Cultural Context Matters: Terry's "Seesaw Effect"

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CULTURAL CONTEXT MATTERS: TERRY'S "SEE SA W EFFECT"

FRANK RUDY COOPER*

Abstract

This Article investigates why the enforcement of a given legal doctrine may vary with changes in the cultural context in which it is applied. It argues that officials apply the law along an "enforcement practices continuum" in accord with changes in the prevailing articulations of the meaning of cultural identity norms associating particular groups with crime.

Terry v. Ohio doctrine allows police officers to make "stops" and "frisks" of limited scope upon reasonable suspicion of crime rather than requiring the higher standard of probable cause. The Article contends the officer discretion resulting from this "scope continuum" approach permits cultural identity norms to influence enforcement practices. While scholars have noted that the discretion permitted under Terry encourages racial profiling, this Article identifies a larger problem: Terry's "seesaw effect." That is, the cultural context in which law enforcement occurs will sometimes swing from (1) support for extreme racial profiling; to (2) a popular shift against racial profiling; to (3) a responsive "depolicing" of potential crime in racial minority communities.

For example, in the mid-1990s, cultural identity norms supported Mayor Rudolph Giuliani's implicitly race-based campaign to maximize Terry stops. In the late 1990s, the media began criticizing the NYPD, identifying racial profiling as an underlying cause of police brutality. Consequently, the NYPD refrained from policing racial minorities at the Puerto Rican Day Parade in June 2000, resulting in sexual assaults of at least fifty-seven women.

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* Associate Professor, Suffolk University Law School. This Article is dedicated to the memory of Jerome McCristal Culp, Jr. Special thanks go to the author's Legal Assistant, Grayce Smith, and research assistants, Alicia Coleman, Elizabeth Coleman, Krystina Lopez de Quintana, and Donald Willis. Additional thanks to Michelle Anderson, Tina Beyene, Michael Carroll, Daniella Courban, Nancy Ehrenreich, Emily Houh, Anne Poulin, Richard Turkington and Leti Volpp. Versions of this article were presented at the Latina/o Critical Theory; Law, Culture and the Humanities; and Midwest and Northeast People of Color Legal Scholarship conferences as well as University of Maryland and Rutgers-Camden Law School faculty colloquia. Villanova University School of Law supported this Article's production. D. Kencade Babb and the staff of the University of Oklahoma Law Review provided invaluable assistance.
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I. Introduction

Several voices have been heard recently . . . . It is time, they say, to leave aside the obsession with "identity politics" . . . . The solution is not to abandon the 'cultural' struggle to go back to "real" politics.¹

Cultural² context matters.³


3. Recent identity theory emphasizes the cruciality of context. See Frank Rudy Cooper, Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory, 71 UMKC L. REV. 355, 356 (2002) [hereinafter Cooper, Understanding "Depolicing"] (explaining "why a practice develops in some places but not others even though the relevant identities are the same"); Peter Kwan, Jeffrey Dahmer and the Cosynthesis of Categories, 48 HASTINGS L.J. 1257, 1265-68 (1997) (showing context's identity effects); see, e.g., Robert S. Chang & Jerome
Nonetheless, at times scholars mistakenly presume legal doctrines produce fixed results. In fact, doctrines always produce a range of potential law enforcement practices. The choice of a particular enforcement practice is influenced by the cultural context in which it occurs. This context is most influenced by a community's cultural identity norms, evidenced by McCristal Culp, Jr., After Intersectionality, 71 UMKC L. REV. 485, 489 (2002) ("Oppression or subordination cannot be understood outside of the context in which it occurs."); Nancy Ehrenreich, Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251, 280 (2002) (summoning "detailed, historicized, and context-specific inquiries into the relationships among systems of oppression" revealing "their mutually reinforcing effect"); Darren Leonard Hutchinson, New Complexity Theories: From Theoretical Innovation to Doctrinal Reform, 71 UMKC L. REV. 431, 442 (2002) ([O]ppression is fluid and contextual . . .").

4. By "legal doctrine," I mean the controlling judicial statements of what the law allows and disallows. See Paul Schiff Berman, Telling a Less Suspicious Story: Notes Toward a Nonskeptical Approach to Legal/Cultural Analysis, in CULTURAL ANALYSIS, supra note 2, at 144 n.21 (distinguishing "formal legal rules and procedures," broader cultural studies "law") (citations omitted).

5. By a "law enforcement practice," I mean the policy — official or defacto, and in general or on a particular occasion — whereby those who apply the doctrine shall place themselves at a particular point on the continuum between allowed and disallowed actions.

discourses\(^7\) articulating\(^8\) the cultural significance of policing methods prevailing at a given time in a given place.\(^9\) These "cultural identity norms" include the representations of the meanings of specific categories of identity that influence the background assumptions people use when interpreting behavior.\(^10\)

service jobs, reinforced white women's domesticity).

