

TRANSCRIPT OF KEYNOTE SPEECH

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Stephon Clark, Michael Brown, Eric Garner, Laquan McDonald, Walter Scott—all of these individuals share something in common. They all were African-American men who were unarmed, who were killed by police officers. The most recent of these occurred just a few weeks ago in Sacramento—the name I mentioned first—Stephon Clark. Police got a call of some burglaries in a residential area. They went to investigate, they saw a man, and they chased him. At the time he was approached by police, he was in his own backyard. The police saw what they thought to be a gun. They repeatedly shot Clark. We now know that several shots were fired into his back when he was already on the ground. No gun was ever found on or around him. There was just a cell phone near his dead body.

What's the relationship of these instances of police violence to this symposium? The most direct relationship is that some of these incidents occurred as a result of what started as a *Terry* stop. But more generally, what I want to suggest to you is that what we've had in this country for more than a half-century is a choice that combating crime is more important than controlling the police. The Supreme Court has continually given the police more tools to use and ever greater discretion and, at the same time, has lessened the checks that exist on the police.

I want to make four points. First, I want to suggest to you that *Terry v. Ohio* is both a reflection of, and a cause of, what I've described to you in terms of a commitment to combating crime but not controlling police. Second, I want to argue that *Terry* and its progeny, the cases that followed it, have given police almost unlimited discretion in their ability to stop individuals. Third, I want to argue that this very much contributes to racialized policing in the United States. Then fourth, I want to talk about the absence of adequate controls on the police.

So, let me go back to the first point and discuss how *Terry v. Ohio* is very much a part of what I've described. It's undoubtedly a provocative thesis that we've decided to put combating crime ahead of controlling police behavior.

It is important to situate *Terry v. Ohio* in the year in which it was decided, 1968. In that decade, the Warren Court handed down a number of controversial rulings all about controlling police behavior. In 1961, in *Mapp v. Ohio*, the Supreme Court held that the exclusionary rule under the Fourth Amendment applies to state local governments. It was thought, not only by the Warren Court, but by its predecessor courts, that the exclusionary rule was the key way of deterring police violations of the Fourth Amendment. *Mapp v. Ohio* was met by great criticism, especially by law enforcement. Their perspective was that it would mean that criminals would get off because of technicalities—evidence that was crucial for prosecutions would be excluded.

In 1965, in *Escobedo v. Illinois*, the Supreme Court said that the government, specifically the police, have to provide counsel for a suspect when the matters shifts from just investigative to accusatory. Of course, most controversial of all of this in 1966, *Miranda v. Arizona*, the Supreme Court said that in-custodial police interrogation is inherently coercive and the Supreme Court said that before the police are

going to question somebody who's in custody, they have to provide a series of warnings.

Law enforcement immediately decried this ruling. They said that it would make it impossible for police to get confessions from guilty individuals. Now, history has proven that this concern did not manifest itself. Indeed, when the Supreme Court was reconsidering *Miranda*, in *Dickinson v. United States*, in 2000, it was law enforcement that urged the Court to continue the *Miranda* warnings because it created a clear bright-line rule. So long as these warnings were administered, there was a presumption that the confession would be allowed to come into evidence. But in 1968, *Miranda v. Arizona* was still very controversial especially for those who are most concerned with combatting crime.

It is in this context, of these very controversial rulings expanding the rights of suspects in criminal cases, that the Supreme Court dealt with *Terry v. Ohio*. And, actually, *Terry* was one of several cases that came to the Supreme Court in October Term 1967, dealing with the issues in regard to a now called "stop and frisk".

The facts of *Terry v. Ohio* are familiar to everyone in the room. It involved a couple of individuals who were on a street corner. A police officer recognized one as a known shoplifter. The officer regarded the behavior that they were engaged in—walking back and forth—as suspicious. And one of the individuals was known for pickpocketing. These two individuals were joined by another person and, on this basis, the police officer took them into a store, stopped, frisked them, and found guns. The issue was whether the guns that they illegally possessed would be admissible in their criminal trials.

