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The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis [pdf]

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The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis [pdf]

Abstract

This article proposes a legal framework to analyze the "high crime area" concept in Fourth Amendment reasonable suspicion challenges. Under existing Supreme Court precedent, reviewing courts are allowed to consider that an area is a "high crime area" as a factor to evaluate the reasonableness of a Fourth Amendment stop. See *Illinois v. Wardlow*, 528 U.S. 119 (2000). However, the Supreme Court has never defined a "high crime area" and lower courts have not reached consensus on a definition. There is no agreement on what a "high-crime area" is, whether it has geographic boundaries, whether it changes over time, whether it is different in different parts of the country, whether there are different types of "high-crime areas," or who determines that an area is, in fact, a higher crime area. Yet, after *Wardlow*, the concept has taken on controlling significance in determining the constitutional protections of citizens located in certain neighborhoods. Because new crime-mapping technology exists to generate objective and verifiable data on crime rates in particular areas, this article proposes requiring the government to introduce this information in Fourth Amendment suppression hearings. The goal is to provide guidance on how to establish a meaningful "high crime area" definition for Fourth Amendment purposes. This article proposes a three-part framework to identify a high crime area based on objective and quantifiable evidence. First, the "high crime area" in question would have to be marked by a higher incidence of particularized criminal activity than other areas of the jurisdiction. Second, the area at issue would have to be tailored to a specific geographic location and limited to a recent temporal finding of criminal activity. Finally, there would have to be a demonstrated nexus between the police officer's knowledge about a defined area and the reasonableness of the officer's observations in that area. In this way there will a verifiable, particularized, and relevant definition of this important Fourth Amendment concept. The article concludes that this type of data driven analysis is the only way to make sure individual liberty is protected in all jurisdictions.

Keywords

Fourth Amendment, Reasonable suspicion, Probable cause, Terry, Terry stop, High crime area, High-crime, High drug area, Crime mapping, data driven policing, technology and crime, civil rights, Constitutional law, search and seizure, *Wardlow*

ARTICLES

THE “HIGH-CRIME AREA” QUESTION: REQUIRING VERIFIABLE AND QUANTIFIABLE EVIDENCE FOR FOURTH AMENDMENT REASONABLE SUSPICION ANALYSIS

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Picture the following: On two separate street corners, in two different neighborhoods, two men stand holding two identical paper bags. Police officers patrolling each neighborhood looking for drug dealers spot the men, and in response to police presence, each man flees. One man runs through a poverty-stricken neighborhood known for having the highest incidence of drug crime and murder in the city. The other man runs through an affluent neighborhood that has not had any recorded drug arrests or murders in over a year. Under existing Supreme Court precedent, the police officers may be legally entitled to stop the first man, but not the second. The Fourth Amendment protections of each man are different simply because of the neighborhood in which the police observation occurs. The fact that the suspicious action and unprovoked flight occurs in a “high-crime area” alters the Fourth Amendment reasonable suspicion analysis.

But, what if the area in which the first man fled did not have the *highest* incidence of drug crime or murder in a given jurisdiction? What if it was merely one of the many areas that suffered from moderate levels of criminal activity in a city? What if the area had undergone recent economic improvement and development, reducing the amount of crime in a historically crime-ridden neighborhood? Would it still be considered a high-crime area? What if the area in question is known for a high incidence of car theft and burglary, but not drugs or violent crime—should that affect the police officer’s suspicions? What if the police officer thinks the area

is a high-crime area, but in fact it turns out to be a rather low-crime area compared to other areas? How should this affect the Fourth Amendment calculus to determine reasonable suspicion? These are the questions addressed in this Article.

"High-crime areas"¹ are a fact of constitutional law: individuals in those areas have different Fourth Amendment protections than they would in other locations in the same town, city, or state.² This development represents a significant shift away from equal constitutional protections for all citizens. In the context of Fourth Amendment police-citizen "stops," high-crime areas are constitutional realities³ that must be dealt with by any lawyer seeking to protect Fourth Amendment rights against unreasonable searches and seizures.⁴

In a series of Fourth Amendment cases from *Adams v. Williams*⁵ to *Illinois v. Wardlow*,⁶ the Supreme Court of the United States has considered the character of the neighborhood⁷ to be one factor in finding "reasonable suspicion"⁸ to stop someone. While never yet allowing the character of the neighborhood to be the sole justification for a stop based on reasonable suspicion, it has narrowed the totality of circumstances needed to two factors: "high-crime area" and unprovoked flight from police.⁹ Lower courts have gone further

1. The term "high-crime area" was first used by the Supreme Court in *Adams v. Williams*, 407 U.S. 143, 147-48 (1972) ("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, Sgt. Connolly had ample reason to fear for his safety.").

2. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (recognizing that the Court allows the fact that a stop occurs in a "high-crime area" to be taken into consideration in performing a *Terry* analysis).

3. See *infra* Part I (tracing the use of the phrase "high-crime area" in Supreme Court opinions).

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

5. 407 U.S. 143 (1972).

6. 528 U.S. 119 (2000). In *Illinois v. Wardlow*, the Court found 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." *Id.* at 124.

7. *Id.* at 129.

8. See *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (establishing the reasonable suspicion test).

9. See *Wardlow*, 528 U.S. at 124 ("In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

and allowed a high-crime area combined with additional otherwise innocent actions to constitute sufficient reasonable suspicion for a stop.¹⁰ The term “high-crime area” has become a familiar “talismatic litany”¹¹ often quoted and almost always determinative in legitimating the police conduct of stopping an individual. The conclusion in legal opinions, among scholars, and on the street is the same: a high-crime area designation almost always shifts the analytical balance toward a finding of reasonable suspicion.

What exactly is a “high-crime area”? The Supreme Court has never provided a definition. Lower court decisions are equally imprecise. Yet, as practicing criminal defense lawyers know, the question is highlighted in almost every Fourth Amendment suppression hearing focused on the legitimacy of a police stop.¹² A police officer takes the stand, explains his actions, testifies to his suspicions, adds the magic words—“high-crime area”¹³—and reasonable suspicion is found as a

10. See, e.g., *United States v. Baskin*, 401 F.3d 788, 793 (7th Cir. 2005) (finding reasonable suspicion to stop person who tried to evade police near a methamphetamine lab); *United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (finding reasonable suspicion to stop person because of his flight in a high-crime area coupled with information from reliable source); *Bolton v. Taylor*, 367 F.3d 5, 9 (1st Cir. 2004) (finding reasonable suspicion to stop driver in known area of prostitution because suspect quickly pulled out of parking lot upon seeing officer); *United States v. Jordan*, 232 F.3d 447, 447–49 (5th Cir. 2000) (finding reasonable suspicion to detain person seen running in a high-crime area because of knowledge that nearby store had recently been robbed); *United States v. Moore*, 235 F.3d 700, 703–04 (1st Cir. 2000) (finding reasonable suspicion to search individual running through an apartment building because apartment was in high-crime area and police had observed suspicious people and known drug user leaving building).

11. See *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975) (“[W]e eschew the notion that the above facts assume added significance because they happen to have occurred in a high crime area. This familiar talismatic litany, without a great deal more, cannot support an inference that appellant was engaged in criminal conduct.”); L. Darnell Weeden, *It Is Not Right Under the Constitution To Stop and Frisk Minority People Because They Don’t Look Right*, 21 U. ARK. LITTLE ROCK L. REV. 829, 839 (1999) (“The courts have consistently considered the crime rate in a given neighborhood as a relevant factor in justifying a police officer’s increased suspiciousness of a suspect.”).

12. For a practicing criminal defense attorney, this reality is observed every day in suppression hearings. Such suppression hearings involve application of the exclusionary rule and are many times the only mechanism to effectuate a client’s Fourth Amendment rights. See *Simmons v. United States*, 390 U.S. 377, 389 (1968) (“In order to effectuate the Fourth Amendment’s guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure. More recently, this Court has held that the ‘exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments’”) (citations omitted).

13. This phenomenon was recognized and criticized by a former prosecutor. See Lenese C. Herbert, *Can’t You See What I Am Saying? Making Expressive Conduct a Crime in High Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 135 (2002) (“As an eager young Assistant United States Attorney who ‘papered’ countless complaints, conducted numerous hearings, and tried a substantial number of cases, I learned

matter of constitutional law. Rarely is there any analysis of why this particular area is a high-crime area, on what objective, verifiable, or empirical data the police officer has based his conclusion, or whether the officer knew this information *before* he made the stop. In fact, trial courts rarely seem to question whether there is even an official definition of a high-crime area in their jurisdiction,¹⁴ on what facts that definition is based, whether the definition changes over time, and whether there are different types of offense-specific areas (i.e., those areas known as "high drug areas," "high theft areas," "high robbery areas," etc.). Statistical data is rarely entered on the record by the government.¹⁵ Outside experts are never consulted.¹⁶ The high-crime area designation is hardly ever empirically supported with factual evidentiary proof. As a result, individuals' Fourth Amendment constitutional protections are altered without verifiable "specific"¹⁷ and "objective"¹⁸ reasons to support that change.

This Article does not seek to challenge the use of the "high-crime area" designation. Although scholars have criticized the term as

how to decode police officer jargon and law enforcement terminology. One of the most commonly used—yet seldom defined—phrases was 'high-crime area.' . . . Before court appearances, I would often question police officers about this characterization. In court, however, judges rarely challenged the proffered label or required its definition. Judges never asked officers for data to support assertions that an area was high-crime.").

14. *But see* United States v. Wright, 485 F.3d 45, 49 n.3 (1st Cir. 2007) ("None of the officers offered boundaries or a definition of the 'area' being described as a 'high crime area.'"); State v. Cooper, 830 So. 2d 440, 445 n.5 (La. Ct. App. 2002) ("One is tempted to imagine a 'low-crime area.' Does such exist? Perhaps a few high-dollar gated communities with moats, barbed wire and armed guards? Could it be that the term 'high crime area' is so over-used, and crime is so rampant, that a better definition of same today may be the entire State of Louisiana? Or is it just where the poor folks live? Is this fair? Is it legal?").

15. In criminal cases, as opposed to civil lawsuits, statistics are rarely, if ever, introduced. The only criminal cases using such statistics are discussed in this Article. *See infra* Part II.

16. However, experts are consulted in civil cases involving liability of stores and other industries in high-crime areas. *See, e.g.,* Henry v. Parrish of Jefferson, 835 So. 2d 912, 918 (La. Ct. App. 2002) (reviewing testimony introduced by plaintiff's expert regarding "high-crime area" designation in negligence suit); Simpson v. Boyd, 880 So. 2d 1047, 1052 (Miss. 2004) (assessing expert testimony as to whether building was situated in "high-crime area" as part of negligence suit). There are no major reported cases involving an expert testifying in a criminal case about a high-crime area.

17. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (recognizing that the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion").

18. *See, e.g.,* United States v. Arvizu, 534 U.S. 266, 273 (2002) (paraphrasing United States v. Cortez, 449 U.S. 411, 417–18 (1980)) ("In making reasonable-suspicion determinations, reviewing courts must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing.").

being racially biased,¹⁹ class biased,²⁰ targeted to affect communities of color,²¹ violative of First Amendment rights,²² and troubling constitutional law, it is currently a reality of Fourth Amendment law.²³

19. See Amy Ronner, *Fleeing While Black, the Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 385 (2001) (“[T]he *Wardlow* Court effectively removed the protections of the Fourth Amendment from individuals that need it the most, namely minorities who have faced historic discrimination at the hands of the police.”); Mia Carpiello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355, 358 (2001) (proposing a race-specific standard for reasonable suspicion: “[A] race specific standard will force police officers and the Court to recognize the unique experience of racial minorities in the United States and the significance of race in *Terry* stops.”).

20. See Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 405 (2003) (“[L]iving in a high crime (poor) neighborhood, while not sufficient in itself to give police reasonable suspicion to stop individuals, can authorize detention on relatively little else, such as when the person runs from the police, despite the fact that many poor people, especially African American ones in certain urban areas, do not want to deal with the police even when innocent of any crime.”); Brian D. Walsh, Note, *Illinois v. Wardlow: High Crime Areas, Flight, and the Fourth Amendment*, 54 ARK. L. REV. 879, 913–14 (2002) (“*Wardlow* increases the burden on innocent residents of ‘high-crime’ areas. Not only do those residents still have the problems associated with living in a ‘high-crime’ area, but *Wardlow* has now increased their risk of being detained by police.”).

21. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994) (“It will not surprise anyone who lives or works in an urban center to learn that these areas share another characteristic in addition to the presence of crime: they are racially segregated. African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.”); Lewis R. Katz, *Terry v. Ohio at Thirty Five: A Revisionist’s View*, 74 MISS. L.J. 423, 493–94 (2004) (“[H]igh crime area’ becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops. Location in America, in this context, is a proxy for race or ethnicity. By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race. It is as though a black man standing on a street corner or sitting in a legally parked car has become the equivalent to ‘driving while black’ for motorists.”); David Seawell, *Wardlow’s Case: A Call To Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1131 (2001) (“Due to the politics of past and present racism, minority members are often forced to live in poverty-stricken, crime-riddled communities, and this segregation continues despite race-neutral policies. Therefore, the high crime area designation as a basis for increased legal justification of police, and diminished expectations of privacy for residents, only perpetuate this distrust and the politics of identification.”).

22. See Herbert, *supra* note 13, at 158 (arguing that flight from police is a protected means of non-verbal communication protected by the First Amendment).

23. See, e.g., Stanley A. Goldman, *To Flee or Not To Flee—That Is the Question: Flight as Furtive Gesture*, 37 IDAHO L. REV. 557, 572 (2001) (exploring how judges attempt to find a constitutionally acceptable definition of “high-crime area” without questioning the designation itself); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 120–22 (1999) (“The result is an extraordinary body of case law, in which strikingly similar behaviors in high crime areas lead to wildly different outcomes. In a high crime area, sitting in a car in a parking lot late at night may create reasonable suspicion in Georgia, but not in Tennessee, and standing on a street corner may create reasonable suspicion in Louisiana, but not in Pennsylvania, even though these jurisdictions apply the same standard.”) (citations omitted).

This Article instead seeks to bring intellectual honesty and objective clarity to the existing constitutional framework.

Because the "high-crime area" designation is a fact of constitutional jurisprudence, this Article suggests that courts must begin taking seriously the requirement that the term be based on objective, quantifiable—statistical or otherwise—settled data, rather than allowing the designation of "high-crime areas" to be based on subjective assertions or unprovable suspicions. As will be discussed in detail, such objective evidence can be entered into the record through statistical data, expert testimony, or official police department reports.²⁴ This evidence can then be subjected to cross-examination and ruled on by the trial court. Like other contested facts in the suppression hearing, only in this way will appellate courts and commentators be able to evaluate the usefulness of this legal terminology.

The technology to generate the necessary objective data to characterize a neighborhood's crime rate has now reached a sufficient maturity to be useful for litigants and courts.²⁵ Neighborhood mapping systems and computer crime pattern technology currently exists with a sophistication that was only developing when the Supreme Court announced its adoption of the "high-crime area" concept.²⁶ For the first time, it is possible to compile the statistics and catalogue the number of arrests and crime patterns in a neighborhood or city.²⁷ It is, thus, possible to determine if a specifically delineated geographical area is, in fact, "higher crime" than another area. Many police districts use this information for

24. See *infra* Part III (discussing the sophistication and prevalence of crime mapping data).

25. See Luc Anselin et al., *Spatial Analyses of Crime*, in 4 CRIMINAL JUSTICE 2000, MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE 213 (David Duffee ed., 2000), available at http://www.ncjrs.gov/criminal_justice2000/vol_4/04e.pdf ("Many of the capabilities to support computerized mapping and spatial statistical analysis emerged only recently during the 1990s.").

26. See *Adams v. Williams*, 407 U.S. 143, 147 (1972) (referring to the term "high-crime area" for the first time in a Supreme Court opinion).

27. See Anselin et al., *supra* note 25, at 215 ("Technological advances, primarily in computer capabilities, are fundamental to recent analytical advances in the methods available for analyzing place-based crime data. The advent of computer mapping applications and accompanying geographic information systems (GIS) are crucial to being able to measure and represent the spatial relationships in data. Perhaps the most powerful analytical tools emerging from GIS technologies are (1) flexible spatial aggregation capabilities to facilitate the measurement of place-based crime and (2) simple contiguity matrices for representing neighbor relationships between different areal units . . . [C]omputer aided dispatch (CAD) systems of citizen calls to police make it possible to systematically quantify varying levels of criminal activity at different places within a city.").

staffing and resource allocation,²⁸ but rarely does it make its way to court. This Article suggests that the data should be included in the Fourth Amendment analysis and refined in a way that offers clarity to police, judges, and those individuals who live in high-crime neighborhoods.²⁹

Part I of this Article explores the use of the “high-crime area” designation in Fourth Amendment cases. Tracing the term in Supreme Court opinions, it can be reasonably concluded that the designation has grown in importance—occasionally being the determinative, if not always admitted, factor in many Fourth Amendment decisions. After the Supreme Court’s decision in *Illinois v. Wardlow*,³⁰ the totality-of-the-circumstances test has devolved into a test that is met with two factors: high-crime area and unprovoked flight from police.³¹ Other courts have required even less. Thus, the first Part seeks to establish the importance of getting the term right.

