

It's High Time to Dump the High-Crime Area Factor

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A high-crime area, when used as a factor in reasonable suspicion analysis to help justify a police officer's stop and frisk of an African American, is overtly racist. This Note will first analyze the empirical data showing that high-crime areas are predominately high-black areas—including a historical analysis for how this came about. Next, the Note will explain the origin and jurisprudence of the high-crime area factor, highlighting its curtailment by lower courts. It will then validate that the only viable solution is to dump the high-crime area factor. Finally, this Note explains how the high-crime area factor potentially violates the Equal Protection Clause.

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I. THE HIGH-CRIME AREA FACTOR HAS A DISPARATE IMPACT ON AFRICAN AMERICANS

Judges consider whether an area is high crime when determining if reasonable suspicion exists. The Supreme Court's jurisprudence allows police officers to assume that a person is more likely to be engaged in criminal activity if it occurs in a "high-crime area." The main problem is that high-crime areas have disproportionately high African American populations.¹

In a 2013 empirical study on race and crime in the United States, former Republican candidate for United State Senate, Ron Unz, argues that urban crime rates are almost entirely explained by racial distribution.² Specifically, he argues that these rates can be explained by examining the distribution of African Americans in urban communities.³ Unz focuses his study on violent crime rates in large urban cities.⁴ His findings reveal that the size of the African American population in large urban areas is strongly correlated with higher incidents of violent crime.⁵

Unz begins by analyzing data relative to three main socioeconomic explanations for crime in major cities of at least 500,000 people: (1) urban density, (2) the size of police forces, and (3) poverty rates.⁶ Surprisingly, crime rates and urban density have a small or insignificant correlation.⁷ Unsurprisingly, the size of the local police force is fairly strongly correlated with crime.⁸ But perhaps most unexpectedly,

¹ Steven Raphael & Melissa Sills, *Urban Crime, Rates, and the Criminal Justice System in the United States, in the United States*, in A COMPANION TO URBAN ECONOMICS 524, 529 (Richard J. Arnott & Daniel P. McMillen eds., 2006), <http://ist-socrates.berkeley.edu/~raphael/ACTC30.pdf>. ("Crime in the USA has a disproportionate effect on African-Americans").

² Ron Unz, *Race and Crime in America, The Unspoken Statistical Reality of Urban Crime Over the Last Quarter Century*, THE UNZ REVIEW: AN ALTERNATIVE MEDIA SELECTION (July 20, 2013), <http://www.unz.com/article/race-and-crime-in-america/>.

³ *Id.*

⁴ Unz defines "violent crime rates" as "homicide rates, robbery rates, and violent crime overall."

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ This is so because "[h]igher crime rates usually persuade local authorities to hire additional police officers." *Id.*

there is only a moderate correlation between crime rates and poverty rates.⁹ In fact, “the race/crime correlation so substantially exceeds the poverty/crime relationship that much of the latter may simply be a statistical artifact due to most urban blacks being poor.”¹⁰

Unz focuses exclusively on violent crime rates in large urban cities;¹¹ nonetheless, the results of his study are stunning.¹² The “black connection to local crime has been so strong as to almost eliminate the possible role of any other variable.”¹³ This point is illustrated in the comparison of crime rates of major cities with substantial poverty rates and small black populations, to major cities with substantial poverty rates and large black populations.¹⁴ For example, “El Paso and Atlanta are comparable in size and have similar poverty rates, but [Atlanta] has eight times the robbery rate and over ten times the homicide rate.”¹⁵ Comparing cities in California: “Oakland approximately matches Santa Ana in size and poverty, but has several times the rate of crime.”¹⁶ The data show that “major cities with substantial poverty but few blacks tend to have far lower level of crime.”¹⁷ This Note will explain why this is caused by the racist underpinnings of our society—not due to a greater propensity for African Americans to commit more crime than other races.

Institutional racism, societal racism, law enforcement racism, political racism, and racist jurisprudence are the main reasons African Americans offend at disproportionately high rates. Black offenders are accused of committing roughly 25 percent of violent crime in the United States.¹⁸ This is a high rate considering that African Americans account for about 14 percent of the population.¹⁹ Crime is mostly concentrated in

⁹ *Id.*

¹⁰ *Id.*

¹¹ Unz explains that it would require a major research undertaking to figure out the correlation between race and crime through smaller geographical units such as neighborhoods. Unz speculates, however, that the correlation between crime rates and the size of the African American population would actually increase if we examined the data of smaller geographical units, rather than major urban cities. *Id.*

¹² Unz’s findings have largely been confirmed by other scholarship. *See, e.g.*, Raphael & Sills, *supra* note 1, at 515 (noting that African Americans commit 25 percent of all violent offenses in the United States, but account for only 13 percent of the population).

¹³ Unz, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Raphael & Sills, *supra* note 1, at 529.

¹⁹ *African American Statistics*, BLACK DEMOGRAPHICS,

central urban areas.²⁰ African Americans live disproportionately in those central urban areas with the highest crime rates.²¹ In the following section, this Note extrapolates that this is due to systemic racism.

A. The Disproportionate Rate of Violent Black Offenders is Caused By Systemic Racism

While African Americans are more likely to be arrested for violent offenses, they are far more likely than whites to be victims of violent crime.²² “The overall likelihood of being the victim of a violent crime is 27 percent higher for blacks relative to whites.”²³ The racial difference in victimization rates is even larger for homicides. In the year 2000, “blacks were 6.2 times more likely to be murdered than whites.”²⁴ In 1991, at the peak of black homicide rates, “blacks were 7.2 times more likely to be murdered than whites.”²⁵ This is mostly attributed to black-on-black killings: “Roughly 94 percent of black homicide victims are murdered by a black offender.”²⁶ The main causes of these homicides are gang activity and drug abuse.²⁷

The single largest predictor of violence is drug abuse, but this is related to gang violence.²⁸ Gang violence accounts for nearly half of all violent crime in America.²⁹ “Gang violence is interconnected with other underlying causes of violence stemming from drug abuse . . . and concentrated urban poverty.”³⁰

Before erroneously assuming that African Americans have a greater propensity to engage in violence, it is vital to understand the broader social context from which these statistics originated.

The driving force behind America’s support for getting “tough on

<http://blackdemographics.com/population/>.

²⁰ Urban violent crime rates are 1.49 times that of suburban neighborhoods and 1.57 times that of rural areas. Raphael & Sills, *supra* note 1, at 522.

²¹ Raphael & Sills, *supra* note 1, at 524.

²² *Id.* at 516.

²³ *Id.* at 519.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Raphael & Sills, *supra* note 1, at 530.

²⁷ Matt MacBradeigh, *Gun Control Debate: Gang Violence Accounts For Half of Violent Crime in America*, POLICY.MIC (Mar. 01, 2013), <http://mic.com/articles/27281/gun-control-debate-gang-violence-accounts-for-half-of-violent-crime-in-america#.eFyrqCiam>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

crime” was conservative politics, which began a media campaign to sensationalize a fabricated “crime epidemic” in response to white people’s fear of the civil rights’ movement.³¹ “Capitalizing on an overwhelming public opinion in favor of more rigid crime control, conservative politicians at the national and state level stoked their constituents’ fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time.”³² The general conservative reaction against the civil rights movement allowed Richard Nixon to capitalize on white voters’ anxieties about racial issues, catapulting him to the top of the polls in the 1968 Presidential Election.³³ “A deep unease with the virulence of some black activists and the extent of the changes taking place, coupled with an entrenched culture of outright racism in the lives of less progressive whites, led to a general reaction against the movement towards rapid racial equality.”³⁴

From the initial roots of Goldwater and Nixon’s “law and order” rhetoric to Reagan’s ability to ride his “tough on crime” reputation all the way to the presidency, the turmoil of the late-1960s was a key catalyst for the reorientation of national and state campaigning and policymaking toward criminal justice reform programs like mandatory minimum sentences that would be the driving forces behind the incarceration explosion.³⁵

The politically driven “tough on crime” campaigns continued from the 1970s to the early 2000s—though this time, it was coined as the “War on Drugs.”³⁶ Despite decreasing levels of crime, the media created a false portrayal of an increase in violent crime rates and drug abuse.³⁷

The War on Drugs is the root cause of the significant increase in violent crime.³⁸ In fact, the War on Drugs “*predated* the remarkable levels of violence that now impact poor communities of color so

³¹ Walker Newell, *The Legacy of Nixon Reagan and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L & POL’Y 3, 12 (2013).

³² *Id.*

³³ *Id.* at 12–13.

³⁴ *Id.* at 13.

³⁵ *Id.* at 14.

