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NOTE

“BECAUSE, YO, MY BROTHER JUST GOT HURT”: MARYLAND FAILS TO ACCOUNT FOR THE EMPIRICAL REALITY UNDERLYING UNPROVOKED FLIGHT FROM POLICE IN WASHINGTON V. STATE

ASHLEY METZBOWER*

In Washington v. State, the Supreme Court of Maryland evaluated the probative value of unprovoked flight from law enforcement and, specifically, whether unprovoked flight in a high-crime area is sufficient to establish reasonable suspicion of criminal activity. The court held that in determining whether reasonable suspicion for an investigatory stop exists, a court should consider whether an individual’s unprovoked flight is a circumstance consistent with innocence or, coupled with presence in a high-crime area or other indicia of suspicion, is suggestive of criminal activity. Applying this holding, the court concluded that law enforcement had reasonable suspicion

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1. 482 Md. 395, 287 A.3d 301 (2022).
2. On December 14, 2022, Maryland Governor Larry Hogan announced that the majority of votes cast in the 2022 General Election were in favor of a constitutional amendment changing the names of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland to the Supreme Court of Maryland and the Appellate Court of Maryland, respectively. See MD. EXEC. DEP’T, GOVERNOR’S PROCLAMATION DECLARING THE RESULT OF THE ELECTION OF NOVEMBER 8, 2022, FOR CONSTITUTIONAL AMENDMENT (2022), https://www.courts.state.md.us/sites/default/files/import/reference/pdfs/proclamation20221213.pdf. This Note will refer to Maryland’s highest court as the Maryland Court of Appeals for decisions rendered prior to December 14, 2022, the effective date of the state constitutional amendment.
4. Id. at 406–07, 287 A.3d at 308–09.
to stop Tyrie Washington because Washington fled without provocation in a high-crime area.\(^5\)

Although the court correctly interpreted United States Supreme Court precedent as requiring an analysis of the totality of the circumstances, this Note argues that the court erred in holding unprovoked flight in a high-crime area alone is sufficient to establish reasonable suspicion of criminal activity.\(^6\) Section IV.A maintains that neither Supreme Court precedent nor the court’s own case law supports sanctioning an investigatory stop without additional articulable facts forming the basis for suspicion.\(^7\) Section IV.B argues that the court discounted the Black community’s legitimate apprehension of law enforcement, particularly in Baltimore City, by failing to properly appraise how the Baltimore Police Department’s (“BPD”) well-publicized and institutionalized corruption frames Black individuals’ perceptions and responses to encounters with BPD officers.\(^8\) Section IV.B further asserts that the court wrongfully ignored empirical data confirming that direct and secondhand exposure to violent interactions with law enforcement engenders negative emotional and psychological outcomes in Black individuals.\(^9\) Section IV.B concludes by positing that this data supplies an entirely reasonable and innocent reason for attempting to evade contact with law enforcement: fear.\(^10\)

With respect to the significance of presence in high-crime areas, Section IV.C. contends that the court improvidently adopted a subjective standard for determining whether an area is high crime based solely on officer testimony, which research shows is often inaccurate and possibly biased.\(^11\) Section IV.C. also argues that the court erred in dispensing with the requirement of a nexus between the individual’s conduct and the criminal activity prevalent in the area.\(^12\) Instead, the court announced a lesser mandate that for an individual’s presence in a high-crime area to be probative of guilt, the observed conduct must not be inconsistent with the crimes prevalent in the area.\(^13\) Section IV.C. concludes by asserting that this diluted framework enhances law enforcements’ ability to invoke the high-crime label as a pretext for conducting racially motivated investigatory stops.\(^14\)

\(^5\) Id. at 407, 287 A.3d at 309.
\(^6\) See infra Part IV.
\(^7\) See infra Section IV.A.
\(^8\) See infra Section IV.B.
\(^9\) See infra Section IV.B.
\(^10\) See infra Section IV.C.
\(^11\) See infra Section IV.C.
\(^12\) See infra Section IV.C.
\(^13\) See infra Section IV.C.
\(^14\) See infra Section IV.C.
I. THE CASE

In the early afternoon hours of July 9, 2020, Detective Darwin Noesi and Detective Winkey from the BPD were on patrol near Cordelia Avenue in Northwest Baltimore. The detectives observed Tyrie Washington, a twenty-two-year-old Black man, standing with another individual in an alleyway, but did not see any signs that the two were engaged in criminal activity. Washington and the other individual noticed the detectives’ marked patrol vehicle at the end of the alley, turned, and ran down the alleyway in the opposite direction. Detective Winkey then radioed Detectives Alex Rodriguez and Israel Lopez, stationed on the opposite end of the alley, that two individuals were running in their direction. Washington noticed the other detectives’ unmarked patrol car upon exiting the alley, ran in the opposite direction, climbed over a fence, and attempted to conceal himself behind a bush. Detective Rodriguez subsequently exited his vehicle and initiated a foot pursuit, apprehending Washington shortly thereafter. Detective Rodriguez proceeded to ask Washington why he ran, to which Washington responded, “Because, yo, my brother just got hurt.” Nevertheless, Detective Lopez conducted a pat down which led to the discovery of a handgun in Washington’s waistband.

Washington filed a motion to suppress the handgun recovered from his person in the Circuit Court for Baltimore City. Washington’s motion specifically argued that the handgun was the fruit of an investigative stop conducted without reasonable suspicion in violation of the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights. The Circuit Court for Baltimore City conducted a hearing on Washington’s motion to suppress on June 16, 2021. The State called Detectives Noesi, Lopez, and Rodriguez as witnesses.

17. Id. at *1.
18. Id.
19. Id.
20. Id.
21. Id.
25. Id. at 408–09, 287 A.3d at 309–10.
26. Id.
27. Id.
The suppression hearing produced relevant testimony relating to how the officers perceived Washington’s flight. Detective Noesi testified that he did not see Washington engage in a hand-to-hand transaction or any other suspicious behavior prior to his flight. However, he and Detective Lopez both testified to seeing signs of a weapon on Washington’s person. Notably, neither Detective Noesi nor Detective Lopez informed Detective Rodriguez of their observations, and Detective Rodriguez observed no sign of a weapon prior to stopping Washington. All three detectives testified to the high levels of gun, drug, and violent crimes in the area. The circuit court denied Washington’s motion.

Washington tendered a conditional guilty plea to possession of a regulated firearm, retaining the right to appellate review of the denial of the motion to suppress. On appeal, the Appellate Court of Maryland affirmed the circuit court’s judgment and held that Detective Rodriguez had reasonable suspicion to stop Washington based on Washington’s unprovoked flight in a high-crime area. However, the intermediate appellate court cautioned that a review of Maryland’s Fourth Amendment jurisprudence surrounding “unprovoked flight” and “high-crime area” may be warranted in light of data highlighting the BPD’s racially disproportionate policing practices. In support of its concerns, the court cited to the Department of Justice’s (“DOJ”) investigation which found that BPD’s enforcement strategies produced “severe and unjustified disparities in the rates of stops, searches, and arrests of African Americans,” and the scandal surrounding BPD’s Gun Trace Task Force (“GTTF”), which revealed that GTTF members violently apprehended and attempted to frame Black Baltimore City residents for gun-related charges. According to the Appellate Court of Maryland, continued reliance on “unprovoked flight” and presence in a “high-crime area” might be problematic due to the legitimate reasons why

28. See id. at 409–413, 287 A.3d at 310–12 (summarizing officer testimony at Washington’s suppression hearing).

29. Id. at 410, 287 A.3d at 310. Detective Noesi also testified that he observed Washington “just standing there in the alley.” Id.

30. Id. at 410–11, 287 A.3d at 310–11.

31. Id. at 406, 287 A.3d at 308.

32. Id. at 409, 411–12, 287 A.3d at 310–11.

33. Id. at 414, 287 A.3d at 313.

34. Id. at 415, 287 A.3d at 313.

35. See supra note 2.


37. Id. at *6–7.

38. Id. at *7 (quoting CIV. RTS. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016) [hereinafter DOJ REPORT]).
Black individuals may fear interacting with law enforcement in Baltimore City. Following the intermediate appellate court’s admonition on the state of Maryland’s Fourth Amendment jurisprudence, the Supreme Court of Maryland granted certiorari to consider the persisting probative value of “unprovoked flight” and “high-crime area” in the reasonable suspicion analysis.

II. LEGAL BACKGROUND

The Supreme Court of the United States has historically emphasized the importance of the constitutional privacy protections guaranteed by the Fourth Amendment. Although the right to be free from unreasonable governmental intrusion is of inestimable value, the Supreme Court eventually recognized that the exigencies of particular situations on the street require swift police action. Identification of this need has led to the development of a narrow exception allowing police to stop and briefly search individuals on less information than the traditionally required probable cause. Section II.A discusses the mechanics of Fourth Amendment protections generally. Section II.B describes the origin of investigative stop-and-frisks and traces the evolution of the reasonable suspicion standard. Section II.C assesses how Maryland courts have applied and refined reasonable suspicion principles. Section II.D addresses differences in application of the reasonable suspicion calculus by courts in other jurisdictions.

39. Id.
40. Id. at *6–7.
42. See Terry v. Ohio, 392 U.S. 1, 9 (1968) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891))).
43. See id. at 23–24, 27 (acknowledging that certain suspicious observations justify an officer in investigating an individual further and ensuring that the individual is not armed while doing so, even in the absence of probable cause).
44. See id. at 27 (announcing a narrow authority that permits police officers to conduct a limited search of one’s person whether or not probable cause exists). Probable cause for a search exists where “the facts and circumstances within [the officers’] knowledge and of which [the officers] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the individual] had committed or was committing an offense.” Beck v. Ohio, 379 U.S. 89, 91 (1964).
45. See infra Section II.A.
46. See infra Section II.B.
47. See infra Section II.C.
48. See infra Section II.D.
discusses the significance of presence in a high-crime area to the reasonable suspicion analysis. 49

A. Traditional Fourth Amendment Protections

The Fourth Amendment to the United States Constitution creates an individual right to be free from unreasonable searches and seizures by government actors or agents. 50 The Framers of the Constitution developed the Fourth Amendment in response to criticisms of Colonial Era “general warrants” and “writs of assistance,” which authorized British officers to conduct unfettered searches of private homes for evidence of criminal activity. 51 As a check on this previously unrestrained government power, the Fourth Amendment operates to “safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” 52

Fourth Amendment restraints originally applied only to federal officials, 53 and penalties for violation of the Amendment’s safeguards were only applicable in federal courts. 54 It was not until the mid-twentieth century that the Supreme Court extended Fourth Amendment prohibitions to state and local officers. 55 In doing so, the Court explained that allowing state officials to escape the mandates of the Fourth Amendment would be inconsistent with our historical conception of human rights and run counter to basic constitutional principles. 56 Despite this revolutionary expansion of individual rights, the Supreme Court stopped short of extending the remedy for Fourth Amendment violations to state court proceedings. 57

Finally, the Court’s 1961 landmark decision in Mapp v. Ohio 58 announced that the mechanism intended to secure compliance with the Fourth Amendment—the exclusionary rule 59 —also applied in state courts by way of the Due Process Clause of the Fourteenth Amendment. 60 The Court, in rendering its decision, recognized that the assurance against unreasonable

49. See infra Section II.E.
50. U.S. CONST. amend. IV; seeCoolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (recognizing that evidence seized from Petitioner without a search warrant would not be admissible if Petitioner’s wife acted as an “instrument” or “agent” of the State in producing her husband’s belongings to law enforcement).
55. Id. at 27–28.
56. Id. at 28.
57. Id. at 33.
59. The exclusionary rule is a remedy that allows for the suppression of evidence obtained through an unreasonable governmental search or seizure. Id. at 655.
60. Id.; U.S. CONST. amend. XIV.
invasion by state officials would be rendered valueless if that right could not be enforced by a penalty to flagrant state-level violators.61 According to the Court, to hold to the contrary would be to “grant the right but in reality to withhold its privilege and enjoyment.”62

Though the application of the Fourth Amendment has evolved over time, the mechanics of its protections have remained generally unchanged. The Supreme Court has time and again expressed that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”63 A search and seizure of one’s person or property is reasonable if it is conducted pursuant to a judicially authorized warrant founded on probable cause.64 Probable cause exists where there is “a fair probability that contraband or evidence of a crime will be found.”65 Searches conducted without a warrant founded on probable cause are per se unreasonable under the Fourth Amendment unless an established exception applies.66 Notwithstanding the unique characteristics of each individual exception, deviations from the warrant requirement generally developed to ensure effective law enforcement in situations where it may otherwise be unreasonably thwarted by the mandate to retreat and obtain a warrant.67 If an exception to the warrant requirement does not apply, evidence obtained as a result of an unreasonable search or seizure may be subject to suppression under the Fourth Amendment’s exclusionary rule.68

61. Mapp, 367 U.S. at 655.
62. Id. at 656.
64. Terry v. Ohio, 392 U.S. 1, 20 (1968).
67. See Johnson v. United States, 333 U.S. 10, 14–15 (1948) (explaining that there are “exceptional circumstances” in which “the need for effective law enforcement” outweighs the right of privacy and justifies bypassing the warrant requirement).

