Stop-and-Strip Violence: The Doctrinal Migrations of Reasonable Suspicion

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Abstract

In 1968, the U.S. Supreme Court decided Terry v. Ohio. *Writing for the Court, Chief Justice Earl Warren ruled that police officers may "stop-and-frisk" people whom they have reasonable suspicion to believe are armed and dangerous. The reasonable suspicion standard was an exception to the Fourth Amendment's probable cause requirement, one that the Chief Justice maintained would be narrowly tailored to circumstances under which police officers fear for their safety or the safety of others. Over the past forty years, that exception has metastasized across Fourth Amendment law, beyond the* Terry *stop-and-frisk context, to justify a range of governmental intrusions. This Article describes that development. In particular, the Article highlights a demeaning and intrusive practice that reasonable suspicion now authorizes at the United States border. There, the Court allows governmental officials to mobilize reasonable suspicion to subject people not simply to stop-and-frisk, but to a more invasive form of search and seizure fairly termed "stop-and-strip violence."*

Today, at the border, the Supreme Court's reasonable suspicion standard permits law enforcement to conduct significantly more intrusive seizures and searches than the stop-and-frisk practice out of which the standard emerged.[1] There, reasonable suspicion acts almost like a warrant with respect to the kinds of intrusions it authorizes. In particular, armed with only reasonable suspicion, the government may subject individuals to stop-and-strip, a lengthy detention in which government agents question and strip search a person in the context of seizing them.[2]

To appreciate the ease with which border agents can target a person to stop-and-strip, imagine that Tanya is returning to the United States from a

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* The Honorable Harry Pregerson Professor of Law, University of California, Los Angeles (UCLA), School of Law. This Article is part of a broader scholarly project on race, the Fourth Amendment, and police violence. *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125 (2017); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479 (2016); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. Rev. 1508 (2017); Devon W. Carbado, *Predatory Policing,* 85 UMKC L. Rev. 548 (2017). For conversations about or feedback on this Article, I thank: Paul Butler, Beth Colgan, Kimberlé Crenshaw, Justin Hansford, Cheryl Harris, Priscilla Ocen, Andrea Ritchie, Joanna Schwartz, and Sherod Thaxton, as well as participants at the African American Policy Forum's Writer's Retreat. Rachel Gill-Stine, Brad Zukerman, and Kanwalroop Kaur Singh provided invaluable research assistance, as did UCLA Law's Hugh and Hazel Darling Research Library. All errors are my own.

[1] *See, e.g.*, United States v. Vega-Barvo, 729 F.2d 1341, 1343–44, 1350 (11th Cir. 1984) (finding that the non-forced x-ray of an individual internally carrying cocaine at the border was reasonable).

[2] *See id.* at 1345.

weekend trip to Jamaica.[3] Officer Mathews, a U.S. Customs Officer, greets her, introduces himself, and asks her a series of questions:

"Where are you coming from?"

"Jamaica," Tanya responds.

"For how long were you there?"

"Three days."

"Why such a short trip?"

"I just needed a break and couldn't stay longer because of work commitments."

"What kind of work do you do?"

"I'm a teacher."

"And you can afford to take a weekend trip to Jamaica?"

"Excuse me?"

"Never mind. May I see your ticket?"

"Have I done anything wrong?"

"This is a random stop. Do you know what random means?"

Tanya doesn't know how to respond. After all, "random" is not the most challenging vocabulary word. Was Officer Mathews really asking if she knew what that word meant? Before Tanya has the opportunity to respond, Officer Mathews asks her again, this time a little more firmly, to show him her ticket. Tanya complies.

"You purchased this ticket in cash?"

"Yes, my travel agent prefers cash to avoid the credit card fees."

"You have only one piece of luggage?" Mathews continues.

"Yes. As I told you, I was in Jamaica for only three days."

The officer then asks to see Tanya's passport.

"You've been to Jamaica before, right?"

"Yes," Tanya responds, "two years ago to attend a wedding."

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[3] Susan Ferriss, *'Shocked and Humiliated': Lawsuits Accuse Customs, Border Officers of Invasive Searches of Minors, Women*, Ctr. for Pub. Integrity (Sept. 12, 2018, 10:57 PM), https://publicintegrity.org/inequality-poverty-opportunity/immigration/shocked-and-humiliated-lawsuits-accuse-customs-border-officers-of-invasive-searches-of-minors-women/, *archived at* https://perma.cc/6LHB-JN4Y (describing cases of U.S. Customs and Border Protection officers performing a luggage and body cavity search of a Black woman at a New York airport as she was returning to the United States from Jamaica, performing body cavity searches of female minors in Texas and at the San Diego border, performing multiple body cavity searches of a woman returning to the United States from Mexico at a pedestrian port in San Diego, and performing body cavity searches and ordering hospital staff to conduct x-rays and CT scans of a Black woman seized at the Philadelphia airport as she was returning from the Dominican Republic and of a Hispanic woman entering the United States from a pedestrian port in El Paso).

The agent returns Tanya's passport, and then asks what Tanya experiences as a question from out of nowhere:

> "Are you bringing back any drugs?"
>
> "Drugs? Me? Carrying drugs?"
>
> "Will you please just answer my question: Do you have any drugs?"

Tanya remains baffled. What prompted Officer Mathews to question her about drugs? She is also upset. What was is it about *her* that triggered the inquiry?

Tanya manages to contain her anger. Like other Black people, she's had "the conversation"—the discussion Black families have with each other about how to navigate encounters with the police. Though the expression of those talks varies in rhetorical form, the underlying message is the same: Do whatever you can to terminate the encounter. Your overarching goal is to survive the incident and to return to your family physically unharmed. Efforts to preserve dignity, and simply invoking rights, can prove deadly. While Tanya did not feel that her life was at stake, she knew that nothing good would come from escalating the encounter.

> Somewhat compliantly, Tanya responds: "No . . . I don't have any drugs." Officer Mathews then instructs Tanya to accompany him to a room in which he will ask her some additional questions.
>
> "I have done nothing wrong," Tanya responds, now toeing the line between acquiescence and resistance. "Is this really necessary?"
>
> "Ma'am. The quicker you follow me to this room over here, the sooner this will all be over."

Tanya accompanies the officer into the room, where he searches her luggage and finds nothing incriminating.

> "May I leave now?" Tanya inquires.
>
> "That depends," Mathews responds. "Are you carrying any drugs on your body?"
>
> "What?"
>
> "Did you swallow any balloons?"

Tanya, at this point, is livid. Breaking racial protocol, she speaks her mind:

> "This is outrageous. Is this how you treat *everybody?* Do I look like I'm carrying drugs on my body?"
>
> "I don't know whether you have drugs," Officer Mathews responds. "That's what I'm trying to figure out. I can't let you go unless I know for sure."

Frustrated that, from his vantage point, Tanya was not doing her part to dispel his suspicions, the officer informs Tanya, "It might be more appropriate if Officer Johnson investigates the matter further."