³⁶ Heather Ann Thompson, *Inner-City Violence in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 30, 2014), <http://www.theatlantic.com/national/archive/2014/10/inner-city-violence-in-the-age-of-mass-incarceration/382154/>.

³⁷ *Id.*

³⁸ *Id.*

disproportionately.”³⁹ The violent crime rate more than tripled from 1965 to 1995.⁴⁰ The last time we saw such high levels of gun violence was during the Prohibition.⁴¹ “Indeed, without the War on Drugs, the level of gun violence that plagues so many poor inner-city neighborhoods today simply would not exist.”⁴² Much of this gun violence can be attributed to the astounding incarceration rates that followed the War on Drugs and the flowing consequences such as devastation to African American families.⁴³ The War on Drugs increased the funding for anti-drug activities of police departments, it enhanced the arrest rates and prosecutions for drug offenses, and it skyrocketed the incarceration rates for drug crimes.⁴⁴ “[E]xtraordinary levels of incarceration *create* the conditions for extraordinary levels of violence.”⁴⁵

To explain, we must understand the policy behind the War on Drugs and its intended targets. The War on Drugs “created a brand-new market for illegal drugs—an underground market that would be inherently dangerous and would necessarily be regulated by both guns and violence.”⁴⁶ This disparately affects African Americans. “[P]olice drug surveillance is concentrated on inner-city drug markets because these drug arrests are easier: drugs are sold on street corners, through neighborhood networks, and a stranger appearing to buy drugs is a commonplace occurrence.”⁴⁷ This type of foot peddling, drug trafficking is extremely dangerous. “Since drug dealers are likely to be carrying large sums of money, they are at serious risk of robbery. Since they cannot rely on the police for protection, they must, to survive, protect themselves.”⁴⁸

Oakland, California is a prime example for how the concentration of police drug surveillance in the inner-city regions lead to intensified violent crime rates in those areas, while at the same time, insulating the

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Raphael & Sills, *supra* note 1, at 532.

⁴⁴ *Id.*

⁴⁵ Thompson, *supra* note 36.

⁴⁶ *Id.*

⁴⁷ Robert L. Carter, *Fourth Annual W. Haywood Burns Memorial Lecture the Committee on Minorities and the Law New York County Lawyers Association, Discrimination in the New York Criminal Justice System*, 3 N.Y. CITY L. REV. 267, 272 (2000).

⁴⁸ Dave B. Koppel, *Crime: The Inner-City Crisis*, <http://www.davekoppel.com/CJ/Mags/InnerCityCrisis.htm>.

more prosperous neighborhoods from violence.⁴⁹ In 2001, the national murder rate was 6.1 homicides per 100,000 residents.⁵⁰ In Oakland, the 2001 murder rate was roughly 20 homicides per 100,000 residents.⁵¹ “Nearly all of the higher-income residential areas in the Oakland hills and the more middle-income communities of north Oakland were homicide free during 2001. Conversely, the poor, predominantly black and Latino residential areas in the flats of east and west Oakland accounted for nearly all of the city’s homicide count.”⁵²

As white households are largely insulated from violent areas, whites tend to be shielded from law enforcement drug surveillance because it is less focused on the suburban drug market. This Note will explain that the focus of drug surveillance on inner-city neighborhoods accounts for not only more African Americans being arrested for drugs, it also accounts for more African Americans being entrapped in a cycle of violence.

White people account for a large majority of drug users in the United States.⁵³ Whites account for roughly 82 percent of drug users in the country, blacks account for about 17 percent.⁵⁴ “In most US metropolitan areas, racial and ethnic minorities reside in central urban communities, while white households tend to reside in metropolitan area suburbs.”⁵⁵ Since there are far more white drug users in the United States than black drug users, combined with the fact that more whites live in the suburbs, the suburban drug market is larger than the inner-city drug market.

The War on Drugs was never concerned with the larger suburban drug market. “[T]o the extent that poor urban drug users consume drugs outdoors while wealthier suburban drug users consume in the privacy of their homes, police strategies that crack down on visible drug use will disproportionately net urban, poor, and largely minority drug users.”⁵⁶ Meanwhile, “[p]olice departments devote less effort in infiltrating the much larger suburban drug market because it is conducted by word of mouth, through stable workplace and social contacts, and therefore

⁴⁹ Raphael & Sills, *supra* note 1, at 522

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 532.

⁵⁴ *Id.*

⁵⁵ *Id.* at 522.

⁵⁶ *Id.* at 532.

requires more intense investigatory effort.”⁵⁷ This partly explains why inner-city blacks are more likely to get caught up in violence than whites—including more assaults, robberies, and homicides.⁵⁸ While many blacks are involved in the drug turf battle on the streets, most whites can sell drugs discreetly through safer, more stable markets.

Research Director Dave Kopel elaborates on the high risk of inner-city drug dealing culminating in violence:

When drug dealers engage in commercial transactions with each other, there is no Uniform Commercial Code and state district court for resolving disputes about the quality of goods sold. Disgruntled buyers, having no other means of redress, may resort to violence. Similarly, the addicts who sell drugs often end up consuming the drugs which should have been sold; because higher-level dealers have no legal means of handling salespersons who stole the merchandise with which they were entrusted, violence often results. Other drug users buy goods on credit, but fail to pay their debt. Since the seller has no lawful means of debt collection, violence again may result. In addition, when disputes are settled violently, they are often settled in the most vicious manner possible, for acquiring a reputation for being willing to “exert maximum force” may assist the resolution of future disputes.⁵⁹

Why is it that so many poor African Americans live in inner-city neighborhoods? “In the 1950s, prosperity brought suburban growth, at the price of dilapidated inner-city neighborhoods.”⁶⁰ Inner-city ghettos were created by “two African-American migrations from the rural South and the abandonment of inner-city neighborhoods by new middle-class blacks for the more prosperous suburbs . . .”⁶¹ This led to intensified segregation in inner cities.⁶² “With the absence of black-middle class center[s] for

⁵⁷ Carter, *supra* note 47, at 272.

⁵⁸ See Unz, *supra* note 2.

⁵⁹ Kopel, *supra* note 48.

⁶⁰ ROBERT C. WADMAN, POLICE THEORY IN AMERICA: OLD TRADITIONS AND NEW OPPORTUNITIES 69 (Charles C. Thomas Publisher Ltd. 2009).

⁶¹ *Id.*

⁶² *Id.*

leadership, stability, and guidance, poor blacks found themselves stuck in the city ghettos⁶³ without an effective political voice to address the problems of poverty, limited educational opportunity, single-parent families, unemployment, and—as a result higher crime rates.”⁶⁴ Subsequently, “large metropolitan areas have higher poverty rates, larger minority populations, and generally higher levels of black-white segregation.”⁶⁵

The high levels of segregation in inner-city communities are largely involuntary.⁶⁶ Their causes stem from “three interrelated and mutually reinforcing forces in America: high levels of institutionalized discrimination in the real estate and banking industries; high levels of prejudice among whites against blacks as potential neighbors; and discriminatory public policies implemented by whites at all levels of government.”⁶⁷

Today, in most United States metropolitan areas, “racial and ethnic minorities reside in central urban communities, while white households tend to reside in metropolitan area suburbs.”⁶⁸ Additionally, “poverty rates tend to be higher in central urban-communities than in residential areas located on suburban fringes.”⁶⁹ The higher city-center crime rates imply that “minorities and [the] poor face higher neighborhood crime rates than do white households and nonpoor households.”⁷⁰ Stated differently, “black neighborhoods tend to have the highest crime rates, . . .”⁷¹ Crime is more severe in predominately poor neighborhoods of urban areas, where blacks are more likely to reside than whites.⁷²

What follows is an “ever-increasing number of police officers in inner-city neighborhoods.”⁷³ Where there are more police, there is more incarceration. Police target inner-city drug offenses, which are committed

⁶³ Inner cities and city ghettos are used synonymously in this article.

⁶⁴ *Id.*

⁶⁵ Raphael & Sills, *supra* note 1, at 520.

⁶⁶ Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1207 (1995).

⁶⁷ *Id.*

⁶⁸ Raphael & Sills, *supra* note 1, at 522.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Crime rates for predominately Hispanic communities fall in between those for black communities and white communities. *Id.*

⁷³ WADMAN, *supra* note 60, at 69.

in areas where blacks are more likely to reside.⁷⁴ This leads to extraordinary levels of incarceration in these inner cities, which create the conditions for extraordinary levels of violence.⁷⁵ Thus, there is a perpetual cycle of inner-city violence.