In 1968, the Supreme Court examined the propriety of creating an exception to the probable cause requirement in Terry v. Ohio.69 In doing so, the Court focused on balancing the governmental interest in crime detection and officer safety with the nature of the intrusion on fundamental individual rights.70 Acknowledging the severe indignity inherent in submission to a public search,71 the Court refused to exempt police-citizen encounters short of full-scale searches and seizures from the Fourth Amendment’s standard of reasonableness.72 To strike a workable balance, the Court announced a narrow authority for law enforcement officers to briefly stop and conduct a limited search of an individual absent probable cause.73 Such stops, the Court explained, are reasonable if justified by observations that lead the officer to reasonably suspect that criminal activity is afoot.74 Given the “protean variety of the street encounter,” the Court emphasized that determining whether an officer’s suspicion is reasonable will require a fact-bound, case-by-case analysis.75

Notwithstanding several Fourth Amendment decisions in the interim, the Court’s next formative pronouncement of reasonable suspicion principles came in 2000, when the Court further clarified the indicia of criminal activity sufficient to justify a Terry stop in Illinois v. Wardlow.76 In Wardlow, a caravan of law enforcement officers approached a Chicago neighborhood known for heavy narcotics trafficking and observed Sam Wardlow standing while holding an opaque bag.77 Wardlow noticed the officers’ vehicles approaching and fled down an alleyway.78 The officers eventually cornered Wardlow, and one officer exited his car to stop Wardlow.79 Upon making

70. Id. at 22–25.
71. See id. at 16–17 (“[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’”).
72. Id. at 19.
73. Id. at 30. This category of police conduct under the Fourth Amendment has coined the terms “investigatory stop,” “stop-and-frisk,” and, more colloquially, a Terry stop. Sharad Goel et al., Combatting Police Discrimination in the Age of Big Data, 20 NEW CRIM. L. REV. 181, 183 (2017).
74. Terry, 392 U.S. at 30. Observing two individuals alternately casing a store roughly a dozen times total, each time peering in the store window and then stopping to confer with each other on the street corner, was a sufficient objective basis for reasonable suspicion of criminal activity. Id. at 6, 28–29.
75. Id. at 15, 30.
77. Id. at 121–22.
78. Id. at 122.
79. Id.
contact, the officer conducted a weapons search of Wardlow’s person and the opaque bag he was carrying.\textsuperscript{80} After the search of his bag yielded a handgun and multiple rounds of ammunition, Wardlow was arrested.\textsuperscript{81}

Following the denial of Wardlow’s motion to suppress and subsequent conviction on a firearms charge, the issue of whether the stop was reasonable eventually progressed to the United States Supreme Court.\textsuperscript{82} In rendering its decision, the Court first recognized the infeasibility of demanding scientifically certain behavioral judgments by police officers.\textsuperscript{83} As a result, the Court announced that commonsense judgments about human behavior are determinative of reasonable suspicion.\textsuperscript{84} In proceeding through the fact-bound analysis, the Court rejected presence in a high-crime area alone as sufficient to establish reasonable suspicion, but the Court emphasized the relevance of a location’s characteristics to the aggregate calculus.\textsuperscript{85} Confronting unprovoked flight as a matter of first impression, the Court distinguished historical jurisprudence approving mere refusal to cooperate with law enforcement\textsuperscript{86} and analogized to nervous and evasive behaviors traditionally relevant to the reasonable suspicion determination.\textsuperscript{87} The Court concluded that the totality of the circumstances established the requisite amount of reasonable suspicion for an investigatory stop.\textsuperscript{88} In doing so, the Court recognized that innocent explanations for unprovoked flight undoubtedly exist, but it interpreted \textit{Terry} as accepting the risk that police officers may stop innocent people.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. at 123.
\item \textsuperscript{83} Id. at 125.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 124.
\item \textsuperscript{86} Id. at 125 (citing Florida v. Royer, 460 U.S. 491, 498 (1983)). In \textit{Florida v. Royer}, the Court observed that while law enforcement does not violate the Fourth Amendment by approaching an individual and asking questions, the individual approached may decline to respond and go on his or her own way. 460 U.S. at 497–98. The Court elaborated that absent other suspicious circumstances, mere refusal and avoidance does not provide the objectively reasonable grounds for conducting a \textit{Terry} stop. Id. at 498. See Aliza Hochman Bloom, \textit{Reasonable, Yet Suspicious: The Maryland Supreme Court Wrestles with the Paradox of Flight from Police}, 103 B.U. L. REV. ONLINE 59, 62–63 (2023), for a brief discussion on the paradox of relying on flight from police for reasonable suspicion in light of the right citizens have to ignore or avoid interacting with police officers.
\item \textsuperscript{87} \textit{Wardlow}, 528 U.S. at 124 (noting precedent recognizes that “nervous, evasive behavior is a pertinent factor” in the reasonable suspicion calculus and “[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such”).
\item \textsuperscript{88} Id. at 124–25.
\item \textsuperscript{89} Id. at 125 (acknowledging that “in \textit{Terry}, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation,” but, by endorsing the officer’s actions, the Court “recognized that the officers could detain the individuals to resolve the ambiguity”).
\end{itemize}
Although he agreed with the majority’s rejection of a *per se* rule that unprovoked flight in a high-crime area categorically generates reasonable suspicion, Justice Stevens wrote separately to express his views concerning the inferences to be drawn from unprovoked flight from police.\(^{90}\)

According to Justice Stevens,

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, *believes that contact with the police can itself be dangerous*, apart from any criminal activity associated with the officer’s sudden presence. For such a person, unprovoked flight is neither “aberrant” nor “abnormal.”\(^{91}\)

The evidence underlying these beliefs, Justice Stevens explained, is “too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.”\(^{92}\) In light of the various explanations for unprovoked flight, Justice Stevens sanctioned the majority’s refusal to adopt a *per se* inference regarding the motivation for fleeing police.\(^{93}\)

### C. Modern Applications of the Reasonable Suspicion Calculus by Maryland Courts

Maryland’s highest court has consistently applied and refined the reasonable suspicion standards promulgated by the Supreme Court, and now codified in Maryland statutory law,\(^{94}\) in a broad range of factual scenarios. Case law since the *Wardlow* decision demonstrates that the Supreme Court of Maryland adheres to the fact-bound, totality of the circumstances inquiry\(^{95}\) and attaches considerable weight to an individual’s unprovoked flight from police.\(^{96}\) However, the court has also made clear it is concerned with protecting individual privacy rights,\(^{97}\) and it will not find reasonable

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90. *Id.* at 127 (Stevens, J., concurring in part and dissenting in part).
91. *Id.* at 132–33 (emphasis added) (footnote omitted).
92. *Id.* at 134.
93. *Id.* at 136.
95. See, *e.g.*, Bost v. State, 406 Md. 341, 357–58, 958 A.2d 356, 366 (2008) (acknowledging that a totality of the circumstances analysis is the appropriate test for reasonable suspicion).
96. See, *e.g.*, Sizer v. State, 456 Md. 350, 372, 174 A.3d 326, 339 (2017) (finding Sizer’s unprovoked flight from police weighed in favor of finding reasonable suspicion); *Bost*, 406 Md. at 359–60, 958 A.2d at 367 (concluding Bost’s unprovoked flight from officers supported reasonable suspicion).
97. See, *e.g.*, Trott v. State, 473 Md. 245, 268–69, 249 A.3d 833, 847–48 (2021) (noting diminished right to privacy while traveling in a vehicle supported finding investigatory traffic stop was justified by reasonable suspicion).
suspicion absent an express link between objectively innocent conduct and criminal activity.\textsuperscript{98}

In \textit{Bost v. State},\textsuperscript{99} the Maryland Court of Appeals\textsuperscript{100} recognized the Supreme Court’s implementation of a totality-of-the-circumstances test for reasonable suspicion.\textsuperscript{101} Applying the test, the court concluded that the search and seizure of a handgun from Bost’s person was justified by reasonable suspicion arising from his unprovoked flight at the sight of police, presence in an area known for drug trafficking, and continuous clutching of his right waistband area while fleeing.\textsuperscript{102} Of great importance to the court was officer testimony articulating a link between clutching maneuvers and the presence of a concealed weapon, and the nexus between firearms and drug activity.\textsuperscript{103}

The following year, the Maryland Court of Appeals decided \textit{Crosby v. State}.\textsuperscript{104} In \textit{Crosby}, a police officer executed a search after observing Crosby engage in various peculiar driving maneuvers after midnight in an area that experienced isolated criminal activity in the preceding days.\textsuperscript{105} The court, in holding that reasonable suspicion did not exist to justify the search, concluded that Crosby’s conduct was wholly innocent in itself and noted that the officers proffered no particularized reasons to support an incriminating interpretation.\textsuperscript{106} In reaching its conclusion, the court emphasized the need for law enforcement to articulate concrete grounds for associating discrete innocent acts with criminal activity,\textsuperscript{107} and it rejected the notion of putting a

\textsuperscript{98} Compare \textit{Sizer}, 456 Md. at 372, 174 A.3d at 339 (noting Sizer’s flight after officers observed a group commit two misdemeanors suggested Sizer was responsible) and \textit{Bost}, 406 Md. at 359–60, 958 A.2d at 367 (concluding link between Bost’s clutching conduct and possession of a concealed weapon supported reasonable suspicion), with \textit{Crosby v. State}, 408 Md. 490, 515, 970 A.2d 894, 908 (2009) (finding absence of a connection between Crosby’s unusual driving maneuvers and criminal activity precluded finding reasonable suspicion).


\textsuperscript{100} See supra note 2.

\textsuperscript{101} \textit{Bost}, 406 Md. at 357–58, 958 A.2d at 366 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

\textsuperscript{102} \textit{Id.} at 359–60, 958 A.2d at 367.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} 408 Md. 490, 970 A.2d 894 (2009).

\textsuperscript{105} \textit{Id.} at 495, 970 A.2d at 896–97. The officer observed Crosby “slumped down” in the driver’s seat, maneuvering in and out of parking spaces, changing his turn signal from left to right, and taking an extended route to his destination in a car registered in a different county. \textit{Id.} at 496, 970 A.2d at 897.

\textsuperscript{106} \textit{Id.} at 515, 970 A.2d at 908.

