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## Categorical and Vague Claims that Criminal Activity is Afoot: Solving the High-Crime Area Dilemma Through Legislative Action

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## NOTE

# CATEGORICAL AND VAGUE CLAIMS THAT CRIMINAL ACTIVITY IS AFOOT: SOLVING THE *HIGH-CRIME AREA* DILEMMA THROUGH LEGISLATIVE ACTION

By Andrew Dammann

### ABSTRACT

*In Illinois v. Wardlow, the Supreme Court announced that mere presence in a high-crime area is a constitutionally significant factor for deciding if there is the necessary reasonable suspicion that criminal activity is afoot in order to justify a stop and frisk. Relying in part on the constitutional significance Wardlow attached to the vague term high-crime area, New York instituted an aggressive stop-and-frisk policy to combat crime and make New York a safer city. New York was sued under 42 U.S.C. § 1983 in Floyd v. City of New York. New York's appeal was dropped when new mayor Bill de Blasio agreed to the remedies outlined in the Floyd opinion. At the press conference where Mayor de Blasio announced the settlement that dropped the appeal, Police Commissioner William Bratton said, "[W]e will not break the law to enforce the law." This Article asserts that enforcing the law without breaking it becomes impossibly problematic when the law is as uncertain as it is with high-crime areas.*

*This Article begins with a critique of the uncertainty created by attaching constitutional significance to high-crime areas without defining or describing what a high-crime area is. The Article urges city councils and other appropriate legislatures to designate which areas are high-crime areas. It argues that such a designation would foreclose the difficult problem of municipal liability that Judge Scheindlin grappled with in Floyd, that legislative designations of high-crime areas square with Fourth Amendment principles, and that legislatures, not executive auxiliaries like police departments, are the proper governmental bodies to make that designation.*

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## I. INTRODUCTION

Late one night a young man in the Bronx is sent to the corner store to buy some groceries for his mother; he grabs his older brother's coat on the way out the door by mistake. He runs, instead of walks, to the store because of the cold and the crime. He is the "right kind of person" the NYPD officer waiting across the street watching was told to *stop and frisk*. Minutes later, the young man is bent over a patrol car as the police find a suspicious bag of white powder in his brother's coat. His protestations are met with the cold refrain: "If I had a nickel . . . ." Under the exact same circumstances a young man in Upper Manhattan, sent on the exact same chore, returns home with some milk, some crackers, and some bread.

The dissimilar treatment between these two similarly situated young men is constitutional<sup>1</sup> even though the Fourth Amendment and Fourteenth Amendment stand as a safeguard to equally secure both young men in "their persons, houses, papers and effects from unreasonable searches and seizures."<sup>2</sup> Police departments around the country face the daunting task of ferretting out crime and protecting their officers' safety while respecting the constitutional rights of suspects. Recognizing the perils of this daunting task the Supreme Court, in *Terry v. Ohio*, held that limited intrusions on Fourth Amendment rights are justified in the interest of ensuring the safety of law enforcement officers so long as there are "specific articulable facts" indicating that criminal activity may be afoot.<sup>3</sup> This reasonable-suspicion analysis allows considerable room for courts to defer to an officer's experience.<sup>4</sup> Under this analysis, seemingly innocent actions taken together with "rational inferences" in light of the officer's experience can form the basis for a constitutional seizure commonly called a *stop and frisk*.<sup>5</sup> In *Terry*, the Court intended this individualized approach to balance the indignity and stigma associated with being stopped and frisked by police against officer safety.<sup>6</sup> Later in *Illinois v. Wardlow*, the Supreme Court held that presence in a *high-crime area* can be one constitutionally significant factor needed to justify a *stop and frisk*, but not the sole factor.<sup>7</sup> *Wardlow* created a constitutionally significant factor unlike any other factor in the reasonable-suspicion analysis.<sup>8</sup> Prior to

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1. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968). See also *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

2. U.S. CONST. amend. IV; U.S. CONST. amend. XIV, § 2.

3. *Terry*, 392 U.S. at 21.

4. *United States v. Arvizu*, 534 U.S. 266, 274–75 (2002) (noting that reasonable suspicion analysis "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'").

5. See *Terry*, 392 U.S. at 21.

6. *Id.* at 24–25.

7. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

8. See *id.*

*Wardlow*, each “specific articulable fact” in the reasonable-suspicion analysis had to be peculiar to the incident that precipitated the *stop and frisk*.<sup>9</sup> After *Wardlow*, police officers may enlist the categorical claim that an incident took place in a *high-crime area* in aid of establishing that there was reasonable suspicion to *stop and frisk* a suspect.<sup>10</sup> The effect of *Wardlow* is that the young man in the Bronx gets bent over a patrol car while the young man in Upper Manhattan jogs home unmolested. Those in *high-crime areas* are one innocent “articulable fact” away from having their Fourth Amendment rights evaporate, while those in more affluent areas retain robust Fourth Amendment protections.<sup>11</sup>

*High-crime areas* present problems aside from the arguably unequal scheme of Fourth Amendment protections they create.<sup>12</sup> Uncertainty regarding what a *high-crime area* is, how and who designates *high-crime areas*, and what evidentiary standards are required for reviewing a *high-crime area* claim creates problems that cry out for solutions of varying complexity.<sup>13</sup> This Article does not call for an overruling of *Wardlow*—it does not argue that the use of the *high-crime area* factor in Fourth Amendment analysis is facially unconstitutional, nor does it analyze the unequal scheme of Fourth Amendment protections implied by *Wardlow*. This Article merely analyzes the current scheme under *Wardlow*; a broken and uncertain scheme that lacks clarity and often results in no more than deference to a law enforcement officer’s *ad hoc* determination that the *stop and frisk* took place in a *high-crime area*. It urges city councils and other appropriate legislatures to substitute their deliberate democratic designations of what is and is not a *high-crime area* for the *ad hoc* judgment of individual police officers.

Part II of this Article looks at the inherent problems with *high-crime areas* arising from the vagueness of the term. It points to the

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9. *Terry*, 392 U.S. at 21.

10. *Wardlow*, 528 U.S. at 124.

11. *See id.* *See also* Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 423 (2001).

12. *See* Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1591 (2008); *see also* Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas”*, 63 HASTINGS L.J. 179, 181 (2011); *see also* Thomas R. Fulford, *Writing Scripts for Silent Movies: How Officer Experience and High-Crime Areas Turn Innocuous Behavior into Criminal Conduct*, 45 SUFFOLK U. L. REV. 497, 499 (2012); *see also* Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 136 (2002); *see also* David Seawell, *Wardlow’s Case: A Call to Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1120 (2001).

