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Andrea Wang

Illinois v. Wardlow and the Crisis of Legitimacy: An Argument for a "Real Cost" Balancing Test

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Introduction

The Fourth Amendment requires courts to balance an American citizen's individual liberty interests against law enforcement's rights in fighting crime.[1] The courts balance each interest on opposite sides of the scales of justice.[2] Although the growing crisis of legitimacy in our minority communities is altering this balance,[3] the courts have failed to take notice.[4]

America's minority population, and even the majority population, is beginning to suspect that one's experience with law enforcement is linked directly to one's race.[5] In some cases, this phenomenon extends beyond increased and disparate attention from the police to harassment that involves police lawlessness.[6] This injustice results in a crisis of legitimacy: the disillusionment of large segments of America's population with the criminal justice system.[7]

This Article examines the crisis of legitimacy and suggests that law enforcement and courts have failed to take the crisis into account. Accordingly, when courts engage in a balancing test, weighing the individual's interest in being free from unwanted

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* J.D. expected 2001, University of Colorado; B.A. 1994, McGill University. The author will serve as a judicial clerk to Chief Justice Mary Mullarkey of the Colorado Supreme Court for the 2001-02 term.

1. The United States Constitution provides:

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

U.S. CONST. amend. IV.

2. *See infra* notes 140-148 and accompanying text.
3. *See infra* notes 19-44 and accompanying text.
4. *See infra* notes 136-222 and accompanying text.
5. *See infra* notes 39-44 and accompanying text.
6. *See infra* notes 94-135 and accompanying text.
7. *See infra* notes 39-43 and accompanying text.

government intrusion against law enforcement interests, they engage in a fiction. This manifests itself in two ways. First, they fail to give enough weight to the burden of intrusion that police conduct may have on a reasonable, innocent person.[8] Second, when weighing the government interests purportedly advanced by certain police tactics, the courts fail to recognize the effect of the crisis of legitimacy on minority interaction with law enforcement and other areas of the criminal justice system.[9] As a result, the courts give undue weight to police interests, discount the weight of minority fears, and upset the proper balance in Fourth Amendment jurisprudence.[10]

The best example of this flawed balancing is in the decision of *Illinois v. Wardlow*,[11] in which a five-Justice majority held that fleeing from the police in a high-crime area constitutes reasonable suspicion.[12] At first blush, this decision does not seem problematic. We want police to catch criminals, and running away arguably evinces some guilty mind. The Court's reasoning, however, does not account for the crisis of legitimacy. When one examines *Wardlow* with the crisis in mind, it becomes apparent that the Court erred in its balancing of interests on each side. Consequently, *Wardlow* will serve only to exacerbate the crisis of legitimacy.

Section I of this Article documents the crisis of legitimacy by examining the extent of the crisis and exploring the historical and contemporary reasons for it.[13] Section II examines the *Wardlow* decision, focusing on ways in which a failure to recognize legitimacy issues leads the Court to false and perhaps self-defeating conclusions.[14] It explores the errors the Court made in applying the balancing test and ultimately suggests that the Court was counterbalancing two interests that may actually weigh in on the same side.[15] Section III offers suggestions to police departments, state legislatures, and courts of ways to mitigate the effects of *Wardlow*.[16] It provides ways to use the knowledge we have about the real costs of police behavior.[17] Rather than

8. *See infra* notes 184-186 and accompanying text.
9. *See infra* notes 198-222 and accompanying text.
10. *See infra* note 222 and accompanying text.
11. 120 S. Ct. 673 (2000).
12. *See id.* at 676.
13. *See infra* notes 19-135 and accompanying text.
14. *See infra* notes 137-222 and accompanying text.
15. *See infra* notes 159-221 and accompanying text.
16. *See infra* notes 223-246 and accompanying text.
17. *See infra* notes 223-244 and accompanying text.

choosing law enforcement strategies that compound legitimacy issues and ultimately increase crime, state and local governments can hopefully make intelligent choices that will ameliorate the effects of racially disproportionate policing and effectively reduce crime.[18]

I. The Crisis of Legitimacy

A. The Extent of the Crisis of Legitimacy

Any government that does not assert its authority relies upon its perceived authority to keep order.[19] The government's authority thus depends on this perceived legitimacy.[20] Perceptions of governmental illegitimacy can grow out of lawlessness among the government agents as well as from arbitrary or unequal enforcement of its laws.[21] When authority is called into question to such an extent that its legitimacy is disbelieved, a crisis ensues.[22] In extreme cases, citizens not only lose faith in the government, but also may consciously defy it.[23] Those who choose not to defy the government may simply fear its agents.[24] History is replete with examples of this crisis of legitimacy leading to internal strife, violence, and political revolutions.[25]

In the United States, this crisis has long existed in our marginalized communities.[26] "The system's legitimacy turns on equality before the law, but the system's reality could not be further from that ideal."[27] Police are perceived to behave in arbitrary ways, often targeting minority groups.[28] Many citizens

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18. *See infra* notes 223-244 and accompanying text.

19. *See* CHRISTOPHER MCMAHON, AUTHORITY AND DEMOCRACY 25 (1994).

20. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (1990).

21. *See id.*; *see also* DAVID COLE, NO EQUAL JUSTICE 172 (1999) (explaining that "where people view criminal justice procedures as unfairly biased, they will be especially likely to consider the law illegitimate and therefore less likely to comply with the law").

22. *See* NICHOLAS N. KITTRIE, THE WAR AGAINST AUTHORITY: FROM THE CRISIS OF LEGITIMACY TO A NEW SOCIAL CONTRACT 163-67 (1995).

23. *See id.*

24. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 273-74 (1999).

25. *See* KITTRIE, *supra* note 22, at 22, 237-47 (discussing some of the most infamous examples, such as the French, American, and Russian revolutions, and providing a comprehensive overview of the way in which the crisis of legitimacy has played out historically).

26. *See* COLE, *supra* note 21, at 10-13.

27. *Id.* at 3.

28. For evidence of racial profiling, see *infra* notes 58-71 and accompanying text.

also recognize that some police officers abuse their power by engaging in outright aggression and other illegal behavior.[29] "To those sections of the public with whom the police come most frequently into contact, the men in uniform are regarded as rough, capricious, discriminatory and corrupt."[30] This phenomenon is documented throughout American history,[31] and is recognized by legal scholars,[32] social activists,[33] and U.S. Supreme Court Justices alike.[34]

Interviews conducted by Professor David Harris reveal the depth of distrust and fear many people of color have of the police.[35] One woman, who was pulled over and wrongly handcuffed and arrested on her morning commute to work, explained why she did not protest: "I didn't say nothing, because I figured if I said anything, if I moved, that would just give them permission to beat me."[36] Another interviewee's comments echo this fear of arbitrary police action. He recommended refraining from protesting police attention, "because if you do something, maybe they're going to do something else to you for no reason at all, because they have the power . . . . It doesn't make a difference who you are. You're never beyond this, because of the color of your skin."[37]

Police, then, are often more of a threat than a protection to minority citizens:

> [The police] are supposed to be there to protect and to serve, but you being black and being male, you've got two strikes against you. Keep your hands on the steering wheel, and do not run, because they will shoot you in your back. Keep your hands on the steering wheel, let them do whatever they want to do. I know it's humiliating, but let them do whatever they want to do to make sure you get out of that situation alive. Deal with your emotions later. Your emotions are

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29. For examples of the abuse of power, see *infra* notes 95-132 and accompanying text.

30. JOHN BREWER ET AL., THE POLICE, PUBLIC ORDER AND THE STATE 124 (2d ed. 1996).

31. *See* David Cole, *Race, Policing, and the Future of Criminal Law*, HUM. RTS. Q., Summer 1999, at 2 (citing a 1968 report that documents and articulates the crisis of legitimacy).

