ARTICLES

(MIS)JUDGING SUSPICION

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ABSTRACT

Twenty-five years ago, the Supreme Court decided Illinois v. Wardlow, *a Fourth Amendment case that allowed the high-crime nature of a location to be considered in determinations of whether there was reasonable suspicion to support a police stop. In making these determinations, courts rarely acknowledge the role that race can play in decisions that factor in the nature of a location as context. Yet even when the race of a defendant is not mentioned, high-crime area designations can act as a proxy for race inviting racial bias into courts' analyses. Reasonable suspicion analysis involves the interpretation of a suspect's ambiguous behavior, and research suggests that racial bias can play a role in such interpretations. Tellingly, in high-crime areas, police stops have been found to be supported by reasonable suspicion even when people are engaged in commonplace activities that innocent people engage in—like waiting in a car for a few moments, handling an opaque bag, or wearing a fanny pack across the chest rather than around the waist.*

While many articles focus on police officers' biases in these cases, this article shifts the focus to how judges are justifying their decisions to find these stops constitutional. Looking to studies from the field of psychology, this article demonstrates that the use of high-crime area designations can encourage not only police, but also courts who review their actions, to tap into racial bias. It argues that racial stereotypes can find their way into decision-making when judges rubber stamp police officers' characterizations of individuals' ambiguous behaviors that assume criminality or even offer characterizations of their own to fill in evidentiary gaps. Ultimately, this article challenges judges to shore up their processes to disrupt these biases as they assess the lawfulness of police stops that factor in location. Doing so will ensure that suspicion is particular to the individual stopped and not merely the product of widespread biases that high-crime area designations invite.

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INTRODUCTION

Otha Ray Flowers and Jeremy Mayo sat in a parked car outside of an open convenience store on a Saturday evening and paused for a moment.[1] While they waited, at least five police vehicles parked behind and around the men's car with the patrol lights flashing, blocking their exit.[2] A police officer later testified that he concluded the men "didn't appear to be exiting the vehicle" or "patronizing the establishment" after he had observed them sitting in the car for a mere ten to fifteen *seconds*.[3]

This encounter ultimately resulted in the discovery of a gun and Mr. Flowers's conviction.[4] Pursuant to the exclusionary rule, evidence that results from an invalid search or seizure can be deemed inadmissible at trial.[5] Prior to his conviction, Mr. Flowers moved to suppress the gun, arguing the police stop that produced it was unlawful.[6] Assuming that Mr. Flowers was seized when police vehicles surrounded his car, the Fifth Circuit found there was reasonable suspicion prior to that point and allowed the gun to be offered as evidence against him.[7]

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1. United States v. Flowers, 6 F.4th 651, 653–54 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2707 (2022).
2. *Id.* at 653.
3. *Id.* at 654 (emphasis added).
4. *Id.* at 654–55.
5. Wong Sun v. United States, 371 U.S. 471, 485 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").
6. *Flowers,* 6 F.4th at 654.
7. To determine the validity of police stops, courts consider what the police knew prior to a person's seizure. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (noting that in determining the validity of a police seizure or search, the courts' inquiry is whether the officer's action was "justified at its inception" and related in scope to the circumstances that justified the initial interference). In *Flowers*, the court assumed arguendo that the men were seized when police cars surrounded the men's car, and thus the court's opinion addressed whether there was

One might question how judges could justify a police stop based on such normal behavior that many innocent people might engage in. In this case, a police officer had merely indicated that the two men were observed briefly sitting in a car.[8] The police did not testify that the men did anything out of the ordinary that might suggest criminality.[9]

However, the appellate court did not justify its decision merely on the police officer's stated observations. Rather, the court characterized the men's normal behavior in a manner that assumed criminality, attaching great significance to even the most benign facts. The court described the men not as paused in their car, but rather as "dawdling"—suggesting the men were loitering or there for no good reason.[10] The court also described the car as "parked as far as possible from the storefront . . . so its occupants could not easily be viewed from within the store," suggesting, according to the court, "that its occupants might be casing the store or preparing to prey on patrons."[11]

Notably, that the men parked so they were hidden from view was presented by the court as a determinative fact.[12] Yet there was no evidence offered to support this characterization of the men's ambiguous behavior. Rather, the court repeatedly highlighted the high-crime nature of the area, vividly describing it as "unsavory" and "notoriously crime-ridden," while construing the men's ambiguous behavior in a negative light.[13] In finding reasonable suspicion, the court even expressed its concern that deeming such a stop unlawful might hamper the ability of police to actively pursue crime in high-crime communities.[14]

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reasonable suspicion to justify the stop at that point. *See Flowers*, 6 F.4th at 653–54. It is worth noting, however, that while a police officer testified that the men were free to leave, he also acknowledged that it would have been impossible for the men's car to leave the parking lot given the way the officers parked, a factor that would no doubt be considered in a seizure determination. *Id.* at 654; *see id.* at 659 (Elrod, J., concurring in part and dissenting in part) (concluding that "there is no doubt that this encounter constituted a seizure").

8. *Flowers*, 6 F.4th at 654.

9. *Id.* at 659 (Elrod, J., concurring in part and dissenting in part).

10. *Id.* at 657. The term "dawdle" is defined as "to spend time idly" or "move lackadaisically." *Dawdle*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/dawdle [https://perma.cc/8VUV-Z68E] (last visited Jan. 6, 2026). The term "loitering" includes "dawdle" in its definition and is defined as remaining at a location "for no obvious reason." *Loiter*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/loitering [https://perma.cc/YC4H-PSDK] (last visited Jan. 6, 2026).

11. *Flowers,* 6 F.4th at 656.

12. *Id.*

13. *Id.* at 657.

14. The majority expressed great concern about police being able to do their work:

> "If this course of conduct is constitutionally impermissible, then it is difficult to see how any active policing can take place in communities endangered and impoverished by high-crime rates . . . *Terry* [392 U.S. 1 (1968)] prescribes a careful balance that protects individual rights, but not at the expense of reasonable law enforcement activity and officer safety."

Id. at 658. But the Court has expressed that there are limits to police encounters, even for the prevention of crime. *See* Brown v. Texas, 443 U.S. 47, 52 (1979) ("[E]ven assuming that the purpose [of crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.").

In her dissent, Judge Jennifer Walker Elrod homed in on the problem with a court finding reasonable suspicion based on the facts of Mr. Flowers's case:[15]

> For citizens to become suspects, they must do more than merely exist in an "unsavory" neighborhood . . . . "[I]t defies reason to base a justification for a search upon actions that any similarly-situated person would have taken." . . . Otherwise, our law "comes dangerously close to declaring that persons 'in bad parts of town' enjoy second-class status in regard to the Fourth Amendment."[16]

In contrast to the majority opinion, Judge Elrod's dissent offered a measured view of the facts: "Otha Ray Flowers and another man were sitting in a parked Cadillac in front of an open convenience store at 8:30 p.m. on a Saturday night."[17] "[P]arking in one of only a few available spots in front of a convenience store at an unextraordinary time of evening . . . is something that any law-abiding citizen might do in order to patronize the store."[18] Judge Elrod pointed out that this behavior is not inherently suspicious, "nor does it transform into suspicious behavior because the convenience store was located in a high-crime area."[19] She emphasized that the police did not observe Mr. Flowers make any suspicious movements.[20] Rather, Mr. Flowers "just sat there."[21]

In her dissent, Judge Elrod also directly challenged the majority's assumptions—statements asserted as true without proof—when interpreting Mr. Flowers's behavior.[22] Regarding the majority's description of the men as "dawdling," Judge Elrod pointed out that all the officer really noticed was that the men had not gotten out of the car.[23] She then noted that in the approximately ten to fifteen seconds they were observed, the men could have been "finishing a conversation, responding to a text

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15. Judge Elrod wrote an opinion in this case that concurred in part and dissented in part. The dissent addressed the issue of whether Mr. Flowers's seizure was justified. For simplicity, this article will refer to Judge Elrod's opinion as her dissent in this discussion.

16. *Flowers*, 6 F.4th at 662 (Elrod, J., concurring in part and dissenting in part) (quoting United States v. Rideau, 969 F.2d 1572, 1581 (5th Cir. 1992) (en banc) (Smith, J., dissenting)).

17. *Id.* at 659.

18. *Id.* at 660.

19. *Id.*

20. *Id.* at 662.

21. *Id.*

22. Merriam-Webster describes an "assumption" as "a fact or statement . . . taken for granted." *Assumption*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/assumption [https://perma.cc/G565-6XLC] (last visited Jan. 6, 2026). Clearly a reasonable inference must be grounded in facts supported by evidence and amount to more than a mere assumption. *See* Navarette v. California, 572 U.S. 393, 397 (2014) ("[A] mere 'hunch' does not create reasonable suspicion.") (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)); *Terry*, 392 U.S. at 28 (stating, in the context of a frisk, that an officer's suspicion must be more than the "product of a volatile or inventive imagination"); Takiedine v. 7-Eleven, Inc., 2022 WL 837181, at *9 (E.D. Pa. 2022) (stating a hunch is "[a] claim with no supporting facts"); Commonwealth v. Sweeting-Bailey, 178 N.E.3d 356, 375 (Mass. 2021) ("[W]here what an officer infers merely has some conceivable connection to the facts before the officer, that inference is pure speculation."). In this article, the term "assumption" is used to describe conclusions that are often labeled as "inferences" but do not have a meaningful relationship to the facts they are presumably drawn from.

23. *Flowers*, 6 F.4th at 659 (Elrod, J., concurring in part, dissenting in part).

message, watching with curiosity as a six-car police caravan passed, or engaging in other reasonable behavior that explains the delay."[24] She also challenged the majority's characterization of the car being parked as far as possible from the storefront, an interpretation of the men's parking that was labeled as fact[25] and used to bolster further assumptions about the men's purported criminal motivations.[26] Judge Elrod explained that "the men were parked in one of only five or six available spots in the small lot" and the lot "offered few other parking options besides the spot Flowers chose."[27] Indeed, the police officer's testimony had not focused on the men's parking and the police officer did not testify to having drawn any inferences from the men's choice of a parking space.[28]

In the 1968 landmark case *Terry v. Ohio*, the Supreme Court held that police officers could stop individuals based on reasonable suspicion "that criminal activity may be afoot"—a standard whose threshold is less than probable cause.[29] While a "less demanding standard,"[30] the Court made clear that a mere "hunch" does not create reasonable suspicion.[31] Suspicion is to be particular to an individual and to have some objective evidentiary justification.[32] Over thirty years later, in *Illinois v. Wardlow*, the Court held that police could consider the high-crime nature of the location of a stop as a "contextual consideration" in the calculus of reasonable suspicion.[33] In allowing the nature of the location to be considered as context, however, the Court reiterated that suspicion could not be based on one's mere presence in a location alone.[34]

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24. *Id.* at 660.

25. Judge Elrod, the concurring judge, stated that the exhibits submitted at the evidentiary hearing conflict with this characterization. *Id.* at 659 (Elrod, J., concurring in part, dissenting in part). The certiorari petition also makes this argument and includes photos of the exhibits. Petition for a Writ of Certiorari at 8, Flowers v. United States, 142 S.Ct. 2707 (2022) (No. 21-835), 2021 WL 5827344, at *8 [hereinafter *Flowers Certiorari Petition*].

26. See *Flowers*, 6 F.4th at 657 (Elrod, J., concurring in part and dissenting in part) (stating that "the defendants were parked suspiciously close to a convenience store in a manner that suggested to the seasoned officer that its occupants might be casing the store or preparing to prey on patrons").

27. *Id.* at 659. This was significant because the majority's decision left the impression that Flowers made a strategic choice of where to park and chose between close and far parking spots. *See id.* at 657 (suggesting that Flowers' car was in a "suspicious" spot). In reality, every spot was close to the store.

28. *Id.* (noting that exhibits in the case contradicted the majority's conclusion that Flowers's car was parked "as far as possible from the storefront"). While the majority indicated that the way the men parked would have been suspicious "to the seasoned police officer," the police officer did not testify that the Flowers's choice of a parking spot was suspicious. *Flowers Certiorari Petition*, *supra* note 25, at *10.

29. 392 U.S. 1, 30 (1968).

30. Alabama v. White, 496 U.S. 325, 330 (1990).

31. *See Terry*, 392 U.S. at 27 (requiring an officer to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity).

32. *Id.* at 15, 27.

33. 528 U.S. 119, 124 (2000) ("[W]e have previously noted the fact that the stop occurred in a 'high-crime area' among the relevant contextual consideration in a *Terry* analysis.") (citing Adams v. Williams, 407 U.S. 143, 144, 147–48 (1972)).

34. *Id.* ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.") (citing Brown v. Texas, 443 U.S. 47 (1979)).

But *Wardlow* provided little other explicit guidance on how the high-crime nature of an area might be considered in the reasonable suspicion calculus. Nor did the Court address any of the obvious concerns that this designation might prompt decision makers to rely on generalizations, including stereotypes, to help justify police stops. Since *Wardlow* was decided, legal scholars have criticized police officers' frequent use of high-crime area designations and the outsized impact of this factor on police determinations of reasonable suspicion.[35] High-crime area designations have been shown to act as a proxy for race, with even a police officer's determination to call a community a high-crime area reflecting the race of the majority of the people in that community more so than actual crime rates.[36]

Yet less attention has been placed on how race can impact *judges'* reviews of police stops.[37] Perhaps this is because the law encourages judges to defer to police officers' experiences and many judges readily adopt an officer's stated reasons, including their statements of fact and inferences, for finding people's normal behaviors to be suspicious.[38] But, courts are supposed to make their own determinations. The Supreme Court charged courts with reviewing police conduct, offering detached, neutral scrutiny in their assessments of the reasonableness of police

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35. *See, e.g.*, L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 86 (2017) [hereinafter *Implicit Racial Bias*] (describing "the phrase 'high-crime neighborhood'" as "often . . . not based upon empirical proof or other objective measures"); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 396 (2019) (describing the "implementation of the high-crime area standard" as "haphazard at best, and discriminatory at worst").

36. Grunwald & Fagan, *supra* note 35, at 394–96 (finding that high-crime areas are more closely associated with the suspect's race and the racial composition of a neighborhood than actual crime rates); Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 500 (2004) (arguing that justifying a stop based on locale and neighborhood is "often a proxy for race"); *Implicit Racial Bias*, *supra* note 35, at 86 (noting that in addition to the problems with the high-crime area standard, "despite being similarly situated, majority Black neighborhoods are viewed as more disorderly than majority White neighborhoods"); SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 171 (2021) (discussing the association between Blackness and criminality and discussing a study of Chicago neighborhoods that found that "perceptions of neighborhood disorder, like race itself, were socially constructed" and rose with the level of concentrated poverty and the percentage of Black and Latinx residents).

37. Legal scholarship has focused on how police officers' biases can impact judges' decision-making. *See, e.g.*, Aliza Hochman Bloom, *Whack-A-Mole Reasonable Suspicion*, 112 CALIF. L. REV. 1129 (2024) (discussing courts' overreliance on "police tropes embedded with implicit bias" to boost weak cases of suspicion in high-crime areas); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1166 (2012) [hereinafter *Police Efficiency*] (arguing that courts should inquire into police officer's hit rates, or success in police stops, to help determine how much to rely on police judgment given the propensity for police to resort to implicit bias); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (offering doctrinal reforms to improve the ability of judges to "screen out the distorting effects" of race in police perceptions and judgments).

38. *Flowers Certiorari Petition*, *supra* note 25, at *2 (describing the *Flowers* decision as "emblematic of a 'slow systemic erosion of Fourth Amendment protections' for residents of high-crime areas") (citing United States v. Black, 707 F.3d 531, 542 (4th Cir. 2013)); Bloom, *supra* note 37, at 1155 (2024) (describing how terms like "blading" lead to the slow erosion of Fourth Amendment protections to officers' subjective biases); *but see Wardlow*, 528 U.S. at 124–25 (noting that the Court could not demand from law enforcement "scientific certainty" for their inferences when evaluating factors for reasonable suspicion).

searches and seizures.[39] While police make split-second decisions in real time, at times in rapidly unfolding situations, judges have the benefit of hindsight and engagement in a slower, deliberative process.[40] In contrast to police, judges have the benefit of analyzing the facts and inferences of a case when there is time to deconstruct and assess what has already occurred.[41]

Yet racial bias can still find its way into courts' analyses. Not only can judges overlook police officers' biases, but judges can tap into their own implicit biases as they engage with the facts of a case. As *Flowers* demonstrates, judges themselves can struggle to approach the facts of a case objectively when reviewing the validity of police stops, particularly those that are said to have occurred in places designated as high-crime areas.[42] Like the Court in *Flowers*, other courts have justified stops in high-crime areas by describing people's ambiguous behaviors in ways that assume criminality rather than by presenting police officers' observations in neutral terms and then drawing rational inferences from those facts.[43] In these cases, a defendant's behavior might be highly ambiguous and fitting of a range of possible interpretations, including innocent ones. Yet courts have found grounds for reasonable suspicion in everyday behaviors that might go unnoticed in other neighborhoods.[44] Indeed, case precedent in some jurisdictions now makes it lawful for

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39. Terry v. Ohio, 392 U.S. 1, 21 (1968) (stating that "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge . . . .").

40. Ironically, the rapid pace of policing decision-making is often offered as a reason for courts to defer to police judgment. *See* Barnes v. Felix, 605 U.S. 73, 89–90 (2025) (Kavanaugh, J., concurring) (noting that it is "one thing to dissect and scrutinize an officer's actions with the '20/20 vision of hindsight,' 'in the peace of a judge's chambers.' It is quite another to make 'split-second judgments' on the ground, 'in circumstances that are tense, uncertain, and rapidly evolving.'" (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)). *See* United States v. Zambrana, 428 F.3d 670, 677 (7th Cir. 2005) ("In assessing the evidence presented by law enforcement officers, [the] courts should be mindful of the officers' experience, their training and the pressure-filled circumstances under which they fulfill their duties.").

41. *See Police Efficiency*, *supra* note 37, at 1153 (describing how courts engage in a two-part analysis in which they first determine the historical facts on which the officer relied for the police stop and then determine if those facts, viewed from the perspective of an objectively reasonable police officer, amount to reasonable suspicion).