\textsuperscript{107} \textit{Id.} at 512, 970 A.2d at 906–07 (“As several courts have observed, ‘it is ‘impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.’”’ (quoting United States v. Wood, 106 F.3d 942, 948 (10th Cir. 1997))).
“rubber stamp” on police conduct based on an officer’s subjective belief that it was permissible.\textsuperscript{108}

The Maryland Court of Appeals decided two cases in recent years that further refined its reasonable suspicion jurisprudence.\textsuperscript{109} In \textit{Sizer v. State},\textsuperscript{110} the court reaffirmed the significance of unprovoked flight to the reasonable suspicion analysis.\textsuperscript{111} The court held that Sizer’s flight, after officers observed misdemeanor crimes committed by a group of individuals, reasonably led police to believe that Sizer was the misdemeanant.\textsuperscript{112} Finally in \textit{Trott v. State},\textsuperscript{113} the court upheld a search occasioned by an anonymous 911 report of Trott’s inebriated driving.\textsuperscript{114} In rendering its decision, the court highlighted the need to balance the interest of public safety against the individual’s right to privacy to determine whether an investigatory stop was reasonable.\textsuperscript{115} Recognizing the diminished privacy protections enjoyed in one’s vehicle compared to one’s person,\textsuperscript{116} the court concluded that the gravity of harm to the public from intoxicated driving outweighed the intrusion to Trott’s privacy resulting from the initial stop.\textsuperscript{117}

\textbf{D. Differences in Application of the Reasonable Suspicion Calculus in Jurisdictions Outside of Maryland}

Courts in other jurisdictions have taken a divergent approach to analyzing reasonable suspicion premised in part on unprovoked flight.\textsuperscript{118} Specifically, state and federal courts outside of Maryland have recently recognized the compelling reasons for innocent flight from police, particularly for Black men.\textsuperscript{119} In \textit{Commonwealth v. Warren},\textsuperscript{120} the Supreme

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 509, 970 A.2d at 904 (quoting \textit{Ransome v. State}, 373 Md. 99, 111, 816 A.2d 901, 908 (2003)).
\item \textsuperscript{110} \textit{Id.} at 372, 174 A.3d at 339.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 245, 249 A.3d 833 (2021).
\item \textsuperscript{114} \textit{Id.} at 271, 249 A.3d at 848–49.
\item \textsuperscript{115} \textit{Id.} at 268–69, 249 A.3d at 847–48.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 270–71, 249 A.3d at 848.
\item \textsuperscript{119} \textit{See Brown}, 925 F.3d at 1156 (“There is little doubt that uneven policing may reasonably affect the reaction of certain individuals . . . to law enforcement.”); \textit{Warren}, 58 N.E.3d at 342 (“[T]he finding that black males in Boston are disproportionately and repeatedly targeted for [field interrogation observation] encounters suggests a reason for flight totally unrelated to consciousness of guilt.”).
\item \textsuperscript{120} 58 N.E.3d 333 (Mass. 2016).
\end{itemize}
Judicial Court of Massachusetts considered whether reasonable suspicion arose from the defendant’s presence in the vicinity of a recent break-in, match to the suspect’s general description, and flight from responding officers. After refuting the probative value of the two former observations, the court turned to the defendant’s evasive conduct.

According to the court, the right to avoid consensual contact with police is at odds with the inculpatory interpretation often gleaned from an individual’s flight from officers. Unless law enforcement develops reasonable suspicion for a threshold inquiry through additional suspicious observations or circumstances, the court concluded that an individual’s flight should be given little weight in the analysis. Applying this reasoning, the court determined that the defendant’s flight added nothing to the analysis because the officers’ observations preceding his flight were insufficient to establish reasonable suspicion.

The court went on to address the import of unprovoked flight in cases involving Black men specifically. Of great importance to the court was an internal report on the Boston Police Department documenting a practice of racial profiling. According to the report’s findings, Black males in Boston were disproportionately targeted for repeated police-citizen encounters, including stops, frisks, and searches. The court interpreted this finding as suggesting an innocent reason for flight from police and explained that Black males “might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.”

The court concluded by holding that the stop of the defendant was not justified by reasonable suspicion and instructing lower state courts to consider the report’s findings when weighing flight in a reasonable suspicion analysis.

Several years later in United States v. Brown, the Ninth Circuit Court of Appeals considered whether police officers had reasonable suspicion to stop and frisk the defendant, a Black male who fled police and matched the

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121. The defendant was a young Black male wearing dark clothing. Id. at 336.
122. Id. at 336–37.
123. Id. at 339–40.
124. Id. at 341.
125. Id.
126. Id. at 342.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 342–43.
132. 925 F.3d 1150 (9th Cir. 2019).
description of an anonymous tip reporting a man with a gun. After noting that possession of a firearm is presumptively lawful in Washington State and discounting the veracity of a tip from an unknown informant, the court analyzed the significance of the defendant’s flight from responding officers.

According to the court, the defendant had no obligation to interact with officers absent a command to stop, and as such, he was well within his rights to attempt to evade the contact. Turning to Wardlow, the court distinguished the facts of the present case on several grounds. Unlike the petitioner in Wardlow, the court acknowledged that the defendant was not present in a high-crime area, he was not observed holding or concealing an object, and he did not refuse to speak to officers after a verbal request. Indeed, the court observed that this case “presents little more than a black man walking down the street in Belltown.”

With respect to the inferences to be drawn from the defendant’s flight, the court invoked commentary from Justice Stevens’s concurrence in Wardlow. Heeding Justice Stevens’s warning about the potential problems with relying on flight as a factor suggestive of criminal activity, the court recognized that media coverage of racially disproportionate policing has increased awareness of and attention to the issue in the twenty years since Wardlow. The court further cited to the United States Department of Justice Investigation of the Seattle Police Department, which found “serious concerns about racially discriminatory policing.” This data, according to the court, “can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise.” Given the historical tension between law enforcement and Black citizens, and the right to avoid contact with police, the court held that the defendant’s flight along with the unreliable anonymous tip were insufficient to establish reasonable suspicion of criminal activity.

133. Id. at 1152.
134. Id. at 1153–54.
135. Id. at 1155.
136. Id. at 1155–56.
137. Id. at 1156.
138. Id.
139. Id.
140. Id.
142. Id. at 1156.
143. Id. at 1157.
E. Significance of High-Crime Area Designation to Reasonable Suspicion Calculus

1. Supreme Court Jurisprudence

Originally espoused as a consideration relevant to the reasonable suspicion analysis in *Adams v. Williams*,144 presence in a high-crime area and the probative value attached thereto has developed contemporaneously with case law surrounding unprovoked flight. In *Adams*, a police officer was alone patrolling a high-crime area in Bridgeport, Connecticut when, just after two in the morning, he was approached by an individual.145 This person informed the officer that a nearby vehicle was occupied by an individual carrying narcotics and a firearm at his waist.146 The officer approached the vehicle and asked the occupant, Adams, to open the door.147 When Adams refused and instead rolled down his window, the officer reached in and removed a revolver from Adam’s waistband.148

The issue of whether the officer’s seizure of the firearm was justified by reasonable suspicion eventually reached the United States Supreme Court.149 The Court, in addressing the veracity of the informant tip prompting the seizure, emphasized that the information came from an individual known to the officer and was immediately verifiable.150 Of great significance to the Court was the time of day and location of the stop in a high-crime area, which gave the officer “ample reason to fear for his safety.”151 Under these circumstances, the Court held that the handgun seizure was justified under the *Terry* framework as a measure for the officer’s protection.152

The Supreme Court handed down two decisions in the years following *Adams* that further clarified the significance of presence in a high-crime area to the reasonable suspicion analysis.153 In *Brown v. Texas*,154 police officers stopped and frisked Brown after observing him walking away from another individual in a “high drug problem area.”155 Notably, neither officer claimed

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144. 407 U.S. 143 (1972).
145. *Id.* at 144.
146. *Id.* at 145.
147. *Id.*
148. *Id.*
149. *Id.* at 144.
150. *Id.* at 146.
151. *Id.* at 147–48.
152. *Id.* at 148.
155. *Id.* at 49 (“Appellant . . . asserted that the officers had no right to stop him. Officer Venegas replied that he was in a ‘high drug problem area.’”).
to suspect Brown of any specific misconduct or provided a reason to believe that he was armed. The Court reversed Brown’s conviction for failure to provide identification to a police officer and held that his presence in an area with frequent drug activity, standing alone, was not enough to establish reasonable suspicion for a Terry stop. According to the Court, absent some other objectively suspicious criteria, Brown’s actions were no different than that of all other pedestrian’s traversing the neighborhood.

Roughly two decades later in Wardlow, the Court revisited its decision in Brown and reaffirmed that presence in a high-crime area by itself is insufficient to support reasonable suspicion of criminal activity. The Court explained, however, that as in Adams, the characteristics of the location are relevant for determining whether the combined circumstances are suspicious enough to warrant a stop. Accordingly, the Court confirmed that when a stop occurs in a “high crime area,” that designation is a relevant—though not dispositive—consideration in a reasonable suspicion analysis.

2. Maryland Case Law

Shortly after the Wardlow decision, Maryland’s highest court had the opportunity to elaborate on the import of presence in a high-crime area to Fourth Amendment challenges in state criminal proceedings. In Ransome v. State, Deshawn Ransome was observed by police officers standing on a sidewalk in an area known for loitering, shootings, and narcotics activity. Upon approaching Ransome for questioning, the officers noticed that his demeanor was nervous and there was a bulge in his front pants pocket. A subsequent frisk based on these observations yielded a bag of marijuana.

On writ of certiorari, the Maryland Court of Appeals held that the drugs seized from Ransome were inadmissible because the stop and frisk was not justified by reasonable suspicion. That Ransome was present in a high-crime area was not of great importance to the court absent testimony indicating that he was engaged in suspicious acts rather than just standing on the street. The court was similarly unconvinced by the observation of a

156. Id.
157. Id. at 49, 52.
158. Id. at 52.
160. Id.
161. Id. (quoting Adams v. Williams, 407 U.S. 143, 144, 147–48 (1972)).
163. Id. at 101, 816 A.2d at 902.
164. Id. at 105, 816 A.2d at 904–05.
165. Id. at 101, 816 A.2d at 902.
166. Id. at 102, 816 A.2d at 902–03.
167. Id. at 109–10, 816 A.2d at 907.
bulge in Ransome’s pocket, noting no testimony was offered to justify the belief that the bulge was a weapon or otherwise indicated criminal activity. The court concluded its analysis by cautioning that a contrary ruling on these facts would leave “little Fourth Amendment protection . . . for those men who live in or have occasion to visit high-crime areas.”

Maryland’s highest court once again addressed the probative value of presence in a high-crime area in Bost. In Bost, the Maryland Court of Appeals sanctioned a stop and frisk premised in part on Bost’s presence in a known drug trafficking area and clutching of his waistband as he fled police. The court rested its decision on officer testimony indicating that Bost’s clutching conduct is “consistent with possession of a concealed weapon,” and the well-established nexus between firearms and drug activity. Bost thus suggested that the high-crime nature of a stop location is material to the analysis if the observed conduct can be linked to the criminal activity prevalent in the area.