> "Why would another officer 'be more appropriate?'" Tanya wonders. "'More appropriate' in what way?" She decides not to seek clarification and simply asks the officer whether she may use the restroom.
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> "You may use the wastebasket in the corner of the room after I leave," Officer Mathews responds in a tone of bureaucratic ordinariness that suggested Tanya was not the first person whom he had directed to that spot.

Officer Mathews leaves the room and locks the door behind him. Forty minutes later, Officer Johnson, a female Customs worker, arrives.

> "Hi, I am Officer Johnson. I understand that you are coming back from Jamaica. I'm here for one purpose only: To make sure that you're not carrying drugs on your body. Can you please remove your clothing?"
>
> "You want me to undress?!?"
>
> "Yes."
>
> "Why?" Tanya queries.
>
> "That's the only way we will know whether you're carrying drugs on your body," Officer Johnson replies.
>
> "But I've told you I'm not carrying drugs and the other agent searched my bags. What makes you think I still have drugs?"

By now, Officer Johnson is visibly annoyed. Officer Mathews had forewarned her that Tanya would be a "difficult nut to crack." Johnson was beginning to get a sense of what Mathews meant.

> "Look, we can argue about this if you want, but that's going to drag this whole thing out. Will you please just do as I ask? Remove . . . your . . . clothes."

Grudgingly, Tanya begins to undress. As she does so, the officer looks through her luggage.

> "I told you the other officer already searched by bag," Tanya explains.
>
> "I need to examine it again—for safety reasons."
>
> "So now I am carrying guns," Tanya mutters, loud enough for the agent to hear.

Officer Johnson doesn't respond. She continues to search Tanya's bag with greater scrutiny, moving the items around more aggressively than she'd

been doing before. By this point, Tanya is in her underwear. "Satisfied?" she asks, standing as boldly and defiantly as her state of undress will allow.

> "I am going to need you to take off your underwear as well," Agent Johnson responds. "I need to see what's in your underwear. By the way, are you on your period?"
>
> "You know I am," Tanya responds. "You saw the tampons in my luggage."
>
> "Can you please remove the tampon as well?"
>
> "You want me to show you my bloodied tampon?"
>
> "Please just do as I ask," Officer Johnson replies.

Tanya removes the tampon and places it on the table. "Are you satisfied *now*?" Officer Johnson does not respond.

> "I was married for twenty-five years, and my partner never saw what you saw in this room today," Tanya manages to say.
>
> "I am sorry you find this upsetting . . ."
>
> "This is not just upsetting," Tanya interrupts. "It's humiliating and infuriating! Would I be in this room—experiencing this degradation—if I were white?"
>
> "Are you calling me a racist? Agent Johnson pushes back, feeling wounded (and not just irritated) by Tanya's invocation of race.

Tanya knows better than to answer. She understands that her racial injury would lose out to the agent's sense of racial indignation. A classic example of racial table-turning, Agent Johnson's performance of the "are-you-calling-me-a-racist?" script had transformed her from the perpetrator of a racial harm to a victim.

Tanya's is tempted to say: "This is not about whether you like or dislike me or other Black people. Nor is about whether your treatment of me is intentionally racially motivated. I am asking you to imagine if I were white: Would I be in this room, standing before you in my underwear?"

But Tanya says nothing for now. She stands by her words in silence. Officer Johnson, meanwhile, has more to say: "I am *not* a racist! I have *never* been a racist. This has *nothing* to do with race."

Tanya frees her tongue: "What did I do to deserve this treatment? What about me makes this O.K.? What am I supposed to think?"

"I am sorry you feel mistreated," the officer responds.

"Feel mistreated?" Tanya asks rhetorically. "Nothing you say will give me back what you've taken from me in this room."

"I'm just doing my job," Officer Johnson replies after zipping up Tanya's luggage and placing it next to the wastebasket in which Tanya was expected to relieve herself.

Lost for words, and almost disbelieving her own experience, Tanya looks around the room, then at Officer Johnson, and finally at her own body as a way of saying to herself: I was here. Johnson informs Tanya that she may leave. "We're done here. After you're dressed, you are free to go. The door is unlocked. Please close it behind you when you exit."[4]

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Tanya would have difficulty in legally challenging the foregoing encounter. The law is now relatively clear that, if U.S. Customs officials have reasonable suspicion to believe a person is carrying drugs on their body, those officials may seize that person, subject them to questioning, and even conduct a strip search.[5] Of course, Tanya would argue that, even assuming that reasonable suspicion is the appropriate legal standard, the officer's conduct nevertheless violated the Constitution because it was not supported by reasonable suspicion. But Tanya would not get very far advancing that claim. As many scholars have argued, reasonable suspicion is a decidedly easy evidentiary standard for the government to meet.[6] The government would argue that there was reasonable suspicion that Tanya was carrying drugs on (or in) her body because she had purchased her ticket in cash, was travelling from a "source country" (a country from which people allegedly travel with drugs), had only one item of luggage, and was in Jamaica for only three days.

How could such a facile justification, and the weak evidentiary standard of reasonable suspicion, satisfy the Fourth Amendment when the search and seizure take the form of an intrusive and invasive stop-and-strip? The government could find all the support it needed in *United States v. Montoya de Hernandez*,[7] the Supreme Court case bearing most directly on stop-and-strip violence. In *Montoya*, customs officials argued they had reasonable suspicion to believe that another woman arriving at an airport was using her body to smuggle drugs into the United States.[8] Writing for the Court, Justice Rehnquist describes the encounter:

> The inspectors requested a female customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search the female inspector felt respondent's abdomen

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[4] The preceding account draws on the accounts of stop-and-strip Black women provided on *Dateline NBC: Color Blind? Disproportionate Number of Black Women and Strip-Searched by U.S. Customs Agents* (NBC television broadcast April 27, 1999).

[5] United States v. Montoya de Hernandez, 473 U.S. 531, 536–39, 541 (1985) (holding that a strip search of a person at the border is justified at its inception if customs agents reasonably suspect that the traveler is smuggling contraband in her alimentary canal).

[6] *See, e.g.*, Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 Ohio St. J. Crim. L. 57, 57 (2014).

[7] 473 U.S. 531 (1985).

[8] *Id.* at 536.

area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no contraband, but the inspector noticed that respondent was wearing two pairs of elastic underpants with a paper towel lining the crotch area.

When respondent returned to the customs area and the female inspector reported her discoveries, the inspector in charge told respondent that he suspected she was smuggling drugs in her alimentary canal. Respondent agreed to the inspector's request that she be x-rayed at a hospital but in answer to the inspector's query stated that she was pregnant. She agreed to a pregnancy test before the x ray. Respondent withdrew the consent for an x ray when she learned that she would have to be handcuffed en route to the hospital. The inspector then gave respondent the option of returning to Colombia on the next available flight, agreeing to an x ray, or remaining in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors' suspicions. Respondent chose the first option and was placed in a customs office under observation. She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused respondent's request to place a telephone call.

