NOTE

Discovering the Victim: The Enduring Problem with "High-Crime Areas"

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In 1995, Chicago police officers stopped and frisked Sam Wardlow, a black man, after he reportedly ran from them in a "high-crime area" of Chicago, Illinois. The Supreme Court ultimately upheld the stop and frisk in Illinois v. Wardlow*, concluding that flight from law enforcement in a high-crime area constituted sufficient reasonable articulable suspicion to satisfy the Fourth Amendment's strictures on searches and seizures. Twenty years later, Baltimore police stopped another black man, Freddie Gray, this time for allegedly fleeing in a high-crime area of Baltimore, Maryland. Gray was arrested following the stop and frisk, and later died from injuries he sustained in police custody. His death ignited a public uprising in Baltimore, leading to intense protests and violence. Yet under* Wardlow*, the police officers who stopped Freddie Gray decades later did so within the bounds of the Fourth Amendment.*

After Wardlow*, academics and jurists began analyzing the high-crime area factor's place in the "reasonable articulable suspicion" inquiry. Many academics—and some federal judges—recognized the problems associated with labeling entire communities "high-crime areas," including the disproportionate impact that such weakened constitutional protections have on communities of color. Most argued for creating objective criteria to determine when and how the factor is used, often seeking to limit the spatial boundaries of high-crime areas. None, however, tracked the Supreme Court's establishment of the high-crime area factor as it relates to the factor's effect on racial identity and criminality, and racially discriminatory policing.*

Using Alan David Freeman's "perpetrator-victim" framework, I explain

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that even reform-minded academics and judges consider the high-crime area factor from the perpetrator perspective. That position has given rise to proposed legal remedies that fail to support those living and working under weakened constitutional protection, most of whom are poor people of color. I also build upon Devon Carbado's use of a modified perpetrator-victim framework by focusing on the Court's active role in legitimizing and reproducing racially discriminatory police tactics, and by considering the effects on various racial minorities. By tracing the history of the term "high-crime area," I intend to demonstrate that the Supreme Court acts as a type of mirror, reflecting and validating police practices in predominantly black and brown neighborhoods. I also explore how that action aids in constructing racial identities tied to stereotypes of criminality. I then use Freeman's framework to analyze the high-crime area factor from the victim perspective. My analysis reveals that ending the factor's use in the reasonable articulable suspicion inquiry would not change racially discriminatory policing or meaningfully help communities struggling with high crime rates. Instead, the victim perspective shows that change must begin with an attack on the conditions associated with poverty, crime, and cycles of imprisonment. Finally, I discuss extrajudicial changes that may begin to remedy those conditions, which include acknowledging and ending various ways the criminal system targets black men, the social distinction between innocents and criminals, and the modern prison system.

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INTRODUCTION

This Note seeks to contribute to the body of academic research critiquing the Supreme Court's Fourth Amendment jurisprudence as it relates to the intertwined histories and futures of the police and communities[1] of color.[2] The Fourth Amendment, in relevant part, protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[3] Originally, "the people" protected by the Fourth Amendment did not include black people, Latinxs, and other racial groups that were either lawfully enslaved under the Constitution's terms or largely excluded from the rights and protections provided predominantly to white men.[4] Since then, constitutional amendments and Supreme Court jurisprudence have extended the Fourth Amendment's protections to racial minorities and other historically unprotected groups.[5] So too have interpretations of the Fourth Amendment's protection "against unreasonable searches and seizures" evolved. As that doctrine has grown to encompass new concerns, such as technological advancements,[6] the Supreme Court's Fourth Amendment jurisprudence has also evolved in its regulation of a critical point of contact between individuals and the state: police encounters.[7]

In 1968, the Supreme Court dramatically expanded the power of police to stop and search individuals on the street. In *Terry v. Ohio*, the Court distinguished traditional government searches and seizures, which presumptively require a warrant, from *limited* searches and seizures conducted

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1. When used in the phrase "community of color," the term "community" is defined in a cultural sense, rather than a physical or spatial sense. Otherwise, when used without relation to a specific cultural, racial, or ethnic group, "community" is used to denote those living in a physical place.

2. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

3. U.S. CONST. amend. IV.

4. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (stating that "Representatives . . . shall be apportioned among the several States . . . according to their representative Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons"). This clause was later superseded by the Fourteenth Amendment.

5. *See* U.S. CONST. amends. XIII, XIV, XV.

6. *See, e.g.*, Katz v. United States, 389 U.S. 347, 352-59 (1967) (early electronic recording surveillance); Carpenter v. United States, 138 S. Ct. 2206, 2216-23 (2018) (cell-site location information).

7. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (holding that police may conduct a limited seizure of a person if the police have reasonable articulable suspicion of criminal activity); Florida v. Bostick, 501 U.S. 429, 433-40 (1991) (holding that police questioning passengers on a bus with their consent is not a per se violation of the Fourth Amendment).

during certain public encounters between police and individuals, holding that this latter class does not require a warrant or probable cause.[8] These investigatory stops, now known as *Terry* stops, delineate a police officer's power to briefly stop (or "seize") someone based on a reasonable suspicion that the individual is involved in criminal activity. During these stops, police may also pat down, or "frisk," the person they have stopped if they believe the person to be "armed and dangerous."[9]

To determine whether a police officer had sufficient "articulable suspicion" of a crime to conduct a *Terry* stop,[10] courts use a "totality of the circumstances" approach.[11] Relevant factors include, inter alia, flight from police,[12] refusal to cooperate,[13] credible anonymous tips of illicit behavior,[14] observed behavior that may "be preface to" illegal actions,[15] time of day,[16] and presence in a "high crime area."[17] While the presence of any single factor is generally insufficient for an officer to perform a *Terry* stop, they can, in combination with each other or a plethora of other relevant facts, amount to reasonable articulable suspicion and thus provide the basis for a legal stop and search.

When defining the constitutional bounds of *Terry* stops, courts seek to balance individuals' privacy interests against the state's law enforcement interests.[18] Such balancing implicitly assumes that law-enforcement activity—specifically, stopping persons that the police perceive as suspicious—is in the interest of the community and thus the State.[19] The Court's use of law enforcement as a counterweight to individual privacy in Fourth Amendment doctrine narrowly focuses on police action as the central, and perhaps sole, mechanism for controlling criminal behavior. Through this line of cases, the

8. *Terry*, 392 U.S. at 26-27.

9. *Id.* at 27.

10. *Id.* at 31 (Harlan, J., concurring).

11. Illinois v. Wardlow, 528 U.S. 119, 126-27 (2000) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

12. *See id.* at 123-26 (majority opinion).

13. *See* Brown v. Texas, 443 U.S. 47, 48-49 (1979).

14. *See* Adams v. Williams, 407 U.S. 143, 144-47 (1972).

15. *Terry*, 392 U.S. at 27-30.

16. *See Williams*, 407 U.S. at 144, 147-48; *see also* United States v. Johnson, 921 F.3d 991, 998 (11th Cir. 2019) ("[c]ircumstances that we consider include the time of day"); United States v. See, 574 F.3d 309, 314 (6th Cir. 2009) ("[a]part from the contextual factors of time and the high-crime status of the area . . ."); United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987) ("the hour was late, the street was dark, the officer was alone").

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

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

19. Carbado, *supra* note 2, at 969 n.113. This balancing also assumes that the community and the State share the same interests.

Court armed police with a new tool—the stop and frisk—that has been used to oppress and criminalize people of color.[20]

The "high-crime area" factor is unique from the other factors considered in

20. In New York City, a federal district court found extensive evidence of racially discriminatory *Terry* stops committed by the New York Police Department (NYPD). *See* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The court determined that "[t]he NYPD carries out more stops where there are more black and Hispanic residents, even when other relevant variables are held constant." *Id.* at 560. It also found "[t]he racial composition of a precinct or census tract predicts the stop rate *above and beyond* the crime rate." *Id.* Furthermore, a study of 4.4 million stops in New York City found that in 52% of those stops, the person stopped was black, even though "New York City's resident population was roughly 23% black," and stops of white people were more likely to lead to the seizure of weapons and contraband. *Id.* at 559.Another study of *Terry* stops in New York City found that in one fifteen-month period, "Non-Hispanic Black, Hispanic Black, and Hispanic White New Yorkers were three times more likely than their white counterparts to be stopped and frisked on suspicion of weapons or violent crimes relative to each group's participation in each of those two types of crimes." Jeffrey Fagan et al., *Street Stops and* Broken Windows *Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, Columbia Public Law Research Paper No. 09-203, at 2 (2009) (citing Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821 (2007)). Subsequent research found that "street stops continue to be disproportionately concentrated in [New York City's] poorest areas" and that "demographic makeup predicts stop activity above and beyond what local crime conditions suggest is necessary and justifiable." *Id.* at 3-4. Researchers also determined "that the dramatic increase in stop activity in recent years is concentrated predominantly in minority neighborhoods, and that minority residents are likely to be disproportionately subjected to law enforcement contact based on the neighborhoods in which they live rather than the crime problems in those areas." *Id.* at 4. Indeed, the analysis noted that "as stops have become more prevalent in recent years they are substantially less likely to lead to arrests." *Id.*In Milwaukee, Wisconsin, one expert found that "Black pedestrians [we]re more likely to be stopped than white pedestrians in all districts." Decl. of David Abrams, Ph.D., *Collins v. City of Milwaukee*, No. 17-CV-00234, Doc. 85-13 at 39 (E.D. Wis. 2018). The expert further determined that "the most predominantly Black district[] ha[d] the highest rate of pedestrian stops," and that "Black people [we]re stopped 6.6 more times per hundred people in comparison to white/Latino people" (the statistics for pedestrian stops failed to distinguish whites and Latinxs). *Id.* at 39-40. The additional stops associated with being Black were "equivalent to an elevation in the stop rate of over 500 percent," and might be a "conservative estimate." *Id.* at 41. Moreover, for vehicle stops, the expert found that the "fact that the discovery rate of drugs is significantly lower among Black and Latino drivers than white drivers implies that Black and Latino drivers are over-searched in comparison to white drivers." *Id.* Finally, the expert found the "the overall rate of stops lacking legal sufficiency" was "at least 40 percent." *Id.* at 42.In Charlottesville, Virginia, a 2017 police department study found that 73% of the stop and frisks involved stopping and searching black people, even though less than 20% of the city's population is black. Charlottesville, VA, City Council Agenda, Mar. 19, 2018 (providing stop statistics); Michael L. Owens, *Charlottesville stop-and-frisk cases 70 percent black, 29 percent white*, ROANOKE TIMES (May 6, 2014), https://perma.cc/LEN9-HXCF (providing the city's demographic information).

