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WARDLOW'S CASE: A CALL TO BROADEN THE PERSPECTIVE OF AMERICAN CRIMINAL LAW

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INTRODUCTION

> Sam saw Timothy, turned, and ran. Timothy saw Sam run, followed, and caught him. Timothy frisked Sam and found a gun. Sam went to a suppression hearing, a trial, a sentencing hearing, and finally jail.[1]

The events above began shortly after noon on September 9, 1995, at 4035 West Van Buren Street, Chicago, Illinois. Sam is Sam Wardlow, a 44-year-old African-American man and previously convicted felon. Timothy is Officer Timothy Nolan, a white member of the Chicago Police Department. The reading-primer-simple actions of these two dramatis personae have been described and argued in four forums and for as many years since they occurred. These events culminated in a final performance in the grandest judicial venue this country has to offer: the United States Supreme Court. Before the performance, legal dramaturgists and critics from all over the country submitted thirteen reviews through briefs of *amicus curiae* to help instruct the nine-person audience. While many of the reviews focused on the plot of the case, there was a great deal of rhetoric concerning the setting. Only two, however, discussed the racial and cultural identities of the principal characters.

It is the discussion of setting and identity that concerns this present paper. Officer Nolan and the Illinois District Attorney's office argued that the events occurred in a "high-crime area."[2] This fact, combined with the flight of Mr. Wardlow, they say, justified the officer in stopping the suspect.[3] They frame this argument pursuant to the guidelines established in *Terry v. Ohio*,[4] stating that location plus evasion gave an officer articulable reasonable suspicion to believe that criminal activity was afoot.[5] The trial court ruled in favor of the state. Sam was sentenced to two years on the charge of possession of a handgun by a felon.[6] The Appel-

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1. People v. Wardlow, 701 N.E.2d 484, 485 (Ill. 1998).
2. Petitioner's Reply Brief at 17-19, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036) [hereinafter *Petitioner's Brief*].
3. *See id.*
4. 392 U.S. 1 (1968).
5. *Petitioner's Brief*, *supra* note 2, at 17.
6. *Wardlow*, 701 N.E.2d at 484.

late Court of Illinois reversed the conviction on limited grounds,[7] and this decision was affirmed by the Illinois Supreme Court.[8]

The first part of this paper sets the framework for the Fourth Amendment analysis. In order to understand the concepts argued and decided in *Wardlow*, it is first necessary to understand the underlying legal precedent. This section will trace the history of "stop and frisk" jurisprudence, highlighting cases that have focused on location and evasion analysis.

The second section argues against the reasoning of the State of Illinois, its amici, and all the reviewing courts, as all believe, either explicitly or implicitly, that the issue of location should be meaningful in determining articulable reasonable suspicion under *Terry*. The issue of location should be eliminated from *Terry* analysis for three reasons. First, the statistical "objective" data relied on to determine a high-crime area, while possibly an effective tool for safe, efficient police work, is too ripe for racially discriminatory abuses in the court room. Second, the subjective bias of police officers perpetuates the discriminatory impact. Third, the use of location in this area will heighten the animosity between inner-city police forces and the racial minorities within their districts.

The final section will focus on the aspect of flight. The use of flight in *Terry* analysis, while difficult to eliminate from consideration, has problems in the light of racially biased policing in high-crime areas. I will discuss whether or not, for minority populations, there can be such a thing as unprovoked flight. I will also argue that the concept of flight pursuit cuts against one of the foundations of *Terry*. As Justice Stevens pointed out in his dissent, flight is less indicative of wrongdoing in a high crime area.

I. *TERRY* TO *WARDLOW*

The primary issue in *Wardlow* is one of suppression -- that is, whether the gun found on Sam Wardlow by Officer Nolan was properly admitted into evidence during the bench trial, or if it should have been excluded because it violated the Fourth Amendment's protection from unreasonable searches and seizures. The gun constituted the entirety of the physical evidence presented at the trial, and both the prosecution and the defendant stipulated to the facts of the case as described by Officer Nolan. If the gun was admitted properly, Sam's conviction should stand; if the gun was unreasonably obtained, the conviction should be vacated.

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7. *Id.*
8. *Id.* at 489.

Due to the factual stipulation, the appellate court and all subsequent courts reviewed the issue *de novo*.[9]

During Wardlow's appeal, the prosecution argued that the subject's flight and location in a high-crime area were satisfactorily specific facts that justified pursuit, detention and frisk of Sam and his effects.[10] The appellate court disagreed and limited the holding to the issue of flight.[11] The court found no support in the record that Sam was located in a high-crime area at the time of his flight.[12] Therefore, the court relied on Illinois precedent, holding that flight alone is insufficient to justify a *Terry* stop.[13] The appellate court stated in dicta that if the area of arrest could be proven to be a high-crime area, a stop might have been justified.[14] Thus, the appellate court recognized the legal significance that a high-crime area could have on a determination of articulable reasonable suspicion. However, the court was unable to determine if the area of 4035 West Van Buren fell into that category.

