supra* note 145, at 232.

147. *Id.* at 231. There was notably not as serious of a negative effect on non-Black and non-male students. *Id.* at 233.

148. Bacher-Hicks & De La Campa, *supra* note 145, at 20–21. Notably, in their study of the effect of policing on educational attainment, Bacher-Hicks and De La Campa found evidence of long-run increased educational achievement for white and Asian students, suggesting that increased police activity may benefit some racial groups less likely to experience a negative police interaction. *Id.* at 27.

149. Kang & Dawes, *supra* note 78, at 5.

150. *Id.* at 1, 13.

151. *See id.*

152. *See id.* at 13–14.

153. *See* The HUMAN IMPACT REPORT, *supra* note 137, at 17.

154. *See From Stopping to Killing*, *supra* note 7, at 129 ("[T]he Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact, but also to the violence of serious bodily injury and death. Put another way, the legalization of racial profiling facilitates the precarious line between stopping [B]lack people and killing [B]lack people."); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

interactions between Black people and police officers.[155] Many deaths at the hands of the police began as ordinary *Terry* stop encounters.[156] Where a police department sees the opportunity for additional investigation, a Black person encounters a potential life-or-death situation.

The collateral consequences of *Terry* implicate the government side of the balancing analysis. The government has interests in crime control and officer safety, as identified in *Terry*,[157] but it also has interests in protecting constitutional liberties and maintaining public safety. The modern practice of stop-and-frisk has not decreased crime rates, and officers rarely discover weapons through frisks.[158] Stop-and-frisks are annoying and humiliating at best and fatal at worst.[159] Although stop-and-frisk is typically conducted in the name of public safety, it often makes communities of color feel less safe. The delicate compromise the

155. In the same way that Justice Harlan described the interaction in *Terry* as having been forced by Terry, Chilton, and Katz, Professor Carbado explains that Fourth Amendment jurisprudence has developed in a way that "effectively 'pushes' police officers to target [Black people] and 'pulls' [Black people] into contact with the police." *From Stopping to Killing*, *supra* note 7, at 129; *see also* Terry v. Ohio, 392 U.S. 1, 34 (1968) (Harlan, J., concurring). Professor Carbado goes on to discuss traffic stops and racial profiling in his article, but the idea that Fourth Amendment jurisprudence facilitates more interactions between Black people and law enforcement applies to *Terry* and the practice of stop-and-frisk as well. *Terry* provided some court oversight for a police tactic that already existed, but it also legitimized the practice of stop-and-frisk. As discussed previously in this section, stop-and-frisk as a practice resulted in thousands of police-civilian interactions that may not have otherwise happened. *See* N.Y.C.L. UNION, *supra* note 125.

156. *See, e.g.*, Thompson, *supra* note 1 (telling the story of Nathaniel Pickett, who was shot and killed after he tried walking away from a police officer during an ordinary encounter where he had the right to walk away); Associated Press, *Judge Acquits Amtrak Officer in Fatal Chicago Shooting*, ABC NEWS (Feb. 28, 2020, 3:26 PM), https://abcnews.go.com/US/wireStory/judge-acquits-amtrak-officer-fatal-chicago-shooting-69289840 [https://perma.cc/2GA9-6UJJ] (telling the story of Chad Robertson, a Black man fatally shot by police when he took off running during a frisk for weapons).

157. *Terry*, 392 U.S. at 22–23.

158. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (showing that police detected a weapon just 1.5% of the time in frisks from 2004 to 2012); BORN SUSPECT, *supra* note 106, at 12 (showing that in 2011, at the height of stop-and-frisks in New York City, police discovered weapons in only 0.2% of frisks).

159. *See Terry*, 392 U.S. at 14 n.11, 24–25 (citing PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. JUST., *supra* note 107, at 183–84) (noting that some police officers use stop-and-frisk to embarrass and describing a frisk as a "severe, though brief, intrusion upon cherished personal security . . . [and] an annoying, frightening, and perhaps humiliating experience"); *From Stopping to Killing*, *supra* note 7, at 129 (explaining how ordinary police interactions and routine law enforcement surveillance put Black communities at risk of experiencing violence at the hands of law enforcement); Dave Mayers, *How the Death of Eric Garner Changed the NYPD and New York City*, VICE NEWS (July 18, 2019, 3:38 PM), https://www.vice.com/en/article/3k3ga5/nypd-commish-james-oneill-teared-up-in-an-interview-about-eric-garner [https://perma.cc/BC7N-CZH4] (showing how the killing of Eric Garner in 2014, which began as a stop-and-frisk interaction for allegedly selling loose cigarettes, helped shift NYPD practices toward building relationships with community members); Sarah Childress, *How Baltimore's Police Policy Led to Freddie Gray*, PBS FRONTLINE (Aug. 10, 2016), https://www.pbs.org/wgbh/frontline/article/how-baltimores-police-policy-led-to-freddie-gray/ [https://perma.cc/P6RQ-HGXS] (showing how the Baltimore Police Department's stop-and-frisk practices targeted Black people and involved suspicionless stops and excessive force, ultimately leading to the stop-and-frisk, arrest, and killing of Freddie Gray).

Supreme Court struck in 1968 has aggrandized police power to the detriment of the safety of communities of color.[160]

B. Whren v. United States

In *Whren v. United States*, the Supreme Court held that where an officer has probable cause to believe that someone violated a traffic law, the officer has a lawful basis for stopping the vehicle—even if the stop is pretextual.[161] This often plays out as officers stopping vehicles for technical traffic violations when they are interested in investigating something more serious.[162] In 1993, plainclothes police officers, who were part of a specialized drug unit, sat in an unmarked vehicle patrolling a Washington, D.C., neighborhood for suspicious activity.[163] The officers witnessed a car that had been stopped at a stop sign for an unusually long amount of time suddenly turn without using a turn signal and speed off.[164] The officers followed and stopped the vehicle.[165] When they approached the car and looked inside, they saw plastic bags of crack cocaine.[166] James Brown and Michael Whren, both Black men, were arrested on federal drug charges.[167] Brown and Whren moved to suppress the evidence, arguing that the stop was not justified based on probable cause of committing a drug-related offense, and consequently, the officers' probable cause was pretextual.[168]

In *Whren*, a unanimous Court conducted an abbreviated balancing analysis favoring the government's interests. The Court identified the government's interest as promoting effective law enforcement and the individual's interest as avoiding police contact.[169] The Court recognized the need to balance interests but held that the presence of probable cause tipped the balance in favor of the government.[170] The Court stated that all Fourth Amendment questions involve a

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160. *Terry v. Ohio* was decided in 1968.

161. Whren v. United States, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."); *id.* at 812–13 ("We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification . . .. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

162. *See* Rushin & Edwards, *supra* note 14, at 649 ("*Whren* stands for the proposition that police officers are permitted to engage in pretextual traffic stops—that is, stops justified by technical violations of the law but executed primarily so that the officer can investigate an unsubstantiated hunch (a hunch that, by itself, would not create constitutionally adequate suspicion)."); *id.* at 697–98 (showing that in Washington state, the *Whren* decision has likely led to an increase in racial profiling in traffic stops and proposing as a reform that "traffic-code enforcement should be decoupled from the investigation of more serious criminal offenses").

163. *Whren*, 517 U.S. at 808.

164. *Id.*

165. *Id.*

166. *Id.* at 808–09.

167. *Id.* at 809–10.