the reasonable articulable suspicion inquiry. It does not depend on the actions of a particular person but instead defines neighborhoods and physical communities in which a person has, by default, diminished constitutional freedoms and lowered expectations of privacy.[21] Unlike factors that consider an individual's specific actions, like fleeing from police[22] and refusing to cooperate,[23] the high-crime area factor weakens the Fourth Amendment's protections against police invasion of a person's body and effects solely because they live in, work in, or visit particular neighborhoods. Crucially, high-crime areas are disproportionately areas where African Americans[24] and other minorities live.[25] The conspicuousness of this correlation and the United States' history of police abuse of minority communities[26] lead inexorably to critical questions regarding the high-crime area factor's role in further subordinating minority groups. Why did the Supreme Court weaken constitutional protections for people living in particular communities, which disproportionately affected racial minorities? How has that decision continued to impact those communities?

In 2015, a twenty-five-year-old African-American man, Freddie Gray, was stopped by police in Baltimore, Maryland, in an alleged high-crime area.[27] The officers asserted that the young man made eye contact with the officers and then fled.[28] After finding a knife in his pocket, the police arrested him and placed him in the back of a police van without a seatbelt.[29] En route to the police station, he suffered a severe spinal injury.[30] Gray died from these injuries a week later, igniting a public uprising in Baltimore.[31] The officers involved in Gray's arrest and death faced no federal criminal charges,[32] and were ultimately acquitted of those state charges that were not dismissed.[33]

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21. David Seawell, Wardlow*'s Case: A Call to Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1125 (2001).

22. *See Wardlow*, 528 at 123-26.

23. *See* Brown v. Texas, 443 U.S. 47, 48-49 (1979).

24. Reshaad Shirazi, *It's High Time to Dump the High-Crime Area Factor*, 21 BERKELEY J. CRIM. L. 76, 77 (2016).

25. PAUL BUTLER, CHOKEHOLD 109 (2017); *see also supra* note 20.

26. *See generally* Carbado, *supra* note 2.

27. Rebecca R. Ruiz, *Baltimore Officers Will Face No Federal Charges in Death of Freddie Gray*, N.Y. TIMES (Sept. 12, 2017), https://perma.cc/4UE2-MTEH.

28. *Id.*

29. *Id.*

30. John Woodrow Cox et al., *Who Was Freddie Gray? How Did He Die? And What Led to the Mistrial in Baltimore?*, WASH. POST (Dec. 16, 2015), https://perma.cc/4YQE-5KAX.

31. *Id.*

32. Ruiz, *supra* note 27.

33. Sheryl Gay Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore*

While Freddie Gray died as a result of egregious police misconduct, the circumstances of his stop and search were both commonplace and constitutional. Indeed, nearly twenty years earlier, the Supreme Court expressly sanctioned the exact type of stop that ultimately resulted in Gray's death.

One afternoon in 1995, Sam Wardlow, an African-American man and convicted felon, was standing on a Chicago street.[34] A line of police vehicles drove by canvassing an area thought to have "heavy narcotics trafficking."[35] One officer saw Wardlow look in the direction of the caravan before turning to run.[36] The officers, suspecting Wardlow of drug trafficking based solely on his location and rapid movement, subsequently chased and stopped him.[37] One officer immediately frisked Wardlow because, in the officer's own experience, "it was common for there to be weapons in the near vicinity of narcotics transactions."[38] The officers found a gun on Wardlow and arrested him, but no drugs were ever found. He was eventually convicted of "unlawful use of a weapon by a felon."[39] The Supreme Court held that the police officers' stop and frisk of Wardlow was lawful under the Fourth Amendment, as his "presence in an area of heavy narcotics trafficking . . . [and] unprovoked flight upon noticing the police" satisfied the reasonable articulable suspicion inquiry.[40] Building upon its earlier approval of the high-crime area factor, the *Wardlow* Court issued a strong proclamation supporting the factor's use in regular police activity.

Interrogating the Supreme Court's determination that presence in a "high-crime area" is a legitimate factor in the reasonable articulable suspicion inquiry reveals the discriminatory conditions common to racialized policing. Those include the conditions that led Chicago police to drive a line of police vehicles into a particular neighborhood seeking drug traffickers, and those that led Baltimore officers to chase and arrest Freddie Gray, eventually leading to his death. We must identify and remedy those conditions, including racially discriminatory police practices and communities' over-reliance on police for protection, if we are to end the harms experienced by victims of racial discrimination. Moreover, by ignoring such conditions throughout its high-crime area jurisprudence, the Court has played a significant role in constructing

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Officers in Freddie Gray Case, N.Y. TIMES (July 27, 2016), https://perma.cc/N2XH-SGAZ.

34. Seawell, *supra* note 21, at 1119.
35. Illinois v. Wardlow, 528 U.S. 119, 121 (2000).
36. *Id.* at 122.
37. *See id.*
38. *Id.*
39. *Id.*
40. *Id.* at 124.

racial identities linked to criminality.

Following *Wardlow*, some judges and legal scholars expressed concern with the Court's failure to define the factor's spatial limits and account for its possible abuse by police officers.[41] Like the Supreme Court, however, those writers have failed to adequately analyze the rationale and racially discriminatory effects of the high-crime area factor because they remain entrenched in the perpetrator perspective, an approach to racial discrimination that focuses on the perpetrators of such actions. The perpetrator perspective perceives racism and racial discrimination as consisting of discrete actions by particular actors.[42] By identifying those actors and stopping them from committing one type of discriminatory behavior, such as racially motivated hiring practices, the legal system believes it has remedied the problem for people of color. Viewing racial discrimination from this perspective fails to adequately address the underlying conditions associated with racism and racial discrimination, and therefore fails to address the needs of victims who live and work in those conditions every day. As such, even calls to abolish the high-crime area factor altogether also approach the issue from the perpetrator perspective. Ending the factor's use would not remedy those conditions that lead police to target poor, predominantly black and brown neighborhoods, and likely would have little to no effect on the racially discriminatory conduct of police.

Instead, the insidious effects of the high-crime area factor on communities of color should be conceptualized through the victim perspective, which focuses on those harmed by the racially discriminatory nature of the factor. Devon Carbado has used a variation of the perpetrator-victim framework to reconceptualize discrete parts of Fourth Amendment jurisprudence, although

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41. *See, e.g.*, United States v. Wright, 582 F.3d 199, 204 (1st Cir. 2009) (noting the district court's finding that the area in question was not a high-crime area, its "unease" with the *Wardlow* definition of high-crime area, and its statement that the "problem with that *Wardlow* type of analysis, candidly, is that the rights of the citizens in the Dorchester area of Boston have to be identical to the rights of citizens in Milton and Wellesley"); United States v. Montero-Camargo, 208 F.3d 1122, 1138-39 (9th Cir. 2000) (en banc); 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, 1607-09 (2008) (noting that while many courts "have relied on an officer's testimony that an area is a 'high-crime area,'" other "courts recognized the need for a more structured method of proof"); Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas,"* 63 HASTINGS L.J. 179, 217 (2011) (recognizing that "[n]eighborhoods may become a proxy for racially biased law enforcement").

42. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

his work did not address the reasonable articulable suspicion inquiry.[43] By applying that framework to the high-crime area factor, we can more accurately target the *results* that victims of racial discrimination seek as they live, work, and love in their communities, rather than merely identifying discrete and isolated violations of law that are only relevant after an individual is arrested. The following analysis builds upon Carbado's prior work to address the high-crime area factor's introduction and destructive use against communities of color.

In the following pages, I first explain the perpetrator-victim framework and how the Supreme Court, lower courts, and academics orient their concerns about the factor according to the perpetrator perspective. Next, I argue for the application of the victim perspective when analyzing the high-crime area factor, which also serves as a basis for improving police practices in impoverished minority communities as a whole. Through that analysis, I map the ways in which the Supreme Court serves as a mirror that reflects and validates police behavior, and how both the Court and police help to construct racial identities that are tied to stereotypes of criminality. Finally, I discuss three extrajudicial solutions that may begin to remedy the conditions associated with crime and racially discriminatory policing.

I. LEGAL AND THEORETICAL BACKGROUND

A. The Perpetrator-Victim Framework

The perpetrator-victim framework was introduced by Alan David Freeman, who argued that "[t]he concept of 'racial discrimination' may be approached from the perspective of either its victim or its perpetrator."[44] Freeman used the framework to descriptively analyze the Supreme Court's antidiscrimination jurisprudence, examining the growth and change of doctrinal conceptions of violations and remedies in the civil rights context.

