THE CRIME DROP AND THE FOURTH AMENDMENT: TOWARD AN EMPIRICAL JURISPRUDENCE OF SEARCH AND SEIZURE

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Professors Kahan and Meares used a bold, even inflammatory title for their 1998 *Foreword* to the *Georgetown Law Journal*'s Annual Review of Criminal Procedure.[1] In *The Coming Crisis of Criminal Procedure*, they argued that judicial decisions articulating the constitutional rights of persons accused of crime have unduly compromised the ability of high-crime, inner-city neighborhoods to combat rampant lawlessness in their midst.[2] Kahan and Meares observed that much of the architecture of constitutional criminal procedure, and especially its skepticism about police discretion, was constructed before the civil rights revolution, and accordingly no longer corresponds to social and political reality.[3] They therefore called for a new jurisprudence of constitutional criminal procedure more respectful of the ability of high-crime, inner-city neighborhoods to strike a balance between liberty and order.[4] The following year, in his *Foreword*, Professor Cole denied the existence of a "crisis" in criminal procedure.[5] He argued that judicial decisions have actually left too much discretion in the hands of the police,[6] and that granting police even greater freedom from legal restraint is all too likely to result in discrimination against racial and ethnic minorities.[7]

Among legal scholars, Professor Cole's position has far more support. For example, in recent years, legal scholars have produced a virtual avalanche of work attacking the law of search and seizure as granting police overly broad discretion that is all too often used to disadvantage racial minorities and the poor.[8] In contrast, support for the view that constitutional law has made a wrong

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1. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

2. *See id.* at 1166–71.

3. *See id.* at 1155–66.

4. *See id.* at 1171–78.

5. *See* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999).

6. *See id.* at 1070–74.

7. *See id.* at 1074–82, 1090–99.

8. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1648–63 (1998); Frank Rudy Cooper, *The Un-Balanced Fourth*

turn by unduly circumscribing the ability of the police to intervene in high-crime communities has been scant, equivocal, and grudging.[9]

The fiftieth anniversary of the decision in *Brown v. Board of Education* [10] provides a particularly useful lens through which to view this debate. *Brown* reminds us that even settled rules of constitutional law must be reconsidered when they fail to take account of sociological reality. *Brown*, after all, was as much about sociology as law. In *Brown*, the Court relied on none of the doctrinal strictures about racial classifications that have since become a staple of constitutional jurisprudence.[11] The Court's failure to invoke legal doctrine was understandable; the concept of so-called "separate-but-equal" segregation had been doctrinally blessed in *Plessy v. Ferguson*,[12] and, at least as a matter of arid

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Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu, 47 VILL. L. REV. 851 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Diana Roberto Donahoe, *"Could Have," "Would Have": What the Supreme Court Should Have Decided in* Whren v. United States, 34 AM. CRIM. L. REV. 1193 (1997); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329 (2002); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highways*, 66 GEO. WASH. L. REV. 556 (1998); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419 (2002); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001); Thomas Regnier, *The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 UMKC L. REV. 631 (2004); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure, and Judicial Integrity*, 40 AM. CRIM. L. REV. 143 (2003); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian To the Internment*, 70 FORDHAM L. REV. 2257 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

9. *See, e.g.*, Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985 (2003); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Richard C. Shragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001); William J. Stuntz, *Local Policing after the Terror*, 111 YALE. L.J. 2137 (2002); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253 (2000).

10. 347 U.S. 483 (1954).

11. I refer, in particular, to the rule that classifications based on race or national origin must be subjected to strict scrutiny and may be sustained only when narrowly tailored to serve a compelling governmental interest. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

12. 163 U.S. 537 (1896).

logic, it seemed to many difficult to explain how separate-but-equal segregation was inconsistent with the equality principle found in the Fourteenth Amendment's Equal Protection Clause.[13] To overturn *Plessy*, the Court turned to what it took to be the sociological significance of segregation: "To separate [African-American schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[14] The Court's concern with the sociology of segregation was overt; it famously cited Kenneth Clark's sociological research to support its conclusion on this point.[15] Thus, it was the sociological significance of segregation that caused the Court to hold that "[s]eparate educational facilities are inherently unequal," and that "plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[16] To this day, the sociology of segregation remains a powerful rejoinder to *Plessy*. In the most potent defense of *Brown* ever advanced, Charles Black wrote that the social context in which segregation operated made "separate but equal" a myth because anyone familiar with social reality in the South understood that segregation's purpose was to maintain a caste system in which one race was superior and one was subordinate.[17] Thus, *Brown* properly repudiated *Plessy* because *Plessy* rested on a concept that had no basis in the reality of how people lived their lives. Surely one of *Brown*'s most potent lessons is that stare decisis must give way when legal doctrine is out of step with sociological reality.

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13. As Professor Herbert Wechsler famously wrote: "In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?" Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (emphasis in original and footnote omitted) (quoting *Plessy*, 163 U.S. at 551).

14. 347 U.S. at 494.

15. *See id.* at 494 n.11. *See generally* Sanjay Mody, Brown *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

16. 347 U.S. at 495. The rule that racial classifications are subject to strict judicial scrutiny made no appearance in *Brown*, and instead was discussed only briefly in the companion case attacking segregated schools in the District of Columbia under the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

17. Professor Black memorably wrote:

> I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on a level with the fiction of "finding" in the action of trover. I think few candid southerners deny this. Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

In the discussion that follows, I mean to confront the sociological reality of inner-city crime. In my view, constitutional criminal procedure has been impoverished by its failure to take into account empirical evidence about the realities of inner-city crime or the need for aggressive law enforcement intervention in high-crime communities. In Part I, I consider the magnitude of the threat of violent crime facing inner-city communities. The threat of violent crime is both quantitatively and qualitatively different in unstable inner-city communities than elsewhere, and constitutional law should take account of this reality. In Part II, I consider the profound effect that high levels of violent crime have on residents of inner cities, and in particular, on inner-city minority youth. Analyzing the impact of violent crime on inner city communities, I believe, is critical to any assessment of the proper balance between liberty and order in high-crime communities. In Part III, I discuss the dramatic decrease in urban violent crime over the past decade, and argue that changes in urban police tactics deserve a good deal of the credit. In Part IV, focusing on data from New York City, I acknowledge that despite their success in driving down violent crime, there is reason to doubt that the police tactics employed over the past decade comport with current constitutional standards. I then ask whether the problem is with the police, or with the Constitution as interpreted by the courts. The social meaning of police tactics that successfully drive down inner-city violent crime and mitigate its enormously destructive impact differs dramatically from the social meaning of segregation. Thus, I argue that commentators are quite wrong to characterize aggressive inner-city policing as a form of racial discrimination, even if the police employ tactics in high-crime communities that would be unwarranted elsewhere. In Part V, I argue that the success of aggressive police tactics over the past decade helps to demonstrate their consistency with the Fourth Amendment. After all, the Fourth Amendment forbids only "unreasonable" searches and seizures. A jurisprudence that condemns as "unreasonable" the policing methods that show the greatest promise for ending the horrific slaughter in the inner city—and its attendant economic, social, and psychological costs—is not much more attractive than the doctrine of *Plessy*. Even worse, such a jurisprudence disproportionately confers its "benefits" on the middle class, the liberty of which is enhanced by the host of rules that constrain police authority, but which does not experience the cost of this jurisprudence in terms of constraining the ability of the police to provide effective security in high-crime communities. The Fourth Amendment should not protect the liberty of the middle class at the expense of the security of the poor.

I.

Urban minority youth face a threat from violent crime utterly different in magnitude from the threat the rest of us must confront. This is largely because violent crime is concentrated among the poor, youth, and those who live in large cities.

To begin with, the rate of violent victimization is much higher among the poor than among any other income group.[18] Accordingly, African-Americans face disproportionate risks of violent victimization, since they are disproportionately represented among those who live in poverty.[19] The rate of violent victimization is also higher for teenagers than any other demographic category.[20] The risk of violent victimization is also greater in urban than suburban and rural areas.[21] As Frank Zimring and Gordon Hawkins have put it: "[a] major element in the explanation of the larger concentration of violence among African-Americans is the fact that they more often reside in cities where violent crime rates are high generally."[22] Accordingly, black youth residing in impoverished neighborhoods in large cities face especially high rates of violent victimization.

The statistics are grim. A Department of Justice study of homicide in eight major cities found that between 1985 and 1994, black men aged eighteen to twenty-four were between five and ten times overrepresented among homicide victims.[23] Victimization rates are even higher in areas of concentrated poverty.

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18. *See* SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2003, at 8 (Sept. 2004). For example, the estimated rates of violent victimization per one thousand persons twelve and older in 2003, by annual household income, were as follows:

Less than $7500	$7500 to $14,999	$15,000 to $24,999	$25,000 to $34,999	$35,000 to $49,999	$50,000 to $74,999	$75,000 or more
49.9	30.8	26.3	24.9	21.4	22.9	17.5

Id. at 8 tbl.7.

19. In 2004, the poverty rate among whites was 10.5 percent while the poverty rate among blacks was 24.4 percent. *See* CARMEN DENAVAS-WAIT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 2004, at 10 tbl.3 (Aug. 2005).

20. *See* CATALANO, *supra* note 18, at 8 tbl.6. For example, the data for 2003 show the following rates of violent victimization per 1000 persons:

Age	Rate
12-15	51.6
16-19	53.0
20-24	43.3
25-34	26.4
35-49	18.5
50-64	10.3
65+	2.0

Id. Over the past quarter-century, there has been a consistent pattern reflecting much higher rates of violent victimization among persons ages 12–24 than for any other age group. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AGE PATTERNS IN VIOLENT VICTIMIZATION, 1976–2000 (Feb. 2002).

21. *See* CATALANO, *supra* note 18, at 8 tbl.7.

22. FRANKLIN E. ZIMRING & GORDON E. HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 83 (1997).

23. *See* PAMELA K. LATTIMORE, JAMES TRUDEAU, K. JACK RILEY, JORDAN LEITER & STEVEN EDWARDS, U.S. DEP'T OF JUSTICE, HOMICIDE IN EIGHT U.S. CITIES: TRENDS, CONTEXTS, AND

For example, Lauren Krivo and Ruth Peterson analyzed crime rates by census tract from 1989 to 1991 in Columbus, Ohio, finding that rates of violent crime are dramatically higher in census tracts containing indicia of extreme disadvantage, and that this variable explained virtually the entire racial disparity in violent crime rates.[24] Other studies have similarly suggested that residents of impoverished and unstable neighborhoods face unusually high rates of violent crime.[25] The persistence of residential racial segregation, in particular, concentrates violent crime among blacks, since highly segregated communities tend to have the indicia of instability that promote violent crime.[26]

In the late 1980s and early 1990s, rates of firearms-related homicide among black youth spiked dramatically and disproportionately.[27] For example, from 1984 to 1993, while the homicide victimization rate per hundred thousand for white males aged eighteen to twenty-four rose from 11.9 to 17.1, the homicide rate for African-American males aged eighteen to twenty-four rose from 67.9 to 183.4 per hundred thousand.[28] The rate of violent victimization during this period had "no precedent in this century."[29]

POLICY IMPLICATIONS 37 fig.3–12 (Dec. 1997).

24. *See* Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619 (1996).

25. *See, e.g.*, JAMES F. SHORT, JR., POVERTY, ETHNICITY, AND VIOLENT CRIME 50–54 (1997); Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 57 ANNALS AM. ACAD. POL. & SOC. SCI. 123 (2000); Kenneth C. Land, Patricia L. McCall & Lawrence E. Cohen, *Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?*, 95 AM. J. SOC. 922 (1990); Janet L. Lauritzen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 58, 65–70 (Michael Tonry ed., 1998); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

26. *See* Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 243 U. PA. L. REV. 1203 (1995); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996).

27. *See, e.g.*, Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1192–98 (1998) (documenting a surge in both overall homicide commission rate among black youths and in the percentage of homicides committed with firearms); James Alan Fox, *Demographics and U.S. Homicide*, *in* THE CRIME DROP IN AMERICA 288, 292–308 (Alfred Blumstein & Joel Wallman eds., 2000) [hereinafter THE CRIME DROP IN AMERICA] (same). *See also* Alfred Blumstein, *Disaggregating the Violence Trends*, *in* THE CRIME DROP IN AMERICA, *supra* at 13, 20–25 [hereinafter *"Disaggregating the Violence"*] (demonstrating spike in overall homicide arrest rate among all youths); Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, *in* 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 5–20 (Michael Tonry ed., 2002) (demonstrating spike in overall homicide commission rate among black youths).

28. Fox, *supra* note 27, at 300 tbl.9.3. Homicide victimization rates for females aged eighteen to twenty-four showed a similar, though less dramatic pattern, with white female rates rising from 4.2 to 4.3 from 1985 to 1993, while the rate for black females rose from 16.5 to 24.1. *See id.* Homicide offending rates for males ages eighteen to twenty-four reflected a similarly dramatic pattern during this period. The rate for white males rose from 24.5 in 1984 to 31.5 in 1993 while the rate for African-American males rose from 124.2 to 347.6 during the same time span. *See id.* at 301 tbl.9.4.

29. Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, *in* 24

Something of a consensus has emerged among criminologists that the introduction of crack cocaine into urban drug markets was largely responsible for the spike in violence in the late 1980s and early 1990s as criminal factions attempted to gain supremacy in the emerging crack market.[30] Yet the introduction of crack is, at best, an incomplete explanation for the surge in violent crime. After all, illegal drugs have been around for a long time, and criminals have always had an incentive to use violence to gain supremacy in illegal markets. There is no particular reason why crack should have produced more violent competition than is found in other illegal markets. Something evidently happened to make inner-city illegal markets especially deadly, particularly for minority youth. And, indeed, there is reason to believe that something significant had changed in inner-city minority communities by the 1980s. As the work of William Julius Wilson demonstrates, by the 1980s, middle-class residents had almost completely departed from inner-city African-American communities, depriving them of exposure to middle-class values and creating a new type of "underclass," isolated from middle-class values and despairing of the legitimate economy as a means of advancement.[31]

Some years ago, I attended a conference on violence reduction strategies. After a representative of a social service organization advocated greater investment in youth counseling in high-crime neighborhoods to encourage young persons to stay out of criminal gangs, a high-ranking Chicago police official, himself African-American and a product of one of Chicago's most violent neighborhoods, responded: "You have to remember, when I was seventeen, I didn't expect to live to be twenty-one." Indeed, one has to wonder what effect growing up in a neighborhood riven by violent crime has on one's psyche, one's future, and the efficacy of any social service strategy that tries to assist at-risk youth without reducing the rate of violent crime that they experience in their daily lives. In fact, urban sociology has a good bit to say about the impact of violent crime on the social norms of high-crime communities.

CRIME AND JUSTICE: A REVIEW OF RESEARCH: YOUTH VIOLENCE 27, 28 (Michael Tonry & Mark H. Moore eds., 1998) [hereinafter "YOUTH VIOLENCE"].

30. *See, e.g.*, Blumstein & Rosenfeld, *supra* note 27, at 1209–10; Cook & Laub, *supra* note 27, at 21–31; Daniel Cork, *Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Youth*, 15 J. QUANTITATIVE CRIM. 379 (1999); Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 REV. ECON. & STAT. 519 (2000). *See also* Bruce D. Johnson, Andrew Golub & Eloise Dunlap, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, *in* THE CRIME DROP IN AMERICA, *supra* note 27, at 164, 176–89.

31. *See, e.g.*, WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 13–17, 65–86 (1996). Elsewhere I have considered at greater length the implications of this view for law enforcement policy. *See* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 115–32 (2000).

II.

There has been an increasing awareness among legal scholars of the extent to which the law can shape social norms.[32] Equally, if not more important, however, is the extent to which high levels of violent crime shape social norms. This phenomenon has been largely ignored by legal scholars, but has increasingly come to be seen as critical by urban sociologists.

In his pathbreaking study of the effect of criminality on social norms in Chicago's near west side in the early 1960s, Gerald Suttles found that because of the neighborhood's reputation for high rates of violent crime, neighborhood residents had come to distrust all but their most intimate associates.[33] Residents also perceived a relatively limited police presence and therefore doubted the efficacy of the police as guarantors of safety.[34] In contrast, in the area's medical center district, where police patrolled more intensively than elsewhere, the perceived threat was sharply lower.[35] In the bulk of the near west side, however, there was a pervasive threat of violence, which in turn caused residents to justify their own use of violence as a means of self-protection.[36] Gang membership, in particular, was attractive to the area's youth as a means of dealing with the sense of a pervasive threat in the neighborhood.[37] Strikingly, Suttles concluded that:

> the Addams neighborhood area resembles a prison community or any other population that is not initially created with a capacity to behave in an approved social manner. Insofar as the residents depend upon the public definition of each other, there is very little basis for trust except through the exercise of brute force or economic sanctions.[38]

Confirming Suttles's findings, more recent sociological work has consistently concluded that when community residents cannot count on the police to secure their safety, profound alterations in social norms are the result. Those changes in social norms, in turn, dramatically impact the life course of youth in the affected communities.

In his ethnographic study of inner-city Philadelphia, for example, Elijah Anderson concluded that economically disadvantaged high-crime communities develop a normative structure in which the use of violence comes to be condoned by residents.[39] He explained: "The code of the street emerges where

32. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

33. *See* GERALD D. SUTTLES, THE SOCIAL ORDER OF THE SLUM: ETHNICITY AND TERRITORY IN THE INNER CITY 26–27, 231–33 (1968).

34. *See id.* at 36.

35. *See id.* at 37.

36. *See id.* at 31–35.

37. *See id.* at 169–76.

38. *Id.* at 27.

39. *See* ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 9–11 (1999).

the influence of the police ends and the personal responsibility for one's safety is felt to begin, resulting in a kind of 'people's law,' based on 'street justice.'"[40] In these communities, signaling one's willingness to use violence is seen as a necessary form of self-preservation, given the sense of a pervasive threat that is not effectively addressed by the authorities.[41] As Anderson put it: "People here feel they must watch their backs, because anything can happen here, and if the police are called, they may not arrive in time."[42] This sense of threat is, in critical part, the product of widespread and overt criminality in these communities, such as open-air drug dealing.[43] In these communities, youth come to see violence as a necessary means of exerting power and control over their environment.[44] Even adolescents from relatively stable families feel challenged to demonstrate their willingness to display aggression and violence in order to show their ability to defend themselves.[45] In this environment, Anderson concluded, educational success comes to be denigrated by youth as irrelevant to the realities of daily life.[46]

Scott Decker's and Barrik Van Winkle's study of St. Louis street gangs reached similar conclusions.[47] In the authors' interviews of gang members, the primary factor cited by gang members as the motivation for joining a gang is the need for protection from the perceived threats in the neighborhood.[48] The opportunity to earn money through drug trafficking and other illegal activities came to be seen as important after an individual had joined a gang, but was less frequently cited as a reason to join.[49] Thus:

> The framework we use to explain both the origin of gangs and the decisions of individuals to join a gang focuses on the role of *threat*. Threats of physical violence, whether real or perceived, have important consequences for these questions.[50]

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40. *Id.* at 10.

41. *See id.* at 22–25.

42. *Id.* at 23–24.

43. *See id.* at 29–30. Anderson adds that drug trafficking is seen as the best economic opportunity available to youth in these disadvantaged communities, and that the drug trade is itself policed by violence. *See id.* at 110–20.

44. *See id.* at 30.

45. *See id.* at 67–72.

46. *See id.* at 93–98.

47. *See* SCOTT H. DECKER & BARRIK VAN WINKLE, LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE (1996).

48. *See id.* at 65–66, 72–75. Indeed, the need for protection from perceived threats is consistently identified by gang researchers as a major factor behind the growth of street gangs. *See, e.g.*, JOHN HAGEDORN & PERRY MACON, PEOPLE AND FOLKS: GANGS, CRIME, AND THE UNDERCLASS IN A RUSTBELT CITY 81–107 (2d ed. 1998); MARTÍN SÁNCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 44–45 (1991); FELIX M. PADILLA, THE GANG AS AN AMERICAN ENTERPRISE 380–88 (1992); IRVING A. SPERGEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 92–93 (1995).

49. *See* DECKER & VAN WINKLE, *supra* note 47, at 153–55.

50. *Id.* at 20–21 (emphasis in original).

Gang culture, Decker and Van Winkle believe, is an adjustment to the "street culture" in disadvantaged communities, which stresses toughness and suspicion of local mainstream institutions.[51] Street culture alters social norms in a three-stage process: first, individuals conclude that they need protection against outside groups, whether rival gangs or police; second, the widespread belief in the pervasiveness of threat promotes the belief among youth that they must be prepared to use violence; and third, as the use of violence is embraced, inner-city youth become isolated from mainstream activities and institutions.[52]

The importance of the threat of violence to social norms is also reflected in Jeffrey Fagan's and Deanna Wilkinson's analysis of at-risk youth aged sixteen to twenty-four in high-crime areas of New York City.[53] They concluded that the prevalence of firearms crime in these communities creates a kind of contagion in which firearms come to be seen as a necessary means of self-preservation and self-identity.[54] In this environment, expectations develop that disputes are likely to escalate into violence.[55] The prevalence of firearms, in turn, greatly escalates the perceived level of threat that inheres in conflict situations.[56] When an individual displays a willingness to use firearms and violence, however, respect and deference from others is forthcoming.[57] The result is an "ecology of danger":

> The development of an ecology of danger reflects the confluence and interaction of several sources of contagion. First is the contagion of fear. Weapons serve as an environmental cue that in turn may increase aggressiveness. Adolescents presume that their counterparts are armed and if not, could easily become armed. They also assume that other adolescents are willing to use guns, often at a low threshold of provocation.
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> Second is the contagion of the gun behaviors themselves. The use of guns has instrumental value that is communicated through urban "myths" and also through the incorporation of gun violence into the social discourse of everyday life among preadolescents and adolescents.

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51. *See id.* at 274. Gang initiation rituals themselves usually involve an act of violence, either the beating of an initiate or the commission of a violent act, which demonstrates the new member's willingness to use, and experience, violence. *See id.* at 69–71, 172–73.

52. *See id.* at 21–24. *See also* HAGEDORN & MACON, *supra* note 48, at 134–38 (expressing a similar view that busing to achieve school desegregation exacerbated gang crime in Milwaukee by taking gang members out of the neighborhood bases and throwing them together at regional schools where the potential for inter-gang conflict was heightened).

53. *See* Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, *in* YOUTH VIOLENCE, *supra* note 29, at 105.

54. *See id.* at 137–39.

55. *See id.* at 138–40.

56. *See id.* at 141–43.

57. *See id.* at 143–45. Fagan and Wilkinson add that the willingness to use violence ultimately generates social status in high-crime communities. *See id.* at 145–61.

> Guns are widely available and frequently displayed. They are salient symbols of power and status, and, strategic means of gaining status, domination, and material goods.
>
> Third is the contagion of violent identities, and the eclipsing or devaluation of other identities in increasingly socially isolated neighborhoods. These identities reinforce the dominance hierarchy built on "toughness" and violence, and its salience devalues other identities. Those unwilling to adopt at least some dimensions of this identity are vulnerable to physical attack. Accordingly, violent identities are not simply affective styles and social choices, but strategic necessities to navigate through everyday dangers.[58]

Two ethnographic studies of public housing in Chicago—Sudhir Venkatesh's study of the Robert Taylor homes, and the study of three other Chicago public housing projects by Susan Popkin and her colleagues—also stress the role of pervasive violence on social norms among youth.[59] Venkatesh observed that by the late 1980s, gangs had thoroughly intimidated Robert Taylor's residents through their willingness to use violence.[60] Popkin and her colleagues observed the same phenomenon in the projects they studied.[61] Both studies stress that residents' sense of personal safety was undermined by overt criminality occurring in public places, primarily involving drug trafficking.[62] Thus, as Popkin put it, "[r]esidents—especially the children who lived in these

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58. *Id.* at 174.

59. *See* SUSAN J. POPKIN, VICTORIA E. GWIASDA, LYNN M. OLSON, DENNIS P. ROSENBAUM & LARRY BURON, THE HIDDEN WAR: CRIME AND THE TRAGEDY OF PUBLIC HOUSING IN CHICAGO (2000); SUDHIR ALLADI VENKATESH, AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO 110–52 (2000).

60. *See* VENKATESH, *supra* note 59, at 110–52. Venkatesh's description of the manner in which the dominant gang came to exercise such control is illuminating:

> In Robert Taylor, the Black Kings gang used rampant drug distribution, threats, abuse, and the colonization of public space to exploit a tenant body that was in a socially and economically precarious position. BK leaders based in the housing development explain their entrepreneurial actions as the result of pressures from their own, higher-ranking leaders, but to forge their path they intimidated residents and took advantage of their vulnerable social and economic status. With law enforcement agents providing them with minimal assistance apart from "suppression" programs that did not yield any reductions in gang violence or crime, tenants' last line of defense was the "hustles" and self-help mechanisms they had devised a decade earlier. Yet in their drive to become outlaw capitalists, Black King members had begun disrupting these networks and associations through which households supported one another. The gangs demonstrated a willingness to use weapons, bribes, and physical punishment to co-opt or threaten tenants who stood in their way. As in any other American community, it was not realistic to expect that tenant reliance on one another and their self-help schemes could continue to provide safety in the face of an armed and threatening group and an insignificant police presence.

Id. at 150.

61. *See* POPKIN, GWIASDA, OLSON, ROSENBAUM & BURON, *supra* note 59, at 4–8.