7. "Discourses" are stories describing the meaning of a set of events or ideas. See Key Concepts in Cultural Theory 117 (Andrew Edgar & Peter Sedgwick eds., 1999) [hereinafter CULTURAL THEORY] (defining "discourse" as "ways of speaking about the world"). John Hartley defines "discourse" as:

both a noun and a verb . . . . the interactive process and the end result of thought and communication . . . . Discourses are structured and inter-related; some are . . . 'more obvious' than others . . . . Thus discourses are power relations. Textual analysis can . . . follow the moves in this struggle, by showing how particular texts take up the elements of different discourses and articulate them (that is, 'knit them together').


8. I use the term "articulation" in a specialized manner. I mean the way an authoritative telling of an event seeks to create a unified and comprehensive idea out of the elements of the event, which are necessarily incommensurable and subject to contradictory readings. LACLAU & MOUFFE, supra note 1, at x (defining "hegemony" political articulations seek); see, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxviii (Kimberle Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY] ("[T]he Court's rulings with respect to race may more plausibly be deemed a result of a tactical political choice among competing doctrinal possibilities, any one of which could have been legally defensible."); Cooper, The Un-Balanced Fourth Amendment, supra note 2, at 860 (defining articulation methodology "map[ping] the context"); see also Stuart Hall, The Work of Representation, in REPRESENTATION, supra note 2, at 44 (explicating discourse effects); Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks", 6 J. GENDER, RACE & JUST. 381, 430 (2002) ("The definition of crime and the formation of the consensus results from a semiotic process of articulation.").

9. See Jack L. Daniel & Anita L. Allen, Newsmagazines, Public Policy, and the Black Agenda, in DISCOURSE AND DISCRIMINATION 23, 25 (Geneva Smitherman-Donaldson & Teun van Dijk eds., 1988) (declaring that "the mass media help focus our attention on specific problems and public policy issues, that is, set the public agenda").

10. Cultural identity norms are more than mere identity stereotypes. They are more general norms about how to think about identity. They are a resource people draw from, but in a composite and very context specific way, when determining the implications of a person's identity status. While cultural identity norms are fluid, we know that generalized antiracial minority sentiment is a norm in most communities in this country. See, e.g., JODY ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 135
In reviewing how cultural context matters, consider the stop and frisk doctrine of *Terry v. Ohio*. The U.S. Supreme Court defines a stop as a brief interference with one’s freedom of movement, solely for purposes of dispelling reasonable suspicion of criminality. It defines a frisk as a “pat down” of a suspect’s outer clothing, including “the area of the groin,” solely for purposes of discovering weapons.

This Article demonstrates the relationship between doctrine, identity norms, and enforcement practices by analyzing *Terry*’s jurisprudence and subsequent impact. It concentrates on the *Terry* Court’s reasons for allowing stops and frisks whenever an officer has “reasonable suspicion” a crime may be afoot. The Fourth Amendment prohibits “unreasonable” searches and seizures and requires “probable cause” before issuance of a warrant preapproving a search or seizure. The *Terry* decision implicitly overturns *Camara v. Municipal Court*, which applies a “balancing test,” or mere reasonableness inquiry, to municipal housing inspections. The *Camara* decision explicitly forbids the application of the mere reasonableness test to criminal investigations. The *Terry* opinion alters the Fourth Amendment by making the scope of the intrusion, rather than its purpose, the measure of whether a search or seizure is tested for mere reasonableness or for the more stringent standard of probable cause. That is the “scope continuum” view of the Fourth Amendment. The result of the *Terry* Court’s application of a mere reasonableness inquiry to stops and frisks of limited scope is to limit scrutiny of officers’ decisions, granting them virtually unfettered discretion.
The Terry doctrine’s grant of unfettered discretion effectively places law enforcement practices on a seesaw. A seesaw is a playground toy balancing a plank on a fulcrum. Two children sit one on each end of the plank. They take turns bouncing up and then down.

Without constitutional limits on police discretion, officers may bounce between over-enforcement and under-enforcement in exercising their Terry powers. The Terry doctrine’s “seesaw” effect, therefore, is in its tendency, in certain cultural contexts, to shift from (1) popular support for an extreme form of racial profiling; to (2) a “bounce,” whereby popular discourse becomes dominated by calls for police reform; to (3) an officer response of “depolicing” a racial minority event or community by means of refusal to proactively investigate potential crimes. Thus, Terry’s grant of excessive officer discretion creates the potential for a seesaw from extreme racial profiling to depolicing.18