Both courts analyzed the stop under the *Terry* stop rubric of the Fourth Amendment. The Supreme Court of Illinois did not perceive the same confusion over high-crime areas as the lower court. The court ruled that flight alone in a high-crime area does not justify an investigatory detention and affirmed and expanded the limited holding of the court of appeals.[15]

In 1968, the United States Supreme Court announced its decision in *Terry v. Ohio*.[16] With *Terry* the Court performed a retread on traditional Fourth Amendment search and seizure law. By placing the government interest in crime prevention and the private interest to be free from intrusion on the balance, the Warren Court gave the stamp of reasonableness to certain seizures made with suspicion that did not rise to the level of probable cause to arrest.[17] Technically, the decision in *Terry* represents nothing more than an additional exception to the warrant requirement of the Fourth Amendment. But *Terry* casts the warrant requirement in a new light. As Justice Douglas points out in his dissent, the ruling in *Terry* allows a police officer on the street to perform an act that a judge or magistrate could not authorize, as all warrants must issue from probable cause.[18]

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9. *Id.* at 485.
10. *Petitioner's Brief, supra* note 2, at 19.
11. People v. Wardlow, 678 N.E.2d 65, 68 (Ill. App. Ct. 1997).
12. *Id.* at 67-68.
13. *Id.* at 68.
14. *Id.*
15. *Wardlow*, 701 N.E.2d at 488-89.
16. 392 U.S. 1 (1968).
17. *See id.* at 22.
18. *Id.* at 38 (Douglas, J., dissenting).

The defense in *Terry* sought to exclude from evidence a gun found on the defendant because it was found and seized in violation of the Fourth Amendment reasonableness clause.[19] Detective McFadden of the Cleveland Police Department discovered the gun on Terry in a search of his person.[20] McFadden suspected Terry and two associates of casing a store in preparation for an armed hold-up.[21] McFadden based this suspicion on a lengthy observation of Terry and his associates.[22] McFadden watched as Terry and another man walked back and forth in front of a store window a dozen times.[23] As Terry left the scene, McFadden stopped the two men and patted down the outside of their garments.[24] McFadden found a pistol in Terry's breast pocket.[25] After classifying the stop as investigatory, the trial court convicted Terry of carrying a concealed weapon.[26] The Court of Appeals affirmed and the Supreme Court of Ohio dismissed Terry's appeal.[27]

The prosecution in *Terry* argued that the requirement of probable cause was too rigid for police to respond adequately to the dangers posed on the urban streets.[28] As a result, state legislatures began enacting statutes that authorized police stop and frisk procedures on grounds less than probable cause.[29] *Terry* has been described as a judicial response to the increased violence of the inner cities and the pressing public demand for increased law and order.[30] The response by the Court created a reduced standard of suspicion for on-street detentions and a greater deference to the decisions of the beat cop.

The balancing test in *Terry* originated from the 1967 administrative search case, *Camara v. Municipal Court.*[31] *Camara* concerned the inspection of a residence by a municipal health agency without a warrant.[32] The Court found the administrative search unconstitutional, but in so doing defined the Fourth Amendment concept of reasonableness.[33] Without citation, Justice White wrote that determining reasonableness requires a squaring of the need to search with the burden of invasion upon the sub-

19. *See id.* at 5.
20. *Id.* at 7.
21. *Id.* at 6.
22. *Terry*, 392 U.S. at 6.
23. *Id.*
24. *Id.*
25. *Id.* at 7.
26. *Id.* at 4.
27. *Id.* at 8.
28. *Terry*, 392 U.S. at 10.
29. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 43-44 (1968).
30. David Harris, *Factors for Reasonable Suspicion: When Poor and Black Means Stopped and Frisked*, 69 IND. L.J. 659, 663 (1994).
31. Camara v. Municipal Court, 387 U.S. 523 (1967).
32. *Id.* at 525-26.
33. *Id.* at 536-37.

ject of the search.[34] One year later the *Terry* Court applied this test to determine the reasonableness of a warrantless seizure.

To strike the balance between the two interests, *Terry* applied an objective standard by which police officers could perform limited searches based on reduced suspicion.[35] This objective standard has come to be known as reasonable articulable suspicion.

