WARDOLOW AFTER BLACK LIVES MATTER: USING A PROTEST MOVEMENT TO ESTABLISH A COLORABLE EQUAL PROTECTION CHALLENGE TO SUPREME COURT PRECEDENT

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“In the war against drugs, the justification of one questionable search as the basis for the next questionable search, and the next one, is slowly leading to the erosion of our Fourth Amendment protections. This process occurs almost imperceptibly in much the same way that light fades into dusk and dusk into darkness. It is in this twilight period when changes are barely discernable that we must be most vigilant to guard against the unintended surrender of our valued rights.”
—Justice Barry T. Albin, Associate Justice (retired), Supreme Court of New Jersey¹

I. INTRODUCTION

Illinois v. Wardlow was wrong the day it was decided, and the case’s precedent has had disastrous consequences.² Sam Wardlow was a Black man standing in a Chicago neighborhood that police considered a high-crime area.³ When he saw a caravan of police vehicles approach, he ran.⁴ Their suspicion whetted, Officers Nolan and Harvey of the Chicago Police Department’s Special Operations Section exited their

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3 *Id.* at 121.
4 *Id.* at 122.
cars and gave chase, eventually cornering Wardlow, frisking him, finding a .38-caliber handgun in his possession, and arresting him.\textsuperscript{5}

As the case made its way through the Illinois state system and eventually to the US Supreme Court, the issue remained the same: Were Officers Nolan and Harvey justified in detaining and searching Wardlow\textsuperscript{6} Put more technically: Did Officers Nolan and Harvey have reasonable suspicion to conduct the investigatory detention of Wardlow that resulted in discovering the gun and thereby developing probable cause for his arrest? The Illinois trial court considered the stop lawful and convicted Wardlow on a weapons charge,\textsuperscript{7} but the intermediate appellate court reversed, refusing to find reasonable suspicion.\textsuperscript{8} The Supreme Court of Illinois affirmed that holding.\textsuperscript{9} In a 5–4 decision authored by Chief Justice Rehnquist, the United States Supreme Court reversed, finding no Fourth Amendment violation.\textsuperscript{10} According to Chief Justice Rehnquist, contextual factors like the neighborhood’s reputation and Wardlow’s so-called “unprovoked flight” were sufficient contributors to the reasonable suspicion analysis to justify the officers’ actions.\textsuperscript{11}

Although the Wardlow Court refused to establish any bright-line rules regarding police stops, the case’s precedent has become clear in the subsequent decades: courts credit officers’ assessment of a neighborhood’s reputation for crime and suspects’ actions when evaluating the legitimacy of a police officer’s decision to stop a person on the street for temporary detention, questioning, searching, and potential arrest.\textsuperscript{12} Like Sam Wardlow, a person who takes flight at the

\begin{footnotes}
\item[5] Id.
\item[9] Wardlow, 701 N.E.2d at 489.
\item[10] Wardlow, 528 U.S. at 121.
\item[11] Id. at 124.
\item[12] See, e.g., United States v. Baley, 505 F. Supp. 3d 481, 495 (E.D. Pa. 2020) (allowing “the high-crime area where the stop occurred” to contribute to reasonable suspicion); United States v. Valentine, 232 F.3d 350, 359 (3d Cir. 2000) (concluding that a high-crime area contributed to reasonable suspicion); United States v. Smith, 396 F.3d 579, 585 (4th Cir. 2005) (holding that evasive behavior when approaching a police roadblock contributes to reasonable suspicion); United States v. Jordan, 232 F.3d 447, 449 (5th Cir. 2000) (allowing the high-crime area of a stop to contribute to the officer’s justification for a stop).
\end{footnotes}
sight of police or even acts furtively\textsuperscript{13} is subject to a stop and search from which the Fourth Amendment will not protect them. If an officer sees two people make a hand-to-hand exchange in a neighborhood that the officer’s experience suggests is a market for illegal drug sales, \textit{Wardlow} legalizes a stop and search of both individuals.\textsuperscript{14} The primary criteria in assessing the legality of encounters such as these are the officer’s training and experience, to which courts regularly defer.\textsuperscript{15} In short, the \textit{Wardlow} doctrine empowers police to make informed but subjective judgments of any given public action in such a way that limits individuals’ Fourth Amendment rights against unreasonable searches and seizures.\textsuperscript{16}

With the \textit{Wardlow} doctrine in place, over-policing of minority communities has only increased.\textsuperscript{17} One extensive study shows that over a five-year period in New York City, the high-crime-area criterion in particular was deployed haphazardly, ineffectively, and discriminatorily.\textsuperscript{18} This Comment first joins the chorus of critics challenging both the constitutional validity and practical benefits of the \textit{Wardlow} doctrine. As Justice Stevens articulated when dissenting in \textit{Wardlow} (joined by Justices Souter, Ginsberg, and Breyer), the doctrine is unconstitutional in conception.\textsuperscript{19} And as scholars and jurists have established in the years since, the doctrine is discriminatory

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\textsuperscript{14} \textit{See Wardlow}, 528 U.S. at 126.


\textsuperscript{16} \textit{But see}\textit{ Whren v. United States}, 517 U.S. 806, 813 (1996) (holding that an officer’s mental state is irrelevant when assessing the constitutionality of a stop).


\textsuperscript{19} \textit{Wardlow}, 528 U.S. at 140 (Stevens, J., concurring in part and dissenting in part).
in practice, targeting Black and Brown communities for enhanced police activity and lessened constitutional protections. Although endorsing these familiar critiques, this Comment also challenges the most commonly proposed solution: increased reliance on empirical data like crime rates to justify the stops that Wardlow permits. If an officer can use “high-crime area” to legitimize a stop, the argument goes, then that criterion should be as objective as possible. In short: if American law is stuck with Wardlow, data should ground its effects. The argument suggests that since crime begets crime, certain crime-ridden neighborhoods will produce higher crime and justify enhanced policing for the public welfare. But this Comment shows that data will not save Americans from Wardlow. Statistics fail to justify Wardlow, first, because crime rates depend less on criminal activity than they do on patterns of policing and, second, because the notions of racially blind classifications of neighborhoods as high-crime and of presumed wrongdoing by suspects who are evasive of police are fallacies, which has become clearer than ever thanks to the work of the Black Lives Matter movement.

As an alternative to a statistical modification of Wardlow, this Comment contemplates how an equal protection challenge might dismantle the precedent by showing that the doctrine unconstitutionally targets Black people for enhanced policing and limited constitutional protections. In part, this challenge can follow the model of Floyd v. City of New York, the District Court for the Southern District of New York case that held New York City liable for violating citizens’ Fourth and Fourteenth Amendment rights through the police department’s stop-and-frisk policy.\(^{20}\) The Floyd plaintiffs were four named parties who alleged specific instances of unlawful stop-and-frisk, and who sought “to represent a certified Plaintiff class consisting of all persons who have been or will be subjected by NYPD officers” to stop-and-frisk tactics.\(^{21}\) The plaintiffs built their case on historical, statistical, and empirical analysis.\(^{22}\) Floyd therefore stands as a concrete example of the strategy that this Comment considers, but important distinctions remain: the Floyd litigation turned on the experiences of specific plaintiffs within a limited geographic scope.


\(^{21}\) Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages at 8, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 1034).

\(^{22}\) Id. at 23–29.
grounded in empirical data demonstrating biased policing. This Comment does not offer a comparable litigation strategy. While evidence below illuminates Wardlow’s discriminatory aftermath, the general discussion herein is too diffuse to provide a targeted challenge to the doctrine.

Instead, recognizing that such a challenge must be complex and multifaceted, this Comment examines how the work of the Black Lives Matter movement can contribute valuably to an impact litigation project targeting the Wardlow doctrine. As was true in Floyd, litigators can leverage the Fourteenth Amendment to protect the Fourth Amendment, but any equal protection challenge necessitates demonstrating discriminatory purpose at the root of discriminatory practice. Floyd accomplished that with hard data, but as a more sprawling and high-level doctrine, Wardlow is susceptible to an attack of its theoretical underpinnings. The Black Lives Matter movement and Black critical thought more broadly can fuel that attack, arming impact litigators with the sociological context necessary to strengthen their most pointed strikes at the doctrine. At bottom, this Comment seeks to demonstrate how an archive of Black literature and thought can contribute to a comprehensive litigation strategy targeting the Wardlow doctrine. In a constellation of statistical analysis, historical scholarship, and sociological theorization, the discriminatory effects of the Wardlow doctrine sufficient to infer discriminatory purpose begin to emerge into focus.

Part II of this Comment examines the history and development of the jurisprudence on which Wardlow stands. Part III offers an overview of the various tracks through which scholars and judges critique the Wardlow doctrine. Part IV challenges the familiar notion that increased reliance on data or technology can assuage the failures of the Wardlow doctrine. Part V articulates how the work of the Black Lives Matter movement and related concepts can contribute to a powerful equal protection challenge to Wardlow. Part VI concludes by examining a recent failed challenge to Wardlow on the state level, suggesting that the case shows the limitations of attacking the doctrine exclusively on Fourth Amendment grounds without the support of the Equal Protection Clause.