32. *See id.*

33. *See* Bob Susnjara, *Racial Profiling Report Sparks Debate, Sharp Words Fly After Study Downplays Allegations*, CHI. DAILY HERALD, May 16, 2000, News, at 1, *available at* 2000 WL 2029777993.

34. *See* Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting).

35. *See* Harris, *supra* note 24, at 265.

36. *Id.* at 271 (citing Interview with Karen Brank, in Toledo, Ohio (Aug. 21, 1998)).

37. *Id.* at 273 (citing Interview with Michael, in Toledo, Ohio (Oct. 1, 1998)).

going to come second – or last.[38]

Although anecdotal, these quotations illustrate the fear many African Americans have of the police based on their perception of police illegitimacy.

Statistics offer support to this anecdotal evidence. A recent study reported that only 57% of Americans have significant confidence in the police.[39] Regarding racial disparities in police activity, 63% of African Americans felt the police in their neighborhood treated at least one racial group unfairly, as did 52% of Hispanics and 25% of Whites.[40] The crisis is magnified in urban areas. A poll taken after the Diallo incident[41] indicates that 90% of African Americans in New York City believed the police often engaged in brutality against minorities and nearly two-thirds thought this brutality was widespread.[42] Illustrative of the way in which one's experience with the police is linked to race, only 24% of Whites believed that this brutality against minorities exists.[43]

Even the police admit to inequality in law enforcement. Twenty-five percent of Los Angeles Police officers polled agreed that "'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community,' and that 'an officer's prejudice toward the suspect's race may lead to the use of excessive force.'"[44]

B. Historical and Contemporary Reasons for the Crisis of Legitimacy

1. Historical Reasons for the Crisis

There is little debate regarding the historically pervasive racism endemic to our criminal justice system.[45] Therefore, the aim of this Section is not to engage in a detailed analysis of our

38. *Id.* at 274 (citing Interview with Karen Brank, in Toledo, Ohio (Aug. 21, 1998)).

39. *See* BUREAU OF JUSTICE STATISTICS, SOURCE BOOK OF CRIMINAL STATISTICS, tbl.2.16 (Kathleen Maguire & Ann L. Pastore eds., 1998).

40. *See id.* at tbl.2.29.

41. Amadou Diallo was an African immigrant who, although he was unarmed, was shot nineteen times by White police officers. *See infra* notes 110-115 and accompanying text.

42. *See* Cole, *supra* note 31, at 2.

43. *See id.*

44. COLE, *supra* note 21, at 22 (quoting REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991)).

45. *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA 91-428 (2000) (detailing the history of racism towards African Americans, American Indians, Latino/as, and Asian Americans in the U.S.).

racist past, but rather to remind the reader of the historical backdrop of our current problems.

Since the arrival of African Americans in the United States, there has been a double standard in criminal justice. During the years of slavery, African Americans were not considered citizens,[46] and therefore were afforded no rights or protections.[47] For example, there was little redress for slaves that were beaten and raped by their masters.[48]

Emancipation brought little if any justice to African Americans with respect to the way law enforcement treated them. There was still only nominal legal redress for African-American victims,[49] and police officers, rather than officially arresting and processing an African-American suspect, might simply give him or her over to lynching mobs.[50] Moreover, when suspects were arrested, confessions were beaten or otherwise scared out of them.[51] A common tactic was to inform a suspect that if he failed to confess the officer would be forced to let in the angry mob gathering outside the jailhouse.[52] Although these tactics were not legal, there was no appointed counsel to litigate the abused defendant's rights.[53] In addition, the juries consisted exclusively of White men.[54]

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46. *See* Dred Scott v. Sandford, 60 U.S. 393, 454 (1856) (holding, among other things, that "negros" should not be afforded the rights of U.S. citizens).

47. *See* PEREA ET AL., *supra* note 45, at 108-11 (detailing the slave laws of Virginia).

48. *See id.* at 114-17 (explaining that courts viewed battery and murder of slaves as a mere property crime).

49. *See* JAMES W. CLARKE, *Segregation, Disfranchisement and Legal Lynchings, in* LINEAMENTS OF WRATH: RACE, VIOLENT CRIME, AND AMERICAN CULTURE 159, 159-72 (1998) (describing how provisions such as legal segregation, disenfranchisement, and capital punishment further alienated African Americans from the legal system).

50. *See* PEREA ET AL., *supra* note 45, at 149 (citing Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996) (providing a description of lynching as an extralegal means of criminal enforcement)).

51. *See* Michael Mello, *"In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 656 (2000).

52. *See id.* at 655-56.

53. Only in *Gideon v. Wainwright*, 372 U.S. 335 (1963), did the Supreme Court, in the spirit of the Sixth Amendment, declare that indigent defendants must be supplied with legal counsel.

54. It was not until *Strauder v. West Virginia*, 100 U.S. 303 (1880), that the Supreme Court ruled state law could not prohibit African-American men from serving on juries. Even after *Strauder*, however, the Court upheld convictions of African-American defendants by White juries. *See* COLE, *supra* note 21, at 106. It was not until 1986, in *Batson v. Kentucky*, 476 U.S. 79 (1986), that the Court held using peremptory challenges to strike jurors solely because of their race was unconstitutional.

This persisted throughout the civil rights era:

> From the close of Reconstruction to the modern civil rights revolution, law-enforcement played a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life. When suspected, however remotely, of wrongdoing, these citizens became the targets of sweeping and invasive tactics of investigation. And even when not, they remained subject to relentless official intimidation, particularly when they dared to take actions that challenged the white establishment's stranglehold over political power. That intimidation sometimes took the form of horrific state-sponsored violence, such as lynchings and the beatings and killings of civil rights activists. But even more frequently it came in the form of chronic, low-level harassment through the discriminatory enforcement of vagrancy ordinances and other "public order" laws.[55]

Although the law eventually became facially neutral,[56] police discretion permitted continuing disparate treatment.[57] The double standard in the criminal justice system persists.

2. Contemporary Reasons for the Crisis

a. Disparate Impact

Today, police officers often stop and search a disproportionately high number of minorities.[58] Similarly, the highly discretionary "community policing"[59] presents "heightened risks of discriminatory law enforcement and inappropriate police

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using peremptory challenges to strike jurors solely because of their race was unconstitutional.

55. David M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998).

56. The main tool the Court used to strike down laws that were not racially neutral on their faces was the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down, on Fourteenth Amendment grounds, a Virginia statute that prohibited interracial marriage); Brown v. Bd. of Educ., 347 U.S. 483, 500 (1954) (finding that segregation of children in public schools solely on the basis of race deprives the children of the minority group equal educational opportunities, in violation of the Fourteenth Amendment's Equal Protection Clause); Shelly v. Kraemer, 334 U.S. 1, 23 (1948) (holding that the Equal Protection Clause prohibits judicial enforcement by state courts of restrictive covenants based on race).

57. *See infra* notes 72-79 and accompanying text.

58. *See* Cole, *supra* note 31, at 3.

59. "Community Policing" is a form of policing, persisting since its emergence in the 1980s, that focuses on "prevalent and low-key troubles" in the community. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 578 (1997). "Zero tolerance policing" is perhaps its most insidious form. *See* Raja Mishra, *Police Look at Ways to Avoid Racial Profiling*, WASH. POST, Oct. 28, 1999, Weekly, at 1.

involvement in community life and private affairs"[60] and may allow for increased corruption.[61]

One strain of community policing is the so-called "quality of life policing."[62] Proponents of this method link neighborhood disorder with crime.[63] Robert Ellickson describes the problem as follows:

> [A] prolonged street nuisance may trigger broken-windows syndrome. As time passes, unchecked street misconduct, like unerased graffiti and unremoved litter, signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder.[64]

Commentators criticize this "quality of life" policing as dependent "upon making large numbers of stops and searches without . . . individualized justification."[65] Indeed, studies show a shocking connection between race and inappropriate law enforcement attention.[66]

Although African Americans make up only 12% of the general population, they comprise over 50% of the prison population.[67] Accordingly, one of four African-American males born today will spend at least one year in jail.[68] Moreover, "for every one black man who graduates from college each year, another 100 will be arrested."[69] These disproportionate arrest and imprisonment rates may be explained by the following statistics. Of federal cases involving drug courier profiles over a five-year period, 95% of those stopped were minorities. Likewise, 80% of pretext stops and 90% of bus and train sweep cases involved minorities.[70] Similarly, in

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60. Livingston, *supra* note 59, at 578.

