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The Adversity of Race and Place: Fourth Amendment Jurisprudence In *Illinois v. Wardlow*, 528 S. Ct. 673 (2000)

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THE ADVERSITY OF RACE AND PLACE: FOURTH AMENDMENT JURISPRUDENCE IN *Illinois v. Wardlow*, 528 S. Ct. 673 (2000)

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American colonial courts authorized constables and citizens to detain all African Americans found on public streets.[1] Likewise, the South Carolina legislature mandated in the Seventeenth Century that state slave patrols search slave quarters every week.[2] Poor people of color were subjected to race-based and location-based searches and seizures well before the Bill of Rights was enacted. The Fourth Amendment[3]—responding to such practices—was designed to protect against "arbitrary intrusions by the police" and thereby to promote a "free society."[4] Yet, the Supreme Court recently found it acceptable, in *Illinois v. Wardlow*,[5] for law enforcement officials to effectuate race-based and location-based intrusions.

In *Wardlow*, the Court insisted that it was merely adhering to precedent.[6] This is mostly true—the Court looked to the totality of the circumstances in assessing the constitutionality of a Terry stop,[7] devised

* Editor-in-Chief, *Michigan Journal of Race & Law*, Volume 6. This Case Note is dedicated to my South African comrades, who showed me that to not resist is to acquiesce in our own oppression.

1. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334 (1998).

2. *See id.* at 334–35.

3. The Fourth Amendment ensures that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV. It is "given force and effect by the exclusionary rule." Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974).

4. Wolf v. Colorado, 338 U.S. 25, 27 (1948) (Frankfurter, J.).

5. 120 S. Ct. 673 (2000).

6. *See id.* at 675–77.

7. *See* Terry v. Ohio, 392 U.S. 1 (1968). The *Terry* court held that it is not unconstitutional for the police to search a suspect when officers lack probable cause to arrest him. *See id.* at 30. In the absence of probable cause for an arrest, the police may search a suspect if they "reasonably conclude in light of [their experience] . . . that criminal activity may be afoot." *Id.*

The current standard is that officers may detain someone and conduct a brief investigatory search if they have "reasonable suspicion" of criminal activity, which is "considerably less than proof of wrongdoing by a preponderance of the evidence." United States v. Sokolow, 490 U.S. 1, 7 (1989). The suspicion must amount to more than a mere "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27.

rules based on race and socioeconomic class, and relied on an ivory-tower analysis that refused to recognize patterns and practices of police brutality, which dismissed the legitimate fears of poor people of color as unreasonable and irrelevant.[8]

Rather, an officer must be able to point to some "objective evidentiary justification." *Id.* at 15. The police officer must act on "specific articulable facts, which, taken together with the rational inferences from those facts," *id.* at 21, provide a "particularized suspicion" for assuming the detainee has, or is about to be, engaged in criminal activity, United States v. Cortez, 449 U.S. 411, 418 (1981).

A reviewing court looks to the "totality of the circumstances," Sokolow, 490 U.S. at 8, whose factors have gradually expanded. *See e.g.*, United States v. Hensley, 469 U.S. 221, 232 (1985) (tips from law enforcement agencies); Michigan v. Long, 463 U.S. 1032, 1050 (1983) (apparent intoxication); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (traffic violations); Adams v. Williams, 407 U.S. 143, 146–47 (1972) (tips from civilian informants); United States v. Simmons, 918 F.2d 476, 481 (5th Cir. 1990) (observed nervousness of the suspect). A court also considers the suspect's presence in a high-crime area and attempts to evade law enforcement officers. *See infra* text accompanying note 26. For a discussion of these and other factors, see JOHN WESLEY HALL, JR., 1 SEARCH AND SEIZURE § 15.10–15.17 (3d ed. 2000); WILLIAM E. RINGEL, 2 SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 13.4 (1979); Steven C. Bell, *Factors Which Justify a Stop and Frisk*, 6 SEARCH & SEIZURE L. REP. 1 (June 1979).

8. A more conciliatory reading of recent Fourth Amendment Supreme Court opinions is that the Court refuses to account for race, even if brought to the Court's attention by defense attorneys and amicus curiae. For example, when the *Terry* court was considering whether to allow stop and frisk searches when officers possessed less than probable cause, the NAACP Legal Defense and Educational Fund (NAACP LDF) urged the Court, in its amicus brief, to consider studies detailing African Americans' understandable distrust of the police. *See* Brief for the NAACP LDF as *Amicus Curiae* 58–69, *noted in* Tracey Maclin, *"Black and Blue Encounters," Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 267 (1991–92). While the Court recognized the NAACP LDF's argument, *see* Terry, 392 U.S. at 14, it "was given subordinate status to the Court's main concern with police officer safety." Maclin, *supra*, at 267.

The same could be said of the Supreme Court's opinions in *Whren v. United States*, 517 U.S. 806 (1996); *Florida v. Bostick*, 501 U.S. 429 (1991); and *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Bostick*, the Court upheld police drug interdiction raids on interstate buses that disparately impacted people of color, *see* Brief for the American Civil Liberties Union as *Amicus Curiae* 18 n.19, Florida v. Bostick, 501 U.S. 429 (1991) ("the defendants all appear to be Black or Hispanic"), without discussing race. *See* Robert V. Ward, *Consenting to Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 How. L.J. 239, 253 (1993) (noting no mention of Mr. Bostick's race at oral argument).