\textsuperscript{23} Id.
II. SAM WARDLOW, JOHN TERRY, AND WANING FOURTH AMENDMENT PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES

The story of Sam Wardlow grows most directly out of the story of John Terry, an Ohio man arrested in Cleveland on Halloween, 1963, after Detective Martin McFadden grew suspicious that Terry and two other men were casing a storefront for “a stick-up.”\(^{24}\) McFadden observed Terry and his companions for about twelve minutes and then, “[d]eciding that the situation was ripe for direct action,” stopped and forcefully frisked Terry, found a gun, and then frisked the other two men, found a gun on one of them, and arrested all three.\(^{25}\) Soon thereafter, the Supreme Court would make the encounter between McFadden and Terry a monumental precedent for the government’s ability to invade an individual’s legitimate expectations of liberty and privacy. Chief Justice Warren and seven of his colleagues sided with Detective McFadden against Terry’s Fourth Amendment challenge, holding that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”\(^{26}\)

Recognizing the case’s significance from the outset, Chief Justice Warren acknowledged early in his majority opinion that Terry raised “serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.”\(^{27}\) Terry in fact loosens (and therefore lessens) Fourth Amendment protections by recognizing room for police intrusion on individual liberty that is short of a probable cause arrest, but nonetheless does not run afoul of the Constitution.\(^{28}\) This type of police-citizen encounter—neither a simple conversation nor a formal arrest, predicated on reasonable suspicion and not probable cause—is formally known as an investigative (or, occasionally, investigatory) detention, but has developed the colloquial name, “Terry stop.”\(^{29}\)

\(^{24}\) Terry v. Ohio, 392 U.S. 1, 6 (1968).

\(^{25}\) Id. at 6–7.

\(^{26}\) Id. at 22.

\(^{27}\) Id. at 4.

\(^{28}\) See Michael Mello, *Stop: Terry v. Ohio Step-by-Step, as an Illustration of Fourth Amendment Analysis (or, What Did Detective Martin McFadden Know, and When Did He Know It?)*, 44 No. 4 CRIM. L. BULL. 5 (2008).

is Wardlow’s lodestar. The Court in both cases grappled with how the Fourth Amendment informs an analysis of police investigating civilian behavior that an officer considers suspicious.

The Fourth Amendment says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched or the persons or things to be seized.

The Framers developed and promulgated the Fourth Amendment in large part as a response to colonial “writs of assistance,” which “had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws.” In drafting the Fourth Amendment, the Framers exercised their familiar distaste for government intrusion on individual lives, and sought to protect citizens against “indiscriminate searches and seizures conducted under the authority of ‘general warrants.’” The Fourth Amendment therefore prioritizes individual liberty and security against the intrusion of government officials. An assessment of a police search’s constitutionality therefore necessitates balancing legitimate government interests—like public safety—against invasion of an individual’s legitimate expectations of liberty and privacy.

The prevailing test for this balance comes from Katz v. United States, which established “a twofold requirement, first that a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the


31 U.S. CONST. amend. IV.


33 Payton, 445 U.S. at 583; see also Steagald v. United States, 451 U.S. 204, 220 (1981) (“The general warrant specified only an offense—typically seditious libel—and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched.”).

expectation be one that society is prepared to recognizes as 'reasonable.'”

Only one year after Katz, Terry established new, significant precedent in Fourth Amendment jurisprudence, allowing its balancing test to swing toward governmental interests and away from individual liberty. Terry cited Katz approvingly, but underscored that “the specific content and incidents of [the right to be free from unreasonable government intrusion] must be shaped by the context in which it is asserted. For, 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'” In its most significant holding, Terry established that a police officer can stop and search an individual based on a considerably lower standard than probable cause, allowing for a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

The Court insisted that to justify an intrusion, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Further, “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” Thus, within the framework of the Fourth Amendment's bar on unreasonable searches and seizures, Terry stands for the proposition that a police officer's search of an individual grounded in reasonable suspicion that the individual is armed and

37 Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).
38 Id. at 27.
39 Id. at 21.
40 Id. at 27.
dangerous is per se reasonable, and therefore not a violation of the Fourth Amendment.\footnote{See id. at 30–31. The Terry Court did not use the term “reasonable suspicion,” but that has become the shorthand for Terry’s standard of specific, articulable facts plus reasonable inferences guided by an officer’s experience. See United States v. Sokolow, 490 U.S. 1, 7 (1989) (summarizing the development of the reasonable suspicion standard in Supreme Court jurisprudence).}

But the Terry Court did not establish criteria for the reasonable suspicion required to justify intrusion on individuals’ Fourth Amendment rights, leaving state courts to determine their own standards.\footnote{See State v. Davis, 517 A.2d 859, 864 (N.J. 1986). Other states have similar distinctions. See, e.g., Belcher v. State, 244 S.W.3d 531, 538 (Tex. App. Fort Worth 2007) (defining “investigatory detention” in Texas law); State v. Skippings, 388 P.3d 128, 132–33 (N.M. Ct. App. 2014) (listing New Mexico’s factors for justifying an investigatory detention); State v. Maahs, 525 P.3d 1131, 1138 (Idaho 2023) (defining “investigatory detention” in Idaho); Commonwealth v. Sierra, 723 A.2d 644, 647 (Pa. 1999) (defining “investigative detention” in Pennsylvania).} New Jersey, for example, delineates three constitutionally permissible police encounters with citizens: a field inquiry, an investigative detention, and an arrest.\footnote{Terry, 392 U.S. at 29 (“We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases.”).} A field inquiry is the least intrusive encounter: it occurs when a police officer asks if a person is willing to answer questions, the person is free to decline or not to engage with the officer in any way, and the officer is not harassing, overbearing, or accusatory.\footnote{Id. at 891; see also Florida v. Royer, 460 U.S. 491, 497–98 (1983) (holding that a person approached by a police officer without “reasonable, objective grounds” for detention “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way”).} On the opposite end of the spectrum is the most intrusive encounter, the formal arrest, which when not underwritten by a warrant, requires the probable cause standard: a well-grounded suspicion that the individual has committed or is committing a crime.\footnote{State v. Pineiro, 853 A.2d 887, 891–92 (N.J. 2004).} The third type of encounter is the Terry stop, also called an investigative detention, which involves questioning and potential non-invasive searches for weapons.\footnote{State v. Davis, 517 A.2d at 863.} A crucial element of the investigative detention—and often the deciding factor determining that a stop was an investigative detention and not a field inquiry—is that the citizen is not free to leave.\footnote{Pineiro, 853 A.2d at 892.} The most distinctive feature of an
investigative detention is in fact that a citizen is neither placed under arrest nor free to leave.\textsuperscript{48}

A legitimate question within the framework of \textit{Terry} is if a reasonably prudent officer would consider the reputation of a particular neighborhood in deciding whether she believes an individual is armed.\textsuperscript{49} Do actions (e.g., running or abruptly changing course at the sight of police, two individuals engaging in a quick exchange of indecipherable small items, or a person on a curb conversing with the driver of an idling car while standing by an open window) that are insufficient to establish reasonable suspicion in one neighborhood become sufficient to justify a stop in a neighborhood that police consider particularly prone to criminal activity?\textsuperscript{50}

\textit{Wardlow} added significant dimension to \textit{Terry}'s curtailment of Fourth Amendment rights by allowing for these very considerations.\textsuperscript{51} There, the Court gave its blessing to police officers evaluating “the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.”\textsuperscript{52} Wardlow was “standing next to [a] building holding an opaque bag” when a four-car police caravan “converg[ed] on an area known for heavy narcotics trafficking.”\textsuperscript{53} Wardlow looked in the direction of the police and fled.\textsuperscript{54} After a brief chase, police caught Wardlow, “conducted a protective patdown search for weapons because in [the arresting officer’s] experience it was common for there to be weapons in the near vicinity of narcotics transactions,” found a

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Cf.} \textit{Terry v. Ohio}, 392 U.S. 1, 28 (1968) (finding that “the facts and circumstances Officer McFadden detailed before the trial judge” sufficient for “a reasonably prudent man” to suspect Terry was armed and dangerous).

\textsuperscript{50} \textit{See} Christina Sterbenz, \textit{A ‘Big Question’ Surrounds the Arrest of Freddie Gray, Which Sparked Riots Across Baltimore, BUS. INSIDER} (Apr. 30, 2015, 3:37 PM), https://www.businessinsider.com/did-police-have-a-right-to-stop-freddie-gray-2015-4 (quoting Chuck Drago, “a former police chief in Florida with over 30 years of experience in law enforcement," explaining “[i]f the police are driving down a middle-class neighborhood, and the officer sees someone turn and run into their house, that’s probably not enough to follow them. If he’s in a high-crime area though, there may be enough for reasonable suspicion . . . and those areas tend to be impoverished and African-American and Hispanic”).


\textsuperscript{52} \textit{Id.} at 124.

\textsuperscript{53} \textit{Id.} at 121–22.

\textsuperscript{54} \textit{Id.} at 122.
handgun in the opaque bag, and arrested him.\textsuperscript{55} Although the Supreme Court of Illinois found no reasonable suspicion for the Terry stop,\textsuperscript{56} the US Supreme Court reversed, holding that the officer was justified in combining the factors of flight at the sight of police and the neighborhood’s reputation to stop and search Wardlow.\textsuperscript{57} Wardlow now stands for the proposition that an officer can add the reputation of a neighborhood to the totality of the circumstances analysis in justifying an investigative detention.\textsuperscript{58} So, under Wardlow, the difference between the same activity establishing reasonable suspicion for a police stop in one neighborhood but not another is the officer’s subjective assessment of the neighborhood’s propensity for crime.\textsuperscript{59}

III. CRITIQUES OF WARDLOW

Critiques of Wardlow abound, so this Part will not belabor the point. The short version of the story is this: over two decades, the Wardlow doctrine has yielded racist, unequal, and dangerously overzealous policing in communities of color.\textsuperscript{60} This Part begins by acknowledging the not unreasonable logic underlying Wardlow, and then offers a brief overview of the doctrine’s much more prevalent critiques. While the tenor of those critiques is consistent, their approaches vary depending on the source as judicial, scholarly, or data-based.

