

THE WHITE FOURTH AMENDMENT

Paul Butler[†]

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I. THE FOURTH AMENDMENT AT WORK

There is a scene near the end of the Academy Award winning film *The Blind Side* in which the character played by Sandra Bullock has gone to a low-income, African-American neighborhood to find her black adopted son who has run away from home.¹ She does not find him, but her presence in the ghetto amuses and titillates another young black man who is hanging out on the corner. In *The Blind Side*, the black people who have not been rescued by white people mainly spend their time selling drugs or getting drunk or high.² This particular black man also seems to have a thing for white women. He calls Bullock’s character “snowflake” and propositions her. When she rebuffs him, he threatens her family. Sandra first walks away, and then she stops, turns around, and earns her Academy Award. She boldly approaches the black thug and says, “If you so much as set foot into downtown, you will be sorry. I’m in a prayer group with the district attorney, I’m a member of the NRA, and I’m always packing.” The thug asks jokingly whether she carries a Saturday night special or a .22. She answers, “It shoots just fine all the other days too.” Sandra then turns, clicks her heels, and walks back to her expensive car. The camera shows the black thug looking chastened, and the audience is made to understand that he will not be crossing into downtown.

This scene is emblematic of the values that the Fourth Amendment protects. One value is the perpetration, by law enforcement agents, of “white only” space. Another value is a construction of race in which non-whiteness (especially being black or brown) is criminal. To explain this

[†] Paul Butler, Associate Dean for Faculty Development and Carville Dickinson Benson Research Professor of Law, George Washington University. Earlier drafts of this paper were presented at the Texas Tech University School of Law Criminal Law Symposium and the John Hope Franklin conference at Duke Law School. I thank the participants in those conferences. Aaron J. Sussman provided excellent research assistance.

1. *THE BLIND SIDE* (Alcon Entertainment 2009).

2. *See id.* In a pivotal scene, for example, Sandra Bullock’s character pays a visit to her foster son’s biological mother, a black drug addict who cannot remember who her son’s father is. *Id.*

thesis, this article builds on the important work of several scholars, including many critical race theorists, who have written about the Constitution and race. This scholarship includes Devon Carbado,³ Frank Rudy Cooper,⁴ and Tracey Maclin's analysis of race-based policing,⁵ David Harris's indispensable scholarship on racial profiling,⁶ Cheryl Harris's description of whiteness as property,⁷ Mari Matsuda's jurisprudence on the racialized First Amendment,⁸ and Ian Haney Lopez's articles about the construction of whiteness.⁹ This article also draws on the work of Randall Kennedy, who bemoaned a "celebratory tradition" of examining the Constitution as it pertains to race.¹⁰ All of these scholars help us to understand the work that the Fourth Amendment is doing right now.

What do I mean by "The Fourth Amendment"?¹¹ I mean the Fourth Amendment as it lives today.¹² The Fourth Amendment is not "a form of words" on paper.¹³ It is, instead, a project by the Burger, Rehnquist, and Roberts Courts to expand the power of the police against people of color, especially blacks and Latinos. The project is shifting, contested, and usually—but not inevitably—successful. The Fourth Amendment is the familiar image of people who look Arab or Muslim being patted down by Transportation Security agents, of African-American men spread eagle

3. Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

4. Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

5. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

6. DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2003).

7. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

8. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

9. IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006).

10. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

11. See U.S. CONST. amend. IV.

12. See *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (citations omitted) ("[G]eneral limitations on the powers of government . . . do not forbid the United States or the states from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (describing our nation as "an organism" and therefore reasoning that constitutional cases "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago"); *Weems v. United States*, 217 U.S. 349, 373 (1909) ("[A] principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas."); *Cohens v. Virginia*, 19 U.S. 264, 387 (1821) ("[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.").

13. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

against a wall, or of a pickup truck with three Latinos being pulled over by the police.

In a sense, the order of Sandra Bullock's threats to the black man might be seen as a form of racial progress. First, there was the allusion to the "law," i.e., the district attorney, and only afterwards the reference to private violence, the gun that "shoots just fine."¹⁴ In the early twentieth century, extra-judicial lynchings were a principal response to perceived black criminality or unruliness.¹⁵ In the early twenty-first century, the criminal justice system itself can be invoked to do the same kind of racial policing of space.