Princeton Sociology Professor Douglas Massey argues that the perpetual cycle of inner-city black violence is unlikely to end as long as high levels of black segregation continue to exist in central metropolitan areas.⁷⁶ He “links high rates of black crime to two features of U.S. urban society: high rates of black poverty and high levels of black segregation.”⁷⁷ He argues that this link exists because “segregation simultaneously victimizes blacks while giving whites greater incentive to maintain the residential status quo, leading to a vicious cycle whereby segregation promotes poverty among blacks, leading to behavior that hardens white prejudice and discrimination, which in turn promotes further socioeconomic damage to the black community, which leads to continued segregation.”⁷⁸

Professor Massey explains further that a major reason for the lack of change is that most Americans, particularly, whites, perceive themselves as benefitting from the social arrangements that produce racial segregation. If poverty rates are higher for blacks and if crime is associated with poverty, then, by isolating blacks in segregated neighborhoods, the rest of society insulates itself from the crime and other social problems that stem from the higher rates of black poverty.⁷⁹ In short, he argues, “racial segregation persists in the United States because whites benefit from it.”⁸⁰

Due to the extremely high victimization rates faced by people who are entrapped in inner-city ghettos, many inner-city residents resort to violence themselves.⁸¹ “The cultivation of respect through the strategic use of violence represents a logical, instrumental strategy pursued by rational individuals as a means of adapting to the harsh conditions of daily life created by structural arrangements in American society that are

⁷⁴ Raphael & Sills, *supra* note 1, at 532.

⁷⁵ Although there is a strong correlation between greater incarceration rates and increased violence, causation has not been proven.

⁷⁶ Massey, *supra* note 66, at 1203.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1227.

⁷⁹ Massey, *supra* note 66, at 1224.

⁸⁰ *Id.* at 1229.

⁸¹ *Id.* at 1221.

beyond individual control.”⁸² Not only do inhabitants of poor, inner-city neighborhoods pursue rational individual tactics to reduce their victimization—they also, quite rationally, resort to gangs.⁸³

Gangs provide self-protection in the form of deterrence against victimization, while also providing benefits to their neighborhoods by controlling violence, deflecting it away from their own territories.⁸⁴ “Gangs are more able to deter crime in their community than the police because gang members are distributed throughout the community and are able to identify strangers.”⁸⁵ While gangs, of course, do not eliminate violence, their formations are a rational response to the high victimization rates and poverty faced by people in inner-city neighborhoods.⁸⁶ “The wave of crime in urban black America is not simply a product of individual moral failings; it is an inevitable outgrowth of social conditions created by the coincidence of racial segregation and high rates of black poverty.”⁸⁷

B. African Americans Disproportionately Live in High-Crime Areas

Thus far, this Note has demonstrated that the strongest correlation to violent crime rates in major urban cities is the size of the African American population. It has also shown that African Americans commit more violent crime in central urban areas as an inevitable and rational response to the so-called War on Drugs. Due to institutional and political racism, poor African Americans are more likely to reside in inner-city neighborhoods than whites. Because of the high levels of black-white segregation in these areas in conjunction with high rates of poverty police practices that target these regions, and mass incarceration, there is far more violent crime in central metropolitan areas.

However, there are additional inferences required to conclude that high-crime areas are predominately high-black areas: (1) more crime generally occurs in inner-city urban areas than suburban and rural areas; and (2) in addition to violent crimes, African Americans are also disproportionately targeted for drug offenses.

First, “crime is particularly high in poor, minority

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1221–22.

⁸⁵ *Id.* at 1222.

⁸⁶ *Id.*

⁸⁷ *Id.* 1223–24.

neighborhoods.”⁸⁸ In addition, “[c]rime rates are generally higher in the central city of a metropolitan statistical area . . . than in the suburbs.”⁸⁹ Urban violent crime rates are 1.49 times higher than rates of suburban neighborhoods and 1.57 times higher than rates of rural areas.⁹⁰ Likewise, “property crime rates in urban areas are 1.36 times the comparable rate for suburban areas, and 1.61 times the comparable rate for rural areas.”⁹¹ Generally, “large cities have higher crime rates than smaller cities, urban areas have higher crime rates than suburb and rural areas, and poor, largely minority neighborhoods have higher crime rates than more affluent white neighborhoods.”⁹²

Second, in addition to being disproportionately arrested for violent crimes, African Americans are far more likely to be arrested for drug offenses.⁹³ Blacks make up roughly 14 percent of the United States population.⁹⁴ Whites make up 64 percent.⁹⁵ “While African-Americans account for only 17 percent of drug users nationwide, they represent 37 percent of those arrested for drug use.”⁹⁶ To make matters worse, 46 percent of all defendants convicted for drug offenses are black.⁹⁷ Meanwhile, whites “account for 82 percent of drug users yet only 62 percent of drug arrests.”⁹⁸ For marijuana specifically, “black people and white people smoke marijuana at similar rates, yet black people are 3.7 times as likely to be arrested for marijuana possession.”⁹⁹ Although whites are up to 32 percent more likely to sell marijuana, blacks are four times as likely to be arrested for distribution.¹⁰⁰

⁸⁸ Raphael & Sills, *supra* note 1, at 522.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 520.

⁹³ *Id.* at 532.

⁹⁴ *African American Statistics, BLACK DEMOGRAPHICS*, <http://blackdemographics.com/population/>.

⁹⁵ Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2015, 3:28 PM EST), http://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html.

⁹⁶ Raphael & Sills, *supra* note 9, at 532.

⁹⁷ Farbota, *supra* note 95.

⁹⁸ Raphael & Sills, *supra* note 1, at 532. The term “drug arrests,” which includes arrests for possession and distribution, encompasses more than the arrests for “drug use.”

⁹⁹ Farbota, *supra* note 95.

¹⁰⁰ Tom James, *The Failed Promise of Legal Pot*, THE ATLANTIC (May 9, 2016), <http://www.theatlantic.com/politics/archive/2016/05/legal-pot-and-the-black-market/481506/>.

To top it all off, racist policy changes made it easier to lock up African Americans behind bars for longer periods of time. “The disproportionate representation of blacks among drug arrests is linked to the increased law enforcement focus [during the 1980s and 1990s] on fighting the use of crack cocaine.”¹⁰¹ Under the infamous 100:1 ratio, a drug offender apprehended with five grams of crack cocaine used to face the same mandatory sentence as a drug offender with 500 grams of powder cocaine.¹⁰² This “was driven nearly in its entirety by the fact that blacks consume crack at a higher rate than whites.”¹⁰³ In addition to the arbitrary mandatory minimum sentences, the increased funding of police departments for anti-drug activities during the War on Drugs skyrocketed the federal prison rates for drug offenses “from 23 percent in 1980 to about 60 percent in 2000.”¹⁰⁴ Blacks bore the majority of this increase.¹⁰⁵

The bottom line is that the single most significant variable in accounting for urban crime rates is the size of the African American population. Unsurprisingly, crime is a particularly severe problem in predominately poor neighborhoods of urban areas, where African Americans are more likely to reside. In other words, high-crime areas are usually high-black areas.

C. Shedding Light on Donald Trump’s Inaccurate Assertions of African Americans in Inner Cities

Throughout the course of the 2016 presidential debates, Donald Trump repeatedly used the word “inner city” as a synonym for African Americans.¹⁰⁶ Until now, this article also seems to conflate the two. Clarification is necessary.

During the second presidential debate on October 9, 2016, Donald Trump remarked: “I would be a president for all the people—African Americans, the inner cities.” He said, “You go to the inner cities and you see it’s 45 percent poverty, African Americans now 45 percent poverty in the inner cities [sic].”¹⁰⁷ This is not the case.

¹⁰¹ Raphael & Sills, *supra* note 1, at 532

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Simone Sebastian, *Donald Trump Gets a Basic Fact Wrong About Black Americans*, THE WASHINGTON POST (Oct. 10, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/10/10/donald-trump-gets-a-basic-fact-wrong-about-black-americans/>.

¹⁰⁷ *Id.*

By 1970, more than 80 percent of African Americans lived in cities.¹⁰⁸ In recent decades, however, America's large cities have experienced a major exodus of black residents to the suburbs.¹⁰⁹ This shift has been called the "black flight."¹¹⁰ "About nine million African Americans moved to suburban areas between 1960 and 2000."¹¹¹ Black suburbanites now outnumber those living in inner cities.¹¹² "[S]uburban black Americans made up 37 percent of those in metro areas in 1990. Today, they make up 51 percent."¹¹³ Further, poverty is generally higher in rural areas.¹¹⁴ "About 37 percent of rural black residents live below the poverty line. . . ."¹¹⁵

More inaccurately, Trump misunderstands where a majority of black Americans live. "When he equates 'black' with 'inner city,' he relies on a racial stereotype that ignores more than half of the country's black residents."¹¹⁶ The section of the rural south called the "Black Belt" remains home to the most concentrated populations of African Americans in the country.¹¹⁷

So how is that high-crime areas are still more concentrated in inner cities? More importantly, how is that these areas still disparately impact African Americans?