Reasonable articulable suspicion as stated in *Terry* is a guide for police officers and courts to determine what constitutes a reasonable stop and frisk under the Fourth Amendment. To prove that the stop and frisk was reasonably warranted, the detaining officer must be able to point to articulable facts and their rational inferences.[36] In deciding whether to admit or suppress the fruit of *Terry* stops, trial judges must ask, "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[37]

While the standard of reasonable articulable suspicion is more flexible than the arrest standard of probable cause, it is limited. The standard is not the functional equivalent of a gumshoe's hunch. Moreover, unlike other warrant exceptions, an officer's good faith is insufficient to keep evidence from being suppressed absent reasonable articulable suspicion.[38] Since *Terry*, the Court has found occasion to decide cases where factors supporting stop and frisks did not rise to the level of reasonable articulable suspicion.[39]

Brown v. Texas[40] involved the stop and search of a man in an area of El Paso, Texas, with a high incidence of drug trafficking.[41] However, the arresting officers could not point to any specific facts that led them to believe criminal conduct was taking place.[42] The officers merely stated that the defendant was in a high-crime area and "looked suspicious."[43] The Court found that mere presence in a high-crime area, without more, does not justify a finding of articulable reasonable suspicion.[44]

Following *Terry*, courts applied the reasonable articulable suspicion standard to the search and seizure cases before them. However, it was another thirteen years before the U.S. Supreme Court provided guide-

34. *Id.* at 534-35.
35. *Terry*, 392 U.S. at 27.
36. *Id.*
37. *Id.* at 21-22.
38. *Id.* at 22.
39. *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); Minnesota v. Dickerson, 508 U.S. 366 (1993).
40. 443 U.S. 47 (1979).
41. *Id.* at 47.
42. *Id.*
43. *Id.* at 52.
44. *Id.*

lines to determine the presence of the objective standard. While *Terry* and its progeny defined reasonable articulable suspicion, the definition proved elusive without a practical test for determining which facts were articulable enough to be considered in *Terry* cases.[45]

In *United States v. Cortez*, the Court finally articulated the test for determining reasonable articulable suspicion: totality of the circumstances.[46] That is, under this test, all facts at the officer's disposal at the time of the detention are taken into consideration.[47] The defendants in *Cortez* were found guilty of six counts of transporting illegal aliens.[48] Border Patrol Officers in Arizona stopped the defendants' van based on a two-month investigation of border crossings, which began with analysis of footprints in the sand.[49]

Cortez opens the door to all information an officer can marshal to support the basis of his suspicion. The facts supporting the suspicion can be purely benign or extrinsic to the particular suspect.[50] The Court refrains from viewing the facts as a detached scholar, but rather from the perspective of law enforcement professionals. The Court believes that certain factors, seemingly innocuous to the layperson, give rise to a reasonable suspicion to the trained eye and mind of a professional police officer. *Cortez* recognizes and accepts that the *Terry* standard allows for probabilities and rarely relies on hard certainties.[51] Based on *Cortez*, courts must analyze *Terry* decisions on a case-by-case basis without a bright line rule.

Doctrinally, *Illinois v. Wardlow* is not earth shattering. Both parties to the controversy besought the Court to establish one per se rule or another and the Court unanimously refused both requests.[52] The Court neither expanded nor contracted the scope of the totality of the circumstances test. It weighed all factors as stated by officer Nolan against Mr. Wardlow's private interest, and in a 5-4 decision, ruled in favor of Officer Nolan's actions.[53] The factors of location and evasion were found to equal reasonable articulable suspicion.[54]

One basis for the majority's decision was Officer Nolan's characterization of the area in which Wardlow was stopped. Taking its cue from the Illinois Supreme Court, the U.S. Supreme Court concluded that the area of 435 West Van Buren represented a high-crime area.[55] As

45. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981).
46. *Id.* at 417-18.
47. *Id.*.
48. *Id.* at 416.
49. *Id.* at 413.
50. *Id.* at 418.
51. *Cortez*, 449 U.S. at 418.
52. Illinois v. Wardlow, 528 U.S. 119, 126 (2000).
53. *See id.*
54. *Id.* at 124.

area of 435 West Van Buren represented a high-crime area.[55] As discussed above, location alone does not rise to the level of reasonable articulable suspicion.[56] However, the Court recognized in *Adams v. Williams* that an individual's presence in an area known for a high incidence of crime can be a factor in determining the validity of a *Terry* stop.[57] The character of the area in *Adams* played a factor in determining the propriety of the search and not the initial stop.[58] In *Wardlow*, the reasonableness of the stop was the sole issue; the Court did not reach the validity of the search.[59] Nevertheless, the nature of a given area has been used to determine the objective standard for a stop.[60]

A. *High-crime Areas*

The legal recognition of a high-crime area for the purpose of *Terry* stops is significant. If articulable reasonable suspicion can be seen as a group of specific factors that lower one's expectation of privacy and diminish the personal freedom from police intrusion, then the expectation of privacy is automatically a notch lower for residents of high-crime areas. This is true even if mere presence alone doesn't justify a detention.[61] The high-crime area label should be stricken from the totality of the circumstances analysis in *Terry* decisions as not cognizable in a legitimate manner. It is open to racial manipulation by the officers who utilize it and injurious to the communities which receive the label.