If John Hope Franklin wrote his masterwork today, he would have to name it *From Slavery to Freedom to Prison*.¹⁶ There are approximately one million black people in prison.¹⁷ There are more African Americans under criminal justice supervision than there were slaves in 1850.¹⁸ One in three young black men has a criminal case.¹⁹

The part of the Constitution that is most responsible for these extraordinary racial disparities is the Fourth Amendment. If, to quote another movie, "stupid is as stupid does," the Fourth Amendment is the mass incarceration of people of color.²⁰

The Fourth Amendment accomplishes its racial project in three parts. First, the jurisprudence rarely mentions race. Next, it grants extraordinary discretion to police and prosecutors. Finally, it constructs the criminal as colored, and the white as innocent. This article proceeds as follows. Part II describes Fourth Amendment jurisprudence's willful blindness to race. Part III explores the discretion the Supreme Court has handed to police and prosecutors. Part IV discusses the amendment's equation of blackness with criminality.

II. WILLFUL COLOR-BLINDNESS

Fourth Amendment jurisprudence includes a series of race cases in which race is rarely mentioned. These cases, in the current Court, are a

14. THE BLIND SIDE (Alcon Entertainment 2009).

15. See SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 8-9 (2007).

16. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (7th ed. 1994).

17. Heather C. West, *Prison Inmates at Midyear 2009—Statistical Tables*, BUREAU OF JUSTICE STATISTICS 19 tbl.16 (2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2200>.

18. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 271 n.7 (2010) (citing Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: Pew Charitable Trusts, Mar. 2009); U.S. CENSUS BUREAU, THE SEVENTH CENSUS OF THE UNITED STATES: 1850, at xxxi tbl.X (1853)).

19. MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1, 3 (1995).

20. FORREST GUMP (Paramount Pictures 1994).

stylized conversation between Justices Scalia, Thomas, Roberts, Alito, and Kennedy that resemble a word game in which the contestant has to guess the category from clues that can never include the category's actual name.

In *Terry v. Ohio*, the Court held that police can briefly detain suspects on the basis of reasonable suspicion.²¹ Mr. Terry, an African American, was stopped by a white Cleveland police officer who claimed he suspected Mr. Terry was "casing" a jewelry store.²² The officer did not detain Mr. Terry, however, until he was walking away from the store and stopped to talk to a white man, Mr. Katz.²³ Cleveland police lore held that when a black man and a white man got together, they were likely to be planning a crime.²⁴

The NAACP Legal Defense Fund filed an amicus brief in which it said that concerns about disparate treatment of blacks were "unavoidably intertwined" with the issues in *Terry*.²⁵ The Court's opinion does not mention Terry or Katz's race, nor the police folklore.²⁶ The entire opinion contains only one almost parenthetical reference to race, in which it mentions "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain."²⁷

Shortly after finishing a proposed re-write of *Terry*, Justice Brennan wrote a letter to Chief Justice Warren in which he said:

I've become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present "aggressive surveillance" techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit [and] other ghetto cities. This is happening, of course, in response to the "crime in the streets" alarms being sounded in this election year in the Congress, the White House [and] every Governor's office. . . . It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police—[and] the Court will become the scape goat.²⁸

21. See *Terry v. Ohio*, 392 U.S. 1, 18-23 (1968).

22. *Id.* at 5-7.

23. *Id.* at 6-7.

24. See Paul Butler, "A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 21 n.84 (2009) (citing John Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, in CRIMINAL PROCEDURE STORIES 295 (Carol S. Steiker ed. 2006)).

25. See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 373 (2001).

26. See *Terry*, 392 U.S. at 5-9.

27. *Id.* at 14.

28. John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 825-26 (1998).

Justice Brennan was correct, except that the Court was not as much the scapegoat as it was the enabler of police tactics that inspired the resentment of ghetto (and non-ghetto) Negroes. In a long line of cases handed down after *Terry*, it continued to pay short shrift to race—even when race seemed an integral element.

For example, in *Immigration & Naturalization Service v. Delgado*, the INS suspected numerous illegal immigrants of working at a garment factory, so the agency acquired a search warrant to investigate the facility.²⁹ During the search, some armed INS agents were stationed at the exits of the factory in order to prevent employees from escaping, while fifteen to twenty-five other armed agents systematically moved through the rows of workers—many of whom were visibly scared and some of whom tried to hide—in order to question them regarding their immigration status.³⁰ After showing his badge, an agent would question the employee about his citizenship status and would end questioning only if he could immediately establish American citizenship or provide valid immigration papers; those who could not were handcuffed and taken away to vans waiting outside the facility.³¹ Though the Court admitted that any “brief detention” effected by an officer’s “show of authority” is unconstitutional unless supported by reasonable suspicion of a crime,³² the Court held that these interrogations were constitutional because the agents were “only questioning people.”³³ According to the majority, the employees should have felt free to refuse to answer even though those employees who failed to provide proof of citizenship were arrested, and employees should have felt free to leave even though agents detained those “who attempted to flee or evade the agents.”³⁴