13. *Compare* Seawell, *supra* note 12, at 1120 (arguing that the issue of location should be eliminated from *Terry* analysis), *with* Ferguson & Bernache, *supra* note 12, at 1591 (arguing the “high-crime area” verification should require temporal and geographical bounds and a nexus between the incidents of the types of crimes committed in an area and the types of crimes investigated).

lack of guidance for the Supreme Court in analyzing the claim and the review of *high-crime area* findings as questions of fact rather than as questions of law or mixed questions of law and fact as contributing to the lack of clarity, certainty, and uniformity in *high-crime area* jurisprudence. Finally Part II discusses the additional problems with *high-crime areas* in § 1983 cases such as *Floyd*.

Part III of this Article argues that legislative designations will simplify the analysis of *high-crime area* for the purposes of determining municipal liability. Part IV argues that legislative designations of *high-crime areas* square with Fourth Amendment jurisprudence. Part V speculates on the virtues of the political process of legislatively designating certain areas as *high crime*. Part VI concludes that legislative designations of *high-crime areas* provide simplicity, clarity, and certainty to all those affected by the *high-crime area* in Fourth Amendment jurisprudence.

## II. THE PROBLEM WITH *HIGH-CRIME AREAS*

It is a constitutional reality that individuals in *high-crime areas* have less Fourth Amendment protections than those who are outside *high-crime areas*.<sup>14</sup> The Supreme Court has not defined what constitutes a *high-crime area*, nor has the Supreme Court described what a *high-crime area* looks like or what attributes and metrics differentiate *high-crime areas*. Aside from requiring more than mere presence in a *high-crime area* to justify a *stop and frisk*, the Supreme Court has yet to develop any safeguards to protect against police claiming presence in a *high-crime area* as pretext for impermissible racial profiling or acting on arbitrary “hunches.”<sup>15</sup> Because of the dearth of guidance from the Supreme Court, a prevalent practice is for trial courts to merely defer to an officer’s *ad hoc* determination that a suspect was in a *high-crime area*.<sup>16</sup> Some courts approach this problem by requiring different levels of verification during evidentiary hearings.<sup>17</sup> But even when

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14. *See Wardlow*, 528 U.S. at 124.

15. *Id.*

16. *United States v. Dell*, 487 F. App’x 440, 455 (10th Cir. 2012) (concluding that unchallenged officer testimony was sufficiently specific to indicate that investigatory detention took place in a “high-crime area”); *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (“it’s a high-crime area, because the officers say it’s a *high-crime area*.”) (Kozinski, J., concurring); *C.E.L. v. State*, 24 So. 3d 1181, 1195 (Fla. 2009) (relying on officer testimony and prior complaints to establish *high-crime area*); *People v. Jackson*, 979 N.E.2d 965, 974 (Ill. App. Ct. 2012), *appeal denied*, 982 N.E.2d 772 (Ill. 2013) (finding that an officer’s uncontradicted and undisputed testimony, which is accepted by the trial court, is sufficient to support a trial court’s finding that the incident occurred in a high-crime area).

17. *United States v. Wright (Wright I)*, 485 F.3d 45, 53–54 (1st Cir. 2007) (suggesting three factors for trial courts to consider when making a *high-crime area* finding: (1) the nexus between type of crime committed in the area and type of crime investigated; (2) the geographical bounds of the alleged *high-crime area*; and (3) the temporal bounds of the alleged *high-crime area*).

trial courts address the *high-crime area* claim, it often results in judicial notice confirming the officers' *ad hoc* determination that the suspect was in a *high-crime area*.<sup>18</sup>

The practice of deferring to a law enforcement officer's *ad hoc* determination of the character of an area under *Wardlow* would not be such a problem if a uniform evidentiary scheme was developed to test the claim that a suspect was stopped and frisked in a *high-crime area*.<sup>19</sup> But, development of such a scheme is impeded because *high-crime areas* are generally considered questions of fact.<sup>20</sup> As such, appellate courts review the findings of trial courts concerning the *high-crime* character of areas under a highly deferential standard.<sup>21</sup> If the *high-crime* character of a particular area is a question of fact, and not a question of law or a mixed question of law and fact, then appellate courts must review that finding under a clearly erroneous standard.<sup>22</sup> Therefore, the different evidentiary standards and mechanisms that trial courts use to verify *high-crime area* claims perpetuate inconsistency within an already unequal scheme of Fourth Amendment protection.<sup>23</sup> The evidentiary scheme remains inconsistent because appellate courts cannot martial the various standards and mechanisms into a consistent approach.<sup>24</sup> Moreover, the evidentiary scheme for testing *high-crime area* claims is likely to remain inconsistent not only because *high-crime area* findings are questions of fact, but also because of the uncertainty inherent in the *high-crime area* distinction itself.<sup>25</sup>

Courts have been very reluctant to consider the high-crime character of an area as anything other than a question of fact.<sup>26</sup> The standard of review is not the only impediment to appellate reviews of *high crime areas*—a trial court may refuse to classify an area as “high

18. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968). See also *State v. Burns*, 877 So. 2d 1073, 1078 (noting that a trial court can take judicial notice of the “high-crime” nature of an area); *State v. Francis*, 2010-1149 (La. App. 4 Cir. 2/16/11), 60 So. 3d 703, 708, writ denied, (La. 2011), 71 So. 3d 311 (noting Louisiana Fifth Court of Appeals’ practice of taking judicial notice of the “high-crime” character of an area).

19. See, e.g., Hannah Rose Wisniewski, *It’s Time to Define High-Crime: Using Statistics in Court to Support an Officer’s Subjective “High-Crime Area” Designation*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 106 (2012).

20. *Wright I*, 485 F.3d at 53 (“We see no reason to treat the character of the stop’s location as other than a factual issue.”).

21. *People v. Jackson*, 979 N.E.2d 965, 973–74 (Ill. App. Ct 2012), appeal denied, 982 N.E.2d 772 (Ill. 2013) (“[T]he trial court’s factual findings, concerning whether this is or is not a high-crime area, are entitled to a great deal of deference.”).

22. *Wright I*, 485 F.3d at 53; *United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004) (applying clearly erroneous standard to trial courts finding that incident did not take place in a *high-crime area*).

23. *Wright I*, 485 F.3d at 53.

24. *Id.*

25. *Id.* at 50 (“I do not conclude on this evidence that the area is a, quote, high crime area, close quote. Primarily because I’m not clear what that is.”) (quoting colloquy from the trial court).

26. *Id.* at 53.

crime” because the trial judge does not know what that means.<sup>27</sup> Turning a blind eye to the *high-crime area* issue because a judge cannot figure out “what that means” presents an unassailable obstacle to developing a uniform evidentiary scheme to test the claim that a *stop and frisk* took place in a *high-crime area*. This obstacle is clear in *Wright I* and *Wright II*.<sup>28</sup> But the obstacle presented in *Wright I* and *Wright II* becomes irrelevant if city councils take on the responsibility of designating *high-crime areas*.