62. *See* POPKIN, GWIASDA, OLSON, ROSENBAUM & BURON, *supra* note 59, at 52–55, 77–79, 97–103; VENKATESH, *supra* note 59, at 86–87, 111–12, 118, 139–40, 155, 176–90.

developments—were traumatized by the constant stress of coping with the violence and disorder."[63] An inadequate police presence played a central role in this process, according to Popkin and her colleagues:

> For residents to participate freely in an organized anticrime effort, police protection must be sufficient for them to feel reasonably safe from retaliation. But, as these case studies illustrate, for the most part, the law-enforcement effort intended to secure CHA [Chicago Housing Authority] developments did not have much impact on the level of drug sales and gang violence. In Horner and Rockwell, the sweeps and police patrols had a temporary impact at best: gangs and drug dealers left for a few days, and initially the guards kept them out of the lobbies and stairwells. However, without a strong, continuing police presence and with only poorly paid, untrained contract security guards, the gangs quickly regained control of the buildings.
>
> In contrast, the sweeps and other law-enforcement efforts had a much more sustained impact in Ickes, where trained security officers from CHA's own Security Force worked for several years. While the Security Force guarded the entryways, the level of violence was very low, the drug dealers mostly stayed out of lobbies and stairwells, and other residents felt confident enough to participate in tenant patrols and other activities. But when budget cuts forced the CHA to remove its security officers from Ickes, conditions quickly deteriorated, and the violence escalated dramatically.[64]

Accordingly, social controls against illegal activities were thoroughly undermined by the late 1980s.[65] Youth came to see drug dealing and other illegal activities as the most viable means of advancement.[66] Venkatesh sees this pattern as endemic in high-crime urban areas:

> In the largest inner cities, the neighborhood gang was now like an economic franchise, one member of a larger underground supergang family that was not always successful as an entrepreneur, but was certainly dogged in its staying power. Local gang leaders had a perceptibly different type of symbolic and material power than in the past, grounded in their ability to amass revenue, to sway the aspirations of younger generations who faced few mobility paths, and to entertain

63. POPKIN, GWIASDA, OLSON, ROSENBAUM & BURON, *supra* note 59, at 178.

64. *Id.* at 176.

65. *See* POPKIN, GWIASDA, OLSON, ROSENBAUM & BURON, *supra* note 59, at 178–79; VENKATESH, *supra* note 59, at 119–31, 142–47.

66. *See* VENKATESH, *supra* note 59, at 154–74. Both studies found that the most effective means of controlling violence were truces negotiated between rival gangs, but these tended to stabilize the allocation of territory between gangs and therefore made drug dealing a more overt and institutionalized part of community life. *See id.* at 211–13, 228–29; POPKIN, GWIASDA, OLSON, ROSENBAUM & BURON, *supra* note 59, at 124–27, 146–49.

> the notion that their own "shady" status might actually benefit their families and their community. All such attributes meant that the gang and its leaders would have a much more pernicious effect than ever before on the social fabric of the community.[67]

What this ethnographic work demonstrates, in short, is that high levels of violent crime leave inner-city youth isolated from middle-class values of law-abidingness and upward mobility through legitimate social, educational, and employment paths.[68] Indeed, in light of the impact of high rates of violent crime on a community, one has to wonder whether the normative structure produced by high rates of violent crime undermines the efficacy of educational opportunity in a manner not dissimilar to the impact of segregation discussed in *Brown*. Consider, for example, the achievement gap between white and African-American students as measured by standardized tests. The disparity between white and African-American students as measured by standardized examinations steadily narrowed between 1971 and 1988, but increased in the early 1990s and has persisted since then.[69] The magnitude of this gap is substantial; as Christopher Jencks and Meredith Phillips put it, "the typical American Black still scores below 75 percent of American whites on most standardized tests."[70] This test score gap, in turn, produces income inequality, since in recent decades test scores have come to reliably predict future income.[71] The explanation for the test-score gap, however, has proven elusive.[72] The data suggests that some amalgam of socioeconomic factors reflecting a lower-class background play a

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67. VENKATESH, *supra* note 59, at 188.

68. In connection with the relationship between social norms and violent crime, it is worth considering that teenage pregnancy rates spiked between 1986 and 1991, roughly the same period in which violent crime rates among youth spiked. *See* STANLEY K. HENSHAW, ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS WITH COMPARATIVE STATISTICS FOR WOMEN AGED 20–24, at 10 (rev. Feb. 19, 2004).

69. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2002, at 54–55 (June 2002) (discussing trends in reading test scores). *See also* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NAEP 2004 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE IN READING AND MATHEMATICS 33 fig.3-2 (July 2005).

70. Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, *in* THE BLACK-WHITE TEST SCORE GAP 1 (Christopher Jencks & Meredith Phillips eds., 1998) [hereinafter "THE BLACK-WHITE TEST SCORE GAP"].

71. *See, e.g.*, *id.* at 3–7.

72. Richard Herrnstein and Charles Murray rather infamously attributed the bulk of the achievement gap to genetic factors, *see* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269–315 (1994), but that theory has since been debunked. *See, e.g.*, John L. Horn, *Selecting of Evidence, Misleading Assumptions, and Oversimplifications: The Political Significance of* The Bell Curve, *in* RACE AND INTELLIGENCE: SEPARATING SCIENCE FROM MYTH, at 197–325 (Jefferson M. Fish ed., 2002) [hereinafter "RACE AND INTELLIGENCE"]; Leon J. Kamin, *Lies, Damned Lies, and Statistics*, *in* THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, AND OPINIONS 81–105 (Russell Jacoby & Naomi Glauberman eds., 1995); Richard Nisbett, *Race, Genetics, and IQ*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 70, at 86–102.

primary role in explaining the disparity in educational achievement.[73] Still, how to go about eliminating the gap is unclear. There is, for example, no statistical evidence of a relationship between educational spending and enhanced minority achievement.[74] In light of the sociological evidence demonstrating the impact of high levels of violent crime on social norms, however, it may well be that the high rates of violent crime in inner-city areas explain a substantial proportion of the achievement gap between the races. After all, black students are disproportionately located in inner-city areas most likely to suffer from high rates of violent crime as well as from the type of isolation from middle-class values described by Wilson.[75] For example, as David Grissmer, Ann Flanagan and Stephanie Williamson have observed, in the late 1980s, at the same time that the test-score disparity between the races stopped narrowing, there was an enormous increase in the rate of violent crime among minority youth.[76] Thus, fighting inner-city crime may be more than a law-enforcement issue; it also may be essential to the success of inner-city education.

In any event, whether or not it directly affects educational achievement or test scores, there is surely ample reason to be concerned about the effect of violence on inner-city youth. The question remains, however, we can go about reducing levels of inner-city violence. On that score, there is reason for optimism. The past decade has produced some rather solid evidence that rates of urban violent crime can be lowered dramatically.

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73. *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 105–10 (1990); JAMES S. COLEMAN, ERNEST Q. CAMPBELL, CAROL J. HOBSON, JAMES MCPARTLAND, ALEXANDER M. MOOD, FREDERIC D. WEINFELD & ROBERT L. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY 290–302 (1966); Michael Hout, *Test Scores, Education and Poverty*, *in* RACE AND INTELLIGENCE, *supra* note 72, at 329–54; Meredith Phillips, Jeanne Brooks-Gunn, Greg J. Duncan, Pamela Klebanov & Jonathan Crane, *Family Background, Parenting Practices, and the Black-White Test Score Gap*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 70, at 103–45.

74. *See, e.g.*, HERRNSTEIN & MURRAY, *supra* note 72, at 286–89; Phillips, Brooks-Gunn, Duncan, Klebanov & Crane, *supra* note 73, at 103, 115–19.

75. Rates of racial isolation are highest in the largest central city school districts where student population exceeds 60,000. *See* ERIKA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, HARVARD CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM 53–56 (Jan. 2003). 44.8 percent of students in schools attended by the average black students are poor as defined by eligibility for free school lunches. *See id.* at 35. In intensely segregated schools, 85.8 percent of students are poor. *See id.* at 35–36 & tbl. While neighborhood-specific statistics are unavailable, in 2001, five percent of white students ages twelve to eighteen reported that they have felt unsafe at or as they have traveled to or from school, while nine percent of African-American students reported feeling unsafe. *See* NAT'L CTR. FOR EDUC. STATISTICS & BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2003, at 37 fig.12.1 (Oct. 2003). Similarly, only sixteen percent of white students ages twelve to eighteen report street gangs at their school, as opposed to twenty-nine percent of African-American students. *See id.* at 49.

76. *See* David Grissmer, Ann Flanagan & Stephanie Williamson, *Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 70, at 182, 219–23.

III.

Between 1993 and 2003, the National Crime Victimization Survey reports that rates of violent victimization declined by fifty-five percent.[77] During that same period, the homicide rate declined from 9.5 per hundred thousand population to 5.7 per hundred thousand persons, a drop of forty percent.[78] Reductions in homicide were disproportionately concentrated among persons under the age of eighteen, just as the preceding increase in homicide was disproportionately concentrated within that age group.[79] The racial disparity in violent victimization also narrowed at least a bit, with the rate of violent victimization per hundred thousand population ages twelve and older for whites declining 55.1 percent while the rate for blacks dropped by 56.8 percent.[80] Nevertheless, much remains to be done; levels of youth homicide remain above those of the mid-1980s.[81] Moreover, homicide continues to take a disproportionate toll on minorities: "[I]n recent years, while the epidemic peaked and then receded, over 80 percent of youth homicide victims have been blacks or Hispanics."[82] Still, the progress made to date is real and substantial; a reduction of more than half in the rate of violent victimization is nothing to sneeze at.

Declines in homicide rates since 1993 have been disproportionately concentrated in large cities with populations exceeding one million.[83] During this same period, big-city police departments have adopted more aggressive tactics aimed at suppressing crime.[84] Police departments employing this strategy, sometimes labeled "New Policing," stress, to a greater or lesser extent, three elements: (1) making proactive efforts to identify and eliminate criminogenic conditions; (2) effecting the arrest and prosecution of those committing relatively minor offenses such as public-order laws to increase police intervention in the life of the community and minimize levels of disorder on the streetscape; and (3) requiring officers to liaison with important constituent

77. *See* CATALANO, *supra* note 18, at 2. Statistics reflecting violent crimes reported to the FBI reflect a similar trend. *See, e.g.*, Blumstein, *Disaggregating the Violence*, *supra* note 27, at 13–20.

78. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2003, at 70 tbl.1 (Oct. 27, 2004) [hereinafter "CRIME IN THE UNITED STATES"].

79. *See, e.g.*, Blumstein, *Disaggregating the Violence*, *supra* note 27, at 20–25.

80. *See* CATALANO, *supra* note 18, at 6 tbl.4.

81. *See* Cook & Laub, *supra* note 27, at 11–19.

82. *Id.* at 18.

83. *See, e.g.*, JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES: 1998 UPDATE 3 (March 2000); Blumstein, *Disaggregating the Violence*, *supra* note 27 at 35–39; Blumstein & Rosenfeld, *supra* note 27 at 1202–07; Cook & Laub, *supra* note 27, at 20. *See also* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 167 (2004) (noting larger crime drop where population exceeded 250,000).

84. *See, e.g.*, John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, *in* THE CRIME DROP IN AMERICA, *supra* note 27, at 207, 228–45.

groups in the communities they police in order to identify community problems and integrate community concerns into police strategy.[85]

New York City, for example, adopted increasingly aggressive police tactics beginning in the late 1980s, and accelerated their use in 1994 after the election of Mayor Rudolph Giuliani by stressing increased police-patrol strength in crime "hot spots," making police management more accountable for neighborhood crime statistics, and moving aggressively against signs of visible disorder on the streetscape.[86] The combination of changes in police tactics and rapidly declining rates of violent crime was striking. In 1991, New York's homicide rate peaked at 27.3 per hundred thousand persons.[87] By 2003, New York's homicide rate had fallen to 7.37 per hundred thousand population, a decline of almost seventy-five percent.[88] New York's 2003 homicide rate was considerably lower than the rate in high-crime cities, such as Baltimore, with a rate of 41.88 per hundred thousand, Detroit, with a rate of 39.44, or Washington, D.C., with a rate of 44.01.[89] It even compares favorably to the homicide rates in relatively low-crime big cities, such as Boston's 6.61, Dallas's 18.36, Phoenix's 17.17, or Pittsburgh's 19.98.[90] The precipitous decline in the homicide rate in New York has saved thousands of lives.[91] This pattern holds for all forms of violent crime; the rate for violent crime reported to the FBI in 2002 per 100,000 population in New York was 734.10, compared to Baltimore's 1734.99, Boston's 1216.18, Dallas's 1370.80, Detroit's 2018.18, Phoenix's 692.83, Pittsburgh's 1061.43, and Washington's 1568.91.[92]

What happened in New York does not reflect a mere regression to the mean; the decline in New York's homicide rate represented a substantial reduction from the average homicide rate in the preceding fifteen years.[93] Even more impressive, while non-firearm-related fatalities began to decline in New York in

85. *See, e.g.*, Livingston, *supra* note 9, at 572–84.

86. *See* George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 574–79 (2000). *See also* WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 152–56, 228–29, 233–39 (1998).

87. *See* Jeffrey Fagan, Franklin E. Zimring & June Kim, *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1285 (1998).

88. *See* CRIME IN THE UNITED STATES, *supra* note 78, at 160.

89. *See id.* at 140, 147, 150.

90. *See id.* at 132, 147, 168, 172.

91. *See, e.g.*, Fagan, Zimring & Kim, *supra* note 87, at 1281–84 & fig.1.2 (estimating 1100 lives saved between 1992 and 1996).

92. *See* CRIME IN THE UNITED STATES, *supra* note 78, at 132, 140, 147, 150, 160, 168, 172. The comparison to Boston is particularly interesting. In Boston, an extraordinary effort was made to target virtually every known gang member, first with outreach, and then with criminal sanctions. *See* David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, LAW & CONTEMP. PROBS., Winter 1996, at 147, 164–66. This was possible because the authorities estimated that Boston had only 1100 to 1300 gang members. *See id.* at 161. To attempt something similar in a larger city such as New York, Los Angeles, or Chicago would be impracticable.

93. *See* Fagan, Zimring & Kim, *supra* note 87, at 1286.