Respondent sat in the customs office, under observation, for the remainder of the night. During the night customs officials attempted to place respondent on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport respondent because she lacked a Mexican visa necessary to land in Mexico City. Respondent was not permitted to leave, and was informed that she would be detained until she agreed to an x ray or her bowels moved. She remained detained in the customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. The Court of Appeals noted that she exhibited symptoms of discomfort consistent with "heroic efforts to resist the usual calls of nature."

At the shift change at 4 o'clock the next afternoon, almost 16 hours after her flight had landed, respondent still had not defecated or urinated or partaken of food or drink. At that time customs officials sought a court order authorizing a pregnancy test, an x ray, and a rectal examination. The Federal Magistrate issued an order just before midnight that evening, which authorized a rectal examination and involuntary x ray, provided that the physician in

> charge considered respondent's claim of pregnancy. Respondent was taken to a hospital and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Respondent was then placed formally under arrest. By 4:10 a.m. respondent had passed 6 similar balloons; over the next four days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.[9]

The Court gave the preceding account to support its conclusion that the entire encounter was constitutional because, although the agents did indeed seize Montoya de Hernandez, that seizure was a stop, not an arrest.[10] Therefore, the government only needed reasonable suspicion, and not probable cause, to justify the intrusion.[11] To appreciate the Court's thinking, a little more Fourth Amendment law might be helpful.

The Fourth Amendment protects us from unreasonable searches and seizures.[12] In other words, for Fourth Amendment protections to kick in, the governmental conduct at issue must be a search or a seizure. Assuming that the conduct in question is a search or seizure, that, without more, does not create a Fourth Amendment problem: The Fourth Amendment does not protect us from searches and seizures writ large, only from unreasonable ones.

To return now to *Montoya de Hernandez*: There was no dispute in the case as to whether the agents searched and seized Montoya de Hernandez. They did both. The issue was whether that search and seizure was reasonable. To appreciate how Justice Rehnquist's adjudicated that issue, one more Fourth Amendment nuance may help.

Under Fourth Amendment law, both stops and arrests are seizures. However, because arrests are more intrusive and coercive than stops, police officers must meet a higher burden of justification when seeking to arrest a person than when stopping them.[13] Whereas reasonable suspicion is enough to justify a stop, probable cause is necessary to support an arrest.[14] The difference between stops and arrests is important because a single decision to detain someone can begin as legitimate (because the detention is a stop and the government has reasonable suspicion) and evolve into an illegitimate detention (because the stop morphs into an arrest and the government lacks probable cause).[15]

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[9] *Id.* at 534–36 (citation omitted) (quoting United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984) (per curiam), *rev'd*, 473 U.S. 531 (1985)).

[10] *Id.* at 544.

[11] *Id.* at 541–42.

[12] U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[13] *Id.*

[14] *Id.*

[15] *Id.*

The line between a stop and an arrest is not easy to determine. Courts have offered several factors to guide the analysis, including the location of the detention (for example, whether it occurs on the street or in a police station), the nature of the officer's conduct (for example, whether the officer drew his gun or handcuffed the person), and the length of the detention (for example, whether the encounter lasted hours rather than minutes).[16]

Although Montoya de Hernandez invoked each of the preceding factors to argue that customs official violated her Fourth Amendment rights, she emphasized the length of detention.[17] She argued the government could not rely on reasonable suspicion to justify seizing her for sixteen hours.[18] From her vantage point, after sixteen hours, her detention was no longer a stop. Instead, it became an arrest. As such, the government needed probable cause, not reasonable suspicion, to justify the seizure.[19]

The Court disagreed.[20] Justice Rehnquist first emphasized the fact that the encounter occurred at the border.[21] He rightly noted that courts have repeatedly stated that the government's interests in regulating the border are strong and an individual's right to privacy at the border is relatively weak.[22] Stated differently, at the border, the scales are already tipped in the government's favor.

Justice Rehnquist then focused on the nature of the crime under investigation.[23] Cases "involving alimentary canal smuggling at the border," he maintained, "give[] no external signs and inspectors will rarely possess probable cause to arrest or search, yet the governmental interests in stopping smuggling at the border are high indeed."[24]

As for the sixteen hours of detention, Rehnquist noted that the *Terry* regime does not have a per se brevity requirement.[25] He claimed the Supreme Court has, at no point, stated that if a *Terry* stop exceeds a particular duration, the government needs probable cause, not reasonable suspicion.[26] Justice Rehnquist also insisted that both the length of the detention and the

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[16] *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.2(g) (Place of detention limits); § 9.2(d) (Use of force; show of force); § 9.2(f) (Time and investigative method limits) (5th ed. 2019), Westlaw (database updated Oct. 2019).

[17] *Montoya de Hernandez*, 473 U.S. 531, 542–43.

[18] *See id.*

[19] *See id.*

[20] *See id.* at 544.

[21] *See id.*

[22] *See id. See also* United States v. Flores-Montano, 541 U.S. 149, 152–53 (2004); United States v. Place, 462 U.S. 696, 703 (1983); United States v. Ramsey, 431 U.S. 606, 616 (1977) ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); United States v. Brignoni-Ponce, 422 U.S 873, 881–82 (1975).

[23] *Montoya de Hernandez*, 473 U.S. at 541.

[24] *Id.*

[25] *Id.* at 543.

[26] *Id.* at 544.

defendant's "discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country."[27] Moreover, "[b]ut [for] her visible efforts to resist the call of nature" (in other words, her refusal to defecate in the basket the agents gave her), the encounter would have ended far sooner.[28] According to Rehnquist, "[the Court's] prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions."[29] Rehnquist concluded his analysis by directly invoking the stop-and-frisk line of cases[30]:

> In *Adams* v. *Williams,* 407 U. S. 143 (1972), another *Terry*-stop case, we said that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." . . . Here, by analogy, in the presence of articulable suspicion of smuggling in her alimentary canal, the customs officers were not required by the Fourth Amendment to pass respondent and her 88 cocaine-filled balloons into the interior.[31]

In response, Justice Brennan wrote a scathing dissent, the first line of which reads: "We confront a 'disgusting and saddening episode' at our Nation's border."[32] For Justice Brennan, this "disgusting and saddening episode" was perhaps "the most extraordinary example to date of the Court's studied effort" to push the boundaries of *Terry* well beyond the context of its initial articulation.[33] "It is simply staggering that the Court suggests that *Terry* would even begin to sanction a *27-hour criminal-investigative detention*, even one occurring at the border."[34] Staggering or not, that is precisely what the Court holds—that the detention of Montoya de Hernandez was constitutional.[35]

Even assuming Justice Rehnquist is right on the question of whether the seizure was constitutional, what about the search? Is *Terry's* reasonable suspicion standard enough to justify strip searches? Justice Rehnquist purports not to have answered that question. He reasoned that:

> Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens pos-

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[27] *Id.*
[28] *Id.* at 543.
[29] *Montoya de Hernandez*, 473 U.S. at 543.
[30] *Id.* at 542–44.
[31] *Id.* at 544 (alteration in original) (internal citations omitted).
[32] *Id.* at 545 (Brennan, J., dissenting).
[33] *Id.* at 545, 558-59.
[34] *Id.* at 559.
[35] *Montoya de Hernandez*, 473 U.S. at 544 (majority opinion).