Freeman first defined the perpetrator perspective as "see[ing] racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator."[45] The perspective "presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity," and perceives "racial discrimination not as a social phenomenon, but merely as the misguided

43. *See* Carbado, *supra* note 2 (considering consent searches and the "free to leave" test for Fourth Amendment seizures).

44. Freeman, *supra* note 42, at 1052.

45. *Id.* at 1053.

conduct of particular actors."[46] Under this perspective, violations of antidiscrimination law—or acts of unlawful racial discrimination—constitute discrete actions by particular perpetrators, which are remedied by neutralizing that specific unlawful conduct.[47]

Freeman noted antidiscrimination law's focus on fault, defined as the singling out of "blameworthy individuals who are violating [an] otherwise shared norm," and causation, which distinguishes those conditions that the law will address "from the totality of conditions that a victim perceives to be associated with discrimination."[48] Antidiscrimination law, according to Freeman, thus fails to serve the needs of the victims it purports to protect:

> These dual requirements [of fault and causation] place on the victim the nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator, regardless of whether other conditions of discrimination, caused by other perpetrators, would have to be remedied for the outcome of the case to make any difference at all.[49]

Freeman explained that the doctrine "has thus been ultimately indifferent to the condition of the victim."[50]

Freeman juxtaposes the perpetrator perspective with that of the victim—a perspective that sees racial discrimination as "those conditions of actual social existence as a member of a perpetual underclass."[51] The victim perspective suggests racial discrimination "will not be solved until the conditions associated with it have been eliminated,"[52] and thus can be remedied only through "affirmative efforts to change the condition[s]."[53] The victim perspective recognizes "both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual."[54] Freeman defined "victim" as including members "of the group that was historically victimized by actual perpetrators or a class of perpetrators" and "who . . . continue to experience conditions that are actually or ostensibly tied to the historical experience of actual oppression or victimization."[55]

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46. *Id.* at 1054.
47. *Id.*
48. *Id.* at 1054, 1056.
49. *Id.* at 1056.
50. *Id.* at 1054.
51. *Id.* at 1052.
52. *Id.* at 1053.
53. *Id.*
54. *Id.* at 1052-53.
55. *Id.* at 1053 n.16.

Freeman concluded that antidiscrimination law in the late 1970s had declared "that, despite the discriminatory appearance of current conditions, the actual violation has already been cured, or is being remedied, regardless of whether the remedy prescribed can be expected to alleviate the condition."[56] Due to the doctrine's entrenchment in the perpetrator perspective, Freeman found that antidiscrimination law failed to remedy the conditions of the victim—the *results* of remedying the legal violation, whether positive, negative, or neutral, were beyond the scope of the doctrine so long as a particular actor's discriminatory practice had been changed.[57]

This framework is naturally suited to apply to public encounters between police and private individuals. Like antidiscrimination law, which focuses explicitly on racialized interactions between two parties, the Fourth Amendment regulates racial discrimination by regulating police encounters. *Terry* stops and frisks by police are often criticized for disproportionately targeting young black and brown men,[58] thus implicating racial discrimination by a perpetrator (the police) against a victim (black and brown men). The defendants in the two most significant cases to consider the high-crime area factor were both black men.[59] Social science research has found that areas with the highest tracked rates of crime are predominantly areas with significant African-American populations.[60] As Paul Butler has noted, high-crime areas "almost always mean[] minority communities."[61] Others have argued that the high-crime area factor is illegitimate because the concentration of poverty and policing in many minority communities is caused by systemic racism.[62] As one commentator explained, "[d]ue to the politics of past and present racism . . . segregation [of minority communities] continues despite race-neutral policies."[63] While the Court rarely mentions race when considering *Terry*

56. *Id.* at 1102.

57. *But see* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1386 (2014) (advocating for a version of the perpetrator perspective in employment discrimination law).

58. *See, e.g.*, David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994); Renée McDonald Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 885 (2013).

59. *See* Shirazi, *supra* note 24, at 95-96. In *Brown v. Texas*, the Court held that presence in a high-crime area alone is an insufficient basis for a *Terry* stop. 443 U.S. 47, 51-52 (1979).

60. Shirazi, *supra* note 24, at 88.

61. BUTLER, *supra* note 25, at 109.

62. Shirazi, *supra* note 24, at 79-86.

63. Seawell, *supra* note 21, at 1131 (citing Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 449, 452 (Kimberlé Crenshaw et al. eds., 1995)).

stops,[64] historical connections between race, criminality, and policing continue to inform police behavior in the United States today.

Moreover, like lawsuits against employers that illegally fire employees because of their race, cases arising under *Terry* operate within a structure that identifies "bad" cops (those unable to articulate reasonable suspicion for a stop) and remedies violations of an individual victim's constitutional rights through the exclusionary rule. Where police fail to provide articulable, objective reasons for stopping someone, courts are instructed to identify the stop as a violation of the Fourth Amendment and generally to suppress any evidence stemming from the unlawful stop. This tracks how antidiscrimination law identifies and remedies violations in contexts like jury service and education.[65]

Carbado first applied this framework to the Fourth Amendment, arguing "that the racial effects of the Supreme Court's Fourth Amendment law [are] a function of the Court's adoption of . . . the perpetrator perspective."[66] Carbado used the framework to critique the Court's "investment in colorblindness" as applied to the Fourth Amendment, noting that under current conceptions of the law, "race potentially matters in the Fourth Amendment context only when a case involves a 'racially bad' cop."[67] Under this line of Supreme Court doctrine, the "racial allocation of the burdens and benefits of the Fourth Amendment" is obscured: For racial minorities, the loss of privacy stemming from increased police power does not bolster effective law enforcement—as is expected under *Terry*'s interest balancing—but rather is "a cost of race," which helps explain how communities of color can both be "under-protected even as they are over-policed."[68]

Under Carbado's application of the perpetrator-victim framework, the victim perspective "is explicitly race-conscious" both with respect to the victims of racial discrimination and potential perpetrators.[69] This perspective also provides a better understanding of the harms of racially discriminatory action by police and "a more sophisticated sense of the Court's role in legitimizing those harms."[70] In part, Carbado sought to demonstrate how the Court, through Fourth Amendment doctrine, both constructs and reifies race.[71] Just as application of the perpetrator-victim framework helps to identify the

64. *See* Carbado, *supra* note 2, at 965.
65. *See* Freeman, *supra* note 42, at 1077-79 (jury service); *id.* at 1107-12 (education).
66. *See* Carbado, *supra* note 2, at 968.
67. *Id*.
68. *Id.* at 969.
69. *Id.* at 970.
70. *Id.*
71. *Id.* at 971.

failings of antidiscrimination law and other parts of Fourth Amendment jurisprudence, so too can it uncover the deeper problems with current stop-and-frisk doctrine.

The remainder of this Note attempts to further Carbado's claims by closely analyzing the Court's high-crime area jurisprudence through Freeman's perpetrator-victim framework. Carbado listed three concerns with academic commentary regarding race and the Fourth Amendment: (1) that the literature does not link the Court's "racial insensitivity . . . to racial ideology;" (2) that the literature has not investigated the ways Fourth Amendment doctrine directly affects communities of color; and (3) that the literature is under-inclusive, having failed to recognize "that blackness is but one—albeit significant—racial identity burdened by the Court's formulation of Fourth Amendment doctrine."[72] I seek here to meet these concerns in discussing the high-crime area factor.

B. The Supreme Court's Tacit Elevation of the "High-Crime Area" Factor

The Supreme Court's "high-crime area" doctrine derives from a series of criminal procedure cases spanning from the 1970s to the early 2000s, all of which failed to meaningfully analyze the high-crime area factor's racially discriminatory nature. In each of those cases, the Court took on the perpetrator perspective, leading to inadequate—or nonexistent—remedies for the communities harmed by racially discriminatory police practices. Moreover, attempts by lower court judges to look more critically at the factor's relevance in the reasonable articulable suspicion inquiry have also been entrenched in this perspective. Even proposals to strictly limit the factor have failed to adequately adopt the victim perspective.

1. Early use of "high-crime area"

The term "high-crime area" was first used by the Supreme Court in 1972, when Justice William Rehnquist described the circumstances of a *Terry* stop and search leading to the arrest of Robert Williams.[73] The case, *Adams v. Williams*, held that an informant's tip that someone nearby was selling drugs and had a gun in his waistband, given to an officer late at night in a "high-crime area," was sufficient for the officer to stop the suspect and frisk his waistband.[74] Justice Rehnquist, writing for the majority, simply described the

72. *Id.* at 965-67.

73. Adams v. Williams, 407 U.S. 143, 144 (1972); *see* Ferguson & Bernache, *supra* note 41, at 1598.

74. *Williams*, 407 U.S. at 147-48.

officer as "on car patrol duty in a high-crime area of Bridgeport, Connecticut."[75] Later—and again without analysis or description—Justice Rehnquist summarily stated that the officer was "in a high-crime area."[76] These two references to generic "areas" that the police described as "high-crime" serve as the foundation for this factor's inclusion in the *Terry* stop-and-frisk analysis.