We now know that when the Justices met at conference, Chief Justice Warren said that he wanted to use this case as the occasion for laying down strict rules for when police could engage in stop and frisk. We know that Chief Justice Warren assigned himself writing the opinion. His draft opinion is available; it is totally different from what the Supreme Court ultimately released in the case known as *Terry v. Ohio*. He tried to impose on the police clear rules with regard to stop and frisk just like *Miranda v. Arizona* created clear rules with regard to police interrogation.

The State of Ohio's primary argument to the Supreme Court was that it should not regard what had occurred to John Terry as a search or as a seizure; it was just a brief stop, and nothing more than a frisk. The Supreme Court clearly rejected that argument. But the question was: what should then be the legal standard?

Justice Brennan redrafted Chief Justice Warren's opinion. As I said, the product is nothing like the strict controls on police stops that Warren said at a conference he wanted to impose. Instead the Court said that there can be a stop and a frisk so long as there's reasonable suspicion. The phrase reasonable suspicion doesn't appear in the Fourth Amendment. The Fourth Amendment speaks of probable cause. In fact, if you look through Supreme Court history, you don't find the words reasonable suspicion as a legal test until relatively soon before *Terry v. Ohio*. Indeed, it was the year before *Terry v. Ohio*, in *Camara v. Municipal Court*, that the Supreme Court said, when there's routine administrative searches, to make sure that municipal codes are complied with, there can be entry on reasonable suspicion. That case was nothing like the kind of intrusive police action that's entailed with stop and frisk. To be sure, Chief Justice Warren's majority opinion said that there

has to be an articulable basis for the stop and an articulable basis for the frisk. But it is standard that's much less than probable cause. Justice White wrote a concurring opinion saying that he doesn't believe the Fourth Amendment is implicated here at all; a position much more like that urged by the State of Ohio. Justice Douglas wrote a dissent saying that this should be regarded as impermissible under the Constitution; the Fourth Amendment require probable cause.

Why did the Supreme Court abandon Chief Justice Warren's initial opinion? Why didn't it followed his desire to impose strict limits on the police with regard to stop and frisk? I think here, at the time in 1968, the context is enormously important. There's great concern about crime and violence in the United States in the late 1960s. Soon before, President Lyndon Johnson had created a President's Commission on Law Enforcement and Administration of Justice, chaired by Attorney General Nicholas Katzenbach. This was a reaction to the perception that crime was out of control. 1968 was the year that Richard Nixon ran for President, largely on a platform of what he called "law and order" and against the Warren and its decisions. 1968 was a year in the midst of racial violence in the United States. In 1965, there was a racially motivated riot in Los Angeles in the Watts area. In the summer of 1967, just before the Supreme Court oral arguments in *Terry* and its companion cases, the racially motivated riots in Newark, in Detroit, and in other cities. More riots were to follow including the assassination of Dr. Martin Luther King, Jr., on April 4, 1968. It was in this context that the Supreme Court decided *Terry v. Ohio*.

I think the Court was also reacting to the great criticism of its earlier decisions, especially the ones that I mentioned like *Mapp v. Ohio*, *Escobedo v. Illinois*, *Miranda v. Arizona*. The Justices weren't willing to take another step to significantly limit law enforcement in light of this. I thus would regard *Terry v. Ohio* as a pivotal moment with regard to controlling the police. I regard it as the end of the Warren era in this regard. The Warren Court was soon to be followed, just a year later, by the Berger Court and then the Rehnquist Court and now the Robert's Court. Each successive Court being even less likely to want to impose controls on the police.

This then brings me to my second point: *Terry* and its progeny, the cases that have followed it, have it made it possible for the police to stop almost anyone at any time. I don't want to overstate this, not every case that comes to the Supreme Court is won by police and law enforcement. There have been many cases where the Supreme Court held that the police violated the Fourth Amendment. But I do want to suggest that *Terry*, and the cases that have followed it, have given police tremendous discretion on the streets. The discretion is so much, so large, that the police really can stop almost anyone, at any time. Consider some of the cases that followed *Terry*.