> sess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.[36]

At this point, you have every reason to be confused. After all, customs officers did strip search Montoya de Hernandez. Surely Justice Rehnquist can't simply ignore that fact. What, then, is Rehnquist saying when he asserts that the Court did not decide "what level of suspicion, if any, is required" for strip or body-cavity searches?[37] There is some doctrinal technicality here, but boiled down to its essence, Justice Rehnquist is saying this:

> The government ultimately got a court order to do the body-cavity search.
>
> That search revealed the presence of balloons that were subsequently determined to contain cocaine.
>
> The discovery of that incriminating evidence was, therefore, the product of a search that was supported by a legally obtained court order.
>
> While it took sixteen hours before customs officials got the court order, that delay did not, for reasons already discussed, make the seizure unconstitutional. (The defendant should have used the wastebasket.)
>
> Although the defendant was strip searched, she is not being prosecuted for evidence that was acquired as a result of that strip search. Thus, the Court need not comment on the constitutional requirements for that intrusion.
>
> In sum, the body cavity search that revealed the presence of drugs in Montoya de Hernandez's body was supported by a court order and occurred in the context of a reasonable (albeit lengthy) detention.

The preceding analysis is subject to challenge on at least two grounds. First, Justice Rehnquist effectively decided the very question he claimed to have put to one side. True, the conclusion that reasonable suspicion is enough to justify a *detention* during which a strip occurs is not the same as ruling that reasonable suspicion is enough to justify *strip searches* themselves. But the former comes pretty close to the latter. So close that, after *Montoya de Hernandez* was decided, lower courts explicitly relied on the case to rule that the government only needs reasonable suspicion to conduct strip searches at the border.[38]

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[36] *Id.* at 541 n.4.

[37] *Id.*

[38] *See, e.g.*, United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018); United States v. Gonzalez-Rincon, 36 F.3d 859, 863–64 (9th Cir. 1994), *cert. denied*, 514 U.S. 1008 (1995); United States v. Reyes, 821 F.2d 168, 168–69 (2d Cir. 1987), *cert. denied*, 484 U.S. 1068

A second problem with Justice Rehnquist's analysis is that it fails to consider whether the government's decision to strip search Montoya de Hernandez turned her detention from a stop to an arrest. Seizures that are arrests impose a higher burden of proof on the government than seizures that are stops. Accordingly, if a detention shifts in intrusiveness from a stop to an arrest, the level of the government's justification correspondingly shifts, from reasonable suspicion to probable cause. Note that the issue is not about whether the strip search was an unreasonable *search*. The issue is whether the strip search changed the quality of the detention from a stop to an arrest and, therefore, an unreasonable *seizure* because the government lacked probable cause. The insight here is that strip searching a person, like handcuffing them, can transform a stop into an arrest by ratcheting up the coercive and intrusive dimensions of the encounter.

To put a finer point on the search/seizure distinction I am drawing: Justice Rehnquist is saying that the Court did not decide whether a strip search supported by reasonable suspicion is a *reasonable search*. I am asking whether a strip search supported by reasonable suspicion is a *reasonable seizure*. Crucial to this inquiry is the recognition that, like stop-and-frisk, stop-and-strip effectuates both a search and a seizure. You can neither strip search nor frisk a person without first detaining them in some way. If reasonable suspicion is insufficient to justify the stop-and-strip seizure Montoya de Hernandez was forced to endure, then everything that happens after that seizure, including the court order, would be the product of that illegal seizure, or in the parlance of Fourth Amendment law, the "fruit of the poisonous tree."[39]

The "fruit of the poisonous tree" doctrine derives from the Fourth Amendment's exclusionary rule. The basic idea is that evidence (the "fruit") acquired from the "poisonous tree" (the illegal search or seizure) is inadmissible at trial. Applying this framework to the instant case, and somewhat simplifying the doctrine, if the stop-and-strip is a "poisonous tree" (because the government lacked probable cause), evidence acquired as a result of that stop-and-strip would be inadmissible "fruit."[40]

Justice Rehnquist completely ignores the foregoing basic Fourth Amendment rules. He treats the strip search as separate and distinct from, rather than a defining feature of, the seizure. That disaggregation allows him to limit his analysis of whether the agents illegally detained Montoya de

(1988); United States v. Oyekan, 786 F.2d 832, 836–37 (8th Cir. 1986); United States v. Ogberaha, 771 F.2d 655, 658–59 (2d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

[39] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484–88 (1963); Nardone v. United States, 308 U.S. 338, 340–41 (1939).

[40] With "the fruit of the poisonous" doctrine in mind, it is helpful to also note that although the strip search did not definitively reveal that Montoya de Hernandez was smuggling drugs in her body, it did reveal that she was wearing two pairs of elastic underpants. *Montoya de Hernandez*, 473 U.S. at 534. One question is whether that information (or "fruit") made its way into the application for the court order and was an important basis on which the magistrate decided to issue the order. Justice Rehnquist does not say. *Id.* at 547 n.13.

Hernandez to a focus on the *length* of detention (which he dismisses by blaming it largely on Montoya de Hernandez's decision to smuggle drugs in her body and her refusal to use the wastepaper basket as a toilet). At no point does Justice Rehnquist ask whether the strip search affected the *quality* of the detention in ways that transformed what might have been a stop at its inception into the functional equivalent of an arrest.[41]

Notwithstanding the reasonable suspicion terms on which *Montoya de Hernandez* legitimized stop-and-strip, the government's use of the practice has not gone unchallenged. In the late 1990s, a group of Black women filed a class action lawsuit against the United States Customs and Border Protection, alleging, among other things, that customs officials systemically targeted Black women for strip searches.[42] The evidence revealed that Black women comprised over 14% of the people strip searched, a rate 73% higher than the next highest groups, white men and white women, 181% higher than Black men, six times higher than Latinos, and twice the rate of Latinas.[43] Despite the disproportionate search of Black women, customs agents "virtually never found drugs."[44] In 2006, the government settled the suit for $1.9 million.[45]

The problem of stop-and-strip did not end with the 2006 settlement. The legal complaints of six contemporary cases alleging strip searches, sexual assault, and other violations at the border, primarily of Black and Latinx women between 2013 and 2018, provide accounts that, if true, fit Justice Brennan's description of stop-and-strip violence as "'disgusting and saddening episode[s]' at our Nation's border."[46] The experiences I am about to describe warrant notice that they include both invasive and violent intrusions into the body, the details of which some readers, particularly survivors of sexual violence, may not wish to confront. In these cases, women assert that they were:

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[41] *Montoya de Hernandez*, 473 U.S. at 543–44.