Although this description of a neighborhood may be neutral on its face, it neither describes the observed conduct of a suspect nor any specific knowledge an officer may have about a particular person. It instead generalizes about an undefined "area" without considering why local police officers characterize it as "high-crime" or where the boundaries of the area end. Nonetheless, even Justice Thurgood Marshall accepted the premise that officers can classify a neighborhood as "high-crime" and then use that determination as a basis for the reasonable articulable suspicion needed to justify a stop.[77] Writing in dissent, Justice Marshall initially cast some doubt on the term "high crime area" by appearing to place it in scare quotes,[78] but he abandoned that notation later in his opinion.[79] While Justice Marshall concluded that the "high-crime" factor was irrelevant to whether Williams illegally possessed a gun, he did not critique the majority's use of the term or interrogate its meaning.[80]

Indeed, none of the nearly two dozen state and federal judges who heard Williams's case disputed the characterization of the area in which he was stopped as "high-crime." The Connecticut Supreme Court, which heard Williams's direct appeal, merely noted that the area the officer was patrolling had a "high incidence of crimes of various kinds."[81] In Williams's federal habeas proceeding, the District Court for the District of Connecticut affirmed the factual findings of the Connecticut Supreme Court. On review, the Second Circuit deferred to the District Court's findings.[82] When the Second Circuit revisited the case en banc, they did not interrogate the high-crime label.[83] The State of Connecticut's brief at the United States Supreme Court also adopted the language of the Connecticut Supreme Court, asserting without citation that the officer was on duty in a "neighborhood" of Bridgeport with "a particularly

75. *Id.* at 144.
76. *Id.* at 147.
77. *Id.* at 158 n.5 (Marshall, J., dissenting).
78. *Id.* at 155.
79. *Id.* at 158 n.5.
80. *Id*. at 158-59.
81. State v. Williams, 249 A.2d 245, 246 (Conn. 1968).
82. Williams v. Adams, 436 F.2d 30, 31 (2d Cir. 1970), *rev'd en banc*, 441 F.2d 394 (2d Cir. 1971) (per curiam).
83. Williams v. Adams, 441 F.2d 394 (2d Cir. 1971) (per curiam).

high incidence of crime of various kinds."[84] Even Williams's brief accepted this characterization of the circumstances surrounding the stop and seizure.[85]

Seven years later, the Supreme Court again considered the relevance of a particular area's "high incidence of drug traffic" in determining the lawfulness of a *Terry* stop.[86] In *Brown v. Texas*, the Court unanimously held that "[t]he fact that [Brown] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."[87] Writing for the Court, Chief Justice Warren Burger explained that the case centered on an officer's description of a neighborhood in El Paso as a "high drug problem area."[88] While the Court held that the sole fact of presence in a high-crime area does not constitute reasonable articulable suspicion, the Court still relied on it as a factor in the *Terry* analysis without examining its basis in fact or potential spatial bounds. The Court used the phrase to describe factual circumstances in three additional cases over the next twenty years, all without commenting on or analyzing its use.[89]

Although *Brown* held that presence in a high-crime area, without more, does not constitute sufficient suspicion for a lawful police stop, the Court later explained that this factor remains exceptionally probative in finding reasonable articulable suspicion. Nearly thirty years after first introducing the high-crime area factor, the Court held in *Wardlow* that the Fourth Amendment does not prevent officers from stopping and questioning individuals in a high-crime area who run upon seeing the police.[90] Chief Justice Rehnquist relied on *Williams* for the proposition that the Court had "previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis."[91] Justice Rehnquist also reasoned that "*Terry* accepts the risk that officers may stop innocent people."[92]

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84. Brief for Petitioner at 6, *Adams*, 407 U.S. 143 (No. 70-283).

85. Brief for Respondent at 4, *Adams*, 407 U.S. 143 (No. 70-283) (noting that "[t]he appellee essentially agrees with the statement of the case except that he would characterize the evidence somewhat differently" but not opposing the neighborhood's characterization as high-crime).

86. Brown v. Texas, 443 U.S. 47, 49 (1979).

87. *Id.* at 52.

88. *Id.* at 49.

89. *See* Kolender v. Lawson, 461 U.S. 352, 354 n.2 (1983); Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990); California v. Hodari D., 499 U.S. 621, 622 (1991).

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

91. *Id.* at 124.

92. *Id.* at 126.

2. The perpetrator perspective takes hold

As noted above, Freeman's perpetrator-victim framework can be effectively applied to the reasonable articulable suspicion analysis in *Terry* stops.[93] As in Freeman's analysis of antidiscrimination law, the Supreme Court's high-crime area cases show the Court's entrenchment in the perpetrator perspective. The *Williams* Court's tacit acceptance of police delineating particular areas as "high-crime"[94] elevated police jargon to constitutional legitimacy—all without defining the phrase or attempting to locate its limits.

The perpetrator-victim framework requires identifying the perpetrator, victim, violation, injury, and remedy. The Court's entrenchment in the perpetrator perspective can be identified by first applying the framework to *Brown*, the only Supreme Court case in which a police officer invoked the high-crime area factor to justify a stop and search that was ultimately held to violate the Fourth Amendment.[95] In *Brown*, the Court considered whether a police officer stopping someone based solely on their presence in a high-crime area violated the suspect's Fourth Amendment rights. By holding that mere presence in a high-crime area was insufficient to make the stop lawful—and thereby preventing police officers from stopping someone based solely on racial stereotypes tied to location and community[96]—the Court identified a constitutional violation. The Court was keenly aware of the racialized nature of the police encounter: The second paragraph of Brown's brief stated that the arresting officer knew Brown was a "black male in [his] mid-20s" and "admitted that many blacks are found in that area of town."[97] The officer further "stated that he suspected no crime or that [Brown] was armed."[98] Indeed, the racial dimensions of the high-crime area factor were made clear to the Court when, in response, the State of Texas chose to begin its brief by stating that the officers were "patroling [sic] in a high drug problem area of El Paso."[99] Moreover, the connection between the factor and racial discrimination was raised at oral argument.[100]

The violation the Court identified in *Brown* involved a perpetrator (the individual police officer) illegally stopping a victim (Brown) because he was in

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93. *See supra* Part II.A.

94. Adams v. Williams, 407 U.S. 143, 144 (1972).

95. *See* Brown v. Texas, 443 U.S. 47, 49, 52 (1979) (holding defendant's presence in a "high drug problem area" was insufficient to justify a stop and frisk).

96. *See* Shirazi, *supra* note 25, at 86-88.

97. Brief of Appellant at 7, *Brown*, 443 U.S. 47 (1979) (No. 77–6673).

98. *Id.*

99. Brief for Appellee at 3, *Brown*, 443 U.S. 47 (No. 77-6673).

100. Transcript of Oral Argument at 29, *Brown*, 443 U.S. 47 (No. 77-6673).

a high-crime area. The Court explained that when a stop, such as the one at issue in *Brown*, "is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."[101] The Court therefore acknowledged that stops based only on presence in a high-crime area could be used arbitrarily or invidiously against certain people or groups—especially racial minorities. In other words, the Court held that police officers cannot indiscriminately target all individuals living in, working in, or visiting high-crime areas. The violation in *Brown* was perceived as the "fault" of a single El Paso police officer, caused by his own stereotypes or other unsubstantiated concerns about Brown's presence in the neighborhood.[102] As Carbado explained, the Court's doctrine has "conceptualiz[ed] racial profiling as an 'attitude' that resides in the minds of 'racially bad' police officers (the perpetrator perspective), rather than as a disciplinary practice that police officers deploy and people of color experience (the victim perspective)."[103] The injury here, according to the Court, was the unreasonable seizure of Brown's person, infringing upon his constitutional rights to privacy and freedom of movement. The Court in *Brown* focused on the perpetrator's actions, not Brown's experience or the conditions leading to his seizure. That distinction is key to recognizing the Court's failure to stop racially discriminatory police behavior in communities of color.

The Court's remedy was to reverse Brown's conviction by holding the original stop unlawful.[104] The Court identified the unconstitutional actions of the officer and, in Freeman's words, "neutralize[d] the inappropriate conduct of the perpetrator"[105] by reversing Brown's conviction. Rather than investigating the conditions that led El Paso police officers to label this neighborhood a high-crime area, the Court focused on the discrete violation of Brown's Fourth Amendment rights, perpetrated by an individual officer that wrongfully stopped Brown. It is in this manner that the Court has chosen to identify and remedy unlawful actions taken by police officers against individuals during *Terry* stops.

Wardlow also reveals the entrenchment of the perpetrator perspective in the Court's high-crime area jurisprudence. As in *Brown*, the question before the Court framed the police officer as the perpetrator and the defendant as the victim. Unlike in *Brown*, however, the Court in *Wardlow* found that the police officer did *not* violate the victim's Fourth Amendment rights. The Court held

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101. *Brown*, 443 U.S. at 52.

102. *Id.* (noting that the officer stopped Brown "without any specific basis for believing he [wa]s involved in criminal activity").

103. Carbado, *supra* note 2, at 973.

104. *Brown*, 443 U.S. at 53.

105. Freeman, *supra* note 43, at 1053.

that a police officer stopping and frisking Wardlow because he turned and ran after seeing police in a high-crime area did not violate the Fourth Amendment, and thus did not amount to a constitutional injury.[106] According to the Court, the officer had articulated a legitimate, objective basis for stopping Wardlow—whether the officer in fact discriminated against Wardlow based on his race was therefore not considered. The individual officer was not at "fault" for his actions, and the Court was not interested in identifying, let alone remedying, the conditions that led the police to label the neighborhood as a high-crime area, nor those that led multiple police vehicles to travel together and seek out arrests in such areas.