One of the most important cases that followed *Terry* was *Whren v. United States*. *Whren* involved some undercover police officers in Washington D.C. They saw a car stopped at a stop sign. They thought that it was stopped there for an unusually long period of time. They said it was for over twenty seconds. Now, one of the things you don't know about me is I have the world's worst sense of direction. I am constantly stopped at stop signs more than twenty seconds to consult—used to be a map—my phone and GPS. But the police thought that this was especially suspicious. So, they went to follow the car. They followed the car until it made a

turn without a signal. They pulled the car over thinking that drugs were present. Undercover police officers in D.C. are not supposed to enforce drug laws. They shouldn't have been doing this to start with, but also the crime that this car was pulled over for wasn't having drugs. There was no probable cause of even reasonable suspicion for that. The crime was changing lanes without a turn signal. This quite obviously was a pretext for the stop. Nonetheless, the Supreme Court unanimously ruled in favor of the police.

The Supreme Court said the underlying motivations of the police, their subjective intention doesn't matter. Under the Fourth Amendment it's an objective test as to whether the police have a reasonable basis for concluding there was a violation of the Fourth Amendment. The Supreme Court said, here, the police had a reasonable basis for believing that there was a violation of the law—that the driver had changed lanes without a turn signal. Reasonable basis for believing the law was violated is sufficient for the stop and then, of course, there can be the resulting search of the vehicle incident to the stop.

In many cases since, the Supreme Court has reaffirmed that when it comes to the Fourth Amendment, the subjective beliefs of the officer don't matter. It's just an objective test that the officer's act reasonably, under the circumstances, in believing there's a violation the law. The fact that the D.C. officers were violating the rules about what an undercover officer was allowed to do shouldn't matter the Supreme Court says in assessing whether there's probable cause. It's an aside here, but just this year, in 2018, in *District of Columbia v. Wesby*, Justice Ginsburg in a concurring opinion said the Supreme Court should reconsider *Whren*. *District of Columbia v. Wesby* wasn't about *Whren*. *District of Columbia v. Wesby* involved police getting a tip of a party in a house that was supposed to be unoccupied and whether the police violated the Fourth Amendment by arresting the individuals under the circumstances, and whether even if they violated the Fourth Amendment they would be protected by qualified immunity. It's notable that Justice Ginsburg used this case at the occasion for saying the Court should re-examine *Whren*. I don't see a likelihood that there's a majority of the justices on the Court who are so inclined, but at least now in 2018, we have one Justice on record in that regard.

Another case that expanded the discretion of the police was *Illinois v. Wardlow*. In what the Supreme Court described as a high-crime area, four police cars were driving down the street in caravan fashion. A man seeing this decided to go quickly in the other direction. The police seeing him change course and go in the other direction decided that that was a sufficient basis for a stop and frisk. Was that behavior sufficient to be an articulable ground for suspicion under the standard of *Terry v. Ohio*? The Supreme Court said, yes, that was sufficient for reasonable cause to justify the stop.

I grew up on the south side of Chicago. My guess is a lot of people on the south side of Chicago, and especially African-American and Latino men, have every reason to go in the other direction when they see the police. That's true in most major cities. And yet the Supreme Court says just that behavior, seeing the police and going the other way, is enough to meet the *Terry* standard for reasonable suspicion.

One more case I would mention here, from just a couple of years ago, is *Utah v. Strieff*. Police were observing a house in Utah, where they believe that drug dealing was occurring. They saw a man enter the house and quickly come out. The officer went up to the man and said, "What's your name?" Strieff answered honestly. The officer detained Strieff long enough to do a check to see if there were any outstanding arrest warrants. There was an old outstanding warrant for Strieff. Fraco arrested Strieff pursuant to that old outstanding warrant and a search was done and drugs were found. At the time officer stopped Strieff, the officer lacked probable cause; he lacked even reasonable suspicion. There seems little doubt that the stop here violated even the relaxed standard of *Terry v. Ohio*.

The question is, did the attenuation exception to the exclusionary rule allow the drugs that were found on Strieff to come into evidence? The Supreme Court, in a five to three decision, found that the attenuation exception applied, and the drugs were admissible as evidence. The Utah Supreme Court, and I don't think of it as one of the most liberal state supreme courts in the country, had unanimously ruled in favor of Edward Strieff saying that the police violation of the Fourth Amendment meant the evidence should be excluded. But the United States Supreme Court, an opinion by Justice Thomas reversed. Justice Sotomayor wrote a powerful dissent. She talked about the large number of people for whom there are outstanding arrest warrants. She spoke of the incentive that this gives to the police to stop individuals, even without reasonable suspicion, knowing that they can then do a warrant check and if they find a warrant, they could do a search, and if anything is found, the evidence would be admissible. If nothing is found, the person is then let go.