42. *See* United States v. Caruthers, 458 F.3d 459, 467 (6th Cir. 2006) ("[L]abeling an area 'high-crime' raises special concerns of racial, ethnic, and socioeconomic profiling.").

43. *See, e.g.*, United States v. Douglas, 72 F.4th 332, 340 (D.C. Cir. 2023) (Rogers, J., concurring) (describing an exchange of unknown items as indisputably a "hand-to-hand" exchange); United States v. Bloodworth, 798 F. App'x 842, 847–48 (2019) (finding reasonable suspicion where the court described a "person leaning into a car" suggested a drug transaction, while admitting that it could also suggest that "a friendly neighbor was stopping by to say hello"); United States v. Faught, No. 21-6123, 2022 WL 2813240 at *1, *4 (6th Cir. 2022) (finding reasonable suspicion where police assumed that defendant reaching his hand toward another man's hand before parting ways indicated a hand-to-hand transaction rather than a fist bump or other parting gesture even though police did not see anything change possession); United States v. Clay, 181 F. App'x 542, 544 (6th Cir. 2006) (finding reasonable suspicion where defendant and his passenger were parked behind a house an officer believed to be abandoned, watched the officer drive by, and made "rapid hand movements," without any explanation of why the hand movements warranted suspicion).

44. *Implicit Racial Bias, supra* note 35, at 77 (describing how police may view behavior of Black individuals with more suspicion than whites); *Police Efficiency*, *supra* note 37, at 1143 (arguing that police officers might

police to seize people in designated high-crime areas even when individuals are engaged in ordinary activities—such as waiting in a car, handling a backpack, or wearing a fanny pack across the body rather than around the waist.[45]

Legal scholars have argued that the fact that the validity of a police stop is considered in criminal cases after evidence of a crime already has been discovered encourages judges to find justifications for police stops even when evidence of a crime is lacking.[46] However, one "successful" police stop where evidence of a crime was found does not mean that a police officer has not stopped countless others and gotten it wrong under similar circumstances. Indeed, police more often get it wrong than right.[47] And police more often get it wrong when they stop Black citizens or rely on high-crime areas as a factor supporting a police stop.[48] When courts declare stops to be lawful in high-crime areas in circumstances where evidence is wanting, they create dangerous precedent that allows police officers to stop many innocent people—something the Fourth Amendment was meant to guard against.[49] Even more, by authorizing police stops on lesser evidence in certain neighborhoods based on generalized notions of criminality, courts deprive

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find behaviors engaged in by Black Americans to be suspicious while identical behavior by white Americans would go unnoticed); Thompson, *supra* note 37, at 988 (asserting that the "threshold for labeling conduct as 'criminal' lowers when viewing conduct by people of color").

45. *See* United States v. Carr, 674 F.3d 570 (6th Cir. 2012) (finding reasonable suspicion where police observed for two to three minutes that a person's vehicle was parked at night at a coin operated car wash, but was not being washed, where the car wash was in a high-crime area and police officers had previously received information that narcotics transactions had taken place at the car wash); United States v. Young, 707 F.3d 598, 605 (6th Cir. 2012) (finding reasonable suspicion where police observed for one to one and a half minutes a man reclined in the passenger seat of a car in front of an open restaurant where the restaurant lot was considered a high-crime area and the restaurant conducted pat downs of patrons); *Douglas*, 72 F.4th at 334 (Randolph, J., concurring) (finding that, in a "crime hot spot," grounds for reasonable suspicion included the defendant being handed an opaque backpack and then the giver of the backpack handing something to the defendant); United States v. Hagood, 78 F.4th 570, 578 (2d Cir. 2023) (in addition to the high-crime neighborhood and late hour, relying in large part on a defendant's wearing of a fanny pack in an "unusual manner" in finding reasonable suspicion).

46. *See* Bloom, *supra* note 37, at 1154 (noting that "[b]ecause challenges to reasonable suspicion arise solely in cases where drugs or weapons are found by police . . . this method suffers from selection bias").

47. See PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 94 (2017) (describing a New York Times study that found police had "hit rates" for arrest of .15 percent and of only .05 percent in an eight-block area within Brownsville, a predominantly Black and Latino neighborhood).

48. *See* Grunwald & Fagan, *supra* note 35, at 394–96 (finding that high-crime areas are more closely associated with the suspect's race and the racial composition of a neighborhood than actual crime rates and that police more often get it wrong when they include high-crime area as a factor); Bloom, *supra* note 37, at 1142–43 (discussing Floyd v. New York, 959 F. Supp. 2d. 540, 578 (S.D.N.Y. 2013), a federal class-action lawsuit again the New York Police Department, and explaining that "high-crime area" and "furtive movement" were found to be poor predictors of criminal activity); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037 [hereinafter *Arrest Efficiency*] (noting a consistent statistical demonstration that "stops and searches of whites are more successful in yielding evidence than stops of [B]lacks [sic]").

49. *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 667 (2011) (arguing that the purpose of the Fourth Amendment is to "protect the guilty so as not to intrude on the innocent, rather than the reverse," and thus "the more accurate and powerful a screening device is, the more reasonable it is"); CASHIN, *supra* note 36, at 174 (describing high rates of police stops in Baltimore where several hundred residents said they had been stopped multiple times a week and had not been charged with a crime);

people who are tied to these communities of essential freedoms that others get to enjoy.[50]

The Black Lives Matter movement and the racial reckoning in its wake brought greater awareness to deep inequities in the criminal legal system. That movement led to more focus being given to police practices and recognition of the need for police reform.[51] But more attention needs to be given to the role judges play in perpetuating bias. Like most people, judges are not immune from bias, even when well-intentioned, and bias can influence their decision-making.[52] Yet judges rarely grapple in their opinions with the complexities of how race might influence their assessments of the ambiguous behavior of individuals who come before them.[53] This Article will show one way in which the failure to consider implicit bias can impact courts' legal analyses and consider how courts can lessen the potential for this to occur.

This Article argues that when courts assess the validity of police stops, they are not imposing sufficient safeguards against the real possibility that racial stereotypes might influence how legal decisionmakers interpret an individual's ambiguous behavior. Moreover, it argues that high-crime area designations invite not only police, but also courts who review police stops, to resort to bias in their decision-making. Judicial bias in these cases is of great concern given judges' responsibility to enforce people's constitutional protections against arbitrary police actions. Ultimately, this Article argues for doctrinal changes to the law but also offers recommendations for how courts might better assess these cases to make sure that findings of suspicion are grounded in evidence, not bias.

Grunwald & Fagan, *supra* note 35, at 396 (concluding that police officers may be using high-crime areas "as cover to bolster the appearance of constitutional validity in their weakest stops").

50. *See* United States v. Flowers, 6 F.4th 651, 662 (5th Cir. 2021) (Elrod, J., concurring in part and dissenting in part) (warning of "second-class status in regard to the Fourth Amendment") (quoting United States v. Rideau, 969 F.2d 1572, 1577 (5th Cir. 1992)); *see also Flowers Certiorari Petition*, *supra* note 25, at *30 ("While suburban teenagers are free to linger briefly in their car at a local 7-11 to respond to a text message, the same liberty was not afforded Otha Ray Flowers.").

51. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021) https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/76XS-5Z4N] (discussing state progress toward police reforms including the passing of state laws regarding police use of force, duty to interview, misconduct reporting, and law enforcement decertification).

52. *See generally* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that white judges demonstrated a statistically significant stronger white preference on the race Implicit Association Test than a more general sample of white subjects and studying how this bias might impact decision-making).

53. Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 926 (2023) ("In formulating legal standards, the Court's Fourth Amendment jurisprudence elides the lived experiences of Black people and ignores how those experiences may color police interactions.") (citing Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991)); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L L. REV. 1, 4, 12–13 (2011) (pointing out that the Court rarely acknowledges race in its opinions in criminal procedure cases); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247 (2010) (discussing how "Fourth Amendment jurisprudence includes a series of race cases in which race is rarely mentioned").

The remainder of this Article proceeds as follows: Part I sets forth Fourth Amendment law relevant to *Terry* investigatory police stops and the Supreme Court's allowance in *Wardlow* for high-crime areas to be considered as context in courts' reviews. Part II describes problems that arise when courts factor in the high-crime nature of an area as context for a defendant's behavior without recognizing the potential for racial bias to play a role. This part draws upon psychology research showing that stereotypes can influence how people interpret an individual's behavior. Ultimately, this part will discuss the implications of this social science research for courts' Fourth Amendment analysis. Part III argues that courts have a role to play in reducing bias in police stops and this can start with courts improving their analyses in reasonable suspicion cases.

I. POLICING THE POLICE

The Fourth Amendment explicitly protects the rights of people against police misconduct.[54] While the text makes no mention of the rights of police or government interests, the government's need to enforce the laws requires encounters to take place between people and law enforcement.[55] The Fourth Amendment has been interpreted to navigate these encounters, balancing the rights of the people to liberty and privacy with the interests of the government to maintain order.[56]

Over time, the Supreme Court has expanded the scope of police encounters that fall within the scope of Fourth Amendment protections. Originally, the Fourth Amendment applied only to those encounters between police and the people involving arrests and searches requiring a showing of probable cause.[57] During the 1960s, a period of social progress and unrest, the Court broadened police discretion to allow brief, investigatory police stops where police had reasonable suspicion to believe that criminal activity was afoot—a standard with a lower evidentiary threshold than probable cause.[58] This sea change in the law occurred in *Terry*

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54. The Fourth Amendment sets forth "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

55. Terry v. Ohio, 392 U.S. 1, 22 (1968) (describing the governmental interest of "crime prevention and detection").

56. *Id.* at 21 (noting that there is "no ready test for determining reasonableness other than balancing the need to search [or seize] against the invasion which such a search [or seizure] entails") (citation omitted); *id.* at 22 (describing the governmental interest of "crime prevention and detection").

57. *See* Renee Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. OF LEGIS. & PUB. POL'Y 883, 884 (2013) ("Prior to 1968, the Supreme Court consistently held that the Fourth Amendment demanded a substantial showing of probable cause before police could meaningfully interfere with liberty or private interests.") (citing Henry v. United States, 361 U.S. 98, 102 (1959)); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L. J. 659, 659 (1994) ("*Terry* marked a transformation in the law: For the first time, the Court allowed a criminal search and seizure without probable cause."); *see also* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 418 (2006) (noting that *Terry* held that a "even without 'probable cause,'" a police officer could "stop someone and ask him questions . . .").

58. *Terry*, 392 U.S. at 30; *see* Hutchins, *supra* note 57, at 884 ("In the social turmoil of the 1960s . . . the Court retreated from the bright line and found instead that interference might be permitted on a lesser showing.");

v. *Ohio*, a case in which the Court created a new standard for police encounters on the streets where police were engaging with people in situations that had been beyond the reach of constitutional protections.[59] In *Terry*, the Court struck a compromise allowing more police actions to fall within the ambit of the Fourth Amendment while also legitimizing police stops grounded on less evidence. In doing so, the Court described a need for courts to weigh the reality of police dealing with "rapidly unfolding" and "often dangerous" situations on the streets for which flexible, graduated responses were necessary against the desire for police authority to be strictly circumscribed by the law.[60]

While affording police more discretion when engaging citizens in police stops under the law, the Court clarified that courts would "retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."[61] Courts often consider whether a police stop is lawful, when, after evidence of a crime has been discovered during a stop, the person stopped challenges the stop's validity from their posture as a defendant in a criminal case. This article addresses the courts' judicial review of *Terry* police encounters for this purpose.

In *Terry*, the Supreme Court set forth a framework for courts to determine whether police had reasonable suspicion sufficient to support an investigatory police stop.[62] The Court has added to this framework over time. Central to the present discussion is the Court's decision in *Illinois v*. *Wardlow*, over thirty years after *Terry*, to allow the high-crime nature of an area to be considered as context in this analysis.[63] While the Court held that the high-crime nature of the location where a stop occurred could be considered in courts' reasonable suspicion calculus, the Court did not provide much guidance on its use or discuss the racial implications of this factor.[64]

Harris, *supra* note 57, at 663 (describing *Terry* as a "pro 'law and order' decision timed to address the rising violence and tension in cities and on campuses in 1968 and the police rhetoric this unrest inspired").

59. *See* Hutchins, *supra* note 57, at 886, 892–93; Lerner, *supra* note 57, at 418 (noting that "the legal regime governing pre-*Terry* policing was, in fact, remarkably lenient"); BUTLER, *supra* note 47, at 85 (describing the practice of police conducting stop and frisk as beginning in the 1930s when cops would stop African Americans for doing things that they thought were suspicious, like socializing, hanging out, or driving an expensive car, and ask them for identification and question them).

60. *Terry*, 392 U.S. at 10; *see* Harris, *supra* note 57, at 662 (discussing the *Terry* decision and the Court's finding that it would be "unreasonable to require police to take unnecessary risks simply because they lack probable cause to arrest").

61. *Terry*, 392 U.S. at 15.

62. *See id*. at 1.

63. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (affirming that the fact that a "stop occurred in a 'high-crime area'" is "among the relevant contextual considerations in a *Terry* analysis").

64. Grunwald & Fagan, *supra* note 35, at 347 ("[T]he Court provided remarkably little guidance on how to interpret and implement the high-crime area standard in practice.").

A. The Evolving Terry Standard

The Supreme Court established in *Terry* that reasonable suspicion required police officers to identify "specific and articulable facts which, taken together with rational inferences from those facts," warrant an intrusion.[65] Facts of a case are to be judged by an "objective standard," which considers whether the facts available to a police officer at the moment of seizure would "warrant a man of reasonable caution in the belief" that a stop was appropriate.[66] The Court made clear that "inarticulate hunches" and an officer's subjective good faith are not sufficient to justify a police stop.[67]

As determinations of suspicion are to be particular to individuals and have some objective evidentiary justification, an individual's behavior is central to a court's inquiry.[68] In the process of determining whether a police stop is lawful, courts hear testimony from police officers about what they observed and inferred at the time of a stop, including what they saw an individual doing and the meaning they attached to his actions. Courts are to give deference to police officers' experiences and to consider events from the police officers' point of view.[69] But the Court has also emphasized the need for police conduct to be "subjected to the more detached, neutral scrutiny of a judge" who would consider the reasonableness of a police search or seizure given the particular circumstances.[70]

In *Terry*, police officer Martin McFadden testified to what he observed prior to stopping Mr. Terry: Officer McFadden said his attention was attracted to two men, unfamiliar to him, standing on a street corner.[71] The officer was unable to say precisely what first drew his attention to the two men; he testified that they just "didn't look right to me at the time."[72] He then observed the two men from a slight

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

66. *Id.* at 21–22.

67. *Id.* at 22.

68. In *Terry*, as in subsequent cases, the Court's analysis focused on a series of acts. *Id.* at 22. For example, in *Terry,* the arresting officer stated that "I get more purpose to watch them when I seen [sic] their movements." *Id.* at 6. *See* United States v. Sokolow, 490 U.S. 1, 10 (1988) (stating that "innocent behavior will frequently provide the basis for a showing of probable cause" and "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty' but the degree of suspicion that attaches to particular types of noncriminal acts").

69. United States v. Cortez, 449 U.S. 411, 416–18 (1981) (stating that facts and inferences giving rise to a police stop "must be seen and weighted . . . as understood by those versed in the field of law enforcement"); Ornelas v. United States, 517 U.S. 690, 699–700 (1996) (noting that "a police officer views the facts through the lens of his police experience and expertise" and then giving "due weight" to trial court's finding that police officer's inference was reasonable); United States v. Arvizu, 534 U.S. 266, 273 (2002) (officers are allowed to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person") (citation omitted).

70. *Terry*, 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that, at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

71. *Id.* at 5.

72. While not acknowledged in the opinion, Terry and his companion were both Black, and the man who eventually joined them was white. *See* Thompson, *supra* note 37, at 964–68 (noting the race of Terry and his companions and the Court's choice not to discuss race despite its importance).

distance for ten to twelve minutes.[73] During this time, the officer observed the men walking back and forth in front of a store, pausing to look into the store window as they passed, and periodically conferring.[74] Based on his observations, he suspected the two men of "casing a job, a stick-up," and believed it was his duty to investigate further.[75] At that point, he approached the men and seized them.[76] The Court considered this police testimony about Mr. Terry's behavior and that of his companion and found the evidence sufficient to establish reasonable suspicion.[77]

While the Court found police had reasonable suspicion to stop Mr. Terry, it is important to consider that the Court's decision required it to interpret the men's ambiguous behavior.[78] Indeed, in reviewing the police stop, the Court acknowledged that the circumstances there involved "a series of acts, each of them perhaps innocent in itself":[79]

> There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in.[80]

The Court nonetheless found that "taken together" the men's actions were sufficiently suspicious to warrant further investigation and support reasonable suspicion.[81] In its analysis, the Court then retold the narrative of what occurred prior to the stop, making subtle tweaks to the language used to describe the men's behavior:

> But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.[82]

In retelling these events, the Court presented the facts in a manner that supported its interpretation. The Court in *Terry,* however, did not explain why it described the men's behavior as "hover[ing]," "pac[ing]," and "[star]ing," rather than as strolling,

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73. *Terry*, 392 U.S. at 5–6.
74. *Id.* at 6.
75. *Id.*
76. *Id.* at 7.
77. *Id.* at 22–23.
78. *See id.*; Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (acknowledging that "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation").
79. *Terry*, 392 U.S. at 22.
80. *Id.* at 22–23.
81. *Id.* at 22.
82. *Id.* at 23.

waiting, and looking.[83] After telling the story of what occurred in this manner, the Court then concluded that it would have been "poor police work indeed" for the officer not to have investigated further.[84] In doing so, the Court demonstrated how the *Terry* reasonable suspicion standard would be applied. Notably, despite the ambiguity, the Court found the evidence in *Terry* sufficient to support an investigatory police stop, and its presentation of facts showed how it dealt with this ambiguity in its analysis.