1986, firearm violence did not begin to decline until 1991, which correlates well with the adoption of more aggressive police tactics.[94] Moreover, reductions in violent crime in New York were disproportionately concentrated among firearm-related offenses committed outdoors, which is the type of offense most likely to be influenced by aggressive patrol and stop-and-frisk tactics.[95] And, while the credit for crime reductions is sometimes given to New York's use of the "Broken Windows" theory of policing, which claims that physical disorder on the streetscape is a primary source of crime,[96] there is little data demonstrating a straightforward relationship between violent crime physical disorder.[97] Instead, the New York data showed that a precinct's rate of misdemeanor arrests was the best indicator of the extent to which violent crime decreased in the precinct.[98] The relationship between aggressive enforcement of relatively low-level offenses and violent crime, moreover, makes eminent good sense. As I have argued elsewhere, a growing body of data suggests that officers on patrol engaged in aggressive low-level enforcement are likely to be able to substantially increase the rate at which individuals in high-crime locations are stopped and frisked, and thereby achieve significant increases in the deterrent effects of the policy patrol by substantially increasing the risks associated with carrying guns or drugs.[99]

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94. *See id.* at 1309–16. Thus, skeptics of the relationship between police tactics and crime who observe that the New York crime drop began before Rudolph Giuliani became mayor, *see, e.g.*, Levitt, *supra* note 83, at 172–73, forget that New York began altering policing strategy even before then, although tactics changed further after Mayor Giuliani's election.

95. *See* Fagan, Zimring & Kim, *supra* note 87, at 1313–16.

96. *See* Kelling, *supra* note 86, at 573–74.

97. *See, e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59-78 (2001). In the most comprehensive study of the "Broken Windows" theory to date, Robert Sampson and Stephen Raudenbush could find no relationship between observed physical disorder and crime in subject neighborhoods in Chicago, Illinois, finding instead that indicia of concentrated disadvantage within a community best predicted crime rates. *See* Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–39 (1999).

98. *See* GEORGE L. KELLING & WILLIAM H. SOUSA, JR., THE MANHATTAN INST., DO POLICE MATTER?: AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 6–10 (1999). *See also* HOPE CORMAN & NACI MOCAN, CARROTS, STICKS AND BROKEN WINDOWS (Nat'l Bureau of Econ. Research, Working Paper No. 9061, 2002) (finding that arrest rates explained New York City's crime reductions to a far greater extent than did economic conditions or Broken Windows-related factors); Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584, 601 (2000) (finding that arrest rates explained New York City's crime rate to a substantially greater extent than did indicia of drug usage, the size of the police force, or the poverty rate). This result is consistent with other studies suggesting that proactive arrest policies produce reductions in crime. *See, e.g.*, Lawrence W. Sherman, *Policing For Crime Prevention, in* PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS 8-20 to 8-25 (Lawrence W. Sherman, Denise Gottfredson, Doris McKenzie, John Eck, Peter Reuter, Shawn Bushway eds., 1997). A recent study intriguingly shows a relationship between police counterterrorism alerts and reductions in crime in the District of Columbia. *See* Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J. LAW & ECON. 267 (2005).

99. *See* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 90–91 (2003). *See also* Blumstein & Rosenfeld, *supra* note 27, at 1214. One ethnographic

To be sure, New York City is not unique; at least a few other big cities experienced even greater reductions in violent crime.[100] But it is also the case that big-city police throughout the country adopted a variety of more aggressive tactics beginning in the late 1980s.[101] And, it is becoming increasingly evident that there is no very persuasive explanation for the enormous declines in violent crime that big cities have experienced in recent years that does not take into account changes in police tactics. For example, there is no demographic explanation for the crime drop of the 1990s. While younger populations offend at disproportionately higher rates than older cohorts, there was no increase in the size of this high-risk age cohort to explain the increase in crime rates in the late 1980s, nor a concomitant decline in the size of that cohort to explain the ensuing crime drop beginning in 1993.[102] Nor is there an economic explanation for the

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analysis of the impact of New York City's policing practices lends considerable support to this view:

> Two policing policies appear to have been especially successful in eliminating handguns and in reducing the public visibility of street-level criminality: handgun checks, and quality-of-life enforcement. Both uniformed and undercover police routinely approach persons whom they observe with a "suspicious bulge" for a "handgun check." The police will ask them to open their coat, explain the bulge, and possibly, show the contents of [their] pockets. If suspicions remain, they may pat down the person. If a gun is found, the person will be arrested, and if convicted, will face a jail sentence of a year or longer. Such gun checks are routinely performed in the course of general quality-of-life enforcement. In the 1990s, police routinely stop persons observed committing any of a wide range of minor offenses, ask them for photo identification, and conduct a radio check for warrants, parole/probation, or other criminal justice status . . . .
>
> Quality-of-life enforcement and handgun-check policies have been implemented across the city, but especially in major drug-selling areas. These two policies resulted in over 300,000 arrests in 1998. By the middle of 1998, police policy made it more difficult for a violator to qualify for a mere [criminal citation]. Police now arrest most quality-of-life violators and conduct a full record check based on fingerprints. This increase in quality-of-life policing has challenged the . . . pattern of buying and smoking marijuana in public locations.

Johnson, Golub & Dunlap, *supra* note 30, at 188–89 (citation omitted).

100. *See* Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265, 281–301 (2000).

101. Eck and Maguire, for example, attribute the success of policing not to New York's particular tactics, but to its focus more intensive and effective patrol on particular criminogenic areas and conditions, which was part of a nationwide trend. *See* Eck & Maguire, *supra* note 84, at 245–49. Professor Levitt acknowledges that police had a substantial impact on the crime drops, but he believes that the decline in violent crime is attributable not to changes in police tactics but instead to the unusual growth in the size of its police force between 1991 and 2001. *See* Levitt, *supra* note 83, at 172–73, 176–77. Yet, Professor Levitt overlooks a large body of empirical evidence that merely increasing the frequency of police patrol or reducing police response time does not decrease crime. *See* Sherman, *supra* note 98, at 8-1, 8-8 to 8-13, 8-16 to 8-20.

102. *See, e.g.*, Blumstein & Rosenfeld, *supra* note 27, at 1187–91; Cook & Laub, *supra* note 27, at 22–25; Levitt, *supra* note 83, at 171–72. The most prominent demographic explanation for the crime drop is the claim that the widespread availability of abortion reduced crime rates. *See, e.g.*, John J. Donahue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 407–15 (2001) (finding that higher abortion rates around the time that individuals in a

decline in crime rates; there is no statistically significant relationship between economic conditions and crime rates during the period of the crime drop.[103] This should come as no surprise; in recent decades there has been precious little relationship between economic conditions and crime rates. Murder, robbery, and property crime rates all rose precipitously between roughly 1960 and the early 1990s,[104] and during this same period there was a time of an enormous increase in real income by virtually all measures.[105] Poverty also declined during this period.[106] While I do not doubt that there is some general relationship between poverty and crime, changing economic conditions plainly have only a tenuous relationship to variations in crime rates.[107]

This is not to say that police tactics deserve the entire credit for the reductions in violent crime over the past decade. Crime tends to be cyclical.[108]

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cohort were born were associated with lower arrest rates in their teens and twenties. *See also* Levitt, *supra* note 83, at 181–83. But this claim is deeply problematic. Violent crime among youth reached historic highs in 1993, whereas the crime rate should have been dropping as a result of the legalization of abortion two decades earlier, if indeed crime were a function of abortion rates. *See* Cook & Laub, *supra* note 27, at 22–25; Fox, *supra* note 27, at 302–04. Professors Cook & Laub, relying on homicide victimization rates, found that even individuals in cohorts born after abortion was legalized experienced higher rates of violent crime during this period. *See* Cook & Laub, *supra* note 29, at 22–25. Moreover, with respect to New York City in particular, while Professors Donahue and Levitt claimed support for their thesis by observing that crime dropped sooner in states that legalized abortion earlier, when they excluded New York from their data, the relationship between abortion rates and reduced crime actually increased. *See* Donahue & Levitt, *supra* at 405–06. Thus, abortion appears to play a particularly small role in the New York crime drop.

103. *See* Richard B. Freeman, *Does the Booming Economy Help Explain the Fall in Crime?*, *in* PERSPECTIVES IN CRIME AND JUSTICE: 1999–2000 LECTURE SERIES 23, 40–41 (Nat'l Inst. of Justice, U.S. Dep't of Justice 2001); Levitt, *supra* note 83, at 170–71.

104. *See, e.g.*, GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 19–27 (1998).

105. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MEASURING 50 YEARS OF ECONOMIC CHANGE 7–8, 23 (Sept. 1998).

106. *See id.* at 45.

107. Increasing incarceration rates also doubtless played some role in the crime drop, but not a decisive one. William Spelman, for example, has estimated that increased incarceration could account for up to about one-quarter of the crime drop. *See* William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA, *supra* note 27, at 97, 97–129. Steven Levitt's estimate is closer to one-third. *See* Levitt, *supra* note 83, at 177–79. As Professors Cook and Laub have cautioned, however, the role of incarceration in the crime drop is probably lower for younger offenders, who were responsible for the bulk of the earlier increase in violent crime, since they are incarcerated at lower rates. *See* Cook & Laub, *supra* note 27, at 29–30. There is also a claim that the enactment of laws permitting persons to carry firearms has played an important role in reducing crime, although these analyses make no effort to take account of the large reductions in crime in jurisdictions such as New York that did not enact such laws. *See, e.g.*, John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997). For powerful attacks on this theory, see Ian Ayres & John J. Donahue, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003); John J. Donahue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 FORDHAM L. REV. 623 (2004); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001).

108. *See, e.g.*, Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 25 ANN. REV. SOC. 145, 158–64 (1999).

Thus, crime rates may well have declined after they peaked in the 1990s with no change in law enforcement tactics or strategy and tactics.[109] Nevertheless, there was nothing inevitable about a rate of decline that left crime rates far lower than they had been in some forty years.[110] Not only did the rate of violent victimization decline by more than half between 1993 and 2003, but the 2003 rate was substantially lower than it had been at anytime since the National Crime Victimization Survey began in 1973.[111]

Many observers attribute the decline in violent crime to a stabilization in crack markets.[112] That may be true, but it does not explain why drug markets stabilized.[113] After all, drug-related violence is a function of the reality that violence is frequently the principal means by which drug-selling organizations compete for dominance in drug markets.[114] But this observation does little to explain the decline in crime rates since the early 1990s. There is no particular reason to believe that drug-selling organizations lost interest in competing for market dominance in the 1990s; there is not even much evidence that drug trafficking abated in the 1990s. The most objective measure of drug use available is the reports of drug-abuse related emergency department episodes, and they have increased every year from 1994 to 2002.[115] Federal seizures of

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109. Although, as some skeptics about the relationship between new police tactics and declines in violent crime observe, rates tend to be cyclical, *see, e.g.*, Eck & Maguire, *supra* note 84, at 233–35, the fact that crime began dropping in some cities before they adopted new, more aggressive tactics does not demonstrate that the ensuing crime drop was not a result of these tactics. Precisely because crime is cyclical, the crime drop could not have been as steep or lasted as long had tactics never changed.

110. As Alfred Blumstein and Joel Wallman have observed:

> Prior to 1965, the U.S. homicide rate was consistently under 5 per 100,000 population. Around 1965, it began a steady rise, and from 1970 it oscillated for twenty years in the range of 8 to 10 per 100,000. A decline from 1980 to 1985 was followed by a dramatic growth in youth violence during the period from 1985 to 1991, with arrest rates for homicide more than doubling for each age group of males under age 20; the rise for black youth was even steeper. Then, beginning in 1992, aggregate rates declined steadily to less than 6 per 100,000 in 1999, a level not seen since the 1960s, with no clear indication of when the decline would level off or reverse itself.

Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, *in* THE CRIME DROP IN AMERICA, *supra* note 27, at 1, 3–4.

111. *See* CATALANO, *supra* note 18, at 5.

112. *See, e.g.*, Blumstein & Rosenfeld, *supra* note 27, at 1208–10; Levitt, *supra* note 83, at 179–81.

113. Even Alfred Blumstein, a leading advocate of the view that the introduction of crack cocaine spurred the increases in violent crime in the 1980s, acknowledges that "[t]here is no comparably strong single hypothesis about the decline period." Blumstein, *Disaggregating the Violence*, *supra* note 27, at 30.

114. *See, e.g.*, Paul J. Goldstein, Henry H. Brownstein, Patrick J. Ryan & Patricia A. Bellucci, *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 113, 118–24 (Craig Reinarman & Harry G. Levine eds., 1997); Grogger & Willis, *supra* note 30, at 52.