Particular cultural contexts are required to activate that potential. Consider the way in which the 2000 New York City Puerto Rican Day Parade investigations. See John Q. Barrett, Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference, 72 St. John’s L. Rev. 749, 753-54 (1998) [hereinafter Barrett, Deciding] (reporting Justices originally assumed stops and frisks required probable cause and exigency); Cooper, The Un-Balanced Fourth Amendment, supra note 2, at 883 n.213 (criticizing notion that “we got something” merely because Terry holds the Fourth Amendment applies to stops and frisks); Scott E. Sundby, An Ode to Probable Cause: A Brief Reply to Professors Amar and Slobogin, 72 St. John’s L. Rev. 1133, 1134 (1998) (noting Fourth Amendment reasonableness was previously “a redundant way of saying a ‘warrant based on probable cause’”). I am not alone in criticizing the Terry Court’s application of mere reasonableness to seizures and searches in criminal investigations. See Sundby, supra, at 1135 (“[P]robable cause should be viewed as a norm for a ‘reasonable’ search or seizure.”).

Akhil Reed Amar claims Terry acknowledges that the Fourth Amendment’s reasonableness standard implicates race, but one wonders whether he had read the end of the opinion. Compare Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 St. John’s L. Rev. 1097, 1099 (1998) (claiming that Terry is racially sensitive), with Terry, 392 U.S. at 81 (denying that the exclusionary rule could deter race-based police harassment). Amar is correct that Terry extends the reach of the Fourth Amendment beyond obvious arrests and “full blown” searches. Yet the opinion provides scant consolation to victims of race-based stops and frisks. Compare Amar, supra, at 1098 (applauding reasonableness’s flexibility), with Tracey Maclin, Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John’s L. Rev. 1271, 1287 (1998) (decrying Court’s abandonment of poor and minority suspects).

18. Racial profiling is the categorization of racial minorities as suspicious based on their identity group status. See, e.g., Cooper, The Un-Balanced Fourth Amendment, supra note 2, at 869-76 (discussing racial profiling). Depolicing is police officer refusal to investigate potentially suspicious behavior in a racial minority community or at a racial minority event. See Cooper, Understanding “Depolicing”, supra note 3, at 357-64 (discussing depolicing). As Terry’s seesaw effect demonstrates, racial profiling and depolicing are poles of the same continuum of enforcement practices.
("Parade") reflects Terry's seesaw effect. During the parade, NYPD officers, most of whom were racial majorities, refused to intervene while rampaging men, most of whom were racial minorities, sexually assaulted at least fifty-seven women. For seven years prior to the Parade, the administration of Mayor Rudolf Giuliani had conducted an experiment in fully utilizing Terry doctrine. Prior to the Parade, the administration was intensely criticized by the press for promoting the harassment of racial minority men by the police. In the early 1990s, Giuliani garnered popular support for a policing program that applied racial profiling to the use of Terry stops. In the late 1990s, however, incidents of brutality against racial minorities by the NYPD caused the City's media to switch sides, which led to a popular consensus against racial profiling. Officers acknowledged that the discourse shift incentivized them to depolice the Parade sexual assaults. Accordingly, the NYPD's depolicing of the Parade should be seen as the end product of Terry's seesaw effect.

The goal of this Article is to convince scholars to investigate the ways in which both the cultural contexts in which identity norms circulate and the popular discourses about police methods lead to particular enforcement practices. To that end, Part II describes the concept of cultural identity norms and shows how changes in cultural context can lead to a shift in enforcement practices. Part III demonstrates that the Terry decision's formalistic review of stops and frisks improperly permits extreme forms of enforcement, such as racial profiling and depolicing. Part IV explains the first stage of Terry's seesaw effect: how the cultural context of early 1990s New York City allowed its mayor to convince people to support aggressive race-based policing. Part V traces the second stage of Terry's seesaw effect: how incidents of NYPD brutality caused a popular shift in attitudes and a demand for police reform. Part VI details the third stage of Terry's seesaw effect: how the NYPD responded by depolicing the Parade. Part VII concludes.

II. Method: Analyzing the Effects of Cultural Identity Norms Upon Enforcement Practices

[Greater attention to competing narrative and interpretive practices offers the best opportunity for addressing the legacy of racism in the United States.24]

Cultural context matters because it creates the assumptions upon which enforcement practices will be based. Terry's seesaw effect is possible because of the operation of cultural assumptions about the implications of specific categories of identity. My general goal for this Article is to convince scholars to attend to the ways cultural context affects the translation of a doctrine into an actual enforcement practice. To that end, this Part describes a method for analyzing how prevailing understandings about identity affect law enforcement practices.