Since *Terry* was decided, the Court has often revisited the *Terry* standards, which have continued to evolve. The Court has emphasized that determinations of suspicion are to be rooted in objective evidence.[85] The analysis "proceeds with various objective observations, information from police reports . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers."[86] From this information, officers draw inferences and make deductions.[87] The relevant inquiry of inferences and conclusions a court draws "is not whether particular conduct is 'innocent' or 'guilty,'" but rather "the degree of suspicion that attaches to particular type of noncriminal acts."[88]

But the evolving *Terry* standards also paint a picture of reasonable suspicion determinations as largely intuitive. In subsequent cases, the Court has described reasonable suspicion as a "commonsense, nontechnical" standard.[89] The process of determining reasonable suspicion has been described as one that "does not deal with hard certainties, but with probabilities."[90] It is based on the totality of the circumstances—"the whole picture."[91] The proof required is "considerably less" than preponderance of the evidence.[92] Reasonable suspicion is to be viewed from the perspective of trained law enforcement, and deference is given to police officers' experiences.[93] But an officer can also use "commonsense," rather than law enforcement training and experience, to form reasonable suspicion.[94]

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83. *Id.* at 22–23.

84. *Id.* at 23.

85. *See* United States v. Cortez, 449 U.S. 411, 417–18 (1981).

86. *Id.* at 418.

87. *Id.*

88. United States v. Sokolow, 490 U.S. 1, 10 (1989).

89. Ornelas v. United States, 517 U.S. 690, 695 (1996); *Cortez*, 449 U.S. at 418 ("The process does not deal with hard certainties, but with probabilities.").

90. *Cortez*, 449 U.S. at 418; Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (explaining that courts "cannot reasonably demand scientific certainty").

91. *Cortez*, 449 U.S. at 417–18.

92. *Sokolow*, 490 U.S. at 7; Navarette v. California, 572 U.S. 393, 397 (2014) (stating that although "a mere hunch" is not enough for reasonable suspicion, "the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence").

93. *Cortez*, 449 U.S. at 418 ("[E]vidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.")

94. Kansas v. Glover, 589 U.S. 376, 385 (2020); *Wardlow*, 528 U.S. at 125 (stating that courts must permit police officers to make "commonsense judgments and inferences about human behavior").

The question of where to draw the line between sufficient and insufficient evidence to support reasonable suspicion is one that the Court has continued to consider. Since *Terry*, the Court has made clear that a determination of reasonable suspicion does not require officers to "rule out the possibility of innocent conduct."[95] In *United States v. Cortez*, the Court considered whether border patrol officers had sufficient evidence to identify a particular vehicle as involved in criminal activity.[96] The Ninth Circuit held that there were "far too many innocent inferences" to warrant reasonable suspicion and that the officers did not have a valid basis to single out the vehicle.[97] The Court, however, found that there were sufficient grounds for reasonable suspicion: "Fact on fact and clue on clue" can provide the deductions and inferences that support suspicion.[98]

In a more recent case, *Kansas v. Glover*, the Court seemed to make little distinction between a hunch and a reasonable inference.[99] There, the Court found reasonable suspicion based on a police officer's "common sense" judgment that a driver of a truck was the registered owner.[100] The police officer pulled Mr. Glover over after running a license plate check and discovering that the truck belonged to Mr. Glover and that his license had been revoked.[101] However, when the officer initiated the traffic stop, he did not know whether Mr. Glover was the driver. [102]

While one could argue that the officer had acted on a mere hunch, the Court found the police officer had reasonable suspicion in that case.[103] The Supreme Court held that the inference that the registered owner might be the driver of the truck was reasonable even though that is not always the case.[104] The Court further stated that "the presence of additional facts might dispel reasonable suspicion," but noted that the officer did not possess exculpatory information in Mr. Glover's

95. *Navarette*, 572 U.S. at 403.

96. *Cortez*, 449 U.S. at 412–13.

97. *Id.* at 416–17.

98. *Id.* at 418.

99. 589 U.S. 376 (2020).

100. *Id.* at 385 (noting that the police officer, based on minimal facts linking the truck's license plate to a registered owner with a revoked license, "used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity—driving with a revoked license").

101. *Id.* at 381.

102. *Id.*

103. Notably, the Kansas Supreme Court had previously heard the case and found that the officer's inference that Mr. Glover was behind the wheel of the truck was "only a hunch." *Id.* at 379 (quoting State v. Glover, 422 P.3d 64, 66 (Kan. 2018)). That court explained that the "hunch" involved "applying and stacking unstated assumptions that are unreasonable without further factual basis"—that the registered owner was the primary driver and that the owner would drive despite having a revoked license. *Id.* at 380 (quoting *Glover*, 422 P.3d at 66).

104. *Id.* at 381 (noting that "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy") (citing United States v. Arvizu, 534 U.S. 266, 274 (2002)). In *Glover,* the Court emphasized that reasonable suspicion "depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 380 (emphasis omitted). Courts must allow police officers to make "commonsense judgements and inferences about human behavior." *Id.* (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)) (courts "cannot reasonably demand scientific certainty . . . where none exists").

case.[105] Absent this exculpatory information, the Court found reasonable suspicion.[106] Nonetheless, *Glover* laid the groundwork for courts giving exculpatory information greater consideration in future cases.

B. High-Crime Area as Context

Since *Terry,* the Court has repeated that an investigatory stop must be justified by "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[107] The Court has also reinforced that suspicion is to be based on more than a "hunch."[108] But while suspicion is to be particular to an individual and not based on mere speculation, the Court also has allowed the context in which the behavior takes place to be considered as part of the totality of circumstances.[109] Naturally, contextual factors are not specific to the person stopped but rather are more generalized considerations.[110]

In *Illinois v. Wardlow*, the Court confirmed that the "high-crime" nature of an area was "among the relevant contextual considerations" in a *Terry* analysis.[111] There, the Court ruled that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[112] But it also stated that reasonable suspicion could not be established by an individual's presence in a high-crime area "standing alone."[113]

In *Wardlow*, the Court relied on only one alleged behavior, Mr. Wardlow's "unprovoked flight from police," in finding reasonable suspicion.[114] There, the Court considered whether Mr. Wardlow's behavior was indicative of possible criminal activity while considering the high-crime nature of the location where he was stopped.[115] In *Wardlow*, a police officer testified that he observed Mr. Wardlow standing next to a building holding an opaque bag when a caravan of four police cars

105. *Id.* at 386.

106. *Id.*

107. United States v. Cortez, 449 U.S. 411, 417–18 (1981) (requiring "a particularized and objective basis for suspecting the particular person stopped of criminal activity"); United States v. Sokolow, 490 U.S. 1, 7 (1989) (the Fourth Amendment requires "some minimal level of objective justification" for a stop) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)).

108. United States v. Arvizu, 534 U.S. 266, 273 (2002) (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).

109. Ornelas v. United States, 517 U.S. 690, 696 (1996) (describing reasonable suspicion and probable cause as "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed" (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).

110. *See* United States v. Young, 707 F.3d 598, 603 (6th Cir. 2012) (warning that contextual factors, such as a high-crime area, should not be given too much weight because they raise concerns of racial, ethnic, and socioeconomic profiling (citing United States v. Caruthers, 458 F.3d 459, 467 (6th Cir. 2006)).

111. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (citing Adams v. Williams, 407 U.S. 143, 144, 147–48 (1972)).

112. *Id.* at 124.

113. *Id.*

114. *Id.* at 123.

115. *Id.* at 124.

passed.[116] Mr. Wardlow was reported to have looked in the direction of the officers and fled.[117] The Court found this evidence sufficient to support reasonable suspicion in that case.[118]

In its opinion, while finding reasonable suspicion, the Court acknowledged that there was more than one way to interpret Mr. Wardlow's flight. The Court stated that there are innocent reasons to flee and that flight alone was "not necessarily indicative of ongoing criminal activity."[119] The Court then appeared to dismiss this concern, by acknowledging that circumstances are often ambiguous in these cases. The Court pointed out that "[e]ven in *Terry*, the conduct justifying the stop [("two individuals pacing back and forth in front of a store, peering into the window, and periodically conferring")] was ambiguous and susceptible of an innocent explanation."[120] Acknowledging that innocent men may at times be stopped, the Court proclaimed this was a risk that "*Terry* accepts."[121]

In *Wardlow*, the Court demonstrated once again how it handled ambiguity regarding a defendant's behavior. After pointing out the ambiguity in the case, the Court referenced the high-crime nature of the area to explain its interpretation of Mr. Wardlow's flight as suggestive of criminality. In analyzing suspicion in *Wardlow*, the Court described the police officers as eight officers in a caravan "converging on an area known for heavy narcotics trafficking."[122] The Court noted "the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts."[123] The Court stated "it was in this context that Officer Nolan decided to investigate [Mr.] Wardlow after observing him flee."[124] After stating that court determinations of reasonable suspicion must be "based on commonsense judgments and inferences about human behavior," the Court concluded that the police were justified in suspecting Mr. Wardlow of criminal activity.[125]

Notably, the Court did not exactly explain how the fact of Mr. Wardlow's presence in a high-crime area helped the Justices make sense of Mr. Wardlow's ambiguous behavior, beyond stating this was a matter of "commonsense."[126] Yet, even

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116. *Id.* at 121–22.

117. *Id.*

118. *Id.* at 121 (finding that the police stop in this case did not violate the Fourth Amendment to the Constitution).

119. *See id.* at 124–25 (noting the amici's arguments).

120. *Id.* at 125.

121. *Id.* at 126 ("*Terry* accepts the risk that officers may stop innocent people."). *See* Terry v. Ohio, 392 U.S. 1, 24–25 (1968) (noting "a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience").

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

123. *Id.*

124. *Id.*

125. *Id.* at 125.

126. *See, e.g.*, United States v. Weaver, 9 F.4th 129, 174 (2d Cir. 2021) (Calabresi, J., dissenting) (describing those who do not live in high-crime areas as "fortunate"); Wingate v. Fulford, 987 F.3d 299, 306 (4th Cir. 2021) (noting that high-crime areas are "minimally probative").

the Justices did not agree that flight from police was a good indicator of guilt. During oral argument, the Justices discussed whether one's location in a high-crime area was "reinforcing" of guilt or cut against it with respect to a person's flight, given police misconduct in high-crime communities that might cause even innocent people to flee from police to avoid harassment.[127] In his dissent, Justice Stevens expressed that "presence in a high-crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry."[128]

In finding that Mr. Wardlow's flight was indicative of guilt, the majority was careful to distinguish Mr. Wardlow's act of fleeing from the act of "going about one's business," conduct that is allowed under the law.[129] Indeed, the oral arguments also included discussions about the distinction between merely jogging in one's neighborhood and pausing upon seeing police and then resuming jogging, which was suggested to be highly ambiguous, versus a "panicked" flight in response to police.[130] There was even a seemingly light-hearted discussion among the justices about whether a person with a walker moving at a slow pace could be determined to be fleeing.[131]

The Court ultimately found that "headlong flight—wherever it occurs—is the consummate act of evasion."[132] This reference to headlong flight in the Court's analysis rendered it unnecessary for the Court to discuss what types of running are sufficient to suggest criminality. Unfortunately, an acknowledgement that more neutral variations of flight might not suggest guilt did not make it into the majority opinion. Such an acknowledgement might have signaled to judges the importance of not accepting assumptions about behavior based on the high-crime nature of area too readily but rather to consider carefully whether an individual's behavior supports an inference of criminality regardless of where it occurs.

Finally, while the Court acknowledged some ambiguity in *Wardlow*, it is important to appreciate that even the Court seemed to overlook a key point of factual ambiguity in that case. The Court's finding that Mr. Wardlow was running from

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127. Oral Argument at 27:09, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), https://www.oyez.org/cases/1999/98-1036 [https://perma.cc/7UGN-PP2L]. The debate of whether the high-crime nature of an area reinforces flight as guilt or cuts against continues to be debated. *See, e.g.,* Bloom, *supra* note 37, 1144–48 (discussing that while still being used, judicial reliance on flight and other factors has faced increasing critique).

128. *Wardlow*, 528 U.S. at 139 (Stevens, J., concurring in part and dissenting in part); *see* L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L. REV. 267, 284 (2012) [hereinafter *Cognitive Bias*] (arguing based on a study available when *Wardlow* was decided that flight is a poor indicator of guilt).

129. Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure."); *see Wardlow*, 528 U.S. at 125 ("[U]nprovoked flight is simply not a mere refusal to cooperate.").

130. Oral Argument at 32:38, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), https://www.oyez.org/cases/1999/98-1036 [https://perma.cc/3FD8-5AMT].

131. *Id.* at 31:59.

132. *Wardlow*, 528 U.S. at 124. It is unclear whether the Court was saying that Wardlow himself had engaged in headlong flight, though this seemed to be key to the Court's analysis.

police rested largely on the testimony of a police officer that Mr. Wardlow looked in the direction of the police before he fled.[133] In Justice Stevens's dissent, however, he questioned whether the evidence established that Mr. Wardlow fled *from* police.[134] Justice Stevens pointed out the police were in unmarked vehicles and may not have been in uniform when they encountered Mr. Wardlow—facts that were not highlighted by the majority.[135] The dissent's discussion of the facts prompts the question of whether the high-crime nature of the area might have led the courts to assume that Mr. Wardlow's flight was in response to police rather than a close evaluation of available evidence regarding Mr. Wardlow's behavior. This question gets at the concern raised here about the use of high-crime area designations as a factor for reasonable suspicion given its close association with race and the potential for implicit bias.

C. Ignoring Race

As the above discussion suggests, the interpretation of an individual's ambiguous behavior is often key to analyzing reasonable suspicion, sometimes without the courts seeming to notice. The high-crime nature of an area can be considered in resolving this ambiguity, but it is not clear how this factor is expected to be used by courts in its analysis.[136] Legal scholars have raised concerns that high-crime area designations can tap into racial biases and encourage police officers to interpret behavior consistent with suspicion.[137] The Court, however, has not even hinted at this possibility in its key cases. Instead, the Court often takes a "colorblind" approach and often does not even acknowledge the race of the parties to a case.[138]

Indeed, *Terry* and *Wardlow* both involved Black defendants, but the Court did not mention this in either opinion.[139] However, each case involved significant ambiguity, and it is possible that race may have played a role in each decision. In *Terry*, the police officer indicated that Mr. Terry and his companion, another Black man, did not look right to him when he first saw them, but the officer did not

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133. *Id.* at 138–39, 139, n.17 (Stevens, J., concurring in part and dissenting in part).

134. *Id.* at 138.

135. *Id.* ("Indeed, the Appellate Court thought the record was "too vague to support the inference that . . . defendant's flight was related to his expectation of police focus on him.").

136. *See* Grunwald & Fagan, *supra* note 35, at 347 ("[T]he Court provided remarkably little guidance on how to interpret and implement the high-crime area standard in practice.").

137. *See Cognitive Bias*, *supra* note 128, at 280–81 (arguing that focusing on race and location strengthens associations between race and crime and "makes officers more likely to interpret the ambiguous activities of nonwhites with suspicion"); Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion*, 57 AM. U. L. REV. 1587, 1590 (2008) (arguing that "a high-crime-area designation almost always shifts the analytical balance toward a finding of reasonable suspicion").

138. *See generally* Harawa, *supra* note 53, at 931 (describing colorblind constitutionalism as inflicting "real harm on communities of color . . . ."); *see* sources cited *supra* note 53.

139. *See* Thompson, *supra* note 37, at 964 (noting that Terry and his steady companion were Black, and a third man they interacted with was white); David Seawell, *Wardlow's Case: A Call to Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1119 (2001) (noting that Wardlow was Black).

explain why.[140] In *Wardlow*, the high-crime nature of the area, and any associations with race to which this designation gave rise, was considered as context for understanding Mr. Wardlow's ambiguous behavior.[141] In both cases, the police evaluated the defendants' behavior and found there to be reasonable suspicion despite ambiguity.

While the race of the defendant is rarely mentioned in recent key Fourth Amendment cases unless it is directly relevant to the legal issue, advocates in both cases raised concerns about police harassment in Black communities. Indeed, *Terry* was decided during a time of great racial tension and change.[142] These concerns found their way into arguments in the *Terry* case, particularly those in amicus briefs.[143] There, advocates raised concerns about racial discrimination in policing. The majority acknowledged these concerns in its opinion but dismissed them as isolated to "certain elements of the police community" and too great a problem to be tackled through the exclusion of evidence.[144] Ultimately, the Court afforded police more discretion to stop people with the *Terry* decision.

In *Wardlow*, advocates also raised concerns about police harassment, including complaints of over-aggressive policing in Black neighborhoods.[145] However, those arguments were not acknowledged in the majority decision, even as it allowed police to consider the high-crime nature of an area in determining suspicion. Justice Stevens addressed some of these concerns in his dissent, laying out various reports of police harassment, largely in footnotes.[146]

That the majority did not address the possible implications of race in *Wardlow* seems in line with other Fourth Amendment cases.[147] A few years prior to *Wardlow*, in *Whren v. United States*, the Court had the opportunity to address concerns about racial profiling by police officers in the context of a traffic stop.[148]

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140. Terry v. Ohio, 392 U.S. 1, 5 (1968); *See* Thompson, *supra* note 37, at 966–69 (analyzing Officer McFadden's statement and its meaning in a racial context).

141. *See Cognitive Bias*, *supra* note 128, at 280–81 (arguing that focusing on race and location strengthens associations between race and crime and "makes officers more likely to interpret the ambiguous activities of nonwhites with suspicion").

142. See sources cited *supra* note 58.

143. *See, e.g.*, Brief for the NAACP Legal Defense & Education Fund, Inc., as Amicus Curiae Supporting Petitioner, Sibron v. New York, 1967 WL 113672, at *44 (arguing that a police officer's "suspicious cast of mind is intensified in the ghetto").

144. *Terry*, 392 U.S. at 14–15 ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.") (footnote omitted); *Id.* at 14 n.11 (discussing field interrogations as a "major source of friction between the police and minority groups").

145. *See, e.g.*, Brief for the NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae in Support of Respondent, Wardlow, Illinois v. Wardlow, 1999 WL 606996, at *8–21.