61. *See* Wesley G. Skogan, *The Impact of Community Policing on Neighborhood Residents, in* THE CHALLENGE OF COMMUNITY POLICING 167, 177-79 (Dennis P. Rosenbaum ed., 1994).

62. For a detailed discussion of the development of quality of life policing, see Livingston, *supra* note 59, at 565-95.

63. *See id.*

64. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1177 (1996) (internal citation omitted).

65. David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 241.

66. *See infra* notes 67-79 and accompanying text. For a review of evidence revealing racial targeting, see Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334-54 (1998).

67. *See* Cole, *supra* note 31, at 3.

68. *See id.*

69. *Id.*

70. *See id.*

Volusia County, Florida, a review of videos from cameras mounted on police cars revealed that, although only 5% of highway drivers are people of color, African Americans and Hispanics represent 70% of all people stopped and 80% of all people searched.[71]

The disparate rates persist even when rates of crime commission are statistically controlled. One researcher whose work illustrates this point is Dr. John Lamberth, who studied all arrests that resulted from stops on the New Jersey turnpike over a three-year period.[72] To discern the number of stops of African Americans, Lamberth analyzed patrol activity logs and police radio logs from randomly selected days.[73] To document the racial composition of people traveling on the turnpike, Lamberth's team of research assistants, stationed at the side of the road, observed and recorded the apparent race of each driver.[74] Team members then drove on the turnpike with their cruise control set five miles above the posted speed limit and recorded the number of drivers who passed them, taking care to note each driver's race.[75]

Lamberth's results show that automobiles with an African-American driver or passenger represented only 13.5% of those on the turnpike. Lamberth found that although African-American drivers exceeded the speed limit at the same rate as White drivers, they represented 35% of those stopped.[76] Even more dramatically, his results show that of all those arrested, 73.2% were African-American.[77] Lamberth conducted a similar study in Maryland with comparable results.[78] In Maryland, Lamberth found that even though African Americans were only 17.5% of the highway population violating the traffic code, and were no more likely than White drivers to break the traffic code, they accounted for 72% of those stopped and searched.[79]

When considering the disparate impact of law enforcement against racial minorities, it is apparent that our current law

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71. *See* COLE, *supra* note 21, at 37.

72. *See* Harris, *supra* note 24, at 277-80 (citing Report of Dr. John Lamberth, Plaintiff's Expert, *Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 from the Years 1988 Through 1991*, at 2, State v. Pedro Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)).

73. *See* Harris, *supra* note 24, at 278.

74. *See id.*

75. *See id.*

76. *See id.* at 278-79.

77. *See id.* at 279.

78. *See id.* at 280-81 (relying on Report of Dr. John Lamberth, Plaintiff's Expert at 9, Wilkins v. Maryland State Police, No. MJG-93-468 (D. Md. 1996)).

79. *See id.* at 280-81.

enforcement practices are racially discriminatory.[80] It is important to note that some scholars do not find this problematic. Professor Randal Kennedy, for example, believes that allegations of a racist administration of justice are "overblown and counterproductive."[81] Kennedy believes that facially neutral laws that have a racially disparate impact are not objectionable because they "disadvantage some African-Americans while benefiting others."[82] Kennedy suggests that racial disparities "may be the mark, not of a white-dominated state apparatus discriminating against blacks, but instead, of a state apparatus responding sensibly to the desires of law-abiding people – including the great mass of black communities – for protection against criminals preying upon them."[83]

Similarly, Professors Dan Kahan and Tracey Meares feel that, although community policing techniques in the 1960s were racially enforced, this new wave of aggressive policing is immune to racially motivated abuses. Kahan and Meares draw support for this assertion by pointing to community support of community policing techniques.[84] "Far from being the targets of these new law-enforcement strategies, inner-city minority residents are now their primary sponsors. Flexing their newfound political muscle, these citizens are demanding effective law enforcement. They support discretionary community policing . . . ."[85]

Kennedy, Kahan, and Meares fail to consider the growing populations with more reason to fear police officers than to trust them with the task of protecting their community. Initially, a significant portion of the African-American population may have favored aggressive policing.[86] Indeed, increased police attention is often requested by minority group members because they are disproportionately the victims of crime.[87] This initial support is waning, however, because of the negative effects of increased police attention in minority communities.[88] Even if an increased

80. *See supra* notes 67-79 and accompanying text.

81. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255-56 (1994).

82. *Id.* at 1257.

83. *Id.* at 1278 (internal quotations omitted).

84. *See* Kahan & Meares, *supra* note 55, at 1154.

85. *Id.*

86. *See id.* at 1163.

87. "African-Americans are considerably more likely than whites to be raped, robbed, assaulted, and murdered." Kennedy, *supra* note 81, at 1255 (citation omitted).

88. *See* Mike Tharp, *L.A. Blues: Dirty Cops and Mean Streets*, U.S. NEWS & WORLD REP., Mar. 13, 2000, at 20; *supra* notes 67-79 and accompanying text

police presence is responsible for a decrease in crime,[89] the end result may come at too great a compromise. For example, in the now notorious Rampart neighborhood of Los Angeles,[90] murder has gone down significantly since police presence increased.[91] But, due to overwhelming resident harassment by police officers, "some residents wonder whether such improvements have come at too high a cost."[92] Similarly, more than two-thirds of African Americans in New York City feel that the policies of the Giuliani administration, known for zero tolerance policing, have caused an increase in police brutality.[93]

b. Police Illegality

The racially disparate enforcement of laws is only one source of the present day crisis of legitimacy. Police lawlessness also significantly contributes to the crisis. Several high-profile cases reveal this phenomenon.[94] The following examples are important for three reasons. First, they illustrate the ways in which police lawlessness manifests itself, while also depicting the obvious racial component of these transgressions. Second, they represent some of the high-profile cases that serve to fuel perceptions of illegitimacy. Third, they provide clear-cut reasons for an innocent person of color to run from the police, which sets the stage for a discussion of *Illinois v. Wardlow*.

i. Rodney King

Perhaps one of the greatest fears of members of minority communities regarding interactions with the police is that of brutality.[95] Brutality is "conduct that is not merely mistaken, but taken in bad faith with the intent to dehumanize and degrade its target. It is described as 'conscious and venal, . . . directed against persons of marginal status and credibility,' and 'committed by officers who often take great pains to conceal their conduct.'"[96]

(providing examples of how high arrest rates affect the African-American population).

89. This is debatable. *See infra* notes 187-197 and accompanying text.

90. *See infra* notes 125-135 and accompanying text.

91. *See* Tharp, *supra* note 88, at 21.

92. *Id.*

93. *See* Dan Barry & Marjorie Connelly, *Poll In New York Finds Many Think Police are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1.

94. *See infra* notes 97-132 and accompanying text.

95. *See supra* notes 35-38 and accompanying text.

96. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999) (quoting JAMES SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 19 (1993)).

The most well-known police brutality case to date is that of Rodney King.