168. *Id.*

169. *See id.* at 817–18.

170. *Id.*

form of balancing of interests because they turn on a reasonableness determination, but where an officer has probable cause, the individual's interests are "outbalance[d]."[171] The Court explained that probable cause has been a traditional justification for intrusion on Fourth Amendment liberties unless a police officer behaves in an "extraordinary manner."[172] Although the arresting officer was in plainclothes and sitting in an unmarked vehicle, the Court held that stopping someone for a traffic violation is not extraordinary, and therefore, this case did not require a full balancing analysis.[173]

The Court in *Whren* construed the individual's interests at stake in a very narrow way, rejecting how the Petitioners characterized these interests.[174] The Petitioners asked the Court to consider a nuanced version of the interests at stake: how enforcement of traffic laws by plainclothes officers in unmarked vehicles will make roadways marginally safer and how traffic stops interfere with the freedom of movement, are inconvenient, and induce anxiety, particularly amongst persons of color.[175] The Petitioners acknowledged the government's interest in maintaining safe roadways while also acknowledging the seriousness of a Fourth Amendment search or seizure.

The government's interests in *Whren* were not as one-sided as the Court made them out to be. The government has an interest in not only making sure the roadways are safe, but making sure drivers feel safe on the road as well. The practical effect of the Court's decision is "unbridled [police] discretion"—where an officer wants to stop someone, they can find a justification to do so.[176] When an officer makes a stop based on a technical violation for an alternative purpose, the stops for those alternative purposes—no matter how legitimate the purposes may be—become standardless. Furthermore, the discretion officers have to

171. *Id.*

172. *Id.* at 818. The Court gave examples of cases when the officer had probable cause, but it went on to balance interests anyway. The common thread in the given examples is a more extreme intrusion on a person's right to privacy, such as use of deadly force. *Id.*

173. *Id.* at 818–19.

174. *Id.*

175. *Id.* at 816–17; Brief for Petitioners, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758, at *44–47. The Petitioners also noted in their brief that the government's interest in stopping Whren and Brown was not simply ensuring effective law enforcement; rather, because the police acted contrary to established police procedure, the government's interest could be more accurately described as ensuring effective law enforcement regardless of established police procedure. *See id.*

176. *See (E)racing the Fourth Amendment*, *supra* note 10, at 1030; *see also From Stopping to Killing*, *supra* note 7, at 162–63; *Whren*, 517 U.S. at 810 ("Since, [the Petitioners] contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.").

enforce technical violations for an alternative purpose also makes the underlying stop arbitrary.[177]

Whren effectively blessed pretextual traffic stops.[178] There are two kinds of traffic stops: safety stops and investigatory stops.[179] Safety stops are meant to enforce traffic laws.[180] Investigatory stops are not meant to enforce traffic laws; rather, they are meant to investigate the driver in the hopes of making an arrest.[181] Because police officers require a legal basis to stop a vehicle, investigatory stops are often predicated on minor violations, such as failing to signal when changing lanes, having a burned out license plate light, or driving two miles over the speed limit.[182] While investigatory stops are supposed to be based on actual traffic violations, racial bias often plays a role in who gets pulled over. A recent book analyzed traffic stop data in Kansas City and found that racial disparities in who gets pulled over are "concentrated in investigatory stops."[183] When only safety stops were analyzed, the police were not more likely to stop Black drivers than white drivers.[184] When only investigatory stops were analyzed, the police were much more likely to stop Black drivers and other drivers of color than white drivers.[185] Young Black men in particular were the most likely to be stopped.[186]

Many Black people have personal accounts of being pulled over for "driving while Black."[187] Being pulled over for "driving while Black" means being stopped for a minor offense that an officer might not have chosen to enforce but for the driver's skin color. Getting stopped by the police on the basis of skin color takes an emotional and psychological toll on a person.[188] To avoid unnecessary encounters with the police, some Black people intentionally drive less flashy cars,

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177. In a pretextual stop, the stop itself is theoretically supported by probable cause for a minor violation. This Article argues that because the true purpose of a pretextual stop is not the minor violation, but a more serious crime, not only is there no individualized suspicion to support the more serious violation, but the standard for the minor violation is also warped. In a pretextual stop, the minor violation is only punished because of the possibility of punishment for a more serious offense. *See* Rushin & Edwards, *supra* note 14, at 649 (defining a pretextual stop).

178. *Id.* Rushin and Edwards show empirically that decisions like *Whren* increased the probability of racial profiling in police officers. *See id. passim*.

179. *See* PULLED OVER, *supra* note 139, at 13.

180. *See id.* at 8.

181. *See id.*

182. *Id.*

183. *See id.* at 13–14, 20.

184. *See id.* at 13–14.

185. *See id.*

186. *See id.*

187. *See Stories, Statistics, and the Law*, *supra* note 106, at 267; Sharon LeFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html [https://perma.cc/M757-YJX6].

188. For more stories of "driving while Black," see *Stories, Statistics, and the Law*, *supra* note 106, at 265–66, 270–75. *See also* DRIVING WHILE BLACK: RACE, SPACE AND MOBILITY IN AMERICA (PBS 2020), https://www.pbs.org/video/driving-while-black-race-space-and-mobility-in-america-achvfr/ [https://perma.cc/5CXP-A9PP].

dress in ways that deflect attention, or choose not to drive in certain areas.[189] Taking precautions to reduce the likelihood of a pretextual stop and police contact does not remove the sting of racial profiling.[190] An encounter with the police can have a lasting impact on a person, especially when these types of encounters are happening to entire communities.[191]

"Driving while Black" is not merely an anecdotal offense. *Whren* effectively authorized police use of racial profiling in traffic stops.[192] Racial profiling is a routine practice of police departments across the United States.[193] Statistical evidence shows that in many urban areas Black drivers get pulled over more than white drivers.[194] One study showed Black drivers are less likely to get pulled over just after the sun sets, suggesting police officers are less likely to single out Black drivers when they cannot easily identify the driver's skin color.[195] The same study found that the threshold for searching Black and Brown drivers during a traffic stop is lower than that for white drivers.[196] By allowing probable cause to end the balancing analysis in *Whren*, the Court elevated the government's need for pretextual stops above the individual's freedom of movement.

Pretextual stops hit at the core of American identity and citizenship. Historically, federal, state, and local governments controlled and circumscribed the movements of Black people.[197] At the same time, the automobile became a

189. *See Stories, Statistics, and the Law*, *supra* note 106, at 305–06.

190. *See, e.g.*, LeFraniere & Lehren, *supra* note 187 (recounting the story of two young Black men who were pulled over by the police).

191. After being pulled over by the police, Rufus Scales and his younger brother Devin no longer feel safe around the police. Rufus turns away whenever he sees a police car, and Devin does not leave the house without a video recording device and a business card with a phone number on it for legal help. *Id.* See also, for example, BORN SUSPECT, *supra* note 106, at 13–16, for personal stories of how stop-and-frisk in New York City has negatively impacted different BIPOC and LGBTQ communities.

192. *From Stopping to Killing*, *supra* note 7, at 129–30; *see Stories, Statistics, and the Law*, *supra* note 106, at 281–88 (explaining a study conducted in Ohio analyzing traffic stops from 1996—the year *Whren* was decided—through the first four months of 1998, showing that Black people were two times more likely to be pulled over than non-Black drivers); PULLED OVER, *supra* note 139, at 3.

193. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RSRV. L. REV. 993, 1005–06 (2016); *see From Stopping to Killing*, *supra* note 7, at 155–56.

194. *See* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020); RACIAL JUST. PROJECT, N.Y.L. SCH., DRIVING WHILE BLACK AND LATINX: STOPS, FINES, FEES, AND UNJUST DEBTS 9–11 (2020), https://digitalcommons.nyls.edu/racial_justice_project/8/ [https://perma.cc/2RMG-47EC]; *Stories, Statistics, and the Law*, *supra* note 106, at 281–88; PULLED OVER, *supra* note 139, at 3; Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 164 (2020) [hereinafter Atwater *and the Misdemeanor Carceral State*].

195. Pierson, Simoiu, Overgoor, Corbett-Davies, Jenson, Shoemaker, Ramachandran, Barghouty, Phillips, Shroff & Goel, *supra* note 194, at 737–38.

196. *Id.* at 739; *see* PULLED OVER, *supra* note 139, at 13–14.

197. PULLED OVER, *supra* note 139, at 19.

symbol of freedom, mobility, and status.[198] Traveling free from government intrusion is about more than avoiding police contact. It is about citizenship and respect.[199] It is about maintaining a zone of privacy free from government intrusion.[200] People of color are disproportionately subjected to pretextual stops.[201] Allowing the police to perform racially disparate investigatory stops blows up this zone of privacy for Black communities. Pretextual traffic stops are yet another tool, like those used throughout history, to monitor and control the movements of Black people and communicate their lesser status in society.

Racial profiling erodes trust. Any effort police departments make to build trust and connect with communities is stunted by the practice of racial profiling.[202] Allowing pretextual stops makes Black people more cynical about the criminal legal system.[203] As a result, Black people may feel less inclined to give information to police officers if they are questioned, may be less likely to believe the testimony of a police officer testifying in court, and may be more likely to acquit a criminal defendant if they serve on a jury.[204] Pretextual stops thus undermine the efficacy of the criminal legal system.

The *Whren* Court failed to consider how the individual's interest in living in a safe community, free from race-based harassment by the police, might fit into the government's interest in maintaining public safety. When the Court held that claims of race discrimination have no place in the Fourth Amendment,[205] it effectively shut out the possibility of understanding race-based policing as a public safety issue. "[T]he legalization of racial profiling facilitates the precarious line between stopping [B]lack people and killing [B]lack people."[206] Because *Whren* empowers police to make pretextual stops, Black people are vulnerable to police violence every time they get into a car.[207] The negative emotional, physical, and

198. *Id.* at 18–19.

199. *See The Mismeasure of* Terry *Stops*, *supra* note 139, at 185 ("Interviews conducted by Epp et al. (2014) revealed that, for both Black and White drivers, the 'targeting [of] African Americans for investigatory stops sends unmistakable messages about their lower social status,' and contributes to a 'diminished version of citizenship.'" (quoting PULLED OVER, *supra* note 139, at 17)).

200. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).

201. *See* PULLED OVER, *supra* note 139, at 13–14.

202. *Stories, Statistics, and the Law*, *supra* note 106, at 309.

203. *See, e.g.*, PULLED OVER, *supra* note 139, at 3.

204. *Stories, Statistics, and the Law*, *supra* note 106, at 268–69. *See generally* Butler, *supra* note 59 (examining the role race should play in whether a Black juror chooses to convict or acquit a Black criminal defendant).

205. Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he 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. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

206. *From Stopping to Killing*, *supra* note 7, at 129.

207. *Id.* at 150.

economic consequences of an interaction with the police are far more serious than the need to strictly enforce rules of the road for every minor infraction. By allowing racial profiling and pretextual traffic stops, the Court undermines the public safety it purports to promote.

C. Atwater v. City of Lago Vista

In *Atwater v. City of Lago Vista*, the Court held that police can arrest a person for any offense, no matter how minor.[208] In 1997, Gail Atwater was driving with her three-year-old son, Mac, and five-year-old daughter, Anya, when she was pulled over and arrested in front of them. Her son Mac's toy had gone missing, and they were driving slowly to see if it had fallen out of the car window.[209] Ms. Atwater permitted her kids to take off their seatbelts in order to look for the toy.[210] Ms. Atwater was driving "approximately 15 miles per hour" when she was pulled over by Officer Turek.[211] He yelled at her, among other things, that she was going to jail, which scared her children.[212] A friend picked up Ms. Atwater's children, while Officer Turek handcuffed Ms. Atwater and took her to the police station.[213] At the station she was ordered to take off her shoes and hand over any other possessions she had on her person.[214] She was held in a cell for about an hour before she was arraigned and released on bond.[215] Ms. Atwater pleaded no contest to violating the seatbelt law and was fined $50—the maximum penalty for violating the seatbelt law.[216]

The *Atwater* Court claimed to eschew balancing for the clear-cut rule that a police officer can arrest for any offense, no matter how minor. Nonetheless, it effectively balanced the government's interest in an administrable rule against Ms. Atwater's interest in avoiding the humiliation and inconvenience of arrest for a minor offense.[217] The majority misapplied the test, derived from *Carroll*, regarding when to balance.[218] The *Carroll* test requires balancing when the common law is not clear on whether an officer's action is constitutionally

208. Atwater v. City of Lago Vista, 532 U.S. 318, 323, 354 (2001).

209. Jordan Smith, *How Misdemeanors Turn Innocent People into Criminals*, INTERCEPT (Jan. 13, 2019, 9:30 AM), https://theintercept.com/2019/01/13/misdemeanor-justice-system-alexandra-natapoff/ [https://perma.cc/XP6F-XCKM].

210. *Id.*

211. *Atwater*, 532 U.S. at 369 (O'Connor, J., dissenting).

212. *Id.* at 368.

213. *Id.* at 369.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.* at 361–62.

218. *Cf.* Urbonya, *supra* note 18, at 1427–28 (citing Carroll v. United States, 267 U.S. 132 (1925)). For a discussion of how *Atwater* is an example of competing rhetorical frameworks about what is "reasonable" under the Fourth Amendment, see *id.* at 1426–29.

permissible.[219] The majority extensively examined history to determine whether common law permitted an officer to arrest for low-level, non-violent offenses.[220] It found that the history of whether an officer was permitted to arrest for a minor offense was unclear.[221] The history did not fully support Ms. Atwater's position; but it also did not fully support the City's position.[222] Even though the majority found that the history was not clear, it did not explicitly deploy the requisite balancing analysis. It instead concluded that history was not definitively on Ms. Atwater's side and that the government had an interest in following a clear-cut rule to ensure effective law enforcement.[223] As such, an officer is permitted to perform a full arrest for a minor offense. Although the majority claimed not to balance, its reasoning was a form of balancing—just one that did not properly consider Ms. Atwater's interests.[224] And the government's interest in a categorical rule tipped this balance.

The dissenting Justices in *Atwater* properly balanced interests and found in favor of Ms. Atwater.[225] Because there was contradictory evidence as to whether an officer is permitted to make a warrantless arrest for a minor, fine-only offense, the dissent went on to balance.[226] It balanced the individual's interest in avoiding arrest for a minor offense (when a lesser consequence would suffice) against three different government interests: (1) following a bright-line rule; (2) enforcing child safety laws; and (3) encouraging an offender to appear for trial.[227] The dissent ultimately concluded that a full custodial arrest for a minor offense is not always justifiable based on the promotion of legitimate government interests.[228] An officer should not have unfettered discretion to arrest when something less intrusive would be as effective in promoting government interests.[229] The government had a legitimate interest in a clear rule, but this interest "by no means trumps the values of liberty and privacy at the heart of the [Fourth] Amendment's protections."[230] The dissent found that fining Ms. Atwater would have been just

219. *Atwater*, 532 U.S. at 363 (O'Connor, J., dissenting) (citing Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999)).