146. Illinois v. Wardlow, 528 U.S. 119, 132–34, n.7–10 (2000) (Stevens, J., dissenting).

147. *See* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L. J. 1133, 1151 (2012) ("In countless Supreme Court cases, the race of the defendant is never mentioned, as if irrelevant.").

148. Whren v. United States, 517 U.S. 806, 812 (1996).

In that case, Mr. Whren argued that police officers could use traffic violations selectively as a means of investigating other violations of the law for which police lacked probable cause or reasonable suspicion.[149] Mr. Whren, who was Black, had been stopped for minor traffic violations in a "high drug area."[150] The traffic stop led to the discovery of drugs, and Mr. Whren was ultimately charged with drug offenses.[151] Mr. Whren did not challenge the traffic violations but instead argued that the traffic stop was a mere pretext for a broader investigation.[152]

The Court, however, chose not to tackle these issues of racial discrimination in a criminal case. Rather, the Court ruled that police officers' "subjective intentions" were not to play a role in "ordinary, probable-cause Fourth Amendment analysis."[153] The Court held that regardless of pretext, a police stop is valid so long as it is supported by an objective justification.[154] While stating that the Constitution prohibits selective enforcement of the law based on race,[155] the Court indicated that the constitutional basis for objecting to an intentionally discriminatory application of the law was the "Equal Protection Clause, not the Fourth Amendment."[156]

In treating the issue of bias as separate from the validity of a stop, the Court seemed to assume that racial bias could not impact how a police officer interpreted evidence offered as justification. Therefore, it seems unsurprising, given *Whren*, that the potential influence of race was not addressed in *Wardlow*, even as it allowed courts to consider the high-crime nature of an area. Yet the *Wardlow* case presented a circumstance where race was more likely to play a role in the police officer's assessment of a defendant's criminality than in *Whren*. *Whren* involved a traffic stop in which violations of the law were more straightforward.[157] In *Whren*, the issue was the police officers' selective enforcement, not whether there was

149. *Id.* at 806.

150. *Id.* at 808 (indicating that police officers were patrolling in a high-drug area in an unmarked car); *id.* at 810 (noting that both petitioners were Black).

151. *Id.* at 809.

152. *Id.* at 810 (explaining that "Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated" but argue that probable cause is not enough given the temptation for police officers to use traffic stops as a pretext for other investigations).

153. *Id.* at 806, 809–13.

154. *Id.* at 813 ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (quoting Scott v. United States, 436 U.S. 128, 136, 138 (1973)).

155. *Id.*

156. *Id.* Notably, the bringing of a civil suit does not protect a defendant from prosecution. Moreover, cases brought under this clause have met their own challenges. *See* Zachary R. Hart, *Managing Judicial Discretion: Qualified Immunity and Rule 12(b)(6) Motions,* 97 IND. L. J. 1479, 1504 (2022) (discussing one challenge of civil rights claims—qualified immunity); *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 390–92 (S.D. Miss. 2020) (holding police have qualified immunity while raising concerns about this doctrine); *see generally* Cynder Rodriguez, *May the Force of Section 1983 Be With You: How Judge Reeves Used Storytelling to Call for the Elimination of Qualified Immunity*, 22 LEGAL COMMC'N & RHETORIC: JALWD 105 (2025) (discussing *Jamison*).

157. Mr. Whren agreed that police had probable cause for a traffic stop based on violations of traffic laws in his case. *Whren*, 517 U.S. at 806. However, Mr. Whren was also charged with drug offenses based on evidence found during the stop and sought to have that evidence suppressed. *Id.* at 809.

sufficient evidence to support the traffic stop.[158] In *Wardlow*, not only did the high-crime designation invite race into the reasonable suspicion calculus, but the circumstances of that case required decisionmakers to interpret Mr. Wardlow's ambiguous behavior to determine whether this action suggested criminality.[159] While the Court in *Whren* assumed that race would not impact a Fourth Amendment probable cause analysis, it did not consider the potential influence of race in the context of a case like *Wardlow* where a defendant's ambiguous behavior was offered to support a finding of reasonable suspicion.[160] In such a situation, it seems quite likely that bias can play a role in how an individual's ambiguous behavior is interpreted.[161]

Terry extended the protections of the Fourth Amendment while also opening the door to more police discretion. In *Wardlow*, despite advocates raising concerns about racial discrimination, the Court explicitly allowed police officers to consider the high-crime nature of an area as context when interpreting the circumstances surrounding police stops. In essence, the Court allowed police officers, as well as courts, to consider a factor that is closely associated with race as they assessed an individual's ambiguous behavior to determine suspicion.[162] In doing so, the Court did not address race or consider how it might impact police officers' assessments or judges' subsequent reviews. Recent decisions from the lower courts demonstrate why considering the potential impact of race is important in these decisions.

II. WIGGLE ROOM FOR RACIAL BIAS

Following *Terry*, courts were tasked with reviewing police stops pursuant to a lower threshold of evidence than probable cause, in situations where interpretations of people's often-ambiguous behaviors were central to courts' analyses. In *Wardlow*, the Court held that the high-crime nature of an area could be considered as context for this interpretation without providing safeguards against racial bias or even acknowledging the potential for biased thinking. This was not surprising given that *Wardlow* followed *Whren,* a case where the Court had already assumed that intentional racial bias could not impact a police officer's evaluation of evidence

158. *Id*. at 810, 813.

159. Additionally, when *Wardlow* was decided, *Whren's* holding had already been applied to *Terry* stops even though these stops involved more police discretion and frequently required more interpretations of a citizen's ambiguous behavior than cases based on probable cause. *See, e.g.,* United States v. Sanchez, 89 F.3d 715, 718 (10th Cir. 1996).

160. *See* Thompson, *supra* note 37, 982 (noting that "[o]utside the traffic context, police officers' perceptions and judgment routinely play a role in the formation of suspicion for a search, seizure, stop, or frisk").

161. *See* Sherri Keene, *Stories that Swim Upstream*, 76 MD. L. REV. 747, 760–767 (discussing challenges presented by judicial review following *Whren* that denies that race can impact a police officer's assessment of a defendant's behavior); *Arrest Efficiency*, *supra* note 48, at 2062 (arguing that contrary to behavior assumptions underlying the reasonable suspicion test, "science demonstrates that race can affect an officer's interpretation of ambiguous behavior"); Thompson, *supra* note 37, at 983–91 (arguing that race can impact a police officer's assessment of probable cause and reasonable suspicion).

162. *See, e.g.,* Katz, *supra* note 36, at 500 (arguing that the term "high crime neighborhood" is often used as a proxy for race). For additional sources, see sources cited *supra* note 36.

underlying determinations of suspicion.[163] Together, these cases created a situation where decision-making was ripe for the influence of racial bias, while denying the possibility.

Since it was decided, the *Wardlow* decision has received significant scholarly criticism, much of which has focused on the Court's failure to acknowledge the relationship between high-crime areas and race and how this association might impact police officers' judgments when high-crime areas are considered in the reasonable suspicion calculus.[164] Legal scholarship in this area often focuses on the potential influence of implicit bias on *police* decision-making. Implicit bias describes a person's unconscious beliefs and attitudes that affect their perceptions and judgments, often without their knowing.[165]

Studies show that people can harbor implicit biases even if these biases are not consistent with their ideals.[166] Studies also show that many people hold implicit biases against Black people.[167] Relevant to this discussion, studies show that people are biased to associate Black people with crime, and inversely, associate crime with Black people.[168] Studies further show that police officers hold biases consistent with the general population.[169] Indeed, racial bias has been shown to impact what areas police designate as high-crime areas. Courts rely on police testimony to establish what is designated a high-crime area and in most jurisdictions, courts

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163. *See Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.").

164. *See, e.g.,* Harawa, *supra* note 53, at 943 (discussing racial critiques of *Wardlow*); *Cognitive Bias*, *supra* note 128, at 279–87 (discussing how high-crime areas exacerbate implicit bias in reasonable suspicion determinations by associating race and criminality); *see generally*, Grunwald & Fagan, *supra* note 35, (critiquing the use of high-crime area designations and application in reasonable suspicion decision-making as rooted in racial bias).

165. *Cognitive Bias*, *supra* note 128, at 271 (defining implicit bias as a psychological process in which a person's non-conscious beliefs and attitudes affect their perceptions, judgments, and behaviors in ways that they are largely unaware of and unable to control); Rachlinski et al., *supra* note 52, at 1196 (describing implicit bias as meaning "stereotypical associations so subtle that people who hold them may not even be aware of them").

166. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87, 89 (Sarah E. Redfield ed., 2017) ("[Even] people who embrace egalitarian norms nevertheless harbor invidious implicit associations. Most white adults more easily associate African-Americans with negative imagery. . . ."); Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, *in* ENHANCING JUSTICE: REDUCING BIAS 289, 290 (Sarah E. Redfield ed., 2017) ("One can honestly believe it is wrong to discriminate against others and thus have low self-reported measures of prejudice, yet still have biased thoughts and engage in discriminatory behavior.").

167. For a discussion of relevant studies, *see Arrest Efficiency*, *supra* note 48, at 2043–52.

168. *Cognitive Bias*, *supra* note 128, at 281 (asserting that when thinking about crime, many people think about Black people) (citing Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004)); *see* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORN. L. REV. 383, 419–20 (2013) (arguing that studies suggest that many Americans possess implicit biases of Black youth as dangerous, violent and criminally inclined).

169. *See generally*, *Cognitive Bias*, *supra* note 128 (asserting that like everyone else, police hold implicit biases and discussing the implications for police as they target individuals and assess their suspicion).

require no evidentiary proof.[170] Strong arguments have been made that race, rather than an area's crime rate, is driving these designations.[171]

Legal scholars have argued that implicit bias can also impact a police officer's assessment of what is suspicious.[172] Professor Richardson argued that the impact of racial bias on police stops is demonstrated by the reduced accuracy of police stops involving Black people as compared to white people—what Professor Richardson refers to as lower "hit rates."[173] Professor Richardson has made the argument that as high-crime area designations invoke race, consideration of the high-crime nature of an area as context for behavior worsens a situation that already invites biased thinking.[174] Given the potential for police bias, legal scholars have advocated for limiting courts' deference to police experiences when judging reasonable suspicion.[175]

But what if race impacts not only what areas police designate as high-crime and what they deem suspicious, but also the lens through which *judges* interpret a defendant's behavior when they review police encounters? Judges are meant to offer neutral, detached scrutiny in a case. But like everyone else, judges, even when well intentioned, are not immune from biased thinking.[176] Even more, this bias can impact their decision-making.[177] Yet judges' own vulnerability to bias is rarely acknowledged as part of the problem and reduction of this bias is rarely explored as a potential solution.[178] It is important to consider how racial stereotypes can influence judges' interpretations of a defendant's ambiguous behavior

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170. Ferguson & Bernache, *supra* note 137, at 1590 (noting that courts rarely question whether there is even an official definition of high-crime area in their jurisdiction, what facts the definition is based on, whether the definition changes with time, and whether there are different offense-specific areas).

171. Legal scholars have offered compelling evidence that police officers' high-crime area designations are more closely associated with the race of the majority of people who reside in a given location than actual crime rates. *See* Grunwald & Fagan, *supra* note 35, at 394–96 (finding that high-crime areas are more closely associated with the suspect's race and the racial composition of a neighborhood than actual crime rates); Katz, *supra* note 36, at 500 (arguing that the term "high-crime neighborhood" is often used as a proxy for race); *see also* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individual Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 46–47 (arguing that empirical methods exist for determining the crime in a neighborhood).

172. *See, e.g.*, *Implicit Racial Bias*, *supra* note 35, at 78 ("By allowing officers to act on their interpretations of ambiguous behaviors, the reasonable suspicion test actually permits, rather than prevents, actions based on racial hunches."); Hutchins, *supra* note 57, at 902 (arguing that "when coupled with the considerable discretion afforded by the reasonable suspicion standard, the heightened suspicions of police officers [toward Black Americans] create ample opportunity for trouble").

173. *Arrest Efficiency*, *supra* note 48, at 2037–38.

174. *Cognitive Bias*, *supra* note 128, at 279–87.

175. *See, e.g.*, *Arrest Efficiency*, *supra* note 48, at 2077–79.

176. *See* DOROTHY A. BROWN, CRITICAL RACE THEORY: CASE, MATERIALS, AND PROBLEMS 42–54 (West Academic 4th ed. (2023)). While this article focuses on implicit biases, judges can possess explicit biases as well. *See* Vida B. Johnson, *White Supremacy from the Bench*, 27 LEWIS & CLARK L. REV. 39, 65–68 (2023) (offering examples of conscious racial bias).

177. *See* BROWN, *supra* note 176, at 53; Wistrich & Rachlinski, *supra* note 166, at 89.

178. *See* Johnson, *supra* note 176, at 77 (arguing that "narratives of neutrality or colorblindness can no longer be meaningfully sustained about judges, or the laws enforced and created by them").

for purposes of determining suspicion, particularly where that behavior is considered in the context of a high-crime area.

A. Rubber Stamping Police Assumptions

As the race of the parties involved in a police stop rarely finds its way into Fourth Amendment legal opinions, it can be difficult to even begin to understand where racial stereotypes might play a role. As a starting point, it is important to consider how judges learn about the facts of a case. Typically, judges are not privy to seeing what occurred during a police stop. Rather, judges hear about police stops through police testimony. Through their testimony, police officers are to articulate the facts and inferences that gave rise to their stop or search. Judges then determine the facts and consider the reasonableness of inferences drawn in a case and analyze whether they amount to reasonable suspicion given the totality of the circumstances. On appeal, appellate courts read transcripts or other court documents to learn what occurred before the trial court, as well as what happened in a case.

It follows that judges are not interpreting information they learn firsthand in a Fourth Amendment case, but rather hearing what happened through the lens of a direct observer, often a police officer. Appellate judges are often one step further removed, learning about events through transcripts of police testimony and the framing of the trial court. Thus, it is important to consider how police officers' biases impact their assessments of ambiguous behavior and influence judges' decision-making.

With regards to how bias can impact a police officer's interpretations of an individual's behavior, psychology research demonstrates the potential for stereotypes to influence how individuals interpret ambiguous behaviors that they observe. In his study, psychologist Birt Duncan considered whether participants would interpret ambiguous behavior differently depending on the actor's race.[179] Participants in Duncan's study, who were all white university students, observed a videotape of a purported ongoing scenario of two men engaged in a heated argument that resulted in one man shoving the other.[180] They were told that this was a real event happening in another room. While the scenario did not change, the race of the two men was altered for participants—sometimes the two men were both white or both Black. Other times the man doing the shoving was white and the man being shoved was Black or vice versa.[181] The participants were then asked to categorize the behavior and rate the intensity.[182]

Duncan found the participants interpreted the shove as more violent when done by a Black person than a white person.[183] Indeed, where there was a Black

179. Birt L. Duncan, *Differential Social Perceptions and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 591 (1976).

180. *Id.* at 592–93.

181. *Id.* at 593.

182. *Id.* at 594.

183. *Id.* at 595.

protagonist doing the shoving and a white victim being shoved, 75% of participants categorized the shove as violent.[184] Likewise, where both actors were Black, the shove was labeled as violent by 69% of participants as compared to 13% when both actors were white.[185] But when the protagonist was white and the victim was Black, only 17% percent of participants labeled the behavior as violent.[186] Moreover, the shove was rated as less severe when perpetuated by white protagonists, whose behavior was more often described as "horseplay."[187] When there was a Black protagonist and white victim, only 6% of participants perceived the shove as playing around or dramatizing.[188] When this was reversed, and the white person was the protagonist and the Black person was the victim, 42% categorized the shove as playing around or dramatizing.[189]

Duncan's study has strong implications for the argument that police officers can interpret behavior differently depending on the race of the suspect they observe. Indeed, Professor Richardson relied in part on the Duncan study to argue that racial bias could lead police officers to interpret the same behavior differently based on the race of the actor.[190]

The results of Duncan's study are consistent with others studies in the field that demonstrate the general human tendency to interpret ambiguous information consistently with beliefs and expectations, including stereotypes—generalizations that attach to certain categorized groups of people.[191] Stereotypes are activated automatically, even when people do not seek to endorse prejudiced beliefs toward a particular group.[192] They allow people to draw inferences that go "beyond the information given" and help people "to make sense of the world and gain predictability."[193] In this way, stereotypes can help people resolve ambiguities.[194]

But while stereotyping can be efficient, it can also lead to prejudice and discrimination.[195] People tend to interpret ambiguous behavior consistently with

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 595.
189. *Id.*
190. *See Cognitive Bias*, *supra* note 128, at 276–77 (discussing the Duncan study).
191. Camiel J. Beukeboom, Jesper van der Meer & Christian Burgers, *When "Sometimes" Means "Often": How Stereotypes Affect Interpretations of Quantitative Expressions*, 43 J. LANG. & SOC. PSYCH. 376, 382 (2024).
192. Bertram Gawronski, Daniel Geschke & Rainer Banse, *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCH. 573, 586 (2003) ("Our impressions of a stereotyped target can still be prejudiced, even when we are highly motivated to react in an unprejudiced manner.").
193. Beukeboom et al., *supra* note 191, at 377 (quoting GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1958)).
194. David Dunning & David A. Sherman, *Stereotypes and Tacit Inference*, 73 J. PERSONALITY & SOC. PSYCH. 459–71, 468 (1997) ("In the five studies we conducted, we found evidence that people use their stereotypes as they encounter individuating information about other people.").
195. Diane. M. Mackie, David L. Hamilton, Joshua Susskind & Francine Rosselli, *Social Psychological Foundations of Stereotype Formation*, *in* STEREOTYPES & STEREOTYPING 41, 46 (C. Neil Macrae, Charles

stereotypes.[196] At the same time, people tend not to question their own interpretations of evidence, and are thus systemically biased in their beliefs.[197] Indeed, people tend to give more weight to information that is supportive of their beliefs over information that cuts against it.[198]

It follows that in assessing police stops, judges work from what may already be biased information. Police officers' biases can find their way into their descriptions of the behavior of individuals that they encounter and impact the inferences that they draw.[199] These biases can then be translated to the judge in ways that may go unnoticed. Studies show that stereotypes are reflected in subtle variations in speakers' word choices.[200] Biased variations in language feed stereotypic inferences in message recipients, which "creates a self-perpetuating cycle in which social-category cognition is continuously shared and maintained."[201] A label about a person or group plays a role in communicating the content of the set of stereotypic characteristics associated with a given category.[202] This can induce further judgments and behaviors towards the individual or group.[203]

One might assume that judges are well-positioned to avoid reliance on stereotypes in their decision-making given that they engage in a deliberate and planned

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Stangor & Miles Hewstone eds.) (1996) (finding that categorizing others into groups can impact how subsequently acquired information about group members is processed and influence behavioral discrimination).