Startlingly, the majority opinion failed to mention the race of the targets of the search, the vast majority of whom were Mexican.³⁵ Though the controlling question was whether the individuals in question would feel “free to leave,” the majority failed to recognize that these people were immigrants to America, and therefore might be less aware of their constitutional right to be free from searches and seizures without some degree of suspicion.³⁶ The Court ignored the fact that the employees, many of whom were visibly frightened by the experience, might have had previous encounters with abusive INS agents or police using the racial-profiling tactics surely used in this instance. Moreover, only dissenting Justice Brennan, joined by Justice Marshall, noted the impossibility of visually distinguishing illegal Mexican immigrants from American-born

29. *INS v. Delgado*, 466 U.S. 210, 212 (1984).

30. *Id.* at 212, 218; *id.* at 229-31 (Brennan, J., dissenting).

31. *Id.* at 212-13 (majority opinion); *id.* at 230 (Brennan, J., dissenting).

32. *Id.* at 215 (majority opinion).

33. *Id.* at 220.

34. *Id.* at 212-20.

35. *Id.* at 233 (Brennan, J., dissenting).

36. *Id.* at 215 (majority opinion) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Latinos.³⁷ This task would have been especially difficult considering that the factory was located in Southern California, an area near the Mexican border where Hispanics are the largest ethnic group.³⁸

In *Whren v. United States*, the Court effectively declared that the Fourth Amendment cannot be used as a tool to ensure racial justice.³⁹ The petitioners, both black, were driving in a “high drug area” when they were stopped by police.⁴⁰ The officers claimed that the defendants were stopped for a traffic violation—after stopping at a stop sign, the driver had turned right without indicating.⁴¹ When the officers approached the vehicle, drugs were found.⁴² The petitioners suggested that they were the victims of racial profiling—in other words, that the alleged traffic violation was merely an excuse to pull over the defendants, who were black, in order to search their car for drugs.⁴³ The Court’s unanimous opinion, written by Justice Scalia, swiftly dismissed this argument.⁴⁴ While agreeing that “selective enforcement of the law based on considerations such as race” was impermissible under the Fourteenth Amendment, Scalia declared that, under the Fourth Amendment, any scrutiny of the police officer’s “[s]ubjective intentions” would be improper.⁴⁵ The *Whren* opinion assures police officers that courts examining the validity of a search must ignore the officers’ racially biased motivations in effectuating a search. Therefore, the Fourth Amendment allows police officers to stop and arrest every black man on the street or in their vehicle and refuse to stop any whites, provided that the officer has probable cause of some violation, no matter how minor.

In *Illinois v. Wardlow*, the Supreme Court held that innocent individuals wishing to avoid police harassment may “ignore the police” or “refus[e] to cooperate,” but may not “eva[de]” police officers without risking a stop and frisk.⁴⁶ In *Wardlow*, a number of officers were patrolling a “high crime area.”⁴⁷ When Wardlow—a man whose race is not mentioned in the Supreme Court opinion, nor in either of the state appellate opinions—saw the uniformed officers, he began to run in the opposite

37. *Id.* at 233-34 (Brennan, J., dissenting).

38. CAROLINE S. CLAUSS-EHLERS, ENCYCLOPEDIA OF CROSS-CULTURAL SCHOOL PSYCHOLOGY 1015 (2010).

39. *See Whren v. United States*, 517 U.S. 806, 810-13 (1996).

40. *Id.* at 808.

41. *Id.* at 808-09.

42. *Id.*

43. *Id.* at 810-11.

44. *See id.* at 813.

45. *Id.*

46. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

47. *Id.* at 122.

direction.⁴⁸ Police officers cornered Wardlow, frisked him, and discovered that he was carrying a handgun.⁴⁹ At trial, Wardlow argued that fleeing from police was essentially a refusal to cooperate, which, according to prior Supreme Court precedent, could not be the basis for suspicion.⁵⁰ The Court disagreed.⁵¹ While recognizing that an individual's decision to "ignore the police" or to "refus[e] to cooperate" does not justify a stop,⁵² Chief Justice Rehnquist's majority opinion declared that fleeing from police is an "act of evasion" suggestive of wrongdoing, and therefore the officer was justified in making the stop.⁵³ Justice Stevens's bold dissent, joined by Justices Souter, Ginsburg, and Breyer, recognized the racial implications of such a decision.⁵⁴ Stevens noted that even innocent citizens, "particularly minorities and those residing in high crime areas," might flee from police.⁵⁵ Citing police brutality, abusive interrogation tactics, random stop and frisks, demeaning personal searches, and racially discriminatory practices, Stevens recognized that a black person's decision to flee from police may in fact be entirely reasonable.⁵⁶ Therefore, Stevens would have reversed the conviction on the basis that the state failed to provide sufficient evidence to establish reasonable suspicion.⁵⁷