In the large urban cities of the northern United States, "African American populations remain mostly in the neighborhoods that were left to them as a result of "white flight" that took place after the civil rights movements and the riots of the 1960s."¹¹⁸ As African Americans moved into these neighborhoods, "whites moved further away to avoid forced school integration and the threat of dropping property values."¹¹⁹

High rates of black crime continue to exist despite nationally declining crime rates nationally partially because many African Americans still live in highly segregated and deeply impoverished

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *African American Statistics*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/population/>.

¹¹⁹ *Id.*

neighborhoods.¹²⁰ Throughout the twentieth century racially segregated communities have been the norm.¹²¹ Until now, “none of these segregated spaces experienced sustained rates of violence so completely out of step with national trends.”¹²²

Although violent crime remains at an all-time low nationally, it rose slightly in 2016 with half of the increase driven by Los Angeles (up 13.3 percent) and Chicago (up 16.2 percent).¹²³ The murder rate rose about 13.1 percent in 2016—nearly half of the increase is attributable to Chicago alone.¹²⁴ Chicago is an outlier.¹²⁵ “There were 762 murders in Chicago in 2016.”¹²⁶

Homicides in Chicago “are concentrated in the segregated and poorest areas of the city, such as the South Side and the Austin vicinity.” Today, the entire south side is majority African American.¹²⁷ Thus, in 2016, Chicago “were concentrated in highly segregated pockets that are predominately black.”¹²⁸ How did this come about?

Chicago has the third largest urban Black population in the nation mostly the result of the huge influx of African Americans during both of the “Great Black Migrations” north.¹²⁹ African Americans were attracted to the northern cities railway companies, steel mills, and meatpacking industries.¹³⁰ “The Black newspaper, ‘The Chicago Defender,’ [s]pread the news to African Americans that there was a better life and plenty of jobs in Chicago.”¹³¹ The majority of blacks that moved to Chicago settled in the city’s south side where these major industries were located.¹³² “Chicago’s black belt consisted of a 30 block long stretch of

¹²⁰ Massey, *supra* note 66, at 1203.

¹²¹ Thompson, *supra* note 36.

¹²² *Id.*

¹²³ Mathew Friedman, et al., *Crime in 2016: A Preliminary Analysis*, BRENNAN CENTER FOR JUSTICE (Sept. 16, 2016), at 1, https://www.brennancenter.org/sites/default/files/publications/Crime_2016_Preliminary_Analysis.pdf.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Amanda Willis, et al., *762 Murders. 12 Months. 1 American City*, THE NEW YORK TIMES (Jan. 2, 2017), http://www.nytimes.com/interactive/2016/09/08/us/us-murder-rates.html?_r=0.

¹²⁷ *Chicago*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/cities-2/chicago/>.

¹²⁸ Willis, et al., *supra* note 126.

¹²⁹ *Chicago*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/cities-2/chicago/>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

neighborhoods on the south side of old and dilapidated housing. Much like Harlem, NY, [b]lacks were over-crowded in apartment buildings that lacked plum[b]ing and healthy sanitary conditions.”¹³³ These are the types of inner-city areas that this Note refers to; where disproportionately high rates of African Americans live, and where there are disproportionately high rates of crime.

The more fortunate middle-class African Americans led the “black flight” to the suburbs. As explained by author Robert Wadman, the “black flight” has left those remaining poor African Americans in inner-city areas without the voice and leadership of the more prosperous African American families.¹³⁴

This absence of leadership has left a problem minority class in inner cities.¹³⁵ In all inner-city neighborhood, “there is a problem minority that varies between about 12.1 percent (in San Diego, for example) and 28 percent (in Phoenix) that comes largely from the disconnected youth between ages 16 and 24.”¹³⁶ Most are out of school and many resort to crime and gangs.¹³⁷ “This culture is reinforced by contemporary conditions like poverty, racial discrimination, chronic unemployment, single parenting, and a chemically toxic, neurologically injurious environments, such as the lead paint that poisoned Freddie Gray.”¹³⁸ Overly aggressive law enforcement has continued to profile all ghetto residents as criminals.¹³⁹

Harvard professor and expert on crime trends, Dr. Robert Sampson, explains: “The cynicism and mistrust of legal institutions in poor black communities is longstanding, although recent conflicts with police have exacerbated underlying tensions.”¹⁴⁰ Thus, “[f]lare-ups and spikes in violence are occurring in predictable places.”¹⁴¹ Dr. Sampson believes that the concentration of poverty and segregation in certain areas

¹³³ *Id.*

¹³⁴ WADMAN, *supra* note 60, at 69.

¹³⁵ Orlando Patterson, *The Real Problem With Americas' Inner Cities*, THE NEW YORK TIMES (May 9, 2015), http://www.nytimes.com/2015/05/10/opinion/sunday/the-real-problem-with-americas-inner-cities.html?_r=0.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Haeyoun Park & Josh Katz, *Murder Rates Rose in a Quarter of the Nation's 100 Largest Cities*, THE NEW YORK TIMES (Sept. 9, 2016), http://www.nytimes.com/interactive/2016/09/08/us/us-murder-rates.html?_r=0.

¹⁴¹ *Id.*

of cities relate to city-level differences in rates of violence.¹⁴² Princeton Sociology Professor Wadman theorizes that poverty and black-white segregation are the primary explanations for the disproportionately high rates of crime in urban black America.¹⁴³ He has good reason to postulate this thesis.

Although many crime experts warn not to read too much into recent crime statistics,¹⁴⁴ the statistics are hard to ignore. Out of the cities with the largest black-white segregation rates, Detroit is second highest, New York City is third, and Chicago ranks fourth highest in the country.¹⁴⁵ When looking at the cities with the highest murder rates, Chicago ranks first, New York City ranks second, Detroit and Philadelphia are tied for fifth highest (Philadelphia has the thirteenth highest black-white segregation rate).¹⁴⁶ While these statistics are eyebrow raising, the black-white segregation rates do not explain everything. Not all of the cities with the highest rates of black-white segregation have the highest crime rates.¹⁴⁷ Historian and author Heather Ann Thompson argues that “neither racial segregation nor the racial poverty gap can account for the degree to which poor communities of color are traumatized today, . . .”¹⁴⁸ Racial segregation is largely ahistorical—it has long been persistent in the United States.¹⁴⁹ “What is altogether new,” she explains, “is the extent to which these communities are devastated by the working of our nation’s criminal justice system in general and by mass incarceration in particular.”¹⁵⁰

As explained in the next section, the legal landscaped is stacked against African Americans.

¹⁴² *Id.*

¹⁴³ Massey, *supra* note 66, at 1203.

¹⁴⁴ Park & Katz, *supra* note 140.

¹⁴⁵ *American Urban Segregation*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/geography/segregation/>.

¹⁴⁶ These rankings are based on 2016 projections and are incomplete. Friedman, et al., *supra* note 123, at 6.

¹⁴⁷ *See American Urban Segregation*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/geography/segregation/>; *see also* Friedman, et al., *supra* note 123, at 6.

¹⁴⁸ Thompson, *supra* note 36.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

II. THE SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE IS OVERTLY RACIST

The United States Supreme Court's Fourth Amendment jurisprudence makes it easier for police officers to arrest black people.

In *Whren v. United States*, the Court held that the subjective motivations of police officers are irrelevant in constitutional reasonableness analysis.¹⁵¹ The Court has given the proverbial wink and nod to police officers who wish to instigate a pretextual stop.¹⁵² As long as officers have probable cause or reasonable suspicion, courts must turn a blind eye to blatantly racist, pretextual *Terry* stops.¹⁵³ As a result of the holding in *Whren*, courts now invite police to follow black people around until they inevitably violate some law.¹⁵⁴ The legalization of racial profiling increases the frequency of law enforcement officers' engagement with black people. This inevitably leads to more violent confrontations between police and African Americans, and likewise, greater incidences of police brutality and the use of deadly force against blacks. Furthermore, considering a "high-crime area" helps justify an officer's decision to seize an individual, the Court has provided step-by-step directions for legally intruding on a black person's privacy rights.

The Court first used the term "high-crime area" as a contributing factor for reasonable suspicion in *Adams v. Williams*.¹⁵⁵ The issue on appeal was whether the Fourth Amendment allows a police officer, acting only on a tip from an informant, to approach a person and remove a weapon concealed in the person's waistband.¹⁵⁶

In *Williams*, a police officer received a tip from an informant that Williams was sitting in a nearby car, carrying narcotics, and concealing a

¹⁵¹ 517 U.S. 806, 813 (1996).

¹⁵² There is a limited exception for administrative or inventory searches. *See id.* at 818–19.