Two years later in Bailey v. State, the Maryland Court of Appeals considered whether presence in a high-drug-crime area, failure to respond to questions, and the odor of ether emanating from Bailey’s body was sufficient to justify a warrantless seizure and search. Although the court proceeded on a probable cause analysis, its commentary regarding the lower court’s reliance on the nature of the area in finding reasonable suspicion is particularly instructive. According to the court, Bailey’s presence in a purportedly high drug crime area was of little importance absent testimony that he was acting suspiciously or engaging in behavior suggestive of drug

168. Id. at 107–09, 816 A.2d at 906–07.
169. Id. at 111, 816 A.2d at 908.
171. Id. at 359–60, 958 A.2d at 367. For a discussion of Bost's analysis of unprovoked flight, see supra notes 99–103 and accompanying text.
172. Id. at 360, 958 A.2d at 367.
173. See id.
175. Ether is a substance the odor of which is associated with phencyclidine, or PCP. Id. at 359, 987 A.2d at 78. It is legal to possess ether, and ether is used as a solvent in some household products. Id. at 360, 987 A.2d at 78–79.
176. Id. at 359–60, 987 A.2d at 78–79.
177. Id. at 383–84, 987 A.2d at 92–93. The court noted that the trial judge gave “great weight” to the fact that Bailey was present in a high drug crime area in finding that the stop was justified by reasonable suspicion. Id., 987 A.2d at 93. Unlike the circuit court, however, the Court of Appeals determined that the officer’s forcible seizure of Bailey constituted a de facto arrest rather than a Terry stop. Id. at 366–68, 733–74, 987 A.2d at 82–83, 86–87. Accordingly, the court analyzed whether probable cause existed to justify the de facto arrest, but addressed hypothetically why reasonable suspicion did not exist had the encounter been a Terry stop. Id. at 366–68, 383–84, 987 A.2d at 82–83, 92–93.
use, rather than merely standing and smelling of a legal substance.\textsuperscript{178}

Addressing the character of the area specifically, the court elaborated that vague testimony about general drug activity in the area, rather than PCP specifically, did not support a finding that Bailey was engaged in criminal activity because he smelled like ether.\textsuperscript{179} Similar to \textit{Bost}, the \textit{Bailey} decision alluded to the need for a nexus between the officer’s observations and the crime common in the area for the high-crime designation to be significant.\textsuperscript{180}

More recently in \textit{Sizer}, the Maryland Court of Appeals determined that a \textit{Terry} stop was justified by reasonable suspicion regardless of whether it occurred in a high-crime area.\textsuperscript{181} Although the court rested its ultimate holding on other grounds, it questioned the value of officer testimony purporting to establish the location as high crime.\textsuperscript{182} The court noted that officers did not testify to observing behavior consistent with the criminal activity prevalent in the area, nor did they testify to suspecting \textit{Sizer} or his group of committing the crimes reported in previous days.\textsuperscript{183} Given this uncertainty, the court declined to consider the nature of the area in its reasonable suspicion analysis.\textsuperscript{184} Like \textit{Bost} and \textit{Bailey}, the \textit{Sizer} decision too suggests that the prosecution must demonstrate a connection to the observed conduct in order to buttress the relevance of presence in a high-crime area.\textsuperscript{185}

\section*{III. The Court’s Reasoning}

In \textit{Washington v. State},\textsuperscript{186} the Supreme Court of Maryland held that unprovoked flight remains a relevant factor when analyzing whether law enforcement officers had reasonable suspicion to conduct a \textit{Terry} stop, but courts should consider whether an individual’s unprovoked flight is a circumstance consistent with innocence or, coupled with the presence of other indicia of suspicion, is indicative of guilt.\textsuperscript{187} Applying its holding to the case at bar, the court concluded that the nature of \textit{Washington}’s unprovoked flight, along with his presence in a high-crime area, provided detectives with the requisite reasonable suspicion to conduct an investigatory stop.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{178} \textit{Id.} at 383–84, 987 A.2d at 93.
\item \textsuperscript{179} \textit{Id.} at 384, 987 A.2d at 93.
\item \textsuperscript{180} \textit{See id.}
\item \textsuperscript{182} \textit{Id.} at 370–71, 174 A.3d at 337–38.
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{See id.}
\item \textsuperscript{186} 482 Md. 395, 287 A.3d 301 (2022).
\item \textsuperscript{187} \textit{Id.} at 406–07, 287 A.3d at 308.
\item \textsuperscript{188} \textit{Id.} at 407, 287 A.3d at 309.
\end{itemize}
The court began its analysis with an overview of Washington’s arguments. In response to Washington’s contention that Black individuals have legitimate, innocent reasons to flee from police, particularly in Baltimore City, the court announced that BPD’s documented history of police misconduct may be considered in evaluating whether an individual’s flight had an innocent explanation. The court declined to establish a per se rule that unprovoked flight may never give rise to reasonable suspicion, however, explaining that despite increased awareness of police misconduct in Baltimore City and elsewhere, it remains true that individuals flee police officers for reasons associated with criminal activity. Accordingly, the court declared that unprovoked flight remains a factor relevant to establishing reasonable suspicion, though the fact that such flight may have an innocent motivation should be considered.

The court proceeded to address Washington’s contention that relying on an individual’s presence in a high-crime area is problematic because of the absence of objective standards for defining what constitutes a “high-crime area.” Acknowledging that it had not yet had the opportunity to elaborate on the criteria required to designate an area as high crime, the court announced that an area may be established as high crime through officer testimony specific to the location at issue, the criminal activity known to occur in the area, and the temporal proximity of the stop to the criminal activity known to occur in the area. The court added that the conduct which aroused the officers’ suspicions must not be inconsistent with the crimes known to occur in the area.

Following its clarification of the principles relevant to reasonable suspicion, the court turned to the present case. Citing to Wardlow, the court reasoned that Washington’s unprovoked, headlong flight demonstrated active evasion of the police, rather than allowable passive avoidance. The court highlighted Washington’s other evasive maneuvers during his flight, including fleeing from a second patrol car, jumping a fence, concealing himself behind a bush, and attempting to jump another fence, and the court

189. Id. at 432–34, 287 A.3d at 323–24.
190. Id. at 433–34, 287 A.3d at 324–25.
191. Id. at 434–35, 287 A.3d at 325.
192. Id.
193. Id. at 436, 287 A.3d at 326.
194. Id. at 437, 443, 287 A.3d at 326, 330.
195. Id. at 443, 287 A.3d at 330.
196. Id. at 448–49, 287 A.3d at 333.
197. Id. at 449, 287 A.3d at 334 (“[H]eadlong flight is reckless, without deliberation or delay, flight lacking in calmness or restraint.”).
198. Id. at 450–51, 287 A.3d at 334.
deduced that such acts strongly corroborated criminal culpability.\textsuperscript{199} Additionally, the majority construed the second individual’s simultaneous flight as supportive of reasonable suspicion, noting that an alternative conclusion would require accepting an improbable coincidence that both men concurrently experienced fear of the officers and decided that fleeing was the best course of action.\textsuperscript{200}

The court underscored the fact that said flight ensued merely at the sight of detectives driving by.\textsuperscript{201} Observing that detectives made no attempt to initiate contact with Washington, the court distinguished \textit{Bost} and \textit{Sizer}, cases in which the defendants fled after police officers approached.\textsuperscript{202} The court explained that the absence of similar provocation in this case provided even greater support for a finding of reasonable suspicion.\textsuperscript{203} According to the court, the possibility that Washington may have feared the police did not annul or transcend the fact that Washington engaged in “serial unprovoked, headlong flight . . . [without] even a suggestion that the detectives were going to initiate contact.”\textsuperscript{204}

Addressing the character of the location, the court rejected any challenge to labeling the area high-crime due to the detectives’ detailed testimony and found that this circumstance also weighed in favor of reasonable suspicion.\textsuperscript{205} The court concluded its analysis by noting that the lack of other individuals in the area supports the inference that Washington fled at the sight of uniformed police.\textsuperscript{206}

In her dissent, Justice Hotten argued that the detectives failed to articulate an objective, factual basis for suspecting Washington of engaging in criminal activity and instead acted on a pretense that flight indicates guilt.\textsuperscript{207} Justice Hotten found that by upholding the detectives’ actions, the majority dispensed with the totality of the circumstances analysis in favor of a bright-line rule that unprovoked flight in a high-crime area categorically establishes reasonable suspicion.\textsuperscript{208} She further noted that neither \textit{Wardlow} nor the Supreme Court of Maryland’s prior decisions have endorsed a \textit{per se} rule, and all prior cases have involved indicia of suspicion beyond unprovoked flight and presence in a high-crime area.\textsuperscript{209}

\textsuperscript{199} Id. at 448–49, 287 A.3d at 333–34.
\textsuperscript{200} Id. at 451, 287 A.3d at 335.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 451–52, 287 A.3d at 335.
\textsuperscript{203} Id. at 452, 287 A.3d at 335.
\textsuperscript{204} Id. at 451, 287 A.3d at 335.
\textsuperscript{205} Id. at 452, 287 A.3d at 335.
\textsuperscript{206} Id. at 453, 287 A.3d at 336.
\textsuperscript{207} Id. at 460, 287 A.3d at 340 (Hotten, J., dissenting).
\textsuperscript{208} Id. at 456, 287 A.3d at 338.
\textsuperscript{209} Id. at 460, 463–64, 287 A.3d at 340, 342.
Justice Hotten proceeded to take issue with the absence of a factual nexus between the conduct observed by the officers and criminal activity. She pointed out that the officers failed to articulate why they thought Washington was suspicious for fleeing and instead operated as though “flight[] is probably suspicious of something, and ‘innocent’ people do not regularly run from police.” To this point, Justice Hotten referenced the DOJ’s investigation of the BPD and numerous high-profile police killings of Black individuals, including Freddie Gray at the hands of BPD, and she argued that this information illustrates why overpoliced communities of color grow distrustful of police.

Addressing the import of presence in a high-crime area, Justice Hotten explained that this well-founded fear of interacting with police limits the degree to which officers may rely on unprovoked flight in an alleged high-crime area. According to Justice Hotten, continued reliance on unprovoked flight in a purportedly high-crime area discounts the well-documented adverse encounters between police and minorities and invalidates the compelling reasons why overpoliced minority communities may fear, and thus attempt to evade, law enforcement.

IV. ANALYSIS

In Washington v. State, the Supreme Court of Maryland held that in determining whether an investigatory stop is justified by reasonable suspicion, courts should consider whether unprovoked flight from police is a circumstance consistent with innocence or, coupled with other factors such as presence in a high-crime area, is indicative of criminal activity. The court made clear that this is a case-by-case determination. Applying this holding, the court concluded that Washington’s stop was justified by reasonable suspicion because he fled without provocation in a high-crime area.

With this ruling, the court diminished the quantum of suspicious indicia required to conduct an investigatory stop by concluding that Washington’s unprovoked flight in a high-crime area alone established reasonable

210. Id. at 464–65, 287 A.3d at 343.
211. Id.
212. Id. at 466–68, 287 A.3d at 343–45.
213. Id. at 467–68, 287 A.3d at 344–45.
214. Id. at 466–69, 287 A.3d at 343–45.
216. Id. at 406–07, 287 A.3d at 308.
217. Id.
218. Id. at 407, 287 A.3d at 309.
suspicion of criminal activity. Additionally, the court discounted Black individuals’ legitimate apprehension of law enforcement by failing to meaningfully consider the abundance of research demonstrating that encounters with police are more dangerous and have enduring psychological implications for the Black community. Finally, the court erred in adopting a subjective standard for evaluating whether an area is high crime, and also in dispensing with the requirement of a nexus between the individual’s conduct and the criminal activity prevalent in the area. This diluted framework invites abuse of the high-crime label as a pretext for racially motivated investigatory stops.

Section IV.A describes how the Supreme Court of Maryland weakened the factual basis required to establish reasonable suspicion of criminal activity. Section IV.B asserts that the court failed to meaningfully contemplate the import of data suggesting that Black individuals have innocent explanations for evading contact with law enforcement. Section IV.C. argues that the court’s dilution of the high-crime area framework will further law enforcements’ ability to invoke presence in a high-crime area as a justification for pretextual investigatory stops.