196. *See, e.g.*, Ziva Kunda & Bonnie Sherman-Williams, *Stereotypes and the Construal of Individuating Information*, 19 PERSONALITY & SOC. PSYCH. BULL. 90 (1993); Dunning & Sherman, *supra* note 194.

197. Beukeboom et al., *supra* note 191, at 382 ("Research on confirmation bias has shown how people's patterns of search, evaluation, weighting and interpretation of evidence are systemically biased in the direction of their expectations, hypotheses and beliefs."); Aileen Oeberst & Roland Imhoff, *Toward Parsimony in Bias Research: A Proposed Common Framework of Belief-Consistent Information Processing for a Set of Biases*, PERSPS. PSYCH. SCI. 1464, 1468–70 (2023) ("Instead of disregarding—or even discrediting—their own experience as an appropriate starting point, people rely on it .... [P]eople may ignore or under-weigh information that is inconsistent with their phenomenology ....").

198. Oeberst & Imhoff, *supra* note 197, at 1466 ("Beyond demonstrations of people's readiness toward forming beliefs, research has repeatedly affirmed people's tendency to be intolerant of ambiguity and uncertainty and found a preference for 'cognitive closure' . . . instead.").

199. *See* Thompson, *supra* note 37, at 991 ("Many of the perceptions and judgments an officer reports on the stand—for example, the commission of a "furtive gesture," . . . will not be accurate renditions of the suspect's actual behavior ...."); Bloom, *supra* note 37, at 1154 (noting that terms like "blading" are themselves interpreted).

200. D.H. Wigboldus, G.R. Semin & R. Spears, *How Do We Communicate Stereotypes? Linguistic Bases and Inferential Consequences*, 78 J. PERSONALITY & SOC. PSYCH. 5, 6 (2000) ("The linguistic representation of the very same desirable or undesirable behavior more concretely or abstractly conveys different implicit meanings. For instance, relative to concrete descriptions, abstract descriptions have been shown to lead to generalizations about the targets of such messages.").

201. Beukeboom et al., *supra* note 191, at 383 (citing Camiel J. Beukeboom & Christian Burgers, *How Stereotypes are Shared Through Language: A Review and Introduction of the Social Categories and Stereotypes Communication (SCSC) Framework*, 7 REV. COMMC'N RSCH. 1, 6 (2019) ("[L]inguistic biases feed shared social-category cognition by sharing and confirming [] existing stereotypic views ....")).

202. *Id.*; Camiel J. Beukeboom & Christian Burgers, *How Stereotypes are Shared Through Language: A Review and Introduction of the Social Categories and Stereotypes Communication (SCSC) Framework*, 7 REV. COMMC'N RSCH. 1, 13 (2019).

203. *See* Beukeboom et al., *supra* note 191, at 382.

decision-making process. Psychologist Daniel Kahneman has described two ways in which people cognitively process stimuli to make decisions—termed "System 1" and "System 2" processing.[204] System 1 thinking "operates automatically and quickly, with little or no effort and no sense of voluntary control."[205] It is more intuitive and impulsive.[206] By contrast, System 2 "allocates attention to the effortful mental activities that demand it" and is "often associated with the subjective experience of agency, choice, and concentration."[207] System 2 is slower, monitors System 1, and, when engaged, attempts to maintain control.[208] However, later reflections may be influenced by System 1 thinking as System 2 thinking does not operate independently of System 1. Indeed, System 2 "often endorses or rationalizes ideas and feelings" generated by System 1.[209]

As police make quick assessments of unfolding ambiguous situations, such a situation would seem ripe for resorting to System 1 thinking. Judges, on the other hand, are to take a more measured approach that would seem to align with System 2 thinking.[210] But, when courts defer heavily to police officer's judgments this would seem to encourage judges to adopt police officers' System 1 thinking, rather than make independent judgments of their own.

In a recent article, Professor Aliza Bloom argued that judges too readily accept police officers' loaded terms, such as "furtive" and "blading," that are used to describe an individual's behavior while suggesting criminality.[211] But it appears that even police officers' more seemingly benign descriptions of people's ambiguous behaviors can subtly reflect biases that judges likewise easily accept.

In *United States v. Young*, for example, the Sixth Circuit adopted a police officer's assumptions about a defendant's ambiguous behavior to justify a police stop.[212] In that case, Michael Young was seized when a police car parked behind his car in a parking lot outside of an open restaurant at 1:15 a.m.[213] The police officer testified that prior to that point, he observed Mr. Young resting in a reclined position for a minute to a minute and a half.[214] In its opinion, the court declared that "[a]mbiguous behavior does not give rise to reasonable suspicion," a challenging statement given that reasonable suspicion analysis often involves the interpretation of a

204. DANIEL KAHNEMAN, THINKING FAST AND SLOW 20–21 (Farrar, Straus and Giroux eds. 2011).

205. *Id.* at 20.

206. KAHNEMAN, *supra* note 204, at 20–21 (describing System 1 as "effortlessly originating impressions and feelings"); *id.* at 24 (describing System 1 as continuously generating "impressions, intuitions, intentions, and feelings").

207. *Id.* at 21.

208. *Id.* at 24.

209. *Id.* at 415.

210. *See* Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of Negativity Bias*, 14 LEGAL COMMC'N & RHETORIC: JALWD 1, 27 (2017) (describing "a judge reading briefs and processing information to render a judgement" as quintessential System 2 thinking).

211. Bloom, *supra* note 37, at 1140–51.

212. United States v. Young, 707 F.3d 598, 604 (6th Cir. 2012).

213. *Id.* at 600–01, 603.

214. *Id.* at 601.

person's ambiguous behavior.[215] But after acknowledging the man's behavior might be ambiguous, the court then simply accepted the police officer's testimony that Mr. Young looked like he had no business at the restaurant and was thus trespassing.[216]

In finding reasonable suspicion, the court accepted the police officer's assumption that Mr. Young was not a patron of the restaurant without interrogating why the police officer reached this conclusion. The court did not question why the police officer assumed Mr. Young was trespassing instead of drawing an alternative conclusion that someone sitting in their car in the restaurant parking lot—even if dozing in their seat—might still be there to patronize it. Nowhere in its analysis did the court consider that a person in the parking lot may be planning to go inside to eat or waiting for take-out. In fact, the court seemed to overlook evidence in the case suggesting that Mr. Young was waiting to go inside. When the police questioned Mr. Young, he indicated that he fell asleep in the car, but he was there to get dinner with his friend, Eric.[217] Mr. Young said that Eric had run inside to find out if they could get a table.[218] A few minutes after that, Eric approached from the restaurant.[219]

The *Young* case offers an example of what can happen during a court's review. If facts and inferences are not approached critically, a court's review can easily become merely an exercise to rationalize police officers' assumptions generated by their System 1 thinking. In this case, it is not clear why the police officer thought that Mr. Young was not a restaurant patron simply because he was observed waiting in his car. Yet in its analysis, the court did not grapple with this question or stop to consider whether Mr. Young's behavior, or something else, had prompted this response.

Notably, in its analysis, the court cautioned that while relevant to the totality of the circumstances, "contextual factors, such as high-crime, should not be given too much weight because they raise concerns of racial, ethnic, and socioeconomic profiling."[220] While asserting that they would give little weight to contextual factors as they were not specific to Mr. Young, the court nonetheless considered these factors, including the high-crime nature of the area, which included reports of violent crime in the same parking lot.[221] The court also considered police testimony that because the restaurant conducted pat downs, a person in possession of a gun would likely remain outside.[222]

In another case, *United States v. Hagood*, the Second Circuit also readily accepted police officers' assumptions about a defendant's behavior.[223] In that case, Mr. Hagood was near a public housing complex, a location deemed to be a

215. *Id.* at 603 (citing United States v. Beauchamp, 659 F.3d 560, 571 (6th Cir. 2011) ("[R]easonable suspicion looks for the exact opposite of ambiguity.")).

216. *Id.* at 604.

217. *Id.* at 601.

218. *Id.*

219. *Id.*

220. *Id.* at 602 (citing United States v. Caruthers, 458 F.3d 459, 467 (6th Cir. 2006)).

221. *Id.* at 600.

222. *Id.* at 604.

223. United States v. Hagood, 78 F.4th 570, 580 (2d Cir. 2023).

high-crime area, when police officers saw him.[224] The police testimony focused on a two to three second window when police observed Michael Hagood standing outside next to a double-parked car while they drove past.[225] The officers were in an unmarked car but were wearing uniforms.[226] It was 1:00 a.m. at the time and thus dark outside.[227] Yet, an officer reported Mr. Hagood looked "really nervous" like a "deer-in-the-headlights" when he saw the police.[228] A police officer also testified that as they drove by he observed Mr. Hagood wearing a fanny pack in an "manner that was not consistent with everyday wear of it."[229] The officer also noted that he saw a bulge in the fanny pack and that it looked heavy; he reported seeing an "elongated, rigid, solid object within the fanny pack," a "line," "hard at the top," which he said appeared to be the top slide of a firearm.[230]

After noting that "something unremarkable on its own may become significant when considered in conjunction with other factors," the Second Circuit found there was reasonable suspicion in this case.[231] Most relevant to this discussion, the district court, and later the appellate court, easily accepted the police officer's assumption that Mr. Hagood might be carrying a gun though the behavior described was quite normal.[232] In essence, Mr. Hagood was seen wearing a fanny pack across his chest; the bag was full and one of the objects inside produced a visible line.[233] Indeed, a police officer testified that the manner Mr. Hagood wore his fanny pack was not typical, but he also acknowledged that he had seen many other people wear fanny packs the same way.[234] Notably, the court did not ask the officer to explain why Mr. Hagood wearing a fanny pack across his body rather than at this waist suggested that he might be concealing a weapon.[235] The police officer also acknowledged that the "line" he saw in the fanny pack could have been a cell phone or wallet.[236] Indeed, a gun was discovered in the fanny pack, but evidence suggested that it was not in the position that the police officer described and not the only item in the fanny pack.[237]

The above cases offer examples of judges not recognizing the potential for bias in a police officer's interpretation of facts. Judges who fail to scrutinize what they hear, could easily miss where police officers make assumptions when interpreting ambiguous behaviors. But are judges in a better position if they are left to interpret ambiguous behavior on their own? Research suggests that implicit bias can impact

224. *Id*. at 572.
225. *Id*. at 573.
226. *Id*. at 572.
227. *Id*.
228. *Id*. at 573.
229. *Id*.
230. *Id*.
231. *Id*. at 580.
232. *See id*.; United States v. Hagood, 20 Cr 656, 2021 WL 2982026, at *15 (S.D.N.Y. 2021).
233. *Hagood*, 2021 WL 2982026, at *13.
234. *Hagood*, 78 F.4th at 582.
235. *Id*. at 583.
236. *Id*. at 581
237. *Id*. at 581–82 (Calabresi, J., dissenting).

judges' own interpretations of people's ambiguous behaviors offered in support of police stops, even when police officers' interpretations offer a more measured description of their observations.

B. Leaning into Stereotypes to Resolve Ambiguity

Judges who review police stops are to engage in a measured analysis, scrutinizing police officers' articulated facts and inferences offered to justify the stops. Yet, the relevant legal rules encourage courts to defer to police. Even more, they encourage judges to rely on their own commonsense—a process that would seem to require judges to rely, at least in part, on their own intuitions.[238]

In relying on their own understanding of how the world works as they interpret a situation they learn about through police testimony, judges need to be mindful of the possibility that implicit biases might influence their interpretations of what occurred. Duncan's study demonstrated that bias can impact an individual's interpretation of ambiguous behavior that they observe firsthand. But bias also can impact how a recipient perceives information that is shared with them. Other studies have shown that readers, who do not experience a situation firsthand, are also more likely to infer ambiguity in line with their stereotypes.[239] Indeed, recipient inferences "can be biased by stereotypic expectation even when identical words are used to describe a target person's behavior."[240] "Regardless of speakers' communicative intentions, recipient interpretations of statements about individuals can be driven by stereotypic expectations that, by definition, do not apply to all individual cases."[241] Thus a neutral description can turn into a "stereotype-confirming piece of information."[242] Moreover, the "shifting-standards model" suggests that "people routinely shift or adjust their standards of judgment as they think about members of different social groups."[243] Even when behavior is described in identical terms, people from different social groups may be expected to have engaged in significantly different behavior.[244]

Studies involving gender and occupation stereotypes demonstrate how subjects can make different assumptions about behavior performed by different actors even

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238. Kansas v. Glover, 589 U.S. 376, 388–89 (2020) (Kagan, J., concurring) (noting that in some contexts common sense "would not much differ from a 'mere hunch'"); *id.* at 395 (Sotomayor, J., dissenting) ("Allowing judges to offer their own brand of common sense where the State's proffered justifications for a search come up short also shifts police work to the judiciary.").

239. *See, e.g.,* Dunning & Sherman, *supra* note 194, at 462, 464 (1997) (explaining that studies "provided initial evidence that stereotypes influence interpretations of another person's behavior" that participants read about).

240. *See* Beukeboom et al., *supra* note 191, at 383.

241. *Id.* at 382.

242. *Id.*

243. Monica Biernat & Melvin Manis, *Shifting Standards and Stereotype-Based Judgments,* 66 J. PERSONALITY & SOC. PSYCH. 5, 5 (1994) (finding that what is deemed to be "very assertive" behavior in a woman may be quite different from what is deemed to be "very assertive" in a man).

244. *Id.*

when the behavior is described in the same way.[245] Psychologists Ziva Kunda and Bonnie Sherman-Williams completed a series of studies that considered how stereotypes could impact participants' impressions of ambiguous behaviors subject to multiple interpretations.[246] Notably, their studies involved events that subjects read about, rather than observed first hand.[247] In an initial pilot study, a small group of participants read that either a construction worker or a housewife "hit someone who annoyed him or her."[248] This description was vague and subject to multiple interpretations. While participants were offered little information other than the label of the actor as a construction worker or housewife, participants were asked to describe this behavior in detail.[249]

Like Duncan, Kunda and Sherman-Williams found that the same ambiguous behavior could be construed quite differently when participants learned that they were performed by members of different groups that were subject to different expectations.[250] Though the question was open-ended, and participants attached many different narratives to the same behavior, participants typically described the housewife as disciplining a child, while they described the construction worker as engaged in a violent fight with a co-worker.[251] Notably, the construction worker was assumed to be more aggressive, while the housewife was assumed to be less.[252]

Kunda and Sherman-Williams also considered whether the extent of ambiguity of behavior impacted the reliance on stereotypes. For this part of the study, the psychologists again used the same description of an ambiguous act (an actor hit someone that annoyed him or her) but also offered some participants a more specific description of the act for each actor.[253] One third of participants were give the general ambiguous description that the construction worker or housewife hit someone that annoyed him or her.[254] One third were given a high-aggressiveness construal—the housewife or construction worker's neighbor was taunting them about their marriage and the actor lost their temper and decked the neighbor. And one third were given a low threshold construal—the housewife or construction worker spanked their six-year-old son when he trudged mud all over the carpet.[255] For this latter construal, the actor was said to have regretted the action and comforted the son.[256] Participants read their given vignette and then rated the aggressiveness of the actor. [257]

245. *Id.*
246. Kunda & Sherman-Williams, *supra* note 196, at 91.
247. *Id.* at 92–93.
248. *Id.* at 92.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 93.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*

This study demonstrated that where the description of an actor's behavior was vague, decisionmakers relied on stereotypes. But where the description was specific and there was little room for interpretation, stereotypes did not have an opportunity to play a role.[258] As in prior studies, the results showed that the construction worker performing the ambiguous behavior was perceived as more aggressive than the housewife performing it when no additional details were provided.[259] But when details were provided, there was no difference in how their behavior was interpreted.[260] Both the housewife and construction worker were deemed highly aggressive when participants were offered the highly aggressive construal.[261] And both were found to be less aggressive when participants were offered the low threshold construal.[262]

Notably, an additional study by Kunda and Sherman-Williams demonstrated that stereotypes could affect impressions even when there was no information provided about a target's behavior at all and all that was known was that the target was present in a context that allowed for diverse behaviors. In this experiment, Kunda and Sherman-Williams used the stereotypes of a car salesman and librarian, who are typically stereotyped respectively as extraverted and introverted.[263] Participants read that a car salesman and a librarian attended a party, and participants were asked to describe how each actor behaved in that setting or to rate their extraversion.[264] The descriptions of the car salesman's behavior at the party were rated as more extraverted with participants often describing the salesman as smiling and introducing himself and making business connections.[265] Participants rated the librarian's descriptions as less extraverted with typical descriptions portraying her as friendly but quiet, and not loud or outgoing but nonetheless having "no trouble in private conversations."[266]

The aforementioned studies have implications for judges given that *Terry* stops often involve the interpretation of an individual's ambiguous behavior that is described to a judge. It would follow that when judges hear about a defendant's behavior for the purpose of assessing grounds for suspicion, a judge might rely on stereotypes more often when the description provided is more ambiguous. Similar to the participants in the study, judges might fill in gaps consistent with expectations that they make about an actor. Moreover, this might occur even in the absence of any evidence. Court decisions reveal what can happen when judges have different expectations of different people even when they are engaged in the same

258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 94.
264. *Id.*
265. *Id.* at 95.
266. *Id.*

activities. These decisions raise the question of whether a defendant's behavior, or stereotypes about the defendant, are driving the courts' analyses.