¹⁵³ *See id.*

¹⁵⁴ This is readily apparent when examining the frequency of traffic stops by race. There is empirical evidence that police stop black drivers at a higher rate. In the year 1999, police stopped roughly 10.4 percent of white licensed drivers at least once, but stopped roughly 12.3 percent of black licensed drivers. This data is even more damning considering that African American drivers travel 2,200 fewer miles per year than white drivers, African American households are considerably less likely to own a car, and own fewer cars on average than white households. African American vehicles are also significantly more likely to be searched. Raphael & Sills, *supra* note 1, at 531.

¹⁵⁵ 407 U.S. 143, 144, 147 (1972).

¹⁵⁶ *Id.* at 143.

gun in his waistband.¹⁵⁷ The officer approached the car, tapped on the window, and asked Williams to open the door.¹⁵⁸ When Williams rolled down the window instead of opening the door, the officer reached into the car and removed a revolver from Williams' waistband.¹⁵⁹ Although the officer could not see the revolver prior to grabbing it, the revolver was in the location where the informant claimed it would be.¹⁶⁰ Writing for the majority, Justice Rehnquist first stated that the officer "was alone early in the morning on car patrol duty in a *high-crime area* of Bridgeport, Connecticut."¹⁶¹ And once again, in conclusory fashion, Justice Rehnquist articulated that, "While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a *high-crime area* at 2:15 in the morning, [the officer] had ample reason to fear his safety."¹⁶²

Justice Rehnquist never expressly articulated that the high-crime area of Bridgeport, Connecticut was a contributing factor that helped justify the police officer's search of Williams's waistband. Nor did Justice Rehnquist explain what constitutes a high-crime area. Likewise, the Second Circuit's opinion in *Williams* noted that the officer was "patrolling alone in a section of Bridgeport noted for its high incidence of crimes of various kinds."¹⁶³ The Second Circuit's opinion also did not state explicitly that the supposed high-crime area of Bridgeport helped justify the officer's actions. Nonetheless, it became clear a few years later that Justice Rehnquist's use of term "high-crime area" in the Majority opinion was an instruction to lower courts that the characteristics of a neighborhood may help justify a search and/or seizure.

*Brown v. Texas*¹⁶⁴ was the next Supreme Court decision to mention "high-crime area." In that case, Brown was arrested under a Texas statute, which makes it a crime for a person to refuse to identify himself to an officer "who has lawfully stopped him and requested information."¹⁶⁵ The Court first explained that stopping a person to ask

¹⁵⁷ *Id.* at 145.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (emphasis added).

¹⁶² *Id.* at 147–148 (emphasis added).

¹⁶³ *Williams v. Adams*, 436 F.2d 30, 31 (2d Cir. 1970), *rev'd en banc; aff'd Adams v. Williams*, 407 U.S. 143 (1972)).

¹⁶⁴ 443 U.S. 47 (1979).

¹⁶⁵ *Id.* at 49.

for their name and address pursuant to the statute constitutes a seizure.¹⁶⁶ The seizure was not justified by reasonable suspicion.¹⁶⁷ “The area of El Paso where appellant was stopped has a *high incidence of drug traffic*. However, the officers did not claim to suspect appellant of any specific misconduct, nor did they believe that he was armed.”¹⁶⁸ Thus the Court made clear that something more is needed to constitute reasonable suspicion than simply the presence of an individual in a high-crime area.¹⁶⁹ “The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, appellant’s activity was no different from the activity of other pedestrians in that neighborhood.”¹⁷⁰ Taken to its logical conclusion, while the Court declared that standing in a high-crime area on its own is not enough to constitute reasonable suspicion, the Court left open the possibility that a high-crime area coupled with some additional “reasonable, articulable suspicion” of wrongdoing, may be enough to justify a seizure of the person.¹⁷¹

Notably, Brown was a black male in his mid-20s.¹⁷² “The officer admitted that many blacks are found in that area of town”¹⁷³ But the officer had not seen Brown in that area before, and wanted to ask for his name.¹⁷⁴ If the Supreme Court allowed the officer to seize Brown on this basis alone, it would shock the conscience. Therefore, at first blush, the Court’s majority opinion in *Brown* seems like a reasonable decision, since it explicitly rejected an officer’s ability to detain an individual based on the arbitrary justification of a black person’s irregular presence in a high-crime area. However, by not outright rejecting the high-crime area factor to help validate a police officer’s decision to detain a black person, the Court opened the door to permitting arbitrary detentions of African Americans based on the location where poor black people are more likely to reside. This became explicitly clear in *Illinois v. Wardlow*,¹⁷⁵ where the Court for the first time elaborated on the weight afforded to a high-crime

¹⁶⁶ *Id.* at 51–52.

¹⁶⁷ *Id.* at 52.

¹⁶⁸ *Id.* at 49 (emphasis added).

¹⁶⁹ *Id.* at 52.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 51–52.

¹⁷² Brief for Appellant at 24, 27, 28, *Brown v. Texas*, 443 U.S. 47 (1979) (No. 77–6673), 1978 WL 207192, at *7.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 528 U.S. 119 (2000).

area factor.

1. *Sam Wardlow*

Sam Wardlow, a 44-year old black man,¹⁷⁶ was standing in the 11th District of Chicago¹⁷⁷ around noon.¹⁷⁸ As a four-car, “special operations” police caravan drove by, an officer in the fourth car of the caravan noticed Wardlow holding an opaque bag, looking in the direction of the officers, and then fleeing.¹⁷⁹ The officers in the fourth vehicle observed Wardlow run down an alleyway, eventually cornering him on the street.¹⁸⁰ Officer Nolan got out of the vehicle, “immediately conducted a protective patdown search for weapons,” including a patdown of the opaque bag that Wardlow was carrying.¹⁸¹ Officer Nolan felt an object similar to the shape of a gun; he then opened the bag and found a handgun.¹⁸² Wardlow moved to suppress the handgun, arguing that the patdown constituted an unreasonable search and seizure. An Illinois appellate court granted the motion¹⁸³ and the Supreme Court of Illinois affirmed.¹⁸⁴ In a 5-4 decision, the United States Supreme Court reversed.

Writing for the majority, Justice Rehnquist began his opinion by stating, “Respondent Wardlow fled upon seeing police officers patrolling an area known for *heavy narcotics trafficking*.”¹⁸⁵ A few sentences later, Rehnquist once again noted that the four-car caravan was “converging on an area known for heavy narcotics trafficking in order to investigate drug transactions.”¹⁸⁶ After describing Wardlow’s flight, Rehnquist credited the officer’s “protective patdown search” for weapons of Wardlow’s bag

¹⁷⁶ Todd Oppenheim, *The Bad Court Ruling That Let Police Chase Freddie Gray*, THE WASHINGTON POST (Dec. 21, 2015), https://www.washingtonpost.com/opinions/the-bad-court-ruling-that-let-police-chase-freddie-gray/2015/12/21/28bc1e54-a78d-11e5-9b92-dea7cd4b1a4d_story.html.

¹⁷⁷ *People v. Wardlow*, 183 Ill.2d 306, 308 (1998), *rev’d sub nom. Illinois v. Wardlow*, 528 U.S. 119 (2000).

¹⁷⁸ Brief for Respondent, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 607000, at *2.

¹⁷⁹ *Wardlow*, 528 U.S. at 121–22.

¹⁸⁰ *Id.* at 121.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *People v. Wardlow*, 287 Ill.App.3d 367 (1997), *rev’d sub nom. Illinois v. Wardlow*, 528 U.S. 119 (2000).

¹⁸⁴ *People v. Wardlow*, 183 Ill.2d 306 (1998), *rev’d sub nom. Illinois v. Wardlow*, 528 U.S. 119 (2000).

¹⁸⁵ *Wardlow*, 528 U.S. at 121 (emphasis added).

¹⁸⁶ *Id.*

and person, because in the officer's experience, "it was common for there to be weapons in the near vicinity of narcotics transactions."¹⁸⁷

After once again mentioning that the four-car caravan was "converging on an area known for heavy narcotics trafficking," Rehnquist noted that the "officers expected encountering a large number of people in the area, including drug customers and individuals as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee."¹⁸⁸

First, citing *Brown v. Texas*, Rehnquist affirmed that an "individual's presence in an area of expected criminal activity, standing alone, is not enough to support reasonable, particularized suspicion that the person is committing a crime."¹⁸⁹ But citing *Adams v. Williams*, Rehnquist elaborated that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."¹⁹⁰ As Rehnquist wrote for the majority in *Williams*, he explained that the stop in that case "occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis."¹⁹¹

Next, Justice Rehnquist expounded, "Headlong flight—wherever it occurs—is the consummate act of evasion . . ."¹⁹² Explaining that Wardlow's "unprovoked," "headlong flight," constituted extreme "nervous, evasive" behavior, Rehnquist gave little credence to the possible innocent reasons why a person might run upon seeing the police.¹⁹³ Instead, Rehnquist wrote, "*Terry* accepts the risk that officers may stop innocent people" reasoning that a "*Terry* stop is a far more minimal intrusion" than an arrest.¹⁹⁴ Therefore, Rehnquist found no Fourth Amendment violation in the officer's search and seizure of Wardlow's bag and person.¹⁹⁵

Justice Rehnquist's holding in *Wardlow* did not expressly state that a person's unprovoked, headlong flight in a high-crime area always constitutes reasonable suspicion of illegal activity. At least one circuit,

¹⁸⁷ *Id.* at 122.