The *Garner* Court likewise intentionally neglected that the issue at bar—the constitutionality of police officers using deadly force to seize unarmed, fleeing felons—disproportionately affected people of color. *See* Respondent's Brief at 23–26, Tennessee v. Garner, 471 U.S. 1 (1985) (alerting the Court to this impact on African Americans). Similarly, the Court ruled four years ago in *Whren* that no violation of the Fourth Amendment occurred when officers' traffic violation stops were pretextual, which "neglect[ed] racial concerns" clearly discernable to all involved. Maclin, *supra* note 1, at 340.

This Case Note lays out *Wardlow's* pertinent facts, describes the decisions of the Court and lower courts, and then analyzes the ramifications of the Court's holding. In particular, this Case Note argues that the Court's ruling recognizes substantially less Fourth Amendment protections for people of color and indigent citizens than for wealthy Caucasians. This perpetuates a cycle of humiliating experiences,[9] as well as fear and mistrust of the police by many poor people of color.

I

Wardlow's facts were not disputed. At approximately noon[10] on September 9, 1995, eight officers (in four marked police vehicles) were driving through an area known for drug trafficking.[11] William Wardlow,

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9. Although the *Wardlow* majority attempted to belittle the effect of a Terry stop, referring to it as merely a "brief, investigatory stop," Illinois v. Wardlow, 120 S. Ct. 673, 675 (2000), the stop is embarassing and intrusive, regardless of its length. *See id.* at 678 (Stevens, J., dissenting) (observing that "[e]ven a limited search . . . must be an annoying, frightening, and perhaps humiliating experience" (quoting Terry v. Ohio, 392 U.S. 1, 24–25 (1968)).

Anyone contesting the humiliation and severe intrusion accompanying a Terry stop should consider "The Routine," LAPD's standard Terry stop: an officer forces the detainee to kneel on the ground where he is stopped, and then to interlock his fingers behind his neck. The officer then demands that the suspect lie "prone out" (i.e., with his face touching the ground). David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 3–4 (1994).

10. *See* People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997). The Supreme Court did not even mention—let alone consider as relevant—the time of Wardlow's arrest. However, suspicion may be heightened if the suspect is observed in the middle of the night, and consequently, there is less cause for suspicion if the suspect is observed, as here, during daylight hours. *Compare* United States v. Torres-Urena, 513 F.2d 540, 542 (9th Cir. 1975) (concluding that less suspicion attaches if the defendant's observed conduct transpired during daylight hours), State v. Stampalia, No. 38402-3-I, 1997 WL 360790, at *4 (Wash. Ct. App. 1997) (same), *and* Gibbs v. State, 306 A.2d 587, 593 (Md. Ct. Spec. App. 1973) (same), *with* United States v. Dawdy, 46 F.3d 1427, 1429 (8th Cir. 1995) (finding Terry was satisfied because, in part, the suspect was outside at a late hour), United States v. Kimball, 25 F.3d 1, 6–7 (1st Cir. 1994) (same), United States v. Briggman, 931 F.2d 705, 709 (11th Cir. 1991) (same), *and* Commonwealth v. Cortez, 491 A.2d 111, 112 (Pa. 1985) (same). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 454 (2d ed. 1987) (explaining that the time of day a suspect is observed is an appropriate factor in assessing whether reasonable suspicion existed to warrant a Terry stop); Brian J. O'Connell, Casenote, *Search and Seizure: The Erosion of the Fourth Amendment Under the Terry Standard, Creating Suspicion in High Crime Areas*, 16 U. DAYTON L. REV. 717, 730–31 (1991) (observing that "[m]ost of the cases where the time of day has been found to contribute to reasonable suspicion involve suspects who are observed on the streets near midnight, and typically much later").

11. *See Wardlow*, 120 S. Ct. at 674.

a forty-four-year-old African American man, standing alone and not engaging in any suspicious activity, fled the area as the caravan passed.[12] The two officers in the last car gave chase, though they observed nothing out of the ordinary about Wardlow except his flight.[13] The officers stopped him and immediately conducted a pat-down search.[14] During the frisk, one of the officers felt an object in a closed bag Wardlow was carrying.[15] The officer opened the bag, found a handgun and ammunition, and arrested Wardlow, charging him with the unlawful possession of a handgun by a felon.[16]

At trial, the Cook County Court denied Wardlow's motion to suppress the contraband's seizure pursuant to an alleged Fourth Amendment violation.[17] It convicted Wardlow after a stipulated bench trial and sentenced him to two years imprisonment.[18] The appellate court reversed the conviction, holding that Wardlow's sudden flight did not justify a Terry stop.[19]

The Supreme Court of Illinois affirmed the state court of appeals' decision.[20] It found that observing a subject who flees at the sight of police officers in a high-crime area, without more, does not meet the *Terry* standard: a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime.[21] The officers, the Illinois Supreme Court found, impermissibly acted on a mere subjective "hunch" that Wardlow was engaging in criminal activity, and it further held that his flight was merely his exercising his constitutional right "to move on."[22]

The United States Supreme Court reversed, holding that Wardlow's Fourth Amendment rights were not violated.[23] A five-member majority, with Chief Justice Rehnquist writing for the Court, recognized that the

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12. *See id.* at 675.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See* People v. Wardlow, 701 N.E.2d 484, 484 (Ill. 1998).