Los Angeles police officers stopped Rodney King for speeding early on March 3, 1991.[97] Although King claims he cooperated with the officers, they clubbed him over fifty times and kicked him at least seven times.[98] A local resident caught the incident on video and released it to the news.[99] For mainstream Americans, the King incident was their first glimpse at police brutality. But for much of the minority community, it was a confirmation of what they already knew.[100] The sergeant charged with assaulting King admitted it was the worst beating he had ever seen, but claimed that it was not excessive.[101]

ii. Abner Louima

Five years after King, another police brutality incident grabbed the media's attention. This time, the abuse was discovered because the victim was hospitalized.[102] In confusion arising from a brawl outside a Brooklyn club on Saturday, August 9, 1997, police officers arrested Abner Louima for disorderly conduct, obstructing governmental administration, and resisting arrest.[103] Officers Schwarz and Wiese, believing Louima was responsible for hitting Officer John Volpe, stopped the patrol car on the way the to the precinct and beat Louima.[104] Before reaching the precinct, the officers met up with Volpe who again beat Louima on his head and face with a radio and a closed fist.[105]

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97. King claimed he was driving forty-five miles per hour in a thirty-five mile per hour zone. *See* Deborah Hastings & Jeff Wilson, *How Video Turned L.A. Bust into Police Brutality Scandal Beating of Black Man Taped by Neighbor, Broadcast on National TV; Outrage Followed,* S.F. EXAMINER, Mar. 7, 1991, at A4, *available at* 1991 WL 8925015. L.A. Police claimed he was driving over one hundred miles per hour. *See id.*

98. *See* Robert Reinhold, *Criminal Charges Sought in Beating: LA Chief Concedes 'Excessive Force' Used,* HOUS. CHRON., Mar. 8, 1991, at 2, *available at* 1991 WL 3907516.

99. *See id.*

100. Civil liberties organizations in Los Angeles receive an average of fifty-five police brutality complaints per week. *See* Hastings & Wilson, *supra* note 97, at A4.

101. *See* New York Times, *Koon Calls Beating Worst He's Seen: Sergeant Testifies Force Justified,* L.A. DAILY NEWS, Mar. 22, 1992, at N6, *available at* 1992 WL 8160982.

102. *See* David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody,* N.Y. TIMES, Aug. 13, 1997, at B1.

103. *See id.*

104. *See* United States v. Volpe, 78 F. Supp. 2d 76, 79 (E.D.N.Y. 1999). In fact, it was Louima's cousin who hit Volpe. *See id.*

105. *See id.* at 80.

At the station, Volpe and Schwarz took Louima into a bathroom and sodomized him with a broom handle.[106] Volpe then shoved the feces- and blood-covered broom handle into Louima's mouth, breaking several teeth.[107] Louima was hospitalized for over a month with injuries to the head, bladder, rectum, and colon.[108] Louima is Haitian; John Volpe is White.[109]

iii. Amadou Diallo

A recent high-profile incident involving a single suspect of color is the shooting of Amadou Diallo. On February 4, 1999, New York City police officers in an unmarked police car saw Amadou Diallo standing in the vestibule of his building.[110] Without any particularized suspicion, an officer got out of the car and asked Diallo to talk with him.[111] Diallo ducked into his apartment and came back with his wallet.[112] The four officers, who later testified that they perceived the wallet to be a gun, opened fire.[113] Of the forty-one shots fired, nineteen hit Diallo, who died instantly.[114] All of the officers involved were acquitted.[115]

iv. Area Two

Thus far, the discussion of police lawlessness has revolved around single incidents and might therefore be characterized as unique occurrences.[116] Other cases, however, involve the complicity of many officers and affect dozens of suspects over a period of years.

Area Two is a violent crimes unit that covers the south side of Chicago.[117] Criminal defendants have accused several officers from this unit of brutally torturing more than sixty suspects in

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106. *See id.*

107. *See* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1166 (1999).

108. *See Volpe*, 78 F. Supp. 2d at 81.

109. *See* Alfieri, *supra* note 107, at 1157.

110. *See* Jane Fritsch, *Two Officers Back Story of Partners: They Say They Thought Diallo Was Holding Gun*, N.Y. TIMES, Feb. 16, 2000, at B1; John J. Goldman, *4 White Officers are Acquitted in Death of Diallo*, L.A. TIMES, Feb. 26, 2000, at A1.

111. *See* Goldman, *supra* note 110, at A1.

112. *See* Fritsch, *supra* note 110, at B1.

113. *See id.*

114. *See id.*; Goldman *supra* note 110, at A1.

115. *See* Goldman, supra note 110, at A1.

116. *See supra* notes 95-114 and accompanying text. Of the Rodney King incident, Police Chief Daryl Gates said, "This is an aberration." Associated Press, *Police Chief Says Officers Should Face Felony Charges in Beating*, ST. PETERSBURG TIMES, Mar. 8, 1991, at 20A, *available at* 1991 WL 9127290.

117. *See* Bandes, *supra* note 96, at 1276.

order to extract confessions.[118] The suspects claimed that torture took the form of the police suffocating them with a typewriter cover; putting a revolver in their mouths; playing Russian roulette; squeezing their testicles; electrically shocking them; forcing them against a hot radiator; and punching, kicking, and choking them.[119]

This extreme brutality had a racial element. "It eventually became known that over a period of at least thirteen years, starting in the early 1970's, more than sixty men, all of them black, had been systematically tortured by members of a group of approximately fifteen Area Two officers, all of them white."[120] One suspect's description of the brutality indicates the racial motivation of the officers:

> [A]t approximately 2:30 a.m., defendant was taken to another room where he was handcuffed behind his back. Detectives Peter Dignan and Charles Grunhard, and police sergeant John Byrne interviewed defendant and confronted him with accusations which he persisted in denying. Defendant testified that Byrne put a chrome .45 caliber automatic gun with a brown handle in his mouth and told him that he should blow off his head because he knew what they were talking about. In addition, Byrne struck defendant three or four times across the left side of his chest and stomach with a flashlight while his wrists were handcuffed behind his back. Defendant fell out of the chair and Grunhard kicked him in his side, stomach and ankle, and hit him on the back of his legs with a flashlight.
>
> When defendant continued to deny knowledge of what the officers were talking about, Dignan said "we have something for niggers" and he put a plastic bag over defendant's head.[121]

The court held that evidence of this incident was admissible in trial in order for the jury to determine whether the confession was coerced.[122]

v. Los Angeles Police Anti-Gang Unit

Although widespread corruption may occur in some police departments,[123] the Los Angeles Police Department is worth

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118. *See id.* at 1276-77.

119. *See id.* at 1276, 1290, 1294.

120. *Id.* at 1288-89.

121. People v. Banks, 549 N.E.2d 766, 767 (Ill. App. Ct. 1989).

122. *See id.* at 771.

123. *See, e.g.*, COLE, *supra* note 21, at 24 (describing a neighborhood in North Philadelphia where "a group of police officers . . . engaged in a widespread practice of beatings and robbing citizens, planting evidence, and lying to support false convictions"); *Ex Officer's Account of Brutal Police Fraternity*, N.Y. TIMES, Sept. 30, 1993, at 83 (acknowledging random beatings by Bronx police officers); *supra* notes

exploring in more detail because its issues are so timely. The Los Angeles Police Department was perhaps just recovering from the King incident when stories of widespread corruption in "CRASH," the department's elite anti-gang unit, began to surface.[124] The corruption took place mainly in the Rampart area, home to mostly poor Koreans and Hispanics.[125] Allegations included police brutality, planting and rearranging evidence, lying under oath, and shooting unarmed suspects.[126] Further allegations pointed to intimidation of witnesses.[127]

The investigation began when a court convicted Officer Rafael Perez of stealing three kilograms of cocaine from a police evidence locker.[128] In exchange for a lighter sentence, Perez broke the silence surrounding the corruption.[129] Among other things, Perez admitted that he and his partner shot an unarmed suspect, paralyzing him, and then lied about it under oath.[130] Perez also admitted to killing an unarmed suspect and planting a gun on him before calling an ambulance.[131] At the time of this writing, the Los Angeles Police Department has placed more than seventy officers under suspicion and overturned more than one hundred criminal convictions as a result of police illegality in Rampart.[132]

These outrageous examples of lawlessness may be labeled as extreme or unusual. Although some were seemingly isolated incidents,[133] many involved multiple officers and persisted for a number of years,[134] indicating that this behavior is common or tolerated. Even if one believes that these incidents are truly unique occurrences that do not represent the system as a whole, they are high-profile enough to be salient events in the minds of many minority citizens. Thus, these examples influence their perceptions of police illegitimacy. As discussed below, it is this

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117-122 and accompanying text (describing corruption in a Chicago precinct).