Police are very responsive to Supreme Court decisions. Not long after this decision, I met with the inspector general of Los Angeles Police Department and members of the inspector general's staff. They said already police in L.A. had gotten the word that they can stop individuals without needing reasonable suspicion, check for a warrant, knowing if they find one, they could do a search incident to the arrest and the evidence would be admissible.

If you put together just the cases that I've mentioned, *Terry v. Ohio*, *Whren v. United States*, *Illinois v. Wardlow*, and *Utah v. Strieff*, think of what it means. Start with driving on streets. The police can follow any of us, and wait until we change lanes without a signal, or turn without our signal on, or not stop quite long enough at a stop sign, a rolling stop, and then pull us over, even if their underlying motivation has nothing to do with enforcing traffic laws. If the police follow any of us long enough, they will at some point observe something like changing lanes without a signal or turning without a signal or a stop that they can describe as a rolling stop or some other minor police violation. The police, when out on the streets, can certainly stop anybody, if they can articulate some suspicion. Suspicion can be as much as just going the opposite direction as the police. And after *Utah v. Strieff*, the police can feel pretty confident they can stop somebody even in violation of *Terry v. Ohio*, check for an outstanding warrant, and then do a search if there is one. I think if you look at these cases together, you can see why I say they give police tremendous discretion. The discretion is enough to make it possible for police to stop almost anybody at any time.

This leads to the third point: this very much contributes to racialized policing in the United States. Every study that's been done with regard to the criminal justice system tells us that when there is discretion it's exercised in a racially biased manner. Studies have been done in terms of police encounters with individuals, and holding all else constant, if the suspect is African-American or Latino, he or she is much more likely to be arrested than if the individual is White. Studies have been done on prosecutorial behavior and they show that holding all other variables constant, if the criminal suspect is African-American or Latino, he or she is more likely to be charged than if the suspect is white; the charges are likely to be greater. We can see the same thing in terms of convictions, the same thing in terms of sentences.

Against this backdrop, it shouldn't surprise us that the more discretion that we give to the police, the more likely that it's going to be used in a racially discriminatory fashion. This was part of what the Supreme Court was considering in *Terry v. Ohio*. This idea of racially motivated policing isn't a new insight in 2018. The Supreme Court very briefly addresses it and they do so in a very cryptic passage that I've never quite understood. Chief Justice Warren wrote: "The wholesale harassment by certain elements the police community of which minority groups particularly Negroes frequently complained will not be stopped by the exclusion of any evidence from any criminal trial." In other words, the exclusionary rule isn't going to be enough to stop racially discriminatory policing. The Court continued: "Yet a rigid, an unthinking application of the exclusionary rule, in futile protest against practices which you can never use to control may exact a high toll in human injury and frustration of efforts to prevent crime." So, the Court says, if it were to limit stop and frisk based on a concern for racially-motivated policing, that would exact a high toll in human injury. I think that refers to injury to police officers and frustration of efforts to prevent crime. Isn't that a very clear declaration by the Supreme Court what I stated as my thesis that we are choosing combating crime over limiting police behavior.

Studies have been done that show that stop and frisk is conducted in a racially discriminatory fashion. It is very difficult to measure this just by looking at cases because obviously many of the stops will never lead to cases that are brought to Court. Many of the stops find no evidence, literally no criminal prosecutions. But some studies have been done by monitoring police behavior. I think the most important was that which was part of a lawsuit, *Floyd v. City of New York*, in the Southern District of New York. The study examined the way in which stop and frisk is done in New York City. The statistics here are startling. It looked at between January 2004 and January 2012, an eight-year period. There were 4.4 million stops by the police. That statistic by itself is staggering. Of those only six percent resulted in arrests and six percent resulted in summonses. In other words, 88% of the 4.4 million stops resulted in no further action, meaning a vast majority of those that were stopped were doing nothing wrong. More than half of all the people who were stopped were frisked. Yet only 1.5% of the frisks found weapons. In 83% of the cases, the person stopped was Black or Hispanic, even though those two groups accounted for only half of the population of New York. The evidence clearly showed the police carried out more stops on Black and Hispanic residents, even though all

other relevant factors were controlled for. An officer was more likely to use force against minority residents even though stops of minorities were less likely to result in weapon seizures than stops of whites.