A. Cultural Identity Norms

"Who needs identity?"25 Everyone. Identity is the guidance system we use when navigating the maze of objects, people, and events we encounter. To understand how identity might affect the ways the police apply legal doctrine, I will briefly outline a model for understanding identity. My model distinguishes between aspects of an individual's day-to-day performance of "identity negotiation."26 These aspects include: (1) "self identity," the individual's sense of who she is in relation to others; (2) "attributed identity," others' perceptions of who an individual is; (3) "performance practices," the concrete "signaling" behaviors an individual uses to "work" her identity so as to render both her self and attributed identities consistent; and (4) "cultural identity norms," assumptions about particular categories of identity circulating

26. We can also explain identity by distinguishing "structural positions" — the ways an individual's categories of identity position her within social hierarchies that influence the tendencies of social institutions — and "subject positions" — the ways discourses articulating the meanings of structural positions provide individuals with means of explaining their place in the world to themselves. LACLAU & MOUFFE, supra note 1, at 113 (defining discursive identity formation); SMITH, RADICAL DEMOCRATIC, supra note 1, at 56-59, 63-70 (contrasting structural, subject positions).
in popular culture that an individual uses to articulate the meaning of her own and others' identities.  

As one might guess, "self identity" is our internal perception of who we are in relation to the world. We become aware of and express our self identity by means of the "voice" inside our heads, we form that sense of self through our interactions with others. Our self identity is inherently "intersectional." Experiences of gender, race, class, sexual orientation,

27. See Carbado & Gulati, supra note 6, at 1261 n.2 (defining “self identity” and “attributal identity”).

28. Id. (defining “self identity”); see also Cooper, Understanding “Depolicing”, supra note 3, at 357 n.13 (“Self-identity’ is ‘how we define and perceive ourselves.’”) (quoting Carbado & Gulati, supra note 6, at 1261 n.2).

29. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT xvi (2d ed. 1993) (analogizing “voice” to “core of the self”).

30. See id. (identifying feminist relational psychology developmental model based on intersubjective relationships rather than autonomous agency); see also Anita Christina Butera, Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America, 7 BUFF. HUM. RTS. L. REV. 1, 13 (2001) (arguing that individuals base self-identity on the “mainstream definition of race/ethnicity”).

31. Gender is the social meaning attributed to differences associated with our biological sex characteristics. We are inculcated with senses of the implications of our own and other people’s gender prior to our development of individual agency. See BLACKMEN ON RACE, GENDER, AND SEXUALITY 425 (Devon W. Carbado ed., 1999) (“People who are body-coded female cannot experience their personhood outside of the social construction of gender . . .”); Kay Deaux & Abigail J. Stewart, Framing Gendered Identities, in HANDBOOK OF THE PSYCHOLOGY OF WOMEN AND GENDER 84 (Rhoda K. Under ed., 2001) (arguing children cannot select their gender identity).

32. “Race” is commonly understood as the biological difference between groups from different continents: Caucasian, Negroid, Asian, Indian (First Nation). MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55 (2d ed. 1994) (exploring how concepts of race are created and changed). The difference is usually judged on phenotypical characteristics such as skin color, hair, and facial features. Id. While the notion of a genetic difference between races has been discredited, that is not to say that as a matter of social reality, race does not have enormous significance. Id. at 72.

In certain contexts, individuals may prioritize other aspects of their identity, such as gender, sex orientation, class, religion, et cetera, but even those priorities are subject to the value and meaning attached to specific racial identities. Because of the way racial formation has been constructed in the United States, whites have often been able to forget their race in both political movements and daily life, while racial minorities have not been able to do so. As Grace Elizabeth Hale puts it, Central to the meaning of whiteness is a broad, collective American silence.

The denial of white as a racial identity, the denial that whiteness has a history, allows the quiet, the blankness, to stand as the norm. This erasure enables many to fuse their absence of racial being with the nation, making whiteness their unspoken but deepest sense of what it means to be an American.

GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH,
and so on, are indivisible. Finally, our self-identity changes over time according to our cultural context.

"Attributed identity," on the other hand, includes the set of others' initial assumptions about us based upon a society's categories of identity. That is, people attribute implications to a person's status as a member of a particular identity group. People base those attributions on stereotypes.
We attempt to make our self and attributed identities consistent by “signaling” how we wish to be perceived.\(^\text{38}\) The process has been described as the way people “work” their identity.\(^\text{39}\) Carbado and Gulati’s “working identity” thesis is instructive. Carbado and Gulati contend that all workers, but especially people of color, face a potential conflict between their own senses of self identity and the “attributed identity”\(^\text{40}\) they must convey to succeed professionally.\(^\text{41}\) For example, Carbado and Gulati consider an individual who is asocial by nature, working at a law firm in which a criterion for success is being perceived as social and collegial.\(^\text{42}\) Hence, a conflict emerges between his self and attributed identities.\(^\text{43}\) The worker must negotiate that conflict.\(^\text{44}\) He has two basic choices: (1) compromise by socializing, or (2) remain consistent with his identity and try to succeed in other ways.\(^\text{45}\) In either case, he is “working” his identity by signaling his degree of willingness to conform to workplace norms.\(^\text{46}\)

The last aspect of my model for understanding identity is the “cultural identity norm.” Because the way we “work” our identity — including the way police interpret identity — necessarily draws from the preexisting reservoir of cultural identity norms, we must link identity negotiation to cultural identity norms. “Cultural identity norms” are the set of prevailing popular

\(38\) See Carbado & Gulati, \textit{supra} note 6, at 1261 n.2 (hypothesizing individual’s desire to be deemed funny).