B. *Who Lives In A High-crime Area?*

"If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one." [62] In their Brief of Amicus Curiae in support of the State of Illinois to the U.S. Supreme Court, a caucus of law enforcement organizations attempts to explain what constitutes a high-crime area for law enforcement purposes, and the method by which a location receives such a distinction.[63] The organizations point to numerous bits of data that when compiled allow the enforcement agencies to pin point geographical areas that have tendencies towards certain types of criminal activity.[64] This datum includes arrest

55. *Id.* at 124.
56. Brown v. Texas, 443 U.S. 47, 52 (1979).
57. *See* Adams v. Williams, 407 U.S. 143, 147-48 (1972).
58. *See id.*
59. *Wardlow*, 528 U.S. at 124 n.2.
60. *See, e.g.*, United States v. Brignone-Ponce, 422 U.S. 873, 884-85 (1975).
61. *Brown*, 443 U.S. at 52.
62. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 218 (1966).
63. *See* Brief of Amicus Curiae National Association of Police Officers et al. at 19-21, Illinois v. Wardlow, 528 U.S. 119 (2000) (98-1036) [hereinafter *NAPO Brief*].
64. *Id.*

statistics, citizen complaints, officer observations and numbers of crimes committed.[65] The brief goes on to show how these quantitative and qualitative factors have been demonstrably useful to law enforcement agencies around the country in their efforts to curb crime.[66] Also included are statistical reports of crimes committed in Chicago, broken down by police district.[67] The brief concludes that the 11th District of Chicago, the District having the thirteenth highest crime rate in the city, is a high-crime area.[68]

The NAPO brief seems to state that this is an obvious conclusion. The assumption is where a geographical location has a worse crime rate (even marginally) than half of the other districts in a given locale, it is a high-crime area.

Difficulty in labeling high-crime areas poses a legitimate problem to accepting the designation as a specific factor. However, even if it were possible to objectively determine the criteria in a neutral manner, it would not necessarily mean that the criteria would produce a race-neutral result. In many situations of racial jurisprudence, objectively neutral standards have been seen to produce a racially disadvantaging result.[69] The purported objective standard of location is nevertheless open to racial discrimination due to the current inability of defendants to raise claims of disparate racial impact, and the practical impossibility of demonstrating the disparate impact of *Terry* stops.

In her article, *Race and the Fourth Amendment*, Tracy Maclin discusses the pervasive reluctance of courts to entertain arguments of disparate racial impact in terms of the Fourth Amendment.[70] Professor Maclin—who also authored the ACLU's Brief of Amicus Curiae in support of Sam Wardlow—focuses her attention on the impact of racial profiling in traffic stops and automobile searches.[71] She shows that for years highway patrols have disproportionately targeted minority drivers for pretextual traffic stops in an effort to curb drug trafficking on the eastern seaboard.[72] Judges have traditionally disfavored deciding Fourth

65. *Id.*

66. *Id.* at 21-26.

67. *Id.* at app. at 1.

68. *Id.* at 19.

69. *See generally* Alan David Freeman, *Legitimizing Racial Discrimination though Antidiscrimination Law: A Critical Review of Supreme Court Doctrine in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 43-45 (Kimberlé Crenshaw et al. eds., 1995) (discussing the racially adverse impact of an objective employment test in Washington v. Davis, 476 U.S. 229 (1976) [hereinafter CRITICAL RACE THEORY].

70. 51 VAND. L. REV. 333 (1998).

71. *Id.* at 340-41.

72. *See id.* at 350 (showing that on a highway where minorities composed 24.3% of the drivers committing traffic violations, they were subjected to 72.9% of the total traffic stops and auto searches).