The troubles with *high-crime areas* did not come out of the blue.<sup>29</sup> Ever since *Wardlow* was decided in 2000, judges, practitioners, and scholars have expressed concerns about the abuse of the *high-crime area* factor in the Fourth Amendment analysis.<sup>30</sup> The recently settled case *Floyd v. The City of New York*<sup>31</sup> brings these concerns into a novel and stark contrast in the context of a § 1983 claim for the systematic abuse of, among other things, the *high-crime area* factor in the NYPD’s *stop-and-frisk* protocols.<sup>32</sup> *Floyd* muddied an already cloudy question by adding another problem: At what point does the abuse of *high-crime area* claims become a policy or practice such that a municipality itself is liable for deprivations of constitutional rights under color of state law?<sup>33</sup>

In *Floyd*, District Judge Shira A. Scheindlin attempted to answer this question,<sup>34</sup> and in doing so she begged for a reconsideration of *high-crime area* jurisprudence. Judge Scheindlin concluded that institutional police pressures to increase stops coupled with department

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27. *United States v. Wright (Wright II)*, 582 F.3d 199, 219–20 (1st Cir. 2009) (noting the “troubling inconsistencies in the trial court’s remarks.” The trial court refused to find that the area was “high-crime” under *Wardlow* while recognizing that the officers were competent to ascribe significance to the character of the area.) (Lipez, J. dissenting).

28. The discussions of “high-crime” areas in *Wright I* and *Wright II* are dicta as the trial courts refused to make a finding on whether the Dorchester area of Boston was a “high-crime area” probably because the trial courts did not know what a “high-crime area” was and because the appellate courts did not direct the trial courts to reconsider the question on remand. *Wright I* and *II* are examples of how the regime that has evolved since *Wardlow* is unworkable because the colloquies from the trial court, the dicta, and dissents clearly show that the alleged “high-crime” character of the Dorchester area of Boston was a factor in the officers decision to stop and frisk Wright even though the trial and appellate courts refused to make explicit findings on whether Dorchester was a “high-crime area” or not.

29. *See, e.g., Illinois v. Wardlow*, 528 U.S. 124, 139 (2000). (Stevens, J., dissenting) (“[P]resence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.”).

30. *See generally supra* text accompanying notes 12–13.

31. As of this writing it is not known whether the Second Circuit Court of Appeals will allow various police unions to intervene in the appeal dropped by the city of New York.

32. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013), *appeal dismissed*, (Sept. 25, 2013).

33. *See id.*

34. *See id.*

stop-and-frisk practices created a “predictable formula for producing unjustified stops.”<sup>35</sup> In her analysis, Scheindlin considered the UF-250 form—the form that NYPD officers submitted after conducting routine *stop and frisks*.<sup>36</sup> This form tracked the justification for the *stop and frisks* by providing boxes, which corresponded to categories of “articulable facts” that gave rise to the officer’s “reasonable suspicion that criminal activity [was] afoot.”<sup>37</sup> The admittedly conservative analysis showed that of the more than 200,000 UF-250 forms submitted on unjustified stops, *high-crime area* was checked more than any other factor listed.<sup>38</sup> Her conclusion that this “predictable formula” constituted a § 1983 violation begs a reconsideration of the most significant ingredient in this formula, the *high-crime area* factor.

The constitutionality of considering a suspect’s presence in a *high-crime area* in Fourth Amendment analysis was definitively decided by the Supreme Court in *Wardlow*.<sup>39</sup> Though the alleged § 1983 violations in *Floyd* were not limited to *high-crime areas*, the role of that factor in the NYPD’s systematic Fourth and Fourteenth Amendment violations cannot be ignored, nor can the inherent temptation to use *high-crime areas* as a pretext for racial profiling and other impermissible police tactics.<sup>40</sup> *Floyd* makes very real the fear that citizens’ right to be free from unreasonable searches and seizures will be routinely violated merely because they are on the wrong side of the proverbial tracks.<sup>41</sup> Since a scheme of unequal Fourth Amendment protection is currently the reality, it is imperative that the parameters of that inequality be clearly defined, simple to apply, and carry the imprimatur of the democratic process.

The legislative solution proposed in this Article will foreclose the legion of problems associated with *high-crime areas*. These problems stem from the fact that considering the character of an area does not fit with the requirements of *Terry*, namely that an officer be able to point to “specific articulable facts” to justify a *stop and frisk*.<sup>42</sup> The claim that a suspect was in a *high-crime area* is not specific, and as *Wright I* and *Wright II* show, it is very difficult to articulate.<sup>43</sup> Because they are categorical claims, *high-crime areas* are simply unlike the facts considered in a traditional Fourth Amendment totality-of-the-circumstances analysis.<sup>44</sup> When listening to the litany of factors given

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35. *See id.* at 602.

36. *Id.* at 559.

37. *Id.*

38. *Id.*

39. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

40. *See generally Floyd*, 959 F. Supp. 2d at 556.

41. *See id.*

42. *See Terry v. Ohio*, 392 U.S. 1, 20–21 (1968).

43. *See United States v. Wright (Wright I)*, 485 F.3d 45, 53 (1st Cir. 2007); *United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004).

44. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996).



by a police officer, it is easy to point to which one of these things is not like the others. Given that *high-crime areas* do not comport with traditional Fourth Amendment analysis, coupled with the fact that the point of *stop and frisks* is to protect individual police officers and public safety, it is not surprising that trial courts tend to defer to police officers' impressions.<sup>45</sup>

Instead of merely deferring to police officers' claims that a suspect was in a *high-crime area*, city councils, relying on statistical data and public sentiment, should designate which particular areas are *high-crime areas*. Doing so would shield police officers from liability when conducting *stop and frisks* in these legislatively designated *high-crime areas*.<sup>46</sup> It would also provide certainty to the citizens in the ghetto, to police officers walking the beat, and to federal judges hearing motions to quash and § 1983 claims, where the issues are unjustified *stop and frisks*. This legislative solution would remove a constitutionally problematic factor from the police officer's calculus, thus increasing officer safety by reducing officers' hesitation.<sup>47</sup> Finally, assigning the *high-crime area* designation to the political process would provide transparency and could also foster political involvement by those most affected by crime.

### III. LEGISLATIVE DESIGNATIONS WILL SIMPLIFY MUNICIPAL LIABILITY BASED ON FOURTH AMENDMENT VIOLATIONS

42 U.S.C. § 1983 imposes civil liability on anyone who, acting under color of state law, deprives a citizen of his or her constitutional rights.<sup>48</sup> Based on actions taken under their official capacity, state officers' may be held personally liable under § 1983.<sup>49</sup> A *stop and frisk* undoubtedly can form the basis for a § 1983 claim against an individual officer.<sup>50</sup>

Damages for successful § 1983 claims can reach into city coffers as well.<sup>51</sup> In *Monell v. New York City Department of Social Services*, the Supreme Court held that municipalities may be held vicariously liable

45. See Ferguson & Bernache, *supra* note 12, at 1590.

46. See Coward v. Town & Vill. of Harrison, 665 F. Supp. 2d 281, 305 (S.D.N.Y. 2009) (declining to find individual employees of city liable under § 1983 absent a showing of personal involvement in the deprivation of constitutional rights motivated by racial discrimination). See also Oliver v. Univ. of Conn. Health Care, 292 F. Supp. 2d 398, 410 (D. Conn. 2003) (noting requirement for personal involvement in deprivation as a prerequisite for damages under § 1983).