124. *See* Rene Sanchez, *LAPD Reeling As Corruption Cases Multiply: Probe Finds False Arrests, Other Abuses Widespread*, WASH. POST, Feb. 12, 2000, at A1.

125. *See* Tharp, *supra* note 88, at 20.

126. *See* Sanchez, *supra* note 124, at A1.

127. *See* Donna Foote & Anna Figueroa, *'Time and Again, I Stepped Over the Line'*, NEWSWEEK, Mar. 6, 2000, at 25.

128. *See id.*

129. *See* Sanchez, *supra* note 124, at A1.

130. *See id.*

131. *See id.*

132. *See* Ann W. O'Neill & Henry Weinstein, *In Blow to Rampart Case, Perez Unlikely to Testify in Court: Prosecutors will not give him immunity in murder probe. Expert calls developments 'a bombshell.'*, L.A. TIMES, Oct. 14, 2000, at A23.

133. *See supra* notes 95-115 and accompanying text.

134. *See supra* notes 117-132 and accompanying text.

perception of illegitimacy that has devastating effects on crime prevention efforts.[135]

II. *Illinois v. Wardlow* and the Crisis of Legitimacy

As the discussion above reveals, the crisis of legitimacy is pervasive and constant.[136] Still, courts fail to acknowledge the extent of the crisis and the impact it has on policing efforts. Because of this, when courts engage in a Fourth Amendment balancing test, they neglect to weigh the real costs. Not only are their conclusions grossly inaccurate, they are also dangerous because they condone behavior that will only further compound the legitimacy crisis and accordingly, undermine the very interests that they are trying to advance.

A. The Fourth Amendment Balancing Test

As the discussion in Section I indicates, without proper protections, law enforcement is racially discriminatory.[137] The Fourth Amendment provides one check on this type of government intrusion.[138] The Fourth Amendment is important to any discussion of street law enforcement because it applies to all searches and seizures of the person, including "seizures that involve only a brief detention short of traditional arrest."[139]

The Fourth Amendment's protections, however, are not absolute. In determining whether police activity violates the Fourth Amendment, courts engage in a balancing test weighing the legitimate interests of law enforcement against "the individual's right to personal security free from arbitrary interference by law officers."[140] Accordingly, law enforcement must have suspicion particular to the suspect in order to justify a search. For a full search, "probable cause" is the level of suspicion necessary.[141] Probable cause requires that the facts available to the officer would "warrant a man of reasonable caution to believe

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135. *See infra* notes 187-221 and accompanying text.

136. *See supra* notes 26-44 and accompanying text.

137. *See supra* notes 66-80 and accompanying text.

138. In part, the Fourth Amendment was a reaction to the Writs of Assistance that the British used to justify suspicionless searches of the colonists. *See* Rudovsky, *supra* note 65, at 242. These Writs have been denounced by some as "the worst instrument of arbitrary power . . . because they placed the liberty of every man in the hands of every petty officer." *Id.* (quoting Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (quoting Boyd v. United States, 116 U.S. 616, 625 (1886))).

139. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

140. *Id.* at 878.

141. *See* Texas v. Brown, 460 U.S. 730, 742 (1983).

that certain items may be contraband or stolen property or useful as evidence of a crime."[142]

However, the Supreme Court has articulated a lesser standard of suspicion for a minimal pat-down search.[143] In *Terry v. Ohio*, the Court held that a stop and frisk, absent probable cause, is allowed provided that there is "reasonable suspicion" that crime is afoot.[144] Although the threshold of suspicion warranting the stop and frisk is small, the officer is still required to justify the stop by citing to some factor that gave rise to an articulable, individualized suspicion.[145] Of course, the suspect's race is not a constitutional reason, and the Court has previously noted that an individual's presence in a high-crime area is only one factor among several that would support a reasonable particularized suspicion of criminal activity.[146] In addition, the Court has stated that refusing to talk to a police officer or simply "going on one's own way" is not sufficient to trigger reasonable suspicion.[147] What *is* now sufficient to satisfy "reasonable suspicion," however, is an individual fleeing from the police in a high-crime neighborhood.[148]

B. Illinois v. Wardlow

Sam Wardlow stood on the street in an area of Chicago known for heavy narcotics trafficking.[149] A police caravan drove through the area and, upon seeing the cars, Wardlow ran.[150] Officers Nolan and Harvey caught up with him and conducted a *Terry* stop.[151] They discovered a handgun and arrested him.[152] Wardlow argued that the gun should be suppressed because its seizure was in violation of the Fourth Amendment.[153]

The trial court denied Wardlow's motion to suppress the evidence of the gun, and convicted him of unlawful possession of a weapon by a felon.[154] The Illinois Appellate Court reversed,

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142. *Id.* at 731.

143. *See* Terry v. Ohio, 392 U.S. 1, 19 (1968).

144. *See id.* at 30.

145. *See id.*

146. *See* Adams v. Williams, 407 U.S. 143, 147 (1972).

147. *See* Florida v. Royer, 460 U.S. 491, 497-98 (1983).

148. *See* Illinois v. Wardlow, 120 S. Ct. 673, 676 (holding that flight from law enforcement officials in a high-crime area is sufficient to warrant reasonable suspicion).

149. *See id.* at 674.

150. *See id.* at 673.

151. *See id.* at 673-74.

152. *See id.* at 674.

153. *See id.* at 675.

154. *See* People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997).

reasoning that there was insufficient evidence in the record to indicate that the search and seizure was justified by having occurred in a high-crime neighborhood.[155] The Illinois Supreme Court affirmed, holding that flight in a high-crime area cannot create reasonable suspicion.[156] The court stated that every individual has the right to avoid the police should they so choose.[157] The United States Supreme Court granted certiorari and held that flight from police in a high-crime neighborhood is sufficient to establish reasonable suspicion.[158]

What follows is a deconstruction of the Fourth Amendment balancing test as applied in this case. Noting how the crisis of legitimacy alters the equation at each level of this analysis, it becomes apparent that the Court is disserving the Constitution and law enforcement efforts by failing to be cognizant of the crisis.

1. The Court Did Not Sufficiently Recognize the Infringement of a *Wardlow* Stop on the Innocent

On one side of the scale are the rights of the individual.[159] The Court describes these rights as an individual's interest in being free from unreasonable government intrusion.[160] A look at the toll that legitimacy issues have taken on innocent minorities reveals the disparity between the weight the *Wardlow* Court attributes to the infringement on individuals' rights and the real costs.

a. Innocent Minorities Have Reason to Run

The Fourth Amendment is not absolute. It protects individuals from only unreasonable government intrusions into their privacy.[161] Those who believe *Wardlow* stops are not an unreasonable intrusion hypothesize that only guilty people have an incentive to run, and therefore there is no violation for the reasonable innocent citizen.[162] This reasoning is flawed, however, because there are many reasons why an innocent person in a high-

155. *See id.* at 67-68.

156. *See* People v. Wardlow, 701 N.E.2d 484, 486 (Ill. 1998).

157. *See id.* at 487.

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

159. For a discussion of the Fourth Amendment balancing test, see generally Maryland v. Wilson, 519 U.S. 408, 408 (1997); Terry v. Ohio, 392 U.S. 1, 21 (1968).

160. *See* Mitchell v. Forsyth, 472 U.S. 511, 534 (1985) (citing United States v. United States Dist. Ct., 407 U.S. 297, 299 (1972)).