Amendment issues on grounds of racially based police motives due to a perceived lack of the relevance to race in the overall standard of reasonableness.[73]

Some might argue that this court practice is justifiable. The argument might suggest that criminal cases are solipsistic in nature, focusing on the individual and that the alleged crime statistics only demonstrate aggregate probabilities. In this sense, whether or not a law enforcement agency typically discriminates against minorities is immaterial as to whether or not the specific defendant looked reasonably suspicious to the individual officer. The only time evidence should be suppressed is upon a clear showing of racial discrimination on the part of the specific officer. However, this argument fails when considering the relevance of the high-crime area label. If the Court allows evidence or factors not specific to a defendant, like presence in a high-crime area, they depart from only looking at the individual and his crime, and look instead to the probable suggestions from his environment or surroundings. Under this view, officers may use the character of the suspect's environment to justify a stop, but the suspect cannot use the character of the officer's environment to refute the justification. In other words, "[t]he Court's Fourth Amendment logic should not be unidirectional."[74]

C. *Intelligent Bayesians in Blue*

Anticipating possible race based arguments, the NAPO brief offered a conjunctive solution to the racial problems of high-crime designation. The NAPO contends that through strict statistical analysis *and* officer experience with the day-to-day workings of the area, the alleged racial injustices will be laid asunder.[75] The first provision of the conjunction was discussed above. This section argues that relying on officers to determine what neighborhoods are high-crime areas allows geographic locations to be labeled high-crime due to the racial makeup of the population.

In *Negrophobia and Reasonable Racism*, Jody Armour describes various manifestations of post civil rights racism. One of these manifestations Armour calls the Intelligent Bayesian.[76] According to Armour, the Bayesian justifies his racist viewpoints based on statistical data and economic decision-making.[77] The Bayesian argues that his race-based stereotypes are merely substitutes for other factors that statistically coincide with race.[78] The only reason race is utilized by the Bayesian is because it

73. *See id.* at 338.

74. *Id.* at 374.

75. *NAPO Brief*, *supra* note 63, at 27.

76. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 35-61 (1997).

77. *See id.* at 36.

78. *See id.*

is easier to ascertain someone's race than education, income or social status.[79] The Bayesian contends that his world assessments are reasonable because they are statistically justified.[80] Under this view, race need not be the factor that the stereotype rests on; instead, it could be any of the factors that are most readily determinable. Armour suggests that if a Bayesian is cognizant of the correlation between poverty and crime, he will be more on guard in locations that demonstrate lower economic health, and race becomes a non-issue.[81] While Armour goes on to refute this argument in ways that will be addressed in section D, it becomes necessary to analyze whether or not race can become a non-issue in the question of high-crime areas.

Richard Delgado examines how American society has fabricated stereotypes about crime.[82] Delgado argues that the white majority has assigned and reinforced the stereotype that blacks, especially young men, are inexorably linked to violent and interpersonal property crimes, to justify exertion of control over the group.[83] While Delgado's reasoning is novel, the concept of "black crime" is not. Delgado effectively points out that the equation of blacks and crime is as pervasive in American culture as teenagers and consumerism.[84] Even the NAPO brief recognizes the high correlation between crime and minority groups stating, "many high-crime areas are in or [near] urban neighborhoods with large racial or ethnic minority populations."[85] The NAPO brief does not refer to the correlation between poverty and crime. Even if a Bayesian does factor economic status into the assessment of high-crime areas, it is not likely that economic determinations will displace racial stereotypes, due to the pervasive social recognition and acceptance of the latter.

The NAPO brief contended that police officers relying on their heightened training and ability to evaluate situations are better trained than the general public to ascertain the likelihood of crime in the urban arena.[86] This might suggest while Bayesians might exist in the civilian members of a community, the training of law enforcement officers effectively diminishes the likelihood that they exist among those who serve and protect our cities. Police work is a demanding and dangerous occupation. Our law enforcement officers are required to make instantaneous decisions with dire consequences attached to their actions, especially in cases involving flight of a potentially dangerous person like the case of Mr. Wardlow. If the Intelligent Bayesian argument makes any

79. *See id.*

80. *See id.*

81. *See id.* at 45.

82. Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

83. *Id.* at 511.

84. *See generally id.*

85. *NAPO Brief*, *supra* note 63, at 23.

86. *Id.* at 16.

Mr. Wardlow. If the Intelligent Bayesian argument makes any sense at all, it does so in its ability to streamline the decision making process. Therefore, the public should expect a greater representation of Bayesians within communities called on to make such rash and important decisions. Moreover, as the police have greater access to the demographic and criminal statistics involved in the creation of the Bayesian's argument, the justification for the racist inclination is substantial.

If the above argument is true, it is difficult to fault our police forces for such a prevalent problem in our society when the very nature of the job increases their susceptibly to fall victim to racist tendencies. We should not, however, legitimate these practices by giving these rash and possibly discriminatory decisions the power of law. Therefore, when the case moves from the street to the relative serenity of the courtroom, our legal system should attempt to counteract the discriminatory and injurious harshness of the urban landscape. This can only be accomplished through a refusal to recognize arbitrary and racially laden distinctions like high-crime areas.