Part II demonstrates that despite its importance, there is no definitional clarity to the “high-crime area” term now regularly used by the courts post-*Wardlow*. In reviewing court opinions, most striking is the lack of consistent analysis about the requirements of high-crime areas.³² While some courts have questioned the lack of objective basis for the term³³ and have cautioned about over-reliance on its use, few courts have sought to define the term. The second Part sets out the problem faced by trial courts and lawyers litigating the issue in the Fourth Amendment context.

28. See JOHN MARKOVIC & CHRISTOPHER STONE, VERA INSTITUTE OF JUSTICE, CRIME MAPPING AND THE POLICING OF DEMOCRATIC SOCIETIES 7 (2000), available at http://www.vera.org/publication_pdf/156_232.pdf (recognizing that computerized crime mapping is used to measure police performance and solve specific crime problems).

29. This Article focuses on the narrow question of Fourth Amendment law. However, other scholars have recognized the larger societal benefit of crime mapping technologies. See *id.* at 1 (“Crime mapping offers a powerful way for police and the public to define the patterns of crime that the police must address and track how police actions affect crime. The maps allow constables and street officers, their senior commanders, and public representatives to develop a common picture of crime in an area, incorporate other information that may help explain crime patterns and suggest solutions, and then monitor changes over time. In short, crime mapping can make democratic policing not only possible, but practical.”).

30. 528 U.S. 119 (2000).

31. See *id.* at 124–25 (finding that defendant’s presence in an “area known for heavy narcotics trafficking” combined with defendant’s unprovoked flight from police created reasonable suspicion that justified the officers’ stop of defendant).

32. Compare *United States v. Wright*, 485 F.3d 45, 53–54 (1st Cir. 2007), with *United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004). These cases are discussed in detail in Part II of this Article.

33. *United States v. Montero-Camargo*, 208 F.3d 1122, 1142–43 (9th Cir. 2000) (Kozinski, J., concurring). The *Montero-Camargo* case is discussed *infra* at Part II.

Part III proposes a solution to the ambiguity, by requiring an empirical and verifiable factual basis to support the assertion that an area or neighborhood is a “high-crime area” before that information may be used to evaluate a Fourth Amendment stop. This evidence of the character of the area must be specific to the crime charged. Furthermore, this objectively based knowledge must not only be known to the individual officer, but must be known *before* making the contested Fourth Amendment stop. In this way, the character of the area will be directly and relevantly linked to the otherwise ambiguous actions observed by the police officer. This objective factual basis can be established with existing data regularly collected by law enforcement organizations. Intriguingly, this solution was suggested by the National Association of Police Organizations, Policemen Benevolent and Protective Association of Illinois (“NAPO”) in its amicus brief before the Supreme Court in the *Wardlow* case.³⁴

The concluding section of the Article summarizes the benefits of providing definitional clarity to the term “high-crime area” and the benefits of requiring the government to produce empirical evidence of the area’s relevant characteristics. With increasing technological sophistication, including crime mapping and data collection, “high-crime areas” can become an established fact to be decided by courts. The result will be a more consistent and fair application of constitutional principles. In addition, it may offer additional benefits to law enforcement and community organizations. Empirical data and consistent definitions for high-crime areas would help guarantee that all citizens share the same Fourth Amendment protections.

I. HIGH-CRIME AREAS AND THE FOURTH AMENDMENT’S REASONABLE SUSPICION REQUIREMENT

A. *The History of the Use of the Term “High-Crime Area” in the Supreme Court*

A brief review of the Supreme Court case law from *Terry v. Ohio*³⁵ to *Wardlow v. Illinois*³⁶ demonstrates that the “high-crime area” concept has grown in acceptance, if not doctrinal clarity in recent decades. The characterization of a neighborhood as a “high-crime area” has

34. Brief for National Ass’n of Police Organizations et al. as Amici Curiae Supporting Petitioner at 7, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 451226, at *7 [hereinafter NAPO Amicus Brief].

35. 392 U.S. 1 (1968).

36. 528 U.S. 119 (2000).

developed into an important factor for determining reasonable suspicion.³⁷

I. Terry v. Ohio

As is well established, prior to *Terry*, all Fourth Amendment searches and seizures on the street had to be supported by probable cause.³⁸ *Terry* operated as a turning point in Fourth Amendment analysis.³⁹ For the first time, the Court allowed law enforcement the ability to search and seize individuals on less than probable cause. A new test of reasonableness was put forth to balance the government's need to deter crime and the citizens' interest in rights of personal privacy against governmental invasion.⁴⁰ The Court articulated a two-prong analysis: first, whether the stop was reasonable,⁴¹ and second, whether the search was likewise reasonable.⁴² To satisfy the

37. See Raymond, *supra* note 23, at 100 ("Characterization of that neighborhood as a 'high crime area' or one 'known for drug trafficking' is often critical to the finding of reasonable suspicion.")

38. *E.g.*, California v. Hodari D., 499 U.S. 621, 635 (1991) ("Prior to *Terry*, the Fourth Amendment proscribed any seizure of the person that was not supported by the same probable-cause showing that would justify a custodial arrest.")

39. See Harris, *supra* note 21, at 661 ("*Terry v. Ohio* broke new ground. For the first time, the Supreme Court allowed searches and seizures in traditional on-the-street encounters between police and citizens with less than probable cause.")

40. *Terry*, 392 U.S. at 21–22.

41. Concerning the reasonableness of the stop, the *Terry* Court found that the governmental need in this case was "effective crime prevention and detection," which "underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior" without probable cause to arrest. *Id.* at 22. The Court found that none of *Terry's* actions, taken individually, would compel a finding of reasonable suspicion. See *id.* at 22–23 ("There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in."). However, the Court found in that the aggregate, the present circumstances "warranted further investigation." *Id.* at 22. The Court did not reach a conclusion about whether this action was reasonable or not, and therefore, there was no finding that the stop itself was reasonable. See *id.* at 20 n.16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred. We cannot tell with any certainty upon this record whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching *Terry* for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.")

42. Concerning the reasonableness of the search, the Court announced a two-prong test: "[W]hether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20.

When an officer is investigating suspicious behavior, another governmental interest comes into play—the safety of the officer. *Id.* at 23. The Court held that due

requirement of reasonableness, the government was required to demonstrate objective evidence that would “warrant a man of reasonable caution in the belief’ that the action taken was appropriate.”⁴³ Since “there is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails,’”⁴⁴ the Court first looked to the governmental interest affected. In *Terry*, the Court found that the governmental interest was “effective crime prevention and detection.”⁴⁵ Contrasting this governmental interest was the individual’s right to be free from governmental intrusion, since even a simple pat-down is “a serious intrusion upon the sanctity of the person.”⁴⁶ The Court’s initial determination on what was reasonable is now well-established. Objective reasonableness is to be based on “specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant that intrusion.”⁴⁷ When evaluating the reasonable inferences, the reviewing court must consider the officer’s experience and “due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which

to the potential for violence, “it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” *Id.* The officer may not search a suspicious person in all circumstances; the officer must be “justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,” in order to search the suspect. *Id.* at 24. However, an officer does not have to be certain that the suspect is presently armed and dangerous. Rather, the inquiry 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.” *Id.* at 27. The Court found that since Officer McFadden had reasonable suspicion that the suspects were planning an armed robbery, “it [was] reasonable to assume,” that the robbery would “be likely to involve the use of weapons . . .” *Id.* at 28. Therefore, Officer McFadden could reasonably conclude that the suspects were presently armed and dangerous. *Id.* Counterbalancing the governmental need of officer security is the citizen’s right to be free from governmental “intrusion upon cherished personal security[.]” even if only in limited searches. *Id.* at 24–25. Therefore, the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 20. In order to be reasonably related, the Court created “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.” *Id.* at 27. The search must be “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer,” *id.* at 29, and not for the purpose of “prevent[ing] the disappearance or destruction of evidence of crime.” *Id.* Since Officer McFadden limited his protective search to a pat-down of the outer clothing of appellants, the Court found that the search was reasonably related and thus satisfied the second prong. *Id.* at 29–30.

43. *Id.* at 22.

44. *Id.* at 21 (internal citations omitted).

45. *Id.* at 22.

46. *Id.* at 17.

47. *Id.* at 21.

he is entitled to draw from the facts in light of his experience.”⁴⁸ This necessarily results in a case-by-case analysis.⁴⁹ It is within this case-by-case factual analysis that the nature of the area in which the stop occurs becomes of central concern.

2. *High-crime areas after Terry*

Over the years of interpreting the *Terry* rule, the Supreme Court determined that one of the “facts” that could be articulated was the character of the area in which officers saw the suspicious actions. In 1972, the Court decided *Adams v. Williams*⁵⁰ and made its first reference to the nature of the neighborhood as being relevant to the reasonable suspicion calculus. In determining whether to uphold a stop based on less than probable cause, the Court stated, “[w]hile 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, Sgt. Connolly had ample reason to fear for his safety,” and summarily search appellant.⁵¹ In *Adams*, the Court reiterated 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.”⁵² The Court broadened *Terry* to include not only personally observed facts, but also facts relayed to the officer by an informant, specifically rejecting the argument that “reasonable cause for a stop and frisk can only be based on the officer’s personal observation.”⁵³ The Court also modified *Terry* by including the characterization of the area as a high-crime area as an articulable fact to be taken into account in determining the reasonableness of the search. However, the Court provided no guidance as to the meaning of the term “high-crime area.”⁵⁴

48. *Id.* at 27.

49. *Id.* at 29.

50. 407 U.S. 143 (1972).

51. *Id.* at 147–48 (emphasis added).

52. *Id.* at 145 (citing *Terry*, 392 U.S. at 24). Similar to *Terry*, there was little analysis of the justification for the stop itself; instead the Court focused on the propriety of the search. *See id.* at 147 (stating simply that “the information [provided by the informant] carried enough indicia of reliability to justify the officer’s forcible stop”). Justice Marshall’s dissent notes that “the testimony of the arresting officer in the instant case patently fails to demonstrate that the informant was known to be trustworthy and since it is also clear that the officer had no idea of the source of the informant’s ‘knowledge,’ a search and seizure would have been illegal.” *Id.* at 157 (Marshall, J., dissenting). Justice Marshall further characterized the tip as “unreliable, unsubstantiated, conclusory hearsay.” *Id.* at 159.

53. *Id.* at 147 (majority opinion).

54. *Id.*

With this beginning, the Supreme Court began recognizing the character of the neighborhood in more explicit ways. In *United States v. Brignoni-Ponce*,⁵⁵ the Court was faced with another *Terry* issue, this time involving the stop of a car along the U.S.-Mexico border.⁵⁶ The Court in *Brignoni-Ponce* framed the issue as balancing the public interest, which "demands effective measures to prevent the illegal entry of aliens at the Mexican border,"⁵⁷ against the interference with "individual liberty that results when an officer stops an automobile and questions its occupants."⁵⁸ The Court in *Brignoni-Ponce*, after reviewing *Terry* and *Adams*, held that the first prong of the *Terry* analysis is satisfied "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country."⁵⁹ In order to satisfy *Terry*'s second prong, "[t]he officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."⁶⁰ After rejecting the argument that race alone could satisfy the *Terry* standard, the Court noted that:

Officers may consider the *characteristics of the area* in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. They also may consider information about recent illegal border crossings in the area.⁶¹

In relying on the location of the stop, the Court gave legitimating effect to the "high-crime area" reasoning in *Adams*.⁶²

In *Brown v. Texas*,⁶³ the Court was asked to decide whether being confronted in a high-crime area alone was enough to justify a *Terry* stop.⁶⁴ The Court reviewed the oft-repeated balancing test, and noted that the determination necessarily involves weighing "the gravity of

55. 422 U.S. 873 (1975).

56. *Id.* at 874.

57. *Id.* at 878.

58. *Id.* at 879.

59. *Id.* at 881.

60. *Id.* at 881–82.

61. *Id.* at 884–85 (emphasis added) (internal citations omitted).

62. The Court held that when determining the reasonableness of the officer's conduct, "each case must turn on the totality of the particular circumstances," a test which was elaborated on in further cases. *Id.* at 885 n.10; see *United States v. Cortez*, 449 U.S. 411, 417–18 (1980) (explaining that the "totality of circumstances" must lead to a "particularized and objective basis for suspecting the particular person stopped of criminal activity").

63. 443 U.S. 47 (1979).

64. *Id.* at 52.

the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”⁶⁵ The officers in *Brown* could only say that the appellant “looked suspicious,” but could not articulate why he looked suspicious; the Court, therefore, eliminated this factor from consideration.⁶⁶ The only other factor the officer gave was that the appellant was in a high-crime area.⁶⁷ The Court held that, standing alone, being in a high-crime area was “not a basis for concluding that appellant himself was engaged in criminal conduct,”⁶⁸ because the “appellant’s activity was no different from the activity of other pedestrians in that neighborhood.”⁶⁹ While stating that being in a high-crime area is insufficient to show reasonable suspicion, the Court did not exclude the factor from consideration, so long as the officer could point to other facts that differentiated the suspect from the community at large.⁷⁰

In *United States v. Cortez*,⁷¹ the Court took the opportunity to refine what it meant by the “totality of the circumstances” test in the context of reasonable suspicion.⁷² *Cortez* involved the investigatory stop of an

65. *See id.* at 51 (noting that the Fourth Amendment requires “specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers”).

66. *Id.* at 52.

67. *Id.*

68. *Id.* at 52.

69. *Id.*

70. *See id.* at 52 n.2 (“This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.”). Professor Raymond points out that mere probability, even a statistical probability, cannot alone be sufficient for reasonable suspicion:

Something more than a purely probabilistic inference of suspicion based on statistical likelihoods must be present to justify a stop. Consider a hypothetical that concluded that, in a particular neighborhood, one person in three was likely to be in possession of unlawful narcotics at any given time. The probability that an individual in that neighborhood was in possession of narcotics would be 33-1/3%. Notwithstanding the percentages (which would appear to satisfy the probability requirements of the reasonable suspicion standard), reasonable suspicion would not exist as to each individual in the neighborhood. Some particularized observations—proof that implicates an identified individual—must also be offered in support of the claim of reasonable suspicion.

Raymond, *supra* note 23, at 105–06.

71. 449 U.S. 411 (1980).

72. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 n.10 (1975). This totality of the circumstances test includes two parts. *Cortez*, 449 U.S. at 418. First, the Court must look at all the facts and circumstances, whether from objective observations, police reports, or informants as well as take “consideration of the modes or patterns of operation of certain kinds of lawbreakers.” *Id.* Then, taking this objective data, “a trained officer draws inferences and makes deductions . . . that might well elude an untrained person.” *Id.* These inferences are not to be seen and weighed by scholars,

automobile suspected of transporting illegal aliens.⁷³ The Court reiterated that “[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”⁷⁴ Part of the totality relied on by the Court was the fact that this location was known for a particular type of illegal activity. In *Cortez*, the suspicion focused on areas of known illegal immigrant traffic, and thus the reasonable suspicion was tied to that particular illegal activity.⁷⁵ The Court deferred to officer experience based on a particularized understanding of the local landscape.⁷⁶

B. Illinois v. Wardlow: High-Crime Areas and Reasonable Suspicion

The seminal Supreme Court case on high-crime areas is *Illinois v. Wardlow*.⁷⁷ In *Wardlow*, the Court held that unprovoked flight in a high-crime area could constitute reasonable suspicion for a *Terry* stop.⁷⁸ The factual circumstances and basis of the high-crime determination are revealing and are addressed in some detail.

As detailed by the Illinois trial court, the arresting officer, Officer Nolan, was in an eight-officer, four-car caravan proceeding along West Van Buren Street in Chicago—an area that was “one of the

“but [are to be] understood by those versed in the field of law enforcement.” *Id.* The second part of the totality of the circumstances test is that the “process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.” *Id.*

^{73.} See *Cortez*, 449 U.S. at 413–16 (detailing that stop was based on long-term immigration investigation and stopped vehicle fulfilled a number of suspected criteria).

^{74.} See *id.* at 417–18 (noting that to determine whether stop is justified, the “totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity”).

^{75.} See *id.* at 419 (“Of critical importance, the officers knew that the area was a crossing point for illegal aliens. They knew that it was common practice for persons to lead aliens through the desert from the border to Highway 86, where they could—by prearrangement—be picked up by a vehicle.”).

^{76.} See *id.* at 418 (recognizing that “the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement”).

^{77.} 528 U.S. 119 (2000); see, e.g., Debra Meek Nelson, *Illinois v. Wardlow: A Single Factor Totality*, 2001 UTAH L. REV. 509, 510 (2001) (arguing that *Wardlow* is “unprecedented in light of past Fourth Amendment jurisprudence regarding reasonable suspicion and the significance of flight”); Ronner, *supra* note 19, at 384 (arguing that *Wardlow* “makes the Fourth Amendment’s exclusionary rule, a principal means of curtailing police lawlessness, virtually inapplicable to the very minority communities that need it the most”); Walsh, *supra* note 20, at 879 (explaining that *Wardlow*’s importance rests in its use of “unprovoked flight” and “high-crime area” as the factors used to determine reasonable suspicion).