18. *See id.*

19. *See* People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. Ct.) (1997). The court did not consider the fact that Wardlow was seized in a "high-crime area" because it found that a high-crime area must be "sufficiently localized and identifiable" and that the record was "simply too vague to support the inference that the defendant was in a location with a high incidence of narcotics trafficking." *Id.* at 67.

20. *See* People v. Wardlow, 701 N.E.2d at 486.

21. *See id.* at 488–89 (referencing Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

22. *Id.* at 487 (referencing Florida v. Royer, 460 U.S. 491, 498 (1983)).

23. *See* Illinois v. Wardlow, 120 S. Ct. 673, 676 (2000).

Court's prior cases held that presence in a high-crime area does not by itself justify a Terry stop,[24] and that refusal to cooperate with police, without more, is likewise insufficient,[25] but that both factors are relevant when assessing the reasonable suspicion necessary for an officer to conduct a stop.[26] It then concluded that these two conditions combined are sufficient to provide officers a "reasonable, articulable suspicion that criminal activity is afoot."[27]

II

The *Wardlow* majority's holding—that flight from the police in a high-crime area satisfies *Terry*—disproportionately affects people of color and people with a low socioeconomic status. However, the Fourth Amendment makes no distinction between the protections extended to different groups of people.[28] It does not refer to *the right of rich people to be secure in their persons* or *the right of White people to be secure in their persons*. The Supreme Court, however, in *Wardlow*, through short-sighted reasoning and unjust application, interpreted the Fourth Amendment to include such race- and class-based distinctions. Indeed, the decision furthers American aristocracy and pigmentocracy.

A. *Race Matters*[29]

The Court's reliance on flight is rooted in its belief that "[t]he wicked flee when no man pursueth; but the righteous are as bold as a lion."[30] It agreed with the arresting officers' conclusion that Wardlow was

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24. *See id.* (citing Brown v. Texas, 443 U.S. 47, 47 (1979)).

25. *See id.* (citing Florida v. Bostick, 501 U.S. 429, 437 (1991)).

26. *See id.* (citing Adams v. Williams, 407 U.S. 143, 144, 147–48 (presence in a high-crime area is an appropriate consideration in Terry analysis); United States v. Sokolow, 490 U.S. 1, 8–9 (1989) (evasive behavior similarly pertinent); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam) (same); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (same)). *See generally* LAFAVE, *supra* note 10, at 448 (explaining that flight "may be taken into account by the police and that together with other suspicious circumstances these reactions may justify a stopping for investigation").

27. *Wardlow*, 120 S. Ct. at 675 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).

28. "*Every* person has a right not to be targeted without justification. The Fourth Amendment . . . [secures] the right of *all* people to be treated fairly . . . ." Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1525 (1996) (emphasis added).

29. I borrow this phrase from Cornell West's insightful book, RACE MATTERS (1993).

30. *Proverbs* 28:1. Justice Stevens, whose opinion concurred in part and dissented in part, and was joined by Justices Breyer, Ginsburg and Souter, countered that there are many reasons an "innocent" person would flee from the police, including an unwilling-

involved in criminal activity because he fled.[31] Such analysis ignores scores of studies and detailed testimony regarding the legitimate fear of the police held by some people of color, and thus their reasonable flight at the sight of law enforcement officers.[32]

The fact that many people of color in the United States generally feel "alienation and hostility" toward the police is undeniable.[33] Police brutality and harassment are common topics of conversation in communities of color.[34] Accounts of such experiences are traded like war stories; there are few people of color, contends Professor Henry Louis Gates, Jr., "who don't have more than one story to tell."[35] These shared common experiences are exchanged between friends and family members and through community newsletters and radio programs. At some point, many people of color begin to view the police as just another gang, a vigilante organization whose *raison d'être* is to seek and destroy people of

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ness to appear as a witness at a future trial and a fear of having his or her name connected to a criminal trial. *See Wardlow*, 120 S. Ct. at 680 (Stevens, J., concurring in part and dissenting in part) (quoting Alberty v. United States, 162 U.S. 499 (1896)). It pointed to one more possible cause: people of color, based on their prior experiences, are generally afraid of the police. *See id.*

31. *See Wardlow*, 120 S. Ct. at 676. The Court admitted that "there are innocent reasons for flight from police," but refused to enumerate these reasons or give them much weight. *Id.*

32. Even federal courts and prosecutors publicly recognize such alienation. *See* United States v. Bishop, 959 F.2d 820, 822 (9th Cir. 1992) (describing prosecutor's attempt to use a peremptory challenge on a prospective juror from Compton because the government understood that the juror believed that the "police in Compton . . . pick on black people").

33. Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 629 (1993). *See also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 23, 24, 26 (1999) (documenting distrust of people of color of the police in Los Angeles, New York, and Boston, respectively).

34. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997). Because police officers use race as a proxy for an increased risk of criminality, Professor Kennedy reports, people of color "tend to grow up believing that the law is the enemy." *Id.* at 76.

35. Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 58. Professor Kennedy reiterates: "A dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States." KENNEDY, *supra* note 34, at 152–53 (quoting Don Wycliff, *Blacks and Blue Power*, N. Y. TIMES, Feb. 8, 1987). Kennedy and Gates eerily restate James Baldwin's haunting observation 40 years earlier: "[r]are, indeed, is the Harlem citizen, from the most circumspect church member to the most shiftless adolescent, who does not have a long tale to tell of police incompetence, injustice, or brutality." JAMES BALDWIN, NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 66 (1961) (quoted in Brief for the NAACP LDF as *Amicus Curiae* in Support of Respondent at 11, Illinois v. Wardlow, 528 S. Ct. 673 (2000)).

color.[36] A few examples—clearly just a sampling of hundreds of thousands of such instances—will hopefully provide a proper backdrop to show the reasonableness of the fear of the police felt by many people of color, and, therefore, their flight response.

Perhaps the most well-known and vivid alleged racial attack by police officers on an unarmed civilian is the infamous Rodney King beating. King was pulled over in his vehicle by the police, and without demonstrating much resistance, was forced out of his car. Inexplicably, King was beaten with police batons, kicked, stomped, and shot twice with a stun gun while more than a dozen officers observed the assault.[37] He lay on the ground with his hands covering his head for much of the abuse. As a result of the fifty-six blows King received, he sustained brain damage, skull fractures, partial paralysis of the face, a shattered eye socket, internal bleeding, missing teeth, and a broken leg and ankle.[38]

Adolph Lyons, also an African American, shares a similar story. He was pulled over by four LAPD officers for driving with a burned-out

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36. *See* Maclin, *supra* note 1, at 388. A typical view is expressed by a Chicano resident of a Los Angeles, California housing project:

> Sometimes I think of the Los Angeles police officers in the neighborhood as soldiers of a hostile foreign army who harass good citizens and commit untold acts of brutality. We are not against the police. We think it's right that they come and do their work and take away those people doing bad. . . . But we don't want them to beat our children and call us dirty names.

Ward, *supra* note 8, at 247 (quoting Hector Tobar, *Police Fear, Need Shape Pico-Aliso*, L.A. TIMES, Apr. 28, 1991, at B1).

37. *See* Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue: Details Heighten Sense That It Was No Aberration*, N.Y. TIMES, Mar. 18, 1991, at A1. The beating lasted for nearly two minutes, and it was carried out in full view of the street and with residents shouting, "[n]o, don't kill him," leading many critics to conclude that the officers thought that they could act "ferociously" with impunity. *Id.* at 137. *See also* Seth Mydans, *In Messages, Officers Banter After Beating in Los Angeles*, N.Y. TIMES, Mar. 19, 1991, at A1 (describing how the officers engaged in "lighthearted banter" immediately following the episode).

38. *See* CORAMAE RICHEY MANN, UNEQUAL JUSTICE 134 (1993). Los Angeles Police Chief Daryl Gates referred to the beating as an "aberration," even though the Los Angeles Police Department (LAPD) doled out $8.1 million to victims of excessive force the previous year and received in excess of 600 complaints alleging police brutality by LAPD officers that year. *See id.* (citing Bill Torque, Linda Beckley & Linda Wright, *Brutality on the Beat*, NEWSWEEK, Mar. 25, 1991, at 32–34). In addition, the ACLU of Southern California police brutality hotline received an average of 55 complaints per week from African American and Hispanic American citizens the same year. *See id.* (citing James N. Baker & Linda Wright, *Los Angeles After Shocks*, NEWSWEEK, Apr. 1, 1991, at 18–19).

taillight.[39] They approached the car with guns drawn and ordered Lyons—who was not acting suspiciously—out of the car.[40] He complied, as he did when the officers asked him to face his car, spread his legs, and put his hands on his head.[41] Lyons dropped his hands after the ensuing pat-down search, which prompted an officer to slam his hands to the back of his head.[42] When Lyons complained of pain from holding his keys, the officer applied a chokehold with such force that Lyons lost consciousness and fell to the ground.[43] When he regained consciousness, Lyons had spat up blood, urinated and defecated, and suffered permanent damage to his larynx. The officers then left after issuing Lyons a traffic ticket for the taillight infraction.[44]

Such stories are not limited to the west coast.[45] In Detroit, Malice Green, an African American, was kicked, punched, and beaten by police

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39. *See* Los Angeles v. Lyons, 461 U.S. 95, 97 (1983) (concluding that Lyons had failed to demonstrate a case or controversy sufficient to justify the issuance of an injunction prohibiting LAPD officers from ever again using a chokehold).

40. *See* COLE, *supra* note 33, at 161.

41. *See Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

42. *See id.* at 114–15.

43. *See* COLE, *supra* note 33, at 162.