47. See generally Dunaway v. New York, 442 U.S. 200, 213–14 (1979).

48. 42 U.S.C. § 1983 (2006).

49. Hafer v. Melo, 502 U.S. 21, 31 (1991).

50. See Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D. N.Y. 2013); see also El-Ghazzawy v. Berthiaume, 636 F.3d 452, 460 (8th Cir. 2011); Verdier v. Borough, 796 F. Supp. 2d 606, 631 (E.D. Pa. 2011).

51. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978); see also *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011); *Cash v. Cnty. of Erie*, 654 F.3d 324, 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

under § 1983 for the actions of their officials even if the action, which visited the deprivation of constitutional rights, did not receive “formal approval through the body’s official decision-making channels.”<sup>52</sup> Clearly the individual police officer walking the beat is neither a lawmaker nor a policymaker of the municipality.<sup>53</sup> But, affirmative policies are not the only municipal actions that create § 1983 liability.<sup>54</sup> A municipality’s inaction regarding constitutional violations by its officers can have the “force of law” sufficient to subject the municipality to vicarious liability under § 1983.<sup>55</sup> The *Monell* question is whether the officer is acting pursuant to a municipal policy, custom, or practice such that the municipality as well as the individual officer is liable under § 1983 for the violation of a citizen’s constitutional rights.<sup>56</sup>

The question of municipal liability is not an easy one.<sup>57</sup> It is made more difficult in light of *Wardlow*.<sup>58</sup> With the current practice, in order to decide if the municipality is liable for damages under § 1983, courts are required to parse out when an officer’s *stop and frisk* of a suspect in a *high-crime area* is pursuant to a municipal policy (or tacit inaction sufficient to carry the “force of law”) and when the officer’s *stop and frisk* is not.<sup>59</sup> This is precisely the question in *Floyd*.<sup>60</sup> It took Judge Scheindlin over 100 pages to conclude that the City of New York was liable for the actions of its police officers under *Monell*.<sup>61</sup> Part of the problem with *Floyd* is that the opinion does not meet the *high-crime area* problem head on.<sup>62</sup> The *high-crime area* problem becomes two-fold when both the initial determination of the *high-crime area* and the judicial review are opaque.

*Floyd* demonstrates that *Monell* and *Wardlow* make strange bedfellows.<sup>63</sup> Where the predicate constitutional violation for a § 1983 claim

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52. *Monell*, 436 U.S. at 691.

53. See *Woodley v. Town of Nantucket*, 645 F. Supp. 1365, 1377 (D. Mass. 1986).

54. See *Cash*, 654 F.3d at 334.

55. *Id.*

56. *Monell*, 436 U.S. at 690–91.

57. *Id.*; see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563–64 (S.D.N.Y. 2013); *Los Angeles Cnty., Cal. v. Humphries*, 131 S. Ct. 447, 453 (2010) (concluding that *Monell’s* “policy or custom” requirement applies to prospective as well as monetary relief); *Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989) (discussing the potential for municipal liability that may arise from inadequate training); *Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011) (declining to extend municipal liability for failure to train prosecutors on *Brady* requirements).

58. See *Floyd*, 959 F. Supp. 2d at 580.

59. See *Humphries*, 131 S. Ct. at 453 (concluding that as long as a plaintiff can show a policy or practice there may be prospective or monetary relief).

60. *Floyd*, 959 F. Supp. 2d at 556.

61. *Id.* at 658.

62. *Id.* at 556 (*Floyd* addressed systematic violations of Fourth and Fourteenth Amendment rights under a general “stop and frisk” policy, not the acute challenge to the use of “high-crime areas” in the “stop and frisk” policy.).

63. See *id.*

is an unjustified *stop and frisk* premised on the suspect's presence in a *high-crime area*, deference to the officer's *ad hoc* determination that the area is sufficiently *high crime* to be constitutionally significant creates considerable uncertainty for all the parties involved. Is a finding that an area is *high crime* binding on later § 1983 litigation? If so, how specific must those findings be? How much experience must law enforcement officers have to merit deference to their judgment? How many articulable factors are required to conduct a constitutional *stop and frisk* in a poor neighborhood? How does a federal judge hearing a § 1983 claim know whether to simply hold the officer liable or to extend the liability to the municipality under *Monell*? Or does judicial deference to law enforcement officers' *high-crime area* claims weigh in favor of a finding that there is a policy or practice sufficient to carry the force of law such that the district judge hearing the § 1983 claim may find the municipality liable? If city councils simply designate which areas are "high crime" relative to permissible *stop and frisks*, then all these questions will be foreclosed.

Not only do the *high-crime areas* confuse the question of municipal liability, it also is bad policy to give law enforcement officers the discretion to determine if their suspect is in a *high-crime area* and then to subject them to civil liability for exercising that discretion.<sup>64</sup> It is an even worse policy to simply turn a blind eye to violations of constitutional rights committed under color of law.<sup>65</sup> If § 1983 claims for pretextual *stop and frisks* are taken seriously, then encouraging officers to use their discretion and then second guessing the exercise of that discretion under the threat of civil liability will create considerable uncertainty on the streets and in the courtroom. Police officers must act quickly and second guessing their actions in federal court creates doubt and hesitation.<sup>66</sup> This uncertainty would be eliminated if *high-crime areas* were definitively designated by city councils because the officers would know for sure when their suspects are actually in *high-crime areas*, and that designation would carry the weight of the political process. The officers would know when a suspect is in a *high-crime area* with certainty and would not hesitate to *stop and frisk* a suspect based on a suspicious furtive movement. And considerable judicial resources will be conserved by simple deference to legislative designation of which areas are *high-crime* rather than spending

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64. *Tanner v. San Juan Cnty. Sheriff's Office*, 864 F. Supp. 2d 1090, 1116 (D.N.M. 2012); *see, e.g., Hoitt v. Vitek*, 497 F.2d 598, 600 (1st Cir. 1974) (declining to second-guess correction officers decision to lockdown a prison); *Gibson v. Charlottesville-Albemarle Joint Sec. Complex*, 401 F. Supp. 544, 546 (W.D. Va. 1975) (declining to second-guess treatment decisions of prison medical personnel).

65. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (finding municipal liability under § 1983 when policy makers are deliberately indifferent to the need for adequate training).

66. *See Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

time considering various pieces of evidence proffered to support a *high-crime area* claim.