^{78.} *Wardlow*, 528 U.S. at 119.

areas in the 11th District that's high [in] narcotics traffic."⁷⁹ Officer Nolan and his partner were in uniform, although he could not recall whether any other officer was in uniform and he could not recollect whether his car, or any other in the caravan, was marked.⁸⁰ The officers observed the defendant standing along West Van Buren Street, violating no laws.⁸¹ When the defendant looked in the officers' direction, he fled through an alley and gangway with a white plastic bag under his arm.⁸² Officer Nolan pursued the defendant until the defendant eventually ran towards the officers' car and was forced to stop.⁸³ Officer Nolan immediately conducted a pat-down of the defendant and the bag both because he could not see inside the plastic bag,⁸⁴ and because in his experience, "it was common to find weapons in the vicinity of such [high-crime] areas."⁸⁵ Officer Nolan "felt a hard object that had a similar shape to a revolver or a gun," which was "very heavy."⁸⁶ Upon finding a .38-caliber handgun with five live rounds inside the bag, Officer Nolan arrested the defendant.⁸⁷

Wardlow moved to suppress the gun at trial and lost.⁸⁸ On appeal, the Illinois Court of Appeals discounted the "high-crime area" factor of the Fourth Amendment calculus, and because the only other factor was flight, reversed.⁸⁹ The court found that Officer Nolan's testimony lacked specificity as to the particular area in which the defendant was located, and questioned whether the defendant ran because he thought that the officers were focusing on him.⁹⁰ Additionally, the court was concerned with the lack of evidence that established the area as a high-crime area,⁹¹ and found "no support in the record for the contention that defendant was in a high-crime location."⁹² The court noted that the location of an incident can be a

79. *People v. Wardlow (Wardlow I)*, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997), *aff'd*, 701 N.E.2d 484 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000).

80. *Id.* at 66.

81. *Id.*

82. *Id.* It was unknown whether the defendant actually saw any of the officers, their cars, or their uniforms. *Id.*

83. *See id.* (detailing that no other cars in the caravan were involved in the stop).

84. *Id.* at 66.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 68.

90. *Id.*

91. *See id.* at 67 ("The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking . . .").

92. *Id.* at 67-68.

factor in the determination of reasonable suspicion,⁹³ and together with flight, may provide reasonable suspicion,⁹⁴ but stated that in order to "pass constitutional muster . . . the high crime area should be a sufficiently localized and identifiable location."⁹⁵

The Illinois Supreme Court disagreed with the analysis of the court of appeals, but affirmed the reversal of the trial court on different grounds.⁹⁶ First, the Illinois Supreme Court reversed the court of appeals' determination that the testimony did not establish that the area was a high-crime area, finding that it was a high-crime area.⁹⁷ The Illinois Supreme Court then reconsidered the issue of whether flight in a high-crime area provides reasonable suspicion for a *Terry* stop. The court first surveyed other jurisdictions and found that the majority of courts held that "flight alone is insufficient to justify a *Terry* stop."⁹⁸ The court held that flight in a high-crime area alone is not enough, acknowledging that other "courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police."⁹⁹ After emphasizing the importance of protecting the freedom to engage in such harmless activities as "loafing, loitering, and nightwalking,"¹⁰⁰ and "the right to travel, to locomotion, to freedom of movement, and to associate with others,"¹⁰¹ as well as the "right of law-abiding citizens to eschew interactions with the police,"¹⁰² the court reasoned that "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those

93. *See id.* at 68 ("[A] high crime area is a place in which the character of the area gives color to conduct which might not otherwise raise the suspicion of an officer.") (citations omitted).

94. *Id.*

95. *Id.*

96. *People v. Wardlow (Wardlow II)*, 701 N.E.2d 484 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000).

97. *See id.* at 486 ("[W]e believe Officer Nolan'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.").

98. *See id.* at 486 (citing *State v. Hicks*, 488 N.W.2d 359, 362 (Neb. 1992)); *see also State v. Tucker*, 642 A.2d 401, 407 (N.J. 1994) ("Although flight is evidence that a fact finder may consider in assessing guilt . . . [it must] be accompanied by some evidence of criminality.").

99. *Wardlow II*, 701 N.E.2d at 486 (citing *Hicks*, 488 N.W.2d at 363); *see also State v. Sullivan*, 203 A.2d 177, 192 (N.J. 1964) ("[F]or departure to take on the legal significance of flight, there must be some circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt.").

100. *Wardlow II*, 701 N.E.2d at 487 (citations omitted).

101. *Id.* (citations omitted).

102. *Id.* (citing *Hicks*, 488 N.W.2d at 364).

same citizens to stand still at the appearance of an officer.”¹⁰³ After finding no other corroborating facts to support the inference of “a consciousness of guilt,” the Illinois Supreme Court affirmed the lower court and ordered the gun suppressed.¹⁰⁴

The United States Supreme Court reversed the Illinois Supreme Court.¹⁰⁵ After noting that presence in a high-crime area alone is not enough to support reasonable suspicion,¹⁰⁶ the Court reiterated that it is nonetheless a salient factor to be considered because “[o]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.”¹⁰⁷ The Court then noted that evasive conduct can also be used in the reasonable suspicion calculus, and found that “[h]eadlong flight . . . is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”¹⁰⁸ The Court confirmed that citizens indeed have the right to go “about one’s business” and cannot be forcibly detained and that refusal to cooperate cannot be a factor for reasonable suspicion.¹⁰⁹ However, the Court went on to reject the Illinois Supreme Court’s interpretation of flight by stating that “unprovoked flight is simply not a mere refusal to cooperate.”¹¹⁰ Indeed, “[f]light, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite.”¹¹¹ The Court rejected the notion that because many innocent reasons exist for flight from the police, flight is not necessarily indicative of ongoing criminal activity by noting that conduct such as flight may well be ambiguous, but that “*Terry* recognized that the officers could detain the individuals to resolve the ambiguity.”¹¹² The majority also reasoned that because “courts do not have available empirical studies dealing with inferences drawn from suspicious behavior . . . we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists.”¹¹³ Therefore, “the determination of reasonable

103. *Id.*

104. *See id.* at 486, 488 (noting “that defendant herein gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan’s vehicle,” and therefore “the officers lacked an articulable basis for suspecting defendant of involvement in criminal activity prior to the point at which he turned and ran”).

105. *Illinois v. Wardlow (Wardlow III)*, 528 U.S. 119 (2000).

106. *Id.* at 124 (citing *Brown v. Texas*, 443 U.S. 47, 53 (1979)).

107. *Id.*

108. *Id.*

109. *Id.* at 125.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 124–25.

suspicion must be based on commonsense judgments and inferences about human behavior."¹¹⁴ Part of that analysis, of course, is the neighborhood in which the events take place. The Court concluded that in a high-crime area, the type of unprovoked flight is sufficient for reasonable suspicion.

The questions left unanswered by the Supreme Court's analysis of the high-crime area in *Wardlow* are considerable. While it no doubt makes sense to consider the location in which suspicious activities are observed, the major unresolved question is how lower courts should consider that location. The next section discusses the impact of *Wardlow* on courts struggling to define a high-crime area for Fourth Amendment purposes.

II. A STRUGGLE FOR DEFINITIONS AND PROOF POST-*WARDLOW*

After the Supreme Court's decision in *Wardlow*, courts can consider whether an area is a high-crime area in a Fourth Amendment reasonable suspicion calculus. Courts began labeling areas as high-crime without settling on a definition. For example, some courts have defined a high-crime area as an area of "expected criminal activity,"¹¹⁵ which fits within the language of *Wardlow*.¹¹⁶ Other courts have described it as an area known for drug activity, or one under surveillance.¹¹⁷ Still other courts have held that a high-crime area is one that is "riddled with narcotics dealings and drug-related shootings."¹¹⁸ Some courts have found that a "crime wave" can create a high-crime area.¹¹⁹ Being an area which is "notorious" or has a reputation for illegal conduct can also qualify an area as high-crime.¹²⁰ Areas "plagued by gang-related shootings, drug dealing,

114. *Id.* at 125.

115. See *United States v. Baskin*, 401 F.3d 788, 791, 793 (7th Cir. 2005) (rejecting the defendant's claim that "the government must produce 'specific data' establishing that a location is a 'high-crime area' for this inference of criminality to be drawn from the defendant's flight," and holding that location is relevant, not in a well particularized "high-crime area" but rather an area of "expected criminal activity").

116. See *Wardlow III*, 528 U.S. at 124 ("[P]resence in an area of expected criminal activity.").

117. *State v. Biehl*, No. 22054, 2004 WL 2806340, at *5 (Ohio Ct. App. Dec. 8, 2004).

118. *Cunningham v. State*, 884 So. 2d 1121, 1122 (Fla. Dist. Ct. App. 2004).

119. *State v. Donnell*, 239 N.W.2d 575, 578 (Iowa 1976).

120. See *People v. Davis*, 815 N.E.2d 92, 98-99 (Ill. Ct. App. 2004) (noting that "there was no evidence that the area around the convenience store was a 'high crime area' or notorious for any type of criminal activity"); *Slayton v. Commonwealth*, 582 S.E.2d 448, 449 (Va. Ct. App. 2003) (noting "the reputation of the location as a 'high crime area' notorious for drug transactions"). *But see State v. Hollimon*, 900 So. 2d 999, 1004 (La. Ct. App. 2005) (putting higher emphasis on areas that are "notorious" for certain crimes rather than areas that are simply "known for high crime and high drug trafficking activity").

assaults, and robberies” may also be termed high-crime areas.¹²¹ This “hodgepodge”¹²² of definitions demonstrates the importance of the high-crime area label without actually clarifying what it means. How does one know one is in a high-crime area? How is the determination that a location is a high-crime area made? These questions are still unanswered. As Judge Kozinski of the United States Court of Appeals for the Ninth Circuit recognized, “[t]he question is not *whether* the characteristics of the area may be taken into account, but *how* these characteristics are established.”¹²³ This section seeks to explore the definitional problem of the “high-crime area” terminology.

A. *High-Crime Characteristics*

The term “high-crime area,” for Fourth Amendment purposes, expresses certain causal assumptions. First, most criminal cases involving Fourth Amendment concerns take place in a physical, geographical location.¹²⁴ Generally, this is a neighborhood, a street, an intersection, a police district, or a particularized geographic area. Second, this physical location can be compared to other locations that have a different level of criminal activity.¹²⁵ “High” would be a meaningless term if there did not exist lower areas of criminal activity. Third, it is assumed that some evidence can be presented to establish that an area is a “high-crime area.”¹²⁶ Beyond these basic assumptions, however, there is little agreement on how courts should evaluate claims that certain areas merit a high-crime designation.

121. *United States v. Rogers*, No. Crim. 10-10313, 2005 WL 478001, at *1 (D. Mass. Mar. 1, 2005); *see also* *United States v. Ford*, 333 F.3d 839, 841 (6th Cir. 2003) (finding that a skating rink could be a high-crime area because “gang members have been known to patronize the rink, and screwdrivers and knives have been found by the owner near the Roller Dome’s dumpster”).

122. *See* Raymond, *supra* note 23, at 100 (“[C]ourts, however, have little guidance as to how to consider the [high-crime area] factor. The result is a hodgepodge of inconsistent and incoherent case law.”).

123. *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring).

124. For example, each of the cases discussed in Part I involve a factual scenario out of the physical world, be it District 11 in Chicago or on the United States-Mexico border. High-crime areas would necessarily be different if we were talking about cyber crime, or non-physical searches. For purposes of this Article we will focus on the physical world and regular police-citizen face-to-face encounters.

125. Implicit in the term “high-crime area” is a comparison between areas with differing levels of crime. Presumably there should also be “low-crime areas” and “medium-crime areas.” However, such designations do not appear in Fourth Amendment jurisprudence. As will be discussed later, the need to accurately determine high-crime areas will necessitate the creation (or recognition) of other areas with lesser criminal activity.

126. This question is the central focus of this Article.

In reviewing the cases that have addressed the definitional problem of a high-crime area, three questions emerge: (1) what type of evidence should courts require to determine if an area is a high-crime area; (2) what standard of proof should courts adopt to evaluate that metric of crime; and (3) how should courts cabin the “area” so designated to make it a meaningful and relevant description for Fourth Amendment purposes. These three questions of the method of proof, standard of proof, and geographic and temporal scope help unravel the question Judge Kozinski posed about how we establish the characteristics of a high-crime area.

1. *Method of proof*

The first issue—highlighted in *Wardlow* itself—is what proof do we require for a high-crime area to be considered a high-crime area? Can a police officer’s subjective belief be sufficient, or should there be some objective data put into evidence? Appropriately enough, the Illinois state courts debated the empirical basis of whether Mr. Wardlow was standing in a high-crime area.¹²⁷ The Illinois Court of Appeals questioned the empirical basis for the assumption, finding the record vague on the question of whether Wardlow was in an area known for narcotics trafficking.¹²⁸ In contrast, the Illinois Supreme Court simply accepted the trial court’s finding that the officer’s uncontested testimony established that it was a high-narcotics area.¹²⁹

Similarly, the majority of jurisdictions pre- and post-*Wardlow* primarily have relied on an officer’s testimony that an area is a “high-crime area” without much analysis as to the basis of that conclusion. Some jurisdictions allow inexact reports of arrests to qualify an area as a “high-crime area,” sometimes as limited as “several [prior] . . .

127. Compare *People v. Wardlow (Wardlow II)*, 701 N.E.2d 484, 486 (Ill. 1998), *rev’d*, 528 U.S. 119 (2000) (“[W]e believe Officer Nolan’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.”), with *People v. Wardlow (Wardlow I)*, 678 N.E.2d 65, 67 (Ill. App. Ct. 1997), *aff’d*, 701 N.E.2d 484 (Ill. 1998), *rev’d*, 528 U.S. 119 (2000) ([Officer Nolan’s testimony that] “the area[] . . . had ‘high narcotics traffic’ . . . indicates only that the officers were headed somewhere in the general area. There was no evidence that the officers were investigating the specific area where defendant had been standing or that any of the police cars had stopped at that location or that defendant had any basis for believing that police were interested in his activity.”), and *id.* (“The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking . . .”).

128. *Wardlow I*, 678 N.E.2d at 67.

129. *Wardlow II*, 701 N.E.2d at 486. Of course, absent some heightened standard of proof (as proposed in this Article), this is the expected legal consequence of uncontested testimony.

arrests.”¹³⁰ Other jurisdictions accept officer opinion testimony that is based on subjective beliefs or experience that the area is a “high-crime area” with no corroborating facts.¹³¹ Some jurisdictions require a bit more factual proof, either departmental findings,¹³² citizen complaints,¹³³ or the prior number of arrests that the testifying officer has made.¹³⁴ A few courts even have taken judicial notice that an area is a “high-crime area.”¹³⁵ As one might guess, because no court has

130. See *United States v. Lovelace*, 357 F. Supp. 2d 39, 43 (D.D.C. 2004) (reasoning that officer making several prior arrests for narcotics coupled with residents’ complaints of narcotics dealing created a “high-crime area.”); see also *United States v. Pittman*, 102 F. App’x 315, 316 (4th Cir. 2004) (quoting officer’s testimony that specific area of arrest was not “high-crime area” but was “across the street from [a housing complex], where [there were] quite a few shootings and . . . quite a few homicides”); *Burkett v. State*, 736 N.E.2d 304, 305 (Ind. Ct. App. 2000) (“From previous arrests [that the officer] had made in the area, [the officer] knew the neighborhood to have a high incidence of drug trafficking.”); *State v. Blackstock*, 598 S.E.2d 412, 414 (N.C. Ct. App. 2004) (“[Unparticularized] statistical data indicated this area had a problem with robberies and break-in and enterings.”).

131. See, e.g., *State v. Morgan*, 539 N.W.2d 887, 891–92 (Wis. 1995) (“[I]f the state wants the Court to rely on a high-crime area theory in justifying a *Terry* pat down, there has to be a clear and specific record made. I’ve discussed this issue at length and reviewed the applicable cases and reviewed the problems we will face if we simply say whenever police are in a high-crime area, they have a right to frisk. Maybe that’s reasonable in this day and age but if it is going to be done, it’s going to have to be done with some clear and specific rules which we don’t have right now.” (quoting the trial court judge)). The Wisconsin Supreme Court found that an “officer’s perception of an area as ‘high-crime’ can be a factor justifying a search” and rejected the district court’s call for clarity and specificity in determining what a “high-crime area” actually is. *Id.* at 892; see also *Riley v. Commonwealth*, 412 S.E.2d 724, 726 (Va. Ct. App. 1992) (noting that officer simply testified that defendant “was in a high crime area late at night”).