44. *See id.*

The chokehold was applied 975 times by LAPD officers between 1975 and 1980, killing 16 people, 12 of whom were African American. *See id.* In a city in which African American males comprise nine percent of the population, they have been the victims of 75% of LAPD chokehold deaths. *See* Maclin, *supra* note 8, at 256 n.56. Former LAPD Chief of Police Daryl Gates blamed the victims—and African Americans in general—for the deaths, claiming that African Americans do "not hav[e] veins in their necks like 'normal people.'" MANN, *supra* note 38, at 152 (citing Torque, Buckley & Wright, *supra* note 38, at 33).

45. California, and Los Angeles, in particular, seems to be a hot-bed of race-based police brutality. The LAPD has come under even more intense scrutiny recently as a result of the much-publicized Rampart Division scandal. Substantiated allegations of police officers assaulting unarmed citizens, filing false arrest reports, and stealing evidence have surfaced after one member of the Division's anti-gang unit admitted that his partner and he had handcuffed and shot an unarmed man, then framed him by placing a gun near his paralyzed body. *See* Todd S. Purdum, *Los Angeles Police Scandal May Soil Hundreds of Cases*, N.Y. TIMES, Dec. 16, 1999, at A16. The officer told investigators about the assault and agreed to cooperate in discussing other officers' similar rogue behavior after he was convicted of stealing cocaine that was being held as evidence. *See id.* Such unauthorized violence, lying, and thievery is being exposed as "the Rampart way." Matt Lait & Jim Newton, *The 'Rampart Way': Macho, Insubordinate, and Cliquish*, N.Y. TIMES, Mar. 1, 2000, at A16.

Consider also the story of Don Jackson, a former police officer who visited Long Beach, California to witness police harassment and brutality inflicted upon people of color. On their way to Long Beach, he and a companion received a first-hand account. They were stopped by the police while driving and asked to get out of the car. Jackson did, and when he asked why he was stopped, an officer threw him through a plate-glass

officers with a heavy flashlight. He died after receiving fourteen rapid-fire blows to his head. The official reason for the assault was that the officers were bothered that Green would not "expose his palm."[46]

In Miami, police officers reported that a thirty-three-year-old African American insurance salesman, Arthur McDuffie, died when he fell off his motorcycle.[47] Not long after, the officers' prevarications were revealed, and it was shown that McDuffie was killed when the officers repeatedly hit him.[48] His broken motorcycle evidenced only that the officers tried to cover up the murder by running over it with their squad car.[49] The fatal injuries, the medical examiner explained, were as bad as those suffered when one falls from the top of a four-story building and lands on concrete—head first.[50]

Six years ago a special investigation by the Mollen Commission was established in New York City to uncover rampant police corruption and brutality. The final report was bleak, though expected: such brutality was widespread and was uniformly directed toward people of color. One officer bragged that he was known as "The Mechanic" because "I used to tune people up."[51] When asked why he savagely assaulted people, but rarely, if ever, arrested the suspects, The Mechanic replied: "[t]o show who was in charge. We were in charge, the police."[52] The Commission found that The Mechanic's victims, like most of the police brutality victims in New York, were people of color.[53]

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store window. *See* Maclin, *supra* note 8, at 254. Jackson subsequently wrote in a New York Times op-ed article that "the police have long been the greatest nemesis of blacks, irrespective of whether we are complying with the law or not." Don Jackson, *Police Embody Racism to My People*, N.Y. TIMES, Jan. 23, 1989, at A25.

46. Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 156 (1994). Officer Larry Nevers was subsequently convicted on charges of second-degree murder and involuntary manslaughter for killing Green. *See Ex-Detroit Officer Guilty in Beating Death*, N.Y. TIMES, Apr. 19, 2000, at A9.

47. *See* KENNEDY, *supra* note 34, at 116.

48. *See id.* at 117.

49. *See id.*

50. *See id.* The four rogue officers were prosecuted for second-degree murder. They successfully petitioned for their trial to be moved to Tampa, where earlier that year an all-White jury acquitted other police officers of charges stemming from their killing a young Black motorcyclist stopped for a routine traffic violation. After striking all potential Black jurors, the defendant officers were acquitted by an all-White jury. The acquittal led to rioting in socioeconomically depressed areas of Miami. *See id.*

51. COLE, *supra* note 33, at 23.

52. *Ex-Officer's Account of Brutal Police Fraternity*, N.Y. TIMES, Sept. 30, 1993, at B3.

53. *See* COLE, *supra* note 33, at 23. Police officers' recent use of violence in New York City casts doubt on the hope that the NYPD has changed its ways since the Mollen Commission's findings. Between February 1999 and March 2000, for instance, plain-

Police brutality is not limited to socioeconomically disadvantaged people of color. The only egalitarian police practice, one could conclude, is that nearly *all* people of color are victims of police abuse.[54] Al Joyner, an Olympic bronze medalist, refuses to drive in Los Angeles due to a fear of being further harassed by the police.[55] Hall of Fame baseball player Joe Morgan, former professional football star Marcus Allen, and retired basketball standout Jamaal Wilkes have similarly been unreasonably detained and harassed by the police due, at least in part, to the color of their skin.[56]

The aforementioned stories are graphic, sensational, and deeply troubling. They represent more than physical injuries—they are manifestations of police, societal, and governmental racial discrimination that permeate the country.