Similarly, a legislative designation would make the decision on municipal liability an easier one: An officer who goes rogue and subjects citizens to *stop and frisks* outside the legislatively designated *high-crime areas* without individualized suspicion would clearly not expose their departments or the municipalities to *Monell* liability because it would be obvious that she is acting contrary to municipal policy embodied in the legislative designations.<sup>67</sup>

As *Floyd* demonstrates, *stop and frisk* procedures and justifications create a tension between crime prevention and officer safety on the one hand, and protection of civil liberties, namely Fourth Amendment rights, on the other.<sup>68</sup> This tension is made unnecessarily problematic by the constitutional significance that attaches to presence in a *high-crime area*.<sup>69</sup> The current practice of deferring to an officer's *ad hoc* determination that a suspect is in a *high-crime area* makes the question of whether to hold the municipality liable under § 1983 almost impossible.<sup>70</sup> By relieving the officer of the task of determining what is and is not a *high-crime area* and assigning that designation to city councils the § 1983 liability is clear. The officer is either acting pursuant to the municipal policy or practice when relying on *high-crime area* designations or is not. If an officer's *stop and frisk* is not conducted within one of the legislatively designated *high-crime areas* without particularized suspicion and the Fourth Amendment violation is not collaterally estopped by the findings in the suppression hearing,<sup>71</sup> only that officer is liable, not the city or police department.<sup>72</sup> *Floyd* is but one example of the problems created by the inherent uncertainty in the scheme created post-*Wardlow*. Legislative designations would not only remove the uncertainty of *high-crime areas* in § 1983 claims but also in traditional Fourth Amendment forums.

#### IV. LEGISLATIVE DESIGNATIONS OF HIGH-CRIME AREAS COMPORT WITH FOURTH AMENDMENT JURISPRUDENCE

Legislatively designated *high-crime areas* not only provide for greater certainty within the context of § 1983 claims, they also square with several Fourth Amendment policies and precedents. In his much cited article "*Case-by-Case Adjudication*" versus "*Standardized Procedures*": *The Robinson Dilemma*, Professor Wayne R. LaFave discusses

67. See *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690–91 (1978).

68. *Floyd*, 959 F. Supp. 2d at 556.

69. *United States v. Wright (Wright I)*, 485 F.3d 45, 53 (1st Cir. 2007).

70. See *Floyd*, 959 F. Supp. 2d at 540.

71. *Allen v. McCurry*, 449 U.S. 90, 101 (1980) (holding that principles of *res adjudicata* preclude a § 1983 suit where the predicate constitutional violation was alleged unreasonable search and seizure found valid by a prior suppression hearing).

72. *Monell*, 436 U.S. 690–91.

the tension highlighted by the Court's grant of generalized authority to search incident to arrest.<sup>73</sup> The tension was between the long history of case-by-case adjudication and the practical concerns of police in the field.<sup>74</sup> Professor LaFave notes that although a test that weighs a multitude of factors might be theoretically perfect, the reality of law enforcement practice and Fourth Amendment guarantees require rules with more clarity than sophistication.<sup>75</sup> Though the article focuses on searches incident to arrests, the authority to search incident to arrest is no less generalized under *Robinson* than are *high-crime area* claims categorical under *Wardlow*.<sup>76</sup> Furthermore, the temptation to arrest for a minor violation as pretext to search a suspect, which attends the generalized grant of authority to search incident to arrest, is analogous to the temptation to throw out the categorical claim that an area was *high crime* to bolster a less than reasonable suspicion that criminal activity was afoot.<sup>77</sup> Moreover, the same concerns and policy considerations apply to the *high-crime area* justification: officer safety and pretext.<sup>78</sup>

Officer safety is a valid and constitutionally significant policy consideration.<sup>79</sup> It is bad policy to ask police to carefully balance a multitude of factors before frisking a suspect because such a requirement would cause the officer to hesitate thereby jeopardizing her safety.<sup>80</sup> It is good policy to have clear rules understandable by police (and citizens alike) so that police can take swift, decisive action to secure their own and the public's safety.<sup>81</sup>

Legislative designation of *high-crime areas* will enable police to take swift, decisive action based on a sole articulable factor that criminal activity is afoot so long as that encounter takes place in a legislatively

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73. Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 132 (Philip B. Kurland ed., 1974).

74. *Id.* at 141.

75. *Id.*

76. The dissent in *Robinson* pointed out that the generalized authority to search incident to an arrest was "a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 239 (1973) (Marshall J., dissenting). Similarly the dissent in *Wardlow* was troubled by the generic nature of flight and "high-crime areas." *Illinois v. Wardlow*, 528 U.S. 119, 139 (2000). (Stevens J., dissenting).

77. *Accord* LaFave, *supra* note 73, at 132; Herbert, *supra* note 12, at 136.

78. *See* LaFave, *supra* note 73, at 148.

79. *Terry v. Ohio*, 392 U.S. 1, 23–24 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) ("What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.") (per curiam); *Brendlin v. California*, 551 U.S. 249, 258 (2007).

80. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.")

81. *Id.*

designated *high-crime area*.<sup>82</sup> The certainty of the legislative solution will embolden police to act without hesitation because the officers will know that their consideration of the *high-crime area*, when deciding to *stop and frisk* a suspect, is sanctioned by the democratic process.<sup>83</sup> Moreover, legislative designations would put both the culpable and the innocent alike on notice that they are in fact in a *high-crime area* and are thus a single innocuous movement away from a nonconsensual and potentially unpleasant police encounter.<sup>84</sup>

The temptation for pretext presented by *high-crime areas* is no less than the temptation for pretextual arrests discussed by Professor LaFave.<sup>85</sup> In his article, Professor LaFave proposed excluding everything but weapons when the justification for a *stop and frisk* is officer safety.<sup>86</sup> His solution of excluding everything but weapons would have fundamentally altered the scope and application of the exclusionary rule.<sup>87</sup> Although Professor LaFave's solution would surely have eliminated the temptation to use officer safety as a pretext for unjustified intrusions on Fourth Amendment rights, it gained little traction.<sup>88</sup> Similarly, by eliminating the *ad hoc* character of a *high-crime area* claim, the legislative solution eliminates the risk that such a claim will be pretext for discriminatory *stop and frisks*. When police are not walking the beat in a legislatively designated *high-crime area*, they will have to show the requisite individualized suspicion that criminal activity is afoot that was required prior to *Wardlow* in order to justify a *stop and frisk*.<sup>89</sup>

The legislative solution has an advantage over other proposed solutions to the *high-crime area* dilemma because, where other solutions resolve the uncertainty further down the line in court or in the police station, the legislative solution resolves the uncertainty before it can

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82. *Illinois v. Wardlow*, 528 U.S. 119, 125–26 (2000) (deference to legislative designations of a “high-crime area” does not violate the stricture in *Wardlow* that neither flight nor presence in a “high-crime area” standing alone is sufficient to justify a “stop and frisk” because the government would still have to point to one additional articulable fact indicating that criminal activity was afoot).