132. See, e.g., *State v. Arellano*, No. A-04-060, 2004 WL 1151984, at *1 (Neb. Ct. App. May 25, 2004) (“[The officer] testified [that], based on briefings and discussions with members of the State Patrol and other law enforcement officers, [the area was] one where crimes against property and persons frequently take place.”).

133. See, e.g., *State v. Collins*, 890 So. 2d 616, 619 (La. Ct. App. 2004) (pointing out that narcotics division “received frequent complaints about crime in the vicinity of [arrest]”); *Commonwealth v. Blair*, 860 A.2d 567, 570 (Pa. Super. Ct. 2004) (indicating that arresting officer received numerous complaints about this address in the past); *Commonwealth v. McCleave*, 750 A.2d 320, 323 (Pa. Super. Ct. 2000) (noting that officers received generalized complaints about area involving alcohol, guns, and drugs).

134. See, e.g., *People v. Aldridge*, 674 P.2d 240, 241 (Cal. 1984) (noting that arresting officer “had made more than two hundred arrests in the area”); *Lee v. State*, 868 So. 2d 577, 578 (Fla. Dist. Ct. App. 2004) (stating that officer “had made fifteen to twenty drug arrests at that corner”); *State v. Scott*, 561 So. 2d 170, 172 (La. Ct. App. 1990) (pointing out that in this particular area, officer “personally made over forty arrests for drug-related offenses”); *Gamble v. State*, 8 S.W.3d 452, 453 (Tex. Ct. App. 1999) (“[P]olice had been called either to this area or the residence about 70 times in a year, including many ‘disturbance calls’ and calls for trespassing,” [but noting that] “[n]either [arresting] officer had ever arrested anyone there for drugs or weapons.”).

135. See, e.g., *United States v. Evans*, 994 F.2d 317, 322 n.1 (7th Cir. 1993) (concluding that trial judge did not improperly take judicial notice that police encounter occurred in high-crime area); *United States v. Four Million, Two*

required a threshold level of arrests or complaints, what is termed a "high-crime area" can differ from case to case, and jurisdiction to jurisdiction.¹³⁶

Only recently have courts recognized the need for a more structured method of proof. The Ninth Circuit was one of the first federal appellate courts to examine the method and mode of proof for establishing a "high-crime area." In its first case to address the *Wardlow* "high-crime area" problem,¹³⁷ the court expressed concern that the "high-crime area" factor was being utilized far too often in questionable circumstances, and "may well be 'an invitation to trouble,'"¹³⁸ which "can easily serve as a proxy for race or ethnicity."¹³⁹ In its analysis in *Montero-Camargo*,¹⁴⁰ the en banc court held that "more than mere war stories are required to establish the existence of a high-crime area."¹⁴¹ Instead, the court required that "courts . . . examine with care the specific *data* underlying any such assertion."¹⁴²

Montero-Camargo presents an interesting introduction to the question of the "method of proof" because, while critical of officers relying on past "war stories" about certain areas, the court did not rely on much more than these type of war stories to determine that

Hundred Fifty-Five Thousand, 762 F.2d 895, 904 (11th Cir. 1985) (noting that court could properly observe as "common experience consideration" that Miami had become a center for drug smuggling and money laundering); *In re Malone*, 592 F. Supp. 1135, 1144 n.3 (E.D. Mo. 1984) (taking judicial notice that housing project was high-crime area), *aff'd sub nom. Malone v. Fenton*, 794 F.2d 680 (8th Cir. 1986); *State v. Burns*, 877 So. 2d 1073, 1078 (La. Ct. App. 2004) (noting that 6000 block of Field Street was previously recognized as high-crime area); *State v. Vinet*, 576 So. 2d 1200, 1200 (La. Ct. App. 1991) (taking judicial notice that area known as "Coke alley" was known for drugs).

136. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (en banc) (Kozinski, J., concurring). In *Montero-Camargo*, Judge Kozinski compares the majority's finding that an average of "[one] arrest every four months" constituted a "high-crime area," 208 F.3d at 1143 with *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999), which cites officer testimony that there were 2500 narcotics arrests in five-block-by-five-block area in less than one year, *United States v. Morales*, 191 F.3d 602, 604 (5th Cir. 1999), which indicates the officer testified that he had detained 600 illegal aliens on same stretch of highway in less than one year, and *State v. Donnell*, 239 N.W.2d 575, 576-77 (Iowa 1976), which notes evidence of residential burglaries numbering "almost in the hundreds" during previous year.

137. *Montero-Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring).

138. *Id.* at 1139 n.32 (majority opinion).

139. *Id.* at 1138. The *Montero-Camargo* decision is also notable for its abandonment of race or ethnicity as one of the permissible factors for a *Terry* stop. See Ian H. Hlawati, *United States v. Montero-Camargo Elimination of the Race Factor Develops Piecemeal: The Ninth Circuit Approach*, 23 U. HAW. L. REV. 703, 729 (2001) (arguing that despite *Montero-Camargo's* rejection of race as a factor in the reasonable suspicion calculus, police stops based on racial profiling will continue).

140. 208 F.3d 1122 (9th Cir. 2000).

141. *Id.* at 1139 n.32.

142. *Id.* (emphasis added).

the site at issue was a high-crime area. As pointed out in the sharply worded concurrence authored by Judge Kozinski,

The opinion recognizes the danger in allowing the police to characterize an area as “high-crime” to establish a basis for reasonable suspicion, but then proceeds to do just that, based on nothing more than the personal experiences of two arresting agents. As I discuss above, the agents didn’t even claim this was a high crime area, but let’s say they had. What in this record would support their conclusion? Both agents testified only that they had detected criminal violations after stopping people in the area. How often? One agent said he’d been involved in 15–20 stops over eight and a half years, and “[could]n’t recall any . . . where we didn’t have a violation of some sort. The other agent testified to “about a dozen” stops in the same period, all but one of which led to an arrest.

Without hesitation, the majority treats this as a crime wave, but is it really? Does an arrest every four months or so make for a high crime area? . . . Can we rely on the vague and undocumented recollections of the officers here? Do the two officers’ figures of “15–20” and “about a dozen” reflect separate pools of incidents, or do they include some where, as here, both officers were involved? Are such estimates sufficiently precise to tell us anything useful about the area? I wouldn’t have thought so, although I could be persuaded otherwise. But my colleagues don’t even pause to ask the questions. To them, it’s a high crime area, because the officers say it’s a high crime area.¹⁴³

The questions posed by Judge Kozinski are the central questions surrounding a coherent “high-crime area” jurisprudence. Logically, a trial court making a decision about the character of a neighborhood would need certain baseline facts. What do those numbers mean in terms of total arrest numbers? Clearly, an area with an average of “an arrest every four months” sounds unlike a high-crime area that would warrant a change in Fourth Amendment analysis. However, without a baseline comparison, the courts and the litigants are simply guessing at the import of the numbers. What if there were an area with four arrests a day, or fourteen arrests a day? Could they all be considered “high-crime areas” if the officer said so, or should there be an objective measuring of the level of relative crime? Additionally, as can be seen in the vagueness of the numbers (“about a dozen”), even the testifying officer is not basing his testimony on a documented

143. *Id.* at 1143 (Kozinski, J., concurring) (citations and internal quotation marks omitted).

record, making cross-examination and verification difficult. Again as Judge Kozinski recognized:

Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop’s repertoire of war stories to determine what is a “high-crime area”—and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion—strikes me as an invitation to trouble. If the testimony of two officers that they made, at most, 32 arrests during the course of a decade is sufficient to turn the road here into a high crime area, then what area under police surveillance *wouldn’t* qualify as one? There are street corners in our inner cities that see as much crime within a month—even a week. I would be most reluctant to give police the power to turn any area into a high crime area based on their unadorned personal experiences.¹⁴⁴

Built within the *Montero-Camargo* decision is a tension about the requisite method of proof. While seeking empirical data, the court fails to analyze how the lower courts should evaluate that data. The question is raised but resolved without a satisfactory answer.

This question of the appropriate method of proof was also considered by the United States Court of Appeals for the Third Circuit in *United States v. Bonner*.¹⁴⁵ In *Bonner*, the court of appeals was faced with a developed factual record in which the question of the crime rate of the neighborhood was litigated in the district court. The district court found that the contested Fourth Amendment stop did not take place in a “high narcotics trafficking area” as the prosecution contended.¹⁴⁶ At the suppression hearing, the prosecution presented evidence indicating that an average of 1.3 arrests were made per week near the place of the stop and that the majority of these were for misdemeanor or summary offenses.¹⁴⁷ In addition, the prosecution also submitted a news article which characterized the housing project at issue as a “high-crime area.”¹⁴⁸ Despite this offer of proof, the district court found that given the large amount of people who live in the housing project, the area was not high in crime.¹⁴⁹ Additionally, the district court noted that the

144. *Id.*

145. 363 F.3d 213 (3d Cir. 2004).

146. *Id.* at 216.

147. *Id.*

148. *Id.*

149. *Id.*

arrests were not largely for narcotics violations as was alleged in the indictment, and therefore, even if the arrest rate constituted a “high-crime area,” the nature of the offenses were not consistent with narcotics trafficking.¹⁵⁰

The Third Circuit reversed the district court on other grounds, but found the “high-crime area” determination was not clearly erroneous.¹⁵¹ Of note, Judge Smith specifically raised the issue of what method of proof and standard of proof should be required to determine the character of the area:

I write separately only to highlight an issue implicated in the District Court’s fact-finding which we have not been required to address: whether under the flight “plus” analysis of *Wardlow* . . . the government is required to prove the existence of objective criteria for what constitutes a high crime area and that the stop occurred in such an area, or rather that the government is required to prove that officers effecting the stop had a reasonable articulable basis to believe that they were in a “high-crime area.”¹⁵²

The issue to Judge Smith was precisely what information should be required for the government to prove a high-crime area. While the court expressly declined to decide the issue, it raised the concern about the problem of objective criteria, including the reality of incomplete crime reports or unreported reports of crime.¹⁵³ Again, like the Ninth Circuit, the question about the method of proof was raised, but deferred to another day.

A recent case from the United States Court of Appeals for the First Circuit provides another revealing example in the struggle to define the mode of proof for high-crime areas. In *United States v. Wright*,¹⁵⁴ the First Circuit remanded with instructions to the district court to reconsider its high-crime area finding. In doing so, it laid out a three-part framework for analyzing the issue.¹⁵⁵

In *Wright*, the court was presented with a similar factual situation to the *Wardlow* case. Specifically, a caravan of police officers in unmarked cars pulled up next to the car in which defendant Wright was a passenger.¹⁵⁶ Upon seeing the police officers, Wright exited the

150. *Id.*

151. *Id.* at 215–16.

152. *Id.* at 218 (Smith, J., concurring).

153. *See id.* at 219 (“[A]n officer is in the position to know the routines and patterns of a geographic area, and whether it is more prone to crime. This knowledge may not be reflected on arrest records and log sheets, as arrests are not the only indicia of crime. In any case, we need not resolve the issue here.”).

154. 485 F.3d 45 (1st Cir. 2007).

155. *Id.* at 53–54.

156. *Id.* at 47.

car and ran away.¹⁵⁷ The police officers gave chase, stopped Wright and then upon searching him, recovered a gun.¹⁵⁸ Wright was arrested for being a felon in possession of a firearm.¹⁵⁹ Wright moved to suppress the gun on the ground that the search violated the Fourth Amendment.

During the suppression hearing, the character of the area in which the stop occurred became a major point of dispute. For the prosecution, the three officers testified that the area is "a very high crime area consisting of firearm violence, drug activity, street robberies, breaking and enterings, all type of street crimes."¹⁶⁰ Officers based their testimony on their own experiences and arrests in the area. However, also during the government's presentation of evidence, the testifying officers referred to biweekly reports kept by the Boston Police Department containing detailed statistics about crimes in the area.¹⁶¹ In those reports, the Boston Police Department designated certain areas as "hot spots" known for their higher incidence of criminal activity.¹⁶² The defense introduced those reports to show that the area in which Wright was arrested was not a hot spot, and thus, not a high-crime area as defined by the Boston Police Department's own system. The trial court admitted its candid confusion about whether the area was a high-crime area. However, the court credited the fact that since there was a functioning official mapping system that mapped criminal incidents, and the area at issue was not in those designated hot spots, the government had not demonstrated that the particular area in question was a high-crime area.¹⁶³

On appeal, the First Circuit responded to the trial court's findings by providing an analytical framework to determine high-crime areas. The court acknowledged that the question of whether an area is a high-crime area is a "factual issue" to be determined by the trial court.¹⁶⁴ While the appellate court did not express an opinion about the trial court's reliance on the Boston Police Department's reports,

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 49.

161. *See id.* ("Officer Bordley explained how he, and other members of the Youth Violence Task Force, determine whether a particular area is a high crime area: 'There are weekly and biweekly reports that are done. They keep stats on what's happening in the city, and they have a meeting every two weeks and they report those stats in the meeting.'").

162. *Id.*

163. *Id.* at 49–50.

164. *See id.* at 53 ("We see no reason to treat the character of the stop's location as other than a factual issue.").

it did set forth an analysis that validates the trial court's finding. Specifically, the court recognized that a high-crime area must be determined by looking at the connection between the crime at issue and the crime the area is known for, the geographic boundaries of the area in question, and the temporal proximity between the evidence of higher criminal activity and what was seen by the officer.¹⁶⁵ On remand, the district court was, thus, instructed to analyze the proffered contested evidence of the area through this framework.¹⁶⁶

Disagreement about what constitutes a "high-crime area" is not limited to federal courts. For example, in *State v. Morgan*,¹⁶⁷ the Wisconsin Supreme Court grappled with the issue and ended up with yet a different answer.¹⁶⁸ In *Morgan*, the district court found a lack of a "clear and specific record" to support the officer's testimony that the area was a "high-crime area."¹⁶⁹ On appeal, the Wisconsin Supreme Court overruled the district court on the issue of what constitutes a "high-crime area." The Wisconsin Supreme Court held that deference should be given to officers, and that "an officer's perception of an area as 'high-crime' can be a factor justifying a search."¹⁷⁰ The court held that the officer's testimony was sufficient to establish a "high-crime area," and that the officer need not cite crime reports or statistics to validate his belief.¹⁷¹ The dissent in *Morgan* highlighted its concern with this undefined proffer, suggesting several ways to firm up otherwise malleable perception of the area. First, the officer should "state the basis for his portrayal of the area,"¹⁷² and "define the geographic locality about which he was speaking."¹⁷³ The dissent continued by suggesting that "[s]ome effort

165. *Id.* at 53–54.

166. *See id.* at 54 ("Given the significance of location in evaluating the totality of the circumstances . . . and in light of the considerations set forth herein, the district court, upon remand, may wish to reevaluate the high crime area issue. However, we wish to be clear that we are not directing the district court to reconsider its high crime area finding, and we are not suggesting what that finding should be, if it chooses to revisit the issue.")

167. 539 N.W.2d 887 (Wis. 1995).

168. *Id.*

169. *See id.* at 891 (recognizing the lower court's finding that "if the state wants the Court to rely on a high-crime area theory in justifying a *Terry* pat down, there has to be a clear and specific record made").

170. *Id.* at 892.

171. *See id.* at 895 (Abrahamson, J., dissenting) (expressing concern with majority's reliance on officer's testimony that area was "a high crime area, or what I would consider [a] high crime area").

172. *See id.* ("Unspecific assertions that there is a crime problem in a particular area should be given little weight . . ." (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(c), at 457 (2d ed. 1987))).

173. *Morgan*, 539 N.W.2d at 895 (Abrahamson, J., dissenting).

must be made to correlate the specific type of crime allegedly endemic to a particular area with the police officer’s reasonable suspicion.”¹⁷⁴ This concern is similar to the First Circuit’s opinion and will be discussed in more detail in the next section.

The conclusion of this brief overview is that courts are struggling with a method of proof to determine what constitutes a high-crime area. While perception and police officer opinion can be useful, they may not be accurate or verifiable. Courts are, thus, debating the merits of a more empirical and statistical approach. As will be discussed in Part III, this shift may well be the most practical method of creating a useable definition of a high-crime area.

2. *Standard of proof*

Whether courts rely on officer war stories or official police department statistical reports, having a method of proof is only the first step. Courts must also have a standard by which to evaluate that proffer of evidence. In many Fourth Amendment situations, the question of the standard of proof is rolled up in the larger Fourth Amendment standard of a “preponderance of the evidence.”¹⁷⁵ In *Wardlow*, however, the Supreme Court recognized that a reasonable suspicion analysis likely rests on a lesser legal standard.¹⁷⁶ What exactly that lesser standard should look like in the context of a high-crime area has not been settled by the few courts addressing this issue.

In *Bonner*, the federal district court applied a “preponderance standard,” determining that the government failed to show by a preponderance of evidence that the area in question was a high-drug area.¹⁷⁷ There was no discussion of why the preponderance standard was chosen, except it can be inferred that it comports with other Fourth Amendment requirements.¹⁷⁸ In addition, the preponderance

174. *Id.*

175. *See, e.g.*, *United States v. Williams*, 400 F. Supp. 2d 673, 680 (D. Del. 2005) (“Considering the totality of this record against the preponderance of the evidence standard, the court finds plaintiff has not demonstrated that defendant’s behavior gave rise to reasonable suspicion and, as a result, the stop and frisk violated the Fourth Amendment.”).