115. *See* SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., DEP'T OF HEALTH & HUMAN SERVS., EMERGENCY DEPARTMENT TRENDS FROM THE DRUG ABUSE WARNING NETWORK, FINAL ESTIMATES 1995–2002, at 53 fig.3 (July 2003).

cocaine in particular remained relatively constant from 1989 through 2002, except for a spike in 1994, when homicide was already declining.[116] Moreover, the number of drug-related arrests actually rose 22.4 percent between 1994 and 2003.[117] The United States Department of Justice estimates that the sale of powder and crack cocaine has remained pervasive, and its price has been steady.[118] It also estimates that crack markets remain vibrant in most major cities.[119] What this suggests is that there has not been a dramatic decline in the demand for or profitability of crack cocaine. This, in turn, suggests that there is as much reason to compete for dominance in crack markets today as there was in the early 1990s. What has changed since the early 1990s, the evidence suggests, is that more aggressive police enforcement efforts have pushed drug dealing off the streets, and thereby reduced opportunities for drug-related violence among those competing in these markets.[120]

Newly aggressive police tactics not only save lives, but they have an even broader effect by mitigating the impact of high rates of violence on social norms. As the discussion in Part II endeavors to demonstrate, an important reason that the threat of violence has such a profound effect on social norms in high-crime communities is that residents conclude that the police are unable to intervene effectively to secure their safety. It follows that without help from the police, it is unrealistic to expect high-crime communities to combat the destabilizing effects of violence. Sudhir Venkatesh made the point this way:

> [I]t may be impossible for a community to create its own law and order. Wherever communities develop a quasi-juridical foundation to cope with extremely dangerous practices such as gang wars and drug trafficking, a rapid, responsible initiative that recreates the presence of mainstream legal institutions may be the best course to chart. Recent community policing efforts have suggested that an approach that embeds the police and the judicial system within the community—often, quite literally, by placing courts and jails there—may be a means by which to staunch outlaw justice and create more effective relationships between the poor and the wider world.[121]

Thus, not only is there reason to believe that an aggressive police presence on

116. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 389 tbl.4.36 (Aug. 2004).

117. *See* CRIME IN THE UNITED STATES, *supra* note 78, at 274 tbl.32.

118. *See* NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2005, at 4-6 (Feb. 2005). Crack has remained profitable, with prices ranging from $500 to $1500 per ounce in 2001, but it also remains cheap, with rocks (which generally range in size from one-tenth to one-half gram) selling for between $5 and $100. *See* DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, ILLEGAL DRUG PRICE AND PURITY REPORT 5 (April 2003).

119. *See* NAT'L DRUG INTELLIGENCE CTR., *supra* note 118, at 8–11.

120. Elsewhere I have advanced this view to explain reductions in violence associated with the enforcement of public order laws. *See* Rosenthal, *supra* note 31, at 132–48.

121. VENKATESH, *supra* note 59, at 275.

the streetscape will drive down rates of violent crime, but an aggressive police presence can also subvert the mechanism by which a sense of pervasive threat alters social norms within high-crime communities.[122]

In short, there is good reason to believe that newly aggressive police tactics have played an important role in the remarkable drop in violent crime over the past decade. The question remains, however, whether these tactics comport with constitutional standards.

IV.

The most comprehensive effort to assess the constitutionality of the type of aggressive and proactive urban policing that came into vogue in the 1990s is the New York Attorney General's report on policing in New York City.[123] That report suggests that New York City's policing strategy may well have been inconsistent with constitutional standards.

The Constitution's Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race."[124] In general, equal protection is thought to forbid investigative practices that target racial minorities but not similarly situated non-minorities.[125] Analyzing data for the period from January 1, 1998 through March 31, 1999, culled from forms New York's police officers can complete for any investigative stop of a subject, and are required to complete whenever a subject is forcibly stopped and either frisked or otherwise searched, arrested, or when the suspect refuses to identify him or herself,[126] the Attorney General's report found that blacks, and to a lesser extent Hispanics, were more likely to be stopped than nonminorities.[127] At the precinct level, majority-minority precincts had higher stop rates,[128] and the Street Crimes Unit, which was deployed on a citywide basis and emphasized the recovery of firearms through stop-and-frisk tactics,[129] had an even higher rate of stopping blacks,

122. With respect to the relationship between violent crime and social norms, it is worth noting that during the 1990s, not only did the rate of teenage pregnancy dramatically decline as the violent crime rate declined, but black teenagers also experienced a disproportionate reduction in teenage pregnancy rates. *See* Stephanie J. Ventura, Joyce C. Abma, William D. Mosher & Stanley Henshaw, Ctrs. for Disease Control and Prevention, *Revised Pregnancy Rates, 1990–97, and New Rates for 1998–99: United States*, NAT'L VITAL STATS. REP. Vol. 52, No. 7, at 3 figs.4, 6, 7–10 & tbl.1 (Oct. 31, 2003).

123. *See* CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (Dec. 1, 1999) [hereinafter "NYAG REPORT"].

124. Whren v. United States, 517 U.S. 806, 813 (1996).

125. *See, e.g.*, United States v. Bass, 532 U.S. 862, 863–64 (2002) (per curiam); United States v. Armstrong, 517 U.S. 456, 465 (1996).

126. *See* NYAG REPORT, *supra* note 123, at 63–64, 88.

127. *See id.* at 94–95.

128. *Id.* at 95–101.

129. *Id.* at 58–59.

although its members stopped Hispanics at lower rates than other units.[130] The report also found that "during the covered period, police 'stopped' 9.5 blacks for every 'stop' that yielded an arrest, and 8.8 Hispanics, but only 7.9 whites per one arrest."[131] Stops by the Street Crime Unit disclosed an even greater racial divergence; that unit "'stopped' 16.3 blacks and 14.5 Hispanics per arrest, but only 9.6 whites per arrest."[132] Even after controlling for arrest rates, blacks were stopped 23 percent more often than whites, and Hispanics were stopped 39 percent more often than whites.[133] Blacks were more than twice as likely to be stopped for suspected violent crimes as whites, and Hispanics nearly twice as likely.[134] The Street Crimes Unit had even higher rates at which its members stopped minorities.[135] Nor were precinct stop rates predicted by crime rates; high-crime precincts had higher stop rates than predicted by crime rates, and low-crime precincts had lower stop rates.[136]

With respect to the Fourth Amendment's requirement that an investigative stop be supported by reasonable suspicion,[137] the report concluded that 15.4 percent of the required forms documenting stops failed to articulate a sufficient basis to support the stop,[138] and 23.5 percent of the forms did not contain sufficient information to determine whether the facts articulated amounted to reasonable suspicion.[139] The report examined stops in eight selected precincts for racial disparities, and found that only the two majority-white precincts had more properly documented stops than the citywide average, while majority-minority precincts had higher than average rates of stops without sufficient documentation.[140] Moreover, citywide data showed that while the rate for stops not supported by reasonable suspicion was roughly the same for blacks, Hispanics, and whites, when only stops for which a form was required were considered, a racial disparity emerged in which 15.4 percent of blacks but only 11.3 percent of whites were stopped without documentation of facts articulating

130. *Id.* at 107–09.

131. *Id.* at 111.

132. *Id.* at 117. The divergence in rates was significantly smaller for officers assigned to precincts than for officers assigned to specialized units, with "8.6 'stops' of blacks per arrest compared to 7.7 'stops' of whites." *Id.* at 116.

133. *Id.* at 123.

134. *Id.* at 123–27. Conversely, minorities were stopped on suspicion of committing property crimes at lower rates than whites. *Id.* at 127–28.

135. *Id.* at 128–30.

136. *Id.* at 131.

137. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 269–74 (2000); Ornelas v. United States, 517 U.S. 690, 693 (1996).

138. *See* NYAG REPORT, *supra* note 123, at 160–62. The report claims that a failure to articulate in the form facts supporting reasonable suspicion is indicative of an unjustifiable stop, observing that while approximately one in nine stops resulted in an arrest, for the forms that did not contain facts articulating reasonable suspicion, only one in 29.3 resulted in an arrest. *See id.* at 164.

139. *See id.* at 162.

140. *See id.* at 166.

reasonable suspicion.[141] As for the Street Crimes Unit, 23.2 percent of its stops were not documented by facts articulating reasonable suspicion, a rate significantly higher than the citywide average, and 65.7 percent of its stops were of blacks, while the citywide average was 52.1 percent.[142]

Many have argued that the New York data discloses systemic violations of constitutional rights.[143] To be sure, endeavoring to prove systemic violation of rights based on the New York data is a perilous business. This statistical approach is highly inferential, and there may be any number of explanations for data reflecting disproportionate stops of minorities that would not amount to unconstitutional racial or national origin discrimination.[144] Jeffrey Fagan and Garth Davies, for example, performed a regression analysis on the New York data and concluded that a precinct's poverty rate rather than race primarily explained differential stop rates.[145] And given the relationship between areas of concentrated poverty and violent crime, the use of more aggressive police policing in areas of concentrated poverty may well be an entirely reasonable law enforcement strategy. Nevertheless, it may well be true that at least some officers utilize the race of a suspect, at least under some circumstances, as an indicator of criminality.[146] And, as Albert Alschuler has argued, there is a strong case to be made for the view that when the police use race or ethnicity as a proxy for criminality, they signal that the government regards particular racial or ethnic groups with suspicion or worse, a message inconsistent with the concept of equal protection embraced in *Brown*.[147]

Professor Alschuler is not alone. There is an enormous (and steadily

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141. *Id.* at 168–69.

142. *Id.* at 171–74.

143. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496–503 (2000); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 256–57 (2001); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 345–46 (2001); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 425–30 (2001). Using a somewhat less sophisticated methodology, the United States Commission on Civil Rights reached a similar conclusion. Analyzing the forms documenting stops in New York City during 1998, the Commission concluded that blacks and Hispanics were stopped at significantly higher rates than would be expected given their representation in the population, in a pattern suggesting both racial profiling and a practice of making stops absent individualized suspicion. *See* U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 95–108 (2000).

144. *See, e.g.*, R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 580–86 (2003); Jeff Dominitz, *How Do the Laws of Probability Constrain Legislative and Judicial Efforts to Stop Racial Profiling?*, 5 AM. L. & ECON. REV. 412 (2003); Rosenthal, *supra* note 99, at 95–101.

145. *See* Fagan & Davies, *supra* note 143, at 489–96.

146. *See id.* at 496 (noting the possibility that race does serve as a "marker" of criminality).

147. *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 207–23. *See also* Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 LAW & INEQ. 73 (2004).

growing) volume of commentary decrying what is regarded as the costs of racial profiling, which is said to impose undue burdens on those who are subjected to unjustifiable search and seizure and to compromise the legitimacy of the criminal justice system in the eyes of residents of predominantly minority communities.[148] Randall Kennedy, for example, characterizes disproportionate stops of racial minorities as a form of racial tax on minorities.[149] But surely there is something missing from the equation when one talks only about the costs and not the benefits of a law enforcement tactic. As the discussion in Part III should demonstrate, the tactics questioned in the New York Attorney General's report may well have saved the lives of thousands of minority residents of New York. That is a strange sort of tax on the minority community. Surely, both the costs and benefits of any challenged law enforcement practice merit consideration. Equally important, the question whether police tactics impose undue burdens on racial or ethnic minorities is an empirical one, and deserves an empirical answer.

To be sure, conferring unfettered discretion on police officers as they undertake investigative activity gives them freedom to act on what may well be racial stereotypes and prejudices. But the policing model that came into vogue within the past decade does not argue for granting unfettered discretion to police on patrol. In New York's model, for example, crime patterns are analyzed to identify particularized geographic locations that warrant intensified law enforcement efforts.[150] Similarly, a community policing model, like the one used in Chicago, requires officers to acquire detailed knowledge of criminogenic conditions on their own beats.[151] This emphasis on matching enforcement to localized crime data has solid support in criminological theory, which posits that crime is likely to cluster at particular locations where motivated offenders, desirable targets, and insufficient supervision will coincide.[152] Thus, when

148. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16–62 (1998); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136–67 (1997); Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003); Lenese C. Herbert, Bête Noire*: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003); Erika L. Johnson, *"A Menace to Society": The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629 (1995); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1815–18 (2005); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003); Floyd D. Weatherspoon, *Racial Profiling and African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 JOHN MARSHALL L. REV. 439 (2005).

149. *See* KENNEDY, *supra* note 148, at 159–61.

150. *See, e.g.*, KEITH HARRIES, U.S. DEP'T OF JUSTICE, MAPPING CRIME: PRINCIPLE AND PRACTICE 67–89 (1999).

151. For a useful description of the Chicago model, see WESLEY G. SKOGAN, LYNN STEINER, JILL DUBOIS, J. ERIK GUDELL & AIMEE FAGAN, U.S. DEP'T OF JUSTICE, TAKING STOCK: COMMUNITY POLICING IN CHICAGO 4–17 (July 2002). For a valuable comparison of the policing strategies in Boston, Chicago, and New York, see Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407 (2000).