A. The Court Improperly Reduced the Factual Basis Necessary to Establish Reasonable Suspicion of Criminal Activity.

The court’s holding authorizes reasonable suspicion premised solely on unprovoked flight in a high-crime area. No case decided by the United States Supreme Court or the Supreme Court of Maryland has found reasonable suspicion in the absence of additional information or observations. Despite correctly interpreting the Wardlow holding as reaffirming courts’ commitment to a fact-bound totality of the circumstances analysis of reasonable suspicion, the court erred in cabining its application of Wardlow to a stringent focus on dicta regarding unprovoked flight. Indeed, the court discarded a comprehensive contextual analysis of the circumstances reinforcing Wardlow’s holding in favor of selectively quoting commentary that “[h]eadlong flight . . . is the consummate act of evasion.” In its haste,
the court ignored the other circumstances present in Wardlow and its Maryland progeny that contributed to findings of reasonable suspicion.\(^{230}\)

\hspace{1em} 1. Illinois v. Wardlow Did Not Establish That Unprovoked Flight in a High-Crime Area Categorically Amounts to Reasonable Suspicion.

In Wardlow, police officers converged on the area in question as part of a concerted effort to investigate drug transactions.\(^{231}\) In the midst of doing so, the officers observed Wardlow holding an opaque bag prior to his flight.\(^{232}\) That Wardlow was holding a nontransparent bag in a known drug trafficking area is particularly notable, as many state and federal courts have recognized “[t]he indisputable nexus between drugs and guns [that] presumptively creates a reasonable suspicion of danger to the officer.”\(^{233}\) After watching Wardlow flee while clutching a non-transparent bag in a location allegedly plagued by drug trafficking, it was not unreasonable for officers to suspect that Wardlow’s bag contained either drugs or a firearm.\(^{234}\)

In this case, by contrast, testifying officers conceded that they had no prior interactions with Washington, that he was not holding a bag or other item, that he was not engaged in a transaction or any apparent drug activity, and, instead, he was “just standing there in the alley.”\(^{235}\) Although two of the officers testified to noticing signs of a concealed weapon as Washington ran, neither informed Officer Rodriguez, who actually detained Washington.\(^{236}\) Thus, the only information Officer Rodriguez possessed was that Washington was running in a purportedly high-crime area.\(^{237}\) And while it is true that

\hspace{1em} 230. See id. at 463–64, 287 A.3d at 342 (Hotten, J., dissenting) (highlighting the indicia of suspicion present in Wardlow, Bost, and Sizer apart from unprovoked flight in a high-crime area that contributed to establishing reasonable suspicion).

\hspace{1em} 231. 528 U.S. 119, 121 (2000).

\hspace{1em} 232. Id. at 121–22.

\hspace{1em} 233. United States v. Sakyi, 160 F.3d 164, 169 (4th Cir. 1998); see also State v. Banda, 639 S.E.2d 36, 41 (S.C. 2006) (“Given the frequent association between drugs and guns, [the officer’s] safety concerns were justified based on the vehicle’s apparent connection to a known drug dealer.”); United States v. Smart, 98 F.3d 1379, 1385 (D.C. Cir. 1996) (“[W]here [one officer] had just observed what he believed to be a suspect engaged in a drug transaction, it was reasonable for the officers to suspect that appellant had a gun to protect himself and his drugs.”); United States v. Perrin, 45 F.3d 869, 873 (4th Cir. 1995) (“It is certainly reasonable for an officer to believe that a person engaged in the selling of crack cocaine may be carrying a weapon for protection.”); Banks v. State, 84 Md. App. 582, 591, 581 A.2d 439, 444 (1990) (“Possession and, indeed, use, of weapons, most notably, firearms, is commonly associated with the drug culture; one who is involved in distribution of narcotics, it is thought . . . would be more prone to possess, and/or use, firearms, or other weapons, than a person not so involved.”).

\hspace{1em} 234. Wardlow, 528 U.S. at 121–22.

\hspace{1em} 235. Washington, 482 Md. at 409–10, 411, 287 A.3d at 310–11.

\hspace{1em} 236. Id. at 406, 287 A.3d at 308.

\hspace{1em} 237. Id. at 412, 287 A.3d at 311–12.
Washington fled from two police cruisers, jumped a fence, and attempted to conceal himself behind a bush, these actions are more reasonably construed as components of his aggregate attempt to evade officers and not separate factors contributing to reasonable suspicion.\textsuperscript{238} Unlike the officers in \textit{Wardlow}, with the more limited information he possessed, Officer Rodriguez had no articulable reason to perceive Washington as a threat to his safety or to suspect Washington of possessing an item that is dangerous or illegal.\textsuperscript{239}

Even assuming \textit{arguendo} that the \textit{Wardlow} holding rested solely on Wardlow’s flight in a heavy drug trafficking area, the court is not free to disregard the other circumstances that were present.\textsuperscript{240} The Supreme Court of Maryland itself recognized \textit{Wardlow} did not endorse a categorical rule that flight in a high-crime area establishes reasonable suspicion, and yet it engaged in no discussion as to how those other observations and the inferences drawn therefrom may have informed the Supreme Court’s ultimate conclusion.\textsuperscript{241} If nothing else, the amplified attention to law enforcement’s fractured relationship with the Black community in the twenty-three years since the decision in \textit{Wardlow} dictated a departure from \textit{Wardlow}’s outdated analysis of the inferences to be drawn from unprovoked flight.\textsuperscript{242}

2. No Maryland Case Has Found Reasonable Suspicion Based on Unprovoked Flight in a High-Crime Area Alone.

Maryland case law growing out of \textit{Wardlow} supports the contention that a stronger factual basis is needed to establish reasonable suspicion.\textsuperscript{243} In \textit{Bost v. State},\textsuperscript{244} the officers observed Bost running unprovoked in a high drug trafficking area while clutching his waistband.\textsuperscript{245} In this case, by contrast, Officer Rodriguez did not observe Washington attempt to obscure an item

\textsuperscript{238} \textit{Id.} at 405, 287 A.3d at 308. This inference is more appropriate for two reasons. First, Washington attributed his flight to his brother recently being injured, \textit{see supra} note 22 and accompanying text, presumably by police, so it would defy logic to suggest someone fleeing out of fear of experiencing similar physical harm would simply stop upon encountering an obstacle like a fence. Second, it is legally unsound to treat differently an individual who flees unprovoked with a clear path of flight from an individual who flees unprovoked in a congested residential area.

\textsuperscript{239} This article will not address Washington’s actual possession of a firearm because the firearm was discovered pursuant to an investigatory stop conducted without reasonable suspicion and should have been subject to suppression under the exclusionary rule.

\textsuperscript{240} \textit{See supra} text accompanying notes 77–81.

\textsuperscript{241} \textit{Washington}, 482 Md. at 429, 287 A.3d at 322.

\textsuperscript{242} \textit{See infra} Section IV.B.


\textsuperscript{244} 406 Md. 341, 858 A.2d 356 (2008).

\textsuperscript{245} \textit{Id.} at 346, 858 A.2d at 359.
prior to initiating the stop. Bost’s clutching conduct was a clear indicator of criminal activity—possession of a concealed weapon—whereas the same cannot be said for Washington’s flight alone. What is more, the nexus between drugs and firearm possession linked Bost’s conduct to the criminal activity prevalent in the area. On the other hand, no reliable connection exists between Washington’s flight and the firearms, drug activity, and violent crime that allegedly dominated the neighborhood where he was stopped. That factual nexus linking Bost’s conduct to both criminal activity generally, and to the crime common in the area specifically, is entirely absent from this case.

A similar distinction applies to Sizer v. State, where, prior to initiating a stop, police officers observed Sizer flee from a group of individuals that had just committed two criminal misdemeanors. Far from witnessing Washington commit any criminal offense, testifying officers conceded that Washington was “just standing there in the alley” prior to his flight. Indeed, the officers did not even observe Washington engage in behavior indicative of criminal activity, let alone conduct actually constituting a crime. It is true that the officers were not required to observe the commission of a crime before they conducted a stop, but they were obligated to articulate how Washington’s conduct suggested criminal activity was afoot. This requirement was clearly satisfied in Sizer by officer testimony reciting actual observations of criminal activity. And although it was unclear which member of the group committed the misdemeanors, Sizer’s flight reasonably heightened suspicion that he was responsible. That key circumstance—the articulable link between the officers’ observations and criminal activity which was present in Wardlow, Bost, and Sizer—is missing here.

247. Bost, 406 Md. at 359–60, 858 A.2d at 367.
248. Id.
249. Washington, 482 Md. at 408, 287 A.3d at 309.
250. Id. at 406, 287 A.3d at 308.
252. Id. at 357, 174 A.3d at 330.
253. Id.
254. Id.
255. See Illinois v. Wardlow, 528 U.S.119, 123 (2000) (“In Terry, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” (emphasis added)).
256. Sizer, 456 Md. at 357, 174 A.3d at 330.
257. Id. at 372, 174 A.3d at 339.
258. See Washington, 482 Md. at 465, 287 A.3d at 343 (Hotten, J., dissenting) (“The Fourth Amendment required the detectives to explain why they suspected ‘criminal activity was afoot[,] based solely on [Washington’s] unprovoked flight in a high-crime area [and] [t]hey failed to do so.” (quoting Crosby v. State, 408 Md. 490, 503, 970 A.2d 894, 901 (2009))).
B. The Court Failed to Meaningfully Consider the Breadth of Data Suggesting Innocent, Fear-Based Explanations for Flight from Law Enforcement.

The court correctly announced that innocent explanations for flight from law enforcement are relevant to the reasonable suspicion calculus, but it erred in failing to consider any of the findings regarding the BPD’s racially disparate policing practices, or empirical data revealing the implications of negative law enforcement encounters, to interpret Washington’s flight from detectives. Over twenty years ago, the Wardlow Court recognized that “courts do not have available empirical studies dealing with inferences drawn from suspicious behavior . . . . Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” The directive to take into account commonsense judgments about behavior in the absence of empirical data implies that courts should consider such data when it becomes available. Today, courts have available empirical data to inform their decisions, and some courts, including the Supreme Court of the United States, already consider that data in certain cases. The Supreme Court of Maryland should have meaningfully considered research on tensions between law enforcement and Black citizens broadly—and in Baltimore, Maryland specifically—to ascertain whether Washington’s unprovoked flight could have reasonably had an innocent motive. As the following discussion will make clear, Black individuals in Baltimore have ample reason to fear—and run from—law enforcement, and the court’s conclusion to the contrary in Washington’s case flies in the face of both empirical data and “commonsense judgments . . . about human behavior.”

259. Id. at 407, 451, 287 A.3d at 309, 335 (majority opinion).
261. See Kansas v. Glover, 140 S. Ct. 1183, 1189–90 (2020) (explaining that the reasonable suspicion inquiry should be based on “information that is accessible to people generally”).
262. See United States v. Rivera-Santana, 668 F.3d 95, 101 (4th Cir. 2012) (clarifying that while under no obligation to do so, a sentencing court is entitled to consider empirical data underlying sentencing guidelines when fashioning a sentence (citing Kimbrough v. United States, 552 U.S. 85, 107–10 (2007))).
263. See generally DOJ REPORT, supra note 38 (describing BPD’s racially disparate policing strategies that have contributed to a marred relationship between officers and Baltimore City’s Black residents); infra Section IV.B.2.
264. Wardlow, 528 U.S. at 125; see infra Sections IV.B.1–2.
1. Law Enforcement’s Long-Standing Tumultuous Relationship with the Black Community in Baltimore City Has Engendered Fear and Distrust.