D. *What's at Stake?*

> Fuck tha police, comin' straight from the Undergroun'
>
> A young nigga' got it bad 'cause I'm brown.[87]

The previous two sections have focused on the use and application of high-crime areas with regard to parties in the criminal justice system. Now it is time to look at how high-crime distinctions impact the communities themselves, especially the law-abiding members of those communities. This section discusses how high the cost of perceived arbitrary law enforcement actually is on minority communities. The high-crime area designation will further compound these perceptions and costs. The costs and their exacerbation are so injurious as to render the high-crime label inherently unreasonable.

The writings by the authors in this field have polarized on the axis of how much of the nation's resources should be spent curbing crime in neighborhoods that intersect a high crime rate with a high population of racial minorities. "Law and Order Cheerleaders"[88] like Randall Kennedy espouse the view that minority communities actually benefit from heightened police scrutiny because minorities are the usual victims of minority crime.[89] On the opposite end, Critical Race theorists argue that efforts by law enforcement agencies that target minority communities stigmatize those communities and generate a cultural resentment towards

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87. N.W.A., *Fuck Tha Police*, *on* STRAIGHT OUT OF COMPTON (Priority Records 1988).

88. Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT. L. REV. 669, 670 (1998).

89. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1273-74 (1994).

the officers and the courts.[90] This stigmatism is so prevalent, it has caused scholar Paul Butler to call for rational subversions of the criminal justice system.[91]

In *Wardlow*, these two viewpoints found their way into competing briefs of Amicus Curiae. Predictably, the already oft-cited NAPO brief embraces the Cheerleader argument, while the brief authored by the NAACP views law enforcement efforts in a more skeptical light. The NAPO brief basically takes its argument from the views of Randall Kennedy, and states that minorities express a greater concern about crime and are more commonly victims of crimes than whites.[92] Therefore, since minorities are concerned about crime and are victimized by crime, it is logical (though unstated in the brief) that minority communities generally favor police cracking down on crime in their neighborhoods. This argument is obtusely paternalistic. The NAPO fails to establish a causal link between their statistical research and the solution they support. As discussed below, practices of law enforcement that are based on indicators external to the criminal actors themselves, actually adversely affect a minority community's relationship with the criminal justice system, and fosters a lionization of the criminals.

Regina Austin terms this phenomenon the politics of identification.[93] Austin points out that black communities regard the behavior of its members in terms of racial progress.[94] Austin admits that members of the black community recognize that crime stigmatizes the community and impedes upon the social progress of the race.[95] However, the community also realizes that the criminal aspects are *within* the community and tend to equate criminal behavior with race resistance.[96]

The basis of a high-crime area merely perpetuates this lionization. The identification of criminals in the black community, and their equation with race resistance, stems from a group recognition that the majority society has unfairly used indicators beyond community control, like

90. *See* Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 735 (1999) (while touring a prison Armour comments on the "deep sense of connectedness and sympathy that law-abiding blacks feel toward their wayward sons and daughters, brothers and sisters, fathers and mothers, friends and cousins, as well as toward blacks they don't know personally but with whom they share a common plight in a racially oppressive society."); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1280 (1998) (stating that "[the effect of increased law enforcement] is severe. It contributes to the growing legal disenfranchisement of African-Americans, to the poverty of children, and to the breakup of the family.").

91. Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 680 (1995).

92. *NAPO Brief*, *supra* note 63, at 23.

93. Regina Austin, *"The Black Community": Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1989).

94. *Id.* at 1772.

95. *Id.* at 1773.

96. *Id.* at 1774.

race, to identify certain behavioral patterns within the community. This stigmatization is arbitrary, and therefore the community members lose faith in the societal agents that appear to perpetuate the stigma, namely the police.[97] The Eazy E quote that heads this section is a manifestation of that loss of faith. Just as race is beyond a person's control, so too is a person's residence in a high-crime community. Due to the politics of past and present racism, minority members are often forced to live in poverty-stricken, crime-riddled communities, and this segregation continues despite race-neutral policies.[98] Therefore, the high-crime area designation as a basis for increased legal justification of police, and diminished expectations of privacy for residents, only perpetuate this distrust and the politics of identification.

While the loss of trust in governmental agencies represents an intrinsic evil to society, Professor Armour shows that the effects can go beyond the community's perception of state actors and infect the very political structure of the community itself. Armour describes the "chilling effect" the stigmatization of high crime has on group participation in community affairs.[99] Law abiding blacks who fear being identified as criminal tend to avoid public places, and when they do venture out, the self expression necessary to be an active member of society is stifled, lest they appear threatening.[100] Therefore, the label of high-crime area can have a multitude of adverse impacts upon large minority populations.