[42] *See* Susan Ferriss, *In Horrifying Detail, Women Accuse U.S. Customs Officers of Invasive Body Searches*, WASH. POST (Aug. 19, 2018), https://www.washingtonpost.com/world/national-security/in-horrifying-detail-women-accuse-us-customs-officers-of-invasive-body-searches/2018/08/18/ad7b7d82-9b38-11e8-8d5e-c6c594024954_story.html, *archived at* https://perma.cc/3EMS-6BPS.

[43] U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-38, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 12 tbl.3 (2000).

[44] Michael Higgins, *O'Hare Strip Search Suit Settled*, CHI. TRIB. (Feb. 5, 2006), https://www.chicagotribune.com/news/ct-xpm-2006-02-05-0602050279-story.html, *archived at* https://perma.cc/94TP-Y3XN.

[45] Ferriss, *supra* note 42; *accord* Higgins, *supra* note 44.

[46] *Montoya de Hernandez*, 473 U.S. at 545 (Brennan, J., dissenting) (quoting United States v. Holtz, 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting)).

- Searched while menstruating[47]and subjected to the forcible removal of their menstrual products;[48]
- Interrogated, sometimes for hours,[49] with no explanation as to why they were being searched and seized;[50]
- Handcuffed[51] and shackled;[52]
- Forced to remove clothing[53] and to let down hair for inspection;[54]
- Forced to squat and cough;[55]
- Subjected to the probing of their breasts and/or underwear;[56]
- Subjected to the visual inspection of their vaginal and anal areas, including with flashlights;[57]
- Subjected to other bodily intrusions, including the pressing of fingers into vagina[58] and rectal area,[59] and the "insert[ing of] speculum into . . . vagina"[60] in the presence of others, using the same gloves for multiple detained people;[61]
- Subjected to canine sniffs;[62]
- Forcibly transported to a hospital or other medical center,[63] directed to ingest laxatives,[64] to undergo x-ray procedures,[65] to

[47] Complaint at 3, Catlin v. United States, No. 3:18-cv-00322 (S.D. Cal. Feb. 9, 2018); Complaint at 7, Cervantes v. Unites States, No. 4:16-cv-00334 (D. Ariz. June 8, 2016); Complaint at 2, Ferguson v. United States, No. 2:14-cv-06807 (E.D. Pa. Dec. 1, 2014).

[48] Complaint, *Ferguson*, *supra* note 47, at 2.

[49] *Id.* at 8; Complaint, *Cervantes*, *supra* note 47, at 5.

[50] Complaint at 6, Lovell v. United States, No. 1:18-cv-01867 (E.D.N.Y. Mar. 28, 2018); Complaint at 6, Jane Doe v. El Paso Cty. Hospital Dist., No. 3:13-cv-00406 (W.D. Tex. Dec. 18, 2013).

[51] Complaint, *Cervantes*, *supra* note 47, at 5; Complaint at 11, Lewis v. United States, No. 3:15-cv-02319 (S.D. Cal. Oct. 15, 2015). In *Lewis*, a white woman was strip searched. She was mistaken by CBP for another woman, an African American, who had an outstanding warrant. *See id.*

[52] Complaint, *Ferguson*, *supra* note 47, at 8.

[53] Complaint, *Caitlin*, *supra* note 47, at 3; Complaint, *Ferguson*, *supra* note 47, at 12; Complaint, *Jane Doe*, *supra* note 50, at 5.

[54] Complaint, *Lewis*, *supra* note 51, at 11.

[55] Complaint, *Caitlin*, *supra* note 47, at 3.

[56] *Id.*; Complaint, *Lewis*, *supra* note 51, at 11.

[57] Complaint, *Caitlin*, *supra* note 47, at 3; Complaint, *Jane Doe*, *supra* note 50, at 5; Complaint, *Ferguson*, *supra* note 47, at 13.

[58] Complaint, *Jane Doe*, *supra* note 50, at 6; Complaint, *Lovell*, *supra note* 50, at 6; Complaint, *Cervantes*, *supra* note 47, at 8.

[59] Complaint, *Caitlin*, *supra* note 47, at 3; Complaint, *Jane Doe*, *supra* note 50, at 8; Complaint, *Lovell*, *supra note* 50, at 6; Complaint, *Cervantes*, *supra* note 47, at 8.

[60] Complaint, *Jane Doe*, *supra* note 50, at 8.

[61] Complaint, *Lewis*, *supra* note 51, at 14.

[62] Complaint, *Cervantes*, *supra* note 47, at 5.

[63] Complaint, *Jane Doe*, *supra* note 50, at 6; Complaint, *Ferguson*, *supra* note 47, at 2; Complaint, *Cervantes*, *supra* note 47, at 6.

[64] Complaint, *Jane Doe*, *supra* note 50, at 6.

[65] *Id.*; Complaint, *Ferguson*, *supra* note 47, at 14.

provide DNA and urine samples,[66] to undergo gynecological exams,[67] and to be sedated;[68]
- Detained for hours in a confined space[69] without access to restrooms,[70] food and water,[71] and denied the right to contact family.[72]

Words can hardly describe the in-the-moment, and after-the-fact, harms of the foregoing experiences. Even the terms "trauma" and "sexual assault" may prove inadequate. We could, of course, have a debate about exactly when, in the above incidents, the government crossed the *Montoya de Hernandez* line in the sense of engaging in an unreasonable search or seizure. But such an exercise would miss this important point: Because *Montoya de Hernan*dez creates constitutional space for disputes, not only about the kinds of stop-and-strip practices reasonable suspicion may justify but also the kinds of evidence on which the government may rely to establish reasonable suspicion, Black women will continue to find themselves navigating the boundaries between the varieties of stop-and-strip violence that are constitutional and the varieties that are not.

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The story this Article articulates about stop-and-strip violence is part of a broader narrative in which reasonable suspicion covers far more circumstances than the stop-and-frisk context out of which the standard arose. In 1968, in *Terry v. Ohio*,[73] Chief Justice Warren ruled that police officers may stop-and-frisk people whom they have reasonable suspicion to believe are armed and dangerous.[74] In setting forth this rule, the Chief Justice maintained that he was attempting to carve out a very limited exception to the dominant idea in Fourth Amendment law that searches and seizures require probable cause to pass constitutional muster.[75] To put the point the way Jus-

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[66] Complaint, *Ferguson*, *supra* note 47, at 2.

[67] Complaint, *Jane Doe*, *supra* note 50, at 6; Complaint, *Cervantes*, *supra* note 47, at 8.

[68] Complaint, *Ferguson*, *supra* note 47, at 2.