220. *See id.* at 326–46 (majority opinion).

221. *Id.* at 332 ("We thus find disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together and summarize accepted practice.").

222. *Id.* at 332, 335, 329–30.

223. *See id.* at 345, 347 ("Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.").

224. *See* Baradaran, *supra* note 8, at 16 n.77. *Contra Atwater*, 532 U.S. at 354 ("Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.'" (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))).

225. *Atwater*, 532 U.S. at 361, 370–71 (O'Connor, J., dissenting).

226. *Id.* at 361.

227. *See id.* at 366, 369.

228. *Id.* at 365–66.

229. *See id.*

230. *Id.* at 366.

as effective in promoting seatbelt use without the added trauma of an arrest.[231] It added that Ms. Atwater was also very unlikely to skip her court dates.[232] The government's interests did not outweigh the serious intrusion and unnecessary humiliation Ms. Atwater suffered as a consequence of her arrest.[233] Dissenting, Justice O'Connor warned that the majority's rule would have "serious consequences" for everyday Americans.[234]

When the *Atwater* Court held that police officers can make arrests for low-level offenses, the Court not only was valuing the government's desire for an administrable rule over the privacy interests of Ms. Atwater and the community at large; it was also prioritizing punitive and carceral impulses.[235] *Atwater* normalizes the use of state force and the threat of incarceration to induce fear, while ignoring the impact this kind of policing has on individuals, communities, and constitutional liberties.[236] This encourages the government to continue its long-standing practice of using misdemeanor-level offenses to facilitate social control and criminalize Black communities and low-income persons.[237]

Misdemeanor laws are part of a legacy of penal tools used to control and harass Black people.[238] According to Alexandra Natapoff's research, about 13 million misdemeanor cases are filed each year, making up about 80% of criminal court dockets.[239] If traffic offenses are added, the number of misdemeanor cases filed each year jumps to over 33 million.[240] Today, Black people account for about 24% of low-level arrests, though they make up about 13% of the national population.[241] Black people are at least two times, and sometimes ten times, more likely than white people to be arrested for offenses like "gambling, loitering,

231. *Id.* at 369–70.

232. *Id.* at 370–71.

233. *Id.* at 371.

234. *Id.*

235. *See* Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 151–52.

236. *See id.* at 153–54.

237. *Id.* at 152.

238. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1065 (2015) ("Because [Black] men are disproportionately subject to arrest for minor disorder and possession crimes, the misdemeanor process effectively converts racially disparate arrest policies into formal criminalization. This makes the petty offense process the first step in the racialization of U.S. crime and the formal stigmatization of large swaths of the [B]lack male population." (footnotes omitted)).

239. Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 160 (describing annual number of criminal misdemeanor cases and noting that this statistic does not include traffic offenses); *see* Mayson & Stevenson, *supra* note 78, at 975. Misdemeanor offenses may carry jail time, and include "decriminalized offenses, violations of municipal ordinances, and traffic violations." Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 152.

240. Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 160. Not all traffic offenses rise to the level of misdemeanors. Whether an offense is a misdemeanor depends on state and local criminal statutes. Under Texas criminal statutes, Ms. Atwater allegedly committed a misdemeanor-level offense. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

241. Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 164.

resisting arrest, and marijuana possession."[242] People of color generally are more likely than white people to get pulled over for traffic violations and then searched.[243] This increased exposure to the police increases the risk of experiencing violence at the hands of the police.[244]

Permitting arrests for low-level offenses is more about maintaining order than it is public safety. *Atwater* facilitates quality-of-life policing, which has a disparate impact on communities of color.[245] Quality-of-life policing has many forms—"zero tolerance" policing; "broken windows" policing; "hot spot" policing—but the core idea is the same: maintaining order and social control by enforcing low-level offenses in the hopes of detecting and preventing more serious crimes.[246] Aggressive enforcement of misdemeanor-level offenses has swept millions of people into the criminal legal system for minor, largely victimless offenses.[247] Justice O'Connor recognized in the *Atwater* dissent that the majority's rule could have serious consequences for every American whose conduct may constitute a misdemeanor.[248] The Fourth Amendment requires that police investigation tactics be reasonable under the totality of the circumstances of a police encounter,[249] but the majority's rule in *Atwater* "gives officers unfettered discretion to choose [a more invasive means of investigation] without articulating a single reason why such action is appropriate."[250] Justice O'Connor also noted that police can use minor offenses as pretext to harass people of color.[251] In fact, aggressive enforcement of low-level offenses has had a disparate impact on Black

242. *Id.*; *see also* BECCA CADOFF, PREETI CHAUHAN & ERICA BOND, DATA COLLABORATIVE FOR JUST. AT JOHN JAY COLL., MISDEMEANOR ENFORCEMENT TRENDS ACROSS SEVEN U.S. JURISDICTIONS 9 (2020), https://datacollaborativeforjustice.org/wp-content/uploads/2020/10/2020_20_10_Crosssite-Draft-Final.pdf [https://perma.cc/CQ9J-SEDY] (finding, across all seven jurisdictions studied, that there were approximately between three and seven arrests of a Black person for every one arrest of a white person).

243. *See* Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 164.

244. *See id.*; *From Stopping to Killing*, *supra* note 7, at 129.

245. *See* Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of* Terry, 15 OHIO ST. J. CRIM. L. 49, 58 (2017); Ngozi C. Kamalu & Emmanuel C. Onyeozili, *A Critical Analysis of the 'Broken Windows' Policing in New York City and Its Impact: Implications for the Criminal Justice System and the African American Community*, 11 AFR. J. CRIMINOLOGY & JUST. STUD. 71, 83–85 (2018) (explaining the disparate impact that broken windows-style policing has had on the Black community and other communities of color).

246. *See* Kamalu & Onyeozili, *supra* note 245, at 76–81 (explaining different variations of aggressive policing strategies); George L. Kelling & James Q. Wilson, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29, https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf [https://perma.cc/NY8Q-2T82].

247. *See* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 309 (2017).

248. Atwater v. City of Lago Vista, 532 U.S. 318, 371 (2001) (O'Connor, J., dissenting).

249. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))).

250. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

251. *See id.*

communities and other communities of color.[252] This disparate impact is revealed in the collateral consequences imposed upon these communities.

The majority in *Atwater* severely underestimated the economic impact its decision to allow full custodial arrests for misdemeanor-level offenses would have. When someone is arrested, they typically remain incarcerated until they can pay their fines or bail.[253] Ms. Atwater had the resources to pay the bond and the $50 fine to get out of jail and close her case, but not every person arrested for a misdemeanor can afford the set bail or fines. [254] Arresting low-income persons for misdemeanors and mere violations puts pressure on them to plead guilty in order to resolve their cases and get out of jail.[255] Even short periods of time in jail or required court appearances can put a strain on someone's livelihood. A person can lose employment, housing, or custody of their children.[256] Additionally, simply being arrested, much less pleading guilty, triggers a host of collateral effects, such as barriers to finding employment, immigration consequences, and loss of eligibility for public assistance programs.[257] Because the police often target low-income communities of color, Black communities and other communities of color are more likely to experience the negative economic consequences of interacting with the criminal legal system.[258] The collateral consequences of an arrest can have a serious financial impact on arrested individuals and their families.