3. The Ninth Circuit, Latinxs, and the perpetrator perspective

Moving beyond the black-white paradigm that often dominates the discussion of concerns regarding police-community relations,[107] we can also consider the judicial perspectives expressed in *United States v. Montero-Camargo*, a case from the Ninth Circuit Court of Appeals concerning a *Terry* stop of two Latinx men.[108] The case, heard en banc, involved the 1996 arrests of German Espinoza Montero-Camargo and Lorenzo Sanchez-Guillen. The two were stopped after making a U-turn shortly before an immigration checkpoint in southern California.[109] Although the case is well-known for the Ninth Circuit's rejection of the use of ethnic or racial composition as a factor in the reasonable articulable suspicion inquiry,[110] the majority opinion also found that the area in which Montero-Camargo and Sanchez-Guillen were arrested was a "high crime area."[111] Decided just months after *Wardlow*, the Ninth Circuit expressed concern over the high-crime area factor's potentially invidious ramifications, noting that its usage "requires careful examination by the court, because such a description . . . can easily serve as a proxy for race or ethnicity."[112] The Court further noted that judges must "ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business."[113]

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

107. Carbado, *supra* note 2, at 967.

108. 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

109. *Id.* at 1126.

110. *Id.* at 1135 (holding that the defendants' "Hispanic appearance . . . may not be considered as a relevant factor").

111. *Id.* at 1138-39.

112. *Id.* at 1138.

113. *Id.*

Nonetheless, Judge Stephen Reinhardt's majority opinion found that the highway just before the immigration checkpoint was a high-crime area, "based on nothing more than the personal experiences of the two arresting agents."[114] Relying heavily on one officer's testimony, the Court of Appeals determined that this "'high crime' area [was] in an isolated and unpopulated spot in the middle of the desert," so the likelihood of an innocent reason for the defendants stopping on the side of the road was "far less than if the stop took place in a residential or business area."[115] Unlike the Supreme Court in *Brown*, the Ninth Circuit determined that the officers' description of the highway area in question provided "relevant characteristics" that were "sufficiently suspicious" to constitute an objective basis for the stop.[116]

As in the prior Supreme Court cases, Judge Reinhardt's majority opinion in *Montero-Camargo* considered the high-crime area factor from the perpetrator perspective. To be sure, Reinhardt identified the danger of labeling an area "high crime" based in part on suspected immigration violations,[117] recognizing the factor's potential for abuse in metropolitan areas consisting of a high proportion of undocumented immigrants. Yet Reinhardt focused on identifying police violations of an individual's Fourth Amendment rights, rather than the negative consequences of police stereotypes and police-community interactions in areas that police label high crime. Reinhardt's inquiry asked only whether the area was, in fact, high crime, ultimately concluding that it was based solely on officer testimony. The injuries the majority was concerned with thus reflected only the discrete acts of specific officers who unlawfully stop and search individual victims without reasonable suspicion. And the Ninth Circuit concluded that no violation or injury was present in the case because, "[a]ccording to" police, that area of highway was commonly "used by lawbreakers."[118]

II. CRITIQUES OF THE "HIGH-CRIME AREA" FACTOR

A. Judicial Critiques

In *Wardlow* and *Montero-Camargo* respectively, Justice John Paul Stevens and Judge Alex Kozinski rejected the majority opinion's reasoning regarding the high-crime area factor. Both recognized the factor's potential for abuse by

114. *Id.* at 1143 (Kozinski, J., concurring).
115. *Id.* at 1139 (majority opinion).
116. *Id.* at 1138 (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)).
117. *Id.* at 1133-35.
118. *Id.* at 1127.

police and explained that the factor must be defined in an objective manner that does not rely solely on police discretion. Still, both Justice Stevens and Judge Kozinski remained mired in the perpetrator perspective, concerned only with the discrete acts of specific officers who unlawfully stop and frisk individual victims without reasonable suspicion. They did not adequately consider the negative consequences of allowing police to label entire communities "high crime," and thus failed to proffer real remedies for victims of racially discriminatory police practices.

Justice Stevens' dissent in *Wardlow* marked the first time a Supreme Court justice engaged with the term "high-crime area" in a meaningful way, though even he did not question the factor's potential relevance "in specific cases."[119] Justice Stevens accepted the phrase "high-crime area" without close consideration, using only a series of footnotes to cast doubt on the widespread use of the term.[120] He did note that, "[l]ike unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry."[121] And he commented on the consequences associated with ubiquitous *Terry* stops, especially in minority communities, which "further exacerbate[] the perceptions of discrimination felt by racial minorities and people living in high crime areas."[122] Indeed, Justice Stevens wrote that "minorities and those residing in high crime areas" may actually have objectively reasonable justifications for fleeing from police, based on the belief "that contact with the police can itself be dangerous."[123] Yet Stevens concluded that "it would be a different case" if the officers were able to point to a "narrowly defined area" more likely to contain criminal activity,[124] demonstrating his failure to fully consider the problems associated with the factor's use.

Although Justice Stevens' dissent briefly considered how race may inform interactions between individuals and the police, he remained firmly in the perpetrator perspective. He found the facts of *Wardlow* most similar to those of *Brown*—a violation occurred because an individual police officer could not articulate reasonable suspicion for the stop, constituting a discrete violation of Wardlow's rights.[125] Justice Stevens reasoned that "presence in a high crime neighborhood is . . . too generic and susceptible to innocent explanation" and

119. *Wardlow*, 528 U.S. at 129-30 (Stevens, J., concurring in part and dissenting in part).

120. *Id.* at 132-35 nn.7-12.

121. *Id.* at 139.

122. *Id.* at 133 n.8.

123. *Id.* at 132.

124. *Id.* at 138 n.16.

125. *Id.* at 138.

even combined with flight "does not invariably lead to reasonable suspicion."[126] Therefore, the perpetrator (the officer) violated the constitutional rights of the victim (Wardlow). And Justice Stevens concluded that the violation here required a remedy, namely the suppression of evidence produced by the stop and frisk.[127] Still, that remedy remained focused entirely on the behavior of a particular perpetrator, not the conditions that led to racial discrimination against the victim. Although he identified some of the various problems with the high-crime area factor, his dissent identified the unconstitutional actions of a particular officer and provided Wardlow an individual remedy for that discrete injury, rather than attempting to address the conditions that led to the officer's characterization of the area as high crime. Like the majority opinion and *Brown*, Justice Stevens' analysis followed the perpetrator perspective.

Wardlow's brief took the same approach, arguing that Wardlow was not in a high-crime area because "[t]he police presented no evidence of quantitative verification that identified the precise location or boundaries of the area known by the officers to have a high incidence of narcotics trafficking."[128] Wardlow did attempt to call the factor itself into doubt, asserting that "[t]he 'high crime area' factor is not an activity of an individual and cannot be determinative of reasonable suspicion."[129] This limited statement, placed within an argument that the factor should be "sufficiently localized,"[130] was unremarkable due to the Court's prior holdings in *Williams* and *Brown*, which generally forced Wardlow to argue from the perpetrator perspective in order to have a chance of winning his case. Wardlow broadly argued that he was not within a "high crime area," and therefore the stop and search violated his Fourth Amendment rights. The remedy he sought was to have evidence discovered during the stop and search suppressed. Race could enter the argument only implicitly, such as in *Brown*'s race-neutral language warning of "arbitrary and abusive police practices."[131]

In *Montero-Camargo*, Judge Kozinski concurred in the result but rejected the court's high-crime area analysis, writing that the majority found "a high crime area, because the officers sa[id] it's a high crime area."[132] Anticipating

126. *Id.* at 139.

127. *Cf. id.* at 132-40.

128. Brief for Respondent at 32, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 607000.

129. *Id*. at 33.

130. *Id.* at 32.

131. Brown v. Texas, 443 U.S. 47, 52 (1979).

132. United States v. Montero-Camargo, 208 F.3d 1122, 1143 (9th Cir. 2000) (en banc) (Kozinski, J., concurring).

much of the academic literature to follow, Kozinski further explained that, with respect to the high-crime area factor, "[t]he question is not *whether* the characteristics of the area may be taken into account, but *how* these characteristics are established."[133] Kozinski went on to decry the majority opinion's "methodology for establishing the characteristics of [a high-crime area as] about as rigorous as the recipe for Leftovers Casserole."[134]

To be sure, his concurrence highlighted legitimate concerns with the factor's use, adding that "[j]ust as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area."[135] But Judge Kozinski was concerned only with making the high-crime area determination as objective as possible to avoid relying on "war stories" and "unadorned personal experiences."[136] As with Justice Stevens' dissent in *Wardlow*, Judge Kozinski focused unilaterally on identifying particular perpetrators (police providing subjective analyses of crime in particular neighborhoods) and defining violations, rather than addressing the conditions that may lead to those determinations or why victims are subject to the perpetrators' actions.

Judge Kozinski's concurrence also failed to provide an adequate remedy. He rejected the use of the high-crime area factor in the circumstances presented in the case not only because there was no factual basis for its inclusion, but also because, based on the record, the officers' consideration of previous illegal activity near the checkpoint was minimally relevant to that specific stop. The U-turn just before the checkpoint provided much of the reasonable suspicion and, in all likelihood, the Mexican license plates and race of the defendants also played a role in the police officer's decision to make the stop.[137] Despite concerns over the high-crime area factor's use, Judge Kozinski nonetheless concluded that no violation of constitutional rights had occurred.[138] That analysis suggests that even rejecting the high-crime area factor altogether would not provide a sufficient remedy to victims. Adopting the opinions of Judge Kozinski in *Montero-Camargo* and Justice Stevens in *Wardlow* would not actually remedy any conditions associated with the victims' injuries—it would merely limit the instances in which officers can explicitly state in court that they suspected a defendant due to their location. Those opinions show the limits of the perpetrator perspective, even for those analyses that take race and discrimination into account.

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133. *Id.*
134. *Id*.
135. *Id*.
136. *Id.*
137. *Id.* at 1139-40 (majority opinion).
138. *Id.* at 1144 (Kozinski, J., concurring).