In *United States v. Arvizu*, a border patrol agent encountered a minivan containing a family driving near the Mexican border, through a sparsely populated area near a national forest.⁵⁸ The Court's opinion cited a number of "suspicious" behaviors.⁵⁹ For example, the officer found it strange that the driver decreased his minivan's speed after seeing the police vehicle approach him.⁶⁰ Because "most drivers give border patrol agents a friendly wave," the agent found it suspicious that the driver did not wave at the agent after noticing him.⁶¹ Additionally, the agent found it especially suspicious that the children in the vehicle "began to wave" at the officer.⁶² After observing these highly suspicious behaviors, the agent stopped the car, whereupon the agent discovered marijuana in the back seat.⁶³ The

48. *Id.*; see also *People v. Wardlow*, 183 Ill. 2d 306, 307-08 (1998); *People v. Wardlow*, 287 Ill. App. 3d 367, 368-69 (1997) (illustrating the absence of a race discussion in the state appellate decisions).

49. *Wardlow*, 528 U.S. at 122.

50. *Id.* at 122-23 (citing *Royer*, 460 U.S. at 507-08).

51. *Id.* at 124-25.

52. *Id.* at 125 (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Royer*, 460 U.S. at 507-08).

53. *Id.* at 124-25.

54. See *id.* at 132 (Stevens, J., dissenting).

55. *Id.*

56. *Id.* at 132-35.

57. *Id.* at 140.

58. *United States v. Arvizu*, 534 U.S. 266, 269-70 (2002).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 270-71.

63. *Id.* at 272.

Ninth Circuit held that most of these factors “carried little or no weight in the reasonable-suspicion calculus,” but the Supreme Court disagreed.⁶⁴ The Court’s unanimous opinion, written by Chief Justice Rehnquist, asserted that the “totality of the circumstances” allowed the officer, in his judgment and discretion, to rightfully determine that reasonable suspicion existed.⁶⁵ Though the stop occurred near the Mexican border, no mention was made of the defendant’s race or ethnicity.⁶⁶ Moreover, the Court failed to consider the ramifications of considering the border as, essentially, a high-crime area.⁶⁷ Since Hispanics are more likely to live near the border, this type of decision diminishes the Fourth Amendment protection given to Latinos.

III. DISCRETION

In *Arizona v. Gant*, the Court said “the central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion.”⁶⁸ Yet, the Court is so protective of this discretion that, if not unbridled, it is extremely expansive, especially in high-crime—i.e., minority—areas.

On a ride-along with an officer of the District of Columbia Metropolitan Police Department, I play a game that my cop friend invented called “Stop that Car!”⁶⁹ I select a car—any car—and the officer finds a legal reason to stop it. It never takes longer than three or four blocks of following the car. There are so many regulations that it is virtually impossible for a driver not to commit an infraction. In a series of cases applying the *Terry* doctrine, the Supreme Court and federal appellate courts have enhanced the discretion of the police. Many—but not all—of these cases involved minorities, and many—but not all—involved police searches for drugs.

In *Whren v. United States*, for example, a young black motorist complained that he had been the victim of a pretextual stop.⁷⁰ He had been pulled over for, among other things, waiting too long at a stop sign.⁷¹ The Court ruled that a law enforcement officer’s subjective motivation for stopping an individual was irrelevant.⁷² The only question to ask was whether there was probable cause for the stop.⁷³

64. *Id.* at 272-74.

65. *Id.* at 273-74.

66. *See id.*

67. *See id.*

68. *Arizona v. Gant*, 129 S. Ct. 1710, 1720 (2009).

69. *See* PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 24-25 (2009).

70. *Whren v. United States*, 517 U.S. 806, 809 (1996).

71. *Id.* at 808.

72. *Id.* at 813.

73. *Id.* at 818-19.