We must emphasize identity-defining \textit{practices} because even an abstract understanding of “signaling” requires instantiation in concrete behaviors. Those practices are limited by what we can imagine: “Even improvised performances interact with audience expectations; they may challenge or startle us, but they do so by engaging us through shared understandings.” \textit{See} Jones & Leshkowich, \textit{supra} note 6, at 23 (describing how “performance in fact is highly structured work”).

\(40\) “[H]ow others define and perceive us.” Carbado & Gulati, \textit{supra} note 6, at 1261 n.2.

\(41\) \textit{Id.} at 1261 (describing thesis).

\(42\) \textit{Id.} at 1263, 1267 (providing example of working identity).

\(43\) \textit{Id.}

\(44\) \textit{Id.} at 1264, 1267.

\(45\) \textit{Id.} at 1264-65, 1267.

\(46\) \textit{Id.} at 1266-67.
assumptions about categories of identity existing at a given moment and a
given place. The implications people attribute to an individual from a
particular social group are based on assumptions about particular identity
characteristics, such as gender, race, sexual orientation, class, or religion.47
These representations are in flux and compete to be perceived as the "common
sense" interpretation.48 When the predominant cultural identity norm in a
community presents a negative characterization of a particular group, we
should expect members of that group to have to "work" against those negative
identity attributions.

Understanding how cultural identity norms operate helps us understand
how cultural context affects the translation of doctrine into a particular
enforcement practice. First, there is a connection between the existence of
"certain default positions" — created by cultural identity norms — the
specific stereotypes, the attributed identities, racial minorities and women
encounter in interacting with the police.49 If predominant cultural identity
norms associate racial minority men with crime, then we would expect police
officers to operate based on that assumption. The identities attributed to
individuals, therefore, emanate from the realm of cultural identity norms.50

Second, the enforcement of the law is not distinct from the processes of
identity formation; it is influenced by and influences cultural identity norms.
A law or particular enforcement practice contains both explicit and implicit
prescriptions for how people should interact. Laws and enforcement practices
delineate what is inappropriate behavior, thereby identifying "bad" actors.
Accordingly, first-year law students are taught that criminal law is
distinguished from civil law by its stamping the convict with "community
condemnation."51 Law's description of the bad actor also defines another

47. See id. at 1268-69 (analyzing how Korean-American might be stereotyped in large law
firm); see also Cooper, The Un-Balanced Fourth Amendment, supra note 2, at 874-75 &
nn.159-60 (describing prevailing stereotypes of black men).
48. See Michèle Barrett, Ideology, Politics, Hegemony: From Gramsci to Laclau and
(linking philosophies, Gramscian "common sense"); see, e.g., Stuart Hall, Encoding/Decoding,
in CULTURE, MEDIA, LANGUAGE 128 (Stuart Hall et al. eds., 1980) (defining
"encoding/decoding" discourse analysis method) [hereinafter Hall, Encoding/Decoding].
49. See Carbado & Gulati, supra note 6, at 1272 (revealing attributed identities' sources).
50. See generally id. at 1268-72 (discussing attributed identities' sources).
51. See, e.g., Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP.
PROBS. 401, 405 (1958) (canonical understanding of criminal law).
identity: the normal, appropriate, or "good" actor.\textsuperscript{52} When the cultural identity norms promoted by certain laws and enforcement practices ignore the true nature of certain social groups, those laws and practices render the true experiences of those groups invisible.\textsuperscript{53} For that reason, understanding the cultural context in which police administer \textit{Terry} stops requires that we understand how the doctrine, as administered, implicitly articulates the meaning of particular categories of identity.

Finally, relevant for our purposes is the way certain groups are associated with a criminal disposition. As a general matter, the cultural norms of a place might prioritize stopping crime by any means necessary or they might prioritize protecting civil liberties. Specifically, the cultural norms of a place might associate racial minorities with crime or they might consider racial minorities to be victims of overpolicing. As I will discuss, early 1990s New York City's prevailing cultural norms both prioritized crime prevention over civil liberties and associated racial minorities with crime. It was that specific set of prevailing cultural norms that allowed for an extreme form of racial profiling.