The racially disadvantageous effects described are merely risks associated with the high-crime label. However, risks can render probabilistic data—even data that appears to be rational—unreasonable.[101] This final argument goes to the heart of the issue in *Wardlow*, because reasonableness is the foundation for all Fourth Amendment analysis that does not involve a warrant, including *Terry* stops.

Armour illustrates how a rational probability can be unreasonable, depending on the risk associated with the probability. He does so with a hypothetical scenario concerning his "temperamental Rottweiler."[102] If he chains the pooch up in the yard three hours before he goes to bed, and his wife asks at bedtime if the dog is restrained, his affirmative response is both rational and reasonable.[103] Even if the dog has gotten off the leash in

97. *See* Brief of Amicus Curiae National Association for the Advancement of Colored People Legal Defense & Educational Fund at 16 [hereinafter *NAACP Brief*], Illinois v. Wardlow, 528 U.S. 119 (2000) (98-1036) ("Many black Americans are disaffected and suspicious. They are not confident that the police will be fair.").

98. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* CRITICAL RACE THEORY, *supra* note 69, at 449, 452.

99. *See* ARMOUR, *supra* note 76, at 52.

100. *See id.*

101. *See id.* at 50.

102. *Id.* at 48.

103. *See id.*

the intervening time, the only consequence of him not checking is minor property damage to the patio furniture.[104] However, if the same situation exists not at bedtime, but just prior to a one-year-old child entering the back yard, the rational response that the dog is chained becomes unreasonable due to the risk of severe injury to the child.[105]

This example illustrates how high-crime is a delineation can at once be a rational manifestation of statistical probabilities on its own, and when combined with the risk of unequal racial application, it can be an unreasonable factor in predicting crime or threat.

II. FLIGHT

The decision in *Wardlow* has two aspects, location and evasion. The Court states that Sam was legally stopped because he was both in a high-crime area and fled unprovoked upon seeing the cops.[106] While this paper has primarily focused on high-crime areas, it was the flight aspect of the case that gathered headlines across the country. Therefore, negligence follows the omission of the subject from a discussion of this case.

As argued above, the concept of a high-crime area should not be considered a circumstance in the totality of the circumstances of *Terry* analysis. This argument is more difficult to make with regard to evasion. Unlike high-crime area, fleeing police presence is a conscious action by the person who flees. The behavior is specific to the person who undertakes it, and is reflective of an internal intention, however benign the intention might be. The idea that police officers and courts reviewing arrests should consider flight appeals to our commonsense. The Court unanimously held that a person's "unprovoked flight" can be a factor in reasonable articulable suspicion.[107] This section shows the problems that the flight factor creates.

The Court repeatedly categorized Mr. Wardlow's flight as unprovoked, without citing a distinction between provoked and unprovoked flight.[108] The Court's analysis suggests that Officer Nolan did nothing to cause Mr. Wardlow to run,and if Officer Nolan had pulled a gun and began firing it into the air, Mr. Wardlow's flight would have been provoked. This interpretation follows the logic of courts who look only at cases in terms of the actions of the specific defendant and the specific police officer discussed in Section Two, *supra*. If, however, courts cast a broader view on the term "unprovoked" and incorporate matters such as

104. *See id.*
105. *See id.* at 48-9.
106. *Wardlow*, 528 U.S. at 124.
107. *Id.*
108. *See id.*

biased policing and the relationship between minority citizens and the police, it is difficult to conceive of an unprovoked flight from a police officer by a minority resident of inner-city America.

A. *Statistics from the Inner City*

On December 22, 1994, Officer Francis Livotti choked Anthony Baez to death.[109] On August 9, 1997 five officers from New York City Police Department's (NYPD) 70th Precinct raped and tortured Abner Louima with a broom-handle in the precinct bathroom.[110] On February 4, 1999, four officers hailed 41 bullets and killed Amadou Diallo outside his Harlem residence.[111] Each incident involved violence against a person of color by white members of the NYPD. These incidences brought anger and protest from the minority communities of New York City.[112] They also brought about an investigation into the practices of the NYPD by the New York Office of the Attorney General (OAG).[113]

On March 18, 1999, OAG began investigating the practices of the NYPD, and specifically focused their efforts on "stop and frisk" practices.[114] The report looked at 175,000 forms filled out by police officers whenever a "stop and frisk" was performed for a 15 month period in 1998 and 1999.[115] OAG then utilized statistical analysis and regressions to determine the role of race on the practice of "stop and frisks" within the city.[116] While probably coming as little surprise to the minority populations of New York City, the report categorically concluded, "minorities—and blacks in particular—were 'stopped' at a higher rate than whites relative to their respective percentages within the population."[117]

In New York City, blacks comprise 25.6% of the population, yet approximately half of all the stops were performed on black residents.[118] Blacks were more than twice as likely to be stopped on suspicion of

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109. *See* Greg Wilson, *Choke Victim is Honored, City Renames Bronx Street in Memory of Anthony Baez*, N.Y. DAILY NEWS, July 31, 2000, at 1.

