

RUNNING FROM RAMPART

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For over one hundred years it has been generally accepted that flight alone should not be the sole basis of a government right to invade areas otherwise protected by the Fourth Amendment. The United States Supreme Court explained the reasons for this position near the end of the nineteenth century:

[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. . . . Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.¹

At the turn of the twenty-first century, however, the Court modified this attitude. In *Illinois v. Wardlow*,² the United States Supreme Court, in a five to four decision, ruled that under the circumstances of the case before it,³ an individual who ran upon seeing the police in

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1. *Alberty v. United States*, 162 U.S. 499, 511 (1896).

2. 120 S. Ct. 673 (2000).

3. Shortly after noon on September 9, 1995, four police cars converged in what they suspected was an area of high drug trafficking on the west side of Chicago in order to investigate possible illicit drug activity. The occupants of the last of these police vehicles, Officers Nolan and Harvey, noticed an African American man—later identified as William Wardlow—carrying an opaque bag. Wardlow allegedly, upon seeing the two officers arrive, attempted to flee

a high drug trafficking area gave the officers a sufficiently reasonable suspicion to justify a *Terry v. Ohio*⁴ stop and frisk. In reaching its decision, the majority stated: “Flight, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite. . . . Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing but it is certainly suggestive of such.”⁵

The *Wardlow* majority did not argue that flight alone is sufficient to justify a police detention. The Court did, however, find sufficient additional suspicion in the suspect’s flight from the officers in a heavy drug trafficking neighborhood. The combination of the high crime area and flight was enough to justify the stop and frisk.⁶

Few can doubt that a neighborhood’s high crime rate is a legitimate factor when answering the constitutional question of whether the police possessed reasonable suspicion justifying a *Terry* stop and frisk. Yet, nearly thirty years ago, in *United States v. Davis*,⁷ the Federal Circuit for the District of Columbia, while accepting its relevancy, assessed the dangers of overemphasizing the importance of

the scene through an alley. Though the suspect had not appeared to be violating any laws, Officers Nolan and Harvey briefly pursued, caught, and conducted a protective pat-down search of Mr. Wardlow for weapons. Prior to the pat-down the officers asked the suspect no questions, nor did they state the purpose of the forcible stop. *See id.* at 674-75.

As a part of the pat-down, Officer Nolan squeezed the opaque bag which the suspect was carrying and, upon feeling a hard, heavy object with a shape similar to that of a gun, opened the bag and discovered a .38 caliber handgun and five rounds of live ammunition. Mr. Wardlow was arrested and tried, with the handgun being successfully offered into evidence against him. He was eventually convicted of the unlawful use of a weapon by a felon. *See id.*

4. 392 U.S. 1 (1968). In *Terry*, the Supreme Court distinguished between a full custodial “arrest,” which constitutionally required that the arresting officers possess full probable cause, and a brief “detention,” which required only what the Court described as a “reasonable articulable suspicion.” Where there were sufficient grounds to believe that the detained suspect was armed and dangerous, the detaining officer was constitutionally permitted to engage in a pat-down of the exterior of the suspects clothing, and when probable cause then arose that the suspect was armed, the officer was permitted to intrude inside the suspect’s clothing in order to retrieve the weapon. *See id.* at 27.

5. *Wardlow*, 120 S. Ct. at 676.

6. *See id.*

7. 458 F.2d 819 (D.C. Cir. 1972).

the neighborhood when seeking constitutional justification for police intrusions:

Although no presumption of guilt arises from the activities of inhabitants of an area in which the police know that narcotics offenses frequently occur, the syndrome of criminality in those areas cannot realistically go unnoticed It too is a valid consideration when coupled with other reliable indicia or suspicious circumstances. We make this statement warily, for it is all too clear that few live in these areas by choice.⁸

The *Davis* court concluded that the high crime problem in certain areas should be considered cautiously when analyzing Fourth Amendment issues. Constitutional significance should be given only to highly specific facts and circumstances that create legitimate suspicions, as opposed to mere suspicion by association with the neighborhood in which the suspect is found.

Justice Stevens provided a reason why flight by inhabitants of such a neighborhood must not have too high a degree of suspicion attached to it. On behalf of the four dissenters in *Wardlow*, Stevens wrote: "It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses."⁹ There are also people who simply fear that a confrontation with members of law enforcement could prove dangerous, for example, by being caught in the crossfire.¹⁰

[A] reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity. And where there is criminal activity there is also a substantial element of danger—either from the criminal or from a confrontation between the criminal and the police. These considerations can lead to an innocent and understandable de-

8. *Id.* at 822 (citation omitted).