A. In Defense of Wardlow

Although the problems with Wardlow are legion and critiques of its effects are plentiful, the doctrine is not without certain strained logic.\textsuperscript{61} A person taking flight at the sight of police is more likely to be guilty of wrongdoing than somebody unflustered by police presence.

\textsuperscript{55} Id.

\textsuperscript{56} People v. Wardlow, 701 N.E.2d 484, 489 (Ill. 1998).

\textsuperscript{57} Wardlow, 528 U.S. at 124–26.


A neighborhood with a clear and consistent pattern of criminal activity is more likely than the tranquil neighborhood across town to encompass criminals, so activity in the high-crime area that seems consistent with crime has a higher chance of actually signaling crime. This shallow logic is weak in the face of scrutiny, but the Wardlow doctrine is still good law largely because jurists struggle to resist the allure of arguments like these.

Consider the recent *State v. Goldsmith* decision in the liberal Supreme Court of New Jersey. Nazier Goldsmith was standing near an abandoned house in Camden when Officer Joseph Goonan grew suspicious and along with his partner conducted a *Terry* stop. The officers’ suspicions mounted when Goldsmith appeared nervous during the interrogation and asked the police not to frisk him. Rejecting that request, Goonan searched Goldsmith; found drugs, money, a gun, and ammunition in his pockets; deemed that evidence sufficient to establish probable cause; and arrested him. The Supreme Court of New Jersey held this *Terry* stop unlawful, finding that “the information the officers possessed at the time of the stop did not amount to specific and particularized suspicion that defendant was engaged in criminal activity,” and suppressed the evidence. Although this is to a certain degree a victory for raising *Terry* stop standards, in her 4–2 majority opinion, Justice Pierre-Louis (joined by her colleague, Justice Albin, who, as this Comment’s epigraph exemplifies, was a frequent and pointed critic of the high-crime area criterion during his tenure on the bench) went out of her way to make clear that the decision was not rejecting the Wardlow doctrine:

> We continue to view the impact of previous crimes in the same area as a police encounter as a factor to be considered in the totality of the circumstances when determining whether a stop was based on reasonable suspicion [. . . but] [t]he State must do more than simply invoke the buzz words “high-crime area” in a conclusory manner to justify investigative stops.

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63 Id. at 1031.
64 Id.
65 Id.
66 Id. at 1031–32.
67 Id. at 1040.
Similar support for the criterion exists in other state and federal opinions.\textsuperscript{68} Even when jurists like Justices Pierre-Louis and Albin express hesitation or doubt about the validity of the criterion, the power of the strained logic appears to win out, and they are unwilling to go so far as to dismiss its relevance.

But this logic does not satisfy the exacting standards of American justice, which—at least in theory—establish high bars that must be met before the government may invade individual rights, and should look with great skepticism on juridical shortcuts of “high-crime area” or flight from police. The Federal Rules of Evidence offer a useful example of how these standards operate in the face of seemingly logical shortcuts. Rule 401 sets quite a low bar for relevance, saying that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence,” and the fact is consequential to a determination.\textsuperscript{69} But the Federal Rules of Evidence go on to establish all sorts of limits to admissibility beyond mere relevance, not the least of which is the bar of evidence of a defendant’s past crimes, except in certain narrow circumstances.\textsuperscript{70} Conviction of past crimes certainly has a tendency to make it more probable that a defendant would have committed the present crime, but the complementary logic of these two rules show that the Federal Rules of Evidence recognize that the justice of prosecuting somebody only for the crime at bar and not for a propensity to commit crime outweighs the simplistic logic of relevance. The frequency and quantity of crime in a neighborhood almost certainly tend to make it more probable that crime is happening, but by failing to recognize the danger of crediting that logic, the \textit{Wardlow} doctrine occludes the justice that the Federal Rules of Evidence prioritize.

On one hand, the logical perspective of criminal propensity is meaningful and potentially valuable to a conviction that might prevent a repeat criminal from victimizing people or society again. But on the other hand, American courts recognize from a value perspective the dangers inherent in prosecuting defendants for what they have done in the past or who they are as people rather than for the specific

\textsuperscript{68} See, e.g., United States v. Edmonds, 240 F.3d 55, 60 (D.C. Cir. 2001); United States v. Caruthers, 458 F.3d 459, 468 (6th Cir. 2006); United States v. Monterio-Camargo, 208 F.3d 1122, 1143 (9th Cir. 2000) (en banc); United States v. Bailey, 417 F.3d 873, 874–75, 877 (8th Cir. 2005).

\textsuperscript{69} FED. R. EVID. 401.

\textsuperscript{70} FED. R. EVID. 609.
conditions of a crime.71 Juridical values outweigh logical inferences. The Wardlow doctrine runs counter to this philosophy, allowing a neighborhood’s propensity for past crime, so to speak, to be instructive of its residents’ potential to be engaged in criminal activity at any given time. While a potentially brief and unjustified Terry stop may seem less consequential than a wrongful conviction, police encounters always have the potential to grow violent (look no further than the deaths of Eric Garner, Philando Castile, and George Floyd, all of which began as routine police-citizen encounters), especially when a citizen feels unjustly targeted, and so the same value perspective undergirding the Rules of Evidence is appropriate in the context of defending constitutional rights.

B. Judicial Critiques

Judges and justices at the state and federal level routinely raise concerns—often in dissent to decisions upholding or applying Wardlow—about the relaxation of constitutional protections inherent in Wardlow’s expansion of the Terry doctrine.

Perhaps the most striking of these critiques came at the very beginning, in Justice Stevens’s separate Wardlow opinion. The Justice concurred in part, endorsing the majority’s refusal to announce a bright line or per se rule, as both parties had requested,72 but the primary thrust of his opinion was an objection to the majority sanctioning the high-crime area criterion. Justice Stevens argued that innocent explanations exist for actions like running from police or otherwise acting in such a way that would arouse police suspicion in a high-crime neighborhood, and so the Court should not favor government interests over individual liberties in its Fourth Amendment balance.73 Justice Stevens made a particularly salient point in recognition of tense relationships between police and minority communities:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that

71 See Ric Simmons, An Empirical Study of Rule 609 and Suggestions for Practical Reform, 59 B.C. L. REV. 993, 1001 (2018) (“The history of Rule 609 . . . shows that the drafters of the rule were aware of the unique danger that criminal defendants faced if their prior convictions were admitted against them by creating an unusually high barrier to admissibility in such circumstances.” (footnote omitted)).


73 Id. at 131–33.
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.”

The Justice concluded that “[l]ike unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.” Justice Stevens, in short, objected to allowing unreliable on-the-spot assessments to overruns constitutional rights.

In a recent Second Circuit opinion, Judge Raymond Lohier also challenged the high-crime area criterion, similarly targeting what he characterized as a fatal vagueness: “[T]he whole concept of a ‘high-crime area’ is so ill defined as to be virtually meaningless.” Judge Lohier was particularly concerned about judicial reliance on subjective police assessments that deem areas high-crime: “Blind acceptance of police testimony on this issue creates an unjustified risk of arbitrary and discriminatory policing.” Judge Lohier found objectionable that a subjective high-crime area designation weakens Fourth Amendment protections for all occupants of the area: “Even the most dangerous neighborhoods are also home to law-abiding citizens.” Like Justice Stevens, Judge Lohier advanced constitutional values over their judicially sanctioned infringement.

Justice Albin, recently retired from the Supreme Court of New Jersey, has been a consistent critic of high-crime area jurisprudence, most pronouncedly in State v. Pineiro—quoted in this Comment’s epigraph—which held that a police officer who conducted a Terry stop, searched a suspect, found drugs concealed in a cigarette pack, and made an arrest had reasonable suspicion for the investigative stop but lacked probable cause to seize the cigarette pack, overturning the trial and appellate courts’ denial of a defendant’s motion to suppress evidence. Justice Albin concurred in the judgment but raised concerns about the judicial sanctioning of a high-crime area criterion, calling the handing of a cigarette pack from one person to another.

74 Id. at 132–33.
75 Id. at 139 (citing Brown v. Texas, 443 U.S. 47, 52 (1979)).
76 United States v. Weaver, 9 F.4th 129, 154 (2d Cir. 2021) (en banc) (Lohier, J., concurring in the result).
77 Id. at 156.
78 Id. at 157 (citing People v. Bower, 597 P.2d 115, 119 (Cal. 1979)).
“innocuous conduct [that] is not transformed into a criminal enterprise, justifying a Terry-type detention and questioning, merely because it occurs in a police-designated high crime area.”

Justice Albin insisted that “[t]he words ‘high crime area’ should not be invoked talismanically by police officers to justify a Terry stop that would not pass constitutional muster in any other location.”

Like Judge Lohier, Justice Albin worried that limitations of Fourth Amendment rights will have consequences beyond uncovering otherwise concealed crime, raising particular concerns about the potential infringement on the constitutional rights of “tens of thousands of previous drug offenders in this state who are on parole, probation, or who have completed the terms of their sentences [who] live in communities that are designated high crime areas.” For Justice Albin, the particular danger of the Wardlow doctrine is its inevitable sprawl from particularized suspicion to the exploration of hunches or even willful harassment at the cost and potential erosion of constitutional protections.