152. *See, e.g.*, ROBERT J. BURSIK & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 62–72 (1993).

police engage in aggressive patrol of "hot spots" in order to raise the risks facing those carrying guns or drugs, they are not exercising a brand of unfettered discretion; nor do they act on the basis of racial stereotypes or assumptions; they act instead on the basis of concrete crime patterns and sound criminological theory. In contrast, the clearest and most indefensible patterns of racial profiling are found in data concerning vehicular stops by highway police, who are unlikely to be responding to concrete data about conditions in a particular community.[153] But when aggressive policing is focused on the locations at which guns and drugs are most likely to be destabilizing a community, it is not so much a racial tax as a signal that guns and drugs can no longer be carried with impunity and, even more important, that the police are not indifferent to the threat that guns and drugs pose to that community. Thus, when aggressive stop-and-frisk tactics are focused on unstable and impoverished neighborhoods, where violent crime takes its greatest toll, that approach is likely to produce racially disproportionate stop rates, but it also signals the willingness of government to focus disproportionate law enforcement resources where they are most needed, rather than allocating them to wealthier and perhaps more politically influential neighborhoods. If, moreover, intelligence discloses that street gangs or other criminal organizations associated with a particular racial or ethnic group are disproportionately likely to be involved in illegal activity especially damaging to the community, then when the police devote special scrutiny to persons matching the profile for such criminal organizations, they are not acting merely because of the suspect's race, but because the suspect fits the available intelligence. Such an approach, over time, will likely cause members of these groups to be disproportionately represented among those who are targeted for investigation,[154] but the Equal Protection Clause is violated only when "the decisionmaker . . . selected or reaffirmed a particular course of action

153. *See, e.g.*, Samuel R. Gross & Katharine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post–September 11 World*, 40 AM. CRIM. L. REV. 1195, 1197–99 (2003). This point also explains why New York's Street Crimes Unit had lower arrest rates and greater racial disproportion than officers assigned to precincts. Officers assigned to centralized units are less likely to have detailed knowledge of local conditions that will inform enforcement strategy, and for that reason are more likely to fall back on racial stereotypes. Conversely, the strength of that model is that it creates a reserve of officers available for deployment to emerging hot spots in need of focused attention. Chicago, for example, has recently begun to use such centralized deployments with considerable success. *See* Fox Butterfield, *Rise in Killings Spurs New Attempts To Fight Gangs*, N.Y. TIMES, Jan. 17, 2004, at A1. Perhaps the costs associated with utilizing a centralized unit may be necessary to achieve the dramatic crime reductions experienced in New York.

154. Precisely because arrest statistics indicate that some minority groups offend at disproportionate rates, investigative practices that respond to this reality will over time produce stop rates for these groups that exceed even the underlying rate of offending. *See* Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 118–25 (2003). This point surely explains a good deal of the statistical pattern observed in New York.

at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group."[155] Racially disproportionate stop rates, however, do not necessarily reflect stereotypical assumptions about race and criminality or an effort to place minorities under special burdens; rather, they may well reflect law enforcement's willingness to devote disproportionate resources to the protection of high-crime minority communities in light of the intelligence at hand.[156] Thus, it is far from clear that Professor Alschuler is correct when he claims that racially skewed law enforcement practices create the same type of racial hierarchy condemned in *Brown*. The social meaning of aggressive community-based policing, if done properly, is instead that the police will not tolerate guns or drugs in the communities where they have done the most harm, and are prepared to use the tactics most likely to protect the residents of those communities.[157]

Then there is the question of legitimacy. To read the law reviews, one would conclude that aggressive policing in the inner city has wholly undermined the legitimacy of the police and the criminal justice system.[158] The question that legal scholars rarely if ever consider, however, is whether police can have any legitimacy in inner-city communities when they fail to effectively combat violent crime. In my view, inefficacy in fighting inner-city crime is far more likely than anything else to make the police appear to be inept, corrupt, or even racist in the eyes of the residents of high-crime communities. In any event, in the wealth of legal commentary asserting a crisis of legitimacy among minorities, one might expect critics to offer some empirical evidence to support their assertion that proactive policing has compromised police legitimacy. There is, however, precious little evidence to support that view. To the contrary, research has consistently shown that there is no significant relationship between one's race and one's satisfaction with police once neighborhood crime rate and neighborhood stability are taken into account.[159] For example, Cheryl Maxson,

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155. Wayte v. United States, 470 U.S. 598, 610 (1985) (ellipsis in original) (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

156. Interestingly, the New York data indicate that precinct crime rates accurately predict stop rates for blacks and Hispanics, but not whites. *See* Fagan & Davies, *supra* note 143, at 493–95. This may well reflect precisely the kind of pattern that will develop over time as the police respond to disproportionate rates of offending.

157. It follows that I am equally unpersuaded by the view advanced by a number of legal scholars that statistical evidence of disproportionate stops of minorities will itself make out a prima facie equal protection violation similar to evidence that a prosecutor had disproportionately challenged minorities from a venire. *See, e.g.*, Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1349–54 (2004). Striking an individual from a venire could never be thought part of a special effort to aid disproportionately minority, high-crime communities in the same fashion as a properly targeted law enforcement strategy.

158. *See* text at notes 5–9, 147–49. For what is perhaps the leading academic attack on aggressive urban law enforcement, see HARCOURT, *supra* note 97, at 166-79.

159. *See, e.g.*, CHERYL MAXSON, KAREN HENNIGAN & DAVID C. SLOANE, U.S. DEP'T OF JUSTICE, FACTORS THAT INFLUENCE PUBLIC OPINION OF THE POLICE (June 2003); Michael D. Reisig & Roger B. Parks, *Experience, Quality of Life, and Neighborhood Context: A Hierarchical Analysis of Satisfaction with Police*, 17 JUSTICE Q. 607 (2000); Robert J. Sampson & Dawn Jeglum

Karen Hennigan and David Sloane concluded that "once respondents are categorized further by the level of perceived disorder in their neighborhood, the racial/ethnic-based differences in approval of job performance disappear."[160] Thus, the available empirical evidence suggests that it is the failure of the police to secure law and order, and not friction between the police and the residents of predominantly minority communities, that is most likely to undermine community confidence in the police.

Moreover, there is little evidence of a crisis in confidence on the police among African-Americans. In a 1998 survey of twelve major cities, the United States Department of Justice found that among black residents, 76 percent were satisfied with the police that serve their neighborhood.[161] In New York, where some claim that aggressive policing has seriously undermined relations between the police and the black community,[162] a 2003 Quinnipiac University poll found that although there was a perception that police were tougher on blacks than whites, 55 percent of African-American respondents approved of the way that police in their own community do their job, as compared to 69 percent of all respondents.[163] This data hardly reflects a crisis of police legitimacy in minority communities.[164]

Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777 (1998); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000).

160. MAXSON, HENNIGAN & SLOANE, *supra* note 159, at 8.

161. *See* STEVEN K. SMITH, GREG W. STEADMAN & TODD D. MINTON, BUREAU OF JUSTICE STATS. & MEG TOWNSEND, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, at 25 tbl.34 (May 1999). Specifically, in Chicago, 69 percent of black residents were satisfied with local police; in Kansas City, 86 percent; in Knoxville, 63 percent; in Los Angeles, 82 percent; in Madison, 97 percent; in New York, 77 percent; in San Diego, 89 percent; in Savannah, 81 percent; in Spokane, 79 percent; in Springfield, 76 percent; in Tucson, 91 percent; and in Washington, D.C., 75 percent. *Id.*

162. *See, e.g.*, Andrea McCardle, *Introduction*, *in* ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 1, 1–10 (Andrea McArdle & Tanya Erzen eds., 2001) [hereinafter "ZERO TOLERANCE"].

163. *See New Yorkers Back Police 2–1, but Blacks Disapprove, Quinnipiac University Poll Finds; More Than 80% Say Their Neighborhood Is Safe*, *at* http://www.quinnipiac.edu/x6831.xml (last visited Jan. 21, 2005). Interestingly, when respondents are not asked about police in their own community, but instead are asked whether they approve of how the New York police are doing their job, only 42 percent of black respondents approve, while 54 percent disapprove. *See id.* This suggests that publicity about police misconduct toward minorities may negatively affect blacks' opinions of the department as a whole, but they are more likely to approve of policing that they actually see in their own communities.

164. A word about the issue of police brutality is in order. Some claim that New York City's aggressive enforcement practices have promoted the use of excessive force, and note an increase in allegations of brutality against New York police in the 1990s. *See, e.g.*, Tanya Erzen, *Turnstile Jumpers and Broken Windows: Policing Disorder in New York City*, *in* ZERO TOLERANCE, *supra* note 162 at 30–35. There is no reason why aggressive enforcement of public order laws should increase brutality, however. A police department with an aggressive internal investigation function, including undercover monitoring of officers on patrol, should be able to punish and deter misconduct. Indeed, the New York poll numbers suggest that police brutality is less of a problem

All this should suggest that, at a minimum, when we question whether certain apparently racially skewed investigative tactics comport with equal protection principles and make for wise policy—in particular, whether they impose an unfair tax on the liberty and privacy interests of minorities, send stigmatizing social messages, or compromise police legitimacy—we should turn to empirical evidence, rather than law professors' preconceptions about the impact of policing on high-crime communities. Surely both the costs and benefits of challenged policing strategies merit consideration, and assessing both costs and benefits require an empirical inquiry.[165] Empirical evidence, however, is all too rarely invoked in debate over police tactics.[166] For example, one would think that the enormous reductions in crime over the past decade would compel serious reconsideration of the benefits of aggressive policing, yet such a discussion is almost entirely absent from either judicial opinions or legal scholarship.

The remainder of this article will endeavor to show that the same flaw pervades judicial opinions and legal scholarship defining the contours of the Fourth Amendment's prohibition on unreasonable search and seizure. Here too, the debate over the constitutionality of new policing strategies has been impoverished by an absence of empirical data. The discussion that follows focuses primarily on the decisions in *City of Indianapolis v. Edmond*[167] and *Illinois v. Wardlow*.[168] Both of these decisions considered police tactics with

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for police legitimacy then police critics assert, or that the minority community is more concerned about reducing the crime rate than reducing the rate of police brutality. It is worth noting as well that while minorities exercise considerable political clout in big cities, they have not used that power to put a stop to the new generation of police tactics, a point that Professors Kahan and Meares have stressed. *See* Kahan & Meares, *supra* note 1, at 1171–76.

165. On the virtues of social science data in illuminating constitutional criminal procedure, see Tracey L. Meares & Bernard Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

166. Interestingly, the importance of empirical inquiry is well accepted in at least one area of constitutional criminal procedure. In *Miranda v. Arizona*, 384 U.S. 436 (1966), insisting upon prophylactic warnings in order to protect the Fifth Amendment privilege against compelled self-incrimination, the Supreme Court consulted empirical evidence about police investigative techniques to determine that prophylactic safeguards against police overreaching in interrogation were warranted. *See id.* at 445–56. The Court also pointed to empirical evidence indicating that the warnings, which it held must be given during custodial interrogation, would not unduly interfere with law enforcement interests. *See id.* at 484–90. It was this approach to the Fifth Amendment inquiry that led Professor Monaghan to identify *Miranda* as a primary example of what he named constitutional common law. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19–22 (1975). Commentators have been quite approving of this type of empirically grounded approach to the Fifth Amendment. *See, e.g.*, Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 965–70 (2003); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1060–77 (2001).

167. 531 U.S. 32 (2000).

168. 528 U.S. 119 (2000).

enormous potential to control firearms violence in high-crime communities, and yet both were made without consulting evidence of the extent or severity of targeted crime problems or of the impact of challenged police tactics on these communities.

V.

The Constitution distinguishes between search and seizure with and without prior judicial authorization. Although it unambiguously forbids the issuance of a warrant to search or seize without "probable cause," the Fourth Amendment proscribes only "unreasonable" search and seizure without a warrant.[169] Accordingly, when the Supreme Court confronted the question whether the Fourth Amendment permits a police officer to stop and frisk a suspect without probable cause in *Terry v. Ohio*,[170] the Court explained that the text of the Fourth Amendment compelled it to consider not whether the officer's conduct was based on probable cause, but rather whether the police conduct at issue comported with "the Fourth Amendment's general proscription against unreasonable searches and seizures."[171] This standard of reasonableness, the Court added, called for it to "balanc[e] the need to search (or seize) against the invasion which the search (or seizure) entails."[172] The test the Court adopted to assess the constitutionality of a warrantless stop-and-frisk was accordingly framed in broad terms: "[W]ould the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?"[173] Applying this test, the Court wrote: "[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest."[174] The Court also noted that "[a]n arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve is likewise different."[175] The Court concluded that a brief detention and protective pat-

169. "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." U.S. CONST. amend. IV. It is perhaps an understatement to observe that the historical basis for this formulation has proven controversial. *See generally, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

170. 392 U.S. 1 (1968).

171. *Id.* at 20 (footnote omitted).

172. *Id.* at 21 (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)). Observing the distinction between warrants and warrantless searches drawn by the text of the Fourth Amendment, the Court wrote: "If this case involved the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place." *Id.* at 20.

173. *Id.* at 21–22 (internal quotations omitted).

174. *Id.* at 24.

175. *Id.* at 26.

down of an individual comports with the Fourth Amendment "where a police officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . ."[176]

Since *Terry*, the Court has consistently held that privacy and law enforcement interests must be balanced whenever it is called upon to assess investigative practices undertaken in the absence of a warrant and without probable cause.[177] The Court has also rejected the view that the Fourth Amendment insists on some individualized showing of suspicion before an individual may be detained, upholding warrantless search and seizure even absent particularized suspicion that the individual searched or seized has engaged in unlawful activity when sufficiently compelling law enforcement interests are at stake. The Court has, for example, upheld the stop-and-detention of all motorists approaching a fixed sobriety checkpoint, stressing the magnitude of the drunken-driving problem;[178] the random drug testing of high school students participating in interscholastic athletics, stressing the magnitude of the drug abuse problem;[179] the routine inspection of automobile junkyards, stressing the magnitude of illegal activity in this line of business;[180] the mandatory drug testing of all law enforcement personnel engaged in drug interdiction efforts, stressing the many demands placed on such personnel;[181] the random drug and alcohol testing of railroad employees, stressing the threats to public safety that these employees pose if they are impaired;[182] and the establishment of fixed highway checkpoints in the vicinity of the Mexican border to question the occupants of vehicles about their immigration status, stressing the magnitude of smuggling and illegal entry of noncitizens into the country.[183] In this latter context, the Court concluded that the use of checkpoints was constitutional even if law enforcement personnel utilized an individual's apparent Mexican ancestry as one of the criteria to determine which individuals would be detained for questioning.[184]

In this line of cases, the Court has been attentive to empirical evidence about

176. *Id.* at 30.

177. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995); Whren v. United States, 517 U.S. 806, 816–18 (1996); Maryland v. Bouie, 494 U.S. 325, 331–32 (1990); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989); O'Connor v. Ortega, 480 U.S. 709, 719–20 (1987); New York v. Class, 475 U.S. 106, 116–19 (1986); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); Michigan v. Long, 463 U.S. 1032, 1046 (1983); United States v. Place, 462 U.S. 696, 703–05 (1983); Illinois v. Lafayette, 462 U.S. 640, 644 (1983); Pennsylvania v. Mimms, 434 U.S. 806, 808–09 (1977).

178. *See* Michigan Department of State Police v. Sitz, 496 U.S. 444, 451 (1990).

179. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–63 (1995).

180. *See* New York v. Burger, 482 U.S. 691, 708–09 (1987).

181. *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668–71 (1989).

182. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 628–33 (1989).

183. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556–58 (1976).

184. *See id.* at 563–64.

the efficacy of the investigative technique at issue. For example, upholding the use of sobriety checkpoints in *Michigan Department of State Police v. Sitz*,[185] the Court relied on evidence that approximately 1.6 percent of drivers passing through the checkpoint were arrested for alcohol impairment to demonstrate the efficacy of the program.[186] And as it upheld the use of vehicle checkpoints near the border in *United States v. Martinez-Fuerte*,[187] the Court pointed to evidence that while less than 1 percent of the motorists passing the checkpoint were detained for questioning at a secondary inspection area, of the 820 vehicles detained in the secondary inspection area in the eight-day period surrounding the arrests at issue in that case, approximately 20 percent contained individuals unlawfully in the country.[188]

At the same time, this line of cases has also stressed the impermissibility of granting officers effectively unchecked discretion to stop and detain individuals without probable cause, invalidating, for example, roving patrols in the vicinity of the border stopping vehicles based only on reasonable suspicion that they contained noncitizens,[189] as well as a random stop of a vehicle undertaken to check the driver's license and the vehicle's registration.[190] Still, the Court had declined to hold that some quantum of individualized suspicion was required for search and seizure undertaken as part of a reasonable program that adequately circumscribed the discretion of individual officers. Thus, when the Court summarized the law in *Brown v. Texas*,[191] it explained that "[t]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of a particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of particular officers*."[192] The Court treated the standard articulated in *Brown v. Texas* as controlling in subsequent cases.[193]

Thus, under the standard articulated in this line of cases, there is considerable support for a conception of the Fourth Amendment that would allow police working in high-crime areas to conduct brief street stops to investigate possible gun possession, in the absence of individualized suspicion, provided that the methods employed are minimally intrusive, carried out in accordance with a uniform protocol, and based on a tailored analysis of local crime statistics and periodic review of the efficacy of these tactics. And, given

185. 496 U.S. 444 (1990).

186. *See id.* at 454–55.

187. 428 U.S. 543 (1976).

188. *See id.* at 563–64 & nn.16–17.

189. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

190. *See* Delaware v. Prouse, 440 U.S. 648 (1979).

191. 443 U.S. 47 (1979).

192. *Id.* at 51 (emphasis added).

193. *See* INS v. Delgado, 466 U.S. 210, 233 (1984); Kolender v. Lawson, 461 U.S. 352, 360–61 (1983).

the enormous declines in violent crime observed over the past decade, surely we should be slow to condemn any of the policies that have been utilized during that period as "unreasonable" within the meaning of the Fourth Amendment, at least absent clear reason to believe that those policies have made no meaningful contribution to the crime drop. Moreover, as we have seen, there is a more than plausible argument to be made that policing tactics of the type widely used in New York and elsewhere deserve a good deal of the credit for this success. Nevertheless, when the Court was squarely confronted with the question whether investigative tactics focused on areas of high inner-city crime, utilizing neutral limitations on the discretion of officers, and having a demonstrable record of efficacy, comport with the Fourth Amendment, the Court answered in the negative. At issue in *City of Indianapolis v. Edmond* was the use of vehicle checkpoints to interdict unlawful drugs at locations selected in advance based on crime and traffic flow statistics, with signs posted warning drivers that they were approaching checkpoints, utilizing a protocol under which only a predetermined number of vehicles were stopped at each checkpoint, and requiring the vehicles are stopped only long enough for a brief exterior inspection while a narcotics-detection dog walked around the vehicle's exterior pursuant to a uniform protocol.[194] Between August and November 1998, Indianapolis police undertook six such roadblock operations, stopping 1161 vehicles and arresting 104 motorists, fifty-five for drug-related offenses, and forty-nine for other offenses.[195] The Court invalidated the program without evident consideration of the severity of the problem it was trying to address; nor did the Court treat with the program's efficacy, which, at least in terms of arrest rate, exceeded the efficacy of the sobriety checkpoint program upheld in *Sitz* by a factor of nearly ten.[196] Instead, after observing that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing,"[197] the Court announced a sweeping holding that was apparently indifferent to the conditions that had given rise to the checkpoint program: "Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."[198]

Law professors have heartily approved of *Edmond*.[199] Yet there is much to

194. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 35–36 (2000).

195. *Id.* at 34–35.

196. *See* text at note 186.

197. 531 U.S. at 41.

198. *Id.* at 41–42.

199. *See, e.g.*, Sharon L. Davies, *Justice in the Time of Terror*, 102 MICH. L. REV. 1130, 1146–50 (2004); Arnold H. Loewy, *Cops, Cars and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 547–48 (2002); Alberto B. Lopez, *Racial Profiling and* Whren*: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75, 101–05 (2001–02); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 832 (2002). *See also* Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure, and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 149–51, 153–54

be criticized in the Court's reasoning. As precedential support for its holding, the best the Court could do was to claim that it had "suggested in [*Delaware v.*] *Prouse* that we would not credit the 'general interest in crime control' as justification for a regime of suspicionless stops."[200] It is surely unclear why the *Prouse* dictum to which the Court referred should find greater favor than the equally plain suggestion in *Brown v. Texas* that individualized suspicion is not required as long as the discretion of individual officers is adequately circumscribed.[201] It is also unclear why the "general interest in crime control" should be denigrated when assessing the constitutional reasonableness of an investigative detention. In *Terry* and its progeny, the Court has been quite willing to consider the general interest in crime control in authorizing detention without probable cause.[202] There is no logical reason why that very same interest was entitled to no weight in *Edmond*. Especially for inner-city neighborhoods plagued by guns, drugs, and violent crime, the "general interest in crime control" would seemingly be substantial.

One is left to wonder why the Court is so willing to justify searches not based on individualized suspicion for one set of law enforcement interests—such as combating drunken driving; illegal immigration; drug use by high school students, law enforcement officers, and persons in safety-sensitive professions; and illegal activity by those in closely regulated industries—but not when the more "general interest in crime control" is at stake. Moreover, it turns out that the Court is not even serious about the view that the "general interest in crime control" cannot justify a detention or search on less than individualized suspicion. In *Edmond* itself, the Court acknowledged that the interest in "crime control" could authorize a checkpoint in exigent circumstances, such as "an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."[203] The Court added that its holding "does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."[204] More recently, the Court upheld the use of a so-called "informational" checkpoint to detain motorists for questioning at the site of a hit-and-run accident.[205] What gives?

(2003).

200. *Edmond*, 531 U.S. at 41 (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)).

201. *See* text at notes 191–93.

202. *See, e.g.*, United States v. Hensley, 469 U.S. 221 (1985).

203. 531 U.S. at 44.

204. *Id.* at 47–48.

205. *See* Illinois v. Lidster, 540 U.S. 419 (2004). In *Lidster*, to get out of the hole it had dug for itself in *Edmond*, the Court wrote:

> We concede that *Edmond* describes the law enforcement objective there in question as a "general interest in crime control," but it specifies that the phrase "general interest in crime control" does not refer to "every 'law enforcement' objective." We must read this and related language in *Edmond* as we often read general language in judicial

In short, a fundamental problem with our current Fourth Amendment jurisprudence, in my view, is that it offers no persuasive reason why the Constitution should permit the authorities to dispense with the requirement of individualized suspicion only when something other than a "general interest in crime control" is at stake, but not when other law enforcement practices with an even greater potential to reduce rates of violent crime—such as New York's stop-and-frisk tactics—are at issue. If the available data suggests that the New York Police Department systematically violates *Terry*, but also demonstrates that these policies have saved thousands of lives, then perhaps the problem is with *Terry* and not with stop-and-frisk tactics. It is surely difficult to explain why law enforcement tactics that have a demonstrable effect on the rate of violent crime are "unreasonable" within the meaning of the Fourth Amendment, at least absent some relatively rigorous effort to weigh their costs and benefits.

All this should serve to illustrate another fundamental problem of Fourth Amendment jurisprudence—the reasonableness test for warrantless searches, while compelled by the Fourth Amendment's text, allows enormous play for judicial subjectivity. When it comes to the doctrine of substantive due process, the Court is quite aware of the need for judicial restraint; the Court has frequently noted that the Due Process Clause's open-ended text provides little guidance, posing a risk that judges will read their own preferences into constitutional law.[206] That same concern cannot be found in the Court's Fourth Amendment jurisprudence, but it should be. The Fourth Amendment's text is open-ended, providing judges with ample room to read their own notions of sound policy into the constitutional concept of "unreasonable" search and seizure. Moreover, judges (as well as law professors) predominantly hale from conventional middle-class backgrounds, with middle-class values. Few of them come from or live in high-crime or inner-city neighborhoods.[207] Thus, it should

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> opinion—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.

Id. at 424 (citation omitted) (quoting 531 U.S. at 44 n.1). I suppose this is a judicious way of saying that the *Edmond* opinion should not be taken literally. Then again, *Edmond* itself is sufficiently opaque that it is hard to take literally. For example, in the passage in *Edmond* to which the Court referred, the majority responded to the dissenting opinion's accusation that the Court had mischaracterized the holdings in *Sitz* and *Martinez-Fuerte*, *see* 531 U.S. at 49–56 (Rehnquist, C.J., dissenting), by explaining: "Our opinion nowhere describes the purposes of *Sitz* and *Martinez-Fuerte* as being 'not primarily related to criminal law enforcement.' Rather, our judgment turns on the fact that the primary purpose of the Indianapolis checkpoints is to advance the general interest in crime control." 531 U.S. at 44 n.1 (citations omitted). Perhaps I am not alone in finding the Court's point less than perfectly clear.

206. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Albright v. Oliver, 510 U.S. 266, 271–72 (1994) (plurality opinion); Reno v. Flores, 507 U.S. 292, 301–02 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Michael H. v. Gerald D., 491 U.S. 110, 121–22 (1989) (plurality opinion); Moore v. City of East Cleveland, 431 U.S. 494, 502–03 (1977) (plurality opinion).

207. In this respect, it is interesting to observe that the one current member of the Supreme Court who does not come from a middle-class background evinces considerable sympathy with the

come as little surprise that they are sensitive to problems that concern the middle class, like illegal immigration, drunken driving, drug use by students and employees charged with securing the public's safety, and terrorism. But judges and law professors are largely unfamiliar with the realities of crime in the inner city. When they assess the balance between liberty and order, they are likely to have in mind experiences and concerns of the middle class. And from the standpoint of the middle class, approving search and seizure absent individualized suspicion and based on the "general interest in crime control" may seem like a classic example of an unacceptably slippery slope—one that might seem advisable to avoid for those who do not live with the threat of violent crime as a daily fact of their lives.[208] But from the standpoint of those living in high-crime inner city neighborhoods, the balance between liberty and order may be quite different.[209]

An empirical approach to the Fourth Amendment provides a way to calibrate objectively the balance between liberty and order. Linking an assessment of the constitutional reasonableness of a given investigative tactic to empirical evidence of its efficacy and of the seriousness of the law enforcement problem it endeavors to address provides an objective basis for the assessment of the tactic, as well as a limitation on the circumstances under which it may be employed consistent with the Fourth Amendment.[210] If the Court were to treat as critical the "hit rate" for a challenged practice, as well as the extent of the criminological problem that the practice attempts to address, then only law enforcement practices that demonstrably combat serious law enforcement problems would be sustained.[211] Moreover, the debate over the propriety of

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plight of the residents of high-crime inner city communities. *See* City of Chicago v. Morales, 527 U.S. 41, 98–101 (1999) (Thomas, J., dissenting). The reader should know that I argued the *Morales* case for the City of Chicago. For a description of Justice Thomas's formative years, see JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 31–61 (1994).

208. Indeed, the Court appears to have made a "slippery slope" argument in *Edmond*. In the closest it came to providing a reason for its refusal to accord any weight to the "general interest in crime control," the Court wrote:

> The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

531 U.S. at 43.

209. *Cf.* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999) (noting that Fourth Amendment doctrine is constructed in ways likely to maximize protection against police intrusion granted to the wealthy, while minimizing such protection for the poor).