9. *Wardlow*, 120 S. Ct. at 680 (Stevens, J., dissenting) (citing *Alberty v. United States*, 162 U.S. 499 (1896)).

10. *See id.* (Stevens, J., dissenting).

sire to quit the vicinity with all speed.¹¹

Additionally, many have feared that terms like “high crime area” are simply euphemisms for economically depressed, ethnic minority inhabited inner city neighborhoods.¹² As the Ninth Circuit’s Judge Reinhardt recently noted in a post-*Wardlow* opinion:

The citing of an area as “high crime” requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity. . . . We must be particularly careful to ensure that a “high crime” area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.¹³

Others have spoken of the self-fulfilling prophecy of the police and as a consequence of the vicious cycle in which minority groups such as African Americans and Hispanics find themselves trapped in the inner city areas where they live or work.

Police use *Terry* stops aggressively in high crime neighbor-

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

12. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677 (1994).

The unfortunate fact is that *Terry* and its progeny have resulted in stops and frisks of residents of inner cities—primarily poor persons, African Americans, and Hispanic Americans—far out of proportion to their numbers, and often without justification. These searches and seizures carry a high price, not only to the individuals involved but to all of society.

. . . In fact, the terms “inner city neighborhood” and “high crime area” are synonymous for many Americans, including many of the regular participants in the criminal justice process. These neighborhoods tend to be poorer, older, and less able to support jobs and infrastructure than either city neighborhoods more distant from the urban core or suburban locations.

Id. (citation omitted).

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

hoods; as a result, African Americans and Hispanic Americans are subjected to a high number of stops and frisks. Feeling understandably harassed, they wish to avoid the police and act accordingly. This evasive behavior in (their own) high crime neighborhoods gives the police that much more power to stop and frisk.¹⁴

We are thus lead to the conclusion that it may actually be less suspicious to run from a possible law enforcement encounter in a high crime area than to attempt to flee from the presence of the police in less ominous locations.¹⁵ In a high crime area, the innocent bystander¹⁶ may more rationally fear that the officers have arrived in order to deal with a presently existing danger¹⁷ or at least that the officers, fearing danger, might be prone to draw their weapons and use them.

If one is seeking a pristine example in support of the critics who have been concerned with the police behavior in so-called high crime inner city neighborhoods as well as support for Justice Stevens's dissent from the *Wardlow* majority, one need look no further than the Los Angeles Police Department's Rampart scandal. The portion of Los Angeles policed by the Rampart Division is a textbook example

14. Harris, *supra* note 12, at 681.

15. [B]ecause many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so. Like unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.

Wardlow, 120 S. Ct. at 684 (Stevens, J., dissenting).

16. The *Wardlow* dissent cites a four-city study conducted over eleven years. The study found "substantial increases in reported bystander killings . . . in all four cities." From 1986 to 1988, for example, the study identified 250 people who were killed or wounded in bystander shootings in the four survey cities." *Id.* at 680 n.6 (Stevens, J., dissenting) (quoting Lawrence W. Sherman et al., *Stray Bullets and "Mushrooms": Random Shootings of Bystanders in Four Cities, 1977-1988*, 5 J. QUANTITATIVE CRIMINOLOGY 297, 306 (1989)).

The dissent went on to note that "[m]ost significantly for the purposes of the present case, the study found that such incidents 'rank at the top of public outrage.'" *Id.* (Stevens, J., dissenting) (quoting Sherman et al., *supra*, at 299).

17. *See id.* at 680 (Stevens, J., dissenting).

of the kind of area which may be regularly subjected to overly aggressive police conduct. Considered by the officers who patrol it to be an area of high crime and heavy drug trafficking, it is only three

percent White and has a mean income of less than half of that of the City of Los Angeles taken as a whole.¹⁸

The police department's behavior was often allegedly far more intrusive than one would expect in more affluent, Caucasian areas. It has been claimed, for example, that the Rampart Division would routinely conduct "street sweeps" where they would systematically pick up scores of Latinos and turn them over to the Immigration and Naturalization Service (INS),¹⁹ actions normally not within the portfolio of local law enforcement. It was reported that roughly 200 of the individuals who were thus "swept up" were turned over to the INS for deportation proceedings. Of these 200 individuals, at least eighty percent were found to have been illegally in the country and were deported, while the remaining roughly twenty percent were released.²⁰

With respect to the type of person typically picked up in these sweeps, one police officer noted:

18. INCOME:		
	Rampart	Los Angeles
Median Income	\$21,110	\$43,201
Percent under \$ 15,000	37	22
ETHNICITY:		
	Rampart	Los Angeles
Percent Latino	79	48
Percent White	3	30
Percent Black	4	12
Percent Asian	15	10
Percent American Indian	<1	<1

See The Rampart Scandal: Genesis of a Scandal, L.A. TIMES, Apr. 25, 2000, at A18 (the figures were rounded up in the original source and therefore add up to more than 100%).