B. Academic Critiques

Legal scholars analyzing the high-crime area factor have also remained entrenched in the perpetrator perspective, even when critiquing the Court. Most have focused on creating a narrow, objective definition of high-crime area that matches crime statistics to particular locations and thus lowers the number of stops of "innocent" people in these neighborhoods.[139] Academics have proposed a variety of solutions to that concern, ranging from legislative designations by local governments regarding which areas to label high crime,[140] to using objective crime statistics[141] or predictive police algorithms.[142] Like the Court, those writers all adopted the perpetrator perspective when considering the high-crime area factor. Each article attempted to limit police discretion and thus prevent individual officers or departments from discriminating against minority groups in certain neighborhoods. They targeted discrete, "bad" behavior by individual officers and sought to remedy it by neutralizing that specific action.

For example, one proposal argued for crime-mapping technologies using Geographic Information Systems that can produce narrow and targeted information about the level, rate, and location of crimes in any given area.[143] It sought to limit police discretion by tying an officer's knowledge of particularized crime pattern data to their observation of suspicious behavior. Courts would then ask whether the officer adequately relied upon "specific data about a specific crime problem in a specific area" in determining whether there was reasonable articulable suspicion for a stop.[144] Like Justice Stevens' dissent in *Wardlow*, this type of solution to concerns of racial profiling and

139. *See, e.g.*, Ferguson & Bernache, *supra* note 41, at 1593-94; Hannah Rose Wisniewski, *It's Time to Define High-Crime: Using Statistics in Court to Support an Officer's Subjective "High-Crime Area" Designation*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 104 (2012); Andrew Dammann, Note, *Categorical and Vague Claims that Criminal Activity Is Afoot: Solving the* High-Crime Area *Dilemma Through Legislative Action*, 2 TEX. A&M L. REV. 559, 566 (2015); Kelly K. Koss, Note, *Leveraging Predictive Policing Algorithms to Restore Fourth Amendment Protections in High-Crime Areas in a Post-Wardlow World*, 90 CHI.-KENT L. REV. 301, 302-03 (2015).

140. Dammann, *supra* note 139, at 574.

141. Ferguson & Bernache, *supra* note 41, at 1628.

142. Koss, *supra* note 139, at 301-02.

143. Ferguson, *supra* note 41, at 181-82. The article itself also noted that "crime mapping does not address all crime because not all crime is reported." *Id.* at 226. Ferguson further explained that "crime-mapping technology focuses only on 'street crime' as opposed to corporate crime, cybercrime, identity theft, or fraud." *Id.* at 182 n.11. Crime statistics are therefore rarely useful for particular neighborhoods. Indeed, using such statistics to define Fourth Amendment protections threatens to further target impoverished communities due to "street crime" having a higher likelihood of being reported and located.

144. *Id.* at 221-22.

disparate impact on communities of color remains rooted in the perpetrator perspective. The proposal focused on the actions of discrete perpetrators, failing to consider the conditions that led to the strong relationship between race, poverty, and crime in those areas (or the accuracy of crime statistics generally). In Freeman's terms, the violation is committed by police officers whose use of the high-crime area factor is too broad and thus sweeps in too many "innocent" victims, namely racial minorities. The injury is to the limited set of people who live or work in a high-crime area but are not "criminals." And the remedy is to limit the harm of individual "bad" police officers that rely on stereotypes by decreasing the number of stops that constitute this type of constitutional violation.

Other academics have directly called for abolishing the high-crime area factor.[145] At first glance, this proposal might appear to adopt the victim perspective. In applying the perpetrator-victim framework and identifying the violation and remedy, however, it becomes clear that ending the use of the high-crime area factor in the *Terry* analysis fails to adequately consider the victim perspective. The victim perspective instead requires recognizing that racial discrimination in policing "will not be solved until the conditions associated with it have been eliminated."[146]

In one proposal to eliminate the factor, Reshaad Shirazi explained that disproportionate crime rates track with African-American communities both because of racially discriminatory policies during the War on Drugs and current systemic racism that keeps African Americans trapped in impoverished areas.[147] Shirazi also argued that, because high-crime areas tend to be predominantly African-American areas, the factor may violate the Equal Protection Clause by allowing police to disproportionately target Latinx and African-American neighborhoods.[148] Thus, Shirazi argued, preventing police from using the high-crime area factor when stopping someone would reduce incidents of racial profiling in *Terry* stop and frisks.[149]

In reaching that conclusion, Shirazi remained focused on ending the discrete harms produced by police officers profiling Latinx and black individuals living in "high-crime" communities. The proposed remedy was to stop racial profiling that occurs under the pretext of the high-crime area factor. Such action, however, fails to solve or mitigate the conditions that perpetuate police discrimination against minorities. Even if the police could no longer justify stops merely by claiming a defendant was located in a high-crime area,

145. *See* Seawell, *supra* note 21, at 1132; Shirazi, *supra* note 24, at 104.
146. Freeman, *supra* note 42, at 1053.
147. Shirazi, *supra* note 24, at 79-88.
148. *See id.* at 107-09.
149. *Id.* at 108-09.

they would not stop focusing resources and law enforcement activity on these areas. Shirazi's argument framed the overall reduction of Fourth Amendment rights in these areas as harming those that are stopped arbitrarily—in Carbado's words, the "'good' (nonstereotypical) person of color . . . [which] confirms if not entrenches our racial suspicions about crime and criminality."[150] Ending the use of the high-crime area factor would thus not elevate the victim perspective.

In order to view the high-crime area factor from the victim perspective, we must further interrogate the Court's role in perpetuating harmful police activity in predominantly black and Latinx communities—a product of their continued embrace of the perpetrator perspective. While the current academic literature proposes solutions that focus on harm reduction, rather than prevalence reduction,[151] such arguments still fail to consider the conditions that lead to high-crime areas that are legitimately and objectively labeled as such, or the inaccurate and harmful distinctions that are often made between "criminals" and "innocent" people of color living in those areas.[152] As explained above, the Supreme Court and mainstream legal academics have failed to consider the entrenchment of the perpetrator perspective in the Court's high-crime area jurisprudence, including the ways in which the Court serves to reflect and legitimize discriminatory police behavior.

III. A CRITIQUE OF THE CRITIQUES: TOWARD THE VICTIM PERSPECTIVE

A. The Supreme Court's Construction of Racial Identity

Adopting the victim perspective requires recognizing that racial discrimination "will not be solved until the conditions associated with it have been eliminated."[153] Therefore, any true remedies from the victim perspective would "demand affirmative efforts to change the condition[s]."[154] After critiquing and deconstructing a particular legal doctrine, such as the high-crime area factor, an analysis from the victim perspective can involve various types of reconstruction—the process of countering previously identified locations of

150. Carbado, *supra* note 2, at 974.

151. *See* Robert J. MacCoun, *Moral Outrage and Opposition to Harm Reduction*, 7 CRIM. L. & PHIL. 83, 84-85 (2012) (defining the distinctions between harm reduction and prevalence reduction).

152. Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772-74 (1992).

153. Freeman, *supra* note 42, at 1053.

154. *Id.*

racial discrimination through legal remedies.[155] It can also include further analysis of the "coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons."[156] By taking on the victim perspective—and considering both reconstructive and race-conscious analyses—one can develop a "more complete understanding of the harms of race-based policing, a more sophisticated sense of the Court's role in legitimizing those harms, and a normative basis for reinterpreting and re-conceptualizing particular Fourth Amendment doctrines," such as the high-crime area factor.[157] If we are to disrupt the strong empirical connection between heightened law enforcement activity, constitutional violations, and black and Latinx neighborhoods, we must identify and remedy the conditions that continue to oppress those groups.

By reviewing the Supreme Court's high-crime area jurisprudence in the previous Part, one can see the speed at which the phrase "high-crime area" was integrated into the Court's lexicon. In the early stages of *Williams*, an officer described the area of Bridgeport he was patrolling as having a high incidence of crime.[158] The State later used this language in its merits brief to the Court.[159] The Court then adopted the officer's language, thus announcing to the nation that presence in a "high crime area" is a legitimate factor in the *Terry* analysis.[160] After continually using the phrase to describe circumstances in other cases, the Court eventually held that finding someone in a high-crime area, combined only with their flight upon seeing police, creates sufficient suspicion to support a lawful *Terry* stop.[161]

As we have seen, police concerns and interests often receive significant deference from the Supreme Court. The *Terry* analysis does not balance the interests of individual privacy against community health and welfare—rather,

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155. *See* Roy L. Brooks, Conley *and* Twombly*: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 42 (2008).

156. Carbado, *supra* note 2, at 970.

157. *Id.*

158. *See* Williams v. Adams, 436 F.2d 30, 31 (2d Cir. 1970), *rev'd en banc*, 441 F.2d 394 (2d Cir. 1971), *rev'd*, 407 U.S. 143 (1972) (explaining that "the facts set forth in the Superior Court record" included that the area being patrolled was "noted for its high incidence of crimes").

159. Brief for the Petitioner at 6, Adams v. Williams, 407 U.S. 143 (1972) (No. 70-283), 1972 WL 135533.

160. *See Williams*, 407 U.S. at 144, 147-48 (1972). Prior to *Williams*, the term "high crime area" had been used in only one other case at the federal court of appeals level. United States v. Valentine, 427 F.2d 1344, 1347 (8th Cir. 1970). Since *Williams*, the term has been used in over 1,000 federal court of appeals opinions. I determined this statistic by searching all U.S. Courts of Appeals opinions after June 12, 1972 using the search term [adv: "high crime area!"].