210. As legal scholars are fond of pointing out, "slippery slope" reasoning can have considerable merit if the limiting principle for a proposed legal rule is not sufficiently clear. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

211. Consider this discussion from a recent opinion taking this approach:

> A 27.6% success rate for a particular type of border search is not to be sneezed at. It

those practices will be far more disciplined, with courts considering concrete numbers rather than more subjective intuitions about the balance between privacy and order. To be sure, courts could fairly debate what type of hit rate would suffice to establish constitutional reasonableness, but at least courts would be compelled to develop a relatively objective standard that considers whether a particular hit rate provides sufficient objective evidence of law enforcement interest to justify the intrusion at issue. To my eye, for example, the one-in-nine hit rate for *Terry* stops in New York looks pretty reasonable, given the flexibility of the *Terry* standard and the significance of the problem that New York has attempted to address with considerable success.[212] Conversely, the one-in-sixteen hit rate for the Street Crimes Unit in New York looks much more suspect, especially in light of the rest of the department's ability to produce a hit rate nearly double that. And to me, the fact that a brief detention accompanied by a canine sniff and cursory inspection of vehicles at issue in *Edmond* produced arrests for one out of ten vehicles stopped—despite the signs warning motorists of the upcoming checkpoint—is astonishing evidence of an enormously serious problem that Indianapolis had approached in a measured fashion. Others may disagree, but surely a debate informed by hard numbers describing both crime rates and the efficacy of a challenged practice will be more disciplined and objective than a debate over notions of "reasonableness" in the abstract. An empirical approach, in my view, would be infinitely superior to current thinking about the Fourth Amendment, in which cases are decided under a virtually standardless concept of reasonableness, which inevitably results in judges deciding cases based on highly subjective value judgments.[213] Indeed, developments in law enforcement technology may eventually force courts to take an empirical approach. When courts are called up to decide whether new technologies for identifying "suspicious" individuals or behavior—such as the use of video surveillance and face-recognition technology—are sufficiently reliable to satisfy the *Terry* standard for an investigative stop, they will have

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> may imply that the Customs officials are conducting too few searches, not too many. . . . Other searches, with far lower rates of success, have been held constitutional. If about 0.1% of black women returning from foreign travel are smuggling, and the agents select so carefully that 28% of those searched are caught with contraband, where's the beef?

Anderson v. Cornejo, 355 F.3d 1021, 1025 (7th Cir. 2004) (citation omitted).

212. Reasonable suspicion "requires a showing considerably less than preponderance of the evidence" that involves "a minimal level of objective justification for making the stop." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). *Accord, e.g.*, Alabama v. White, 496 U.S. 325, 329–30 (1990); United States v. Sokolow, 490 U.S. 1, 7–8 (1989).

213. In this sense, my view bears some similarity to that of Professor Lerner, who argues that probable cause should be assessed under a "Hand formula" that weighs both the likelihood of a productive search and the seriousness of the crime to be detected or prevented against the intrusion at stake. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1019–22 (2003). Professor Lerner does not adequately explain, however, how courts could be counted on to reliably apply this approach in the absence of empirical evidence. *See generally* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

little basis for reaching any satisfactory conclusion without empirical data establishing the reliability of these tactics.[214] Lay intuition will offer little help in evaluating the reliability of new technology, and hence empirical data on reliability will inevitably come to the fore.

An approach that would consider the success rate of particular officers, units, or tactics would also usefully inform litigation, and be entirely consistent with the view—already reflected in Fourth Amendment jurisprudence—that an officer's own experiences are relevant to his assessment of probable cause or reasonable suspicion.[215] This approach also has the additional benefit of providing law enforcement agencies with an incentive to collect and disclose data on the efficacy of various investigative practices, and to increase transparency by disclosing this data in the course of litigation. Courts would also properly insist that the data have integrity, and through litigation, police procedures would be reviewed to ensure that police activity is properly documented, and that various safeguards, including the use of undercover police "testers," are employed to ensure that police reporting is fair and accurate.[216] Both prosecutors and defense counsel would generate a voracious demand for empirical research if it were required for Fourth Amendment litigation. And, when research data is released in litigation or otherwise, it will enable the voters to better assess the efficacy of law enforcement to better hold officials accountable for law enforcement practices that appear to be unjustified intrusions on liberty.[217] The data would also give police supervisors an incentive to monitor hit rates carefully, and attempt to improve police performance in order to withstand legal attack. But perhaps most important, this approach would focus courts on the reality of the balance between privacy and safety in high-crime communities. The approach to the Fourth Amendment reflected in *Edmond* expresses indifference to the reign of terror that afflicts all too many communities. That cannot be right.

To be sure, this approach to the Fourth Amendment admits of geographical non-uniformity. Empirical evidence is likely to demonstrate that aggressive police tactics are warranted in discrete locations in high-crime communities but not elsewhere. Geographical non-uniformity, however, would be no innovation

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214. *See generally, e.g.*, Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349 (2004).

215. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 277 (2002); Terry v. Ohio, 392 U.S. 1, 23 (1968).

216. To my knowledge, there is no serious claim about the integrity of the New York City stop data, at least with respect to stops that must be documented. *See* Fagan & Davies, *supra* note 143, at 488 n.142. When officers face internal sanctions for failure to document a stop, they will have a strong incentive to do so regardless of whether it results in an arrest.

217. Increasing the transparency of law enforcement is one objective on which there is relatively wide agreement among legal scholars. *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (2003).

in Fourth Amendment law; nonuniformity is already tolerated near the border, at public schools and workplaces, and at airports and public buildings, all of which are locations where searches not based on individualized suspicion are already permitted.[218] In any event, surely it is an unattractive vision of the Fourth Amendment that denies high-crime communities the level of law enforcement intervention needed to reduce their high rates of violent crime merely because the same tactics are unwarranted elsewhere. High crime communities pay an enormous price for that view of the Fourth Amendment.

Now, consider *Illinois v. Wardlow*. In that case, Wardlow fled as a police vehicle approached in an area known for heavy narcotics trafficking, police pursued him, and a pat-down search produced a handgun.[219] The Court acknowledged that Wardlow's presence in an area known for narcotics trafficking was not alone sufficient to justify his detention on reasonable suspicion of unlawful activity, but the Court added that the officers could consider that fact when assessing their justification for searching him.[220] The Court then held that the fact that Wardlow was in a drug hot spot, coupled with his flight at the approach of the police, provided sufficient individualized suspicion to warrant detaining and searching him under *Terry*.[221] In dissent, Justice Stevens contended that there were many innocent reasons why Wardlow might have fled, and that minorities in particular have ample reason to fear police.[222]

Law professors and other commentators have nearly universally lined up with Justice Stevens.[223] What is so striking about the debate between the majority and the dissenters in *Wardlow*, however, is the complete absence of empirical evidence about what is an empirical question—whether flight at the approach of the police is a reasonable indicator that criminal activity is afoot. Neither party to the case, nor any of the amici, presented any evidence about the frequency with which those who flee the police in high crime minority communities are actually involved in criminal activity.[224] Surely the Court

218. For a discussion of the ubiquity of geographical nonuniformity in constitutional law, see Mark D. Rosen, *Our Nonuniform Constitution: Geographic Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

219. *See* Illinois v. Wardlow, 528 U.S. 119, 121–22 (2000).

220. *See id.* at 124.

221. *See id.* at 124–25.

222. *See id.* at 131–34 (Stevens, J., dissenting).

223. *See, e.g.*, Tovah Renee Calderon, *Race-Based Policing from* Terry *to* Wardlow: *Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 78–82 (2000); Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER, RACE & JUST. 381, 403–04 (2002); Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 413–23 (2001); Taslitz, *supra* note 8, at 2299–30.

224. The Court seemed to take it as given that there is no empirical evidence on which courts can rely when evaluating the existence of reasonable suspicion or probable cause: "In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty

missed a golden opportunity by failing to insist on empirical evidence addressed to the question before it. Fourth Amendment doctrine should be structured so that this kind of debate can be addressed through empirical evidence, rather than through the generally ungrounded intuitions of judges (and law professors) about the relationship between the police and the community. In my judgment, *Wardlow* reflects the unsatisfactory state of our current, largely non-empirical Fourth Amendment jurisprudence.[225]

VI.

When I was a newly minted Assistant United States Attorney in Chicago, one of my supervisors told me that probable cause was a 40 percent chance that a search would produce evidence of a crime. When I pressed him for some authority to support that view, he pointed to the statement in *Illinois v. Gates*[226] that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[227] To this day, I do not know whether my supervisor's estimate was correct; the Supreme Court frequently claims that the concepts of probable cause and reasonable suspicion have no particular numeric value.[228] Even granting that point, surely we should at least consider the rate at which a given investigative practice has disclosed criminal activity when assessing its constitutionality. The Fourth Amendment proscribes "unreasonable" searches and seizures; that would seemingly make empirical evidence of the efficacy of a challenged practice highly relevant. Evidence that a challenged practice pays important law enforcement dividends seems no less important. Yet it is striking that the Supreme Court—with only rare exceptions like *Martinez-Fuerte* and *Sitz*—neither looks at nor insists on empirical evidence.

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from judges or law enforcement officers where none exists." *Wardlow*, 528 U.S. at 124–25. Professors Meares and Harcourt, however, have observed that the New York Attorney General's data indicated that the ratio of arrests to stops based on flight was relatively low, and this data could have usefully been consulted in *Wardlow*. *See* Meares & Harcourt, *supra* note 165, at 790–93. The ratio may be tainted, however, by the likelihood that in cases of flight, suspects may frequently successfully dispose of guns or contraband during their flight. In such cases, the stop may well be justified even if police are ultimately unable to make an arrest. These are the kind of empirical questions likely to become important if empirical evidence is demanded in search and seizure litigation. In any event, the Court was wrong to assume that empirical evidence will never be available; if the Court demands that empirical evidence be produced to support law enforcement practices of uncertain constitutional reasonableness, the data will surely be generated.

225. Empirical evidence can also assist in analyzing other Fourth Amendment questions, such as the question of what constitutes an objectively reasonable expectation of privacy. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

226. 462 U.S. 213 (1983).

227. *Id.* at 244 n.13. The Court has repeated this formulation only once since *Gates*. *See* New York v. P.J. Video, Inc., 475 U.S. 868, 877–78 (1986).

228. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2004); Ornelas v. United States, 517 U.S. 690, 695–96 (1996); *Gates*, 462 U.S. at 235. *See also* Lerner, *supra* note 213, at 995–97.

Equally striking is that courts and scholars have yet to even consider whether the remarkable success of new policing tactics adopted in New York and elsewhere over the past decade should be factored into the constitutional calculus. Since the Fourth Amendment requires courts to weigh both privacy and law enforcement interests, surely the extent to which a given law enforcement tactic drives down rates of violent crime must weigh in the Fourth Amendment's balance. Although no one could tell from recent judicial decisions or law review articles, something dramatic has happened in urban law enforcement in the past decade. Crime rates have fallen to levels not seen in forty years, and there is a strong case to be made that a newly aggressive model of policing deserves a good deal of the credit. One would think that this development would merit the careful attention of courts and commentators, who should be prepared to reassess their views of what amounts to "reasonable" search and seizure in the constitutional sense based on the empirical evidence of police efficacy compiled over the past decade. Instead, the perverse result, as William Stuntz has observed, is that courts now seem less concerned with the interests of law enforcement than they were when crime rates were rising.[229] Professor Stuntz is likely correct that there is at present little sense of "crisis" in criminal procedure, but that is only because courts are no longer under the pressure to remake constitutional criminal procedure produced when crime rates spiral out of control. Law enforcement is accordingly a victim of its own success. But, if police critics are correct that New York–style police tactics violate the Constitution, and if courts compel police departments to abandon those tactics, then there would be ample reason to expect that crime rates would again rise. That outcome, in turn, would fall most heavily on the disproportionately minority inner-city communities that suffered most during the crime spike of the late 1980s and early 1990s. And, it is surely an unattractive conception of Fourth Amendment "reasonableness" that condemns the poorest and most vulnerable among us to live with a daily threat of violence that the rest of us need not face.

Just as the Supreme Court ended its indifference to the sociological reality of segregation in *Brown*, the Court must eventually confront the reality of inner-city crime in its search and seizure jurisprudence. Inner-city, disproportionately minority communities live with a level of insecurity that most of us would never tolerate. Their residents live that way not by choice, but by economic necessity. The level of insecurity they experience has profound effects on their lives and futures. If it were true that the liberty of most would be unjustifiably compromised by condoning police practices that are a constitutionally "reasonable" response only in discrete communities, then perhaps those practices must be forbidden despite the exigencies of inner-city crime. There is no reason,

229. *See* Stuntz, *supra* note 9, at 2155–56. Professor Stuntz adds, however, that the terror attack of September 11, 2001 may alter this state of affairs, at least with respect to terrorism. *See id.* at 2156–60.

however, that the police cannot calibrate their tactics to local conditions. By the same token, police can be expected to produce empirical evidence demonstrating their ability to strike that balance. In the new model of urban policing, police tactics are dictated by sophisticated and highly localized crime analysis, and not the unfettered discretion of officers on patrol. The courts can usefully insist that the police produce evidence of the efficacy of challenged practices. That evidence can be assessed by the courts and voters alike. But surely it is all too easy for those of us who can afford to live in safety to denigrate the "general interest in crime control." Urban sociology tells us that communities afflicted by high rates of violent crime pay an enormous price, which is only partly measured by the statistics on violent victimization. A constitutional jurisprudence that makes judgments about "reasonableness" divorced from the impact that violent crime has on inner-city communities can be neither attractive nor just. We should expect more from the law of search and seizure.