This was on this basis that Judge Shira Scheindlin, in the Southern District of New York, found a violation of the Fourth Amendment. The then mayor of New York, Michael Bloomberg, vehemently objected to her conclusions. The Second Circuit ordered Judge Shira Scheindlin taken off of the case. But then a new mayor in New York was elected and a consent decree was entered. Stop and frisk has not been eliminated in New York, though it's been greatly restricted and there's been no effect in terms of crime control. Crime has continued to decrease in New York during all of this time.

I taught at the University of Southern California for twenty-one years. There was not a class that I did not teach where I did not have African-American and Latino men telling stories of being stopped by Los Angeles police officers while walking down the street or driving, simply for driving while Black or Brown, or walking while Black or brown. This is what *Terry v. Ohio* has contributed greatly to in the United States.

My fourth and final point is that the Supreme Court has prevented there being effective controls on police behavior. Perhaps, despite what I've said, still many believe that it's important, in order to combat crime, to give police the power that *Terry v. Ohio* bestowed upon them. But if so, then we need to have adequate controls and checks on the police. If you think about it, almost every check or control that exists, the Supreme Court has undermined so that right now we have relatively little in the way of stopping abusive police behavior.

Consider what are the possible checks on the police. One that I've already alluded to is the exclusionary rule. As I mentioned, it was long thought that this was to be the primary deterrent of police violations of the Fourth Amendment. Their knowledge that if they offended the Constitution the evidence would be excluded was thought to discourage violations of the Fourth Amendment. Of course, the exclusionary rule only applies if there is a prosecution and if there is evidence, it doesn't do anything for all of the other situations. And also, the exclusionary rule isn't going to help if the doctrine means that no violation of the Fourth Amendment is going to be found. If it's so easy for the police consistent with the Fourth Amendment to justify a stop as reasonable, there will be no basis for excluding the evidence.

But even beyond that, the Supreme Court has greatly weakened the exclusionary role. In *Herring v. United States*, the Supreme Court said that the exclusionary rule doesn't apply to good faith or negligent violations of the Fourth Amendment. It applies to only intentional or reckless violations of the Fourth Amendment. So even if it's found that the police violated the relaxed standards of *Terry*, of *Whren*, of *Wardlow*, of *Strieff*, the evidence still will not be excluded unless one can say that the police behavior was beyond good faith, beyond negligent, and amounted an intentional or reckless behavior.

Another possibility of course is to sue for injunctive relief, to try to prove a pattern and practice of police violation of the Fourth Amendment and then get an injunction to halt the conduct. But the Supreme Court has made it very hard to sue

police departments for injunctions. The key case here was *City of Los Angeles v. Lyons* in 1982. Adolph Lyons was a twenty-three-year-old African-American man, stopped by Los Angeles police officers, about two in the morning for a burned-out taillight. The officers, lawfully, ordered Lyons to get out of his car. An officer slammed Lyons hands above his head on the roof of the car. Lyons complained that he was holding his keys and they were cutting into the skin of his palm. An officer then administered a choke hold on Lyons. It rendered him unconscious. He woke spitting blood and dirt. He had urinated and defecated. The officers gave him a traffic citation and allowed him to go. Lyons did some research and he discovered to that point sixteen people in Los Angeles, most all like him, African-American men, had died from police use of the chokehold.