¹⁸⁸ *Id.* at 124.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 124–25.

¹⁹⁴ *Id.* at 126.

¹⁹⁵ *Id.*

however, has interpreted *Wardlow* to stand for precisely that proposition.¹⁹⁶

What is most troubling about Justice Rehnquist's majority opinion is that he, along with four other justices,¹⁹⁷ allowed the prosecution to satisfy the "high-crime area" designation based *solely* on the subjective testimony of a single officer.¹⁹⁸

The appellate court found that the record was "simply too vague to support the inference that [Wardlow] was in a location with a high incidence of narcotics trafficking . . ." ¹⁹⁹ The record did not reveal the "precise location of the area known by the officers to have a high incidence of narcotics trafficking."²⁰⁰ The officer who stopped and frisked Wardlow testified only that the caravan was headed somewhere in the general area of the 11th District that had "high narcotics traffic."²⁰¹ The officer, however, did not state that the building in front of which Wardlow was standing was known to be a location where drugs were sold.²⁰² "From the evidence elicited at the hearing on the motion to suppress, it appears that the officers were simply driving by, on their way to some unidentified location, when they noticed the defendant . . ."²⁰³ Therefore, the appellate court found that there was "no support in the record for the contention that defendant was in a high-crime location. . . ."²⁰⁴

The Supreme Court of Illinois rejected the appellate court's finding that the record was "simply too vague to support the inference that Wardlow was in a high-crime area."²⁰⁵ The majority stated, "[W]e believe

¹⁹⁶ See, *United States v. Smith*, 633 F.3d 889, 893 (9th Cir. 2011) ("The Supreme Court has held that a person's 'headlong,' 'unprovoked' flight upon seeing a police officer, when it occurs in a high-crime neighborhood, is sufficient to establish reasonable suspicion that the person is involved in criminal activity.") (citing *Wardlow*, 528 U.S. at 124–25).

¹⁹⁷ Justices O'Connor, Scalia, Kennedy, and Thomas joined the Rehnquist Majority Opinion.

¹⁹⁸ Hannah H. Wisniewski, *It's Time to Define High-Crime Area: Using Statistics In Court to Support An Officer's Subjective "High-Crime Area" Designation*, 38 *New Eng. J. on Crim. & Civ. Confinement* 101, 103 (2012).

¹⁹⁹ *People v. Wardlow*, 287 Ill.App.3d 367, 371 (1997), *rev'd sub nom.* *Illinois v. Wardlow*, 528 U.S. 119 (2000).

²⁰⁰ *Id.* at 370.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 370–371.

²⁰⁴ *Id.* at 371.

²⁰⁵ *People v. Wardlow*, 183 Ill.2d 306, 310–311 (1998), *rev'd sub nom.* *Illinois v. Wardlow*, 528 U.S. 119 (2000).

[the officer's] uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area."²⁰⁶ The Supreme Court of Illinois affirmed the appellate court's holding, however, finding that headlong flight, even in a high-crime area, did not constitute reasonable suspicion.²⁰⁷

Wardlow's brief to the United States Supreme Court vehemently argued that there was insufficient evidence to support a high-crime area designation.²⁰⁸ His brief argued that there was "no quantitative verification that identified the precise location or boundaries of the area known by the officers to have a high incidence of narcotics trafficking."²⁰⁹ It pointed out that the officers were not investigating a specific place and the police officer's testimony only indicated that the officers were headed "somewhere in the general area" where Wardlow was standing.²¹⁰ Thus, Wardlow argued that this undefined high-crime area amounted to the entire 11th District of Chicago, a neighborhood with a population of roughly 100,000 people, where large numbers of innocent persons live and work.²¹¹ Nonetheless, Justice Rehnquist's majority opinion accepted the officer's subjective "high-crime area" designation, without defining high-crime area factor.²¹² Since *Wardlow*, lower courts have been left to determine for their selves what constitutes a high-crime area.²¹³

The majority opinion also held that if an individual flees from police in a high-crime area, courts may infer a greater consciousness of guilt. This means that if a white person runs from the police in a suburb, officers must usually let that person flee, absent other evidence of wrongdoing.²¹⁴ But if a black person flees from the police in a high-crime, inner-city neighborhood, police officers may be entitled to pat him or her

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 316–317.

²⁰⁸ Brief for Respondent, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 607000, at *31–35.

²⁰⁹ *Id.* at *32.

²¹⁰ *Id.*

²¹¹ *Id.* at *34

²¹² Apparently, the entire 11th District of Chicago, even at noon, is a high-crime area if an officer believes it to be.

²¹³ Andrew Dammann, *Categorical and Vague Claims That Criminal Activity is Afoot: Solving the High-Crime Area Dilemma Through Legislative Action*, 2 TEX. A&ML. REV. 559, 562 (2015).

²¹⁴ "[C]ourts have generally concluded that '*Wardlow* cannot be used to justifying everyone who flees from police.'" *United States v. Navedo*, 694 F.3d 463, 471 (3d Cir. 2012) (collecting cases).

down on that basis alone. This was the primary reason why four justices²¹⁵ dissented in *Wardlow*.²¹⁶ Writing for the dissent, Justice Stevens explained, “because many factors providing innocent motivations for unprovoked flight are concentrated in high-crime areas, the character of the neighborhood arguably makes an inference of guilt *less appropriate*, rather than more so.”²¹⁷ Justice Stevens listed many innocent reasons why one may choose to flee from the police, but found that minorities residing in high-crime areas are especially susceptible to innocent flight from police:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence. For such a person, unprovoked flight is neither “aberrant” nor “abnormal.”²¹⁸

Justice Rehnquist’s response to this was that “*Terry* accepts the risk that officers may stop innocent people.”²¹⁹ By using the “high-crime area” factor, however, the majority announced that the Court is *more willing* to accept the risk that police stop innocent *black* people. This leads to more street encounters between police and African Americans, which lead to more frequent incidents of police brutality and killings. Indeed, young black males are 21 times more likely to be killed by police than their white counterparts are.²²⁰ It is time for the Court to reexamine the holding in *Wardlow* so that incidents like the police officers’ murder of Freddie Gray occur much less frequently.²²¹

2. *Freddie Gray*

Baltimore police officers admitted that they did not have probable cause to believe that Freddie Gray—a 25-year-old black man—was engaged in criminal activity.²²² “But they still insist they had a reasonable

²¹⁵ Justice Stevens concurred in part and dissented in part. Justices Souter, Ginsburg, and Breyer joined Stevens’ dissent.

²¹⁶ *Wardlow*, 528 U.S. at 139 (Stevens, J. dissenting).

²¹⁷ *Id.* (emphasis in original).

²¹⁸ *Id.* 131–32.

²¹⁹ *Wardlow*, 528 U.S. at 126.

²²⁰ Oppenheim, *supra* note 176.

²²¹ *See id.*

²²² Carlos Miller, *Freddie Gray Death Exposes Constitutional Disparity of “High Crime Areas,”* A FEW BAD APPLES (April 24, 2015),

suspicion that he committed a crime after he made eye contact with them and ran away, prompting three officers to chase him on their bicycles and detain him where two witnesses recorded Gray screaming in pain as cops dragged him into the back of a police van, never to be seen conscious again.”²²³ In fact, under the Supreme Court’s Fourth Amendment jurisprudence, the officers indeed had reasonable suspicion to chase after and seize Freddy Gray because Gray was supposedly in a high-crime area of Baltimore, Maryland.²²⁴ The headlong flight from police officers, combined with the high-crime area factor, made the seizure that led to his senseless death constitutional.²²⁵ None of the six police officers involved in his death were convicted of any crimes²²⁶—despite Freddie Gray having shown no visible signs of criminal activity and despite the officers leaving him unfastened in the back of a police van.²²⁷

We will never know the reasons why Freddie Gray took off running “because he was never given a chance to articulate those reasons before he died on April 19, [2015] with an autopsy determining that his voice box was crushed and 80 percent of his spine was severed.”²²⁸ According to Baltimore police officer Joe Crystal, who was forced to resign from the department, the entire city of Baltimore is considered a high-crime area.