The opinions of Justice Stevens, Judge Lohier, and Justice Albin are typical and exemplary of judicial critiques of the Wardlow doctrine in not only criticizing the doctrine but also chastising judicial majorities for crediting the doctrine’s strained logic.

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80 Id. (Albin, J., concurring).
81 Id. at 898.
82 Id. at 897; see also State v. Carter, 630 N.E.2d 355, 362 (Ohio 1994); United States v. Jones, 606 F.3d 964, 967–68 (8th Cir. 2010); United States v. Neely, 564 F.3d 346, 352 (4th Cir. 2009); United States v. Hughes, 517 F.3d 1013, 1018 (8th Cir. 2008).
C. Scholarly Critiques

Although Wardlow is also not without support among scholars, scholarly criticism of high-crime area jurisprudence has been consistent. Like judicial critics, scholars point out that use of the criterion is racist, inconsistent, and unreliable. While some scholars use this foundation to challenge the concept directly and totally, others attempt nuanced solutions, like arguing that “the character of the neighborhood should not be considered in reviewing the reasonable suspicion determination [of a Terry stop] unless the behavior of the suspect is not common among persons engaged in law-abiding activity at the time and place observed.” The prevailing scholarly rebuttal to high-crime area jurisprudence, however, is to expose the concept’s vagueness and argue for an increased reliance on statistical or apparently objective analysis of crime to regulate high-crime area policing: “Crime-mapping technologies can collect and analyze crime statistics so that police districts can produce almost perfect information about the level, rate, and geographic location of crimes in any given area,” goes one representative argument, insisting that this technology enables police to designate official and objective


85 See Jack T. Vanderford, Comment, Wardlow Revisited: How Media Coverage of Police Brutality Makes Empirical Data More Relevant than Ever, 22 U. PA. J. CONST. L. 1523, 1539, 1549 (2020) (arguing “the motivation for a minority individual to flee at the sight of a police officer may be becoming stronger” with the high visibility of Black people in police custody and concluding that “the Supreme Court should either adopt a more objective, data-driven approach for determining what constitutes a high-crime area or, preferably, drop the high-crime rate factor altogether”).


88 E.g., Vanderford, supra note 85, at 1549.

89 Raymond, supra note 86, at 99.
high-crime areas “for Fourth Amendment purposes.”\textsuperscript{90} In this and similar ways, scholars regularly put their faith in data and analytics to lend statistical credibility to police assessment of neighborhoods’ crime reputation.\textsuperscript{91}

By far the most thorough statistical analysis of high-crime area jurisprudence has come from Ben Grunwald and Jeffrey Fagan in their recent and extensive statistical analysis, “The End of Intuition-Based High-Crime Areas,” an article that joins those discussed above in criticizing the practice of police using their subjective judgment to assess reputations for neighborhood criminality.\textsuperscript{92} After an extensive statistical analysis of over two million data points drawn from police records of New York police officers’ \textit{Terry} stops, Grunwald and Fagan conclude:

[O]fficers often assess whether areas are high crime using a very broad geographic lens; that they call almost every block in the city high crime; that their assessments of whether an area is high crime are nearly uncorrelated with actual crime rates; that the suspect’s race predicts whether an officer calls an area high crime as well as the actual crime rate; that the racial composition of the area and the identity of the officer are stronger predictors of whether an officer calls an area high crime than the crime rate itself; and that stops are less or as likely to result in the detection of contraband when an officer invokes high-crime area as a basis of a stop.\textsuperscript{93}

Ultimately, Grunwald and Fagan recommend that police place greater reliance on data to establish what neighborhoods are high-crime and therefore require a heightened police presence.\textsuperscript{94}

D. \textit{Recapping Critiques}

The judicial and scholarly critiques highlighted in this Part capture the most common themes raised in objection to the high-crime area \textit{Terry} stop criterion. Jurists frequently point out that the high-crime area factor allows police to treat otherwise innocuous


\textsuperscript{92} Grunwald & Fagan, \textit{supra} note 18, at 348.

\textsuperscript{93} \textit{Id.} at 345–46.

\textsuperscript{94} \textit{Id.} at 397–98.
behavior as pretext for stops that would not pass constitutional muster without the high-crime area designation. This critique mingles with concerns about the erosion of Fourth Amendment protections for law-abiding occupants of so-called high-crime areas. Scholars often question the prudence of allowing police to deem an area high crime based solely on training and experience rather than more objective criteria, and suggest that the shortcomings of high-crime area applicability can be alleviated with a greater police dependance on empirical or technologically assisted data.95

IV. THE LIMITATIONS OF DATA

As the previous Part demonstrates, the most common refrain of Wardlaw’s critics is a call for greater reliance on data and technology. But not only does data have fundamental flaws that are discussed below, reliance on data has also proven ineffective as the foundation for equal protection litigation. Consider the example of McCleskey v. Kemp, which shows the limitations of even extremely favorable data in targeting racially discriminatory policies.96 To challenge the constitutionality of his death sentence, Warren McCleskey, a Black Georgia man, relied in large part on a study of over two thousand Georgia murder cases led by Professor David Baldus that demonstrated stark disparities in Black defendants being sentenced to death for killing non-Black victims.97 McCleskey placed this study at the heart of his equal protection challenge,98 but the Court favored what it considered well-settled procedure over any demonstration of discriminatory purpose:

Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study.99

95 Cf. Rosenthal, The Crime Drop, supra note 83, at 677–78 (arguing that “data on the efficacy of various investigative practices” should guide courts in evaluating the constitutionality of newly developed law-enforcement technology). It is striking that the appeal to data and technology is as true for fierce critics of high-crime area jurisprudence as it is for Rosenthal, who argues that Wardlaw fell short of enabling the most effective high-crime area policing as possible. Id. at 680.
97 Id. at 286–87.
98 Id. at 291–92.
99 Id. at 297.
Data proved insufficient to sustain an equal protection challenge; the law stood; and on September 26, 1991, Georgia executed McCleskey.\textsuperscript{100} The problem with data in general—and in particular, the data point of crime rates, which describes the number of crimes per a certain number of people (prorated as necessary)—is that it relies on the production of information by law enforcement officers.\textsuperscript{101} Research shows, for example, that “once a decision has been made to patrol a certain neighborhood, crime discovered in \textit{that} neighborhood” will guide training and patrolling technology, “causing a runaway feedback loop” of crime data.\textsuperscript{102} Indeed, both disproportionate targeting of certain areas that overinflates their criminality and a lack of police attention to white-collar crimes that victimize homes and businesses at high rates taint crime-rate data.\textsuperscript{103} In short, “[t]hough many may assume that police data is objective, it is embedded with political, social, and other biases.”\textsuperscript{104}

Consider a hypothetical. Two neighborhoods—A and B—of equal size, dimension, and population exist in the same location of a large city, one on either side of a main road. Each neighborhood has an identical number of the same illegal activities—say, a certain amount of illicit drug sales, robberies, and aggravated assaults. But the city’s police only patrol neighborhood A (perhaps because of sociological bias, but the example holds even absent discrimination) and do so with a particular view to illicit drug sales, robberies, and aggravated assaults, and never go to neighborhood B unless called there by a resident. Certainly, residents of neighborhood B will occasionally call police, and so illegal actions there will not be unaccounted for as crimes, but the crime rate in neighborhood A will

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\begin{itemize}
  \item Danielle Ensign et al., \textit{Runaway Feedback Loops in Predictive Policing}, 81 PROC. MACH. LEARNING RSCH., 2018, at 1–2.
  \item Id. at 199; see also Barbara E. Armacost, \textit{Organizational Culture and Police Misconduct}, 72 GEO. WASH. L. REV. 453, 494 (2004), https://doi.org/10.2139/ssrn.412620 (“One of the most obvious places to look for a richer explanation of police brutality is in the culture of the policing organization, which includes the formal and informal norms and expectations that create the environment in which the brutal acts were allowed to continue.”).
\end{itemize}
be higher. At present, Wardlow would sanction police using their subjective analysis to dub either neighborhood “high crime,” but increased reliance on empirical police data would disproportionately lower constitutional protections. The artificially inflated high crime rate of neighborhood A would allow for greater police scrutiny, but neighborhood B—with equal crime but a lower crime rate—would experience less police presence and risk fewer intrusions of Fourth Amendment rights. This, of course, presumes that police are keeping accurate records that are relatively reflective of their activities, but even that presumption is unsound.105

Scholars and critics are aware of this problem with crime-rate data, but are far too quick to dismiss it. One published critique argues, for example, that police departments and courts “should proceed cautiously when evaluating the statistical outputs from predictive policing algorithms” because police generate data “by making choices about what information to collect and the method used to collect it,” but nonetheless recommends the use of such data-driven algorithms.106 Contrary to this trend of recognizing the human limitations of data and moving past them as a sign of imperfection within an otherwise positive technique of policing and jurisprudence, these constraints present a fundamental and fatal flaw in the usefulness of data to improve and refine the application of the high-crime area criterion. The argument for reliance on data presupposes that the data will tell a story that is more accurate than subjective police intuition or even years of police experience.107 To the contrary, data only tells a story based on the information provided to it, and if that information results from human limitations and biases, then those same shortcomings will emerge in the story the data tells.108

105 See Richardson et al., supra note 103, at 199 (“[E]ven calling this information ‘data’ could be considered a misnomer, since ‘data’ implies some type of consistent scientific measurement or approach. In reality there are no standardized procedures or methods for the collection, evaluation, and use of information captured during the course of law enforcement activities, and police practices are fundamentally disconnected from democratic controls, such as transparency and oversight” (footnote omitted)).