83. See Part III *supra*.

84. See *Wardlow*, 528 U.S. at 125 (stating flight in a “high crime area” justifies a “stop and frisk”); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013) (noting furtive movement and “high-crime area” were the most commonly checked boxes on the UF-250 forms to justify a “stop and frisk”).

85. LaFave, *supra* note 73, at 155 (Professor LaFave explains that the temptation to arrest for a minor traffic violation as a pretext for a search has the same justification as presented in *Wardlow*, that is: search for weapons and officer safety.).

86. *Id.* at 156 (To date the exclusionary rule is an all or nothing proposition as the Court has declined to allow the justification for a particular type of Fourth Amendment stop or search to dictate the type of evidence admissible at trial as Professor LaFave suggested in the Robinson Dilemma.); see also LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the “Quagmire,”* 8 CRIM. L. BULL. 9, 30 n.76 (1972).

87. LaFave, *supra* note 73, at 156.

88. *Id.* at 163.

89. See *Terry v. Ohio*, 392 U.S. 1, 23–24 (1968).

cause confusion on the streets or in the courtroom. Andrew Guthrie Ferguson and Damien Bernache suggest a solution to the problems with the *high-crime area*. Their solution is:

[R]equiring an empirical and verifiable factual basis to support the assertion that an area or neighborhood is a “high-crime area” before that information may be used to evaluate a Fourth Amendment stop. This evidence of the character of the area must be specific to the crime charged. Furthermore, this objectively based knowledge must not only be known to the individual officer, but must be known *before* making the contested Fourth Amendment stop. In this way, the character of the area will be directly and relevantly linked to the otherwise ambiguous actions observed by the police officer. This objective factual basis can be established with existing data regularly collected by law enforcement organizations. Intriguingly, this solution was suggested by the National Association of Police Organizations, Policemen Benevolent and Protective Association of Illinois (“NAPO”) in its amicus brief before the Supreme Court in the *Wardlow* case.<sup>90</sup>

By requiring the geographic and temporal bounds of a *high-crime area* to be drawn at the police station and the nexus to the investigated crime drawn on the streets, Ferguson and Bernache take on the dilemma at a different place in the process. Moreover, Ferguson and Bernache take a slightly different approach to framing the *high-crime area* problem.<sup>91</sup> They focus on defining what a *high-crime area* is and how courts should make that finding.<sup>92</sup> They cite several different approaches from various jurisdictions, ranging from mere deference to police testimony to judicial notice to requiring arrest reports that support the claim that a *stop and frisk* took place in a *high-crime area*.<sup>93</sup> Since their concern is what is required for a court to find that an area is indeed *high crime*, it is not surprising that their solution amounts to requiring verification of the claim that the police intervention took place in a *high-crime area*.<sup>94</sup> Ferguson and Bernache propose a verification method that goes beyond simply pointing to general crime data that supports the allegation that an area is *high crime*; instead their solution requires a nexus between the types of crime in the area and the particular crime that the law enforcement officer happens to be investigating.<sup>95</sup>

While their solution is an effective safeguard against pretextual claims of presence in *high-crime areas*, it does not square with the jus-

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90. Ferguson & Bernache, *supra* note 12, at 1595 (emphasis omitted) (footnote omitted).

91. *Id.* at 1606–07 (exploring the “definitional problem of the high-crime area terminology”).

92. *Id.* at 1605–07.

93. *Id.* at 1607–09.

94. *See id.* at 1623–40.

95. *Id.* at 1635.

tification for *stop and frisks* provided by the Court in *Terry*, namely concerns for officer safety based on a suspicion that the suspect may be armed.<sup>96</sup> The empirical data regularly collected by law enforcement organizations, though useful in investigating crime and deploying officers, does little to inform the individual officer's suspicion that a specific suspect may be armed. It is more likely that officers' subjective experiences will bear more on their decisions than will lengthy crime data reports that the officers may or may not remember.<sup>97</sup>

Because Ferguson and Bernache's solution views the problem from the courtroom, it fails to consider the actual effect requiring empirical verification will have on the individual officer discharging their duties. The empirical solution does little to provide police with the clarity and certainty they need in order to discharge their duties without hesitation.<sup>98</sup> This "theoretically perfect" solution is not practical from a law enforcement standpoint.<sup>99</sup> A police officer faced with a potentially dangerous situation cannot be expected to recall the current crime-mapping statistics before acting, let alone discern a nexus between the crime he or she is investigating and the incidents of that type of crime in the particular neighborhood reflected in the current crime-mapping report. This tension between sophistication and simplicity is precisely the problem that Professor LaFave discussed in *The Robinson Dilemma*.<sup>100</sup> Although Ferguson and Bernache's solution gets at precisely what a *high-crime area* looks like with statistical sophistication and precision, the reality of *high-crime areas* within Fourth Amendment jurisprudence requires simplicity and clarity that a statistically precise and sophisticated standard cannot provide.<sup>101</sup> Law enforcement officers walking the beat can no more be expected to carefully balance Fourth Amendment rights against interests in ferretting out crime than they can to measure statistical analyses and identify a nexus between that data and their investigation.<sup>102</sup> Police must act

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96. *Terry v. Ohio*, 392 U.S. 1, 23–24 (1968).

97. See generally Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 753 (2010) (noting the tension between officers' subjective experience and training and the Supreme Court's "admonition that probable cause and reasonable suspicion are to be measured in objective terms").

98. See LaFave, *supra* note 73, at 141.

99. See *supra* pp. 574–75.

100. LaFave, *supra* note 73, at 143 (noting that the difficulty officers face when making the decision to "stop and frisk" based in part on presence in an alleged "high-crime area" i.e. drawing the geographic and temporal grounds of the area and discerning a nexus between the prevalence of the crime the officer is investigating in that area is analogous to the difficult task of making a separate probable cause determination for a search for evidence after an arrest).

101. See *id.*

102. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).



quickly, and Ferguson and Bernache's solution will cause them to hesitate.

If Ferguson and Bernache's approach requiring objective verification of the *high-crime area* as adopted by the First Circuit takes hold, the law could develop in one of two ways. Courts may continue to defer to law enforcement's subjective impressions under judicial notice or a less rigorous analysis. Alternatively, courts may subject the proffered data verifying an officer's *ad hoc* determination to rigorous scrutiny. The former would leave the risk of unconstitutional seizures visited under color of state law undisturbed. The latter would require the expenditure of considerable judicial resources as the evidentiary hearings previously limited to a Fourth Amendment reasonableness analysis could open the door to *Daubert* motions challenging the statistical reliability of the objective data proffered to support the officers' determinations.<sup>103</sup> A simple legislative designation of *high-crime areas* would protect Fourth Amendment rights while conserving judicial resources by making this empirical verification unnecessary.