Lyons sued for an injunction to stop the police from using the chokehold except when necessary to protect the officer's life or safety. The Supreme Court in a five-to-four decision ordered Lyons suit dismissed. Justice Byron White wrote the opinion for the Court. He said Lyons lacked standing to sue for an injunction because he could not show that it was likely that he'd personally be choked again in the future. The Supreme Court said a plaintiff, like Lyons, who is suing for an injunction must show a likelihood of future personal injury. This makes it very difficult to sue police departments for injunctive relief. There's a case in Chicago where some women had been stopped by police officers for routine traffic violations and were subjected to degrading and humiliating strip searches. They brought a lawsuit saying that the police use of strip searches under these circumstances violated the Constitution, but the case was dismissed based on *City of Los Angeles v. Lyons* because they could not show that it was likely that they'd personally be stopped again by police officers and subjected to a strip search. A person who is stopped, without reasonable suspicion, just for being African-American or Latino, will find it hard to bring a suit for injunctive relief because of the inability to prove it'll happen to him or her again in the future.

Another possibility for relief is to sue the local government -- the city or the county -- that employs the police officers. But the Supreme Court has made this very difficult as well. In *Monell v. Department of Social Services* in 1978, the Supreme Court ruled that local governments can be sued only if it can be shown that they have a policy that violates the Constitution. Cities cannot be liable on *respondent superior* basis. Any other employer in tort law can be held liable on *respondent superior* basis for actions of an employee in the scope of duties, but not a local government. It has to be demonstrated that it has a policy that violates the Constitution. In *Humphries v. County of Los Angeles*, the Court said that *Monell* applies -- and the requirement for proving policy exists -- whether it is a suit for money or injunctive relief.

There's one more option: suing the police officer. The officer who engages in the illegal stop, the illegal frisk, might be sued for money damages. There's enormous problems with this before you ever get to the law. If all that's been done to a person is being stopped by the police, frisked, and then let go, are there sufficient damages to justify a lawyer taking the case and bringing the litigation? If it's somebody where evidence has been found, and the person is going to be convicted of a crime, how likely is the individual going to be to successfully sue the police for a

violation of the Fourth Amendment? And even if there is such a suit, think back to how the standards that I described, make it so easy for the police to come up with some articulable suspicion and say that the stop, the frisk, didn't violate the Fourth Amendment.

Even if you get pass all of this, the Supreme Court has created doctrines that make it very hard to successfully sue police. The one that's most applicable here is qualified immunity. All government officers, federal, state, and local, when they're sued for money damages can invoke an immunity. For some tasks, some officers, its absolute immunity, they can't be sued for money damages at all. Judges for instance, have absolute immunity for their judicial acts; prosecutors have absolute immunity for their prosecutorial acts. Police officers, when they testify in court, have absolute immunity in civil suits for money damages. Even if a police officer knowingly commits perjury, a plaintiff cannot civilly sue that officer for money damages. That was the Court's holding in *Briscoe v. Lahue* in 1983.

When an officer doesn't have absolute immunity, the officer is protected by qualified immunity. That means the officer can be sued and held liable only if he or she violates clearly established law that every reasonable officer knows and it has to be a right that's established beyond dispute. And the right must be established at a very specific level of abstraction. In case after case involving claims of excessive of police force, the Supreme Court has summarily reversed the Court of Appeals and said the officer is protected by qualified immunity. Most recently, in *Kisella v. Hughes*, the police got a phone call that a woman who had a history of mental illness had a knife. When the police arrived at the scene, the woman seemed to be hacking away at the tree with a knife. The police shot and seriously wounded her. The police weren't threatened by her, she didn't hold up the knife, she didn't have any ability to approach the police. The question was: is this a matter that the jury should be able to decide whether there was excessive force. The Ninth Circuit said yes. But the Supreme Court in a per curium opinion, decided without briefing or oral argument, said the officers are protected by qualified immunity. Justice Sotomayor wrote a powerful dissent about the authority this gives police to shoot first and ask questions later. The ability then to sue police officers and recover money damages is enormously limited by qualified immunity, as well as the doctrines of the Fourth Amendment.

Based on all of this, you can see why I say that, at least for the last fifty years, as a society we've decided that controlling crime is more important than controlling police behavior. I fear that I painted a very bleak picture and yet I am, by nature, an optimist. I very much believe that Dr. Martin King, Jr. got it right when he said, "The arc of the moral universe is long and bends toward justice." I am hopeful that the names that I mentioned at the beginning and that the work of Black Lives Matter, will cause us to re-examine policing in the United States and that if there's another conference on the hundredth anniversary of *Terry v. Ohio*, there will be a very different discussion than the one we are' having today.