106 Koss, supra note 90, at 311.


108 See Rachel Harmon, Why Do We (Still) Lack Data on Policing?, 96 MARQ. L. REV. 1119, 1131 (2013) (suggesting that even if data can be an effective tool in better policing, departments face significant challenges and counterincentives “that can lead them to underinvest in research that could improve policy”).
This is particularly problematic when the information guiding the limitation of individual liberties is produced by forces of power like police. In his influential study of the modern prison system’s development, Michel Foucault challenges the notion that power—like that of the police—responds reactively to reality like crime: “We must cease once and for all to describe the effects of power in negative terms: it ‘excludes,’ it ‘represses,’ it ‘censors,’ it ‘abstracts,’ it ‘masks,’ it ‘conceals.’” Instead, according to Foucault, the existence and influence of power is a creative force of the reality within its domain: “[P]ower produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.” Foucault argues further that “[d]iscipline makes possible the operation of a relational power that sustains itself by its own mechanism and which, for the spectacle of public events, substitutes the uninterrupted play of calculated gazes.” Foucault helpfully shifts an analysis of crime away from how police respond to any given activity and toward how such a response defines the activity. Thus, under this rubric, the prevailing question is not simply how or to what extent criminal activity precipitated a police response, but rather how the instantiation of a police state creates conditions and defines parameters within which power criminalizes certain actions.

These notions model how to think productively through police power sustained by the calculated gaze of “high-crime area”: the relational power about which Foucault writes is in this case tripartite between police, occupants of areas deemed high-crime, and the public at large. If police can convince the public that a so-called high-crime area demands greater policing and the lowering of constitutional liberty, then that power can sustain itself by its own mechanism of creating that high-crime area, substituting the calculated gazes of the public on that area for an objective reality. Police power, then, produces the reality of “criminals” and “high-crime area,” as well as the

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109 See Anna Lvovsky, The Judicial Presumption of Police Expertise, 130 Harv. L. Rev. 1995, 1999 (2017) (“[T]he promise of police expertise expanded over the course of the twentieth century to invade increasingly questionable sites of the judicial system—bolstering not only the police’s discretion in enforcing the law, but also the scope of the criminal law itself.”).


111 Id.

112 Id. at 177.
knowledge that people within a particular area are more apt to be criminals. The danger of this thinking is its potential instantiation and acceptance: “The perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchizes, homogenizes, excludes. In short, it normalizes.” This is possible precisely because of an overreliance on traditional notions of reality like the data that underlies crime rates: “The success of disciplinary power derives no doubt from the use of simple instruments; hierarchical observation, normalizing judgment and their combination in a procedure that is specific to it, the examination.” By normalizing the judgment of police as authoritative, therefore, society strengthens the disciplinary power of a police and carceral state.

This may seem quite vague and theoretical, but evidence exists of specific expressions of police power producing Black criminality that become data points on a crime report justifying the invasive and potentially violent Terry stop. In *The New Jim Crow*, Michelle Alexander demonstrates that “African Americans are incarcerated at grossly disproportionate rates throughout the United States” and points out that “[t]here is, of course, an official explanation for all of this: crime rates.” But Alexander dismantles the validity of crime rates, first by arguing that the process of empowering a racially discriminatory criminal justice system occurs in two stages. “The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free rein. Unbridled discretion inevitably creates huge racial disparities.” Next is “the damning step: close the courthouse doors to all claims by defendants and private litigants that the criminal justice system operates in racially discriminatory fashion.” But Alexander goes further. She demonstrates that because drug crimes are categorically different than violent crimes—mostly because of their mutually consensual nature, incentivizing neither dealer nor buyer to alert police—“[s]trategic choices must be made about whom to target and what tactics to employ.” The most consequential strategic

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113 Id. at 183.
114 Id. at 170.
116 Id. at 130.
117 Id.
118 Id. at 131.
choice with lasting negative effects was President Reagan’s declaration of a War on Drugs, which capitalized on the proliferation of crack cocaine in Black neighborhoods to racialize drug enforcement, encouraging police departments to send enforcement units—often newly militarized SWAT teams—into Black communities to arrest crack users. Strikingly, Alexander compares this historical trend to statistics that show Black people using drugs in lesser amounts to racial counterparts, but Black people make up enormously disproportionate amounts of the American prison population.

Alexander shows how discipline creates reality: by sending ground troops in the War on Drugs almost exclusively to Black neighborhoods, police ensured that crime rates increased specifically in those Black neighborhoods. Any system of lowered constitutional rights based on crime rate statistics would only exasperate these problems by using misleadingly elevated crime statistics to justify greater police presence in neighborhoods of already heightened policing and lowered Fourth Amendment protections.

V. BUILDING AN EQUAL PROTECTION CHALLENGE TO WARDLOW

Wardlow empowers police to the detriment of individual rights that the Constitution guarantees. Justice demands its reversal. Persuasive arguments against the doctrine can and have been launched from the grounding of the Fourth Amendment, but Wardlow stands, and so a new strategy is necessary. The Fourteenth Amendment’s Equal Protection Clause provides recourse. Since the deleterious effects of Wardlow are exacted so disproportionately on communities of color with selectively scant effects elsewhere, it may be possible to establish that Wardlow enforcement denies equal protection of the laws to the people and communities who are the targets of its selective enforcement. This Part considers how the sociological context in, around, and undergirding the Black Lives Matter movement can contribute to that challenge.

119 Id. at 63.
120 Id. at 133.
121 ALEXANDER, supra note 115, at 123.
122 See, e.g., sources cited supra note 84.
A. The Framework of Equal Protection Jurisprudence

The Fourteenth Amendment disallows state governments the ability to “deny to any person within its jurisdiction the equal protection of the laws.” Along with the Thirteenth and Fifteenth Amendments, this addition to the Constitution was a post-Civil War attempt to provide greater protections to peoples and communities with a history of harsh limitations to individual liberties; or, more simply, “[h]ere’s one way to understand the central meaning of the equal protection clause: Black lives matter.” The Equal Protection Clause is a particularly apt vehicle for challenging a racist doctrine like Wardlow because the Fourteenth Amendment was designed with a particular view to the protection of Black rights. The clause “protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man,” said Senator Jacob Howard during the ratification debates. “Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford ‘equal’ protection to the black man,” said Representative Thaddeus Stevens. Even in the process of drastically limiting the reach of the Fourteenth Amendment only four years after its ratification, Justice Miller acknowledged the centrality of race to the provision’s concerns, saying that the “pervading purpose . . . lying at the foundation” of the Thirteenth, Fourteenth, and Fifteenth Amendments is “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,” and that the amendments were “addressed to the grievances of that race, and designed to remedy them.”

123 U.S. CONST. amend. XIV.
127 Slaughter-House Cases, 83 U.S. 36, 71–72 (1872); see also Strauder v. West Virginia, 100 U.S. 303, 306–07 (1879) (describing the purpose of the Fourteenth Amendment as “securing to a race recently emancipated, a race that through many generations has been held in slavery, all the civil rights that the superior race enjoy. . . . [and] declaring . . . that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color”).
The Fourteenth Amendment’s protections extend beyond Black justice, but a concern to rebut systemic anti-Blackness is an enlivening force at its core that has consistently supported fights for racial injustice.128 Since at least 1880, the Fourteenth Amendment has prohibited the government from establishing unreasonable classifications for differing legal protections.129 Such classifications are particularly vulnerable to challenges when they are based on “suspect classifications,” or groups of people that have experienced a history of discrimination.130 This distinction sweeps more broadly than race,131 but Blackness is a foundational and paradigmatic suspect classification, and so laws that draw distinctions based on race are subject to the most searching of judicial scrutiny with little chance of survival.132

On its face, the Wardlow doctrine draws no distinctions based on race or any other identity maker: a neighborhood’s racial demographics or the ethnicity of a fleeing suspect have no bearing on the doctrine’s applicability. Although over two decades of selective, unbalanced enforcement of the doctrine to the detriment of communities of color makes its discriminatory impact difficult to

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128 But see Brando Simeo Starkey, A Failure of the Fourth Amendment & Equal Protection’s Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies, 18 Mich. J. Race & L., 131, 136 (2012) (“The Equal Protection Clause . . . has been shredded. With the maintenance of the Intent Doctrine, which requires a claimant to trace a purported equal protection deprivation back to a discriminatory motive, the Supreme Court has nearly nullified a clause that reads as a guarantee of legal equality.”).