176. *See Illinois v. Wardlow (Wardlow III)*, 528 U.S. 119, 123 (2000) (“While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification . . .”).

177. *United States v. Bonner*, 363 F.3d 213, 218–19 (3d Cir. 2004) (Smith, J., concurring).

178. *See, e.g.*, *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (noting that controlling burden of proof in suppression hearings is proof by preponderance of the evidence); *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (holding that the

standard has the advantage of simplicity. For a preponderance standard to be applied, the court must find that the area is more likely than not a high-crime area.¹⁷⁹ However, as will be discussed below, the preponderance standard may not be the only standard available.

The concurring opinion in *Bonner* specifically addressed the standard of proof and the district court's choice of a preponderance of evidence standard. As mentioned, Judge Smith proposed a more lenient standard, requiring the government to "prove that [the] officers effecting the stop had a *reasonable articulable basis to believe that they were in a 'high crime area.'*"¹⁸⁰ Judge Smith essentially created a reasonable suspicion test for high-crime areas (within the larger reasonable suspicion analysis for a *Terry* stop).¹⁸¹ As justification for the more lenient standard, Judge Smith reasoned that officers "may be informed by various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers."¹⁸² As a result, "an officer is in the position to know the routines and patterns of a geographic area, and whether it is prone to crime."¹⁸³ Judge Smith noted that "reviewing court[s] must give the appropriate weight to *factual inferences* drawn by local law enforcement officers,"¹⁸⁴ and rejected the notion that the government should have to provide hard data on crime statistics.¹⁸⁵

Judge Smith's standard would allow a high-crime area to be designated by the reasonable suspicion of officers thinking they were in a high-crime area. In practical terms, this would mean that officers could explain why they believed the area to be a high-crime area, and

Constitution requires the prosecution to prove that a confession was voluntary by a preponderance of the evidence);

179. When presented with factual data or statistics to compare, such a comparison could be made with minimal difficulty.

180. *Bonner*, 363 F.3d at 218 (Smith, J., concurring) (emphasis added).

181. Presumably, this means that if officers have a reasonable suspicion that they are in a high-crime area, then they can use that reasonable suspicion to justify their reasonable suspicion of the actions of the suspect. Upon analysis, one wonders whether this standard improves anything at all. Certainly, it does not alter the status quo reality of having officers merely testify that they believed they were in a high-crime area without any empirical, verifiable data. It would also require a re-evaluation of *Bonner* despite the district court's findings because the officers clearly believed they were in a high-crime area.

182. *Bonner*, 363 F.3d at 219 (Smith, J., concurring) (internal quotation marks and citations omitted).

183. *Id.*

184. *Id.* (emphasis added) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

185. *See id.* ("This knowledge [of crime data and statistics] may not be reflected on arrest records and log sheets, as arrests are not the only indicia of crime.").

as long as their belief was based on some articulated factors, it would suffice for Fourth Amendment purposes.¹⁸⁶

In dissent, Judge McKee argued for yet another mode of proof lying between the higher preponderance of the evidence standard and the lower reasonable articulable basis standard set forth by Judge Smith. Judge McKee reasoned that “the inquiry must be the *subjective belief of the arresting officer*” which “*must be objectively reasonable.*”¹⁸⁷ Judge McKee buttressed this objectively reasonable standard by noting that “[a]lthough proper deference must be afforded to the training, experience, and knowledge of police officers . . . the Constitution does not allow us to abdicate our responsibilities in favor of their judgments simply because we are operating within the comfortable confines of a courtroom.”¹⁸⁸ Judge McKee rationalized the lesser standard because “reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause”¹⁸⁹ and because “reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”¹⁹⁰

Judge McKee’s standard would require a court to find a high-crime area based on the objectively reasonable, subjective belief of the officer. Essentially, this would mean that an officer could testify to his subjective belief about an area with some minimal requirement that that belief be grounded in objective facts. This raises the bar a bit from Judge Smith’s subjective approach, but still relies on the subjective beliefs of the officer.

Importantly, however, it creates a rebuttable presumption of sorts that could be overcome by objective facts that show the officer’s belief was unreasonable. Such a presumption leaves open the opportunity for a defendant to rebut the claim with crime data statistics or other data (as was successfully done in *Bonner*). Judge McKee’s standard allows for the use of verifiable data, but does not require it in the government’s case. It provides a compromise, recognizing that not all high crime areas can be determined by

186. The difficulty with this standard, as will be discussed *infra*, is that it is not much different from the existing reality and does little to clarify or refine the analysis. It also shifts the determination of a legal fact—that an area was a high-crime area—into the hands of the officer and not the trial court.

187. *Bonner*, 363 F.3d at 222 n.5 (McKee, J., dissenting) (emphasis added).

188. *Id.*

189. *Id.* at 221 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

190. *Id.* Judge McKee’s requirement that the officer’s subjective belief be objectively reasonable would allow a rebuttable presumption, which may, at least theoretically, be overcome by objective facts which show that the officer’s belief was unreasonable.

objective data, but also opens the door for use of that data when requested by either party.

In parsing out the different standards addressed by the district and appellate courts in *Bonner*, there are three apparent options (in descending order of required proof): (1) the preponderance of evidence standard (the *Bonner* district court standard); (2) the subjective belief that must be objectively reasonable (the McKee standard); and (3) the reasonable articulable basis standard (the Smith standard). No other federal court has apparently attempted a similar analysis, but the question of what standard of proof should be applied is raised every day in reasonable suspicion determinations. As will be discussed in Part III, if an empirically driven analysis of high-crime area is to be undertaken, the existing undefined standards may not be sufficient.

3. *Scope of designation*

Inherent in the definition of a high-crime area is a geographical and temporal limitation to that area. What are the geographic boundaries? Do they shift over time? Can an area change from being a high-crime area to a non-high crime area over time, and how do we know when that has happened? Courts have labeled certain streets, housing complexes, neighborhoods, intersections,¹⁹¹ and whole undefined areas with a high-crime gloss without ever giving precise information about the contours of the designation.¹⁹²

Two cases out of the District of Columbia Court of Appeals demonstrate the problems of undefined geographical or temporal boundaries. Unlike many larger jurisdictions, the District of Columbia offers a geographically discrete area of analysis. Compared to the variations of potential “high crime” neighborhoods throughout *Wardlow’s* Illinois, for example, from cornfields to inner-city Chicago, the District of Columbia presents a microcosm of differing socioeconomic areas in a rather limited space. A particular “high-crime area” may well be confined to a few blocks within neighborhoods. Further, with the rapid gentrification of certain neighborhoods, areas once designated high-crime areas may well, a decade later, be home to million-dollar condominiums and relatively

191. See, e.g., *United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) (agreeing that intersection in question was “high-crime area” because the crime defendant was stopped for frequently occurred there).

192. See *infra* notes 196–207 and accompanying text (criticizing a court’s designation of a street as a “high-crime area” when it is almost five miles long).

crime-free streets.¹⁹³ It is in this limited geographic area, that the strength and weakness of the high-crime designation¹⁹⁴ can be analyzed.¹⁹⁵

First, in *James v. United States*,¹⁹⁶ a District of Columbia Metropolitan Police Officer pulled over a car that had just swerved near the officer’s cruiser.¹⁹⁷ The stop occurred on a street described by the testifying officer as “high crime, violent crime, it’s high narcotics, it’s high everything—burglaries, robberies.”¹⁹⁸ When the officer approached the car, the driver looked at the officer and “kind of raised his body up a little bit, and then bent all the way down . . . and then he sat back up.”¹⁹⁹ This led the officer to believe that the driver was “pulling a gun from his waist and putting it under the seat.”²⁰⁰ A search incident to the stop resulted in the recovery of a gun, and James was charged with a series of gun offenses.²⁰¹ James moved to

193. See generally MAUREEN KENNEDY & PAUL LEONARD, THE BROOKINGS INSTITUTION, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 54–59 (2001) (describing the partial gentrification of several Washington, D.C. neighborhoods), available at <http://brookings.edu/reports/2001/04metropolitanpolicy.aspx>.

194. Perhaps because of the shaky neighborhood demarcations, pre-*Wardlow* cases in the District of Columbia viewed the “high-crime area” factor with a certain measure of skepticism. The District of Columbia Court of Appeals required specificity in delineating what was and was not a “high-crime area” and when it was appropriate to consider such a designation. For example, in the first case to address the weight to give a high crime area, the term had little impact. In *Kenion v. United States*, the appellant—whom the officer believed had a prior robbery conviction—was stopped after he was seen conversing with two other men, in inclement weather, in an area described as “the heart and center for vice activity within [the third] district.” 302 A.2d 723, 724 (D.C. 1973). After the court of appeals dismissed the weather factor as being irrelevant, it concluded that “that fact [high crime area], without a great deal more, would not support an inference that appellant was engaged in criminal conduct.” *Id.* at 725; see also *In re D.J.*, 532 A.2d 138, 143 (D.C. 1987) (rejecting the notion that because the stop had taken place in “high narcotics area,” appellant’s conduct warranted heightened police attention, noting that “[t]housands of persons live and go about their legitimate business in areas which are denoted ‘high narcotics areas’ by police,” and that “[i]nnocent activities do not become sinister by the mere fact that they take place in one of these areas”); *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975) (“[W]e eschew the notion that the above facts assume added significance because they happen to have occurred in a high crime area. This familiar talismanic litany, without a great deal more, cannot support an inference that appellant was engaged in criminal conduct.”).

195. As will be discussed in Part III, the District of Columbia crime patterns and crime statistics provide a workable metric to analyze the importance of getting the designation correct.

196. 829 A.2d 963 (D.C. 2003).

197. *Id.* at 964.

198. See *id.* (“[Officer] Green testified that he had been a police officer for five years and had worked in the Fourth District, where these events took place, for four of those years.”).

199. *Id.*

200. *Id.* at 964.

201. *Id.* at 964–65.

suppress the gun and lost at the trial level.²⁰² On appeal, after noting that the “high-crime area” factor is “certainly relevant,” the District of Columbia Court of Appeals stated that “[t]hat is especially true in this case, given that the area where appellant was stopped was not just a ‘high crime’ area, but an area known specifically for the type of activity—*i.e.*, gun possession—of which [the officer] suspected appellant.”²⁰³ The court appeared to give controlling emphasis to the “high-crime area” factor in upholding the trial court’s ruling.

James is instructive for two reasons. First, the area described as a “high everything” area is, in fact, one of the major north-south thoroughfares in Washington, D.C., Northwest.²⁰⁴ The language chosen by the officer, that “the Georgia Avenue corridor” was a high-crime area means that a stretch of road almost five miles long was such an area. In a city that is only about ten miles long north-south, this is an expansive and apparently unchallenged assertion. In addition, the area in which the stop occurred was right by a major university and hospital complex.²⁰⁵ Second, the court inverted the nexus argument by allowing the officer’s scattershot suspicions to justify whatever was found. Clearly, if it is a high “everything” area,²⁰⁶ whatever is found would fall under the officer’s suspicions. The testifying officer did not single out gun possession as what the area was known for, but rather that the area was known for all crimes.²⁰⁷ One can imagine the court could have applied the same logic to drugs or other contraband if it had been found under the seat.

As another example, *Mayes v. United States*²⁰⁸ highlights the difficulty of rebutting a claim that an area is no longer a “high-crime area.”²⁰⁹ In *Mayes*, the officers had approached a stopped car in front of a “notorious crack house”²¹⁰ which they believed matched the description of a car used in a shooting the previous night.²¹¹ At the

202. *Id.* at 964.

203. *Id.* at 968.

204. See, e.g., Nikita Stewart, *Georgia Ave. Awakening*, WASH. POST, Jan. 14, 2007, at A1 (referring to Georgia Avenue as Washington’s “longest commercial corridor” and the “heart and soul of the city”).

205. Whether there are spots along Georgia Avenue that are high crime areas may be accurate, but to claim that the entire road—half the city—is such an area paints with too broad a brush.

206. *James*, 829 A.2d at 864.

207. *Id.*

208. 653 A.2d 856 (D.C. 1995).

209. See *infra* notes 213–219 and accompanying text (showing how a court may designate an area as high-crime despite strong evidence to the contrary).

210. *Mayes*, 653 A.2d at 859.

211. *Id.* at 858; see also *id.* at 863–64 (asserting that officers’ reliance on report was insufficient to establish “articulable suspicion,” at least in part because—as the

motions hearing, the government offered evidence that the block on which the stop occurred was in a "high-crime area," generally, and that the house in which the defendants were parked in front of was, in particular, a "notorious crack house."²¹² This evidence was rebutted by a defense investigator, who testified that "the building was in fact a high-rent luxury apartment house with its own security fence," which housed mostly "professional people."²¹³ The defense also submitted photographs of the luxury apartment house, a brochure about the building, and also testimony that "the premises and grounds were well maintained."²¹⁴ A defense investigator further testified that according to the building manager, there had been "no crime problems at the complex in the past four years" aside from "maybe a domestic situation."²¹⁵ While the trial court rejected the officer's claim that the house was a "notorious crack house," it still "credited the testimony that the general area was a high crime area."²¹⁶ In fact, the appellate court held that "the trial court was required, and so are we, to include in the [reasonable suspicion] calculus . . . the character of the neighborhood."²¹⁷

The issue of over-inclusive high-crime areas is not limited to Washington, D.C. In many East Coast cities such as New York City, Boston, New Haven, and Philadelphia, economic change has reshaped former high-crime boundaries over the past decades.²¹⁸ Yet, a Westlaw or Lexis search for the term in the relevant jurisdiction²¹⁹ will reveal historical judicial findings of high-crime areas fixed in the case law. Litigants, thus, might be tempted to use these judicial findings in court even when the reality on the streets has changed.

These questions of geographical and temporal relevance are manifest in the analysis of some courts trying to find a limit to the high-crime designation. For example, the Ninth Circuit's majority opinion in *Montero-Camargo* held that the data should identify

government admitted— "[t]here was no evidence to speak of regarding the source's basis of knowledge or reliability").

212. *Id.* at 859.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 860.

217. *Id.* at 864. The Court in *Mayes* rejected the trial court's reasoning on other grounds.

218. See, e.g., Joanna Smith Rakoff, *Is New York Losing Its Street Smarts?*, N.Y. TIMES, Oct. 24, 2004, § 14, at 1 (crediting the drop in New York City crime rates, at least in part, to gentrification and the clean-up of the city), available at <http://www.nytimes.com/2004/10/24/nyregion/24smar.html?scp=10&sq=gentrification+crime+&st=nyt>.

219. See www.westlaw.com & www.lexis.com (keyword search "high crime area" /s "fourth amendment").

“specific, circumscribed locations where particular crimes occur with unusual regularity”²²⁰ so as not to include “entire neighborhoods or communities in which members of minority groups regularly go about their daily business.”²²¹ The Court of Appeals for the Sixth Circuit once even limited the designation to a particular intersection, so as not to create an overbroad area.²²² Because the suspicion was tailored to “a specific intersection rather than an entire neighborhood,”²²³ the court found the area narrowly tailored enough to survive scrutiny.²²⁴

The First Circuit in *Wright* provides the clearest recognition of the concern of an overbroad designation. Faced with an area that was not within Boston’s designated hotspots, but was apparently thought by the testifying officers to be a high-crime area, the First Circuit set out a three-part analysis to ensure that the designation of an area is closely correlated with the proof.²²⁵ In *Wright*, as discussed above, the court laid out three categories of relevant evidence for this determination: (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) the “limited geographic boundaries of the ‘area’ or ‘neighborhood’ being evaluated”; and (3) the “temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue.”²²⁶ In setting out this framework, the First Circuit provides the first usable test for courts seeking to focus on the issues of cabining a particular geographic and temporal location. It is also a useful starting point to create an objective, verifiable definition of a high-crime area. This will be the subject of the next section.

III. EMPIRICAL AND VERIFIABLE EVIDENCE TO DETERMINE HIGH-CRIME AREAS

The struggle to define and make meaningful a “high-crime area” designation has two root causes. First, the Supreme Court left the question open in *Wardlow*, basing its holding on an assumed but

220. *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000).

221. *Id.*

222. *See United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) (finding that appellant conceded that particular intersection at issue was “high crime area where officers expect nightly calls regarding robberies or shots fired”).

223. *Id.*

224. *Id.*

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

226. *See id.* (establishing a framework for objectively identifying specific area as “high crime” instead of relying solely on potentially self-serving police testimony).

undefined factual issue.²²⁷ Second, it is simply easier for district courts and prosecutors to rely on subjective opinions of police officers rather than to obtain hard, verifiable data. This Part argues that the status quo is unacceptable for Fourth Amendment purposes, and that if the “high-crime area” designation is going to be used to alter constitutional protections, it must have basis in objective statistical fact.