Another serious consequence of these low-level misdemeanor arrests is an increase in people being ripped from their families, sometimes in front of children, which can prove traumatic for both parents and children alike. After watching a police officer berate and subsequently arrest his mom, Ms. Atwater's son, Mac, was terrified of police officers.[259] To this day, Mac gets nervous if he is ever pulled over.[260] More than half of the people in the United States' prison population are parents.[261] About 45% of Americans have had an immediate family member incarcerated at one point.[262] Low-income persons and people of color are more likely to be incarcerated than higher-income persons or white people, respectively.[263] It is likely many children of color have had similar experiences to

252. *See* Harmon & Manns, *supra* note 245, at 66; Kamalu & Onyeozili, *supra* note 245, at 83–85; Natapoff, *supra* note 238.

253. Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 162; *see* Mayson & Stevenson, *supra* note 78, at 974.

254. Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 162.

255. *Id.* at 162–63; *see* Mayson & Stevenson, *supra* note 78, at 975.

256. Mayson & Stevenson, *supra* note 78, at 974.

257. *See* Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 163; Mayson & Stevenson, *supra* note 78, at 974.

258. *See* Atwater *and the Misdemeanor Carceral State*, *supra* note 194, at 148, 164.

259. *Id.* at 147.

260. *Id.* at 148.

261. *Id.*

262. *Id.*

263. *See id.*

Anya and Mac, where they have watched an officer arrest a parent or loved one.[264] Courts should not underestimate the emotional toll arrests have on families.[265]

The discretion *Atwater* gives a police officer to maximize punishment for a low-level offense puts Black people at risk of physical harm. Many violent police encounters began as enforcement of low-level offenses. For example, George Floyd was arrested for allegedly using a counterfeit $20 bill.[266] Eric Garner was arrested for allegedly selling loose cigarettes.[267] Rodney Reese was arrested for allegedly walking on the road instead of the sidewalk.[268] Black people suffer disproportionately and needlessly when officers are permitted to arrest for low-level offenses.[269] The Court recognized the government's legitimate interest in effective law enforcement,[270] but it failed to consider that the government has an equal interest in members of the community benefiting from and feeling safe because of effective law enforcement. The *Atwater* majority traded constitutional

264. *See id.*

265. *See* Yvonne Humenay Roberts, Frank J. Snyder, Joy S. Kaufman, Meghan K. Finley, Amy Griffin, Janet Anderson, Tim Marshall, Susan Radway, Virginia Stack & Cindy A. Crusto, *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD. FAM. STUD. 214, 219–20 (2014) (finding that children exposed to the arrest of a family member experience greater behavior challenges than their peers without this exposure and also have a greater likelihood of experiencing other potentially traumatic events); *see also* Kristin Turney, *Family Member Incarceration and Mental Health: Results from a Nationally Representative Survey*, 2021 SSM - MENTAL HEALTH 1, 6 (finding that incarceration of any family member can have a negative impact on mental health, which may worsen existing inequalities given higher rates of incarceration among low-income communities and communities of color).

266. Hill, Tiefenthäler, Triebert, Jordan, Willis & Stein, *supra* note 3.

267. Joseph Goldstein & Marc Santora, *Staten Island Man Died From Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html [https://perma.cc/6DLW-M8CW].

268. *See* Maria Guerrero, *Police Investigating Officers' Arrest of Teen During Winter Storm*, NBCDFW (Feb. 22, 2021, 8:31 PM), https://www.nbcdfw.com/news/local/police-investigating-incident-of-teen-arrest-during-winter-storm/2560214/ [https://perma.cc/D4KJ-WAM6]. Notably, the police did not kill Rodney Reese. However, the police did needlessly arrest him. They could have left him alone per his request, or they could have offered to drive him home. David Sentendrey, *Plano Police Say Charge Dropped for 18-Year-Old Arrested While Walking Home from Work in the Snow*, FOX 4 (Feb. 21, 2021, 10:05 PM), https://www.fox4news.com/news/plano-police-say-charge-dropped-for-18-year-old-arrested-while-walking-home-from-work-in-the-snow [https://perma.cc/BYB6-DH7P] (quoting the Plano, Texas, Police Chief Ed Drain saying the officers should have taken Mr. Reese home).

269. *See* Natapoff, *supra* note 238.

270. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (recognizing the government's interest in administrable and clear rules for law enforcement to be able to follow). Atwater argued that she should not have been arrested for her non-violent, minor traffic violation, especially because Texas law authorized a fine as an acceptable punishment. *Id.* at 327, 347–48. Atwater went on to argue that one possible way to distinguish between crimes for which offenders can be arrested was "jailable" vs. "fine-only" offenses. *Id.* at 348. The Court, however, rejected this distinction as one that would burden effective law enforcement. *See id.* at 348–49. It said that police officers cannot be expected to know the details of criminal penalty schemes, nor could "jailable" vs. "fine-only" capture the complexities of the culpability of every criminal offense. *Id.*

liberties for greater police power—power that has not been used to ensure Black communities feel safe.

III.
TOWARD A BETTER BALANCING

The way the Court currently balances interests in Fourth Amendment cases operates as an effective presumption in favor of the government.[271] As a result, the Fourth Amendment is less protective for everyone, but especially for Black people who are routinely exposed to the criminal legal system.[272] The Court plays a significant role in perpetuating systemic racism by sanctioning and blessing police practices often used to target communities of color without individualized suspicion.[273] In doing so, the Court undermines its own concern for "public safety," ignoring how a fear-ridden community is as undesirable as a crime-ridden community.[274] The current balancing analysis does not properly reflect that the public has valid safety interests on both sides of the balancing analysis.

To address some of the racially disparate outcomes of police encounters and add nuance to the currently biased Fourth Amendment balancing test, the Court needs a balancing analysis that is more protective of individual liberties. One way to accomplish this would be to use strict scrutiny when analyzing Fourth Amendment violation claims. A strict scrutiny test would mean that where the government has intruded on an individual's Fourth Amendment liberties by searching or seizing, the government would need to show that (1) it had a compelling interest in searching or seizing; and (2) there were no less intrusive means to achieve the stated purposes.[275] In direct contrast to *Atwater*, this requires the government to consider the least intrusive means of restricting Fourth

271. *See* Baradaran, *supra* note 8, at 20.

272. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486–1508 (2016) (explaining ways in which Black communities are routinely exposed to surveillance and policing); *see also From Stopping to Killing*, *supra* note 7, at 129.

273. *See* PULLED OVER, *supra* note 139, at 13–14 (investigatory stops are an institutionalized practice and have a racially disparate impact).

274. *See* Strossen, *supra* note 29, at 1199 ("Unreasonable searches and seizures are just as illegal as the crimes which the police seek to control.").

275. *See* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1480 (2010).