[69] Complaint, *Jane Doe*, *supra* note 50, at 9; Complaint, *Lewis*, *supra* note 51, at 11–12; Complaint, *Ferguson*, *supra* note 47, at 2; Complaint, *Cervantes*, *supra* note 47, at 8.

[70] Complaint, *Lewis*, *supra* note 51, at 15–16.

[71] Complaint, *Ferguson*, *supra* note 47, at 11.

[72] Complaint, *Cervantes*, *supra* note 47, at 5–6.

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

[74] *Id.* at 30. Importantly, Chief Justice Warren does not actually employ the term "reasonable suspicion." He employed the expression "specific and articulable facts." *Id.* at 21. That formulation was subsequently re-articulated to become "reasonable suspicion." *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (discussing the lack of authority to stop or search the plaintiff and stating there was "not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in *Terry v. Ohio*"). The term "reasonable suspicion" was first articulated in Justice Douglas's dissent in *Terry*. *See* 392 U.S. at 37 (Douglas, J., dissenting).

[75] *Terry*, 392 U.S. at 20, 27.

tice Warren did, his aim was to create "a *narrowly drawn* authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[76] For Justice Warren, this "narrowly drawn" authority was necessary because "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."[77]

The "protean variety of the street encounter" suggested to Justice Warren that it would be a mistake to adopt "a rigid all-or-nothing model of justification and regulation under the Amendment" under which all searches and seizures require, at minimum, probable cause.[78] Instead, judges should take into account the scope and nature of the search and seizure and the government's need to perform the search and seizure to determine the appropriate level of justification.[79] Applying this reasoning to stop-and-frisk,[80] Justice Warren concluded that because "we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure," the constitutionality of stop-and-frisk should be judged not by whether the practice is supported by a warrant or probable cause, but "by the Fourth Amendment's general proscription against unreasonable searches and seizures."[81] For Justice Warren, that general proscription required a police officer to have "specific reasonable inferences"—in other words, reasonable suspicion—prior to subjecting a person to a stop-and-frisk.[82]

Justice Warren may genuinely have believed that his "narrowly drawn" ruling would ensure that searches and seizures based on reasonable suspicion would be an exceptional dimension of Fourth Amendment law.[83] He could not have been more mistaken. *Terry's* reasonable suspicion standard has travelled well beyond the context Justice Warren had in mind. In prior work, I faulted Justice Warren for not realizing how the move away from probable cause would make African Americans easy targets for police officers.[84] I stand by that criticism here. However, I do not fault the Chief

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[76] *Id.* at 27 (emphasis added).
[77] *Id.* at 13.
[78] *Id.* at 15, 17.
[79] *Id.* at 22, 24.
[80] As I explain more fully elsewhere, it is important to distinguish between "stop-and-question" and "stop-and-frisk." *Terry* expressly authorized the latter but not the former. *See* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. Rev. 1508, 1533 (2017).
[81] *Terry*, 392 U.S. at 20.
[82] *Id.* at 27.
[83] *Id.*
[84] Carbado, *supra* note 80, at 1545.

Justice for failing to anticipate the multiple law enforcement contexts in which reasonable suspicion would apply. The migration of reasonable suspicion from *Terry v. Ohio* to just about every dimension of policing is quite remarkable. It should surprise even the most ardent proponent of "law and order." Consider the following examples:

1. Though *Terry v. Ohio* contemplated that police officers would stop people only in the context of having reasonable suspicion that they are armed and dangerous, a police officer may now employ reasonable suspicion to stop and question people even when that officer has no basis to believe that those people are armed or dangerous.[85]
2. Police officers may *Terry* stop and investigate luggage, not just people, based on the reasonable suspicion that it contains drugs.[86]
3. Police officers may employ reasonable suspicion to frisk passengers, and not just the driver of a car.[87]
4. Police officers are also permitted to *Terry* stop cars based on reasonable suspicion.[88]
5. Individuals may be required to disclose their names during a *Terry* stop if there is reasonable suspicion of criminal involvement. Their failure to do so could subject them to arrest.[89]
6. Police may ask whatever questions they want of the individual or anyone else incidentally detained, during the course of a *Terry* stop. "[T]he content of police questions during a lawful detention does not implicate the Fourth Amendment as long as those questions do not prolong the detention."[90]
7. Armed with an arrest or search warrant, police may dispense with knocking and announcing their presence if they have reasonable suspicion (not probable cause) to that there is some kind of exigency.[91]
8. In the context of executing an arrest or a search warrant in the home, police officers are permitted to use reasonable sus-

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[85] Floyd v. City of New York, 959 F. Supp. 2d 540, 558, 566 (S.D.N.Y. 2013), *aff'd in part*, 770 F.3d 1051, 1054–55 (2d Cir. 2014) (per curiam).

[86] United States v. Place, 462 U.S. 696, 696 (1983).

[87] Arizona v. Johnson, 555 U.S. 323, 327 (2009).

[88] United States v. Choudhry, 461 F.3d 1097, 1098 (9th Cir. 2006).

[89] Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty., 542 U.S. 177, 188–89 (2004).

[90] United States v. Stewart, 473 F.3d 1265, 1269 (10th Cir. 2007) (citing Muehler v. Mena, 544 U.S. 93, 101 (2005)). The only limitation is that questions cannot unduly prolong the stop. *See* United States v. Moore, 795 F.3d 1224, 1229 (10th Cir. 2015) ("[Officers] ask questions, whether or not related to the purpose of the stop, so long as they do not prolong the stop.").

[91] Wilson v. Arkansas, 514 U.S. 927, 927 (1995).

picion to justify the search of a house for suspects who might be armed and dangerous.[92]

9. Police may search the home of a person on probation if they have reasonable suspicion.[93] With respect to searching the home of a parolee, no suspicion whatsoever is required.[94]
10. Reasonable suspicion is enough to justify immigration stops in which the sole concern is whether a person is undocumented.[95]
11. Law enforcement officials may take "apparent Mexican ancestry" into account in determining whether they have reasonable suspicions to believe that a person is undocumented.[96]
12. Reasonable suspicion suffices for the purpose of putting people on the government's "No Fly" list.[97]
13. Reasonable suspicion applies to past and future crimes, and not just crimes that might be afoot.[98]

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[92] Maryland v. Buie, 494 U.S. 325, 327 (1990).

[93] United States v. Knights, 534 U.S. 112, 112 (2001).

[94] Samson v. California, 547 U.S. 843, 843 (2006).

[95] Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 992–93 (D. Ariz. 2011), *aff'd*, Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012).

[96] United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975).