Historically, BPD has had an exceptionally fraught relationship with Baltimore’s Black community.265 This tension was markedly exacerbated by former Baltimore Mayor Martin O’Malley’s implementation of zero-tolerance policing in the late 1990s.266 Borrowed from New York City, zero-tolerance policing practices focus on maintaining public order and are based on the notion that enforcement of low-level, quality-of-life crimes would have advantages for reducing violent crime rates.267 Police officers working under a zero-tolerance regime are encouraged to make substantial numbers of street-level stops, searches, and arrests for highly discretionary misdemeanor offenses, such as loitering, trespassing, and disorderly conduct.268 However, and perhaps unsurprisingly, this strategy proved discriminatory in practice.269 Following a fifteen-month-long federal investigation initiated after the 2015 death of Freddie Gray in BPD custody, the DOJ released a scathing report in August 2016 which detailed at length the racially disparate ramifications of BPD’s zero-tolerance enforcement paradigm.270

Looking at data from January 2010 through May 2015, the DOJ’s report revealed that BPD engaged in a widespread practice of making unconstitutional stops, searches, and arrests.271 Specifically, BPD officers frequently stopped and detained Baltimore residents without reasonable suspicion that the individual was engaged in criminal activity, and they conducted frisks without reasonable suspicion that the individual was armed and dangerous.272 What is more, this unconstitutional conduct was disproportionately concentrated in two of the least populated, predominately

265. See generally MICHAEL R. BROMWICH ET AL., STEPTOE, ANATOMY OF THE GUN TRACE TASK FORCE SCANDAL: ITS ORIGINS, CAUSES, AND CONSEQUENCES (2022) (providing a comprehensive review of the myriad misconduct within BPD that has generated severe distrust and animosity within the Black community).


267. DOJ REPORT, supra note 38, at 40–41.

268. Id. at 41.

269. See id. at 5 (explaining how BPD’s zero-tolerance policing paradigm has led to repeated constitutional violations and eroded the community’s trust in police).

270. See generally DOJ REPORT, supra note 38.

271. Id. at 24.

272. Id. at 27, 30.
Black police districts. Indeed, the DOJ report found that 111,500 stops occurred in these two districts containing a combined 75,000 residents, meaning many were subject to repeated encounters with BPD. One Black man was stopped by BPD thirty-four times, none of which resulted in the discovery of criminal activity. Seven other Black individuals were stopped at least thirty times, and thirty-four others at least twenty times. The racial disparity becomes overwhelmingly apparent when compared with DOJ’s finding that BPD officers did not stop any individual of any other race more than twelve times.

The absence of legal justification for stops conducted by BPD officers during this period is underscored by the fact that only 3.7% of stops uncovered evidence of a crime. And for those encounters that did progress past a stop on the street, the futility is even more manifest. From November 2010 through July 2015, 6,736 arrestees were released from Baltimore City’s Central Booking without being charged. The Baltimore City State’s Attorney’s Office declined to prosecute an additional 3,427 cases and cited a complete lack of probable cause in 1,983 of the underlying arrests. In total, 10,163 arrests made by BPD officers were immediately disposed with as not meriting prosecution, an average of 200 arrests per month during the nearly five years reviewed.

In addition to being both harassing and futile, many of BPD’s civilian encounters during this period were also unreasonably aggressive. With respect to foot pursuits specifically, BPD was found to use excessive force in attempting to stop civilians fleeing them, regardless of whether reasonable suspicion existed to justify a Terry stop. Officers frequently deployed their tasers on fleeing suspects, some of whom were completely innocent, and on occasion, even shot at them. The officers also employed force in a racially disproportionate manner, with Black individuals accounting for roughly 88% of subjects on which BPD used non-deadly force.

273. Id. at 26 (finding 44% of pedestrian stops from 2010 through 2014 occurred in two districts that include poor urban neighborhoods and contain only 12% of Baltimore City residents).
274. Id.
275. Id. at 26, 50.
276. Id. at 50.
277. Id.
278. Id. at 28.
279. Id. at 35.
280. Id.
281. Id.
282. Id. at 74.
283. Id. at 92.
284. Id. at 82, 86, 90, 93, 95.
285. Id. at 61.
In the aftermath of the report’s release, the City of Baltimore and BPD entered into a Consent Decree with the federal government for the purpose of reforming the unconstitutional and discriminatory practices uncovered by the DOJ. The 227-page court order requires BPD to implement a myriad of changes that include integrating community-oriented policing strategies, improving internal systems of accountability, and updating policies in accordance with constitutional standards. Notably, the Consent Decree prohibits BPD officers from using either an individual’s presence in a high-crime area or an individual’s attempt to avoid contact with the officer by itself as the basis for an investigatory stop.

While the DOJ investigation rightfully attracted attention to BPD, two scandals in the mid-2010s had already led BPD to face intense public scrutiny, particularly as it pertained to the department’s treatment of Baltimore’s Black community. The catalyst for widespread societal revelations about the BPD, and the impetus for the DOJ investigation, was the death of Freddie Gray in BPD custody following circumstances strikingly similar to Washington’s.

On the morning of April 12, 2015, Gray was standing on a street corner with another individual in a neighborhood in West Baltimore. According to charging documents, Gray then suddenly “fled unprovoked upon noticing police presence.” After Gray surrendered only a moment later, officers confiscated a knife from his pocket and “placed” him on the ground. One bystander recalled that Gray was “screaming for his life at this point,” another witness recounted the officers repeatedly striking Gray with their batons, and a video of the incident shows Gray screaming in pain while begging for an inhaler due to his inability to breathe. The officers then shackled Gray’s

287. Id. at 6–10, 13–22, 25–30.
288. Id. at 16.
290. See Hermann, Bui, and Zapotosky, supra note 266 (noting Freddie Gray died in BPD custody after “running from officers who confronted him in a high-crime area.”).
293. Peralta, supra note 291.
294. Id.
hands and legs and placed him in the back of a police van, head first, unbuckled, and lying on his stomach. After an hour long ride including six separate stops, the van arrived at the police station. BPD officers discovered Gray unconscious with a nearly severed spinal cord. He died seven days later.

Shortly after Gray’s death, BPD found itself in hot water once more with the Gun Trace Task Force (“GTTF”) scandal. Initially conceived in 2007 by Sheryl Goldstein, head of the Mayor’s Office on Criminal Justice, and BPD Commissioner Fred Bealefeld, the purpose of the GTTF was to trace the origins of firearms used in crimes committed in Baltimore. From its inception, however, members of the now disbanded and disgraced GTTF began engaging in unethical, unconstitutional, and, at times, criminal behavior, including reselling seized guns and drugs onto the streets, using GPS devices to track and facilitate robberies of civilians, stealing from homes during search warrants, and framing innocent Baltimore residents.

In one case, GTTF detectives stole an arrestees’ keys, located his home address via his driver’s license, and broke into his home. The detectives stole over $100,000 in cash, two kilograms of cocaine, a $4,000 wristwatch, and designer clothing while the arrestee remained in BPD custody. In another, Black Baltimore resident Ivan Potts was stopped without probable cause, slammed to the ground, kicked, and beat, all whilst GTTF members planted a handgun on him. Potts, who had never seen the gun before, was convicted of possession of a firearm, sentenced to eight years in prison, and spent nineteen months in custody before his conviction was vacated. The downfall of the GTTF resulted in the criminal indictment of eight task force members, all of whom are now incarcerated in federal prison.
All this to say, it is crystal clear why Black individuals may desire to avoid contact with BPD officers in particular, and the court’s failure to meaningfully consider that as a motivation for Washington’s flight was a manifest injustice. 306 Neglecting to seriously contemplate the aforementioned data contradicts Wardlow’s central holding that “commonsense judgments and inferences about human behavior” should inform the reasonable suspicion analysis. 307 In the face of recurrent bombshells about BPD officers harassing, beating, robbing, and even killing Baltimore’s Black residents, the commonsense course of action could reasonably be to avoid contact with BPD officers altogether. 308

The reasonableness of a fear-based, evasive response to police is particularly evident in light of the fact that attention to racially disparate policing has amplified substantially in the last decade, in part due to the ubiquity of smartphones. 309 In addition to regular news coverage of the BPD-specific scandals recited above, public dissemination of both civilian-captured videos and police body camera footage depicting violence against Black citizens has heightened the apprehension Black individuals harbor towards interactions with law enforcement. 310 Thus, the Supreme Court of Maryland should have used Washington’s case as an opportunity to depart from the archaic analysis in Wardlow by specifically instructing lower Maryland courts to discount the weight accorded to unprovoked flight.

306. See supra Section IV.B.1.
308. See supra Section IV.B.1; see also Joel Miller & Robert C. Davis, Unpacking public attitudes to the police: Contrasting perceptions of misconduct with traditional measures of satisfaction, 10 INT’L J. POLICE SCI. & MGMT. 9, 19 (2008) (finding attitudes of citizens regarding police misconduct is susceptible to the influence of media, particularly media coverage of misconduct rather than police responsiveness or effectiveness).
309. More to this point, attention to racially discriminatory policing has not only increased across the country, see infra note 329, but in Baltimore City specifically. The death of Freddie Gray resulted in city-wide riots so extensive that Governor Larry Hogan declared a State of Emergency and called in the Maryland National Guard. BROMWICH ET AL., supra note 265, at 183–84. Additionally, the GTTF’s jarring misconduct has been memorialized in an HBO docuseries titled “We Own This City.” See WE OWN THIS CITY, HBO, https://www.hbo.com/we-own-this-city (last visited Oct. 8, 2023) (“We Own This City is a six-hour, limited series chronicling the rise and fall of the Baltimore Police Department’s Gun Trace Task Force.”). The media coverage of police brutality in Baltimore extends beyond sporadic news stories and is so pervasive that it would be imprudent to suggest every Black individual residing in Baltimore has not been apprised of the BPD’s racially-charged conduct one way or another.
310. See Brief for Petitioner at 28, Washington v. State, 482 Md. 395, 287 A.3d 301 (2022) (No. 15) (arguing that the proliferation of smart phones and officer-worn body cameras has resulted in constant exposure to graphic videos of racialized police violence and thereby amplified fear of police); see also Aimee Ortiz, Confidence in Police Is at Record Low, Gallup Survey Finds, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html (acknowledging 2020 Gallup poll measuring public confidence in police found a record low of 19% of Black Americans expressed confidence in the police following the widely-publicized death of George Floyd by Minneapolis police officers in May 2020).
particularly in cases involving Black men in Baltimore City. A decision of this nature would have recognized the legitimacy of the fear-based responses Black individuals have to BPD; aligned Maryland case law with BPD’s policy and case law from other jurisdictions; and provided lower Maryland courts with clear guidance in lieu of an arbitrary balancing test.

2. Empirical Data Confirms That Disproportionate Targeting by Law Enforcement Has a Traumatic Impact on the Black Community.

Substantial empirical data confirms that Black individuals are disproportionately targeted for interactions with law enforcement, that these encounters are more likely to be physically dangerous, and that both direct and secondhand exposure to volatile police contacts has long-lasting emotional and psychological implications. The Supreme Court of Maryland should have meaningfully considered research demonstrating the consequences of discriminatory policing on the Black community, as the United States Supreme Court has for decades in deciding constitutional questions, to reach a duly informed decision on the propriety of retaining unprovoked flight from police as a circumstance contributing to reasonable suspicion.

   a. Interactions with Law Enforcement Are More Frequent, More Dangerous, and Have Lasting Implications for Black Individuals.

   In New York—the epicenter for the stop-and-frisk practice espoused by Terry—90% of the people stopped by the New York Police Department between 2003 and 2022 were people of color. Black New York residents accounted for 52% of that figure, despite comprising only 23% of the population. In comparison, White New York residents accounted for only 10% of Terry stops even though they represented 33% of the population.

311. Compare Wardlow, 528 U.S. at 124 (“Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”), with Bloom, supra note 86, at 65–66 (concluding Washington’s contention that he fled police out of fear is reasonable in light of empirical data revealing that law enforcement interactions are more dangerous for Black men).