In *Atwater v. City of Lago Vista*, the Court held that police can arrest people for crimes even when the punishment for the offense is only a fine.⁷⁴ Arrests for any possible reason are often a component of “zero tolerance” or “broken windows” urban police strategies.⁷⁵ Police are not as interested in enforcing the jaywalking or drinking-in-public statutes as they are in the side benefits of their arrest power—especially the ability to search.

Justice Marshall’s famous list of the factors that courts have found sufficient to establish reasonable suspicion of a drug courier on an airplane (for example, “first to deplane,” “last to deplane,” or “deplaned from middle”) demonstrates the malleability of the standard for police detention.⁷⁶ Far from regulating discretion, the Fourth Amendment is what gives the police the power to stop people of color.

In the main, this discretion is not subject to judicial review. If the police find Elmer with a marijuana blunt, make him throw the blunt away, and then send Elmer on his way, but under the same circumstances, the police arrest Kwame for marijuana possession, the police have broken no law. Selective prosecution based on race is unconstitutional, but in *United States v. Armstrong*, the Court set an extremely high hurdle for anyone trying to prove this.⁷⁷ Successful claims of selective prosecution are extremely rare.

IV. CRIMINALS ARE BLACK

So, as explained above, the police have the discretion to stop many people. How do they exercise this discretion? They stop criminals. They stop people of color. The Fourth Amendment conflates those categories. It creates criminals, and it helps to define blacks.

In *The Social Construction of Race*, Ian Haney Lopez notes that “race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics.”⁷⁸

The Fourth Amendment is the central legal apparatus in the “war on drugs,” which is, in turn, the most important explanation of racial disparities in arrests and incarcerations. Several studies have demonstrated

74. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

75. See Adam Carliss, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2007, 2011-12, 2015-16 (2009) (explaining “broken windows” police strategies); Wayne A. Logan, *Symposium: Civil Liberties in a Post-9/11 World*, 40 NO. 6 CRIM. L. BULL. art. 1, n.7 (2004) (“[Z]ero tolerance” policing [was] popularized in the late 1990s by New York City Mayor Rudolph Giuliani.”).

76. See *United States v. Sokolow*, 490 U.S. 1, 13-14 (Marshall, J., dissenting).

77. See *United States v. Armstrong*, 517 U.S. 456, 468-70 (1996) (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)) (requiring “some evidence tending to show the existence of the essential elements of a selective-prosecution claim”).

78. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

that African Americans do not use drugs any more than any other group; yet, they account for the majority of people arrested for drug crimes and almost 60% of people incarcerated for drug crimes.⁷⁹

The Fourth Amendment constructs black as criminal by making it easier for the police to investigate and arrest black people. It is self-reinforcing because the statistics are then used to demonstrate that blacks are, in fact, criminals. It turns out that there is an important relationship between looking for things and finding things. If the police selectively enforced the criminal law among law professors, the number of law professors under criminal justice supervision would dramatically increase.

In *Illinois v. Wardlow*, the Court ruled that running away from the police in a high-crime neighborhood is suspicious enough to justify a stop, even if the police had no reason, other than one's flight, to be suspicious.⁸⁰

The police have more power in high-crime neighborhoods than in low-crime neighborhoods.⁸¹ Under the *Terry* doctrine, people are more suspicious because it is more reasonable to suspect that criminal activity is afoot in a high-crime neighborhood than a low-crime neighborhood. Of course, we are all criminals, and every neighborhood is a high-crime neighborhood.⁸² If, for example, the police were only interested in enforcing the drug laws, they would be better off patrolling college dormitories than African-American or Hispanic neighborhoods. The construction of crime embodied in Fourth Amendment doctrine is of black crime, i.e., the kind of crime that is easier to pin on blacks.

79. See, e.g., Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 262-66 (2002) (providing an example of such a study and statistics); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 269-75 (2009) (same).

80. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

81. *But see* *United States v. Arvizu*, 232 F.3d 1241, 1250 (9th Cir. 2000) (“[O]ne’s place of residence is simply not relevant to a determination of reasonable suspicion. Otherwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state’s efforts to prevent those crimes—because their constitutional protections against unreasonable intrusions would be significantly reduced.”), *rev’d*, 534 U.S. 266 (2002). The Supreme Court in *Wardlow*, however, declined to give this analysis constitutional stature. See *Wardlow*, 528 U.S. at 124.

82. A number of studies have demonstrated that most people commit crimes—from cheating on their taxes, to drinking in public, to illegally using narcotics, to stealing from their offices. See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 47 (1981) (“Almost everyone commits one crime or another at some time in his life and most people commit crimes of some seriousness.”).