161. *See supra* note 1 and accompanying text.

162. *See* Brief for Petitioner at 5, Illinois v. Wardlow, 120 S. Ct. 673 (2000) (No. 98-1036).

crime neighborhood may feel it is prudent to avoid the police. Legitimacy issues inform many of these reasons.

First, minorities may have no other choice. While the Court held that an individual has the right to simply refuse to talk with the police,[163] incidents of police corruption tell another story.[164] If the individual refuses to consent to a search, the officer may search anyway and then lie about consent.[165] In addition, the officer may plant evidence on the individual.[166] Accordingly, an innocent person in a high-crime neighborhood may feel that he or she must run or risk being framed by the police.

Second, many people of color may fear for their personal safety. Stories of police brutality of minority group members are widespread.[167] In addition to the Area Two and Rampart scandals discussed above,[168] credible reports show that in the past police officers in the Bronx randomly beat people up in high-crime neighborhoods, simply to assert their authority.[169] An interview between a *New York Times* reporter and a Bronx police officer reflects the random and unpredictable nature of this violence:

> Did you beat people up you arrested?
>
> > No. We'd just beat people in general. If they're on the street, hanging around drug locations. It was a show of force.
>
> Why were those beatings done?
>
> > To show who was in charge. We were in charge, the police.[170]

In addition to the fear of being beaten by the police is the knowledge that there is little hope of justice afterward. The "blue wall of silence" is known to the public, and common sense tells minorities that it is unlikely that a court will believe their story over a police officer's.[171] Thus, an innocent person, for whom stories of police brutality are all too salient, may choose to exercise his right to avoid the police.

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163. *See* Florida v. Royer, 460 U.S. 491, 498 (1983).

164. *See* Brief for Respondent at 10, Illinois v. Wardlow, 120 S. Ct. 673 (2000) (No. 98-1036) (stating that "experience teaches – and empirical research confirms – that officers often initiate such encounters in bad faith, with little regard to those citizens' basic human dignity, let alone their constitutional rights").

165. *See* COLE, *supra* note 21, at 33-34 (writing that federal inmates of color expressed these concerns to one of his students).

166. *See supra* note 126 and accompanying text.

167. *See supra* notes 95-171 and accompanying text.

168. *See supra* notes 116-132 and accompanying text.

169. *See Ex-officer's Account of Brutal Police Fraternity*, *supra* note 123, at 83.

170. Bob Herbert, *Connect the Dots*, N.Y. TIMES, Aug. 24, 1997, § 4, at 13.

171. *See* Bandes, *supra* note 96, at 1276.

The crisis of illegitimacy thus informs people of color that, despite *Florida v. Royer*,[172] they do not have a right to simply refuse to engage with the police. Personal experience, stories from others in their communities, and high-profile media events have taught many innocent minority group members that the only way to ensure that they will not be searched, framed, or beaten is to avoid the police, even if that means running from them.[173] Justice Stevens's dissent in *Wardlow* summarizes this point:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous . . . . For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.' Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.[174]

b. *The Level of Intrusion Is Significant*

In *Terry*, the Court characterized a stop and frisk as a "minor inconvenience and petty indignity."[175] The crisis of legitimacy, however, elevates a *Terry* stop into a major intrusion that should weigh heavily in the Fourth Amendment balancing test. First, the pervasive nature of racial profiling[176] may result in multiple stops of the same innocent person of color.[177] While the first stop may truly be a "minor inconvenience" or a "petty indignity," the second, third, and fourth stops become unreasonable government intrusions. Each stop is a humiliating reminder of state-sanctioned racism.[178]

In addition, even for the innocent person who is stopped just once, the crisis of legitimacy suggests that the encounter is not a mere inconvenience because it produces terror in the individual stopped.[179] Rightly or wrongly, people of color believe that police

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172. 460 U.S. 491, 497-98 (holding that not talking to police is not sufficient to trigger reasonable suspicion).

173. *See* Illinois v. Wardlow, 120 S. Ct. 673, 680-81 (2000) (Stevens, J., dissenting).

174. *Id.* (Stevens, J., dissenting).

175. Terry v. Ohio, 392 U.S. 1, 10 (1968) (quoting People v. Rivera, 201 N.E.2d 32, 36 (N.Y. 1964)).

176. *See supra* notes 67-80 and accompanying text.

177. *See* Harris, *supra* note 24, at 271-73.

178. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (recognizing the psychological injury resulting from the shame and anger of being marginalized and oppressed).

179. *See supra* notes 35-38 and accompanying text.

rate people along racial lines.[180] As mentioned above, a New York City poll revealed that 90% of African Americans thought the police engaged in brutality against minorities.[181] This fear, compounded by high-profile police brutality cases,[182] leads to a high level of anxiety regarding interactions with the police. This anxiety and fear elevates a *Terry* stop from a "mere intrusion" to a potentially life threatening event.[183]

2. The Court Gave Undue Weight to Law Enforcement Interests

Even if the stop condoned in *Wardlow* adversely affects innocent people, as the previous section indicates, it may still pass constitutional muster if the law enforcement interests are strong enough.[184] The Court held that the defendant's flight in a high-crime area created a reasonable suspicion,[185] even if such reasoning might result in innocent people being stopped.[186] The effects of the crisis of legitimacy, however, predict that the law enforcement interests are actually quite small, and perhaps even nonexistent.

a. Aggressive Policing May Not Decrease Crime

There is no consensus on the success of community policing. One reviewer, examining research from the mid-1990s, concluded that studies of community policing "have generally shown that community policing has had a small effect or has produced contradictory results."[187] In accordance with this, studies examining the effects of random patrolling reveal that increasing the degree of "police presence" by adding police to patrol "randomly" has no effect on crime.[188]

Further, seemingly positive results may be due to factors other than community policing. For example, in New York the

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180. *See supra* notes 36-38 and accompanying text.

181. *See supra* note 42 and accompanying text.

182. *See supra* notes 95-171 and accompanying text.

183. *See* Brief for Respondent at 10, Illinois v. Wardlow, 120 S. Ct. 673 (2000) (No. 98-1036).

184. *See supra* note 140 and accompanying text.

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

186. *See id.* at 677.

187. DAVID BAYLEY, POLICE FOR THE FUTURE 117 (1994).

188. *See* Lawrence W. Sherman, *Policing for Crime Prevention*, *in* PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING 8-1, at 8-11 to 8-12 (Lawrence W. Sherman ed. 1997) (citing GEORGE L. KELLING ET AL., THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT: TECHNICAL REPORT (1974) and POLICE FOUNDATION, THE NEWARK FOOT PATROL EXPERIMENT (1981)).

homicide rate decreased by more than 50% between 1990 and 1996.[189] It is debatable, however, whether this can be attributed to policing efforts when other cities used different techniques but had similar drops in crime.[190] Additionally, some areas that experienced the crime reduction under community policing are now showing an increase.[191] It does seem, however, that increased police presence that is directed at high-crime areas does lead to a decrease in crime.[192] For example, one study indicates that an increase in foot patrol may decrease crime.[193]

Another study that seemingly supports the "broken windows" hypothesis[194] but is susceptible to other interpretations is Wesley Skogan's *Disorder and Decline: Crime and the Spiral Decay in American Neighborhoods*.[195] Bernard Harcourt, after re-analyzing Skogan's data concluded that "Skogan's study does not verify the broken windows hypothesis, and the causes of the decline in crime in New York City are far too contested to lend themselves to such simplistic analysis."[196] Even Skogan, a staunch advocate of

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189. *See* Jenny Berrien & Christopher Winship, *Lessons Learned from Boston's Police-Community Collaboration*, 63 FED. PROBATION 25, 25 (1999) (citing FBI, UNIFORM CRIME REPORTS (1991-1996)).