19. *See Anne-Marie O'Connor, Rampart Set Up Latinos to be Deported, INS Says*, L.A. TIMES, Feb. 24, 2000, at A1.

20. *See id.*

“The majority were decent people but they were in the country illegally and weren’t supposed to be here in the first place,” “They were working people on the way home when they were picked up by LAPD CRASH. Some were

cooking or had just come from work. A lot of them were just getting off the bus.”²¹

Even assuming an eighty percent success rate in so harvesting illegal aliens, it would certainly raise justifiable concerns amongst legal residents of the area that, if observed on the street by the police, they too might be swept up along with many other innocents as well as the potentially “guilty.” Of course, these allegations only scratch the surface of the reasons why one might have been and continue to be cautious of contact with Rampart’s law enforcement.

There have been scores of charges against individuals and groups of officers alleging not only the planting of drugs²² and weapons²³ upon suspects, but also the injury and death of both suspects²⁴ and innocent bystanders.²⁵ The latter were caught in the

21. *Id.*

22. Anti-gang officers in the Los Angeles Police Department’s Rampart Division routinely and unnecessarily punched, kicked, choked and otherwise beat suspects in an effort to intimidate the gangs that the officers were charged with policing, according to confidential investigative documents and interviews. The officers then fabricated elaborate stories in police reports, even planting drugs on a suspect, to account for their victims’ injuries, disgraced ex-officer Rafael Perez has told investigators, who are questioning him

Scott Glover & Matt Lait, *Beatings Alleged to be Routine at Rampart*, L.A. TIMES, Feb. 14, 2000, at A1.

23. See Matt Lait & Scott Glover, *Rampart Officer is Arrested at Gunpoint*, L.A. TIMES, July 29, 2000, at A1 (detailing Officer Durden’s account of planting a “throw-down” gun on a wounded suspect); see also Matt Lait & Scott Glover, *3 Officers Plead Not Guilty in Plot to Frame Suspect*, L.A. TIMES, May 16, 2000, at B1 (reporting that a police officer told investigators that a suspect had been framed on a gun possession charge).

24. See Glover & Lait, *supra* note 22; see also Ann W. O’Neill, *3 Rampart Officers Convicted of Corruption: 4th Found Not Guilty*, L.A. TIMES, Nov. 16, 2000, at A1 (reporting the results of the first criminal convictions in the Rampart scandal). Prior to publication of this Article, Judge Jacqueline Connor overturned the convictions of three Rampart Division police officers on

crossfire of officers perhaps a little too eager to use their guns and convinced of their own immunity from prosecution for any mistakes.²⁶ Even if that immunity no longer exists, can we doubt that innocent persons living under Rampart's shadow would feel far less eager to be present during a police investigation than those living in Los Angeles's somewhat more fashionably affluent 90210 ZIP code?²⁷

It must also be understood that actual innocence did not prove an insurmountable obstacle to successful prosecution of those arrested by some of the police working out of the Rampart Division. In many of the cases which were eventually dismissed based upon the revelations that some officers had planted evidence or perjured themselves, the innocent defendants had originally plead guilty.²⁸ An explanation for this phenomenon is easy to come by. From the perspective of the defense, danger lurks in the potentially more severe sentences often imposed upon seemingly unrepentant defendants after a trial produced conviction when compared with the sometimes lesser punishment imposed as part of a negotiated plea bargain. This reality apparently persuaded many not to run the risk of basing their defenses upon the seemingly unbelievable claim that the sworn police testimony pointing to their guilt was merely a "tissue of lies."

The revelations surrounding the Rampart police scandal had already received considerable national publicity by the time the United States Supreme Court rendered its *Wardlow* decision. Yet in spite of

grounds that the jury verdict had been compromised by the jurors' apparent misunderstanding of a common phrase of police slang. See Maura Dolan & Mitchell Landsberg, *Judges Rarely Admit Error, Experts Say*, L.A. TIMES, Dec. 24, 2000, at A1.

25. See Matt Lait & Scott Glover, *LAPD Charges 6 Officers in Rampart Case*, L.A. TIMES, July 26, 2000, at A1 (exposing that LAPD officers in the Rampart division planted a weapon on the body of a twenty-one-year-old Juan Saldana after a fellow officer fatally wounded Saldana).

26. See Scott Glover & Matt Lait, *Panel Calls for Punishment of LAPD Captain*, L.A. TIMES, Feb. 18, 2000, at B1 (reporting that a LAPD captain did not take action after being told of an officer-involved beating).