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

privacy is balanced against the effectiveness of law enforcement.[162] Thus, *Terry* and its progeny, including the line of cases that explicitly consider the high-crime area factor, assume that law enforcement represents the interests of the wider community in the Fourth Amendment context. The problems with this assumption are twofold. First, there is a clear, documented history of racial discrimination by police,[163] ranging from the lawful enslavement, torture, and murder of Africans and the discrimination and violence conducted against black Americans in the Jim Crow era (through both direct police action and police refusal to prevent violence by others), to the current overcriminalization of black and Latinx communities due to discriminatory policing and criminal procedure doctrine and penalties.[164] Second, the country has come to rely on policing and imprisonment as the only forms of protection against actions that harm local communities.

When looking at a map of a city, police departments will allocate resources based on the intensity, real or perceived, of criminal activity in different neighborhoods. Inherently, these officers rely on what *they* consider to be high-crime areas—places where they are most likely to make arrests, based on highly visible crimes like gang activity or open-air drug sales.[165] The police employ the resources *that they have*, namely the ability to place officers tasked with arresting criminals on specific beats in order to clear out this type of behavior, i.e. by arresting people so they are removed from the area and caged.[166] Police focusing on arrests as a solution to high crime levels can lead to situations similar to that in Ferguson, Missouri, where black people represent a highly disproportionate number of those arrested relative to their percentage of the population,[167] or in one particular eight-block neighborhood in Brooklyn, New York, in which men aged fifteen to thirty-four—virtually all black and Latinx—represented nearly seventy percent of the stops made

162. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20-25, 27 (1968). That this observation is true of other constitutional rights does not reduce the problematic nature of this balancing test. Indeed, that many constitutional rights are balanced against the effectiveness of law enforcement entrenches the assumption that law enforcement activity is the sole solution to criminal behavior and therefore can adequately represent the interests of the community overall.

163. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76-135 (1997).

164. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW 97-139 (2012); Butler, *supra* note 2, at 1447-57.

165. Shirazi, *supra* note 24, at 82-83, 86.

166. I use the word "caged" here to reflect the realities of incarceration. Such language is intended to be shocking and has been used elsewhere to reflect such realities. *See, e.g.*, Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 Yale L.J.F. 848, 864-67 (2019).

167. BUTLER, *supra* note 25, at 47-48.

between 2006 and 2010.[168]

By adopting the language and interests of law enforcement through the representations of prosecutors and government attorneys, the Supreme Court both legitimizes and is complicit in "police practices that target people of color."[169] To the Court, we have already reached the point at which we can "declare that the war [against racial discrimination] is over,"[170] and believe that, except in discrete instances involving isolated bad actors, racially discriminatory policing is solved. However, by using the high-crime area factor without interrogating the definition of its terms, the history of its use by police, or the actual results that follow from its use, the Court perpetuates a construction of people in these communities as either "innocent" or "criminal." This constructed racial identity is one that police, and even black and Latinx leaders, have used for decades, yet it fails to remedy the conditions leading to concentrations of criminal activity (real or perceived) and racially discriminatory police practices.[171] Carbado conceptualized this distinction as grounded in the perception that instances of unlawful or wrongful police conduct only come when police "are profiling 'racially good' blacks and Latin[x]s."[172] Austin writes of the tensions within black communities by comparing the politics of distinction, which focus on "[c]utting the lawbreakers loose . . . by dismissing them as aberrations . . . [in order] to concentrate on the innocent" as a form of political self-protection, with the politics of identification, in which "'[t]he community' chooses to identify itself with its lawbreakers and does so as an act of defiance."[173] By endorsing the high-crime area factor, the Court validates police practices that divide people in minority communities into innocents (those stopped due to racial profiling) and criminals (those stopped due to racial profiling who also committed a crime). Moreover, the Court *also* endorses police action that separates that entire community from the rest of society, further constructing the identities of the people living in those communities as criminal. Because such divided communities are disproportionately black and Latinx,[174] the Court ties criminal identity to race, even as it purports to protect "innocent" people in those communities.

By legitimizing police targeting of specific areas and the individuals

168. *Id.* at 81.

169. Carbado, *supra* note 2, at 966.

170. Freeman, *supra* note 42, at 1102.

171. *See generally* JAMES FORMAN, JR., LOCKING UP OUR OWN 9-14 (2017).

172. Carbado, *supra* note 2, at 974.

173. Austin, *supra* note 152, at 1772-74.

174. *See* Shirazi, *supra* note 24, at 82, 86-88; *see supra* note 21 (detailing empirical evidence of racially discriminatory *Terry* stops).

residing there, the Court plays an outsized role in constructing a false dichotomy between "good" and "bad" people who live or work in particular neighborhoods. The Court incentivizes police officers to continue stopping people in high-crime areas and then to use certain "magic words" in court to legitimize their actions.[175] The current system keeps people of color stuck trying to overcome poverty in their neighborhoods, while facially neutral laws continue to systemically segregate them and intensify poverty in their communities.[176] These individuals are often forced to choose between the politics of distinction and the politics of identification, determining within their own communities who is to be abandoned as "criminal" and who is either factually innocent or has been wronged by police in a way that is particularly common or public.[177]

At the same time, the high-crime area factor ultimately labels all those living in such communities as criminals and lesser citizens who must capitulate to weakened constitutional protections. The Court's doctrine legitimizes the cordoning-off of communities that are perceived as having high crime rates from those without such metrics. Thus, the Court's high-crime area jurisprudence is one place in which the Court entrenches the "racial allocation of the burdens and benefits of the Fourth Amendment."[178] And that entrenchment adds to the continued construction of racial identity for people in those communities. While social struggles within communities may attempt to divide "innocents" from "criminals," one-half of the Fourth Amendment balancing test posits an interest in identifying *all* individuals in a particular neighborhood as more criminal, and less deserving of constitutional rights. The high-crime area factor—representing law enforcement interests in arrest and criminalization—further connects the racial identities of people living in those communities to criminality, even as they struggle with the intra-community distinctions Austin described.

Still, the Court continues to frame its Fourth Amendment jurisprudence as a balance between law enforcement's power to identify, arrest, and prosecute particular individuals (serving as a proxy for community safety and welfare), and individuals' interests in privacy and freedom. Rather than considering the legal conditions that lead to concentrated poverty, drug use, and violence, or seeking opportunities to provide municipalities with resources beyond arming police, the Court focuses only on the circumstances of an arrest and the actions

175. *See* Ferguson & Bernache, *supra* note 41, at 1590.

176. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 449 (Kimberlé Crenshaw et al. eds., 1995).

177. *See* Austin, *supra* note 152, at 1774.

178. Carbado, *supra* note 2, at 969.

of police immediately surrounding that arrest. For communities that do have concentrations of serious crime, the Court's curtailment of Fourth Amendment rights in these locations will not reduce harm. In part, this is because the Court's balancing test is untethered from historical and racial context.[179] Police control the narrative with respect to how the law accounts for community safety; rather than seeking out remedies other than arrest and incarceration for areas that may be considered to have "high-victim" concentrations,[180] police departments are instead trained and equipped to deal with extreme violence and physical danger. Those departments do not provide the training and resources needed to support people suffering from addiction, homelessness, and mental health issues. And cheapening the constitutional rights of people living in dangerous communities will not remedy the conditions that led to them living in such places, or that area's susceptibility to violence.

Instead, it is likely that the high-crime area distinction is self-perpetuating. Police can label an area "high crime" and station more officers in the neighborhood, which allows for more *Terry* stop and frisks because less evidence is needed to meet the reasonable articulable suspicion standard. Police then conduct more searches, leading to more arrests, and further validating the police decision in the first instance.[181] The police and the Court's framing of the high-crime area factor from the perpetrator perspective fails to remedy the harms occurring in these communities. Actually remedying those harms requires a shift to the victim perspective.

B. Victims and Remedies

After identifying those conditions, the next task is to remedy the harms in a way that benefits victims of racially discriminatory policing. Imagine a criminal defendant who has been stopped and frisked, and then arrested for possessing some contraband. Either alone or with the help of her family, she has the means to hire counsel. At best, a court will determine that the arresting officer violated her constitutional rights by using the high-crime area factor in a neighborhood that the court determines is not high crime. Her charges are then dropped—not only does she forfeit the attorney's fees accumulated in the case, any time spent in jail following her arrest, and the time she spent meeting with her lawyer and appearing in court, but she also must return home, perhaps to confront the same police officer who previously violated her constitutional rights. No matter how well-intentioned or creative the defense attorney is, she

179. *See generally id.*

180. I owe this terminology to my classmate, Diana Sánchez.

181. James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 804 (2011).

cannot remedy the conditions that led the officer to violate her client's Fourth Amendment rights, nor those that led her client to carry contraband.

The Court's high-crime area jurisprudence does not present opportunities for individual cases to remedy such conditions. Fourth Amendment violations are almost always litigated by defendants in criminal cases—and violations that did not expose any illegal activity are almost never brought before a court. The Court has not established an adequate rule or procedure through which victims could identify the actual conditions harming them and therefore invite meaningful remedies.

The Court could move toward adopting the victim perspective by recognizing the racially discriminatory nature of *Terry* stop and frisks and returning to a pre-*Terry* world in which all seizures and searches by police are unreasonable if the police fail to state probable cause for arrest. The Court could then create a remedy for unlawful stops and searches that requires police to participate in some court process at which the criminal defendant can explain the effects of the constitutional violation on her own life and the types of support she needs from local political leaders to avoid committing a particular crime. This would create a record of criminal defendants' experiences[182] and would identify conditions associated both with racial discrimination and criminal activity. It would also track police officers, precincts, and departments that regularly violate individuals' Fourth Amendment protections.