312. See infra Section IV.B.2.a.

313. See infra Section IV.B.2.b.


315. Id.

316. Id.
This means NYPD officers stopped Black residents at a rate almost eight times that of White residents during the time period measured.\textsuperscript{317}

The frequency with which Black individuals are stopped is particularly concerning in light of the fact that law enforcement encounters with Black citizens are more likely to involve the use of both excessive non-lethal and lethal force. One study concluded that Black civilians are 27\% more likely to experience force during a stop than White civilians and 28\% more likely to have a service weapon drawn on them during a stop.\textsuperscript{318} The same study further revealed that Black civilians were more likely to experience lethal force, regardless of whether officers uncovered evidence of criminal activity.\textsuperscript{319} Another study, which analyzed data from the Washington Post’s “Fatal Force” national police shooting database, found that Black civilians were more than twice as likely as White civilians to have been unarmed when fatally shot by police.\textsuperscript{320} A third study revealed that Black individuals were more than twice as likely to be killed by police than individuals of other races.\textsuperscript{321}

With respect to the implications of these findings, empirical data also demonstrates that contact with law enforcement, and secondhand exposure to negative law enforcement interactions, has a traumatic impact on Black individuals.\textsuperscript{322} Indeed, one study found that young men who reported being stopped by police displayed higher rates of anxiety and PTSD, with more intrusive police contacts correlating to higher rates of both trauma symptoms.\textsuperscript{323} A systematic review of twenty-nine studies found that across the board, police exposures were positively associated with adverse health outcomes for Black individuals, including feelings of anger, fear,
psychological distress, and substance use. Poor mental health outcomes also extend to Black individuals who viewed online, but were not direct subjects of, adverse police contacts. A 2019 study found that viewing race-related traumatic events—such as police shootings—published online is associated with increased depressive and PTSD symptoms among adolescents of color. And finally, a 2020 study assessing the effects of police violence on high school students found that exposure to police killings was associated with decreases in GPA, increases in emotional disturbance, and lower rates of high school completion for Black and Hispanic students, but not for White or Asian individuals.

Against this empirical backdrop, it is understandable that Black individuals, who have suffered through these encounters and felt the attendant consequences firsthand, fear, rather than trust, law enforcement. Experiencing or viewing an inordinately hostile—if not life-threatening or fatal—encounter with law enforcement results in negative psychological and emotional manifestations that influence how individuals perceive and react to interactions with police officers. Within this unsettling context, it is not unreasonable that Washington, after years of consuming stories of police brutality anecdotally and in the media, fled out of fear of becoming the next target of racially biased law enforcement officers.

325. Tynes et al., supra note 322, at 374–75.
326. Desmond Ang, The Effects of Police Violence on Inner-City Students, 136 Q.J. ECON. 115, 118, 134, 140, 156–57 (2021). 86% of students surveyed in this study were Black or Hispanic, while 14% identified as White or Asian. Id. at 127.
327. See JENNIFER FRATELLO ET AL., CTR. ON YOUTH JUST., VERA INST. OF JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, SELF-PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 47, 70, 73 (2013) (finding that surveyed individuals who have been stopped repeatedly are less willing to cooperate with law enforcement, with each additional stop in the past year corresponding to an 8% drop in willingness to report their own violent victimization). This study surveyed over 500 eighteen to twenty-five year old individuals that reside in highly patrolled New York neighborhoods and have been stopped at least once, 69% of whom were Black. Id. at 7, 14.
328. See Tynes et al., supra note 322, at 374–75; Jocelyn R. Smith Lee & Michael A. Robinson, “That’s My Number One Fear in Life. It’s the Police”: Examining Young Black Men’s Exposures to Trauma and Loss Resulting from Police Violence and Police Killings, 45 J. BLACK PSYCHOLOGY 143, 158, 170, 172 (2019) (finding that witnessing police violence against Black individuals facilitated distrust of police officers, and losing a loved one to police violence engendered hypervigilance of police that was predominately expressed by running from police officers). The conclusions of the final study emerged from life history interviews with forty Black men aged eighteen to twenty-four and residing in Baltimore. Smith Lee & Robinson, supra, at 143.
329. See Brief of Washington Lawyers’ Committee for Civil Rights & Urban Affairs et al., supra note 310, at 7 (naming Black individuals killed by law enforcement that have received extensive news coverage, including Eric Garner, Tamir Rice, Breonna Taylor, George Floyd, and Anton Black).
The discretionary balancing test that the court announced instead, which directs lower courts to consider whether unprovoked flight is more consistent with guilt or innocence, does not properly account for this data evidencing excessive physical danger during and persisting psychological consequences after Black individuals interact with the police.\textsuperscript{330} To retain unprovoked flight as a circumstance probative of guilt in light of this information is to unequivocally sanction racially-charged police action while simultaneously confessing that the feelings and fears of the Black community are subservient to the State’s interest in potentially identifying crime. The Supreme Court of Maryland should have contemplated this empirical reality in its analysis of Washington’s case because the concerns voiced by Justice Stevens’s at the time of the Wardlow decision\textsuperscript{331} are significantly greater now due to the proliferation of videos of racialized police violence across electronic platforms, and the publication of sophisticated research confirming its devastating impact.\textsuperscript{332}

\textit{b. United States Supreme Court Precedent Supports Using Empirical Data to Decide Questions of Constitutional Law.}

The court was not without guidance for reckoning with empirical data in reaching its decision, particularly because the Supreme Court of the United States has for decades relied on research demonstrating adverse effects to marginalized groups in deciding the most important questions of constitutional law.\textsuperscript{333} Indeed, in the 1973 watershed case \textit{Roe v. Wade},\textsuperscript{334} the Supreme Court explicitly considered the imminent “[p]sychological harm” associated with forced childbearing, including the taxing of mental and physical health. The court therefore could have looked to empirical data to support its decision.


\textsuperscript{331} See supra notes 90–93 and accompanying text.

\textsuperscript{332} See supra Sections IV.B.1–2 and notes 309, 329. The court’s failure to consider any empirical data relevant to this issue is particularly troubling in light of the fact that the court was presented with this information through Washington’s Brief and an Amicus Brief. See Brief of Washington Lawyers’ Committee for Civil Rights & Urban Affairs et al., \textit{supra} note 310, at 6–13 (highlighting empirical research that demonstrates law enforcement interactions are more dangerous for and have a traumatic impact on Black individuals); Brief for Petitioner, \textit{supra} note 22, at 25–30 (highlighting research indicating that police brutality disproportionately impacts Black individuals and arguing that the ubiquity of smart phones results in constant exposure to videos of this brutality, thereby amplifying Black individuals’ fear of police). Despite the comprehensive recitation provided by Washington and amici, no mention of this research appears in the court’s opinion. See \textit{generally} Washington v. State, 482 Md. 395, 287 A.3d 301 (2022).


\textsuperscript{334} 410 U.S. 113 (1973).
physical health due to child care, the distress of being unable to care for the unwanted child, and the “continuing stigma of unwed motherhood,” in recognizing the right to receive an abortion.335 The demonstrated psychological implications of forced motherhood directly influenced the Court’s decision to prohibit the practice that causes it, namely, abortion bans before fetal viability.336

Similarly in Craig v. Boren,337 the Supreme Court struck down an Oklahoma statute that prohibited the sale of a certain beer to males under the age of 21 and females under the age of 18 on the ground that the statute invidiously discriminated on the basis of sex.338 In reaching its decision, the Court relied on empirical data illustrating that 0.18% of females and 2% of males aged 18–20 were arrested for drinking and driving, and noted that “[w]hile such a disparity is not trivial . . . prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes . . . rested on far more predictive empirical relationships than this.”339

The Supreme Court has also considered empirical data in its affirmative action case law. In Grutter v. Bollinger,340 the Court found that the University of Michigan Law School had a compelling interest in student body diversity in part because of the “expert studies and reports” cited by amici revealing educational benefits attendant to a diverse student population.341 In upholding the law school’s race-conscious admissions program, the Court further noted that “numerous studies show [] student body diversity promotes learning outcomes[] and ‘better prepares students for an increasingly diverse workforce and society.’”342 More recently in Fisher v. University of Texas,343 the Court rejected a challenge to the University of Texas’s race-conscious admissions program.344 In reaching its decision, the Court noted that evidence proffered by the University demonstrated significant disparities in minority enrollment and that enrolled minority students “experienced feelings of loneliness and isolation.”345 In both instances, social science research

335. Id. at 153.
336. Id. at 153, 163–65. This Note does not purport to address how these arguments or decisions may be or have been affected by the composition of the Supreme Court in 2023. The principal takeaway is the use of empirical data, not the respective holdings.
337. 429 U.S. 190 (1976).
338. Id. at 204. The statute’s purpose was to enhance traffic safety by reducing incidents of driving under the influence. Id. at 199–200.
339. Id. at 201–02 (emphasis added).
341. Id. at 325, 330.
342. Id. at 330 (emphasis added).
344. Id. at 387–88.
345. Id. at 384.
revealing psychosocial impacts from the relative presence or absence of race-conscious admissions informed the Court’s decision to uphold the respective programs.

Finally, in the seminal case *Obergefell v. Hodges*, the Court considered the psychological implications for same-sex couples and their offspring in recognizing the constitutional right to same-sex marriage. Specifically, the Court contemplated the “stigma and injury” that individuals endure from laws excluding same-sex couples from the right to marry, and the “harm and humiliat[ion] the children of same-sex couples” suffer from “knowing their families are somehow lesser.” It follows that the Court’s explicit concern with how exclusion affected the psyches of same-sex couples and their children influenced its decision to deem that practice unconstitutional.

In short, the ability of courts to examine empirical data underlying state actions, particularly research demonstrating adverse emotional and psychological impacts of those actions, is well established. Given the history of using empirical data to resolve constitutional issues like the right to abortion, sex discrimination, affirmative action, and the right to same-sex marriage, the Supreme Court of Maryland had no shortage of precedent counseling the use of empirical data to decide this Fourth Amendment question.

**C. The Court Weakened Its High-Crime Area Framework Without Examining the Discriminatory Implications.**

The Supreme Court of Maryland incorrectly endorsed police officer testimony as sufficient to establish an area has high crime levels without contemplating the subjectivity and absence of standards inherent in that approach. Failure to require objective, factual proof of crime rates allows police officers to arbitrarily invoke the “high-crime area” label based on personal beliefs or bias without facing judicial scrutiny. Additionally, prior to this case, the court required a nexus between the suspicious conduct and the criminal activity prevalent in the area in order for the high-crime nature

347. *Id.* at 665, 668, 671.
348. *Id.* at 668, 671.
349. *See id.* at 671 (“[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”).
351. *See supra* notes 334–349 and accompanying text.
353. *See infra* Section IV.C.1.
of a Terry stop location to be probative of guilt. Here, the court weakened that requirement to encompass a broader array of human behavior by announcing that the individual’s suspicious conduct must “not be inconsistent with” the crimes prevalent in the area. Taken together, the court’s principles aid law enforcement’s ability to invoke “presence in a high-crime area” as a Terry stop justification by allowing officers themselves to control the narrative of whether an area is high crime while also expanding the spectrum of potentially innocent behavior that meets the court’s standards. Instead, the court should have mitigated the potential for discriminatory use of presence in a high-crime area by announcing an objective measure for determining crime rates and preserving the nexus requirement.

1. Adopting a Subjective Standard and Removing the Nexus Requirement Furthers Law Enforcement’s Ability to Invoke Presence in a High-Crime Area as a Pretext for Racially-Motivated Investigatory Stops.