Baltimore experienced a dramatic spike in violence in the year 2015.²²⁹ Some experts attribute this dramatic increase of violence in Baltimore to a flood of riots.²³⁰ “The death of Freddie Gray, a young black man who sustained a fatal spinal cord injury in police custody, had set off the city’s worst riots since the death of the Rev. Dr. Martin Luther King Jr.”²³¹

As evidenced by the death of Freddie Gray, the Supreme Court’s

<https://photographyisnotacrime.com/2015/04/24/freddie-gray-death-exposes-constitutional-disparity-of-so-called-high-crime-areas/>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*; *Wardlow*, 528 U.S. at 124–25.

²²⁶ Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes With Zero Convictions Against Officers*, THE BALTIMORE SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>.

²²⁷ Miller, *supra* note 222.

²²⁸ *Id.*

²²⁹ Park & Katz, *supra* note 140.

²³⁰ *Id.*

²³¹ *Id.*

opinion in *Wardlow* have led to greater community-police tensions due to the ease in which a police officer can seize an African-American constitutionally. Along with the distrust of law enforcement, more frequent police contacts with African-Americans lead to greater incidents of violence.

III. LOWER COURTS HAVE CURTAILED THE “HIGH-CRIME AREA” FACTOR

The Ninth Circuit has cautioned that:

The citing of an area as “high-crime” requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race and ethnicity. District courts must carefully examine the testimony of police officers in cases such as this, and make a fair and forthright evaluation of the evidence they offer, regardless of the consequences. [Courts] must be particularly careful to ensure that a “high crime” area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.²³²

Continuing, the Ninth Circuit stated that, “the use of the term ‘high crime area’ as a factor in reasonable suspicion analysis may well be an invitation to trouble.”²³³ It elaborated that, “more than mere war stories are required to establish the existence of high-crime area.”²³⁴ Rather, courts “should examine with care the specific data underlying each assertion. Moreover, both courts and law enforcement must be careful not to tar people with the sins of their neighbors.”²³⁵

Likewise, the First Circuit has curtailed the use of the “high-crime area” factor by creating a “nexus” requirement, among additional

²³² *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc).

²³³ *Id.* at 1139, n.32.

²³⁴ *Id.*

²³⁵ *Id.*

constraints.²³⁶ The First Circuit summarized high-crime area evidence as:

(1) The nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case; . . . (2) limited geographic boundaries of the “area” or “neighborhood” being evaluated; . . . and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue²³⁷

While courts have not gone so far as to create bright-line rules requiring the use of actual statistics to support a high-crime area designation, courts are indeed moving towards the use of statistics when they make this determination.²³⁸ “But even when courts address the *high-crime area* claim, it often results in judicial notice confirming the officers’ *ad-hoc* [sic] determination that the suspect was in a *high-crime area*.”²³⁹

Multiple law review articles have advocated for the bright-line statistics requirement, explaining the ease with which one can retrieve arrest data through online police department data banks. This would allow one to designate a specified area by incident type, circumscribe the boundaries of the area, and limit the temporal range of the data.²⁴⁰ In the same vein, another law review article suggests that city councils, rather than courts and police officers, should be responsible for labeling areas as “high crime.”²⁴¹ This would allow for uniformity and remove police officer’s subjective beliefs from the calculus.²⁴²

While certainly the use of actual hard data, and a uniform objective standard is preferable to the subjective high-crime area designations of individual police officers—these proposed solutions miss

²³⁶ United States v. Wright, 485 F.3d 45, 53–54 (1st Cir. 2007).

²³⁷ *Id.*

²³⁸ Wisniewski, *supra* note 198, at 123 (citing Bonner, 363 F.3d 213, 216 (3d Cir. 2004); United States v. Swain, No. 5:07-cr-00160, 2007 WL 7127027, at *3 (S.D. W. Va. 2007).

²³⁹ Dammann, *supra* note 213, at 562–63 (emphasis in original).

²⁴⁰ Wisniewski, *supra* note 108, at 104; Andrew G. Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing High-Crime Areas*, 63 *Hastings L.J.* 179, 181–82 (2011); Andrew G. Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 *Am. U. L. Rev.* 1587, 1595 (2008).

²⁴¹ Dammann, *supra* note 213, at 564.

²⁴² *Id.* at 566.

the point. The major concern with the use of the high-crime area factor is not simply that we should only use this designation in areas that are objectively high-crime areas. Rather, the main concern is that high-crime areas are predominately high-black areas, and thus overly policing these areas disparately impact African Americans. Using a high-crime area factor is *ipso facto* problematic. The only viable solution, therefore, is to dump the high-crime area factor entirely.

IV. THE ONLY VIABLE SOLUTION: DUMP THE HIGH-CRIME AREA FACTOR

The majority opinion in *Wardlow* has directed officers to infer guilt by location. “*Wardlow* created a constitutionally significant factor unlike any other factor in the reasonable-suspicion analysis. Prior to *Wardlow*, each ‘specific articulable fact’ in the reasonable-suspicion analysis had to be peculiar to the incident that precipitated the stop and frisk.”²⁴³ The use of a high-crime area factor flies in the face of the Court’s long-held requirement for “specific, articulable facts” of criminal behavior because it requires no individualized suspicion to infer guilt.

During a campaign event on September 20, 2016, Donald Trump proposed nationwide stop and frisk to address violence in the black community.²⁴⁴ “I would do stop and frisk,” remarked the President, “We did it in New York. It worked incredibly well . . .” Apparently, none of Trump’s campaign staff alerted him that the New York City Police Department (“NYPD”) stop and frisk policy was declared unconstitutional in 2013.²⁴⁵

In *Floyd v. City of New York*, black and Hispanic plaintiffs brought a successful section 1983 action against the NYPD.²⁴⁶ They argued successfully that, (1) they were stopped and frisked without reasonable suspicion, in violation of the Fourth Amendment, and (2) they were singled out by their race due to a discriminatory NYPD policy, in violation of the Equal Protection Clause of the Fourteenth Amendment.²⁴⁷ The data revealed that the NYPD “made 4.4 million stops between

²⁴³ Dammann, *supra* note 213, at 560–61.

²⁴⁴ Jenee Desmond-Harris, *Trump Wants to Recreate New York’s Unconstitutional, Ineffective Stop-and-Frisk Program*, VOX (Sept. 22, 2016), <http://www.vox.com/identities/2016/9/22/13010782/trump-stop-and-frisk-black-communities-chicago-new-york-city>.

²⁴⁵ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 556.

January 2004 and June 2012. Over 80% of these 4.4 million stops were of blacks or Hispanics.”²⁴⁸ Out of the 4.4 million stops, 52 percent were black, despite blacks accounting for only 23 percent of New York City’s residents in 2010.²⁴⁹ Fifty-two percent of all stops were followed by a protective frisk, but weapons were found in only 1.5 percent of these frisks.²⁵⁰ Police officers seized weapons in only 1 percent of the stops of blacks, but in 1.4 percent of the stops of whites.²⁵¹ Officers seized contraband in only 1.8 percent of the stops of blacks, but in 2.3 percent of the stops for whites.²⁵² In the forms requiring officers to state their justification for the stops, officers checked the box marked “high-crime area” in 55 percent of all forms.²⁵³ The two most checked boxes were high-crime area and furtive movements.²⁵⁴ “Both ‘Furtive Movements’ and ‘High-Crime Area’ are weak indicators of criminal activity. For the years 2004 to 2009, stops were 22% more likely to result in arrest if ‘High Crime Area’ was *not* checked.”²⁵⁵

What these findings reveal is that police officers are more likely to act with explicit or implicit racial bias when they are in a supposed “high-crime area.” Thus, even if we limit the high-crime area designation to objectively verifiable criminal hot spots, this does nothing to protect the people who live in those areas from arbitrary police intrusions of privacy rights. Rather, a high-crime area factor exacerbates community-police tensions that are already present in those communities, contributing to even greater resentment for the law, increasing rebellious behavior, and inflicting devastating economic consequences to already poor communities.

First, regarding increased racial bias by police officers, there is empirical evidence showing that police officers are more susceptible to seeing phantom furtive movements if the suspect is black.²⁵⁶ “[A]necdotal evidence strongly suggests that most victims of phantom-reach shootings

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 558.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 559.

²⁵² *Id.*

²⁵³ *Id.* at 574.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 575 (emphasis in original).