One obvious result is that many people of color learn to fear the police. It is apparent that Americans of color are likely to be stopped by law enforcement officers,[57] suffer tremendous embarrassment from such stops,

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clothes officers have killed three unarmed men. *See* William K. Rashbaum, *Unarmed Man is Shot to Death in Scuffle With 3 Undercover Detectives*, N.Y. TIMES, Mar. 17, 2000, at A19. Most recently, three undercover NYPD officers approached Patrick Dorismond, a Haitian-American man, and asked if they could purchase drugs from him. *See id.* A scuffle ensued after Dorismond rebuffed their request, and the officers fatally shot him. *See id.*

54. "Most black professionals can recount at least one incident of being stopped, roughed up, questioned, or degraded by white police officers." Gaynes, *supra* note 33, at 625. Charles Ogletree, a distinguished African American Professor of Law at Harvard Law School, has stated, "[i]f I am dressed in a knit cap and hooded jacket, I'm probable cause." Ellen Goodman, *Simpson Case Divides Us by Race*, BOSTON GLOBE, July 10, 1994, at 73.

55. *See id.* Joyner described his ordeals to a national audience in an interview aired on the television show *20/20*. The show subsequently sent out two groups of young men—one African American group and one White group—to drive the same routes at the same time of night on multiple evenings. The White group drove past the police 16 times without once being stopped; the African American group was questioned by the police "on several occasions." *Id.*

56. Morgan was assaulted by police officers in Los Angeles who thought he was an accomplice of an African American drug smuggler. *See* Morgan v. Woessner, 975 F.2d 629, 633, 638–39 (9th Cir. 1992). Allen and Wilkes were both "ordered out of their cars [by police officers] and treated like felons when there was no apparent reason to stop them." Mydans, *supra* note 37, at B7.

57. *See, e.g.*, David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677 (1994); MANN, *supra* note 38, at 133. For example, in Maryland, where 93.3% of the drivers on I-95 violate traffic laws that could warrant a stop by the State Police, 17.5% of the violators are African American and 74.7% are White. *See* Maclin, *supra* note 1, at 350. However, between January 1995 and September 1996, 80.3% of the motorists actually stopped by the State Police were people of color. *See id.* at 350, 357 (adding that there is no evidence that African Americans drive any differently from Whites). People of color in New Jersey face similar hazards on the highways. A 1992 study reported that of the arrests on one stretch of the New Jersey Turnpike, 80% were of African American males driving late-model cars with out-of-state

and may face brutality comparable to that inflicted upon Rodney King, Arthur McDuffie, Malice Green, and thousands of others who have been killed or permanently injured and emotionally scarred by repugnant police thuggery solely because of the color of their skin. The aforementioned stories—as well as similar ones told by friends and family members—get "etched deep in the collective consciousness of American blacks."[58] They breed anger, resentment, alienation, and fear.[59]

It is not hard, therefore, to understand why some people of color—whether innocent or guilty of any wrongdoing—run at the sight of the police. Seeing a police officer—let alone eight, as did Wardlow—often means trouble for people of color, regardless of the legality of their present activity. They do not know why the officer is in the area, and they do not want to find out. They cannot accurately guess what will provoke the officer (looking away or looking at him; walking away or standing still), and they are better off not finding out. They do not want to become another statistic. The *Wardlow* Court, therefore, was naive when it concluded that flight is "certainly suggestive of [wrongdoing]."[60] It ignored the aforementioned well-grounded fears, which were clearly brought to its attention by amicus curiae.[61]

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license plates, even though such drivers accounted for only 4.7% of the total volume on that stretch. *See* MANN, *supra* note 38, at 145.

Similarly, in Denver, Colorado, nearly half of the area's population of color had "recent, significant contacts" with law enforcement agents. *Id.* at 144. One-third of the police force did not equivocate when asked the cause of this disproportionate contact: the overwhelming sentiment among Denver police officers was that "Blacks and Hispanics required stricter law enforcement procedures than the rest of the population." *Id.*

58. MANN, *supra* note 38, at 160–61.

59. *See, e.g.*, DAVID H. BAYLEY & HAROLD MENDELSOHN, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 109, 112 (1969) (describing people of color, as a result of police-community relations, as "alienated, distrustful, and belligerent with respect to the police" and as "pervasively disenchanted" with the police).

60. *Wardlow*, 120 S. Ct. at 676.

61. The NAACP LDF wrote in its amicus brief that "the circumstances under which a citizen will run from the police are . . . numerous . . . and often based in innocence." Brief for the NAACP LDF as *Amicus Curiae* in Support of Respondent 9, *Wardlow*, 120 S. Ct. 673 (2000). It described flight from police officers by "inner-city minority residents—the law-abiding no less than the criminal" as a "sincere and understandable response." *Id.*

The Court's ignorance was not lost on the four justices who dissented in part:

> Among some citizens, particularly minorities and those residing in high-crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'

Wardlow, 120 S. Ct. at 680 (Stevens, J., dissenting).