Amendment liberties.[276] Using a strict scrutiny standard would effectively create a presumption in favor of the individual. Applying strict scrutiny to questions of reasonableness will ensure fundamental Fourth Amendment rights are treated like other fundamental constitutional rights and add a clear framework to a currently vague and manipulable balancing analysis.[277] While applying strict scrutiny is not a race-conscious solution, it addresses the issue of what weight should be given to the interests of the individual, a solution which will theoretically ensure the Fourth Amendment rights of Black and Brown accused persons are appropriately valued. The main risk in applying strict scrutiny is that it would either be too strict or barely strict at all.[278]

As a matter of logic and law, it is inconsistent to treat Fourth Amendment interests with a far lower level of scrutiny than other fundamental liberties.[279] In the First Amendment context, any viewpoint-based regulation limiting speech is evaluated using strict scrutiny.[280] In the Second Amendment context, any regulation limiting the core protections of the Amendment, such as the right to own a firearm in the home, is evaluated using strict scrutiny.[281] And in the Fourteenth Amendment context, limits on fundamental liberties, such as the right to marry, trigger strict scrutiny.[282] Fourth Amendment liberties are no less important than these other rights receiving higher scrutiny. In fact, Fourth Amendment liberties "create the environment necessary for other freedoms to

276. *See* Strossen, *supra* note 29, at 1238–42 (arguing that adding a least intrusive alternative standard to the Fourth Amendment will make the test for "reasonableness" more protective of individual liberties). The dissenting Justices in *Atwater* took a least intrusive means approach in their reasoning by taking up the larger question of whether the Fourth Amendment should allow a police officer to perform a full arrest for an offense for which a fine is a sufficient punishment according to the statute. Atwater v. City of Lago Vista, 532 U.S. 318, 370–71 (2001) (O'Connor, J., dissenting). The dissenters were prepared to narrow the scope of what the Fourth Amendment empowers police officers to do based on interest balancing and the ultimate question of what is "reasonable" under the Constitution. The majority was content to affirm or expand the existing state of police authority under the Fourth Amendment by favoring the government's interest in an administrable rule over Ms. Atwater's interest in constitutionally "reasonable" policing. *See id.* at 361–62. Therefore, the majority did not take a least intrusive means approach when deciding *Atwater*.

277. *See* Strossen, *supra* note 29, at 1241–42; Lee, *supra* note 275, at 1480; Sundby, *supra* note 73, at 446 ("[T]he compelling government interest standard unambiguously reorients fourth amendment analysis toward protection of the individual's privacy interest.").

278. Lee, *supra* note 275, at 1491.

279. *See* Strossen, *supra* note 29, at 1241–42.

280. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

281. *See, e.g.*, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 16 (2019) (citing United States v. Masciandaro, 638 F.3d 458, 470–71 (4th Cir. 2011)).

282. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 663–65, 675 (2015) (finding that the right to marry is a fundamental right subject to strict scrutiny and must be extended to same-sex couples). *See also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (applying strict scrutiny to a regulation that would sterilize a thrice convicted criminal).

flourish."[283] Professor Scott Sundby argues that if the right to privacy arising out of the Fourteenth Amendment receives strict scrutiny treatment, then surely the textually enumerated right to be free from unreasonable government intrusion should also receive strict scrutiny treatment.[284] Applying strict scrutiny to Fourth Amendment questions of reasonableness would bring harmony to constitutional treatment of fundamental rights.[285]

The current balancing analysis subjects the individual's interests to something that looks more like rational basis scrutiny than strict scrutiny.[286] Rational basis scrutiny is a standard highly deferential to the government which requires only a rational reason connected to a government interest to justify an action.[287] Strict scrutiny, however, is a more searching standard and requires that a policy be in furtherance of a compelling government interest and narrowly tailored to achieve that interest.[288] While the Court currently recognizes that varying levels of intrusion necessitate varying levels of scrutiny for reasonableness analyses, this fails to recognize the aggregate impact small intrusions have had on Black communities over time, and it fails to appreciate the larger intrusions the small intrusions have facilitated.[289] An unreasonable intrusion, no matter how small, implicates a fundamental right.

Asking courts to apply strict scrutiny would replace the current vague balancing test with a clear two-step analysis. It would require judges to clearly articulate the rights and interests at stake. It would recognize individual Fourth Amendment rights as fundamental and therefore not on an equal playing field with government interests. In theory then, even where a judge would be tempted to undervalue the Fourth Amendment rights of an accused person on account of race, class, or other bias, the judge would be required to articulate the interests of the individual as a fundamental right. While this likely will not correct for all forms

283. Strossen, *supra* note 29, at 1241.

284. *See* Sundby, *supra* note 73, at 436–38.

285. *See id.* at 436; Kevin C. Newsom, Recent Developments, *Suspicionless Drug Testing and the Fourth Amendment:* Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995)*, 19 HARV. J. L. & PUB. POL'Y 209, 209–10 (1995); *see also* Strossen, *supra* note 29, at 1241–42.

286. Holly, *supra* note 24, at 539; *see, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (upholding a regulation on a non-fundamental liberty because the regulation was rationally related to a legitimate government purpose).

287. *Williamson*, 348 U.S. at 483.

288. Lee, *supra* note 275, at 1480 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

289. *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 113–14 (2016) (explaining that the Court recognizes that different levels of intrusion warrant different levels of Fourth Amendment protection); *From Stopping to Killing*, *supra* note 7, at 128–29 (discussing how the Supreme Court's effective legalization of racial profiling, seen often in traffic stops, allows for an encounter that at best is a temporary stop and at worst could end in death, thus "facilitat[ing] the precarious line between stopping [B]lack people and killing [B]lack people"). The Justices in *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) named Officer McFadden's behavior as a justifiable escalating investigatory tactic falling short of a full arrest. The Justices did not anticipate the number of people, especially Black people, who would be swept into the criminal legal system as a result of institutionalized stop-and-frisk tactics. *See* N.Y.C.L. UNION, *supra* note 125.

of racial bias in Fourth Amendment jurisprudence, it will dramatically alter the weight of the interest being balanced against the government's interests. Strict scrutiny, therefore, in theory gives the individual more of a chance of winning against the government because of the characterization of the individual's interest as fundamental. Strict scrutiny will help guide the Court in assigning the proper weight to the interests at stake.

Strict scrutiny represents some of the most searching analysis a court can apply and could pose problems in this context, since it has been described as "'strict' in theory and fatal in fact."[290] Professor Cynthia Lee does not think strict scrutiny is the best approach to Fourth Amendment questions, because either it could be too strict and fatal to many police tactics, or the analysis could swing the opposite direction and strict scrutiny would be watered down.[291] She advocates for "reasonableness with teeth"—"heightened judicial scrutiny without the discretion-constraining limitations of strict scrutiny."[292] A reasonableness with teeth standard would ask the Supreme Court to set out in advance guiding principles to avoid the vagueness issues of the current balancing analysis.[293] However, where the Court has had opportunity to set out guiding principles for the boundaries of some Fourth Amendment rights, it has avoided doing so.

290. Lee, *supra* note 275, at 1480 (quoting Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

291. *See id.* at 1491.

292. *Id.*

293. *Id.* at 1493.

Qualified immunity cases are a painful example of this.[294] It is not clear that the Court would set out adequately protective guiding principles for other Fourth Amendment rights.