\textbf{B. How Shifts in Cultural Norms Can Lead to Seesaw Effects}

Any legal doctrine creates a range of potential enforcement practices. Specifically, unless a law enforcement doctrine dictates a very specific practice on all possible sets of facts, it necessarily affords police some discretion to choose among potential actions. The doctrine covers a zone of activities, but some related activities will fall below the zone and others above it. Under the doctrine's zone of activities lie those that are insufficient to trigger the doctrine; above the zone, another doctrine may be triggered. For example, the Fourth Amendment does not cover routine consensual interactions between police and citizens.\textsuperscript{54} The Fourth Amendment does cover

\begin{itemize}
\item \textsuperscript{52} See \textsc{Michael Foucault}, \textit{Discipline and Punish} (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (showing how modern punishment was developed to teach citizens how they should think); \textit{see also} \textsc{Thomas L. Dumm}, \textit{Democracy and Punishment} (1987) (applying Foucault's theories to the U.S. penal system).
\item \textsuperscript{53} See \textsc{Iris Marion Young}, \textit{Justice and the Politics of Difference} 60 (1990) (Culturally oppressed groups tend to be segregated both socially and economically because "dominant cultural expressions often simply have little place for the experience of other groups."). \textit{See generally} Kimberlé Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics}, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, \textit{Demarginalizing}] (discussing the general uncognizability of Black women's joint race and gender claims in employment discrimination law).
\item \textsuperscript{54} See \textsc{Terry v. Ohio}, 392 U.S. 1, 18-20 (1968) (describing Fourth Amendment's structure).
\end{itemize}
Terry stops and frisks, but only scrutinizes them for reasonable suspicion.\textsuperscript{55} If a stop and frisk turns into a “full blown” seizure and search, the stricter probable cause doctrine applies.\textsuperscript{56} Even within the zone of Terry reasonable suspicion doctrine, some activities take maximum advantage of the doctrine’s grant of discretion and others take minimum advantage. That range of advantage-taking within the doctrine’s zone of coverage is its “enforcement practices continuum.”

Because doctrines afford discretion within the enforcement practices continuum, we should consider what might lead to maximum versus minimum enforcement within the continuum. With respect to police officers, we wish to understand why they might investigate people with more or less frequency and vigor in a specific community at a particular time. One influence upon that choice is the prevailing discourse about the appropriateness of law enforcement methods, which might support pervasive policing and an any-means-necessary public sentiment to reduce crime. To the extent police officers attribute identity based upon cultural identity norms, their choices of how much and how vigorously to investigate a particular group may vary. Taken together, articulations as to both the appropriateness of aggressive versus deferential policing and specific cultural identity norms associating a social group with crime will constitute a “cultural context continuum” influencing an officer’s exercise of discretion along the enforcement practices continuum.

Having identified a cultural context continuum, we should also consider how changes in the cultural context over time might cause a change in the point at which police officers operate within the enforcement practices continuum. We might expect that a general cultural shift toward articulating anti-crime measures as more important than civil liberties, in conjunction with a shift toward cultural identity norms associating a particular social group with crime, would lead to more frequent and vigorous investigation of that group. Similarly, a shift to articulating civil liberties as more important than crime investigation, along with a group’s decreasing association with crime, might lead to less frequent and vigorous investigation of the group. As will be detailed later, New York City saw a shift toward anti-crime articulations and associations of racial minorities with crime in the mid-1990s, then a swing toward civil liberties articulations and cultural identity norms denigrating racial profiling as unnecessary in the late 1990s. Hence, at time #1, the cultural context led NYPD practices to be located at one end of the enforcement practices continuum, but at time #2 the cultural context led

\begin{footnotesize}
\begin{enumerate}
\item See id. at 20-21 (describing test).
\item See id. at 18-21.
\end{enumerate}
\end{footnotesize}
NYPD practices to be located at the other end. I call that swing from one extreme point along the cultural context continuum to another extreme point along that continuum a “seesaw effect.”

III. Doctrinal Background: How Terry v. Ohio Doctrine Allows Racial Profiling

It is impossible to explore a Court's opinion with complete neutrality. To attempt to do so would entail considering all the alternative ways in which the Court might have categorized the issues in the case, might have told the story behind the litigation, might have deployed its arguments, and might have responded to contending strains in American culture.57

Cultural context matters because it is the source of the articulations of the meaning of constitutional clauses, case precedent, and “the facts” that a legal doctrine utilizes.58

What appears to be a neutral process of discerning the right legal rule is inevitably influenced by what is going on in the culture at the time. After all, it is people who do the interpreting. This Part of the Article examines the language of the Terry decision. In the course of that analysis, this Part considers both the Court’s articulations of meanings and the cultural context in which those decisions are made and applied.