[97] *See* Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 918 (N.D. Cal. 2014) ("FBI agents and other government employees normally nominate individuals to the [Terrorist Screening Database (TSDB)] using a 'reasonable suspicion standard' . . . his 'reasonable suspicion' standard was adopted by internal Executive Branch policy and practice."); Elhady v. Kable, 391 F. Supp. 3d 562, 568 (E.D. Va. 2019) ("Nominated individuals are added to the TSDB if their nomination is based upon articulable intelligence or information which . . . creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in . . . terrorism and/or terrorist activities.") (internal citations omitted); Kashem v. Barr, 941 F.3d 358, 381 (9th Cir. 2019) (finding that the government's reasonable suspicion standard for placing individuals on the "No Fly" list satisfied procedural due process); Mohamed v. Holder, 995 F. Supp. 2d 520, 525 (E.D. Va. 2015) (citing to the Terrorist Screening Center and its maintenance of the TSDB, of which the "No Fly" list is a subset); Latif v. Holder, 28 F. Supp. 3d 1134, 1151–52 (D. Or. 2014). For an extended discussion of this particular extension of reasonable suspicion, see Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1593–96 (2016). *See also* Jeffrey Kahn, *The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and* Terry v. Ohio, 26 WM. & MARY BILL RTS. J. 383, 385–86 (2017).

[98] United States v. Hensley, 469 U.S. 221, 227 (1985). *See also* State v. Spillner, 173 P.3d 498 (Haw. 2007) (finding that the officer's knowledge of the defendant's misconduct one and two weeks prior was enough to create reasonable suspicion). Further, the FBI's *About the Terrorist Screening Center* webpage explains that "[i]ndividuals are included in the [Terrorist Screening Database, commonly known as 'the watchlist'] when there is reasonable suspicion to believe that a person is a known or suspected terrorist." *Federal Bureau of Investigation, The Terrorist Screening Database,* FBI, https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc, *archived at* https://perma.cc/2HKJ-Q7AZ. Additionally, Congressional Research Service Report R44678, "The Terrorist Screening Database and Preventing Terrorist Travel" dated November 7, 2016, discusses the reasonable suspicion standard for making it onto the TSDB. Footnote 30 from this report states, "Exceptions to the reasonable suspicion threshold exist, and some people are placed in the TSDB 'to support immigration and border screening by the Department of State and the Department of Homeland Security.'" CONG. RESEARCH SERV., R44678, THE TERRORIST SCREENING DATABASE AND PREVENTING

14. Reasonable suspicion may be based on an informant's tip, and not just an officer's direct observation and expertise.[99]
15. "Evasive behavior," such as "furtive movement" of a suspect in a "high-crime area" is almost enough to constitute reasonable suspicion.[100]
16. Officers may rely on factors that are consistent with so-called "drug courier profiles" to establish reasonable suspicion.[101]
17. Reasonable suspicion may justify subjecting a suspect to a "show up," which is effectively a line-up conducted on the street.[102]
18. An officer may fingerprint a person during a *Terry* stop justified only by reasonable suspicion.[103]
19. There is no per se brevity requirement to the reasonable suspicion standard.[104] Courts have upheld reasonable suspicion-based stops that have lasted more than thirty minutes.[105]
20. Reasonable suspicion can be used to justify not only stopping and frisking children in schools, but strip searching them as well.[106]
21. Government employers may rely on reasonable suspicion to conduct workplace searches.[107]
22. Police may rely on reasonable suspicion to perform full searches at "extended borders" if they possess a reasonable certainty that the subject recently crossed the border.[108]
23. Reasonable suspicion allows personal property, such as laptops and other electronic storage devices, to be forensically examined at the border.[109]

TERRORIST TRAVEL (2016), https://crsreports.congress.gov/product/pdf/R/R44678, *archived at* https://perma.cc/CW6Y-PN5E.

[99] Adams v. Williams, 407 U.S. 143, 147 (1972).

[100] Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

[101] United States v. Sokolow, 490 U.S. 1, 10 (1989).

[102] Michigan v. Summers, 452 U.S. 692, 700 (1981) (quoting, in dicta, 3 W. LaFave, *Search and Seizure* § 9.2, pp. 36–37 (1978)).

[103] Hayes v. Florida, 470 U.S. 811, 816 (1985).

[104] United States v. Sharpe, 470 U.S. 675, 686 (1985).

[105] United States v. Ramdihall, 859 F.3d 80, 85, 95 (1st Cir. 2017).

[106] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 376–77 (2009) (finding the search at issue unconstitutional because it was not based on reasonable suspicion).

[107] O'Connor v. Ortega, 480 U.S. 709, 726 (1987).

[108] United States v. Alfonso, 759 F.2d 728, 734 (9th Cir. 1985). The "extended border" can be quite extended. *See, e.g.*, *id.* at 734–35 (search of boat thirty-six hours after it crossed the border); United States v. Martinez, 481 F.2d 214, 218–21 (5th Cir. 1973) (search conducted 150 miles from the border and 142 hours after a border crossing was an extended border search).

[109] United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013) (en banc).

24. The government may rely on reasonable suspicion to justify searching international mail at the border.[110]
25. Reasonable suspicion permits customs officials to stop-and-strip people at the border.[111]

Of course, the foregoing extensions of reasonable suspicion are not equally problematic. The point is that when one adds them all up, they create a law enforcement world in which government agents may search and seize individuals—on the streets, in their homes, in their cars, in schools, at work, and at the border—on the thinnest of justifications.

In this Article, I focused most of my attention on the border. I did so because with all the discussion we have had about race and policing over several decades—from the height of debates about racial profiling in the 1990s to the more recent organizing around Black Lives Matter—scholars, policymakers, and community organizers rarely invoke border searches and seizures, including stop-and-strip, as examples of racialized state violence. The absence of that discussion elides not only the particular vulnerability Black women face to stop-and-strip,[112] but also the role Fourth Amendment law plays facilitating and legitimizing that violence. The invisibility of Black women in this respect is consistent with their ongoing marginalization in public policy and legal debates about police and state violence more generally. As Kimberlé Crenshaw has argued, drawing on her theory of intersectionality,[113] notwithstanding that Black women and girls have long been over-policed and under-protected,[114] their names are insufficiently heard,[115]

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[110] United States v. Ramsey, 431 U.S. 606, 606 (1977).

[111] United States v. Vega-Barvo, 729 F.2d 1341, 1349–50 (11th Cir. 1984).

[112] According to a U.S. General Accounting Office report, Black women traveling internationally were nine times more likely than white women to be subjected to x-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. *See* U.S. Gen. Accounting Office, *supra* note 43, at 2. *See also Black Women Searched More, Study Finds*, N.Y. Times, Apr. 10, 2000, at A17; Jennifer Loven, *Report: Black Women More Subject to Customs Searches*, Lima News, Apr. 10, 2000, at A4 (indicating that while Black women passing through U.S. Customs as they return home from overseas trips are more likely to be subjected to strip searches and x-rays, they are the least likely to be carrying drugs); David Johnston, *U.S. Changes Policy on Searching Suspected Drug Smugglers*, N.Y. Times (Aug. 12, 1999), https://www.nytimes.com/1999/08/12/us/us-changes-policy-on-searching-suspected-drug-smugglers.html, *archived at* https://perma.cc/6X7J-ALWX (describing policy changes limiting border agents' ability to search amid criticism of racial bias particularly against Black women).