²⁵⁶ David J. Krajicek, *The Phantom Waistband Maneuver: When Police Shoot Unarmed Black Men*, ALTERNET (Oct. 2, 2015), <http://www.alternet.org/civil-liberties/phantom-waistband-maneuver-when-police-shoot-unarmed-black-men>.

are black men or boys.”²⁵⁷ This suggests that police officers “may ‘see’ guns that don’t exist because their experiences convince them that an African American male they perceive to be an adversary is likely to be armed.”²⁵⁸ This would only be exacerbated if police officers know or believe that they are in a high-crime area, because they are already anticipating more crime, and have the benefit of knowing that their actions are more likely to be justified as “reasonable” since courts must consider the characteristics of the neighborhood.²⁵⁹ “If you are in a part of town with a high crime rate, your brain may well predict a weapon.”²⁶⁰ Instead, if courts refuse to accept a justification for a stop or seizure based in part on a high-crime area factor, this would encourage police officers to be more careful before acting on possible misperceptions and impulses.

Next, if community members know their neighborhood is labeled as a high-crime area, they are more likely to distrust law enforcement. This may result in increased community-police tensions and resentment for the law. “Residents in those neighborhoods may believe that different rules apply because of race. This perceived discriminatory treatment both undermines the belief that the legal system is fair, and disrupts other social organizing structures in a community.”²⁶¹

Finally, communities that are stigmatized by a high-crime area designation experience severe economic consequences. “There are direct economic costs, including less economic development, lower real estate values, increased social disorganization, and reduced opportunities for employment.”²⁶² Further, high crime labels “create a destructive feedback loop in which property values decline, causing areas to become less viable socially.”²⁶³ This actually leads to more crime. “[I]ncreasing crime rates follow the wide-scale application of ‘criminal area’ labels to specific neighborhoods, almost encouraging crime.”²⁶⁴

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Ferguson, *supra* note 240, at 217.

²⁶² *Id.* at 230.

²⁶³ *Id.*

²⁶⁴ *Id.*

V. THE HIGH-CRIME AREA FACTOR POTENTIALLY VIOLATES THE EQUAL PROTECTION CLAUSE

To succeed on an Equal Protection Clause challenge for a discriminatory policy under a disparate impact theory, it is not enough to show that the high-crime area factor disproportionately affects African Americans. Rather, one must show that its use by police officers is intentionally discriminatory.²⁶⁵ This is required because a high-crime area factor is facially neutral. Bringing a facial challenge to the high-crime area factor would be very difficult to mount successfully.²⁶⁶ To stand a chance of prevailing, practitioners would have to bring an as-applied challenge on behalf of a black or Hispanic defendant (although it would be easier on behalf of a black defendant) whose search and/or seizure was justified at least in part by a high-crime area factor. *Floyd* has potentially paved the way for such a challenge.²⁶⁷

There are at least three ways²⁶⁸ that a criminal defendant or civil plaintiff can prove intentional discrimination in violation of the Equal Protection Clause, only one of which is relevant here: showing that the facially neutral “high-crime area” justification is intentionally discriminatory, and that its classification does not survive strict scrutiny.²⁶⁹ “Because there is rarely direct proof of discriminatory intent, circumstantial evidence of such is permitted. The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point.”²⁷⁰ The party asserting the claim must show that the police “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁷¹

²⁶⁵ See *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

²⁶⁶ See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (expounding the “no set of circumstances” test for a facial challenge).

²⁶⁷ *Floyd v. City of New York*, 959 F.Supp.2d 540, 560 (S.D.N.Y. 2013).

²⁶⁸ The three methods are: (1) “an express classification based on race that does not survive strict scrutiny;” (2) “the application of facially neutral criminal laws or law enforcement policies ‘in an intentionally discriminatory manner;” or (3) “a facially neutral policy that has an adverse effect and was by discriminatory animus.” *Id.* at 660–1.

²⁶⁹ *Id.* at 570–71. The high-crime area factor easily survives rational basis review because its use is rationally related to the government’s interest in protecting public and police officer safety in high-crime neighborhoods. Therefore, one would need to show intentional discrimination.

²⁷⁰ *Id.* at 558.

²⁷¹ *Id.* at 571.

The findings by the court in *Floyd* reveal that police officers used the high-crime area designation for the *purpose* of stopping blacks and Hispanic people—not merely in spite of blacks and Hispanics being the primary residents of high-crime neighborhoods. “[B]lacks and Hispanics are more likely to be stopped than whites within precincts and census tracts, even after controlling for the racial composition, crime rate, patrol strength, and various socioeconomic characteristics of the precincts or census tracts where the stops take place.”²⁷² This result is not justified by racist explanations such as African Americans’ propensity for committing crime. Indeed, “the odds of a stop resulting in any further enforcement action were 8% *lower* if the person stopped was black than if the person stopped was white. In addition, the greater [the] black population in a precinct, the less likely that a stop would result in a sanction.”²⁷³ The findings led the court to conclude that “blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites.” This shows that police officers use “high-crime area” as a pretext for stopping black people, despite having no other articulable justification.

“Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the [government] to show that the same result would have been reached even without consideration of race.”²⁷⁴ It would be difficult, however, for the government to justify the police officers’ actions. “[B]lacks and Hispanics are overstopped [sic] even after controlling for deployment to high crime areas.”²⁷⁵ The government will be unable to rebut this presumption by pointing to the racial composition of the criminal population because the reasoning is circular. “[T]he racial composition of the people stopped by the NYPD resembles what the NYPD perceives to be the racial composition of the criminal population *because that is why they were stopped.*”²⁷⁶

If a court finds that police officers’ use of the high-crime area designation is intentionally discriminatory, this triggers strict scrutiny. To survive strict scrutiny, the government would need to show that the use of the high-crime area factor is necessary to achieve a compelling government interest.²⁷⁷ The government has a compelling interest to

²⁷² *Id.* at 589.

²⁷³ *Id.* at 560.

²⁷⁴ *Id.* at 572 (internal citations and quotation marks omitted).

²⁷⁵ *Id.* at 587.

²⁷⁶ *Id.* at 588.

²⁷⁷ *See id.* at 663.

protect public and officer safety in high-crime areas. It would be hard pressed, however, to show that the high-crime area factor is the least restrictive alternative or even that it is narrowly tailored.

In *Floyd*, the plaintiffs “offered evidence that the High Crime Area checkbox has been interpreted so broadly by at least some officers that it would contribute very little to the justification for a stop.”²⁷⁸ The plaintiff’s expert showed “that the rate at which officers check High Crime Area in a precinct or census tract is roughly 55%, regardless of the amount of crime in the precinct or census tract as measured by crime complaints.”²⁷⁹ Additionally, evidence showed that one officer “checked both High Crime Area and Time of Day on 75% of the forms, despite the stops being widely geographically and temporally dispersed.”²⁸⁰ This is clear-cut evidence that that “high-crime area” designation is not narrowly tailored to specific locations with objectively verifiable high rates of crime. Rather, it tends to show that “high-crime area” is just a pretext for stopping black people.

Although the constitutionality of the high-crime area factor was not a question before the court in *Floyd*, Judge Shira Scheindlin stated: “I recognize that the police will deploy their limited resources to high crime areas. This benefits the communities where the need for policing is greatest. But the police are not permitted to target people for stops based on their race.”²⁸¹

VI. CONCLUSION

There is nothing in the Constitution that stops police departments from deploying their limited resources to high-crime areas. There is no need, however, for courts to make it even easier than it already is for police officers to stop and frisk black people. Police officers are more likely to arbitrarily stop blacks in high-crime areas. This leads to further community-police tensions in high-crime neighborhoods, which leads to further crime.

High rates of black crime continue to exist despite nationally declining crime rates.²⁸² President Donald Trump has said that crime is “out of control” and that decades of progress are now being reversed.²⁸³

²⁷⁸ *Id.* at 581.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 582.

²⁸¹ *Id.* at 562–63.

²⁸² Massey, *supra* note 66, at 1203.

²⁸³ Park & Katz, *supra* note 140.

Similar to how Richard Nixon capitalized on white voters' fear of the civil rights movement in the 1960s, Donald Trump successfully exploited white constituents' anger with eight years of having a black president and by creating a false portrayal of increasing crime rates—the need to “Make America Great Again.”

When Colin Kaepernick, quarterback of the San Francisco 49ers, began an infamous protest by kneeling during the National Anthem before the start of each NFL game in 2016,²⁸⁴ it drew national ire as many Americans were appalled by his actions. How could someone disrespect the national anthem of this great country? Perhaps Colin Kaepernick recognizes that the racial caste system still exists in America today.²⁸⁵ It just operates in more discreet ways.

²⁸⁴ Steve Wyche, *Colin Kaepernick Explains Why He Sat During the National Anthem*, NFL.COM (Aug. 27, 2016), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

²⁸⁵ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New York: New Press 2010).