A. *The Constitutional Issue*

This Article proposes creating an affirmative burden of production for the government to prove that an area is a high-crime area. In creating an additional burden, it is necessary to justify why such a burden is required and also why the existing legal practice is incomplete.

To do so, one must understand the constitutional principles at play in the current Fourth Amendment reasonable suspicion calculus. Briefly,²²⁸ altering Fourth Amendment protections for individuals in certain sections of a city has real consequences for individual liberty.²²⁹ The legal determination that men like Sam Wardlow have lesser Fourth Amendment protections simply because of the neighborhood in which they find themselves is fraught with concern.²³⁰ Even ignoring the economic, racial, and social inequalities involved, one must hope that police officers are at least correct that it is a high-crime area, and are not using their suspicions of the neighborhood as a proxy for impermissible hunches. The line between constitutional “reasonable suspicion” and unconstitutional hunches is a difficult one to draw.²³¹ Using neighborhoods as a means to blur that line must be carefully monitored.

227. See *supra* Part I.B (discussing how the *Wardlow* Court treated District 11 as a high-crime area without elaborating on the meaning of that phrase).

228. Again, there has been significant scholarly analysis of the liberty interests involved in the use of high-crime areas. See *supra* notes 19–23 (surveying law review articles criticizing the high-crime area designation on racial, class, and First Amendment grounds).

229. The Fourth Amendment was enacted to protect individual liberty from overreaching government officials. See, e.g., Ronner, *supra* note 19, at 397–98 (explaining that agents of English parliament had an unrestricted right to search and seize, much to the dismay of the American colonists).

230. E.g., Seawell, *supra* note 21, at 1131 (arguing that the high-crime area designation leads to diminished expectations of privacy for some citizens and perpetuates the politics of identification).

231. Cf. *United States v. Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir. 2000) (Kozinski, J., concurring) (discussing the difficulty in applying totality of the circumstance test because the police officers discover whether their conduct was permissible only at trial).

In addition, because the current practice allows police officers to make assertions of the high-crime nature of the area without verifiable evidence, it allows the police to shape Fourth Amendment protections of its citizens. Whether an area is a high-crime area is a legal (constitutional) fact. It is an objective definition to be determined by the trial court, not the police officer.²³² Yet, in relying on the testifying officer for the opinion about an area, courts are shifting the responsibility to police to make what is a legal conclusion. Officers acting in good faith about their experiences may be unintentionally shaping the constitutional protections of the citizens in the communities. As Judge Kozinski recognized, we expect police officers to consider their beats a high-crime area because they are looking for—or responding to—reports of crime every day.²³³ However, the fact that an individual officer sees crimes every day does not mean that these areas should necessarily be areas of lesser Fourth Amendment protection. The Fourth Amendment is in part meant to act as a check on the interests of officers “engaged in the often competitive enterprise of ferreting out crime.”²³⁴

Thus, the additional burden of production to prove that an area is a high-crime area merely counteracts the weighty liberty interests at issue. If the fact is going to change the scope of constitutional protections, then it had better be an accurate, provable, and court-determined constitutional fact. Interestingly, this is the position law enforcement took in the *Wardlow* case. In its amicus brief before the Supreme Court, NAPO invited the Court to adopt an empirical test for high-crime areas.²³⁵

B. *The NAPO Amicus Brief*

Far from running away from objective requirements, the *Wardlow* NAPO amicus brief argued that an area with a reputation for high

232. See *id.* at 1138 (majority opinion) (emphasizing that designation of “high-crime area” necessitates a “careful examination by the court”).

233. See *id.* at 1143 (Kozinski, J., concurring) (insisting that the testimony of police officers as to whether an area is “high crime” is not enough to designate it as such based solely on “unadorned personal experiences”).

234. See *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

235. See NAPO Amicus Brief, *supra* note 34, at 7–8 (suggesting that empirical data would rebut arguments that police artificially create “high-crime areas” by targeting neighborhoods with high concentrations of racial or ethnic minorities).

crime can be demonstrated by “verifiable and quantifiable data.”²³⁶ The argument continued that “[s]ophisticated data collection, geographical computer and other mapping, and detailed geographical analysis systems have all become an essential part of crime prevention.”²³⁷ More specifically, the NAPO brief recognized that advancements in technology and computer mapping were providing geographical data useful in crime prevention.²³⁸ Reviewing this data in the context of *Wardlow*, NAPO stated:

Determining which locales or neighborhoods are high crime areas, and knowing what types of crimes are prevalent in those areas, results in a more efficient allocation of resources and thus more effective law enforcement, as was occurring in this case. Chicago Police District 11, where the Respondent fled from the police, is such a high crime area. In 1997, District 11 had a higher overall total crime rate than 13 of the 25 police districts, roughly an equal crime rate to two of the districts, and a lower crime rate than 9 of the districts. When broken down further, this data reveals that in 1997, District 11 had the highest number of murders and robberies, and the second highest number of criminal sexual assaults and aggravated assaults, of all the police districts in Chicago. This data clearly indicates that District 11 is a high crime area²³⁹

The NAPO brief concluded that this “quantification” of reports of crime prevents an arbitrary or unequal application of the high-crime area term.²⁴⁰

The NAPO brief is revealing for two contradictory reasons. First, it shows the limitations of data analysis in the high-crime area context.²⁴¹ Second, it shows that despite those limitations law enforcement has faith in its ability to determine through objective statistical data the existence of high-crime areas.

236. *Id.* at 7.

237. *Id.*

238. *See id.* at 20–21 (“The use of geographical factors in policing is the subject of extensive ongoing studies. In conducting these studies, researchers rely on computer mapping as a fundamental tool when working with geographical data. Aided by advancements in technology, computer mapping, which can encompass the production of a simple pin map or the complex interactive mapping for detailed geographical analysis, has become an essential part of crime prevention in larger cities.”) (footnotes omitted).

239. *Id.* at 7.

240. *See id.* at 20 (“[H]igh crime areas’ are not determined in an arbitrary and capricious manner, but are so defined based on verifiable quantitative and qualitative factors, as well as strong anecdotal evidence.”).

241. *See* text accompanying notes 242–246 (suggesting that, relative to the other districts in Chicago, District 11 may not actually be a “high-crime area”).

As an initial matter, there are a few questions left open by the NAPO conclusion that District 11 is “clearly” a high-crime area.²⁴² First, District 11 appears to rank right in the middle of the districts in Chicago in terms of crime.²⁴³ Apparently, there are nine “higher” high-crime Districts, and two that tie with District 11.²⁴⁴ From the NAPO’s own analysis there are then at least twelve high-crime districts making half of Chicago’s districts “high-crime areas.”²⁴⁵ Further, the NAPO brief makes no distinction within districts, as if there were not particular areas or blocks that might exist as more particular problem locations.²⁴⁶ Finally, as is confounding in a case in which the proffered reasonable suspicion was that Mr. Wardlow was standing in a high-narcotics area, there are no drug statistics.²⁴⁷ Why a prevalence for robbery or murder is indicative of narcotics possession is not immediately obvious. Thus, while the NAPO clearly seeks to rely on data for high-crime areas, the conclusions drawn from that data require more sustained scrutiny.²⁴⁸

However, while the conclusions of that data are debatable, law enforcement’s embrace of objective crime statistics puts into question why courts would rely on anything else in Fourth Amendment hearings. After all, if police have the data available, why would it not be put into evidence as a matter of course in suppression hearings? The NAPO brief essentially invites the Supreme Court to adopt an objective standard for high-crime areas, because the police can provide the required information.²⁴⁹ This practical faith in data militates toward legal acceptance. As demonstrated in the statistics provided in the amicus brief, the data already exists and is being used for staffing and resource allocation decisions in our communities.²⁵⁰ It, therefore, also can be used to create accurate assessments in court.

242. NAPO Amicus Brief, *supra* note 34, at 7.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *See id.* at 25 n.27 (disclosing that drug statistics were not included in the data).

248. However, even if the conclusion that District 11 is a “high-crime area” is contestable, the fact that it can be contested proves the larger point—namely, that objective statistics should be the determining fact in creating or defining high-crime areas.

249. *See* NAPO Amicus Brief, *supra* note 34, at 6–8 (arguing that crime statistics would allay fears that police officers are creating “high-crime areas” through subjective experience).

250. *See id.* at 21–22 (asserting that San Diego, CA; Dallas, TX; Baltimore, MD; and Tempe, AZ have all implemented various methods of crime mapping); *see also infra* note 251 (providing websites for other cities that have implemented methods of crime mapping).

Of course, as also detailed above, this data must be looked at with a critical eye before it is allowed to pass constitutional muster in Fourth Amendment hearings.

Importantly, since *Wardlow* was decided in 2000, this ability to determine a high-crime area has only increased. The prevalence of crime mapping software and crime pattern analysis has increased in sophistication and detail. For example, in over two dozen jurisdictions there exist high-quality mapping technologies that are publicly available on the Internet.²⁵¹ In addition, the Department of

251. See, e.g., Albuquerque Crime Statistics, <http://www.cabq.gov/onlinesvcs/crimestats/index.html> (last visited June 10, 2008); Anchorage Police Department Density Map Archives, <http://www.muni.org/apd1/densityarchives.cfm> (last visited June 10, 2008); Atlanta Police Department Online Crime Mapping, <http://www.atlantapd.org/index.asp?nav=CrimeMapping> (last visited June 10, 2008); Austin Police Department Crime Report Viewer, <http://coagis1.ci.austin.tx.us/website/CrimeViewer/Run.htm> (last visited June 10, 2008); Baltimore County Community Crime Profile Main Page, http://www.baltimorecountymd.gov/Agencies/infotech/geographic_information_systems/interactive_maps/ccpMain.html (last visited June 10, 2008); Baltimore Police Department, <http://141.157.54.34/bpdmaps/police.htm> (last visited June 10, 2008); Boulder Crime Map, http://www.bouldercolorado.gov/files/Police/crime_map101207.swf (last visited June 10, 2008); Charlotte Community Crime Information System, <http://maps.cmpdweb.org/cmpdnet/map.aspx> (last visited June 10, 2008); Chicago Police Department Clear Map, <http://gis.chicagopolice.org/> (last visited June 10, 2008); City of Chico Crime Maps, http://www.chico.ca.us/Police/Crime_Analysis/Crime_Maps.asp (last visited June 10, 2008); City of Lincoln Interactive Crime Map, http://www.lincoln.ne.gov/main/s_map.htm (last visited June 10, 2008); City of New Orleans Police Department, <http://www.cityofno.com/Portals/Portal50/portal.aspx> (last visited June 10, 2008); City of Reno Crime Reports, <http://maps.cityofreno.net/> (last visited June 10, 2008); City of Sacramento Police Department Crime Mapping, <http://gis.cityofsacramento.org/website/sacpd/> (last visited June 10, 2008); Denver Public Safety Reports, <http://www.denvergov.org/DenverMaps/report.asp?rpt=csafe&cat=csafe> (last visited June 10, 2008); Greenville County Incident Mapping System, <http://www.gcgis.org/webmapso/> (last visited June 10, 2008); Indianapolis Law Enforcement Map Viewer, <http://imaps.indygov.org/cvc/> (last visited June 10, 2008); Las Vegas Metropolitan Police Department Crime Mapping Web Site, <http://www.lvmpd.com/crimeviewcommunity/> (last visited June 10, 2008); Lexington Citizen's Crime Watch, <http://crimewatch.lfucg.com/> (last visited June 10, 2008); Los Angeles Police Department Crime Maps, <http://www.lapdonline.org/crimemap/> (last visited June 10, 2008); Memphis CrimeMapper, <https://crimemapper.memphispolice.org/crimemapper/index.cfm> (last visited June 10, 2008); Nashville Police Department Interactive Crime Maps, <http://pdmap2.police.nashville.org/> (last visited June 10, 2008); Philadelphia CrimeBase Maps, <http://www.cml.upenn.edu/crimebase/cbsMapRequest.asp> (last visited June 10, 2008); Phoenix Police Department Monthly Crime Maps, http://phoenix.gov/POLICE/cristat_maps.html (last visited June 10, 2008); Pierce County Neighborhood Crime Homepage, <http://www.piercecountycrimedata.org/> (last visited June 10, 2008); Portland Police Bureau Maps and Statistics, <http://www.portlandonline.com/police/index.cfm?c=29795> (last visited June 10, 2008); San Antonio Police Department Current Crime Data and Maps, <http://www.sanantonio.gov/sapd/maps.asp?res=1344&ver=true#map> (last visited June 10, 2008); San Francisco Police Department Crime Maps, http://www.sfgov.org/site/police_index.asp?id=23813 (last visited June 10, 2008); Scottsdale Crime Data Maps, <http://eservices.scottsdaleaz.gov/dmc/crimes/default.asp> (last visited June 10, 2008); St. Louis Metropolitan Police Department,

Justice has created a clearinghouse website and program to develop the technology.²⁵² The growth of this technology will continue as will the feasibility and ease of creating a statistically verifiable high-crime area. This development will both reaffirm law enforcement's faith in the technology, but will also begin answering some of the questions left open by the courts about how to conceptualize a high-crime area.

Adopting an empirical basis for a high-crime area designation is, however, only the beginning. The real solution takes this starting point and meshes it with some of the considerations and conclusions of the federal appellate courts involving standards of proof, particularity, specificity, and the relevance of the nexus between this data and police actions on the street. In this way, the data that law enforcement already relies on will become constitutionally relevant and useable in Fourth Amendment hearings.

C. A Proposal for an Objective, Quantifiable Approach to a High-Crime Area Designation

A proposal for an objective, quantifiable approach to determine high-crime areas would necessarily have three component parts, each of which the government would have the burden of proving to the appropriate standard of proof. First, the area in question would have to be demonstrated to be marked by a high incidence of particularized criminal activity in comparison to neighboring areas with objective and verifiable data. Second, the area at issue would have to be narrowly tailored to a certain geographic location (perhaps including particular blocks, housing complexes, parks, or intersections) and would have to be current, limited to a recent temporal finding of recent crime activity. Third, the nexus between the particularized criminal activity and the officer's observations would have to be demonstrated. The goal is to provide guidance to litigants and courts in Fourth Amendment suppression hearings when the issue of a "high-crime area" is raised.

<http://64.218.68.50/stlouis/newslmpd/viewer.htm> (last visited June 10, 2008); St. Paul Crime Maps, <http://www.stpaul.gov/index.asp?nid=690> (last visited June 10, 2008); Toledo Police Department Crime Maps, <http://www.toledopolice.com/districtmaps.html> (last visited June 10, 2008); Tulsa Police Department Map Central, <http://www.tulsapolice.org/mapcentral.html> (last visited June 10, 2008); West Des Moines Community Crime Mapping Web Site, <http://crimeview.wdm-ia.com/CVC/> (last visited June 10, 2008); Wichita Police Department Crime Statistics, http://www.wichita.gov/CityOffices/Police/Stats/Crimes_Stats.htm (last visited June 10, 2008).

252. U.S. Department of Justice, Office of Justice Programs, <http://www.ojp.usdoj.gov/nij/maps/links.htm> (last visited June 5, 2008).

1. *Crime statistics and other verifiable data*

In the high-crime area context, the central question will always be whether an area is disproportionately affected by criminal activity. To avoid imprecision, this area will have to be statistically or objectively proven to have a higher incidence of crime than other relevant areas.²⁵³ Taking the invitation of NAPO,²⁵⁴ an objective statistical approach would require the government to produce available crime statistics about an area in the Fourth Amendment suppression hearing. The trial court would thus have to evaluate this information as part of the reasonable suspicion calculus. This additional step of review is in line with *Terry*, in which the Supreme Court noted that reasonable suspicion “becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”²⁵⁵

In practical terms, this means that government attorneys would be required to introduce some objective and verifiable evidence to support the claim that an area is a high-crime area. This evidence could consist of certified arrest or conviction statistics from the area. In certain jurisdictions, the easiest mechanism would be to introduce evidence that the arrest took place in official “hot spots,”²⁵⁶ “drug free

253. See *United States v. Diaz-Juarez*, 299 F.3d 1138, 1145 (9th Cir. 2002) (Ferguson, J., dissenting) (stating that officer’s subjective viewpoint is not adequate support for “high crime” area designation: “Agent Rodriguez testified that Terra del Sol Road ‘was located in a high-crime area, relying on his speculative observations. This testimony was a far cry from the ‘specific data’ required to support the assertion that the stop took place in a ‘high-crime’ area.” (citations omitted)).

254. See NAPO Amicus Brief, *supra* note 34, at 7 (allowing designation of high-crime area to be based on “verifiable and quantifiable data”).

255. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). This insight from *Terry* comes from Professor Goldman’s 2001 article on *Wardlow*. See Goldman, *supra* note 23, at 572 (2001) (asserting that an officer’s insights and perspectives should not end the inquiry in defining “reasonable suspicion” in a “high crime” area).