Such a solution would require support from individual localities that may ultimately fail to materialize. But the Court could order specific remedies that go beyond the language of the Fourth Amendment. Indeed, the exclusionary rule is one such remedy. By explicitly identifying the conditions of racial discrimination occurring in and around perceived high-crime areas, the Court could then begin to address them by creating new remedies for violations of the Fourth Amendment by police.

It is also possible, however, that the legal system—which generally adjudicates individual claims in a piecemeal fashion—cannot, on its own, create adequate remedies for such victims. Recognizing the current structural limits of the criminal legal system and an apparent lack of judicial will to overhaul the *Terry* framework, the next section explores extra-judicial remedies that could affirmatively ameliorate the circumstances that lead to racial discrimination in policing.[183]

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182. This is especially important as criminal defendants, for a variety of reasons, almost never speak on the record.

183. *See* Freeman, *supra* note 42, at 1053 ("The victim, or 'condition,' conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination

IV. EXTRA-JUDICIAL SOLUTIONS

As noted previously, structural racism and the socially constructed connection between racial identity and criminality—or often citizenship status in the Latinx context—persist in everyday policing, whether or not police can claim a stop occurred in a high-crime area. Police target these neighborhoods and communities well before an actual stop. The number of detentions and arrests—and thus the cyclical harms that continue to oppress black and Latinx families—would not change significantly if police could no longer use the high-crime area factor to justify *Terry* stops. While this Part is far from comprehensive, focusing on remedying three specific conditions may begin to change outcomes for black and Latinx communities. Under current Supreme Court doctrine, such remedies must originate outside the judicial system—they cannot be argued by criminal defendants alleging violations of their constitutional rights. Each proposal would contribute to a changed national consciousness that the Court might consider when deciding future cases.

First, legislators, police, and judges must recognize that we do not currently reside in a "future" community in which racial discrimination is the intentional action of just a few bad actors. Rather, our shared history of slavery, lynching, Jim Crow laws, and oppressive Supreme Court decisions in criminal procedure cases have all contributed to and bolstered the enduring stereotype of the black man as a dangerous other—a criminal.[184] These stereotypes about young black men in particular have origins both within and outside the black community. That this phenomenon originates from external forces is well documented and researched.[185] For example, Stanford professor Jennifer Eberhardt has "found that people unconsciously associate blacks with apes,"[186] furthering the dehumanization of men and women that serves as a basis for ignoring the moral failings of racially discriminatory laws and actions. And while men of all races grow up under norms of violent masculinity, black men living in high poverty areas are often most directly exposed to violence.[187] Butler notes three themes of the "Black Macho": Be Hard, Protect Yourself, Demand Respect.[188] Within predominantly black communities, under Austin's politics of distinction, individuals may "cut[] the

would demand affirmative efforts to change the condition.").

184. BUTLER, *supra* note 25, at 19; *see also id.* at 17 (noting that "criminal justice today is premised on controlling African American men"); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA, 4-5, 85-87 (2011).

185. *See, e.g.*, BUTLER, *supra* note 25, at 17-34.

186. *Id.* at 25.

187. *Id.* at 118, 120-21, 139.

188. *Id.* at 137-38.

lawbreakers loose . . . by dismissing them as aberrations."[189] Yet, "[a]t the same time, concentrating on black exceptionalism does little to improve the material conditions of those who conform to the stereotypes."[190] Notions of black criminality were "crucial to the making of modern urban America,"[191] and the divisions created by doctrines like the high-crime area factor continue to construct racial identities that are tied to criminality today.

Dismantling such entrenched stereotypes will take time, and potential solutions are complex and difficult to implement. Butler proposed two solutions to "dramatically reduce black male violence," which would begin to erode the strong nexus (both perceived and real) between black youths and crime.[192] First, Butler argued for getting rid of "the hood—segregated, high-poverty communities that are breeding grounds for homicide."[193] Second, he argued that "we need to greatly limit access to guns."[194] Austin has focused on expanding the politics of identification into "a revitalized black community" that would "make the legal system more sensitive to the social connection that links 'the community' and its lawbreakers and affects black assessments of black criminality."[195] Meaningful resources must also be invested in responding to and correcting the United States government's role in creating and perpetuating areas Butler labels "the hood."[196] The Supreme Court has the power to implement serious change through constitutional remedies—yet it currently "enlists the ideology of colorblindness to elide the complexities of race," which has led "people of color . . . to experience the Fourth Amendment more as a technology of surveillance than as a constitutional provision that renders them 'secure in their persons, homes, papers and effects.'"[197] Going forward, the Court must recognize the racial histories and distrust between police and communities of color in order to lift people of color to equal

189. Austin, *supra* note 152, at 1772.

190. *Id.* at 1773.

191. MUHAMMAD, *supra* note 184, at 272.

192. BUTLER, *supra* note 25, at 145.

193. *Id.*

194. *Id.* at 147.

195. Austin, *supra* note 152, at 1815.

196. *See, e.g.*, Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1240-42, 1257 (2005) (discussing the discriminatory impact of New Deal policies and tracing the federal government's abandonment of school desegregation efforts); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 58, 63-66, 71, https://perma.cc/JZY3-KCGW (calling for reparations to ameliorate the economic impact of black Americans' systemic exclusion from New Deal programs, the GI Bill, and federal loan programs).

197. Carbado, *supra* note 2, at 1044.

citizenship and protection under the Constitution.[198]

Second, we must eliminate the social distinctions between "innocents" and "criminals," ending the politics of distinction that Austin described.[199] Considering the politics of distinction in black communities, Austin explained that "[f]or some blacks who commit crimes, it makes economic sense to engage in such conduct."[200] For others, violent acts "are constants . . . whatever one does."[201] Often, narratives about the Fourth Amendment, crime, and black or Latinx people are "accounts by elites" who experience what is considered "wrongful" racial profiling, rather than people who were also racially profiled but happened to be committing a crime in that moment, and thus do not constitute real "victims."[202] These accounts fail to adequately consider how communities are affected by racially discriminatory policing and serve to "reinforce our obsession with innocence."[203] Just as Austin argued for an increased politics of identification, we must bring stories of factually guilty people who are harmfully profiled to the national consciousness if minds are truly to be changed. "For drug crimes especially, where police concentrate their resources determines who goes to prison as much as who chooses to break the law."[204] Societal recognition that people of color encountering police are more likely to be victims of discriminatory policing will grow if people accept that all individuals, no matter their circumstances, deserve the same constitutional protections currently afforded to the more privileged in society.

The Supreme Court's high-crime area doctrine, and the entirety of its Fourth Amendment jurisprudence, also maintains this innocent-criminal distinction, as generally "bad law enforcement practice that affects good or innocent blacks, Latin[x]s, and other nonwhites" is most likely to be considered unconstitutional.[205] Indeed, state trial court judges feel pressure to avoid "letting defendants off" through remedies such as the exclusionary rule because we, as a country, have not supported the vindication of criminal defendants' constitutional rights. Considering this issue from the victim perspective involves recognizing that *people*, not criminals, commit crimes, and that many times who is stopped or arrested will depend on the color of their skin and/or their location, regardless of whether police can claim presence in a "high-crime area." The social distinction between "innocent" people who

198. *See id.* at 969.
199. Austin, *supra* note 152, at 1772.
200. *Id.* at 1777.
201. *Id.*
202. Forman, *supra* note 181, at 804.
203. *Id.*
204. *Id.*
205. Carbado, *supra* note 2, at 1034-35.

the police have not arrested for committing a crime and "criminals" who happened to be committing a crime when they are racially profiled must end. Removing criminality from the individual identity of people charged with breaking the law would also begin to disassociate criminality from racial identity.

Third, prison abolition must become a mainstream policy platform. This "should be understood not as 'an immediate and indiscriminate opening of prison doors' but rather 'a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.'"[206] Butler proposes three steps toward prison abolition that could begin today: (1) reducing the maximum punishment for all criminal offenses to twenty-one years in prison, (2) decriminalizing low-level offenses, and (3) stopping the flow of public funds to "the police and instead invest[ing] those funds in community health care."[207] The third proposal is deeply connected to the victim perspective as applied to the high-crime area factor. By reallocating resources from police to health care, education, and community programs, we could reduce opportunities for the police to over-criminalize neighborhoods with majority-minority populations and create spaces for the growth of non-police organizations that focus on community safety, such as the Anti Police-Terror Project in Oakland, California.[208] While this type of non-government solution is relatively new, it is premised on rejecting state violence that disproportionately targets high-crime areas, and thus people of color, and local communities should be allowed to evaluate its effectiveness.

CONCLUSION

Throughout this Note, I have argued that, despite the high-crime area factor's disproportionate discriminatory impact on people of color, narrowing or eliminating the factor would not end racially discriminatory policing or remedy the conditions that often lead communities of color to be both over-policed and under-protected. By applying the perpetrator-victim framework and operating from the victim perspective, I hope to have shifted the conversation regarding police interactions with people of color toward objectively positive outcomes in the long-term, rather than highlighting

206. BUTLER, *supra* note 25, at 232-33 (quoting Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015)).

207. *Id.* at 233-34.

208. The organization's website can be found at https://antipoliceterrorproject.org (https://perma.cc/7B7N-6K7F). Another longstanding example is the Safe Streets program in Baltimore, Maryland. More information on Safe Streets can be found at https://mocj.baltimorecity.gov/safe-streets (https://perma.cc/J7HN-QMTD).

narrowly construed legal remedies that do little to help victims of racial discrimination. High-crime areas would not disappear if police and judges stopped naming them as such. Only by addressing the conditions that lead to over-incarceration and over-policing of black and Latinx communities can we begin to remedy the centuries of harm that continue to structure and inform police encounters today.