Whether strict scrutiny would indeed be fatal in fact, or oppositely rendered meaningless, is a real concern in applying strict scrutiny to search or seizure questions. This Article relies on the classic conception of strict scrutiny as a high standard used in many contexts with the hope that judges honor it similarly.[295] However, it also recognizes that strict scrutiny would need to adapt for the Fourth Amendment. It should not be fatal every time because the Fourth Amendment was not intended to curb all law enforcement discretion, but to curb the arbitrary abuse of discretion.[296] Additionally, while using strict scrutiny would bring structure to the current balancing analysis and require judges to articulate their reasoning using a clear framework,[297] there is no guarantee that something like internal biases held by judges could not distort this test, too. Despite potential issues with the

294. Part of the rationale for a court granting qualified immunity to a police officer is giving them leeway to perform their job. Police officers are often required to make split-second decisions. A court does not want to create a standard so strict that it would inhibit the investigation and prevention of crime because officers would fear lawsuits. *See* Michael E. Beyda, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte*, 89 FORDHAM L. REV. 2693, 2701–02 (2021); Aaron Belzer, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 652 (2012). The Supreme Court has taken this so far, however, that it grants qualified immunity without deciding the question of whether someone's Fourth Amendment rights have been violated. In qualified immunity cases, the analysis happens in two steps: (1) Did a state official violate a clearly established right? (2) Would a state official have known their conduct was unlawful in violation of a right? District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citing Reichle v. Howards, 566 U.S. 658, 664 (2012)). The Supreme Court held in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), that lower courts were permitted to do the two-step inquiry in any order "in light of the circumstances in the particular case at hand." As a result, there exists a body of caselaw where police officers are continually granted qualified immunity, but the contours of Fourth Amendment rights are never "clearly established." *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1315 (11th Cir. 2019) (granting qualified immunity to an officer who shot a child while attempting to shoot the family dog, noting that there was no factually similar case to establish that shooting the child while aiming for the family dog was violating a clearly established right); Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019) ("It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer."); Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018) (granting qualified immunity to an officer who sent a police dog to attack a man who had surrendered by sitting on the ground and putting his hands in the air because the case was not factually similar enough to a case where a man had surrendered by laying down on the ground). The Court could have held that the inquiry must proceed in the order that allows the court to determine whether a constitutional right has been clearly established, but it chose not to. Therefore, it is not entirely clear that, if called upon to set guidelines for "reasonableness with teeth," the Court would do so. *See* Lee, *supra* note 275, at 1491.

295. *See supra* notes 278–280 and accompanying text; *see also* Newsom, *supra* note 285, at 209–10 (describing other contexts that use a strict scrutiny standard).

296. *See* Holly, *supra* note 24, at 585 (arguing that *Terry v. Ohio*, 392 U.S. 1 (1968), provides an example of a situation where a police officer might have been best situated to identify the least intrusive means of search and seizure).

297. *See* Sundby, *supra* note 73, at 436 (arguing that strict scrutiny would "yield a more structured reasonableness inquiry").

implementation of strict scrutiny,[298] it is a better standard than the current balancing analysis because it recognizes the fundamental nature of Fourth Amendment rights, provides a clear, two-step analysis for approaching questions, and possibly mitigates implicit racial biases.

In applying strict scrutiny, it is likely the government will be able to articulate a compelling government interest and thus satisfy the first prong of strict scrutiny nearly every time. Some of the most common government interests identified in recent balancing cases include: the need for effective law enforcement; judicial economy; public safety; and officer safety.[299] The need for effective law enforcement, public safety, and officer safety would likely all pass muster as compelling government interests, but judicial economy might not.[300] One reason for this is that the former three government interests can all be characterized as coming up in circumstances where it is too dangerous to allow a situation to develop further without some kind of police intervention.[301] There is not necessarily the same imminence of a threat to safety where judicial economy is the government interest. Though the first prong of strict scrutiny is potentially easily satisfied, it is still beneficial to the analysis because it requires the government to explicitly articulate its reasons for intruding on Fourth Amendment liberties.[302]

The second prong of strict scrutiny ensures individuals are protected, as much as possible, by the Fourth Amendment, even as the government pursues its interests.[303] If the benefits that result from an intrusion on Fourth Amendment liberties can be realized through a less intrusive means, respecting constitutional liberties requires using the lesser means.[304] Requiring the government to use the

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298. *See, e.g.*, Lee, *supra* note 275, at 1491 (describing concerns that applying strict scrutiny to Fourth Amendment questions could weaken the strict scrutiny analysis).

299. Baradaran, *supra* note 8, at 15–18 (identifying the most common government interests and how often each interest showed up in and persuaded the Court in Fourth Amendment cases between 1990 and 2012). The need for effective law enforcement showed up in more than 50% of cases; officer safety showed up in 18% of cases; public safety showed up in 28% of cases; and judicial economy showed up in 30% of cases. *Id.*

300. A government interest could be seen as "compelling" if, for example, it is "the only means available to avert immediate dangers to the public." Sundby, *supra* note 73, at 445.

301. *Id.*

302. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'" (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989))); Johnson v. California, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) ("[T]his Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.").

303. For a discussion of how the "least intrusive alternative" concept has been applied to other areas of law, see Strossen, *supra* note 29, at 1209–14.

304. *See id.* at 1218.

most narrowly tailored means possible should encourage courts to examine police conduct on a case-by-case basis.[305] This ensures that Fourth Amendment liberties are thoughtfully considered and not diminished by categorical rules.

If *Terry* were decided using strict scrutiny, the outcome might be different. *Terry* is a close case, even when applying strict scrutiny.[306] Terry and Chilton would argue that Officer McFadden violated their Fourth Amendment rights by stopping and frisking them without probable cause and a warrant. Under strict scrutiny, the burden would be on the government to show that it had a compelling interest in intruding on Terry and Chilton's liberties and that the means by which Officer McFadden intruded on their liberties were narrowly tailored to meet the government's compelling interest. In stopping Terry and Chilton, the government had an interest in crime detection and prevention.[307] In frisking Terry and Chilton, the government likewise had an interest in officer and public safety.[308] The Court would likely find both interests "compelling."

But Terry and Chilton could argue neither the stop nor the frisk were narrowly tailored. Officer McFadden introduced himself to the men as a police officer and asked for their names, but then almost immediately frisked them.[309] He could have asked them investigative questions about their activities or asked them to leave the area.[310] This would have accomplished the purpose of preventing a daytime robbery with a negligible length detention and without the need to frisk. Without the stop, there is no need to frisk. If Officer McFadden had asked the men to leave and they had refused, he would have had a better justification for escalating to a stop-and-frisk.[311] In Officer McFadden's defense, Terry and Chilton did not answer the question about their names; they mumbled.[312] However, Officer McFadden could still have attempted to engage them further before grabbing Terry, spinning him around, and patting down his clothing.[313] Because Officer

305. *Cf. id.* at 1239 (explaining that a per se rule deferring to efficiency interests is antithetical to the Fourth Amendment).

306. Officer McFadden's behavior in *Terry* can be characterized as an abuse of law enforcement's discretion. However, the Court chose to recognize *Terry*-type stops as an important and necessary use of law enforcement discretion. Terry v. Ohio, 392 U.S. 1, 30–31 (1968). *Cf.* Holly, *supra* note 24, at 574–75 (explaining that the Fourth Amendment is supposed to guard against law enforcement abuses of discretion).

307. *Terry*, 392 U.S. at 22.

308. *Id.* at 23–24.

309. *Id.* at 6–7.

310. *See, e.g.*, Pat Ralph, *Police Pilot Program Exploring Alternatives to Stop-and-Frisk Coming to Northwest Philly*, PHILLY VOICE (July 29, 2021), https://www.phillyvoice.com/philadelphia-police-stop-and-frisk-practices-pilot-program/ [https://perma.cc/6FPV-ESWE] (describing a pilot program in some Philadelphia neighborhoods where police officers will ask people engaging in violations to stop what they are doing and walk away, only being allowed to stop-and-frisk if the person refuses to comply).