"Headlong flight," as the *Wardlow* Court unsympathetically characterized it,[62] is rather a "prudent lesson of survival on the streets."[63] Given the obvious pattern and practice of police brutality, it is understandable that some people of color take precautions to evade the police. As shown by countless examples, their physical and emotional well-being depend on it. But the Court was blind to their fear and suffering. While a "color-blind" decision is nice in theory, it is unworkable in practice. So long as the LAPD's Rampart division, the NYPD Street Crimes Unit, and police departments throughout the country continue tormenting communities of color, we must remember that "[i]n order to get beyond racism, we must first take account of race. There is no other way."[64]

The Court cannot in good conscience turn an apathetic eye to this reality and proclaim that flight—a reasonable precaution—combined only with presence in a "high-crime area," is sufficient to subject an individual to a humiliating Terry stop and the possibility of police abuse and harassment.[65] While it is arguable whether flight should be a factor at all, it cannot be weighed so heavily that when linked only with another dubious cause (i.e., presence in a high-crime area),[66] officers have established an "articulable suspicion that criminal activity may be afoot."[67]

B. *Open Season in Poor, Minority Communities*

Also weighed far too heavily by the Court was Wardlow's presence in a "high-crime area."[68] The Court condoned rather than condemned

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62. *Id.* at 676.

63. KENNEDY, *supra* note 34, at 153.

64. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

65. The Court's ignoring the legitimate fears of people of color is double-edged. As stated, it overlooks decades of police officers' race-based harassment and brutality; it also institutionalizes these fears, creating a self-perpetuating cycle of mistrust between people of color and law enforcement. *See generally* Harris, *supra* note 57, at 660, 681. As we have seen, people run because of a fear of the police. *Wardlow*, however, provides the police a legally sufficient justification to chase down and conduct a pat-down search of such people not otherwise engaged in suspicious activity, serving only to evoke further anger and fear of the police on the part of people of color.

66. *See infra* Part II.B.

67. Terry v. Ohio, 392 U.S. 1, 30 (1968).

68. *Wardlow*-type overreliance on location is precisely the concern of Professor Margaret Raymond. *See* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999) (arguing that a neighborhood's characteristics should be relevant under *Terry* only when the observed behavior differs from that which is common among law-abiding people at the time and place observed). She claims that "prosecutors and police rely on the character of the neighborhood when they have little else," *id.* at 141, and therefore,

the police practice of subjecting inner city residents to more intrusive searches and seizures than affluent individuals.[69] In addition, as with its overemphasis on flight, the Court did not consider the disparate impact an elevated reliance on location has on poor people of color. If we recognize that indigent minorities in "high-crime areas" will be disproportionately burdened by more lenient location-based Terry stop standards, we must realize that *Wardlow*, in effect, erodes Fourth Amendment protections for this group while leaving such protections for wealthier White people undisturbed.

"High-crime areas" are generally populated by people of a low socioeconomic status and people of color.[70] With the previous discussion in mind, it is not surprising that "high-crime area" residents are disproportionately the victims of police harassment and brutality.[71] Police officers engage in selective enforcement of the law—"going after" people in

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the character of the neighborhood "come[s] to dominate the reasonable suspicion inquiry." *Id.* at 99.

Professor Maclin is equally skeptical about police officers grasping at straws to bolster the reasonableness of their Terry stops. *See* Maclin, *supra* note 1. She points out the enormous discretion police are afforded by their departments and the deference given to them by courts, both of which lead to abuses of power. *See id.* Furthermore, knowing that relying solely on the race of the suspect or his location in a "high-crime area" is insufficient, officers frequently commit perjury to support Terry stops. *See id.* at 379–86 ("Police often commit perjury . . . to effectuate arbitrary seizures . . . to deny black[s] and Hispanic[s] . . . their substantive rights under the Fourth Amendment.").

69. *See infra* text accompanying notes 71–75.

70. *See* Raymond, *supra* note 68, at 137–38.

> The "high-crime areas" and "areas associated with high levels of drug activity" . . . are not, by any means, evenly distributed across urban areas. On the contrary, zones of high crime activity are concentrated in inner city neighborhoods. In fact, the terms "inner city neighborhood" and "high crime area" are synonymous for many Americans, including many of the regular participants in the criminal justice process. These neighborhoods tend to be poorer, older, and less able to support jobs and infrastructure than either city neighborhoods more distant from the urban core or suburban locations.

Harris, *supra* note 57, at 677. *See also* Albert J. Reiss, Jr., *How Serious is Serious Crime?*, 35 VAND. L. REV. 541, 572 (1982) ("Residents of high-crime areas share certain characteristics of socioeconomic status, race, and age composition; they are likely to be black, low in socioeconomic status, and relatively young in age.") (citing John Daldwin, *Ecological & Area Studies in Great Britain and the United States*, *in* 1 CRIME AND JUSTICE: AN ANNUAL REVIEW, 47–48 (N. Morris & M. Tonry eds., 1979)). These race- and class-based demographics have been prevalent in American (and European) cities for more than 150 years. *See id.* at 572.