The court’s new high-crime area framework will disproportionately affect the Black community because, as the Appellate Court of Maryland aptly noted in its opinion, alleged “high crime areas” are often majority-minority. The location where Washington’s stop occurred provides a perfect example. Officers stopped Washington in an alley off of Cordelia Avenue, a street in the Langston Hughes neighborhood of Baltimore. Data from the United States Census Bureau indicates that in 2020, the Langston Hughes neighborhood had a population of 741. Of those 741 residents, 683 were Black, and only 17 were White. With Black individuals comprising 92% of the Langston Hughes population, it is clear that the high-crime area in which Washington was stopped is majority-minority. And due solely to the purportedly high-crime nature of the area, the predominately Black

354. See supra Section II.E.2.
355. Washington, 482 Md. at 443, 287 A.3d at 330 (emphasis added).
356. See infra Section IV.C.1.
357. See infra Section IV.C.2.
359. Location of Cordelia Avenue, Baltimore, MD, GOOGLE MAPS, https://www.google.com/maps (search “Cordelia Avenue, Baltimore, MD” in top left search bar; zoom out twice to see location in Langton Hughes neighborhood).
361. Id.
362. Id.
population of the Langston Hughes neighborhood is more susceptible to becoming the subject of a stop and frisk, just as Washington was.\footnote{363}{See Washington v. State, 482 Md. 395, 443–44, 452, 287 A.3d 301, 330, 335 (2022) (noting Washington’s presence in a high-crime area as he fled police supports the existence of reasonable suspicion); see also United States v. Weaver, 9 F.4th 129, 156 n.3 (2d Cir. 2021) (Lohier Jr., J., concurring) (“Because officers are more likely to perceive majority-minority neighborhoods as ‘high-crime areas,’ African Americans are viewed suspiciously wherever they go. Majority-minority neighborhoods become ‘high-crime’ neighborhoods, and otherwise innocent conduct appears to some as suspicious.”).}

The same is true about many of Baltimore’s neighborhoods. By way of example, 2020 census data shows that Black individuals account for 93\% of the population of the Edmondson Village neighborhood, 92\% of the population of the Penn North neighborhood, and 93\% of the population of the Sandtown-Winchester neighborhood.\footnote{364}{Census Demographics, supra note 360. The Edmondson Village neighborhood had a total population of 3,642 in 2020, with 3,400 residents identifying as Black and 55 as White. Id. The Penn North neighborhood had a total population of 1,613 in 2020, with 1,486 residents identifying as Black and 50 as White. Id. The Sandtown-Winchester neighborhood had a total population of 6,162 in 2020, with 5,741 residents identifying as Black and 128 as White. Id.}
The significance of these three majority-minority neighborhoods specifically is that they are located in BPD’s western enforcement district, a district that has been historically over policed.\footnote{365}{BALT. POLICE DEP’T, WESTERN DISTRICT, https://www.baltimorepolice.org/find-my-district/western-district (last visited Sept. 2, 2023).} According to the DOJ Report on the BPD, nearly 55,000 pedestrian stops were recorded in the Western District over the five and a half years of data examined.\footnote{366}{DOJ REPORT, supra note 38, at 65.} The Western District is BPD’s smallest enforcement district, encompassing roughly 37,000 primarily Black residents.\footnote{367}{Id.} This statistic becomes meaningful when compared to the report’s finding that BPD recorded only 21,000 pedestrian stops in the Northern District, a predominately White area with approximately 91,000 residents.\footnote{368}{Id.} Stated differently, BPD recorded 146 stops per 100 residents in the majority Black Western District, but only 22.5 stops per 100 residents in the primarily White Northern District.\footnote{369}{Id.} This data yields a more than 6 to 1 racial disparity in BPD’s enforcement.\footnote{370}{Id.} It follows that residents of Western District neighborhoods “have different Fourth Amendment protections than they would in other locations in the same town, city, or state.”\footnote{371}{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, 1589 (2008).}

The racial composition of these Baltimore neighborhoods, viewed against the backdrop of BPD’s historically disproportionate concentration on
them, makes it particularly troubling that the Supreme Court of Maryland vested police officers with the authority to establish a stop location as a high-crime area.\textsuperscript{372} Indeed, the court rejected an objective measure for evaluating whether a location has high crime in favor of formally adopting a standard based solely on officer testimony.\textsuperscript{373} However, approval of police officers’ overly subjective valuations of a location’s crime levels invites abuse of the label to justify otherwise unconstitutional \textit{Terry} stops.\textsuperscript{374} As Judge Lohier pointed out in his concurrence in the Second Circuit case \textit{United States v. Weaver},\textsuperscript{375} “[b]lind acceptance of police testimony on this issue creates an unjustified risk of arbitrary and discriminatory policing.”\textsuperscript{376}

To emphasize the magnitude of the risk, Judge Lohier cited to a study of the New York Police Department (“NYPD”) that analyzed stop data from 2007 through 2012.\textsuperscript{377} The study revealed that the characterization of an area as “high crime” was \textit{almost completely unrelated} to actual crime rates.\textsuperscript{378} Whether an officer perceived an area as high crime was most substantially influenced by the individual’s race and the neighborhood’s racial composition.\textsuperscript{379} What is worse, NYPD officers were “less likely to make an arrest, recover weapons, or find contraband when they stopped a suspect in a purportedly high-crime area.”\textsuperscript{380} This study plainly demonstrates the danger that an officer’s invocation of the high-crime label is not only significantly influenced by race, but it is wholly divorced from actual crime rates or the likelihood that criminal activity was taking place.\textsuperscript{381}

In the absence of \textit{any} objective standards, such as a defined geographic scope, temporal limitation, or a requisite level of crime relative to that of other neighborhoods, police officers have unfettered discretion to invoke the “high crime” phrase in a way that is “haphazard at best, and discriminatory at worst.”\textsuperscript{382} And when the designation is used to justify \textit{Terry} stops, trial courts rarely challenge or verify the underlying testimony, effectively

\begin{flushleft}
373. \textit{Id}.
379. \textit{Id} at 352, 387, 389.
382. \textit{Id} at 396.
\end{flushleft}
accepting whatever subjective declarations are given at face value. Thus, the “high-crime area” characterization becomes a proxy for race, and it does so with judicial approval. Continuing to blindly accept officer testimony on this issue entrenches the link between race and criminality in the law and, without a course correction, will perpetuate endless racially-motivated Terry stops under the pretext that the individual was present in a high-crime area.

In Washington, the court eschewed that course correction in favor of explicitly adopting the subjective and inherently standardless framework discussed above. Given the demonstrated influence of racial bias on whether the high-crime label is invoked, express judicial approval of this discriminatory paradigm will have troubling implications for Baltimore’s historically overpoliced, predominantly Black neighborhoods. The court’s decision in this regard “comes dangerously close to declaring that persons in ‘bad parts of town’ enjoy second-class status in regard to the Fourth Amendment.”

2. The Court Should Have Adopted an Objective Standard and Retained the Nexus Requirement to Mitigate Abuse of the High-Crime Label as a Pretextual Stop Justification.

Instead of the test it announced, the court should have adopted an objective measure for determining whether a particular location is high crime, such as inquiry into actual crime rates. Remaining faithful to a subjective standard based solely on officer testimony completely ignores the foregoing research demonstrating that police officers’ identification of crime rates is unreliable and heavily dependent on race. The risk that this testimony is biased and entirely inaccurate is unjustifiable in light of the fact that police departments are capable of mapping the location of criminal

383. See Ferguson & Bernache, supra note 371, at 1591 (“Statistical data is rarely entered on the record by the government. Outside experts are never consulted. The high-crime area designation is hardly ever empirically supported with factual evidentiary proof.”) (footnotes omitted).
384. See Lewis R. Katz, Terry v. Ohio at Thirty Five: A Revisionist View, 74 MISS. L.J. 423, 493 (2004) (“Location in America, in this context, is a proxy for race or ethnicity. By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race.”) (footnote omitted).
385. See supra note 384.
386. See supra notes 352–356 and accompanying text.
387. See Grunwald & Fagan, supra note 376, at 389 (finding that “moving from an area with no Black residents to an area with all Black residents” was correlated with a “substantially larger increase” in the likelihood that a police officer invokes the “high crime area” label than “moving from the single safest neighborhood in the city to the single most dangerous”).
390. See supra text accompanying notes 377–381.
conduct in their jurisdiction.\textsuperscript{391} Indeed, BPD’s public crime map, which is updated every morning, allows any user to view the neighborhood- and district-level crime rates in the last 7, 28, or 365 days.\textsuperscript{392} The ease at which anyone can access this data renders indefensible the court’s commitment to inaccurate, and likely biased, testimony from police officers.

The court should have also retained the requirement of a nexus between the crime prevalent in the area and the criminal activity suspected by the officers in each case. Weakening the criteria for whether a high-crime label is material to the reasonable suspicion inquiry is at odds with the court’s prior case law, and the case law of many other state and federal courts, which continue to require a link between the individual’s conduct and the crime prevalent in the area.\textsuperscript{393} A nexus requirement tethers the individual’s conduct to the criminal activity likely to occur in that location, and it ensures that the individual’s presence in a high-crime area is not a coincidence but rather a circumstance increasing the probability that they are engaged in criminal activity.\textsuperscript{394} It is imperative to remember that “[t]he spectrum of legitimate human behavior occurs every day in so-called high crime areas,”\textsuperscript{395} and many of these behaviors law enforcement can interpret as “not . . . inconsistent with” criminal activity, like unprovoked running.\textsuperscript{396} Thus, the court should have kept the nexus requirement to ensure that otherwise innocuous conduct is not deemed suspicious simply because it occurred in a high-crime area.


cONCLUSION

In \textit{Washington v. State},\textsuperscript{397} the Supreme Court of Maryland held that in determining whether an investigatory stop was justified by reasonable suspicion, courts should consider whether unprovoked flight from police is a

\textsuperscript{391} \textit{Weaver}, 9 F.4th at 157 (Lohier, J., concurring).

\textsuperscript{392} \textit{Baltimore Police Department Crime Map}, BALT. POLICE DEP’T, https://arcgisportal.baltimorepolice.org/publiccrimemap/?_gl=1*10zhfdy*_ga*NDYwNjMyMTEzLjE2OTU5NjlyNDL*_ga_N4F03K56YN*MTY5NTQxMDcwMS40LjEwMTY5NTQxMDczMy4yOC4wLjA (last visited Sept. 22, 2023).

\textsuperscript{393} See supra Section II.E.2.; see also United States v. Wright, 485 F.3d 45, 53–54 (1st Cir. 2007) (noting nexus between crime prevalent in the area and crime suspected in the instant is relevant to whether an area is high crime); United States v. Edmonds, 240 F.3d 55, 60 (D.C. Cir. 2001) (finding nexus between crime prevalent in area and crime suspected of defendant supported conclusion that the area was high crime); People v. Stover, 120 N.Y.S.3d 650, 654 (N.Y. App. Div. 2020) (concluding defendant’s argument on his cellphone did not have a nexus to the drugs and weapons crimes prevalent in the area).

\textsuperscript{394} See \textit{Weaver}, 9 F.4th at 158 (Lohier, J., concurring) (“When an officer sees someone carrying a can of spray paint in a high-crime area, it matters whether the crime prevalent in the area is vandalism or pickpocketing.”).

\textsuperscript{395} People v. Bower, 597 P.2d 115, 119 (Cal. 1979) (en banc).


\textsuperscript{397} \textit{482 Md. 395, 287 A.3d 301 (2022).}
factor consistent with innocence or, combined with other inculpatory indicia, is suggestive of criminal activity.\footnote{Id. at 406–07, 287 A.3d at 308.} The court applied this holding to conclude that Washington’s unprovoked flight in a high-crime area established reasonable suspicion for an investigatory stop.\footnote{Id. at 407, 287 A.3d at 309.} In reaching this conclusion, the court misapplied \textit{Illinois v. Wardlow} and consequently diminished the factual basis needed to establish reasonable suspicion to unprovoked flight in a high-crime area alone.\footnote{See supra Section IV.A.} Additionally, the court failed to meaningfully assess and appreciate the implications of research demonstrating innocent, fear-based reasons why Black individuals attempt to evade contact with law enforcement, particularly in Baltimore.\footnote{See supra Section IV.B.} Finally, the court weakened its high-crime area framework by embracing a subjective measure of crime levels and eliminating the nexus requirement without considering the discriminatory impact this will have in practice.\footnote{See supra Section IV.C.} The court’s decision undermines the legitimacy of the judiciary as a justice-oriented adjudicator and effectively relegates Maryland’s Black community to an inferior position with respect to Fourth Amendment protections.