256. A hot spot is defined as “an area that has a greater than average number of criminal or disorder events, or an area where people have a higher than average risk of victimization.” JOHN ECK ET AL., U.S. DEP’T OF JUSTICE, MAPPING CRIME: UNDERSTANDING HOT SPOTS 2 (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/209393.pdf>; see *id.* (“Areas of concentrated crime are often referred to as hot spots. Researchers and police use the term in many different ways. Some refer to hot spot addresses, others refer to hot spot blocks, and others examine clusters of blocks.”) (citations omitted); see also Anselin et al., *supra* note 25, at 222–23 (“A crime hot spot is a location, or small area with an identifiable boundary, with a concentration of criminal incidents. These chronic crime places where crime is concentrated at high rates over extended periods of time may be analogous to the small percentage of chronic offenders who are responsible for a large percentage of crime.”).

zones,”²⁵⁷ or other recognized areas of concern.²⁵⁸ Other means of proof might be the introduction of maps of such designated areas in a locality. Experts could even be called to testify on the subject. Even less formalized proof might be allowed, consisting of police logs, cataloged citizen complaints, or other official findings about a particular area. Officers might even be able to testify about their own arrests in locations as long as those arrests could be verified by proper documentation (including police records or arrest reports). The key modification would be a requirement of empirical data or documentation that could be verified and compared by the trial court.

Importantly, the prosecutor would be required to demonstrate that the introduced statistics were higher than those of other neighboring areas, and that the difference was significant for constitutional purposes. To be relevant, there would have to be a baseline figure for comparison. To challenge the government evidence, defense lawyers would be entitled to introduce contrary statistics, experts, records, or comparisons.

The difficult question remaining for courts to decide will be how “high” a high-crime area must be to shift the Fourth Amendment balance. Whether courts would be satisfied with a middle-of-the-range determination, as with *Wardlow*’s District 11, remains to be seen. It is a question currently unexamined because of the paucity of empirical information and sustained analysis. However, over time an established baseline of understanding will begin to develop about the definition of a high-crime area in particular localities.

At a minimum, it would seem that for constitutional standards to be shifted, the claim of a high-crime area must mean something significant. To alter fundamental Fourth Amendment protections, it would seem necessary that the area really be qualitatively different. Designated high-crime areas in the top ten or twenty percent may make the cut, but one would question whether the middle-ground

257. See Peter M. Flanagan, *Trespass Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327, 331–32 (2003) (comparing drug exclusion zones enacted in Portland, Oregon and Cincinnati, Ohio); see *id.* at 334 (praising the effectiveness of drug-free zones in reducing crime).

258. David M. Kennedy, *Pulling Levers: Chronic Offenders, High Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 459 (1997) (“[M]uch crime—violent, drug, property and domestic—is concentrated in certain neighborhoods, particularly poor minority neighborhoods. More recently, attention has turned to ‘hot spots’ even within such neighborhoods. In Minneapolis, in 1986, only 3% of the city’s street addresses produced 50% of calls for police service. In Boston, gang turf representing less than 4% of the city accounted for more than 12% of the city’s armed robberies and roughly a quarter of youth homicides, gun assaults, weapons offenses, drug offenses, and calls for service regarding ‘shots fired.’”).

determinations should pass muster.²⁵⁹ In some way, the term itself may have to be redefined with distinctions made between “high,” “higher,” and “highest” crime designations.

This Article cannot resolve what is, in essence, the ultimate question for courts considering the high-crime designation in particular locations. The definitional questions addressed here and in the following sections suggest the tools for analysis, but not a universal answer. However, the only way courts will be able to adopt an accurate and rigorous approach to localized high-crime areas is to begin demanding this type of objective and empirical evidence.

2. *Geography and timing*

To create a workable “high-crime area,” the statistics or data must relate to a specific and particularized geographic area with set boundaries.²⁶⁰ In addition, the area must be a current high-crime area, not necessarily a historic high-crime area.²⁶¹ Thus, an empirical, verifiable high-crime definition would also have to require a geographic and temporal limitation.

In practical terms this will likely be determined by how the crime statistics are collected in a particular jurisdiction. For example, in Chicago during the *Wardlow* case, the city was broken up into police districts.²⁶² As detailed in the NAPO amicus brief, the police were confident enough in their collection strategy to propose a district-wide categorization to the Supreme Court.²⁶³ However, it is likely that the Chicago police had an even better understanding of the crime

259. One of the consequences of adopting a preponderance of evidence standard (discussed later) may be to create a binary determination of what is a high-crime area. For example, if an area is in the 51% category, does that mean it is really a “high-crime area” for constitutional purposes? While it is higher than other areas, it would seem that designating half an area (city, county, or even state) a high-crime area will not survive sustained analysis. It would likely be struck down as overbroad and overinclusive for any practical use.

260. See *United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) (recognizing that an overly large or vague demarcation of a high-crime area might lead to impermissible profiling, but because the “high crime” area in question was “a specific intersection rather than an entire neighborhood[,]” the Court’s concerns were alleviated).

261. See Stewart, *supra* note 204 (noting the revitalization efforts aimed at the Georgia Avenue corridor in Washington, D.C.).

262. See NAPO Amicus Brief, *supra* note 34, at 24 (“Chicago has 25 police districts.”) The brief details how the district crime data show that District 11 (the district in question in *Wardlow*) had a statistically higher crime rate than more than half of the police districts in Chicago.

263. See *id.* at 7–8 (comparing data from District 11 with twenty-five police crime districts in Chicago and concluding that, as a whole, District 11 is a high-crime area). NAPO preemptively rejects any assertion that areas with large minority populations are disproportionately targeted, because Chicago’s police districting system allows for quantifiable crime reports. *Id.* at 8.

patterns in the city than mere district summaries.²⁶⁴ In Washington, D.C., the Metropolitan Police Department offers a publicly accessible website, in which one can find the number of crimes for a particular block or intersection for the past two calendar years.²⁶⁵ Thus, while the Metropolitan Police Department also has a district-wide crime mapping system, because more tailored street-by-street mapping exists, it would make little sense to rely on an overbroad district-wide categorization. Instead, in the District of Columbia, litigants should be able to determine to a close degree of certainty the type and frequency of a particular crime during a particular timeframe.²⁶⁶ Looking at how various jurisdictions already catalogue their reports of crime is the first step in determining the appropriate geographic limitation.

How a jurisdiction maps crimes for its own internal purposes, however, may not be the optimal designation for purposes of the Fourth Amendment. Crime does not necessarily remain localized to a particular district.²⁶⁷ The effects of a particular block may well spill over to other blocks or cross district lines.²⁶⁸ In addition, crime may be centered on various buildings, stores, or residential complexes that are located on those blocks.²⁶⁹ Sometimes, there will be a single source point for criminal activity, be it a parking lot, alley, or park.²⁷⁰

264. In fact, if one views the City of Chicago's crime mapping database, one can see a very sophisticated crime pattern analysis. See Chicago Police Department, Clear Map Crime Incidents, <http://gis.chicagopolice.org/CLEARMap/startPage.htm> (last visited June 10, 2008) (allowing users to retrieve results using searches based on a variety of parameters, such as date range or specific geographic range like address, beat, or school). The results can be as specific as within 1/8th of a mile of a particular address.

265. See District of Columbia, Metropolitan Police Department, <http://crimemap.dc.gov/presentation/query.asp> (last visited June 10, 2008) (allowing the user to search for crime by specific address and also within 500, 1000, or 1500 feet of that location). For example, between January 1, 2008, and April 1, 2008, there were twenty-two thefts within 1500 feet of the D.C. Superior Court at 500 Indiana Avenue NW. This type of crime is up 214% from the same date range last year, when there were seven thefts within a 1500-foot radius of the courthouse.

266. Other jurisdictions, as evidenced by the City of Chicago's website, have the same capabilities. See *supra* note 251 (providing a list of websites maintained by cities that track and map crime).

267. See Anselin et al., *supra* note 25, at 223 ("Fixed boundaries (e.g., census tracts, police precincts, or uniform grid cells) have the advantage of giving rise to the space/time series data commonly used for crime reporting and spatial modeling. Their disadvantage is that hot spots may cross the fixed boundaries or vary in size.").

268. See *id.* (noting that an alternative method of defining hot spot boundaries through ad hoc clustering can "yield[] sizes and shapes tuned specifically to individual hot spots").

269. See *id.* at 223-24 (providing examples of hot spots in various cities that limit boundaries to "no more than one linear block of a street" or to specific times of day).

270. In addition, it must be recognized that not all crime is reported or cataloged even in the most sophisticated crime mapping program. See MARKOVIC & STONE, *supra* note 28, at 2 ("No crime map reflects all crime. In order to appear on a map, a

Certain neighborhoods may have safe areas and less safe areas. Thus, the ability to view crime patterns within a larger geographic understanding is important, and may mean that an alternative method of defining a high-crime area is necessary. The question is still how to cabin those "areas" so that they are useable in court and meaningful for Fourth Amendment purposes.²⁷¹

The majority of jurisdictions will likely adopt a high-crime area definition using existing metrics including districts or sub-districts (usually police patrol areas) or particular streets.²⁷² However, another solution would be to create an accepted geographic radius as a unit of measure for a high-crime area. For example, a 500-foot, 1000-foot, or 1500-foot radius of the area around the arrest location could be considered a fair geographic measure of an area. In the District of Columbia, using the public crime mapping technology, one can view a 500-foot, 1000-foot, or 1500-foot radius of the area in which the crime occurs.²⁷³ The mapping technology creates a shaded circular

crime must be reported, have a geographic reference, and be of sufficient priority to be put on a map. . . . Among crimes that are reported to police, some do not have geographic references. Financial fraud, extortion, and many forms of conspiracy do not occur at fixed locations and are therefore rarely mapped. . . . Even for crimes that occur at specific locations, such as armed robbery and sexual assault, police agencies do not always record the location with enough detail to allow the incident to be mapped. This is especially common when someone reports a crime at a police station days after the event. . . . Even some jurisdictions with sophisticated crime mapping programs choose not to map some forms of domestic violence, crimes among juveniles, threats, defacing public property, and other criminal offenses.").

271. The study of crime mapping technology and specifically hot spots is incredibly complex and beyond the scope of this Article. The analysis can include differentiating between hot spot places (specific addresses, corners, or other physical places, robberies at ATMs or stores, drug dealing locations), hot spot streets (corridors, avenues, alleys that encourage prostitution, robberies or street drug dealing), hot spot areas (neighborhoods, multi-block concentrations that recognize residential burglaries or gang activity), and repeat victim spots (domestic violence cases). See ECK ET AL., *supra* note 256, at 5 (noting that the identification of hot spots requires multiple techniques). In addition, based on the type of crime, there might be different types of crime maps, including, for example, "dot maps" (for specific addresses), "line maps" (for streets), and ellipse, choropleth, and isoline maps (for broader areas). See *id.* at 9–10 (comparing different hot spot theories).

272. See Anselin et al., *supra* note 25, at 223 ("Perhaps the easiest means of identifying hot spots is to partition a jurisdiction into a fixed set of boundaries (e.g., square grid cells, census block groups, or some other boundary set) and to develop a set of rules (a 'rule base') using threshold values.").

273. The technology allows a user to adjust the search from 100 feet to 1500 feet from the location of the arrest. This is a common phenomenon with crime mapping technology. See MARKOVIC & STONE, *supra* note 28, at 3 ("In general, crime mapping projects rely on digital base maps created by government departments other than the police. . . . The base maps themselves vary in the level of detail they provide. For example, many cities contain informal settlements without planned streets or services, and addresses in these areas may not have standard names or numbers. The level of detail is important not only for display and analysis, but also for locating crime incidents and contextual features on maps in the first place, a process known as 'geocoding.' The geocoding process translates standard street address

area around an arrest location with more detailed mapping of the cross streets, houses, and other things in the area.²⁷⁴ This localized crime mapping technology may provide a better definition of a “high-crime area” than using predefined neighborhood labels or entire police districts.²⁷⁵ Depending on the technology, this type of defined radius could be adopted in particular locations. Thus, as a practical matter in a Fourth Amendment hearing, an officer would testify that he made an arrest at a particular location. Then, a review of a 1000-foot radius of that location could be conducted to determine all of the similar crimes over the past few months. The result would be an accurate and verifiable number of crimes to compare with the entire jurisdiction’s crime pattern.

The solution of a limited geographic area for a high-crime area also solves the temporal issue of relying on historic high-crime areas that no longer have the same incidence of crime.²⁷⁶ Again, by using modern mapping technology such as the one provided in the District of Columbia, one can search for crime patterns within the relevant time period. Usually, a one- to three-month time period before the arrest at issue will be the relevant time frame. Even if one extends that period to sixth months or a year, the parties will at least have a baseline idea of the amount of crime in a particular area. One of the dangers of not restricting the inquiry to a particular time period is that certain areas will never escape the perception being a high-crime area. Neighborhoods should be judged on current facts rather than a negative reputation or outdated history.²⁷⁷

information into latitude and longitude coordinates so that the locations of criminal incidents and contextual features such as parks and schools, boundaries of police and neighborhood watch districts, and census tracts can be displayed on the maps.”).

274. *See id.* at 2–3 (“Crime maps are most useful when they display a variety of geographical features that place crime data in context. . . . Some of these contextual elements can be classified as crime generators or crime suppressors. Crime generators may include shops with liquor licenses, shopping malls, gambling establishments, concert venues, and the like. Crime suppressors may include police stations, neighborhood watch areas, or designated safety corridors.”).

275. Of course, this radius would be unnecessary if police departments created already predetermined maps of hot spot or high drug activity with specific streets included.

276. *See D.R. v. State*, 941 So. 2d 536, 537 (Fla. Dist. Ct. App. 2006) (holding that because “[t]he evidence adduced established only that the officer’s knowledge of the area was not current and that an undetermined number of narcotics arrests took place there at some unknown time[,]” the government’s evidence of a high crime area was insufficient); *see also id.* at 538 (“The burden of proof rests with the State, and the officer’s testimony suggests strongly that more detailed evidence about the current status of the neighborhood could have been provided. As it was, however, the officer’s out-of-date conclusion, unreinforced by specific, contemporary information, was legally insufficient to satisfy the Fourth Amendment.”).

277. *See Stewart*, *supra* note 204 (noting the “renaissance” of an area of Washington, D.C. “tattered by time, drugs, and neglect”).

Refining the definition of a high-crime area to a defined geographic and temporal area yields two main advantages for Fourth Amendment purposes. In terms of geography, it provides a measure of precision in creating a defined and limited area. This precision prevents overbroad analysis of areas, limiting "high-crime areas" to only those areas that deserve the label. Second, in requiring current, updated high-crime designations it provides the ability for courts to make an accurate determination of the conditions on the ground. Deciding cases based on out-of-date determinations or incorrect information is not relevant and should not be the basis for Fourth Amendment decisions when better information exists.

3. *Nexus*

The fact that a designated area statistically might be a high-crime area does not end the analysis. That an area may have a heightened number of crimes means little if this information is either not known by the police officer or not related to the observation of that officer. Central to the Fourth Amendment reasonable suspicion analysis is the nexus between knowledge about an area and the observations of an individual officer on the street.

One of the least discussed issues in the high-crime area debate is relevance.²⁷⁸ The only reason a high-crime area is relevant is that it makes an officer's "suspicion" about otherwise innocent conduct in that area more reasonable.²⁷⁹ If the area is a high-crime area known for burglaries, the sight of a man loitering with a bag over his shoulder may mean something different than if the area is known as a bus stop or transit point. However, if that area is known for burglaries, the fact that an officer sees a hand-to-hand transfer of an object for money (consistent with a drug deal) should add little to his suspicion in that neighborhood. While he may be in a "high-crime area," there is no relevant connection between the character of the neighborhood and what he observed. A broad brush characterization cannot withstand this type of specific and particularized scrutiny.²⁸⁰

278. See Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214, 222 n.42 (1983) ("[U]nless there is some identity between the prevalent crime and the crime suspected, a 'crime-prone' neighborhood does not increase the probability that a particular crime is being committed.").

279. See *United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) ("[T]he crimes that frequently occur in the area are specific and related to the reason for which Caruthers was stopped. Thus, we are satisfied that we have not too easily permitted the consideration of this factor.").

280. See *United States v. Edmonds*, 240 F.3d 55, 60 (D.C. Cir. 2001) ("[T]he government established not just that Livingston Road suffers from general,

In addition, the information about the area cannot simply be collected at police headquarters and introduced at a suppression hearing; it must be known before the officer makes his observation. If an officer does not know the information before making the observation, that information would be irrelevant to the reasonableness of the officer's reasonable suspicion.²⁸¹ For the information about the neighborhood to have constitutional weight, the officer would have to be educated on it and then base his or her actions on that information.