71. *See* COLE, *supra* note 33, ch. 1.

high-crime areas more than in affluent suburbs.[72] "Punitive differential enforcement" is clearly aimed at poor people of color.[73] Unquestionably, high-crime area residents and low-socioeconomic status suspects "receive harsher treatment from the police" than wealthy people in middle- and upper-class neighborhoods.[74] As Professor David Cole points out, residents of high-crime areas suffer from unequal and iniquitous police practices.[75]

The most disturbing and least logical response to this location-based injustice would be to make it even easier for the police to further discriminate against poor people of color. However, *Wardlow*'s heavy emphasis on presence in a "high-crime area" produces precisely this result. Being a poor person of color already subjected one to disproportionate police harassment and brutality before *Wardlow*; now the Court has branded many poor people of color with a second strike for purposes of Fourth Amendment protections.

The Court has sanctioned what has been a deplorable, yet traditional, practice: every person in a high-crime neighborhood is "stop-eligible."[76] Police were unofficially, yet unabashedly, relying on presence in a high-crime neighborhood, without much else, to satisfy *Terry*'s reasonable suspicion standard before *Wardlow*.[77] Now the Supreme Court explicitly says that they need not articulate much more.

Just as people of color should not be stripped of their Fourth Amendment rights, neither should people with a low socioeconomic status. Regardless of whether residents of high-crime areas are more likely to be the victims or perpetrators of crime,[78] they deserve the same Fourth

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72. *See* Douglas A. Smith, Christy A. Visher, & Laura A. Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 249 (1984). Professor Mann agrees: after studying records of arrests in a range of neighborhoods, Mann concludes that "poverty level of a community was influential in such decisions." MANN, *supra* note 38, at 145.

73. Smith, Visher, & Davidson, *supra* note 72, at 249.

74. MANN, *supra* note 38, at 147. It thus comes as no surprise that people with incomes above $50,000 have much more favorable opinions of the police than people with incomes under $7,500. Similarly, when asked to rank police officers' use of force, only 17% of indigent people thought of the police as "excellent," while the percentage of wealthy people responding similarly was nearly double. COLE, *supra* note 33, at 171.

75. *See* David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. 2, 4 (Summer 1999).

76. Raymond, *supra* note 68, at 99.

77. *See id.* at 128. Professor Raymond explains: "the character of the neighborhood for criminality may bootstrap the [police officers'] observations to reasonable suspicion. . . . [It] fail[s] to narrow the stop-eligible class in any meaningful way." *Id.*

78. The higher probability of being a criminal or a victim of criminal activity in a high-crime area is often used to justify the authorization of more intrusive policing in

Amendment protections extended to wealthier individuals. People in downtrodden communities, contrary to the Supreme Court's intimations, do have privacy interests. Moreover, they have homes and other property interests at stake. Importantly—though this seems to have gotten lost somewhere along the way—they have expectations of privacy in their homes and over their bodies and property equal to those of wealthy citizens.

While the plight of the urban poor is great, and the need for law enforcement officials to protect themselves is vital, we cannot strip poor people of color of their Fourth Amendment rights to solve these problems, lest we forget that the Fourth Amendment is an *individual* right.[79] Allowing lesser *Terry* standards in high-crime neighborhoods does not adequately balance fighting crime, protecting the police, and upholding fundamental individual Fourth Amendment rights. It tells indigent citizens that their rights are less important than the rights of those in wealthier environments. The Court's ruling significantly withers Terry protections for certain segments of the population, officially endorsing the abuse to which poor people of color have been subjected unofficially for years.

CONCLUSION

Indifferent to issues of race and class, the *Wardlow* Court watered down Fourth Amendment protections for groups of people based on their skin color and socioeconomic status. This will hurt already-strained relations between poor communities of color and law enforcement agencies, and it will subject members of such communities to further police brutality and harassment.

We still live in a time where there are two worlds of criminal justice: one for the privileged and one for the less privileged. Race and class, as we have seen, unfortunately play a determining role in that placement. If the Court is unwilling to take affirmative steps to break down American pigmentocracy and aristocracy, it at least should not proactively further the iniquity by granting poor people of color fewer protections than affluent members of the majority. Though it cloaks its rhetoric in equality and fairness, the Court has ensured through its

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such communities. *See* COLE, *supra* note 33, at 44–47 (referring to such a policy as "quality of life policing").

79. *See* Colb, *supra* note 28, at 1457. "Recently, however, it seems the Rehnquist Court is more concerned about the needs and interests of police officers, than the rights of individuals. . . . As Professor Yale Kamisar asks . . . '[w]hose [a]mendment [i]s [i]t [a]nyway?'" Maclin, *supra* note 8, at 275.

decision in *Wardlow* that the "administration of criminal law . . . is in fact predicated on [the] exploitation of inequality."[80]

The twin adversities of race and place work incredible hardships on indigent people of color, even without the Court sanctioning pervasive police and societal discrimination. With its official imprimatur, the Court has furthered the divide between the two worlds of criminal justice.

80. COLE, *supra* note 33, at 5.