311. *See id.*

312. *Terry*, 392 U.S. at 7.

313. *Id.*

McFadden did not attempt to ask further questions or for the men to leave the area, he did not use the least intrusive means to detect and prevent crime.

The holding in *Whren* might also be different if subjected to strict scrutiny. Under strict scrutiny, the burden would be on the government to show that it had a compelling interest in stopping Whren and Brown and that the means were narrowly tailored to meet that interest. The government would likely argue that it has a compelling interest in enforcing traffic laws.[314] The government does have a general interest in enforcing traffic laws, but the plainclothes officers from the specialized unit themselves did not have a compelling need to enforce traffic laws.[315] The plainclothes officers merely had an interest in enforcing drug laws—an interest tangential to traffic law enforcement which does not pass muster. Applying strict scrutiny requires the government to articulate a compelling interest rather than hiding behind the subjective intentions of an officer.

Whren and Brown could also argue that the means by which they were stopped were not narrowly tailored. Deploying a plainclothes officer from a specialized unit to enforce traffic laws is not the narrowest way of ensuring traffic safety.[316] Because Whren and Brown were stopped by a plainclothes officer in an unmarked vehicle, the stop likely felt more serious than a stop by a regular police officer.[317] Put differently, the stop was more intrusive because of who performed it.[318] Additionally, while enforcing drug laws would likely count as a "compelling" interest, using traffic violations as pretext for a drug investigation is not the narrowest way to achieve that interest. The narrowest way would require an officer's individualized suspicion of a drug offense.

Atwater presents yet another example of how using strict scrutiny might produce a different outcome. Ms. Atwater could now win by arguing that the means the government used to achieve their interests were not narrowly tailored. Ms. Atwater would argue Officer Turek violated her Fourth Amendment rights by arresting her for a minor offense when the underlying statute authorized a less punitive response.[319] In *Atwater*, the government argued that it had an interest in: (1) following a bright-line rule; (2) enforcing child safety laws; and (3) ensuring

314. *See* Whren v. United States, 517 U.S. 806, 818 (1996).

315. Whren and Brown could also argue that they were being stopped for a minor, non-safety traffic violation (failing to use a turn signal), but this argument would fail because of their subsequent speeding. In PULLED OVER, *supra* note 139, the authors describe that traffic stops are divided into two general categories: safety stops and investigatory stops. An officer is required to make safety stops to ensure safe roadways. Speeding is an example of a safety violation. An officer is not required to make an investigatory stop; these stops are discretionary. Investigatory stops are often predicated on minor violations that do not present an immediate safety threat. Whren and Brown would not succeed if they argued that their stop fit into the type of investigatory stop described in PULLED OVER. While failing to use a turn signal is a classic predicate offense for an investigatory stop, speeding can trigger a safety stop. *Id.* at 13–14; *Whren*, 517 U.S. at 808–09.

316. *See Whren*, 517 U.S. at 808–09.

317. *See id.* at 817.

318. *Id.*

319. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

Ms. Atwater would not abscond.[320] Applying strict scrutiny, the Court would likely credit all of these as compelling government interests: (1) adhering to a bright-line rule would help officers develop predictable patterns of interacting with the community; (2) enforcing the child seatbelt law is a matter of public safety; and (3) ensuring Ms. Atwater would not abscond ensures she can be held accountable for her actions and goes to the legitimacy of the criminal legal system.

But Ms. Atwater could argue that the government's actions were not narrowly tailored. She could first argue that allowing an officer to make a full arrest for a minor offense is not narrowly tailored because minor offenses are not typically punished so severely.[321] The means of achieving a bright-line rule are not narrowly tailored if they permit an officer to react more harshly than a situation requires.[322] Second, Ms. Atwater could argue that imposing a fine for violating the child seatbelt law would have been a more narrowly tailored and effective approach to ensuring compliance than a full arrest.[323] Finally, Ms. Atwater could argue that she was unlikely to abscond because she lived in a small town and had no reasons to flee.[324] An individualized analysis of Ms. Atwater's conduct reveals how the government failed to deploy the less intrusive, reasonable alternatives at its disposal.

Using a strict scrutiny standard recalibrates the analysis in favor of the individual by placing the initial burden on the government to justify its actions. In this way, it gives proper weight to fundamental Fourth Amendment liberties. It also requires the government to be more mindful of Fourth Amendment liberties so as to ensure police policy and practice actually create safer, healthier communities. Replacing the current balancing analysis with strict scrutiny will help make Fourth Amendment liberties more meaningfully protective.

CONCLUSION

The overall trend in Fourth Amendment jurisprudence since the 1960s has been toward assessing the "reasonableness" of police conduct by balancing the individual's liberty interests against the government's interests in curbing that liberty. The way the Supreme Court characterizes the interests in these cases has, over time, produced a balancing analysis that is skewed in favor of the

320. *Id.* at 366, 369 (O'Connor, J., dissenting).

321. *Id.* at 365.

322. *Id.* at 365–66 ("Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the additional intrusion' of a full custodial arrest." (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968))).

323. *See id.* at 370.

324. *See id.* at 370–71.

government. This results in a less protective Fourth Amendment, which Black communities and other communities of color feel more acutely.[325]

The Supreme Court's skewed balancing analysis has sanctioned police practices that have had a disproportionately negative impact on Black communities and other communities of color. *Terry*, *Whren*, and *Atwater*, respectively, have empowered police to (1) stop, question, and search people without individualized suspicion of wrongdoing;[326] (2) arbitrarily enforce minor traffic laws as pretext for investigating larger crimes for which they do not have the requisite, individualized level of suspicion;[327] and (3) perform full arrests for low-level offenses, even when a lesser consequence, such as a fine, would be a sufficient punishment.[328] Additionally, the racially disparate effects of these police practices reveal how race is deployed as a proxy for criminality.[329]

To combat these racially disparate practices, the Court needs a better balancing analysis: one that is sufficiently protective of Fourth Amendment liberties. The Court should abandon the current form of balancing for a presumption that explicitly favors fundamental liberties. Applying strict scrutiny instead of the current balancing analysis will make the Court's assessments of what is "reasonable" properly protective of Fourth Amendment liberties. Strict scrutiny effectively creates a presumption in favor of the individual and requires the government to articulate a compelling interest for conduct that is narrowly tailored.

The community depends on the government to ensure public safety[330] while respecting fundamental liberties. Currently, fundamental liberties, especially those of Black communities and other communities of color, are eroding at the hands of police practices ironically meant to promote public safety. The Supreme Court plays a role in perpetuating this cycle of over-policing and under-protecting; but it can do something about it.

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325. *See supra* Part I.

326. *See supra* Part II.A.

327. *See supra* Part II.B.

328. *See supra* Part II.C.

329. *See supra* Part II.

330. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514–15, 520–21 (1991) (tracing the concept of public safety as a government function back to natural rights theory and John Locke, both of which had a formative impact on American constitutional legal theory); Barry Friedman, *What is Public Safety?*, 102 B.U. L. REV. 725, 735–36, 740–46 (2022) (explaining that ensuring public safety is a primary role of government and exploring the ways public safety might extend beyond traditional notions of physical protection).