110. Bob Liff, *Pols Push for Change in the NYPD*, N.Y. DAILY NEWS, March 29, 1999, at 1.

111. Leslie Casimir et al., *Crowd Voices Anger, Sorrow*, N.Y. DAILY NEWS, February 14, 1999, at 5.

112. *See id.*

113. *See* THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL, *available at* http://www.oag.state.ny.us/press/reports/ stop_frisk/stop_frisk.html, visited February 19, 2001.

114. *Id.* at 1.

115. *See* THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL EXECUTIVE SUMMARY 2, *available at* http://www.oag.state.ny.us/press/reports/ stop_frisk/executive_summary.html, visited February 19, 2001 [hereinafter EXECUTIVE SUMMARY].

116. *See id.*at 2-3.

117. *Id.* at 3.

118. *Id.*

committing a violent crime and carrying a weapon than whites, and were stopped a staggering 62.7% of the time by the NYPD's Street Crime Unit[119]—the same unit that shot 41 bullets at Amadou Diallo.[120] However, even though the minority populations of New York were subject to greater numbers of stops, the stops were less likely to lead to a finding of probable cause to arrest than the stops of whites.[121] The Street Crime Unit performed 16 times the number of stops without arrests on blacks than stops with arrests, while the NYPD stopped whites less than eight times for every white arrest.[122] Therefore, even though their accuracy for suspicion of criminality was higher for whites, the NYPD nevertheless stopped blacks at a greater rate. In fact, where the stop involved a frisk of the suspect or other physical force, blacks were more frequently stopped without reasonable suspicion than were whites.[123]

The starkness of the results of the investigation requires further comment. The report shows that in precincts of predominately minority populations, the police performed a greater number of stops. In precincts with a majority of white residents, the disparity between minority make-up of the community and the stop rates for minorities is even greater.[124] The nine precincts with the greatest numbers of stops per capita were composed of populations in which whites were the minority.[125] In precincts where whites constituted a majority and blacks and Hispanics comprised less than 10% of the total population, black and Hispanics constituted 53.4% of people who were stopped.[126] This shows that minorities who lived in predominately minority neighborhoods faced stops occurring more frequently than whites in their neighborhood, while minorities living in predominately white areas were stopped at a rate two to three times greater than their representation in the community.

Though the results of the report are drastic, they do not account for underreporting by police units of the number of people stopped and searched.[127] Nevertheless, the report confirmed the suspicions and emotions of many within the minority communities of New York.[128] The report, while only concerning the Metropolitan area of Gotham City, lends

119. *Id.* at 3.

120. *See* Alice McQuillan, *Patrol Units Big on Gun Arrest,* N.Y. DAILY NEWS, February 5, 1999, at 5.

121. *See* EXECUTIVE SUMMARY, *supra* note 115, at 4.

122. *See id.*

123. *See id.* at 8.

124. *See id.* at 3-4.

125. *See id* at 3.

126. *Id* at 3.

127. *See* Richard Perez-Pena, *Police May Have Understated Street Searches, Spitzer Says,* N.Y. TIMES, March 23, 1999, at B4 (stating that the Attorney General himself suggested that more stops took place than reported by police).

128. *Police Tactics in Question,* Editorial, N.Y. TIMES, Dec. 4, 1999, at A16.

credence to the strong criticisms of police/minority relationships throughout America.[129]

Where a group of people is subjected to harassment, brutality, and systematic injustice to the point where faith is lost in the people hired to protect them,[130] what amount of narrow arrogance is required to state that a black man, who flees a white officer, did so unprovoked? The police forces around the country that have practiced biased policing provoke the subjects of their profile to flee their arbitrary and injurious pursuits. The flight of Sam Wardlow was not unprovoked. Instead, it was a justifiable response to an unjust system.

CONCLUSION

The case of Sam Wardlow illustrates the difficulties our country faces in maintaining the effective enforcement of our criminal laws. The criminal system as a whole needs to broaden its perspective; if we are to cure the systems racial ills, criminal courts must look beyond the caption of the case. The case of Sam Wardlow has greater significance than its primer-simple facts suggest. *Wardlow* is not about one man running from another. It is about the neighborhoods where we live, and the toll crime has taken on them. It is about how we make decisions, and how we ask police officers to perform some of the most difficult tasks our nation requires. Our criminal courts must begin to take into account the practices of police officers and the effects those practices have on our communities and our very idea of criminality.

129. *See, e.g., NAACP Brief, supra* note 97, at 16.
130. *See id.*.