For example, in *United States v. Douglas*, the District of Columbia Circuit sought to explain why the behavior in that case was deemed suspicious, while acknowledging it would not be suspicious if done in a different location.[267] There, the court considered whether the police had reasonable suspicion to support a stop of Theodore Douglas, who was observed in a walkway between two buildings when another man approached and handed him a small black backpack.[268] A police officer reported that he was undercover and in an unmarked vehicle about fifteen yards away as he observed Mr. Douglas.[269] He testified that he observed the approaching man hand Mr. Douglas the backpack in exchange for "a light-colored object" that he could not identify.[270] The officer conceded that he made an "assumption" that a sale had taken place and admitted that he could not tell if the object exchanged was even paper.[271] The officer testified that after the exchange, he saw Mr. Douglas quickly "hid[e]" the backpack by placing it on his back and then putting his jacket over it.[272] The court found reasonable suspicion based on these facts.[273]

Notably, in this case there was no testimony suggesting the police officer could tell what was in the backpack and it was not established that money was exchanged for the backpack.[274] The court nonetheless accepted the police officer's description of what had occurred as a "hand-to-hand" transaction of drugs or a firearm.[275] But not only did the court assume that Mr. Douglas had engaged in a "hand-to-hand" transaction, but also that he was "concealing" the backpack when he put it under his jacket.[276] Notably, the court assumed that Mr. Douglas was hiding his backpack from police, even though the exchange of the backpack took place out in the open during daylight and there was no evidence that Mr. Douglas realized that police were watching him.[277]

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267. United States v. Douglas, 72 F.4th 332, 336 (D.C. Cir. 2023). Notably, in this case, there was a *per curiam* decision and there were two concurrences and one dissent. For simplicity, the concurring judges are described as "the court" in the discussion. *See id.*

268. *Id.* at 334 (Randolph., J., concurring).

269. *Id.*

270. *Id.* at 340 (Wilkins, J., dissenting) (citing United States v. Williams, 507 F. Supp. 3d 181, 188 (D.D.C. 2020)).

271. *Id.* at 341.

272. *Id.* at 334 (Wilkins, J., dissenting).

273. *Id.* at 337.

274. *Id.* at 341 (Wilkins, J., dissenting).

275. *Id.* at 337 (Randolph, J., concurring) (stating that factors that the police officer set forth—including hand-to-hand transactions, efforts at concealment, and exchanges of a concealed container—converged in the transaction that the police officer observed); *id.* at 339 (Rogers, J., concurring) (stating that the police officer observed a "hand-to-hand exchange"); *id.* at 341 (Wilkins, J., dissenting) (noting that the police officer "conceded that he made an 'assumption' that a sale had taken place" even though he could not tell if currency, or even paper, was exchanged).

276. *Id.* at 337 (Randolph, J., concurring).

277. *Id.* at 334 (describing Douglas "hiding the bag"); *see id.* at 342 (Wilkins, J. dissenting) (noting that the backpack "was handed over openly while [the men were] standing in the middle of a public walkway in broad daylight" and there was no evidence that Mr. Douglas sensed that police were present).

In his concurring opinion, Judge Arthur Raymond Randolph explained why a drug exchange could be assumed from a police officer's observation of one man handing another man a bookbag whose contents were unknown in exchange for an unidentified item. Judge Randolph indicated that the fact that the men were observed in a high-crime area, or "crime hot spot," made a difference: "If an individual hands a bookbag to another person in the Library of Congress, that is one thing. If the hand-off takes place in a high-crime area in an outdoor walkway noted for criminal activity, that is quite another."[278] The suggestion seemed to be that the former act of handing someone a bookbag in a library would not be suspicious while a "hand-off" of a bookbag in an outdoor walkway would. While initially focusing on Mr. Douglas's behavior, Judge Randolph also pointed out that the men appeared "to be of the age of those who commit the most street crimes, especially drug and firearms crimes."[279] He then offered a story about little girls exchanging a bookbag and compared it to the exchange of the bookbag between the adult men in the present case, noting that the former would not raise concerns for police while the later exchange would.[280]

But contrary to what the court suggested, even the men's actions were open to multiple interpretations. Indeed, there were alternative inferences that the court could have made that were not acknowledged in the *Douglas* majority opinion. Even in a high-crime area, the backpack could have contained books or other legal items. A backpack could be passed from one person to another for a variety of reasons that are lawful. For example, the backpack could have belonged to Mr. Douglas and was being returned. And placing a backpack under one's coat does not have to lead to the conclusion that one is hiding something from police detection. As the dissent pointed out, people often place their bags under their coats to protect them from theft.[281]

Judge Robert Wilkins wrote a dissent in *Douglas* in which he expressed concern about criminality being assumed from a seemingly innocent activity because of where it occurred or who engaged in it. In his dissent, Judge Wilkins pointed out that the question of whether there is reasonable suspicion to suggest something illegal should rest on something more than police observing two men handling a bag and assuming them to be criminals based on their age and location.[282] Even in a high-crime area, some proof of the contents is required:

> The government argues that the fact that the backpack was used for the exchange is itself evidence of concealment, because someone selling drugs or guns would use an opaque bag to obscure the contraband contained inside. Crediting that argument means that citizens in high-crime neighborhoods can

278. *Id.* at 336 (Randolph, J., concurring).
279. *Id.* at 334.
280. *Id.*
281. *Id.* at 343 (Wilkins, J., dissenting).
282. *Id.* at 339 (Wilkins, J., dissenting).

> be deemed suspicious for "concealment" by handing something over to anyone in a bag at all, unless of course the bag is transparent, quite a remarkable position.[283]

As demonstrated above, different assumptions can be made about the same described behavior, dependent on the decisionmaker's expectations of the person engaged in the action. This seems troubling in Fourth Amendment cases where a defendant's ambiguous behavior plays a central role. High-crime area designations can activate racial stereotypes.[284] At the same time, judges can draw generalizations from such a location as they interpret an individual's behavior. The studies suggest that when courts consider factual scenarios in designated high-crime areas where there is great ambiguity, such as when individuals are engaged in innocuous behaviors, the natural temptation would be for judges to tap into racial stereotypes to fill in evidentiary gaps.

Judges are, of course, allowed to draw reasonable inferences from the facts in a case. But *Douglas* exposes the possibility that an inference will be drawn not from a description of an individual's behavior so much as from an impression of the actor that then shapes how an activity is perceived. Indeed, in *Douglas*, Judge Randolph suggested that the same behavior observed there would be interpreted differently in a different context with different actors.[285] Given that people can rely on stereotypes to hypothesize what someone might do even in the absence of any information about a defendant's behavior, it would appear that a risk exists that a finding of suspicion could be based on expectations about an individual and not their behavior at all.

As *Douglas* demonstrates, when an individual has been observed carrying an opaque bag, courts have assumed that the person is concealing an unlawful object inside.[286] Other courts have likewise assumed criminality from ambiguous behavior that would likely be assumed to be innocent, and might even go unnoticed, if they occurred in other locations. Seemingly normal interactions between individuals have been assumed to be for a nefarious purpose.[287] The exchange of items has been assumed to be a hand-to-hand transaction.[288] And as demonstrated by earlier

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283. *Id*. at 342 (Wilkins, J., dissenting).

284. *See* Harris, *supra* note 57, at 677 ("[T]he terms 'inner city neighborhood' and 'high-crime area' are synonymous for many Americans, including many of the regular participants in the criminal justice process.")

285. *Douglas*, 72 F.4th at 333–35 (Randolph, J., concurring).

286. *Id*. at 337 (2023) (finding reasonable suspicion where police observed the defendant take a closed, opaque backpack from another man and handed him an unidentified object that police thought could be money); *see also* United States v. Hagood, 78 F.4th 570, 579 (2d. Cir. 2023) (finding reasonable suspicion where police assumed a gun was in a fanny pack that looked heavy and was said to have a rigid solid object inside—a description that was also consistent with a phone).

287. *See, e.g*., United States v. Bloodworth, 798 Fed. App'x 842, 847–48 (6th Cir. 2019) (finding reasonable suspicion where the court held that a "person leaning into a car" suggested a drug transaction, while admitting that it could also suggest that "a friendly neighbor was stopping by to say hello").

288. *See, e.g*., *Douglas*, 72 F.4th at 340 (Rogers, J., concurring) (describing an exchange of unknown items as indisputably a "hand-to-hand" exchange); United States v. Faught, No. 21-6123, 2022 WL 2813240, at *4 (6th

case examples, when a person is observed briefly waiting in their car outside of an open business, courts have assumed he is not a patron.[289] Moreover, an assumption of being a shooter has been made from walking in an area where a gun shot was heard.[290] When a person touches their waist, it has been assumed they possess a gun.[291] And when a gun is possessed, it has been assumed to be unlawful.[292]

Sadly, a judge's experiences may work to reinforce associations between crime and Black people, and the neighborhoods that are associated with them. This situation may be made worse by lack of diversity on the bench. Judges are not fully representative of the people in our society and, as a group, have a relatively narrow range of experiences compared to the broader population.[293] The process of judges considering police encounters in the context of deciding motions to suppress may not work to broaden their expectations. Relevant standards and procedures place the focus on police perspectives, and the experience of the defendant is deemed legally irrelevant.[294] Hearing about case facts from the police perspective to the exclusion of hearing about other people's lived realities can leave judges ignorant to the experiences of people who more frequently experience police stops.

Moreover, it can reinforce stereotypes and validate assumptions about ambiguous behavior given that the focus is on police stops where the assumptions appear to have proved true.[295] In repeatedly hearing about police stops that result in

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Cir. 2022) (finding reasonable suspicion where police assumed that defendant reaching his hand toward another man's hand before parting ways indicated a hand-to-hand transaction rather than a fist bump or other parting gesture).

289. *See, e.g.*, United States v. Carr, 674 F.3d 570, 575 (6th Cir. 2012) (finding reasonable suspicion where police observed for two to three minutes that a person's vehicle was parked at night at a coin operated car wash, but was not being washed, where the car wash was in a high-crime area and police officers previously received information that narcotics transactions had taken place there); United States v. Young, 707 F.3d 598, 604 (6th Cir. 2012) (finding reasonable suspicion where police observed for one to one and half minutes a man reclined in the passenger seat of a car in front of an open restaurant where the restaurant lot was considered a high-crime area and the restaurant conducted pat downs of patrons even though the defendant told police that he was waiting for a friend who had gone inside the restaurant).

290. *See, e.g.*, United States v. Jones, 1 F.4th 50, 53 (D.C. Cir. 2021) (finding reasonable suspicion where police saw a man walking in the area where gunshots had been detected and did not respond to police immediately but had on headphones, suggesting perhaps that Jones might not have heard the police).

291. *See, e.g.*, Commonwealth v. Karen K., 164 N.E.3d 933, 943 (Mass. App. Ct. 2021), aff'd, 199 N.E.3d 860 (Mass. 2023) (finding reasonable suspicion where police testified that a juvenile girl made a hand movement around her waist but acknowledged that they did not see the girl adjust her waistband).

292. *See, e.g.*, United States v. Cloud, 994 F.3d 233, 249 (4th Cir. 2021) (finding reasonable suspicion where it was inferred that the defendant owned a gun that was hidden in his car—though North Carolina allows carrying of concealed weapons with a permit—given the "reasonable possibility" that he was illegally concealing the gun).

293. Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2d 45, 46–47 (2009) (discussing lack of diversity on the courts); Johnson, *supra* note 176, at 52 (arguing that judges often do not racially reflect the communities they serve).

294. Legal standards for Fourth Amendment law focus on whether police can justify a stop, not on what the defendant was doing or experiencing. This leaves the defendant's perspective largely irrelevant in the courtroom. *See* Tal Kaster, *Policing Narrative*, 71 SMU L. REV. 1117, 1117 (2018) (discussing the need for legal doctrines to create space for excluded narratives of Fourth Amendment encounters).

295. United States v. Douglas, 72 F.4th 332, 344 (D.C. Cir. 2023) (Wilkins, J., dissenting) ("We almost always decide whether a quantum of acts constitutes reasonable suspicion in contexts raising the specter of

evidence of a crime in designated high-crime areas, judges may also lose sight of the fact that not everyone who lives in a high-crime area, even of a certain age and race, is a criminal.[296] So-called high-crime areas are also homes to many innocent people.[297] Often the product of segregation, majority Black neighborhoods are the home to diverse communities. [298] They are locations that include not only street corners, but also schools, churches, stores, and businesses that people visit.[299] Courts' analyses can deny this reality.

As Judge Wilkins warned in *Douglas*, "people living in high-crime areas have fewer Fourth Amendment rights than those who do not, because we rubber stamp characterizations of their actions as 'suspicious.'"[300] But not only can judges rubber stamp police officers' characterizations, they can offer characterizations of their own.

C. Conflating Facts and Inferences

As judges review police stops, they are to determine the facts of a case and reasonable inferences to be drawn from those facts. But the line between facts and inferences can be blurred. Inferences are spontaneous and "can be so strong that people believe that those inferences were no inferences at all, but rather information presented in the original description."[301] It follows that inference drawing can happen without a decisionmaker even being aware, and these inferences can impact not only descriptions that are recognized as inferences, but also descriptions that contain inferences, but are treated as proven facts.

Another set of psychologists, David Dunning and David A. Sherman, studied how and when people make inferences when interpreting events. For their study, Dunning and Sherman observed participants' recollections as they read passages about the social behavior of individuals in different stereotyped groups.[302] They

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whether we are giving the guilty too many rights, rather than situations in which we actually confront whether we are shearing away the rights of the innocent.").

296. *See Cognitive Bias*, *supra* note 128, at 279–86 (discussing how racial proxies such as the high-crime area moniker suggest that it is appropriate to associate race and crime); Rachlinski et al., *supra* note 52, at 1227 ("Frequent exposure to [B]lack criminal defendants is apt to perpetuate negative associations with [B]lack Americans.").

297. *See* United States v. Weaver, 9 F.4th 129, 157 (2d. Cir. 2021) (Lohier, J., concurring) ("[I]t is far-fetched and unfair to paint an entire community neighborhood as crime-ridden. Even the most dangerous neighborhoods are also home to law-abiding citizens.").

298. Contrary to what some may assume, Black neighborhoods are home to concentrated groups of Black people by design, including many law-abiding people. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 215–17 (2017) (describing the impact of laws past and present that created racial segregation); CASHIN, *supra* note 36, at 172 (arguing that geography is central to American caste and that once constructed, poverty-dense "hoods" facilitate not only unequal distribution of resources but also a different style of policing for Black people).

299. *See* People v. Bower, 597 P.2d 115, 119 (Cal. 1979) ("The spectrum of legitimate human behavior occurs every day in so-called high-crime areas.").

300. United States v. Douglas, 72 F.4th 332, 344 (D.C. Cir. 2023) (Wilkins, J., dissenting).

301. Dunning & Sherman, *supra* note 194, at 460.

302. *Id.* at 461.

conducted a series of studies where they presented participants with passages that invited them to make tacit inferences—implied conclusions that are not explicitly stated.[303] Soon thereafter, the participants were presented with altered passages that contained tacit inferences suggested by stereotypes relevant to what they read.[304] Dunning and Sherman predicted that participants would be more likely to falsely remember the altered passages as having been previously presented when the inferences contained in the sentences were consistent with the stereotype contained in them than when they were inconsistent with the stereotype.[305]

In an initial study, all participants were given a sentence saying that "Amy found it hard to disguise her feelings toward X."[306] Half of the participants were told that "X" was a Hollywood actor and the other half were told "X" was a criminal.[307] Participants were then given a memory test that included sentences containing inferences consistent with common stereotypes—e.g., "Amy found it hard to disguise her attraction toward the Hollywood actor."[308] It also included sentences containing inferences that were inconsistent with common stereotypes and consistent with the stereotype of the unrepresented actor—e.g., "Amy found it hard to disguise her repulsion toward the Hollywood actor."[309]

As predicted, the participants falsely recognized sentences that were consistent with stereotypes more often than sentences that were inconsistent with stereotypes. Participants mistakenly recognized an average of 35% of stereotype-consistent interpretations, but only 15% of stereotype-inconsistent interpretations.[310] A later study provided evidence that the participants made inferences while encoding the original information at acquisition. [311] In other words, some inferences were made during the identification of the behavior itself before the point when inferences are acknowledged.

Notably, these inferences occurred even when decisionmakers held more egalitarian views. Another study showed that stereotype-driven inferences were made regardless of the level of stereotypes the participants were found to possess. Participants were assessed as possessing high or low levels of sexism.[312] Then, all participants were given 50 sentences to interpret.[313] The behavior in the sentences did not change but the gender of the actor did, with names like Elizabeth and Bob being used for the actor to suggest that the actor was a man or woman.[314] For

303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*at 462.
311. *Id.* at 466.
312. *Id.* at 467.
313. *Id.*
314. *Id.*

example, participants were shown the sentence "Elizabeth was not very surprised upon seeing her quantitative SAT scores."[315] The sentence did not indicate whether her surprise was due to the score being low or high. Thus, the question considered whether people would be more likely to infer that Elizabeth's score was low than if the protagonist was named "Bob."[316] To make this determination participants were given stereotype consistent sentences, stereotype inconsistent sentences, and some filler sentences.[317]

The study results were that stereotype consistent sentences were more frequently misremembered. For example, when the named individual was assumed to be a woman, participants more often chose stereotype consistent sentences that assumed that the reaction was to a low score.[318] Notably, the tendency of participants to make different tacit inferences about a brief description of a person's behavior, depending on whether the person was male or female, was not impacted by the participant's assessed level of sexism.[319] In fact, the rate at which participants made stereotype-consistent inferences was deemed statistically equivalent.[320]

The above studies also have strong implications for judges. They suggest that even judges, who seek to be fair in cases, may nonetheless resort to reliance on stereotypes, often without even recognizing it. As demonstrated in the prior case examples, courts acknowledge some points of ambiguity in cases and how they resolve them. But assumptions can happen at earlier points in the analytical process that typically are not addressed in court opinions. Descriptions of defendants' behaviors, even if they appear to be neutral, can reflect underlying assumptions that align with relevant stereotypes: Police officers' assumptions might be reflected in their descriptions of a defendant's behavior that they share with a judge through their testimony. And judges might make their own assumptions when they hear or read about what happened in a case. These assumptions might then find their way into legal opinions where they are reflected in the court's own description.