129 See Strauder, 100 U.S. at 308–09.


131 See United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938) (“[P]rejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.”). When considering whether a classification is suspect, the Court generally asks if the group has experienced a history of discrimination, if membership in the group is obvious or immutable, and if the group is politically powerless. See, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986); see also Kenji Yoshino, Assimilatist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 Yale L.J. 485, 489 (1998), https://doi.org/10.2307/797496 (“[The Supreme Court has] deployed, again without much explanation, a set of factors to determine whether a group is worthy of heightened scrutiny.”); Marcy Strauss, Rerevaluating Suspect Classifications, 35 Seattle U. L. Rev. 135, 141 (2011) (“This Article explores [what it calls] the inconsistencies and absurdities of the tests used to establish a suspect classification for equal protection purposes.”).

challenge, Fourteenth Amendment jurisprudence demands establishing discriminatory purpose as the touchstone for an equal protection challenge.\textsuperscript{133} This Supreme Court precedent grows out of \textit{Washington v. Davis}, a failed challenge by Black applicants to the Washington D.C. police department’s use of a written test as part of the hiring process.\textsuperscript{134} Every applicant had to take the test, but Black applicants failed at a rate four times greater than that of other races, and so Black applicants were offered very few jobs.\textsuperscript{135} The Supreme Court denied the Black challengers relief because they did not establish a discriminatory purpose undergirding the alleged discriminatory impact.\textsuperscript{136} According to the Court, “[t]he essential element of de jure segregation is ‘a current condition of segregation resulting from intentional state action. The differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.’”\textsuperscript{137} Under \textit{Washington v. Davis}, even clear and indisputably discriminatory impact is insufficient to mount an equal protection challenge without meeting the considerably high bar of establishing discriminatory purpose.\textsuperscript{138}

In certain circumstances, however, intent can be inferred from impact.\textsuperscript{139} This principle enables challenges to facially neutral laws that receive racially discriminatory application. The classic and still leading cases are \textit{Yick Wo v. Hopkins} and \textit{Gomillion v. Lightfoot}.\textsuperscript{140} \textit{Yick Wo} struck down a San Francisco ordinance prohibiting the operation of a

\begin{footnotes}
\footnotetext[134]{\textit{Davis}, 426 U.S. at 232.}
\footnotetext[135]{\textit{Id.} at 237.}
\footnotetext[136]{\textit{Id.} at 246.}
\footnotetext[137]{\textit{Id.} at 240 (second alteration in original) (citation omitted) (quoting \textit{Keyes v. Sch. Dist. No. 1}, 413 U.S. 189, 205, 208 (1973)).}
\footnotetext[139]{\textit{See}, \textit{e.g.}, United States v. Johnson, 40 F.3d 436, 439–40 (D.C. Cir. 1994).}
\end{footnotes}
laundry business in anything other than a brick or stone building without the Board of Supervisors’ consent. The Board granted permits to operate laundries in wooden buildings to all but one of the non-Chinese applicants, and to none of the 240 Chinese applicants.

The Court held:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

_Yick Wo_ stands for the proposition that the racially selective enforcement of a facially neutral law presumptively violates the Equal Protection Clause.

In _Gomillion_, the Court proved itself willing to find discriminatory motive from circumstantial evidence of extreme racially disparate impact. There, an Alabama statute gerrymandered the shape of Tuskegee “from a square to an uncouth twenty-eight-sided figure” in such a way that excluded nearly all of the town’s 400 Black voters but did not affect any other residents. The Court found the stark differences in the redistricting plan to be sufficient contextual evidence to suggest a racially discriminatory purpose.

Even though these cases set a high bar and narrow litigation path to success, the logic of _Yick Wo_ and _Gomillion_ allow for a colorable equal protection challenge to the _Wardlow_ doctrine. The language of the precedent is facially neutral as to race, but the statistics that Grunwald and Fagan cite, the efforts of scholars like Alexander and Ta-Nehisi Coates to demonstrate racial disparities, and especially the

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141 _Yick Wo_, 118 U.S. at 357.
142 _Id._ at 358–59.
143 _Id._ at 373–74.
144 _But see_ Gabriel J. Chin, _Unexplainable on Grounds of Race: Doubts About Yick Wo_, 2008 U. I.L.L. L. Rev. 1359, 1359 (2008) (“[T]he traditional view of _Yick Wo_ is mistaken: _Yick Wo_ was about neither race discrimination nor prosecution. . . . _Yick Wo_’s race was irrelevant to the decision; a white person or corporation deprived of property would have had precisely the same claim.”).
146 _Id._ at 340, 347.
increased social awareness that the Black Lives Matter movement has spurred around the dangerous and potentially fatal effects of racially disparate policing may contribute to a demonstration of sufficient contextual evidence to suggest a discriminatory purpose.\footnote{See Brando Simeo Starkey, Why the Black Lives Matter Movement Should Claim the 14th Amendment, \textit{Andscape} (July 30, 2020), https://andscape.com/features/why-the-black-lives-matter-movement-should-claim-the-14th-amendment.}

\section*{B. High-Crime Area Policing as Unexplainable on Grounds Other than Race: A Statistical Approach}

In their analysis of more than two million investigative stops that the New York City Police Department conducted over a five-year span, Professors Ben Grunwald and Jeffrey Fagan demonstrate fundamental deficiencies in high-crime area policing that can help establish an inference of racially discriminatory purpose underpinning the \textit{Wardlow} doctrine. Among other findings, the scholars argue:

\begin{quote}
[Officers’] assessments of whether an area is high crime are nearly uncorrelated with actual crime rates; that the suspect’s race predicts whether an officer calls an area high crime as well as the actual crime rate; [and] that the racial composition of the area and the identity of the officer are stronger predictors of whether an officer calls an area high crime than the crime rate itself.\footnote{Grunwald & Fagan, \textit{supra} note 18, at 345.}
\end{quote}

After their statistical analysis exposed that high-crime area policing does not correlate with actual crime rates, geographic specificity, or objective officer assessment,\footnote{Id. at 350.} Grunwald and Fagan demonstrated that police invocation of high-crime area to justify the requisite reasonable suspicion for a Terry stop correlates with race.\footnote{Id. at 351.} Officers more frequently cite the criterion to justify stops of young, Black men.\footnote{Id.} The scholars show also that “officers rely on neighborhood proxies, such as the racial and socioeconomic composition of residents” rather than crime itself to justify treating an area as high-crime.\footnote{Id. at 385.}

Grunwald and Fagan’s sophisticated modeling “support[s] the interpretation that officers are invoking [high-crime area] more frequently against young men of color.”\footnote{Id. at 350.} This finding proves true
even when the scholars control for more narrow geographic ranges of stops that invoke high-crime area.  The results are equally damning when that range focuses on neighborhood demographics:

[M]oving from a block group without any Black residents to a block group with 100 percent Black residents is associated with an 8 to 9 percent increase in the probability that an officer will call the area high crime . . . In other words, moving from an area with no Black residents to an area with all Black residents is associated with a substantially larger increase in the probability that an officer invokes [high-crime area] than moving from the single safest neighborhood in the city to the single most dangerous.

Grunwald and Fagan demonstrate not only that high-crime area policing fails to deliver on the goals of the Wardlow doctrine but also that the doctrine sanctions racial discrimination. Rather than limiting crime at its source or in areas where it thrives, the high-crime area criterion proves a cudgel to batter the Fourth Amendment rights of Black people.

Grunwald and Fagan’s work demonstrates dramatically, first, that enforcement choices on the individual and administrative level influence crime rates more profoundly than does unlawful activity and, second, that anti-Black biases underwrite those choices. As a case study of Wardlow in action in a particular time and place, it is difficult to imagine a more damning assessment. Grunwald and Fagan in fact show that Wardlow is vulnerable to an equal protection challenge built on the inference of discriminatory purpose, and Floyd v. City of New York—discussed below—demonstrates how that challenge might materialize. This statistical analysis, that is, makes undeniable that high-crime area policing exerts unequal pressure on Black people and communities, and there is no indication in any other statistical analyses to suggest that Wardlow functions differently in New York City than anywhere else.

While Grunwald and Fagan show the discriminatory purpose underlying New York’s stop-and-frisk policy, adding the work of the Black Lives Matter movement to the analysis helps broaden the inference of discriminatory purpose to the Wardlow doctrine writ large.

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156 Grunwald & Fagan, supra note 18, at 387.
157 Id. at 388–89.
158 See id. at 348–49 ("Wardlow depends on at least three unspoken empirical assumptions. The first assumption concerns the geographic scope of a high-crime area. . . . The second assumption is that officers’ assessments of high-crime areas are relatively accurate. . . . The third empirical assumption concerns predictive power.").
Because the Black Lives Matter movement has shown how law enforcement is steeped in systematic racism, and because legal doctrines require human performance to make measurable impact, the imputation of systematic biases to individual actors gives rise to the inference of discriminatory purpose. The sociological context of Black critical thought is necessary because statistical analyses seem always confined to the limited domain of data. Although, for example, Grunwald and Fagan conclude that “the high-crime area standard seems haphazard at best, and discriminatory at worst,” and although their research exposes Wardlow’s fatal flaws, the scholars fall into the familiar trap of suggesting solutions like courts requiring higher standards for admissibility of police assessment of neighborhood crime in Terry stops, or police departments establishing stricter guidelines or using data-based technology for the designation of high-crime areas. They make these proposals, however, after suggesting that they are potentially valuable solutions “[s]hort of reversing Wardlow.” But, as is evident from the above section on the limitations of data and the following section on the realities that the Black critical thought has exposed, justice demands reversing Wardlow.

C. The Contribution of the Black Lives Matter Movement to Establishing Wardlow’s Discriminatory Purpose

Little question remains that the high-crime area criterion has been deployed, like the War on Drugs, to the detriment of communities of color, driving up crime rates and offering further pretext for intrusive and unreasonable Terry stops. The high-crime area criterion enables and often underwrites police violence like that which has fueled so much protest in recent years in communities that are disproportionately populated by Black people. This is to say that the concept “is applied and administered by public authority with an evil eye and an unequal hand,” targeting Black communities for selective and heightened enforcement. Such evidence lays bare the racially discriminatory effect of the Wardlow doctrine, but efforts to overturn Wardlow through an equal protection challenge will require establishing a discriminatory purpose guiding the doctrine.