The *Wardlow* case itself demonstrates the forgotten relevance of nexus. According to the NAPO argument, the area in question was known for a statistically high incidence of serious crimes—murder, robbery, aggravated assault.²⁸² There was no statistical evidence of drug crimes, but the evidence introduced (through non-statistical testimony) was that the area was known for “high narcotics traffic.”²⁸³ The officers were on patrol as part of their narcotics enforcement duties and observed Sam Wardlow standing with a white bag on the street.²⁸⁴ Would a trained officer seeing a man with an opaque bag think this was consistent with criminal activity of murder, robbery, assault, or even drug dealing? Likely, the answer is no. So even in the foundational case of *Wardlow*, we are left with arguably irrelevant crime statistics creating a high-crime area and making a constitutional difference for Fourth Amendment purposes. Properly analyzed, *Wardlow* would likely be decided differently if the high-crime nexus were taken seriously. Even assuming that the officers on patrol reasonably suspect the area in question was objectively a high narcotics area, here, knowing that fact adds little to the reasonableness of whether officers should know that criminal activity was afoot based on the observation of flight while holding a white bag.

undifferentiated ‘crime,’ but that it is home to the precise type of infractions—drug and firearm offenses—that [Officer] Feirson suspected [Defendant] Edmonds of committing.”).

281. This is simply a matter of logic. The legal relevance of the information is how it affects the officer's judgment on the street. If he did not know anything about the area, it could not affect his judgment. Further, this information should not only be relevant for the stop, but also the search. The information an officer has about the particular crime patterns should also allow certain freedom and/or restraint in terms of the scope of the search under the Fourth Amendment.

282. See NAPO Amicus Brief, *supra* note 34, at 7 (“District 11 [the district in question] had the highest number of murders and robberies, and the second highest number of criminal sexual assaults and aggravated assaults, of all the police districts in Chicago.”).

283. *People v. Wardlow (Wardlow I)*, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997), *aff'd*, 701 N.E.2d 484 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000).

284. *Id.*

Of course, in some cases the expectation of the officers will be central to the suspicion. In a high-drug area, the incidence of hand-to-hand transactions may well be sufficient to create reasonable suspicion for a *Terry* stop.²⁸⁵ Such direct nexus between the expectation about the area and the officer’s observation should not be overlooked by reviewing courts. Nexus is central to the relevance of the Fourth Amendment reasonableness analysis and the inclusion of objective, verifiable statistics or information makes this relevance analysis possible.

D. Standard of Proof

The final issue in creating an objective and verifiable standard for high-crime areas is to decide on a standard of proof. It is, unexpectedly, a complex and unsettled question, as courts have not analyzed the issue in any great detail.

Under any standard, the government would have the burden of justifying an infringement of an individual’s Fourth Amendment’s rights. It must be the government’s burden to prove that there is an “objective evidentiary justification” for the infringement of that expectation of privacy.²⁸⁶ Further, for an empirical statistical approach to have any meaning, the standard of proof must be clear.

Two possible solutions to the standard of proof are proposed here. One solution would be a preponderance of evidence standard. While not required under existing law, the standard would have the advantage of clarity. A trial court could simply determine whether there is a significantly higher incidence of relevant crime in the designated area based on available evidence.²⁸⁷ Like many points of

285. See 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.6(g), at 366 (4th ed. 2004) (“The courts have rather consistently concluded that ‘the incidence of a high crime rate is a relevant circumstance to be considered in determining the existence of probable cause,’ and properly so. . . . [I]f an officer observes a street corner exchange of some substance for money, such an event takes on a special meaning if it happens in a part of the community where drug traffic is intensive.”).

286. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

287. In certain civil cases involving the existence of high crime areas, courts have been willing to demand crime data to determine the foreseeability of criminal incidents and thus the viability of negligence claims. See, e.g., *Oliver v. Abdul Prod. II, Inc.*, No. 03-2240, 2005 WL 3478399, at *2-3 (D.D.C. Dec. 20, 2005) (stating that “general crime statistics” are not sufficient to prove that harm is foreseeable); *District of Columbia v. Doe*, 524 A.2d 30, 33-34 (D.C. 1987) (accepting evidence of previous violent crimes in school and surrounding area sufficient to prove notice of harm); *Asbell v. BP Exploration & Oil, Inc.*, 497 S.E.2d 260, 264 (Ga. Ct. App. 1998) (rejecting security expert’s testimony because he lacked statistical data to back up claim that location in question was in high crime area); *Tex. Real Estate Holdings, Inc. v. Quach*, 95 S.W.3d 395, 398-99 (Tex. Ct. App. 2003) (relying on statistics from census tract rather than those from police beat because tract more narrowly and accurately reflected criminal activity of specific location of crime). Courts have

disputed evidence, the trial court would decide, weighing the proffered evidence.

However, as demonstrated in the *Bonner* debate, the preponderance of evidence standard may not neatly fit a Fourth Amendment reasonable suspicion calculus. Specifically, the language from *Wardlow* states that reasonable suspicion “requires considerably less” than the preponderance of evidence.²⁸⁸ Thus, the ultimate legal standard is less than a preponderance of evidence, making it somewhat counter-intuitive that the component facts of the reasonable suspicion totality would have to be proven to a higher standard. In other words, while the legal standard for the trial court may be a lower bar of “reasonable suspicion,” each of the facts supporting that reasonable suspicion might have to be proved to a higher preponderance of evidence standard.

As an example, imagine a scenario in which, at a Fourth Amendment suppression hearing, the government introduced evidence to support the claim that the suspect “fled” at the sight of police. The testimony to support this claim was that the suspect, a young man, observed the presence of police and walked rapidly into a building while tucking an unknown object quickly into his bag. A trial court deciding how to evaluate whether there was evidence of flight would have to evaluate the facts to some legal standard. Walking rapidly is a fact. Whether the suspect walked rapidly enough to be considered flight from officers would be a fact with legal considerations. It would not be unreasonable for a trial court to use a preponderance standard as a default standard to determine if, in fact, this fact had been established. A judge could say, “Yes, the young man walked rapidly away from officers, I can find that to a preponderance standard.” However, without more, this fact may not be sufficient for the legal conclusion that the young man fled at the sight of police. It would, however, be one fact included in the totality of circumstances analysis necessary for reasonable suspicion.

Similarly, with high-crime areas, the judge could say,

cautioned that findings of the foreseeability of crime in a specific area should be based on well-defined reports of crime statistics. *See* *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 757 (Tex. 1998) (noting that “[s]tatistics regarding large or undefined geographic areas do not by themselves make crime foreseeable at a specific location.”).

288. *See* *Illinois v. Wardlow (Wardlow III)*, 528 U.S. 119, 123 (2000) (“While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification . . .”).

I find that the area in which the young man walked is a known high drug area. The prosecution has shown that this neighborhood has one of the highest incidences of drug crime in the city. The prosecution has provided official arrest statistics that demonstrate that this neighborhood is a recognized problem area for drugs and guns, compared to other areas in the city. I can find by a preponderance that the area is a high crime area, and will factor that into my Fourth Amendment calculus.

The two facts: that the young man walked rapidly away from police officers, and that the area is a high-crime area are, thus proved to a higher standard than the ultimate reasonable suspicion legal analysis, without harm done to the legal standard. The court is still making the ultimate legal conclusion based on existing constitutional standards. The court's conclusion regarding the high-crime area, however, may not end the analysis. If, for example, the young man were a student at a law school in a high-crime area, the building were a library, and the object a cell phone, the court could well balance the facts to come to a different legal conclusion about reasonable suspicion. Yet, in terms of the standard of proof, there is little reason to lower the standard below a preponderance of evidence for each of the individual facts under consideration by the trial court.

However, this type of preponderance analysis was exactly what the Third Circuit discussed and apparently rejected in *Bonner*.²⁸⁹ Recognizing the debate in *Bonner*, this Article would also offer another alternative standard of proof based in part on Judge McKee's dissent. It would be a lesser standard than a preponderance of evidence, but still have sufficient analytical force to protect individual liberties. Instead of positing the reviewing standard as a "subjective belief of the arresting officer" that "must be objectively reasonable,"²⁹⁰ this Article would require a subjective belief that is objectively reasonable, *and objectively accurate*. The reviewing court would have to determine: (1) if the police officer had a subjective belief that the area was a high-crime area; (2) that this belief was objectively

289. *United States v. Bonner*, 363 F.3d 213, 222 n.5 (McKee, J., dissenting). In part, this was because Judge Smith chose to rely on the "factual inferences" of the officer to help shape the understanding of the neighborhood. *See id.* at 219 (Smith, J., concurring) (noting that a law enforcement officer might have background knowledge about criminal activity of area not reflected by empirical data such as arrest records). The difference between an officer relying on a factual inference about a neighborhood and a court reviewing the objective facts about a neighborhood is a subtle, but critical shift. Relying on police officers to provide factual inferences about a neighborhood is, in essence, to allow officers and not the court to shape the conclusion of whether an area is, in fact, a high crime area. *See supra* note 234.

290. *Id.* at 222 n.5 (McKee, J., dissenting).

reasonable, and (3) that this assessment about the neighborhood was, in fact, accurate based on existing data.²⁹¹

The third, added step would be to see if the officer's subjective belief based on objective information correlates with the actual objective data available about the area. Courts would review the government's proffer of statistics or other data about the area in light of the officer's subjective assessment of the area. The defense would also be able to challenge those facts with their own contrary objective data if it existed. If the court determined that there existed accurate and verified data about a defined high-crime area and that the officer correctly relied on accurate data, then the objective standard would be met. The difference between this and the preponderance of evidence standard is that under this lesser standard the court would not have to determine as a fifty-one percent fact that the area was a high-crime area, only that the officer relied on objectively accurate information about the area. It still would be the court, not the officer, making the factual determination.²⁹²

V. CONCLUSION: THE BENEFITS OF THE EMPIRICAL APPROACH TO HIGH-CRIME AREAS

To summarize, a requirement of verifiable and quantitative high crime evidence would require several steps. First, in a Fourth

291. In practical terms, this proposed standard would mean that the court would have to be satisfied not only that the arresting officer knew through some objective means that the area was a high crime area, but that the officer was correct in that belief. Thus, the first step would be to look at what the officer knew. The officer's subjective knowledge could be shown through incident reports, prior arrest logs, or other forms of proof short of official statistics. The second step would be to see if this subjective belief was objectively reasonable. Most times the officer's subjective belief will be based on some set of collected objective facts, including reports, briefings, or experience about the area. An officer whose subjective belief was not based on any prior information or experience could not survive this second step. However, in most cases there is some objective basis for the subjective belief, even if it cannot be quantified or verified (or even if it is actually incorrect). As discussed above, it is this third step of analyzing and comparing the objective data that ensures that the suspicion about a neighborhood is anchored in accurate and verified information.

292. The difference between this and the *Bonner* standard of Judge McKee is demonstrated in the following example: An officer could testify that a particular block is known to be a high-drug area (step one). He could explain that this subjective belief is based on official arrest reports from the area that show three arrests a month for the past six months. The officer's belief thus would be based on objective facts (step two). However, if it could be shown that there were one hundred other blocks with three arrests *a week*, or three arrests *a day*, it could be shown that, in fact, this was not a high drug block compared to other places in the city. Further, if the defense could show that there were over ten designated hot spots and that they were not near the block at issue, it would undermine the high-crime area claim. Only by requiring the third step of review can there be any confidence that certain areas are, in fact, higher crime areas.

Amendment suppression hearing, the government must introduce objective, verifiable data about the level of crime in a particular area, as compared to other comparable areas in the region. This evidence can be admitted through crime statistics, crime maps, designated hot-spot or red-zone maps, verifiable arrest data, crime report data, expert testimony, or other official police information. The statistical evidence must be current to the time of the arrest. The statistical data must relate to a particular and circumscribed area. This area must be limited and described using existing police districts, established neighborhood demarcations, particular intersections or streets, or previously designated areas or a specified radius. For example, in hot spot areas, having a north, south, east, and west boundary would be required. For a radius, a specified number of feet would be appropriate. Second, this particularized knowledge about an area must be demonstrated to be known to the officer before making the arrest, so as to establish the nexus between the relevance of the high-crime area and the reasonable suspicions of the officer. Third, the trial court would have to make a factual finding about whether the area was objectively a high-crime area. Finally, the trial court would have to analyze whether this fact affected the Fourth Amendment reasonable suspicion analysis.

The requirement of objective data in Fourth Amendment hearings will present concerns for both prosecutors and defense lawyers. From the prosecution side, the requirement creates an additional burden of production. While the statistics may be available to most police departments, they might not be as accessible to line prosecutors. One can imagine that while a police captain might have a virtual or actual pushpin map of every crime in his jurisdiction,²⁹³ a prosecutor may not be privy to such information. In addition, for the statistics to mean anything they will need to be current to the month near the alleged offense. New channels of communication may need to be created to facilitate this flow of information from the police to the prosecutor. In those jurisdictions that do maintain such crime statistics, however, it should not be too difficult to produce the materials to be introduced in court.²⁹⁴ Certainly, once courts begin demanding such data, prosecutors' offices will respond. In many

293. See MARKOVIC & STONE, *supra* note 28, at 1 ("For decades, police agencies have relied on wall maps to detect patterns in the locations of certain crimes, but the recent use of computers to map crime has greatly increased the value of mapping.")

294. This mechanism could be as simple as having the police print out the publicly available information before coming to court.

jurisdictions the information exists in the public record and merely needs to be organized for submission to the court.

From a defense perspective, the introduction of objective crime statistic data also presents some real concerns. At a conceptual level, it legitimates an otherwise ambiguous and usually contestable argument of the government. The otherwise vague opinions of a police officer now will be replaced with evidence that can be given constitutional weight. This may mean that courts will be more willing to factor “high-crime area” considerations into their Fourth Amendment analysis. Further, in lending the veneer of objectivity, it minimizes the racial- and class-based assumptions that may be built into “reasonable suspicion” determinations.²⁹⁵ Also, with the police department controlling the collection and dissemination of statistics and data, there is a concern with police officials’ ability to influence Fourth Amendment determinations. There will be an incentive to label certain areas “high crime” to focus police resources and attention on those areas. This may create a self-fulfilling situation, whereby police targeting of certain areas will result in more arrests and thus more latitude to stop even more people based on a lower standard of reasonable suspicion. On the other hand, for defense lawyers, verifiable data will allow challenges to previously unchallengeable assertions of police officers in Fourth Amendment hearings. It now will be possible empirically to refute assertions of officers and demand a more accurate assessment of neighborhood characteristics.

Despite these concerns, moving toward an objective, statistics-based approach to high-crime areas will ultimately offer courts the significant advantage of clarity and a measure of intellectual honesty to an otherwise malleable term. As observed in the discussion in Part II, reliance on inexact, subjective beliefs leads to inconsistent and unverifiable findings. If Fourth Amendment protections are to be constitutionally altered (either explicitly or implicitly) in particular areas, courts should carefully consider the characteristics of those areas to focus the analysis on more objective metrics. Because the data and collection measures now exist to determine whether statistics show that one area objectively has more crime than another,

295. See Johnson, *supra* note 278, at 255 (“With other factors, prejudice may be hidden in the police officer’s ‘expertise.’ For example, when a police officer describes a neighborhood as ‘high crime’ or ‘drug-prone,’ a court cannot exercise the judicial detachment relied upon with factors involving overt prejudice. The court may completely accept the expertise, risking that the officer’s prejudice about ghetto neighborhoods clouds his evaluation of the probability of crime contributed by the neighborhood.”).

courts should be demanding this information on a regular basis. Like many contestable facts, high-crime areas will not be easily defined, but the debate will help improve the analysis.

Adopting this requirement for objective and verifiable evidence accomplishes several constitutional and practical goals. First, it strengthens the protection of individual rights by requiring the government to justify an infringement on liberty. In addition, it grounds the objective nature of Fourth Amendment analysis in real data and limits the area in question to a specific and particularized geographical and temporal area. It ensures that the information is used only in appropriate cases requiring courts to find a nexus between the area and the suspicions of the officer. Finally, it provides an incentive to improve intelligence-based crime-solving technologies.

This last point should not be forgotten. Establishing an objective, data-supported standard not only strengthens constitutional protections, but improves local policing and community involvement.²⁹⁶ Data driven policing is a reality of modern law enforcement. The requirement to collect and utilize existing information with existing tools can only benefit the effectiveness of police. Similarly, this information should be shared with community stakeholders who have an interest in a safe community.²⁹⁷ The high-crime area designation has many consequences, from depressing economic investment and home prices, to increasing public funds to underserved districts. Using this information in court will simply sharpen the collection mechanisms and provide a better sense of the crime patterns of an area.

From a constitutional perspective, the addition of some objective, verifiable data will benefit trial courts that are otherwise ill-equipped to make judgments about the character of a neighborhood. Eventually, the repetition of cases and areas will be such that some order will be placed on local jurisdictions in terms of high crime spots. Judges may soon come to know the repeat problem areas, and also have a comparative benchmark in terms of rates of crime.

296. See MARKOVIC & STONE, *supra* note 28, at 7 ("The three most common uses of computerized crime mapping are to measure police performance, solve specific crime problems, and inform the public. Police agencies that use maps to measure their own performance and hold themselves accountable are typically trying to monitor changes in crime over time or to compare crime levels in different districts.")

297. See *id.* at 11 (examining ways in which crime statistics can be used by community members as well as government officials to allow for community-wide strategies for crime reduction and prevention).

Determinations such as legislatively designated hot-spots or red zones will simplify some judicial decisions. However, the real definition will only be determined through cases, as litigants argue about the specific areas, patterns, and their relevance to the particular case before the court.