A. The Terry Decision Re-Articulates the Meaning of the Fourth Amendment

Crucial to my conclusion that the Terry Court opened the door to racial profiling is the fact that the decision constituted a fundamental re-articulation of Fourth Amendment jurisprudence. In preparation for understanding how the Terry decision constituted a fundamental shift, it is helpful to pause and note the way the Terry Court re-characterizes the very language of the Fourth Amendment. The Court states: “The Fourth Amendment provides that ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .’”59

57. See Amsterdam & Bruner, supra note 2, at 10 (dismissing pure objectivity).
58. A note about my method. I seek to understand the ways key concepts are articulated. That requires understanding the parts that exemplify the whole. I do not survey Terry stop decisions. Accord Amsterdam & Bruner, supra note 2 (generally alternating theoretical chapters, chapters closely reading two cases). My method is to conduct “close readings” of key cases.
59. Terry, 392 U.S. at 9 (quoting U.S. Const. amend. IV).
Note that the Court fails to quote half the Fourth Amendment. The Fourth Amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.60

One can easily interpret the Amendment's use of the word "and" as protecting us against unreasonable searches and seizures by requiring warrants based on probable cause. In fact, many scholars have argued that probable cause should be the default standard for judging searches and seizures and that reasonableness should be a rare exception.61 The Terry Court decided not to take that approach.

In Terry, the Court considered a situation where a white police officer, McFadden, is patrolling his regular area.62 His attention is drawn to two black men, Terry and Chilton.63 McFadden observes one of the men walk down a block, peer into a particular store window, keep walking, turn, peer into the same store window, return, and confer with the other man.64 Each man repeats this process approximately a half-dozen times.65 A third man, Katz, then joins the two black men, confers with them, and walks away.66 The black men then repeat their peering and conferring approximately a half-dozen times each.67 The black men then walk in the direction of Katz.68 McFadden, fearing the
black men are planning a robbery, follows them.\textsuperscript{69} McFadden comes upon Terry and Chilton as they are conferring with Katz a block away.\textsuperscript{70} McFadden asks the men to identify themselves.\textsuperscript{71}

When the three men only mumble a reply, McFadden grabs Terry, spins him around, and pats the outside of his overcoat.\textsuperscript{72} Feeling a gun, McFadden seeks to retrieve it, but cannot.\textsuperscript{73} McFadden then orders the three men into a store, removes Terry's overcoat, and retrieves the gun as they enter the store.\textsuperscript{74} McFadden orders the three men to face a wall and begins patting Chilton's outer clothing.\textsuperscript{75} Feeling a gun, McFadden retrieves it.\textsuperscript{76} Feeling no gun on Katz, McFadden does not reach inside Katz's outer clothing.\textsuperscript{77}

In the prosecution of Terry and Chilton for illegal possession of a firearm, the lower courts refuse to exclude the evidence on the theory that stops and frisks are constitutional if reasonable and need not be supported by probable cause.\textsuperscript{78}

In its decision, the \textit{Terry} Court described a "stop" as an officer's questioning of someone he suspects of crime that falls between a mere consensual encounter and an arrest.\textsuperscript{79} The Court described a "frisk" as an officer's patting down of a suspect's outer clothing in search of weapons that falls between nothing and a "full blown" search.\textsuperscript{80} The Court held that stops and frisks are more than mere "petty indignities" and are thereby subject to Fourth Amendment scrutiny as searches and seizures.\textsuperscript{81} The Court further held that stops and frisks are not subject to the probable cause requirement of the Fourth Amendment, but only the general reasonableness requirement.\textsuperscript{82} The Court reasoned that stops and frisks are reasonable whenever they (1) are

\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.} at 6-7.
\textsuperscript{71} \textit{Id.} at 7.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 8 (reasoning McFadden "had reasonable cause to believe [the suspects] might be armed").
\textsuperscript{79} \textit{See id.} at 16-20 (distinguishing levels of scrutiny).
\textsuperscript{80} \textit{See id.} (distinguishing levels of scrutiny). As an example of a frisk, the Court quotes a police manual suggesting an officer "feel with sensitive fingers . . . the groin and area about the testicles." \textit{Id.} at 17 n.13.
\textsuperscript{81} \textit{Id.} at 17.
\textsuperscript{82} \textit{See id.} at 24.
warranted at their inception, and (2) remain within the scope of their justification.\(^8\)

Citing its newly minted \textit{Camara} “balancing test,” the \textit{Terry} Court created the “reasonable suspicion” test. The Court held that a stop is warranted when (1) a “man of reasonable caution;”\(^9\) (2) would find facts specific to the suspect;\(^10\) (3) that he could articulate;\(^11\) (4) “which, taken together with rational inferences,”\(^12\) justify suspecting the person is committing a crime or is about to do so.\(^13\) The Court held that a frisk requires that (1) the stop itself is valid;\(^14\) and (2) “a reasonably prudent man,” granting “due weight” to “specific reasonable inferences” based on the officer’s experience, would be warranted in believing the suspect is armed and dangerous.\(^15\) The Court summarized the test as follows: “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous,” he may conduct both the stop and the frisk.\(^16\)