159 Id. at 396.
160 Id. at 397–98.
161 Id. at 397.
Floyd v. City of New York, a successful equal protection challenge to New York City’s stop-and-frisk policy, is a useful model of establishing both discriminatory effect and purpose.\textsuperscript{163} In that case, a group of four plaintiffs successfully represented a class of thousands of New Yorkers by showing the grossly disproportionate enforcement of stop-and-frisk against people of color and establishing from that reality and the deliberate indifference of senior officials the inference of discriminatory purpose.\textsuperscript{164} But Floyd was a sharply focused litigation, armed with voluminous statistics to help target a specific, enumerated policy.\textsuperscript{165} Developing a comparable litigation strategy is beyond the scope of this Comment. Even so, data alone will not save Americans—or the Fourth Amendment—from Wardlow. Simple data may not demonstrate the degree to which the Wardlow doctrine has targeted communities of color as effectively as necessary to establish the discriminatory purpose sufficient to mount a successful equal protection challenge. As Grunwald and Fagan’s research demonstrates, police lean on the high-crime area criterion to justify investigatory detentions of non-Black people and in not predominantly Black neighborhoods as well.\textsuperscript{166} And while an 8–9 percent greater probability that an officer will consider a Black neighborhood high-crime is significant,\textsuperscript{167} it is not likely stark enough to demonstrate gross disparity. A broader theoretical apparatus is therefore necessary.

But by remembering the lesson of McCleskey,\textsuperscript{168} Floyd also proves instructive of how and why broader concepts of history and society can contribute valuably to an equal protection challenge. For although Floyd relied primarily on statistical analysis of discriminatory effects of the stop-and-frisk policy, it also couched that data in broader sociological context.\textsuperscript{169} Here again Professor Fagan emerges; he was an expert witness for the Floyd plaintiffs and swayed Judge Shira Scheindlin more than the defense’s expert witness precisely because “Dr. Fagan has a deeper understanding of the practical, real-world

\textsuperscript{164} Id. at 658.
\textsuperscript{165} See id. at 572–75.
\textsuperscript{166} Grunwald & Fagan, supra note 18, at 371–72.
\textsuperscript{167} Id. at 388–89.
\textsuperscript{168} See supra note 96 and accompanying text.
meaning and implications of the statistical analyses in this case.\textsuperscript{170} Judge Scheindlin underscored the importance of a practical framework: “Given a choice between relying on a highly sophisticated mathematical analysis but limited practical understanding, or deep practical understanding informed by established statistical expertise, I favor the latter.”\textsuperscript{171} Floyd’s success, that is, finds root in its nuanced interplay of data and sociological context.\textsuperscript{172}

Valuable sociological context that can contribute to a colorable equal protection challenge to Wardlow exists in the Black Lives Matter movement and the related tradition of Black critical thought. Understanding and embracing these traditions can empower impact litigators to demonstrate to courts the grand scale of Wardlow’s dangers and the doctrine’s propensity to perpetuate and exasperate historical injustice. As the discussion below demonstrates, Black Lives Matter movement in fact exists in a historical continuum that stretches from before the Civil Rights Movement and has consistently highlighted police abuse of Black communities. Thus, while the Black Lives Matter movement is epochal, the concepts at its core and the social ills that it targets are far from new. Black activists and scholars like Malcolm X,\textsuperscript{173} Angela Davis,\textsuperscript{174} James Baldwin,\textsuperscript{175} and the Civil Rights Movement more broadly have long decried police brutality and selective enforcement against Black people and communities. Two targets of Black Lives Matter activism, for example, are no-knock warrants—the type of warrant that preceded the killing of Breonna Taylor\textsuperscript{176}—and stop-and-
frisk policies that codify and exasperate the problems of Terry stops.\textsuperscript{177} In 1966, Baldwin targeted both. Chronicling terrible police violence against Black residents of Harlem, which he called “occupied territory”—a Black neighborhood overrun by totalitarian police—Baldwin suggested:

[Harlem residents] can come to grief at any hour in the streets, and . . . are not safe at their windows, are forbidden the very air. They are safe only in their houses—or were, until the city passed the No Knock, Stop and Frisk laws, which permit a policeman to enter one’s home without knocking and to stop anyone on the streets, at will, at any hour, and search him. Harlem believes, and I certainly agree, that these laws are directed against Negroes. They are certainly not directed against anybody else.\textsuperscript{178}

This passage would fit neatly into any contemporary body of Black critical theory. And while Baldwin knew that publication of these ideas was a radical move in 1966, he also knew that, regardless of any particular laws or policies, the reality he wrote about was neither revelatory nor exceptional because Black people at least since emancipation “have lived with it since [their] eyes opened on the world.”\textsuperscript{179} Baldwin’s point was that in 1966 the life-threatening subjugation of Black people to the violent whims of police was a familiar way of life to all Black people in the United States, whose eyes were forced open on the world, and only to others who chose to open their eyes on the world (although Baldwin held dim hope for the latter prospect).\textsuperscript{180}

While the ideas of the Black Lives Matter movement exist in an unbroken genealogy of Black thinkers stretching to at least W.E.B Du Bois,\textsuperscript{181} the big bang element that energized and continues to invigorate contemporary protest movements is the proliferation of portable video devices on cellphones, police uniforms, and

\begin{itemize}
  \item 178 Baldwin, \textit{supra} note 175.
  \item 179 \textit{Id.}
  \item 180 \textit{See} James Baldwin, \textit{Letter from a Region in My Mind}, \textit{The New Yorker} (Nov. 9, 1962), https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind (“White people in this country will have quite enough to do in learning how to accept and love themselves and each other. . . . [and] whatever white people do not know about Negroes reveals, precisely and inexorably, what they do not know about themselves.”).
\end{itemize}
These recordings bolster the inference of discriminatory purpose underwriting *Wardlow*. Baldwin and many of his Black readers saw Harlem for themselves, but others could exist naively or in denial from afar. The Black Lives Matter movement can support impactful litigation precisely because it can build its platform on documentary evidence. Indeed, the 1991 police beating of Rodney King was so impactful not simply for its outrageous brutality but because it was filmed and disseminated. The filmed deaths of George Floyd, Eric Garner, Philando Castile, and others have made it far more difficult for authority figures and society as a whole to keep their eyes closed to the truth of police violence that Baldwin demonstrates as essential Black knowledge. Filmed violence fortifies the construction of *Wardlow*’s discriminatory intent by making it far more difficult to deny the prevalence of its nonfilmed counterpart.

In short, the work of the Black Lives Matter movement to advance the tradition of Black critical thought through protest, continued discourse, and especially documentary evidence forces police violence against Black people and communities into the nation’s collective consciousness and exposes a pattern of violence consistent since emancipation that is unexplainable on grounds other than race. In this way, the Black Lives Matter movement’s successful efforts to increase awareness of anti-Black police violence can progress effectively into challenging *Wardlow* via equal protection litigation. The Supreme Court has previously overturned precedent when sociological conditions either change or develop into a greater position of national awareness, as was the case with *Brown v. Board of* 182

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Education’s carve out of education from the separate-but-equal doctrine.\textsuperscript{187}

Justice Stevens in fact provided a roadmap for overturning Wardlow in his separate opinion to the decision, making clear in 2000 what the Black Lives Matter movement would begin to amplify a decade later: Black fear of police is real and justified.

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.\textsuperscript{188}

Nikole Hannah-Jones echoes this notion, indicating that a presumptive fear of the police resides in Black Americans who “have little expectation of being treated fairly by the law or receiving justice [and] cannot fundamentally trust the people who are charged with keeping us and our communities safe.”\textsuperscript{189} As Justice Stevens recognized, a tradition of police violence against Black people makes Black flight from police on the occasion of no wrongdoing an entirely justified and logical means of removing oneself from the potential of becoming a victim. Considering the reality of Black people’s concern for their safety in police encounters—and awareness on the part of those same Black people that their presence in what police consider a high-crime area only heightens the potential that an officer will choose to stop and engage them—Justice Stevens recognized that flight is a natural and understandable reaction to recognition of police presence: “For such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal.’”\textsuperscript{190}

Even at the time Terry was decided, documentary evidence existed showing the belief among citizens that police conducted field interrogations indiscriminately and abusively against Black communities.\textsuperscript{191} That attitude remained consistent in the thirty-three

\textsuperscript{187} See Rosenthal, The Crime Drop, supra note 83, at 642–43 (“Brown reminds us that even settled rules of constitutional law must be reconsidered when they fail to take account of sociological reality. . . . Surely one of Brown’s most potent lessons is that stare decisis must give way when legal doctrine is out of step with sociological reality.”).


\textsuperscript{190} Wardlow, 528 U.S. at 132–33.

\textsuperscript{191} See President’s Comm’n on L. Enf’t & Admin. of Just., Task Force Report: The Police 182–83 (1967) [hereinafter Task Force Report].
years between Terry and Wardlow. And yet, although the Terry and Wardlow majorities were aware of this evidence, it did not persuade either court.

A new level of racial awareness precipitated by the Black Lives Matter movement can go a long way toward establishing a broader, more influential judicial understanding of the conditions that Stevens articulated in his Wardlow opinion and, in turn, establishing the groundwork to show discriminatory purpose underlying the Wardlow doctrine. Impact litigators can and should embrace this work as a vital component in challenging Wardlow. Ta-Nehisi Coates’s 2015 book Between the World and Me, for example, is particularly representative of how contemporary Black critical theory can shed new light on perennial tensions in the relationship between police and Black communities in such a way that can be an impactful component of a litigation strategy. Between the World and Me takes the form of a letter to Coates’s young son who was growing upset about police escaping legal accountability for violence against Black people. Deploying a critical approach similar to Foucault and Alexander, Coates writes that “race is the child of racism, not the father.” His point is this: “Difference in hue and hair is old. But the belief in the preeminence of hue and hair, the notion that these factors can correctly organize a society and that they signify deeper attributes, which are indelible—this is the new idea.” But Coates makes very clear to his son that even though the category of race is invented and relatively new to the world, it is nonetheless very operative: “[T]he police departments of your

192 See, e.g., STEVEN K. SMITH ET AL., U.S. DEP’T OF JUST., CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES 25 (1998) (showing Black residents more than twice as likely as others to be dissatisfied with police practices in the same communities).