Notably, descriptions of a defendant's behavior are often malleable in case opinions and subtle changes in language often go unexplained. In *Terry*, what police described as "looking" became "peering" in the Court's opinion.[321] In *Wardlow*, "looked in the direction of police and fled" became "fled upon seeing police."[322] In *Flowers*, sitting in a car became "dawdling."[323] In *Douglas,* handing another person a book bag became a "hand-to-hand transaction."[324] These shifts in terms and meaning may be strategic choices, or they could be examples of judges not

315. *Id.* at 466–67.
316. *Id.* at 467.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. Terry v. Ohio, 392 U.S. 1, 6 (1968).
322. Illinois v. Wardlow, 528 U.S. 119, 121–22 (2000).
323. United States v. Flowers, 6 F.4th 651, 657 (5th Cir. 2021).
324. United States v. Douglas, 72 F.4th 332, 337 (D.C. Cir. 2023) (Randolph, J., concurring).

recognizing when they are making assumptions consistent with stereotypes, rather than reasonable inferences from facts.

In the Fourth Amendment context, not only what a person did, but their reasons for acting, are often important. Naturally, a police officer who is making observations may not have the benefit of knowing the purpose behind a person's actions. Where a behavior is inherently non-suspicious, there may be a temptation to make assumptions about a person's motivations to explain why that behavior is nonetheless suspicious. Moreover, the court may not explicitly state this motivation but rather embed it in the language used to describe the defendant's behavior.

In *Flowers*, discussed in the Introduction, a police officer testified that he observed two men sitting in a vehicle for about ten to fifteen seconds before concluding that the occupants were not planning to patronize the store.[325] In this case, the men's normal behavior alone does not offer an explanation for this assumption. Yet the court's description of the facts went beyond the police officer's testimony of what he observed to include motivations for the defendant's ambiguous behavior. There, the court deemed it a determinative fact that Mr. Flowers had parked "as far as possible from the storefront," though the parking spot chosen seemed unremarkable and the court heard no police testimony suggesting anything nefarious about the men's choice of where to park. Indeed, all the police officer testified to observing was two men sitting briefly in an available parking spot adjacent to an open store.[326] One could assume that this was a deliberate choice by the court to treat what is at best an assumption as a determinative fact. But it is also possible that judges may not recognize that they are making assumptions consistent with stereotypes associating Black people and neighborhoods with criminality.

In *Flowers*, the majority opinion did not discuss how the facts were interpreted or the validity of inferences drawn. Rather, the court used the above description as a starting point for its analysis and thus it carried significant weight in the *Flowers* decision. After emphasizing the high-crime nature of the area, the court inferred, based on so-called facts about how closely Mr. Flowers had parked to the store, that Mr. Flowers might have been sitting in the car because he was getting ready to "prey on patrons."[327]

As the studies discussed above show, in situations where there exists significant ambiguity and little information to resolve it, a decisionmaker is more likely to resort to stereotypes.[328] Even in the absence of any details about a person's behavior, people hypothesize how a person will behave based on stereotypes that they attach to

325. *Flowers*, 6 F.4th at 654.

326. *Id.* at 654; *id.* at 662 (Elrod, J., concurring in part and dissenting in part) ("[T]he two men just sat there.").

327. *Id.* at 657.

328. Kunda & Sherman-Williams, *supra* note 196, at 91; *see generally* Duncan, *supra* note 179 (discussed at Part II.A.); Dunning & Sherman, *supra* note 194 (discussed at Part II.C).

that person.[329] Such hypothesizing may happen beyond the decisionmaker's notice, impacting not only what is inferred, but what the underlying facts are thought to be.[330]

Based on stereotypes alone, in one of the studies it was assumed that a librarian would be socially awkward at a party and a car salesman would enjoy talking to everyone.[331] What might one assume of a young, Black man imagined in the setting of a high-crime area? How might one view his actions given their expectations of him? Will criminality be inferred from his behavior, or are assumptions of criminality being made that are driven by stereotypes associated with the defendant's race, or even his neighborhood? Are these assumptions reflected in descriptions of the defendant's behavior? Case precedent has offered some hints. Now it is time to consider how to reduce the opportunity for biased decision-making.

III. DISRUPTING COURTS' RELIANCE ON RACIAL STEREOTYPES

The Court has created a framework for evaluating the lawfulness of *Terry* investigatory police stops based on reasonable suspicion. Though imperfect, Fourth Amendment law offers some standards that should help judges make sure that suspicion is rooted in evidence, rather than racial bias: Courts are to consider a police officer's articulated reasons for a stop and determine whether there are sufficient facts and rational inferences drawn from those facts to support reasonable suspicion.[332] Reasonable suspicion is to be particular to an individual and anchored in some objective justification.[333] It is to be based on more than a "hunch."[334]

But allowing courts to consider the high-crime nature of a location as context when interpreting a defendant's ambiguous behavior undercuts these standards.[335] Even when the race of a defendant is not known to a judge, the mention of the location of a stop in a high-crime area can invoke race and invite racial bias into the court's analysis. Deference to police compounds the problem, discouraging judges from interrogating police officers' articulated reasons for police stops to ensure they rest on evidence. It can dissuade judges from asking police to describe exactly what they observed or to explain why they interpreted a defendant's ambiguous behavior one way versus another despite the possibility of multiple interpretations. But judges also can fail to interrogate their own thinking to address their own implicit biases.

This lack of meaningful critique of interpretations of defendants' behaviors allows biased thinking to go unchallenged. Such a critique is needed, particularly when there is too little evidence for judges to establish a clear line between a

329. Kunda & Sherman-Williams, *supra* note 196, at 95 (discussed at Part II.B).
330. *See* Dunning & Sherman, *supra* note 194, at 461–62, 466.
331. Kunda & Sherman-Williams, *supra* note 196, at 95.
332. Terry v. Ohio, 392 U.S. 1, 21 (1968).
333. *See* United States v. Cortez, 449 U.S. 411, 418 (1981).
334. *Terry*, 392 U.S. at 27.
335. *See supra* Part I.

defendant's observed behavior and possible criminality. In these cases, some judges appear to justify police stops with unfounded assumptions about the nature of a defendant's behavior and their motivations; such assumptions seem easy to accept when they are consistent with racial stereotypes. Given the challenges that can arise in courts' reviews of police stops where race is invoked, it is important that steps be taken to guard against this.

A. Prohibiting High-Crime Area Designations

The studies suggest that a high crime area designation should not be allowed as a factor in support of reasonable suspicion given their ability to act as a proxy for race and invite bias into legal decision-making. Considering the high-crime nature of the area in determining reasonable suspicion only adds to judges' challenges by inviting race into a situation that is already ripe for biased thinking.[336]

In his dissent in *Hagood*, Judge Guido Calabresi observed that courts "stretch the record to the point of absurdity" to achieve a totality of the circumstances.[337] Justice Calabresi suggested that the issue there was not merely courts' deference, but the temptation to find justifications for police stops in these cases given that evidence of a crime was found.[338] In *Douglas*, Judge Wilkins warned about the potential for bias to fill in the gaps when high-crime areas are part of the equation:

> Courts already face confirmation bias when [they] evaluate reasonable, articulable suspicion in suppression motions. After all, these are searches where the police actually found something inculpatory . . . [C]ourts are already at risk of using confirmation bias to validate inchoate hunches as reasonable suspicion in suppression motions given 'the familiar shortcomings of hindsight judgment,' . . . and it makes matters worse when we consider those living in high-crime areas as more suspicious than others . . . [339]

That a judge can consider the high-crime nature of an area as context when interpreting a defendant's ambiguous behavior warrants these concerns given the potential for reliance on stereotypes to help justify these decisions. As the prior case examples demonstrate, when evidentiary proof is lacking, criminality can be read into defendants' non-suspicious behavior when race is invoked.[340] Allowing courts to consider a factor that implicitly invites stereotypes to fill in evidentiary

336. *Cognitive Bias, supra* note 128, at 279–87.

337. United States v. Hagood, 78 F.4th 570, 585 (2d. Cir. 2023) (Calabresi, J., dissenting).

338. *Id.* (stating that "the exclusionary rule, though seemingly needed to control police misbehavior, has been the primary source of acceptance of dubious justifications of police playing hunches that turn out to be right.").

339. United States v. Douglas, 72 F.4th 332, 344 (D.C. Cir. 2023) (Wilkins, J., dissenting); *see also* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112–13 (2003) (describing how "in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable," thereby gradually relaxing the standard for reasonable suspicion and allowing "almost anything a policeman says to justify a search . . .").

340. *See supra* Part.II.

gaps seems to encourage courts to see suspicion in ambiguous behavior that could just as easily be found to be innocent.

Admittedly, despite increased knowledge about implicit bias, a change in the law seems unlikely anytime soon. However, even if judges continue to be allowed to consider the high-crime nature of an area as a factor in reasonable suspicion analysis, other doctrinal changes could improve the present situation. Indeed, some legal standards seem to discourage careful analysis as courts review police stops. For example, the requirement that police suspicion is based on some objective justification and specific to the individual stopped should help judges avoid finding reasonable suspicion based on generalizations and biases. But the Court has diminished these protections by setting a low evidentiary bar and allowing reasonable suspicion to be justified by non-suspicious behaviors.[341] Judges are not required to dispel potential innocent explanations of the facts.[342] Moreover, court rules that require judges to defer to police experience can discourage judges from interrogating the facts and inferences police articulate in support of a stop to make sure that there is some evidentiary basis.[343]

But serious interrogation of facts is needed to avoid reliance on stereotypes, which is more likely when there is significant ambiguity. Inferences can easily be accepted when they align with relevant stereotypes. They can also be reflected in the descriptions of the behaviors themselves, which often are treated as a starting point for analysis rather than as a point of ambiguity to investigate. Courts should be discouraged from relying on an individual's ambiguous behavior to establish suspicion when they are unable to point to reasons other than the fact that the behavior occurred in a high-crime area or find it necessary to characterize facts consistently with racial stereotypes to justify their decision. Moreover, to disrupt biased thinking, courts should be encouraged to question their own conclusions. Rather than being told that it is not necessary to rule out innocent explanations, courts should be prompted to consider alternative interpretations of facts and to stop and consider why they have chosen one interpretation over another. They should be encouraged to ask themselves if they would interpret the facts the same way if the defendant was of a different race or not associated with a high-crime area.[344]

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341. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

342. *See Douglas*, 72 F.4th at 337. (Randolph, J., concurring) (stating that "a determination of reasonable suspicion 'does not require officers to rule out a suspect's innocent explanation for suspicious facts'" (quoting District of Columbia v. Wesby, 583 U.S. 48, 61 (2018))).

343. *See Police Efficiency*, *supra* note 37, at 1155–57 (describing the problem of court deference to officer judgments of criminality without criteria for determining whether such deference is justified); Bloom, *supra* note 37, at 1149 (noting that scholars have decried court deference to police as an abdication of their duties).

344. *See* Cynthia Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 421–22 (1996) (discussing the conception of "race-switching"—where the only modified facts are the races of the parties—as a "useful vehicle to test whether racial stereotypes have influenced one's assumptions about a given case").

Even more, case precedent that underestimates the potential influence of race and diverse perspectives should be reconsidered. The failure to discuss race in Fourth Amendment cases and to acknowledge its potential influence only exacerbates this situation. *Whren* should be overturned, or interpreted less broadly, so it does not continue to chill much-needed discourse about the potential influence of race in Fourth Amendment analysis.[345] And in the process of determining reasonable suspicion in individual cases, the totality of the circumstances should take into account not only the police perspective, but the diverse lived realities of the people who are stopped.[346] Judges should be mindful that most police stops do not lead to the discovery of evidence and recognize that discovery of evidence in the case before them does not mean that police tend to "get it right."[347] Judges should consider the police stops they hear in this context and be encouraged to closely consider whether the defendant before them was actually stopped because their behavior suggested criminality, rather than police assuming criminality and just happening to find evidence this time.[348] In doing so, judges should appreciate the potential for racial bias to impact police officers' interpretations of an individual's ambiguous behavior, as well as their own.

Beyond these doctrinal changes, however, there is plenty of work that can be done. Relevant legal rules highlight what judges can do and what they do not have to do, but engaging in practices that lead to a better and more fair analysis is not prohibited and should be encouraged. While judges are to give deference to police experience, the law does not prohibit judges from scrutinizing whether evidence supports the justifications offered for a stop. *Whren* does not require that judges ignore the potential influence of implicit bias when courts analyze the validity of facts articulated in support of police stops.[349] After all, judges are to offer detached, neutral scrutiny of police actions—a responsibility that the Supreme Court has highlighted as being of great importance.[350]

B. Improving Reasonable Suspicion Analysis

Police officers are vulnerable to biased thinking. Judges are as well. But judges have the opportunity to engage in a more deliberate assessment of a police stop

345. *See* United States v. Weaver, 9 F.4th 129, 160 (2d. Cir. 2021) (Lohier, J., concurring) (joining "the chorus of voices" who say that "*Whren* sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection"); *see also id.* at 181 (Calabresi, J., dissenting) ("I believe the majority need not read *Whren* and its sequelae so expansively complacent with police pretexts as it does.").

346. *See generally* Kaster, *supra* note 294 (discussing the need for legal doctrines to create space for excluded narratives of Fourth Amendment encounters).

347. *See* BUTLER, *supra* note 47, at 94 (describing studies that found police had "hit rates" for arrests of .15 percent or less).

348. United States v. Hagood, 78 F.4th 570, 585 (2d. Cir. 2023) (Calabresi, J., dissenting) ("All too often courts of appeals find dubious justifications to be adequate in order to uphold the admission of evidence which was found on a hunch that turned out to be right.").

349. *See Weaver,* 9 F.4th at 181 (Calabresi, J., dissenting) ("[W]hat remains critically relevant is the accuracy of [an] officer's testimony regarding whether certain things—a tug of the pants, for instance—suggest that the individual in the car is armed and dangerous.").

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

than the police officers on the scene given the circumstances in which they judge the facts of case. Police make split-second judgments during police stops in circumstances that often invoke race and are ripe for biased thinking. By contrast, judges have more time to assess the facts that gave rise to police stops and to analyze the strength of asserted bases for suspicion. Given their beneficial posture, judges should be able to make sure that decisions are supported by some objective evidentiary justification particular to the individual being stopped and not merely supported by intuition buoyed by racial bias that masquerades as reasoning. They can apply their expertise of legal process to carefully scrutinize the evidence as they determine what the facts are and what inferences can be reasonably drawn.

But as the prior case examples illustrate, the courts' current approach to reviewing police stops and searches nonetheless allows for biased thinking to enter reasonable suspicion analysis. Courts seem to overlook much of the ambiguity in a case and fail to distinguish facts from inferences. In doing so, they mask where facts have been interpreted and fail to recognize the potential for racial bias to influence their interpretations. They miss where what they treat as facts, or find to be reasonable inferences, are merely assumptions that are consistent with stereotypes. At the same time, high-crime area designations act as a racial proxy, triggering race implicitly in a case, while Fourth Amendment law denies the possibility that race can influence decision-making. And relevant rules discourage close scrutiny of police officers' judgments and encourage reliance on commonsense.

The good news is that while judges hold racial biases consistent with the general population, judges do well to avoid reliance on racial bias when it is made salient.[351] Where courts are made aware of the potential for biased thinking in their own decision-making, they appear to be in a good position to avoid it.[352] Recognizing the potential for reliance on stereotypes in these cases is a good start. Shoring up legal processes to better assess the facts and inferences of a case can go even further toward limiting the potential influence of bias.

As a starting point, every effort needs to be made for courts to start their legal analysis with a clear picture of the facts that are supported by evidence in a case. In courts' reviews of police stops, this would often mean that courts need to pay close attention to police testimony describing what a defendant was observed doing. Proven facts need to be distinguished from inferences. The rationality of inferences needs to be questioned, and reasonable inferences need to be distinguished from mere assumptions. These steps will help to ensure that generalizations and

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351. Rachlinski et al., *supra* note 52, at 1220 (finding that when race was made explicit, white judges did not show any preference for white or Black defendants, even when they showed a strong white preference on the IAT); *see* Henning, *supra* note 168, at 432 (discussing studies that suggest that "well-intentioned actors can overcome automatic or implicit biases, at least to some limited extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so").

352. Rachlinski et al., *supra* note 52, at 1221 (reporting findings that implicit bias can impact judges' judgment, "at least in contexts where judges are unaware of the need to monitor their decisions for racial bias" but "when judges are aware . . . and motivated to suppress that bias, they appear able to do so").

stereotypes associated with high-crime areas are not substituted for evidence or reasoning in a case. This will require methodical work by the judge.

1. Recognizing Ambiguity

A defendant's behavior is a key element of the reasonable suspicion analysis and can provide information that can aid decision-making by offering evidence of suspicion that is particular to the person being stopped. But ambiguity can lurk in descriptions of individuating information. While ambiguity is abundant, people often fail to recognize it.[353] Even common and mundane words can be indeterminate in their meaning.[354] Information that is thought to be disambiguating, may not always be.

Ideally, judges would work from specific descriptions that remove all ambiguity about an individual's behavior. In Kunda and Sherman-Williams's studies, the specific descriptions of the actors' behaviors left little room for ambiguity as to what the actor did and why—for example, the housewife or construction worker's neighbor was taunting them about their marriage and the actor lost their temper and decked the neighbor.[355] In this scenario, the actors' actions were clear and their motivations for acting were also known to the readers. When offered these details, study participants did not resort to stereotypes to interpret the actors' behavior.[356]

But specifics are not always known in Fourth Amendment cases. In these cases, police, and later judges, often lack enough information to know what a defendant's behavior means and what his motivations are. And, as demonstrated in the aforementioned studies, the level of ambiguity might not always be appreciated. Notably, in Fourth Amendment cases, courts seeking to resolve the ambiguity in a person's behavior might look to other ambiguous facts from which they draw more assumptions. It would seem only to be reinforcing stereotypes when courts rely on layers of ambiguous behaviors that can be interpreted consistently with stereotypes.[357]

In *Flowers*, for example, the court did not simply rely on the police officer's testimony that he briefly observed two men in a car outside an open store and concluded that the men were not going to patronize it.[358] Rather, the court identified additional ambiguous facts to support reasonable suspicion. To explain why it was

353. Dunning & Sherman, *supra* note 194, at 470 ("Life is fraught with ambiguities. Although this fact is one all people recognize in the abstract, it is one people may often miss in their day-to-day affairs.").