That is not to say that crime-mapping technology and statistical reports have no place in solving the *high-crime area* problem. To be sure, the data collected by law enforcement organizations should be put to use in designating which areas are *high crime*, but that data should be considered by more deliberate bodies—city councils. City councils are in a much better position to consider the data and weigh it against public sentiment before they designate an area as *high crime*. City councils' use of such information would not be limited to merely designating which areas are *high crime*, it would be useful for budgeting and various other community projects.

#### V. CITY COUNCILS ARE THE PROPER BODIES TO DESIGNATE *HIGH-CRIME AREAS*

City councils are best suited to designate what is and is not a *high-crime area* because city councils are in the best position to review relevant crime data, have a stake in such designations, and consider public sentiment in alleged high-crime areas. Moreover, as a democratically elected body, city councils' *high-crime area* designations would carry the weight of the political process and would thus be more deserving of judicial deference.<sup>104</sup>

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103. See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993) (providing the standard for evaluating scientific and technical expert testimony under the Federal Rules of Evidence).

104. See *Graham v. Florida*, 560 U.S. 48, 87, (2010) (“This ‘narrow proportionality principle’ does not grant judges blanket authority to second-guess decisions made by legislatures . . . .”); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 488 (2005) (“[W]e decline to second-guess the City’s considered judgments about the efficacy of its development plan . . . .”); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun J., concurring) (“[T]he Court will not second-guess legislative judg-

While an individual police officer is not in a position to carefully consider crime-mapping reports and statistical analysis when determining what is and is not a *high-crime area*,<sup>105</sup> a city council is. Legislatures, such as city councils, are far more deliberate bodies than individual police officers.<sup>106</sup> Professor LaFave's insight into why Fourth Amendment rules should be more clear than sophisticated does not apply to legislative bodies.<sup>107</sup> While a police officer needs to make swift decisions without hesitation, the meetings of legislatures are deliberate and methodical by design.<sup>108</sup> Thus, city councils and other legislative bodies are in the best position to consider the types of data that Ferguson and Bernache suggest be used in evidentiary hearings to verify a police officer's claim that an area is *high crime*.

Though objective crime data would certainly inform city council's designation of *high-crime areas*, nothing would prevent a city council from considering public sentiment in its decisions. Legislatively designated *high-crime areas* would give city councils another method of responding to public concerns about crime rates. City councils would certainly give due weight to citizens' concerns about security, property values, and police practices when deliberating which areas call for the *high-crime area* designation.

Crime is a subject of great public interest. New York Mayor Bill de Blasio has been accused of "playing politics with public safety" by settling *Floyd*.<sup>109</sup> But politicizing crime rates is nothing new.<sup>110</sup> Crime rates have been and continue to be common issues in political campaigns. Candidates often deride their opponents as being "soft on

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ment about their importance in comparison with related burdens on interstate commerce.").

105. See *supra* p. 569.

106. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1796–97 (2001) (noting that "the vagueness doctrine serves to push responsibility for constitutionally troublesome judgments about criminality away from individual law enforcement officers (as well as individual prosecutors, courts, and juries) onto the agenda of more representative, more accountable, and more deliberative lawmaking assemblies.").

107. See LaFave, *supra* note 73, at 141.

108. Compare *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."), with *Furman v. Georgia*, 408 U.S. 238, 465 (1972) (noting that the slowness of legislatures is no reason for judicial interference in matters of lawmaking), and *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012), *reh'g denied* (Sept. 21, 2012) ("This Court presumes that "legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact.").

109. Heather Mac Donald, *Re-breaking the Windows*, CITY J. (Jan. 31, 2014), <http://www.city-journal.org/2014/eon0131hm.html>.

110. See Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 532 (1996).

crime,” even if that derision is false and ineffective.<sup>111</sup> It almost goes without saying that these concerns will remain the subject of electioneering, debates, and other political forums when it is time to elect local councilpersons. But a legislative solution would bring a certain measure of transparency to a municipality’s police policy. This transparency coupled with democratic authorization of *high-crime areas* could help heal the rift between police and community that exists in some large metropolitan areas. A legislative solution may even prompt greater political participation and voter turnout.

While the effect that a legislative solution would have on political participation and voter turn-out is highly speculative, citizens whom crime affects and those whose Fourth Amendment rights are diminished because of where they live ought to have their voices heard when certain neighborhoods are designated as *high crime*. Since crime is so prevalent in political discourse and the Court has ruled that the character of a particular area is a constitutionally significant factor in Fourth Amendment analysis,<sup>112</sup> it is appropriate for the democratic process, not an *ad hoc* determination of law enforcement, to address the question of which areas are *high crime* under *Wardlow*. Legislative designations of *high-crime areas* would address public sentiment regarding crime by providing a democratic response to public uproar that crime in certain neighborhoods deserves increased attention.

Where an individual police officer’s determination of a *high-crime area* is subject to criticism as being a pretext for discrimination and impermissible hunches,<sup>113</sup> a city council’s decision cannot be ascribed to an inarticulate hunch because most city council deliberations are recorded in minutes and are open to the public.<sup>114</sup> Furthermore, the dangers of pretextual designations would be eliminated by the objective data that would inform the decision and the public sentiment that drives the election of councilpersons and their deliberation. Individuals affected by either high crime rates or oppressive police *stop and frisk* policies could express their concerns at the voting booth. Like any other issue of public concern, crime and the mechanisms of combating crime should be given the opportunity to play out in the democratic process, especially when the mechanism involves a scheme of unequal constitutional protection.

By using legislative designations of *high-crime areas* in concert with the exercise of other traditional duties and strategies, city councils

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111. See H. Lee Sarokin, *Tough on Crime/Soft on Crime: Redefining the Labels*, 29 HUM. RTS. 7, 7 (2002).

112. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000).

113. See *United States v. Rideau*, 969 F.2d 1572, 1583 (5th Cir. 1992) (en banc) (Smith, C.J., dissenting).

114. E.g., FLA. STAT. § 286.011 (2013); GA. CODE ANN. § 50-14-1 (2013); IOWA CODE § 21.3 (2004); KY. REV. STAT. ANN. § 61.835 (LexisNexis 2004); NEB. REV. STAT. § 84-1413 (2013); N.C. GEN. STAT. ANN. § 143-318.10 (West 2013).

could provide a concerted response to public outcry regarding crime rates in many cities. Judicial deference to concerted actions of deliberate democratically elected bodies is more consonant with principles of comity than is deference to on-the-spot determinations by individual police officers.<sup>115</sup>

Legislative designations put the imprimatur of the democratic process on *stop and frisk* policies designed to combat crime in certain areas. Although it is far from clear how legislative designations of *high-crime areas* would play out in the context of a § 1983 claim, like *Floyd*, two things seem very likely: (1) the legislative designations would deserve considerably more deference than the *ad hoc* determinations of individual police officers;<sup>116</sup> and (2) municipal liability would be clear because the existence of a policy or practice sufficient to carry the force of law under *Monell* would be certain.<sup>117</sup>

Moreover, if a municipality can potentially be held liable under *Monell* for the police department's use of *high-crime areas* in *stop and frisk* policies then the municipality has a clear stake in the designation of these *high-crime areas*. If a city's funds are at stake when police conduct *stop and frisks* in *high-crime areas* the city's governing body should have a say in how these areas are designated. It could be argued that city councils even have a duty to consider how their police departments are employing the *high-crime area* factor because law enforcement's use of *high-crime areas* can expose the municipality to § 1983 liability.<sup>118</sup> Far from stepping on the toes of the executive, making *high-crime area* designations part of the political process squares with separation of powers principles.