27. A section of the City of Beverly Hills which has become synonymous in popular culture by its ZIP code.

28. See Samuel H. Pillsbury, *Even the Innocent Can be Coerced into Pleading Guilty*, L.A. TIMES, Nov. 28, 1999, at M5.

this, the majority did not critically analyze the reality of the relationship that exists between the police and minority groups on the streets of many of our inner cities. Rather, the Court chose to simply conclude that in neighborhoods very much like that policed by the Rampart division, running upon the arrival of the police is so suspicious

an act that it is sufficient to justify a governmental invasion of privacy which would otherwise have been constitutionally protected.

There is no question that—even if some or all of the negative allegations leveled against the Los Angeles Police Department²⁹ prove to be untrue—the Rampart police scandal provides us with an unfortunate yet excellent illustration of why, just as it was true over a hundred years ago, many a reasonable and innocent person might well find it prudent to run upon the arrival of the police. Unfortunately, this turns out to be an even more troubling concern today for the residents of so-called “high crime areas.” Yet the *Wardlow* majority chose to single out the inhabitants of these same high crime neighborhoods for less—rather than greater or even equal—constitutional protection from governmental intrusions.

Once the United States Supreme Court has spoken on a constitutional question there may be very little room to deviate from its conclusions. Fortunately, the absence of a per se rule created by the high court in this 5-4 decision may leave some air for lower courts to maneuver. Several of the lower courts to have considered the issues raised by *Wardlow* have chosen to distinguish their facts and thus reach the conclusion that they are not controlled by the *Wardlow* majority opinion.

Some courts have concluded that since the individual stopped in

29. See Ralph C. Carmona, *Standing Between Community and Chaos*, L.A. TIMES, June 26, 2000, at B9; Mike Feuer & Cindy Miscikowski, *Give Police Commission a Chance*, L.A. TIMES, Feb. 17, 2000, at B9; Matt Lait & Jim Newton, *The ‘Rampart Way’: Macho, Insubordinate and Cliquish*, L.A. TIMES, Mar. 1, 2000, at A16; Roberto Lovato, *In Pico-Union, Broken Trust Hurts*, L.A. TIMES, Feb. 25, 2000, at B7; Patrick McGreevy, *Community Activists Urge Parks to Restore LAPD Liaison Officers*, L.A. TIMES, Apr. 28, 2000, at B4; Myrna S. Raeder, *Tainted Verdicts Leave Evidence Debased and Courts Sullied*, L.A. TIMES, Feb. 13, 2000, at M5; Nicholas Riccardi & Antonio Olivio, *Latino Leaders Relatively Quiet on Rampart*, L.A. TIMES, Feb. 29, 2000, at A1.

their cases was merely standing or only walking away and not running from the police, even though they may have been in a high crime area when they were stopped, the police were not justified in detaining them.³⁰ Another court concluded that nothing in a suspect's behavior of lawfully driving away from the vicinity of the police was unusual enough to justify a governmental intrusion.³¹

These may be small victories in the effort to provide minority inhabitants of inner city neighborhoods the same constitutional protection afforded most others, but a careful distinguishing of the *Wardlow* holding may prove to be all that is left to us for the time being or perhaps even for decades to come.

30. See *People v. F.J.*, 734 N.E.2d 1007, 1010 (Ill. App. Ct. 2000) (observing a suspect standing at the entrance of an alley, who, upon seeing the officer, placed an object in his pocket, did not establish reasonable articulable suspicion as in *Wardlow* since he was "standing and not running"); see also *State v. Warfield*, No. 23932-9-II, 2000 WL 1009035, at *3 (Wash. Ct. App. July 21, 2000) ("a well founded suspicion does not arise merely because a group of people gathered at night in a high crime area and the defendant was one who walked away when the police approached").

31. See *Ex parte James v. State*, CR-95-2011, 2000 WL 8004442, at *5 (Ala. June 23, 2000) ("[T]he officer in the case now before us did not articulate any specific facts that would create a reasonable suspicion that James was involved in criminal activity."). Unlike the flight discussed in *Wardlow*, here the court concluded that there was no evidence that the defendant had driven away from the officers either "hastily, erratically, or nervously." *Id.* The suspect's having driven away from the direction of the officers could not be deemed either "unprovoked" or "unusual," since "[t]he people to whom he had been talking were gone." *Id.*; see also *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 n.32 (9th Cir. 2000) (demonstrating that the majority as well as the concurrence agreed that "the use of the term 'high-crime area' as a factor in reasonable suspicion analysis may be 'an invitation to trouble.'").