354. *See* sources cited *supra* notes 200, 201.

355. Kunda & Sherman-Williams, *supra* note 196, at 93.

356. *Id.*

357. United States v. Hagood, 78 F.4th 570, 584 (2d. Cir. 2023) (Calabresi, J., dissenting) (stating that the law does not require that "noncredible pieces of evidence be given weight merely because of the presence of other similarly unpersuasive pieces of evidence. Zero plus zero plus zero still equals zero"); Commonwealth v. Torres, 424 Mass. 153, 161 (1997) ("[A]dding up eight innocuous observations—eight zeros—does not produce a sum of suspicion.").

358. United States v. Flowers, 6 F.4th 651, 654 (5th Cir. 2021), cert. denied, Flowers v. United States, 142 S. Ct. 2707 (2022).

suspicious that the men were sitting in their car, the court looked to the manner of how the men parked, an action that was itself ambiguous.[359] The court, however, did not acknowledge the ambiguity in the facts or that it drew inferences. Rather, the court labeled the men's choice of where to park as motivated by a desire to hide from view and labeled these unproven assumptions as "determinative facts."[360]

As a starting point, judges need to recognize that ambiguity is not rare and may exist in multiple layers of a case. Judges should consider the potential for ambiguity so they can more tactfully separate facts from inferences. In looking at these cases more carefully, judges may recognize when there is simply too much ambiguity to justify a police stop.

2. Interrogating Descriptions of Defendants' Behavior

Recognizing ambiguity ultimately helps judges understand where bias can influence a case. "When information about another person is indeterminate in meaning, people may fill in ambiguities and details based on stereotypical cues about that person."[361] This was demonstrated in Kunda and Sherman-Williams's work when participants were asked to interpret ambiguous behavior with little information.[362] Where an individual's behavior was highly ambiguous, or even where there was no information about what an individual did, participants filled in the gaps to interpret behavior consistently with stereotypes.[363]

Psychologists Dunning and Sherman discussed how people make social judgments. Relying on the work of other social scientists, Dunning and Sherman observed that before people make judgments about another individual, "they must first *identify* the behavior that is to be judged."[364] The next step is to make inferences about the dispositions of persons doing the behavior.[365] Dunning and Sherman offered that this two-step process of social judgment may seem as simple as naming a behavior—weeping—and determining whether this is a happy or sad act.[366] However, Dunning and Sherman concluded that their studies show that there may be other tasks to be completed at the

359. Notably, it is also a question here how the men's parking spot even gained significance in the case. Contrary to what the court suggested, the police officer did not testify regarding the parking spot or draw any inferences from the men's choice of where to park. Race impacts the extent to which one even gives significance to facts. *See Arrest Efficiency*, *supra* note 48, at 2064 ("Once activated . . . implicit stereotypes can cause officers nonconsciously to pay more attention to blacks than to whites" and "cause officers to interpret the ambiguous behaviors of blacks as suspicious and criminal.").

360. *Flowers*, 6 F.4th at 656 (stating as determinative facts that Mr. Flowers's car was "parked in the convenience store lot as far as possible from the storefront, facing its brick wall, rather than the glass door, so its occupants could not easily be viewed from inside the store").

361. *Id.*

362. Kunda & Sherman-Williams, *supra* note 196, at 91.

363. *Id.* at 92, 95.

364. Dunning & Sherman, *supra* note 194, at 459–60, 469 (citing Yaacov Trope, *Identification and Inferential Processes* in *Dispositional Attribution*, 93 PSYCH. REV. 239–57 (1986)).

365. *Id.* at 469.

366. *Id.* at 460, 469.

identification stage because stereotypes alter the tacit inferences people make when comprehending descriptions of social behavior.[367] They opined that people may need to identify the exact nature of a behavior and offer a meaning for vague terms.[368] For example, rather than state that two people are fighting, it might be better to explain whether the action being described involves physical hitting with fists or a verbal spat.[369]

As explained above, in her recent article, Professor Bloom noted how courts often rely on terms of art like "furtive" movement, "blading," or even "high-crime area," and assume criminality from them.[370] Notably, in presenting solutions, Professor Bloom suggested that rather than offer catchphrases, police need to be more specific about the behavior that they have observed.[371] The above studies demonstrate why this is easier said than done. Yet where specific descriptions are provided, there exists less room for stereotypes to fill in the gaps. In order to better evaluate whether facts and reasonable inferences support reasonable suspicion, judges will need to make sure that they identify the exact nature of the behavior that police observed and carefully consider any inferences that were drawn.[372] Even more, they need to consider what they are treating as determined facts in a case and recognize when their own descriptions go beyond a police officer's observations.[373]

Moreover, once judges recognize the inferences that have been drawn in a case, they need to interrogate whether these inferences are supported by facts even when inferences are made by police officers. In *Young,* the judge seemed to recognize that the facts were ambiguous but then seemed unprepared to challenge the police officer's testimony.[374] There, the court simply accepted the police officer's assumption that Mr. Young was loitering rather than patronizing the restaurant he was parked in

367. *Id.* at 468.

368. *Id.* at 469.

369. *Id.*

370. Bloom, *supra* note 37, at 1182 ("The reasonable suspicion calculus must be replaced with one that does not rest upon police tropes embedded with implicit bias, and instead offers specific and concrete basis for each level of intervention.").

371. *Id.*

372. *See, e.g.*, United States v. Jones, 606 F.3d 964, 967 (8th Cir. 2010) (noting that while the government emphasized that the defendant was clutching the outside of his hoodie pocket, the officer also admitted that he could not see the size or shape of what was in the pocket and there were no other "clues" of firearm possession); United States v. McKinney, 980 F.3d 485, 492 (5th Cir. 2020) (finding that while police report said that the group was wearing red colors in a gang location, videos of the police stop showed that the defendant wore the only red clothing—red shorts—and the court found this insufficient to assume the group was gang members); United States v. Hood, 435 F. Supp. 3d 1, 8 (D.D.C. 2020) (finding upon reviewing video footage that the defendant was not "blading" his body away from the view of officers but rather positioning his body consistent with crossing the street at a diagonal).

373. For an example of this approach, see Judge Milkey's dissent in Commonwealth v. Karen K., 164 N.E.3d 933, 941–51 (Mass. App. Ct. 2021), aff'd, 199 N.E.3d 860 (Mass. 2023) (Milkey, J., dissenting in part). In this dissent, Judge Milkey compared the courts' findings of fact to the police officer's testimony and concluded that the court "embellished" the police officer's testimony. *Id.* at 943.

374. United States v. Young, 707 F.3d 598, 604 (6th Cir. 2012).

front of without explaining how Mr. Young's behavior supported this conclusion.[375] It was unclear why the court found it reasonable to infer that Mr. Young was trespassing rather than waiting to enter the restaurant given the limited facts before it. In such a case, it seems important for a court to have a clear picture of what police actually observed and then to consider whether there is any relationship between the defendant's behavior and any inferences drawn.

3. Questioning Stereotype-Consistent Inferences

Once points of ambiguity are identified and descriptions are interrogated, underlying assumptions can be unpacked. To examine these assumptions, a judge must first be able to identify where they are occurring. Judge Elrod, the dissenting judge who held that there was not reasonable suspicion to justify the police stop in *Flowers*, took a methodical approach in her analysis, interrogating whether there were adequate grounds to support reasonable suspicion in that case.[376] In doing so, she carefully examined the evidence, taking care not to embellish the facts or make assumptions.[377] To start, the judge was clear as to what the police officer testified to observing as the basis for the stop: "He merely noticed that [the men] had not exited the car during the time that the police caravan turned the corner."[378] Relying on the established testimony before the court, the judge concluded that "[t]wo men sitting in a parked car outside an open convenience store during the early evening for a mere ten seconds" was not "suspicious behavior."[379]

Judge Elrod was careful not to assume criminality from the men's ambiguous behavior based on their location. She noted that the action of pausing in one's car did not "transform into suspicious behavior because the convenience store was located in a high-crime area."[380] Here, the judge considered whether there was any evidence in the case that supported an interpretation of the defendant's behavior as suspicious. She did not rely on characterizations that assumed criminality or emphasize the high-crime nature of the area. Ultimately, Judge Elrod found that "the government did not point to any additional facts sufficient to convert an ordinary scene of two people sitting in a car into one that would support an officer's suspicion."[381]

Judge Elrod also did not supplement these facts with unproven assumptions in the absence of evidence. Rather than rely on the manner in which the men parked to support suspicion, Judge Elrod considered whether the evidence in the case supported this conclusion.[382] Indeed, the judge found that the court's descriptions of

375. *Id.* at 604.
376. United States v. Flowers, 6 F.4th 651, 660 (5th Cir. 2021) (Elrod, J., concurring in part and dissenting in part).
377. *Id.* at 659.
378. *Id.*
379. *Id.* at 660.
380. *Id.*
381. *Id.* at 662.
382. *Id.*

where the men were parked and the conclusions drawn from their purported manner of parking were not supported by the evidence, but rather that the evidence cut against it.[383] Judge Elrod noted that "the exhibits show[ed] that the men were parked in one of only five available spots in a small lot" that "offered few other parking options besides the spot Flowers chose."[384] Judge Elrod also considered alternative interpretations for the men's behavior: "Parking in one of only a few parking spots in front of a convenience store at an unextraordinary time of evening—8:30 p.m.—is something that any law-abiding citizens might do in order to patronize the store."[385]

Judge Elrod's dissenting opinion offers a template for a more thoughtful legal analysis that avoids reliance on assumptions that might reflect racial bias. Notably, Judge Elrod's approach was not to try to determine whether stereotypes were being employed in the case. Rather, her focus was on teasing out the proven facts and avoiding unfounded conclusions. She made sure that the facts of the case were supported by evidence and that there was sufficient evidence to support inferences drawn from those facts. She took care to separate facts from inferences.[386]

As Dunning and Sherman explained, when people make social judgments about another individual, they must first "identify the behavior that is being judged" and *then* draw inferences.[387] In her analysis, Judge Elrod (1) boiled the case down to the basic facts based on what the police officer testified to observing, (2) distinguished facts about the defendant's behavior from inferences by identifying any embedded characterizations in the police officer's descriptions and any further characterizations added by the court, (3) scrutinized whether there was evidence to support these characterizations and attempted to provide unembellished descriptions of the defendant's behavior, (4) made sure that there was a rational basis for any inferences drawn from these unembellished descriptions, and (5) avoided resting the rationality for inferences merely on the high-crime nature of the location—a factor that reinforces associations between Blackness and crime.[388]

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383. *Id.*

384. *Id.* at 659.

385. *Id.* at 660.

386. Other courts have recognized the importance of questioning whether a defendant's behavior supports the inference being drawn. *See* United States v. Slocumb, 804 F.3d 677, 684 (4th Cir. 2015) (stating that the government "must do more than simply label a behavior as 'suspicious' to make it so"; rather it must "articulate why a particular behavior is suspicious or logically demonstrate . . . that the behavior is likely to be indicative of more sinister activity") (internal citations omitted); United States v. Hernandez, 847 F.3d 1257, 1268 (10th Cir. 2017) (distinguishing "merely walking next to" a construction site that had been targeted for thefts from being "inside the fence, carrying construction materials, or acting as a lookout"); United States v. Dell, 487 Fed. App'x 440, 446 (10th Cir. 2012) (noting that the government skipped "the crucial part" of reasonable suspicion analysis by not asking "*why* the officer's observations indicated suspicious criminal behavior").

387. Dunning & Sherman, *supra* note 194, at 459.

388. *See Flowers,* 6 F.4th at 658–62 (Elrod, J., concurring in part and dissenting in part).

CONCLUSION

The solutions offered above could be met with some resistance. After all, the law says that high-crime areas can be considered as context in reasonable suspicion analysis. Moreover, the Court has not recognized that racial bias can impact a police officer's assessment of a defendant's ambiguous behavior to determine reasonable suspicion. The Court says that courts are to defer to police officers' experiences. And it says that innocent behaviors considered together can establish reasonable suspicion. A court does not have to expel all innocent reasons for a behavior, and the Court has found that one factor—flight from police—in a high-crime area can be enough to support reasonable suspicion.

Yet none of these rules bar more careful court review. Indeed, in several cases, lower courts have indicated that though high-crime area is a factor to be considered, it has little value.[389] Courts have rejected police officers' articulated facts and inferences, even when those inferences could be credited to police officers' experiences.[390] Courts have acknowledged that innocent facts do not always add up to suspicion.[391] Moreover, high-crime area plus one additional factor alone has been

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389. *See, e.g.*, Wingate v. Fulford, 987 F.3d 299, 306 (4th Cir. 2021) ("[S]imply being in an area where crime is prevalent is minimally probative in the reasonable suspicion analysis."); United States v. Weaver, 9 F.4th 129, 157 (2d. Cir. 2021) (Lohier, J., concurring) ("[C]ourts should give little if any weight to the suspect's presence in a 'high-crime area' unless the area's boundaries are narrowly circumscribed"); Commonwealth v. Karen K., 164 N.E.3d 933, 951 (Mass. App. Ct. 2021) ("[T]he fact that the stop occurred in a high-crime area, while relevant, is of limited value.").

390. *See Wingate*, 987 F.3d at 307 (holding that "the notion" put forth by police "that the driver of a broken-down vehicle creates suspicion of criminal activity by approaching the officer trying to render him aid . . . defies reason"); United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013) (finding that "being a felon in possession of a firearm is not the default status" in a jurisdiction that permits residents to openly carry even though a police officer testified that he had never seen anyone in the area openly carry a weapon and police did not know whether the defendant's possession was lawful); United States v. Jones, 606 F.3d 964, 967 (8th Cir. 2010) (concluding that despite police officer testimony that defendant walking with a hand close to the midriff suggested that the defendant was carrying a firearm, the court found that the officer lacked the requisite reasonable suspicion that the object was a gun, rather than some other object or no object at all); United States v. Gray, 213 F.3d 998, 1001 (8th Cir. 2000) (holding that "[g]iving due respect to the instincts of experienced law enforcement officers," the court could not see how Gray's answers to police officer's questions turned the defendant's innocent activity into conduct supporting reasonable suspicion); United States v. Dell, 487 Fed. App'x 440, 446 (10th Cir. 2012) (concluding that police officer's observation of defendant and a companion peering into a parked car "was so innocuous and so very much in the realm of ordinary behavior that it would not lead a reasonable officer to suspect that a car break-in had occurred or was about to occur"); United States v. Hernandez, 847 F.3d 1257, 1268 (10th Cir. 2017) (while articulated as a reason for the stop by police officers, the court was not persuaded that the defendants black clothing and two backpacks supported reasonable suspicion).

391. *See Jones*, 606 F.3d at 967 ("Though we are mindful of the need to credit law enforcement officers on their experience and specialized training, we conclude that '[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity.'"); Johnson v. Campbell, 332 F.3d 199, 208 (3rd Cir. 2003) ("There are limits . . . to how far police training can go towards finding latent criminality in innocent acts."); *Wingate*, 987 F.3d at 307 ("Although we generally defer to officers' claimed training and experience, we withhold that deference when failing to do so would erode necessary safeguards against 'arbitrary and boundless' police judgments.") (citation omitted); United States v. Slocumb, 804 F.3d 677, 684 (4th Cir. 2015) (warning against using "whatever facts are present, no matter how innocent, as indicia of suspicious activity") (internal citations omitted); *Gray*, 213 F.3d at 1001 (finding "[t]oo many people fit [the] description for it to justify a reasonable

found not to be sufficient to establish reasonable suspicion, particularly when that additional factor is not inherently suspicious.[392]

Even more, courts have begun to recognize and address the specific issue raised in this article that what may appear to be a reasonable inference may merely be unfounded assumptions. Judges have begun to recognize that the inferences they have found to be reasonable in the past, may not be. Given the numerous reports about police harassment of minority communities, some courts have begun to reconsider the inferences that they are drawing from a person's unprovoked flight from police.[393]

But courts' questioning of inferences drawn from defendants' flights is just the tip of the iceberg. While courts have recognized that they are drawing inferences from a defendant's flight, many other inferences go unacknowledged. If flight from police is not a good indicator of criminality, what about briefly sitting in a car in front of a store? Or choosing a parking space? Handing someone a bag? Placing a backpack under one's coat? Or wearing a fanny pack across one's chest?

The question remains whether courts are able to objectively determine suspicion where there is significant ambiguity, race is invoked, and evidence of a crime has already been discovered. But when judges better understand the potential for biased decision-making in this situation, they can shore up their own processes and take steps that help them resist the strong pull to interpret a defendant's ambiguous behavior consistently with stereotypes simply because a defendant was stopped in what has been deemed a high-crime area.

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suspicion of criminal activity"); Reid v. Georgia, 448 U.S. 438, 441 (1980) (finding no reasonable suspicion where "circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that [such] little foundation" could justify a police stop).

392. *See, e.g.*, United States v. Sprinkle, 106 F.3d 613, 618 (4th Cir. 1997) (finding that an individual raising his hand to the side of his face as if to conceal his identity but driving away in a normal manner did not meet the threshold for reasonable suspicion); United States v. Crawford, 891 F.2d 680, 683 (8th Cir. 1989) (acknowledging that while not so common for an innocent person to be looking up and down the street while running, this conduct is not sufficient to establish reasonable suspicion); *see also* Bloom, *supra* note 37, at 1137 (citing additional cases where courts have declined to find reasonable suspicion based on lawful conduct).

393. Indeed, flight has been shown to be a poor indicator of guilt. *See Cognitive Bias*, *supra* note 128, at 284 (discussing a study available at the time Wardlow was decided that only one stop in twenty-six based on a defendant's flight resulted in arrest).