190. *See* COLE, *supra* note 21, at 192-94 (noting that crime dropped in Boston and San Diego without using the aggressive "zero-tolerance" law enforcement common to community policing strategies). Instead, Cole points to forms of community policing that are "community-based crime prevention." *Id.* at 192. This type of community policing "tries to make police an integral part of the neighborhoods they serve through more decentralized police stations, more foot patrols, and regular meetings with citizens in the community." *Id.* Cole also cites efforts to keep children in school, mentoring, and developing effective channels for communication between the police and the community. *See id.* at 192-93.

191. *See* Berrien & Winship, *supra* note 189, at 25 (citing Fred Kaplan, *Brooklyn Adopts 'Boston Plan' on Savings*, BOSTON GLOBE, Oct. 14, 1999 (reporting that Brooklyn is now experiencing an eight percent increase in homicide rates)).

192. *See* Sherman, *supra* note 188, at 8-17 (stating "the more arrests police make in response to reported or observed offenses of any kind, the less crime there will be").

193. *See id.* at 8-12 (citing Robert Trojanowicz, *Evaluating a Neighborhood Foot Patrol Program: The Flint, Michigan Project*, *in* COMMUNITY CRIME PREVENTION: DOES IT WORK? (Dennis P. Rosenbaum ed. 1986)).

194. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31 (introducing the broken-window theory, which hypothesizes that if one window in a building is broken and not repaired, all the rest of the windows will soon be broken because failure to fix the first window is a signal that no one cares).

195. *See* WESLEY SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL DECAY IN AMERICAN NEIGHBORHOODS 2 (1990) (stating, in introducing the book, that when a community is in a state of disorder, people in that community are not expected to act in an orderly fashion, and that this phenomenon is a major catalyst of urban decline).

196. Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-*

community policing, admits that "the evidence is mixed."[197] Accordingly, aggressive policing may not have any direct benefit to law enforcement interests.

b. Aggressive Policing May Frustrate Other Areas of the Criminal Justice System

Because the crisis of legitimacy undermines the criminal justice system at many levels, and because *Wardlow* can only serve to exacerbate the crisis, its costs are wide spread. The *Wardlow* Court held that running from the police constitutes reasonable suspicion only in high-crime neighborhoods.[198] High-crime neighborhoods have an extensive minority population.[199] Thus, *Wardlow* stops will have a disproportionate impact on people of color. This effect is compounded by the fact that people of color have a greater incentive to run from the police in the first place.[200] Because *Wardlow* stops exacerbate the crisis of legitimacy, *Wardlow* may have an adverse effect not only on crime prevention but also on other law enforcement practices as well.

The effects of the crisis are two-fold. First, with a loss of faith in the system comes an unwillingness to cooperate.[201] Second, when individuals lose respect for the system, they are more inclined to defy it.[202] Accordingly, legitimacy problems may lead to an increase in crime.[203] These results, in turn, create a feedback loop that leads to the failure of law enforcement efforts.[204]

Maintenance Policing New York Style, 97 MICH. L. REV. 291, 309 (1998).

197. Skogan, *supra* note 61, at 178.

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

199. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.44 (1999).

200. *See supra* notes 162-174 and accompanying text.

201. *See* TYLER, *supra* note 20, at 5 (discussing the role of perception of procedural fairness in conceptions of legitimacy); *see also* KITTRIE, *supra* note 22, at 163-67 (providing a historical overview of responses to erosion of legitimacy); Cole, *supra* note 31, at 3 (asserting that perception of unfairness leads to less likelihood of cooperation).

202. *See supra* notes 22-23 and accompanying text.

203. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64, 76-81 (1988) (discussing the role of procedural fairness in conception of legitimacy); *see also* Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 334-35 (2000) (discussing how law breakers in the African-American community can be treated as figures to be admired rather than condemned); Cole, *supra* note 31, at 3 (explaining that people who have lost respect for the law are more likely to break it themselves).

204. *See* Sherman, *supra* note 188, at 8-22 to 8-25 (providing a scientific evaluation of eight hypotheses on policing).

i. Unwillingness to Cooperate

Research establishes that one result of the crisis of legitimacy is a loss of faith in the system.[205] From that grows an unwillingness to cooperate.[206] "[B]ecause legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities[,] . . . legitimacy will affect the degree to which people comply with laws in their everyday lives."[207] In the American system, this unwillingness manifests itself at every stage of our criminal justice system.[208]

At the participation level, be it during a crime investigation or serving as a witness or juror, resistance may come from a subtle, perhaps unconscious, rejection of an unjust criminal justice system.[209] Of this rejection John Edgar Wideman said:

> [W]e can't help but feel some satisfaction seeing a brother, a black man, get over on these people, on their system without playing by their rules. No matter how much we have incorporated these rules as our own, we know that they were forced on us by people who did not have our best interests at heart.[210]

Those citizens who do participate in the system may rebel against the law through jury nullification.[211] A staunch supporter of race-based jury nullification, Paul Butler describes the moral reasons why African-American jurors should refuse to convict non-violent African-American defendants:

> [F]or pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by traditional criminal justice process, which is controlled by white lawmakers and white law enforcers.[212]

Thus, *Wardlow* stops may thwart law enforcement efforts by frustrating minority members' cooperation with the criminal justice system as a whole.

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205. *See* TYLER, *supra* note 20, at 5.

206. *See supra* note 201 and accompanying text.

207. TYLER, *supra* note 20, at 5.

208. *See* Cole, *supra* note 31, at 3.

209. *See* Harris, *supra* note 24, at 268-69.

210. Brown, *supra* note 203, at 334-35 (quoting JOHN EDGAR WIDEMAN, BROTHERS AND KEEPERS 57 (1984)).

211. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700-12 (1995).

212. *Id.* at 679.

ii. Increased Law Breaking by Citizens

In addition to subverting the system's processes, the crisis may actually result in increased crime. With a loss of respect for the legitimacy of the law comes an increased willingness to break the law.[213] Fear of punishment is only part of what motivates individuals to follow the law.[214] Internal and community morals may be more powerful bases for compliance with the law.[215] When one questions the legitimacy of the system, one is much more likely to violate that system's rules.[216] In addition, when one's community also questions the system's legitimacy, non-compliance at the individual level is more likely.[217] Lawbreaking then becomes not only socially acceptable, but also "romanticized, idealized, condoned or even celebrated."[218]

Research of America's inner cities supports this hypothesis. Although one study suggests that arrest rates above a "tipping point" have a deterrent effect on crime, the statistical support for this finding was weak.[219] Most studies find no deterrent effect from increased reactive arrest rates at either an individual or community level of analysis.[220] In fact, the most striking findings indicate that arrest rates actually correlate with increased criminal activity in juvenile populations.[221]

By failing to recognize the dynamics involved in the crisis of legitimacy, the Court in *Wardlow* engaged in a misguided balancing test.[222] Legitimacy issues frustrate the goals of *Wardlow* stops by rendering them ineffective or at least so

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213. *See supra* note 203 and accompanying text.

214. *See* TYLER, *supra* note 20, at 3-4.

215. *See id.* at 4.

216. *See supra* note 203 and accompanying text.

217. *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772-76 (1992) (discussing the way in which many African-American communities vacillate between ostracizing criminals or identifying with them and approving of their behavior as a form of race resistance).

218. David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1091 (1999); *see also* Austin, *supra* note 217, at 1776-80 (discussing how crime can provide social and occupational identity in addition to financial returns).

219. *See* Sherman, *supra* note 188, at 8-16 to 8-17. The "tipping point" is the threshold beyond which the effect of increased arrest rates becomes evident. *See id.* at 8-16. Even with this point, the conclusion that arrests above it deter crime is evident only in cities of 10,000 or more people. *See id.*

220. *See id.* Reactive arrest rates are those in response to citizen complaints. *See id.*

221. *See id.*

222. *See supra* Part II.B.

marginally effective that they do not outweigh the interests behind government intrusion. In addition, *Wardlow* stops may undermine other crime prevention efforts by fueling the crisis.