[113] *See generally* Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. Chicago Legal F. 139 (1989).

[114] Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control,* 59 UCLA L. Rev. 1418 (2012). For other works that foreground Black women's experiences with the criminal legal system, including in the context of policing, see also Angela Davis, Are Prisons Obsolete? (2011); Andrea J. Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color (2017); Beth E. Ritchie, Arrested Justice: Black Women, Violence, and America's Prison Nation (2012); Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration and the Shackling of Pregnant Prisoners,* 100 Cal. L. Rev. 1239 (2012); Priscilla Ocen, *The*

and their experiences insufficiently invoked, in efforts to bring attention to the carceralization of the Black life.

Even those familiar with intersectional critiques of racial justice advocacy may be surprised by how little attention has been paid to *Montoya de Hernandez* in scholarly and legal debates about race and racial profiling. While *Montoya de Hernandez* is arguably the most important constitutional law opinion on stop-and-strip, the case has received virtually no scholarly, media, and judicial engagement. As a limited example of what I mean, consider first Table 1 below. It compares *Terry v. Ohio* and *Montoya de Hernandez* with respect to the extent to which those cases are associated with the terms "race" or "racial profiling." A Westlaw search produces 1000 results for *Terry*[116] and only sixteen for *Montoya de Hernandez*.[117]

TABLE 1

	Terry v. Ohio: # of Results	U.S. v. Montoya de Hernandez: # of Results
Race or Racial Profiling	Cases: **341** Trial Court Orders: **11** Statutes & Court Rules: **6** Secondary Sources: **645** Total: **1,003**	Cases: **5** Trial Court Orders: **0** Statutes & Court Rules: **0** Secondary Sources: **11** Total: **16**

Now consider Table 2 which compares the frequency with which Black men are associated with *Terry* to the frequency with which Black women are associated with *Montoya de Hernandez*. As Table 2 illustrates, that inquiry produces 496 results in the *Terry* Black man search[118] and two in the *Montoya de Hernandez* Black woman search.[119]

New Racially Restrictive Covenant: Race, Welfare and the Policing of Black Women in Public Housing, 59 UCLA L. REV. 1540 (2012).

[115] *See* KIMBERLÉ W. CRENSHAW & ANGELA RITCHIE, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN, African American Policy Forum, Center for Intersectionality and Social Policy Studies (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf, *archived at* https://perma.cc/RM9L-BRNF.

[116] Westlaw search: advanced: (Terry /p "race" "racial profile" "racial profiling") & "Terry v. Ohio", Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[117] Westlaw search: advanced: ("Montoya de Hernandez" /p "race" "racial profile" "racial profiling"), Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[118] Westlaw search: advanced: (Terry /p "black man" "African American man") & "Terry v. Ohio", Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[119] Westlaw search: advanced: ("Montoya de Hernandez" /p "black woman" "African American woman"), Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

TABLE 2

Table 2	Terry v. Ohio: Black Men: # of Results	U.S. v. Montoya de Hernandez Black Women: #of Results
Race or Racial Profiling	Cases: **223** Trial Court Orders: **4** Statutes & Court Rules: **6** Secondary Sources: **263** Total: **496**	Cases: **0** Trial Court Orders: **0** Statutes & Court Rules: **0** Secondary Sources: **2** Total: **2**

Turning now to Table 3. The data in this table suggests that Black women's experiences are largely absented from racial critiques of the reasonable suspicion standard. Whereas Black men[120] are mentioned 955 times in relation to reasonable suspicion, the number for Black women[121]—two—is decidedly smaller.

TABLE 3

	Black Men	Black Women
Reasonable Suspicion	Cases: **577** Trial Court Orders: **21** Statutes & Court Rules: **26** Secondary Sources: **331** Total: **955**	Cases: **34** Trial Court Orders: **0** Statutes & Court Rules: **2** Secondary Sources: **29** Total: **65**

Finally, when one counts, as Table 4 does, the number of times Black men and Black women are invoked in the context of discussions of *Terry v. Ohio*, the results are consistent with the prior tables—a *Terry* Black man[122] search yields 496 items and a *Terry* Black woman search yields twenty-one.[123]

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[120] Westlaw search: advanced: ("reasonable suspicion" /p "black man" "African American man"), Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[121] Westlaw search: advanced: ("reasonable suspicion" /p "black woman" "African American woman"), Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[122] Westlaw search advanced: (Terry /p "black man" "African American man") & "Terry v. Ohio", Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

[123] Westlaw search: advanced: (Terry /p "black woman" "African American woman") & "Terry v. Ohio", Jurisdictions: All States and All Federal (last visited Feb. 29, 2020).

TABLE 4

	Black Men: # of Results	Black Women: # of Results
Terry v. Ohio	Cases: **223** Trial Court Orders: **4** Statutes & Court Rules: **6** Secondary Sources: **263** Total: **496**	Cases: **13** Trial Court Orders: **0** Statutes & Court Rules: **1** Secondary Sources: **12** Total: **26**

Two points deserve emphasis. The first is that these numbers don't fully speak for themselves. Undoubtedly, they embed more nuanced stories that careful qualitative analyses would reveal. Still, the numbers are striking. Second, I do not invoke the foregoing data to suggest that we are learning too much about Black men and their experiences of criminal injustice. We are not. The "surveillance chokehold," a term I employ—building on Paul Butler's work—to describe the formal and informal mechanisms through which Black men are socially surveilled, socially supervised, socially disciplined, and socially put down—sometimes quite literally in the form of death—continues to occupy peripheral space in our collective imagination.[124] In that regard, we need to know more, not less, about the ways in which Black men are policed,[125] including under the stop-and-frisk regime *Terry* instantiated. The reason I present the above tables is to suggest that, although *Terry v. Ohio* was decided more than forty years ago, we have learned virtually nothing about the impact of that case, and its progeny, on the lives of Black women. This Article is just one chapter in that larger untold story.

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Reasonable suspicion emerged in *Terry* as an exception to the probable cause requirement. Chief Justice Warren articulated the rule as a "narrowly drawn" standard to make Fourth Amendment law flexible enough to deal with what he perceived to be the "protean variety of the street encounter."[126] Whatever the merits of Warren's initial deployment of reasonable, the doctrine is no longer an exceptional dimension of Fourth Amendment law. Reasonable suspicion applies to a range of contexts, from the streets of our country all the way to its borders. This metastasizing of reasonable suspicion is an important part of the legacy of *Terry v. Ohio.* As is now clear, that

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[124] *Cf* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

[125] *See* ANGELA J. DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (2017).

[126] 392 U.S. 1, 15, 27 (1968).

legacy includes the government's use of a very weak evidentiary standard (reasonable suspicion) to justify a very muscular investigatory practice (stop-and-strip).