193 See Terry v. Ohio, 392 U.S. 1, 14–15 (1968) (“The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.” (footnote omitted) (citing Task Force Report, supra note 191, at 183)); Wardlow, 528 U.S. at 125 (“[T]here are innocent reasons for flight from police . . . . This fact is undoubtedly true . . . .”)); cf. Wardlow, 528 U.S. at 132 n.7 (Stevens, J., concurring in part and dissenting in part) (citing several authorities—including the same Task Force Report that Terry cites—supporting the proposition that fear among “minorities and those residing in high crime areas” that a police encounter may be dangerous often provokes flight).


195 Id. at 7.

196 Id.
country have been endowed with the authority to destroy your body.”

He makes this point more poignant and concrete with the story of having been pulled over by police in Prince George’s County, a suburb of Washington D.C. that had a particularly strong reputation for police violence against Black people: “They took my identification and returned to the squad car. I sat there in terror.”

Coates underscores how the consistent pattern of American courts sanctioning police violence—by refusing to prosecute its perpetrators—empowers police to continue the same violence without consequences. He in fact calls police who kill Black people “the sword of the American citizenry”; his point is that the bigger problem than police is the national zeitgeist that considers police as a response to crime rather than a contributor, as Foucault and Alexander would have it. “It is not necessary that you believe that the officer who choked Eric Garner set out that day to destroy a body. All you need to understand is that the officer carries with him the power of the American state and the weight of an American legacy.”

Ultimately, Coates shows the ways in which courts’ and law enforcement authorities’ refusal to curtail police violence against Black people and communities has in turn sanctioned its practice, instantiating Black vulnerability to police.

This refusal, sanction, and instantiation engenders the inference of discriminatory purpose. The unequal effects of the Wardlow doctrine are apparent from statistics and other empirical evidence, but Black writers from Baldwin to Coates and beyond have demonstrated, in specific enforcement practices rather than vague sociological theories, the systematic racism at the heart of those effects. When racism blooms into targeted harassment, discriminatory purpose emerges. The Black Lives Matter movement therefore allows for a powerful and necessary equal protection maneuver of shifting judicial gaze away from misleading end results like crime rates, and toward the structural conditions that influence, construct, and sustain neighborhoods deemed “high-crime,” as well as the histories of violence that make flight from the police reasonable.

The inference of discriminatory purpose necessary to establish a successful equal protection challenge to Wardlow in fact lies in

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197  Id. at 9.
198  Id. at 75.
199  Id. at 86.
200  COATES, supra note 194, at 103.
structure rather than results. The Black Lives Matter movement’s exposure of structural racism underwriting violent policing in the communities of color that authorities deem high-crime areas reveals that purpose. The process is systematic: Wardlow sanctions police consideration of a neighborhood’s reputation; police use this license to exact greater and more violent enforcement on Black people and communities; the long and firmly established history of structural racism shows discriminatory motivation for that enforcement; and, finally, the inference of Wardlow’s discriminatory purpose emerges.

The Black Lives Matter movement, that is, helps make unmistakable that the discrimination at the heart of the Wardlow doctrine is a purposeful denial of equal protection. Scholars recognize, for example, that “[i]n order to properly understand police violence—and the movements addressing it—today, it must be viewed through a racial lens,”201 but work remains for lawyers to teach such concepts to courts. The Black Lives Matter movement and contemporary Black thought equip impact litigators with the tools necessary to show courts that a rethinking of the sociological reality of policing Black communities is not only possible but essential, and that precedent exists throughout American history for changed sociological circumstances to engender overturning stare decisis at the Supreme Court. Litigators challenging Wardlow should seize on the intellectual tradition advanced by the Black Lives Matter movement, show how that tradition exposes purposeful discrimination on the ground, unite it with concrete and focused plaintiffs similar to those that Floyd advanced, and construct a complex litigation strategy establishing the Wardlow doctrine’s discriminatory purpose. Such a strategy, which contextualizes empirical evidence within a broad sociological framework, could create the perspective necessary for federal and state courts to recognize that the high-crime area criterion has a disproportionate and violent effect on communities of color, making it an untenable element of contemporary policing.

Ultimately, after the Black Lives Matter movement, the Wardlow doctrine cannot sustain an equal protection challenge. Black writers and activists have demonstrated that the discriminatory impact that has been empirically evident since the case came down grows from a discriminatory purpose inherent to high-crime area policing. Enforcement decisions and actions perform and thereby actualize

systematic biases; the performance of such a bias is the purpose to discriminate. And the Black Lives Matter movement shows violent policing to be purposefully discriminatory by situating any single example within a long historical and systematic continuum. This broadly discriminatory pattern of practice is fertile ground from which to establish the inference of foundational discriminatory purpose necessary to topple Wardlow with an equal protection challenge.

VI. CONCLUSION

The Supreme Court of Maryland recently took up the question of Wardlow in Washington v. State, whose facts are materially similar to Wardlow, Goldsmith, and any number of other cases: a Black man ran at the sight of police, who gave chase, apprehended him, found a gun, and made an arrest. Predictably, the court upheld the trial court’s denial of a motion to suppress, affirming the appellate court’s explicit refusal to “diverge from the Supreme Court’s decision in Wardlow.” Significantly, though, the appellant’s brief used a strategy similar to that which this Comment advocates: deploying a combination of statistical and sociological evidence growing out of the Black Lives Matter movement to argue that Washington’s unprovoked flight from the police should not contribute to reasonable suspicion. The brief grounded its argument in Justice Stevens’s opinion and cited cases from around the country that show a softening of the Wardlow doctrine’s characterization of flight from the police. “The Wardlow Court issued its opinion over two decades ago. In the years since then, our understanding of the lived reality of Black Americans has come a long way,” pointed out the brief, after citing statistics and empirical data about the danger and fear attendant upon Black encounters with police. The court embraced this line of reasoning, opening its opinion by acknowledging that “[i]n recent years, the Baltimore Police Department has experienced a series of unsettling events, giving rise to what has been described as an increased public awareness of police misconduct and a fear of police officers by some residents of Baltimore City, particularly those who are African American,” and then spending

204 Appellant’s Brief and Appendix at 18–30, Washington, 287 A.3d 301 (2021) (No. 739).
205 Id. at 26–30.
206 Id. at 25–26.
a long second paragraph recounting specific injustices, including the death of Freddie Gray. \footnote{Washington, 287 A.3d at 307.}

But the appeal failed. The court reasoned that it was applying Wardlow “as the language in the majority opinion and Justice Stevens’s opinion indicates it was intended to be applied: as a fact-based analysis of the totality of the circumstances.”\footnote{Id. at 322.} And while the court said it “reviewed and considered Washington’s arguments [about legitimate fear of police provoking flight] with care and [did] not take lightly his contentions,” the opinion used this logic only to suggest that flight and its context should be considered a factor in a Terry stop, and not a bright-line rule.\footnote{Id. at 324–25.} The court made similar analytical moves regarding the question of high-crime areas.\footnote{Id. at 330.} At bottom, then, the court held “Detective Rodriguez had reasonable suspicion to stop Washington. The nature and circumstances of Washington’s unprovoked flight in a location that was a high-crime area lead us to this conclusion.”\footnote{Id. at 333.} The court considered and acknowledged issues surrounding the Black Lives Matter movement, but Wardlow won the day.

What was missing from Washington was equal protection. Nowhere did the litigation lean in any way on the Fourteenth Amendment, choosing instead to charge once more unto the Fourth Amendment’s Terry and Wardlow breach. The Washington litigators made valuable use of sociological context and seemed to have made at least some inroads into the consideration of the court, but the case shows just how foreclosed the Fourth Amendment avenue to a Wardlow challenge really is. As this Comment has suggested, the Fourteenth Amendment must be leveraged in service of the Fourth Amendment. Terry and Wardlow have chipped away at the Fourth Amendment to such a degree that there remains little footing for a direct rebuttal. With the help of the Black Lives Matter movement, the Equal Protection Clause might very well provide the recourse that justice requires.

Ultimately, statistical analysis of the Wardlow doctrine’s discriminatory impact joined with the sociological context that the Black Lives Matter movement provides can be crucial elements of a litigation strategy that eventually topples Wardlow under the weight of
an equal protection challenge. Even though Wardlow was wrong the day it was decided, the avalanche of racial awareness that the Black Lives Matter movement and others have advanced over the more than two decades since the doctrine’s establishment equips advocates with the tools necessary to advance the position of Justice Stevens’s opinion over the case’s majority. The work of the Black Lives Matter movement can show courts and law enforcement agencies that appeals to high-crime area justification for Terry stops are out of keeping with the Constitution.\textsuperscript{212} Justice demands that Wardlow be overturned in the Supreme Court and that states follow suit, going further than simply curtailing the doctrine’s reach or demanding a more exacting standard for its use.\textsuperscript{213} Courts must reject the Wardlow doctrine entirely.