III. Ameliorating the Effects of *Wardlow*

The implications of *Wardlow* are enormous. The decision allows police to translate flight into reasonable suspicion only in high-crime neighborhoods,[223] the very neighborhoods in which legitimacy is most at issue. The negative ramifications[224] of the Supreme Court's decision in *Wardlow* on legitimacy issues and crime prevention call for development of solutions at all levels of the criminal process. The following are suggestions for ways that police departments, state legislatures and courts may ameliorate the adverse effects of the *Wardlow* decision.

A. Local Police Departments

First, changes can be made in the police departments themselves. After learning about the dynamics between legitimacy and crime prevention, departments can adopt procedures that lessen the discretion involved in policing, or at least educate their officers to use discretion in a race-neutral manner. One commentator recommends recruiting police executives to research and understand the problems of police-community relations.[225]

Police departments can also shift to a less combative policing style. Recent trends like "zero tolerance" policing have frustrated urban citizens because of the resulting "overloaded criminal courts, overcrowded jails, and surge in complaints of police abuse."[226] On the other hand, community law enforcement efforts that focus on creating a mutual trust between the police and neighborhood residents have actually resulted in a decrease in crime concomitant with a decrease in arrest rates.[227] For example, the Boston Police Department created a system that formed a relatively closer, more cooperative relationship between the police and the community.[228] Boston's program strategically focuses on

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

224. *See supra* Part II.

225. *See* Jerome H. Skolnick, Terry *and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1269 (1998).

226. COLE, *supra* note 21, at 193.

227. *See id.* at 193-94.

228. *See* Berrien & Winship, *supra* note 189, at 25-32 (contrasting New York City's aggressive battle against crime with Boston's overhaul of police and probation practices that emphasize community-based approaches).

problem areas and problem youth, and involves police partnerships with the Boys and Girls Club of Boston, schools, universities, and churches in working toward crime prevention.[229]

Unfortunately, there remain substantial barriers to these efforts. First, many police view their job as combat. "[T]he cops and the gangs are the two rival sources of power . . . and the gangs are not going to win."[230] As a former New York City police commissioner stated, "criminals are our competition."[231] In addition, there is a police mentality that ordinary legal processes are inadequate to maintain order and that officers are therefore justified in using extralegal measures as social custodians.[232] With this strong culture in place, it seems unlikely that a police department will comprehend the true dynamics of legitimacy and law enforcement efficacy.

Another avenue of police department reform is the hiring of more minority officers. Diversifying the force by adding officers who do not believe crime has a black or brown face can help break down the stereotypes that other officers hold.[233] There are, however, a number of impediments to these efforts. First, minority police officers coming from a community in which police legitimacy is already suspect risk losing the respect of their family and friends.[234] Second, predominately White precincts may maintain racist viewpoints resulting in a racially hostile work environment for minority officers.[235] Third, physical requirements, such as those for height and eyesight, tend to have a disparate impact on African-American, Latino, and Asian applicants.[236] Accordingly, police departments may not be the most realistic avenue for change.

B. State Legislatures

State legislatures present another avenue for mitigating the negative effects of *Wardlow* stops on legitimacy. Legislatures

229. *See* COLE, *supra* note 21, at 193.

230. Harcourt, *supra* note 196, at 377 (quoting Wilson & Kelling, *supra* note 194, at 35).

231. *Id.* at 337.

232. *See* Alexa P. Freedman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 698-99 (1996).

233. For a discussion on the way in which exposure to racial groups can break down stereotypes, see John Charles Boger, *Willful Colorblindness: The New Racial Purity and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1765-67 & nn.215-16 (2000).

234. *See* BREWER ET AL., *supra* note 30, at 125.

235. *See id.*

236. *See id.*

should be interested in protecting their minority citizens from state-sanctioned harassment and adopting policies that promote the effectiveness of the criminal justice system. Therefore, the legislature should pass laws that forbid *Wardlow* stops. In addition to these means for restoring legitimacy, the legislature may want to pass laws that require public reporting of the racial character of police practices.[237] Public reporting and the elimination of hurdles to bringing challenges to discriminatory practices may "provide avenues for airing and adjudicating charges of race discrimination... [and may] go far toward restoring the criminal justice system's legitimacy among disadvantaged communities."[238]

C. State Courts

Lastly, change can be effected at the judicial level. Many state courts have held that that fleeing from the police in a high-crime neighborhood does not rise to the level of reasonable suspicion.[239] These states recognize that "[a]uthorizing the police to chase down and question all those who take flight upon their approach would undercut this important right [of law-abiding citizens to eschew interactions with the police] and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime."[240] For example, the Colorado Supreme Court has recognized that:

> From the perspective of the person observed, the "furtive gesture" might be impelled by a variety of motives, from an unsettling feeling of being watched to an avoidance of what might be perceived as a form of harassment.... Then again, a person's movement may not be a reaction to the police at all.[241]

Similarly, the Supreme Court of Nebraska recognized that the desire to avoid police was not necessarily indicative of a guilty conscience.[242] Indeed, this aversion could arise from a host of reasons: "[f]ear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment, and fear of unjust arrest...."[243]

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237. *See* COLE, *supra* note 21, at 188.

238. *Id.* at 189.

239. *See* State v. Hicks, 488 N.W.2d 359, 363 (Neb. 1992) (citing cases in other jurisdictions holding that flight alone is insufficient to justify an investigative stop).

240. *Id.* at 364.

241. People v. Thomas, 660 P.2d 1272, 1275 (Colo. 1983).

242. *See Hicks*, 488 N.W.2d at 363.

243. *Id.*

Although *Wardlow* overrules the state decisions decided on federal constitutional grounds, most states have search and seizure provisions in their own constitutions that restrict unreasonable government intrusion into the affairs of their citizens.[244] Under new federalism principles,[245] a state court may interpret these provisions more broadly than the Fourth Amendment.[246] Accordingly, state courts can perform their own balancing tests, taking the real costs of *Wardlow* stops into account. They can conclude that under their constitutions, these stops constitute an unreasonable search and seizure because the intrusion on the privileges of innocent citizens outweighs the minimal benefits to crime reduction.

Conclusion

There is a widespread crisis of legitimacy in our country, and it is justified. Anecdotal and statistical evidence demonstrates that discriminatory police practices, ranging from the use of racial profiling in traffic stops to the more extreme occasions of police brutality, create a system of law enforcement that is at best arbitrary and, at worst, insidiously racist and lawless. Despite this widespread crisis, its costs are neither incorporated into law enforcement policies nor considered in the judicial review of these policies. The result is a balancing test that purports to take into account individual and government interests, but is ultimately flawed in the values it assigns.

This discord, best exemplified by *Illinois v. Wardlow*, results in a regime that allows unconstitutional government intrusions, which may actually serve to undermine the very goals it seeks to promote. Because innocent people of color have good reason to run from the police, *Wardlow* stops are an unreasonable government intrusion. Moreover, because they will have a disparate impact

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244. For example, the Colorado Constitution states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

COLO. CONST. art. II, § 7.

245. "'[N]ew' federalism seeks to elevate the power of state governments over that of the federal government and, in part, encourages state governments to pursue their own constitutional rights agendas." Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 519 (2000).

246. *See* People v. Sporleder, 666 P.2d 135, 151 (Colo. 1983).

on minorities, *Wardlow* stops will reinforce the crisis of legitimacy. Not only will they have a minimal direct effect on crime prevention, but they also will compound the existing crisis and frustrate other efforts of the criminal justice system. Accordingly, police departments, state legislatures, and courts must be cognizant of the intersection of legitimacy issues and law enforcement procedures, and embrace policies that help ameliorate this conflict. Only then can we move toward a more just and effective system of law enforcement.