As an arm of the executive, law enforcement officers are charged with enforcing the law, not with making judgments that effectively diminish a class of citizen's constitutional rights.<sup>119</sup> The Constitution does not permit executive officers to make *ad hoc* decision that an individual cannot own a gun but it does permit legislatures to control who cannot carry a gun in certain areas.<sup>120</sup> Similarly, a decision that

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115. Compare *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451–52, (2002) (deferring to city council's finding that the secondary effects of adult oriented businesses justified a restrictive zoning ordinance), with *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that *de novo* review of general matter determinations of reasonable suspicion and probable cause).

116. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 105 (2007) (arguing that political process theory demands that general suspicionless searches and seizures, such as administrative searches and random drug tests should receive rational basis review).

117. See *supra* Part III.

118. See *supra* Part III.

119. See U.S. CONST. art. II.

120. See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws impos-

diminishes Fourth Amendment guarantees should not be entrusted to the individual agent of the executive but rather should be made by a legislative body.

Courts readily and properly defer to the actions of legislatures because legislatures are charged with the task of lawmaking and are democratically elected.<sup>121</sup> An individual law enforcement officer is neither democratically elected nor charged with the task of lawmaking. The current uncertainty with regard to *high-crime areas* and the lack of a uniform evidentiary standard often results in mere deference to an individual police officer's impression of the area.<sup>122</sup> By foreclosing an officer's *ad hoc* judgment that a suspect is in a *high-crime area*, a legislative designation also forecloses a court's unseemly deference to that decision.<sup>123</sup>

The *high-crime area* distinction under *Wardlow*, unlike most decisions of law enforcement that implicate the Fourth Amendment, is not individualized. Traditional Fourth Amendment analyses, especially *stop and frisk* analysis, entail scrutiny of "specific articulable facts that taken together would lead a reasonable police officer to believe that criminal activity is afoot."<sup>124</sup> The claim that an area is *high crime* is not a claim specific to the *stop and frisk* incident; rather it is a categorical claim. The categorical nature of designating certain areas as *high-crime areas* smacks of lawmaking and is thus more appropriate for legislatures than executives.

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ing conditions and qualifications on the commercial sale of arms."); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *cert. denied* 133 S. Ct. 1806 (U.S. 2013) ("[T]he state may ban firearm possession in sensitive places . . .").

121. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (noting that city councils are in a "better position than the Judiciary to gather and evaluate data on local problems."); *see Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (noting that "Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data."); *see generally Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (noting that state legislatures are just as deserving of judicial deference as congress when making public use determination).

122. *People v. Jackson*, 979 N.E.2d 965, 974 (Ill. App. Ct. 2012), *appeal denied*, 982 N.E.2d 772 (Ill. 2013) (finding that an officer's uncontradicted and undisputed testimony, which is accepted by the trial court, is sufficient to support a trial court's finding that the incident occurred in a high-crime area); *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) ("[I]t's a high crime area, because the officers say it's a high crime area.") (Kozinski, J., concurring); *United States v. Dell*, 487 F. App'x 440, 455 (10th Cir. 2012) (concluding that unchallenged officer testimony was sufficiently specific to indicate that investigatory detention took place in a "high-crime area").

123. *See generally* U.S. CONST. art. I, II, III (separation of powers principles dictate that legislatures, not executives, make laws such as designations of "high-crime areas").

124. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

## VI. CONCLUSION

Apart from the unequal scheme of constitutional protections they create, *high-crime areas* are fraught with problems arising from the vagueness and uncertainty of the distinction. Attaching constitutional significance to *high-crime areas* affects the rights of many innocent citizens who are only guilty of furtive movements. At the very least, the democratically elected representatives of those citizens should have a voice in deciding whether their Fourth Amendment rights will be diminished. Providing a democratic forum to vindicate Fourth Amendment rights with regard to *high-crime areas* will not only safeguard against pretextual *high-crime area* claims but also save considerable resources when the time comes to protect those rights in a judicial forum.

The recent *Floyd* case, its settlement, and the statements made by the Mayor and Police Commissioner bring into focus the inherent problems with attaching constitutional significance to a fact that is not specific to the incident that leads to a *stop and frisk*. Deciding when police department's use of *high-crime areas* to justify *stop and frisks* rises to the level of policy or practice is a laborious task as the lengthy *Floyd* opinion will attest.<sup>125</sup> The problem of determining municipal liability when police departments routinely rely on *high-crime* determination for *stop and frisks* is but one of the many problems with *high-crime areas*.<sup>126</sup>

The temptation to claim presence in a *high-crime area* as pretext for an unconstitutional *stop and frisk* is exacerbated by the uncertainty regarding what is a *high-crime area* and what is not, especially when courts tend to defer to the experience and judgment of police.<sup>127</sup> Although requiring rigorous after-the-fact verification that an incident took place in a *high-crime area* is an effective safeguard against claiming an area is *high crime* as pretext for discrimination, such rigorous verification does not comport with promoting officer safety and the need for officers to make quick decisions in the field.<sup>128</sup> The limited intrusions on Fourth Amendment rights are justified in the interest of protecting police officers and the need for officers to make quick decisions in the field.<sup>129</sup> Asking police to conduct an extensive calculus before stopping and frisking a suspect will create hesitation and thereby imperil the officer's safety.

Courts, scholars, and lawyers have exerted considerable resources to articulate and bring specificity to the *high-crime area* factor.<sup>130</sup> Designating an area as *high crime* is a categorical designation. Be-

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125. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D. N.Y. 2013).

126. See *supra* pp. 564, 572.

127. See cases cited *supra* note 16.

128. See *supra* Part IV.

129. *Terry*, 392 U.S. at 23–24.

130. See *United States v. Wright (Wright I)*, 485 F.3d 45, 50 (1st Cir. 2009).

cause of the categorical nature of *high-crime areas*, they defy the specific articulation that is the hallmark of reasonable-suspicion analysis. Instead of judges, police, and lawyers laboring to fit the square peg of *high-crime areas* into the round hole of reasonable-suspicion analysis, city councils should substitute their deliberate democratic judgment for that of law enforcement. This legislative solution will foreclose the legion of problems with *high-crime areas* that diminish Fourth Amendment protections, imperil police and public safety, and expend valuable judicial resources.