Based on its new reasonable suspicion test, the Court upheld \textit{Terry}’s conviction.\(^17\) The Court found \textit{McFadden}’s stop valid because a suspect passing in front of one store window twenty-four times reasonably warrants further investigation.\(^18\) The Court found \textit{McFadden}’s frisk valid because the facts suggested a daylight robbery, making it reasonable to suspect \textit{Terry}

\begin{footnotes}
83. \textit{Id.} at 28-29.
84. \textit{Id.} at 22.
85. \textit{Id.} at 21. The specificity requirement could have been read to impose the traditional “particularization” requirement. The latter requirement limits the scope of a seizure or search to those persons or things actually associated with a crime. \textsc{Richard C. Turkington \& \textsc{Anita L. Allen}}, \textsc{Privacy Law: \textsc{Cases and Materials}} 95-96 (1999) (identifying traditional Fourth Amendment privacy rules). The \textit{Terry} doctrine’s specificity requirement seemingly does not require particularization. \textsc{Cooper}, \textit{The Un-Balanced Fourth Amendment, supra} note 2, at 888 (critiquing the allowance of criminal profiles in \textit{United States v. Sokolow}, 490 U.S. 1, 10 (1989)).
86. \textit{Terry}, 392 U.S. at 21.
87. \textit{Id.}
88. \textit{Id.} at 22.
89. \textit{See id.} at 32 (Harlan, J., concurring) (“[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.”).
90. \textit{Id.} at 27.
91. \textit{Id.} at 30.
92. \textit{Chilton}’s conviction was not at issue because he had been murdered prior to the appeal. \textit{Id.} at 5 n.2.
93. \textit{Id.} at 28.
\end{footnotes}
would be armed.\textsuperscript{94} Thus, after \textit{Terry}, officers may stop people on the street and frisk them whenever they can articulate an objectively reasonable basis for doing so.\textsuperscript{95}

\textbf{B. How \textit{Terry} Creates the "Scope Continuum" Model of Fourth Amendment Protection}

\textit{1. Overturning \textit{Camara v. Municipal Court}}

Prior to \textit{Terry}, the Fourth Amendment required probable cause for a criminally-oriented search or seizure to be deemed constitutionally permissible.\textsuperscript{96} As of 1966, the Court's decisions suggested that any police activity constituting a search or seizure must satisfy the Fourth Amendment's probable cause requirement.\textsuperscript{97} In its groundbreaking \textit{Camara v. Municipal Court} decision, however, the Court held that some searches need only satisfy the Fourth Amendment's reasonableness requirement.\textsuperscript{98} These searches are judged by a "balancing test": weighing the government's law enforcement interests against the individual's privacy interest.\textsuperscript{99} According to the \textit{Camara} Court, the balancing test applies to administrative searches, those conducted for health and safety pursuant to a regulatory code.\textsuperscript{100} For example, the local fire department's entry of a building to inspect fire extinguishers pursuant to a regulatory code would be subject to the balancing test, rather than the probable cause test. But the \textit{Camara} Court explicitly forbade application of the balancing test to criminal investigations.\textsuperscript{101} In light of the \textit{Camara} decision, \textit{Terry}'s application of the balancing test to criminal investigations constituted a fundamental re-articulation of Fourth Amendment jurisprudence.

The \textit{Terry} Court could have avoided placing criminal investigations in the same category as the fire extinguisher inspections \textit{Camara} envisions if it had held that stops and frisks do not trigger Fourth Amendment scrutiny. Law enforcement had sought to distinguish stops and frisks from searches and

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{See id. at 21.}
\textsuperscript{96} \textit{See Cooper, The Un-Balanced Fourth Amendment, supra} note 2, at 880-81 (arguing pre-\textit{Terry} Court required probable cause for criminal investigations).
\textsuperscript{97} \textit{See Camara v. Municipal Court, 387 U.S. 523} (1967) (issuing landlord writ of prohibition preventing warrantless apartment search and characterizing \textit{Frank v. Maryland}, 360 U.S. 914 (1959), as warrant-probable cause "exception"); \textit{see also Cooper, The Un-Balanced Fourth Amendment, supra} note 2, at 880-81 (analyzing \textit{Camara}'s language).
\textsuperscript{98} \textit{Camara}, 387 U.S. at 534-35.
\textsuperscript{99} \textit{Id.} at 536-37 (defining the test for determining reasonableness).
\textsuperscript{100} \textit{Id.} at 535.
\textsuperscript{101} \textit{Id.} (distinguishing criminal from administrative investigations).
seizures as mere "petty indignities." Indeed, lower courts had distinguished stops and frisks from searches and seizures. The Court rejected that argument, however, holding that searches and seizures exist prior to the inception of a "technical arrest." Instead, the Court declared that to "stop" is to "accost" and to "frisk" is to carefully explore. Hence, neither stops nor frisks escape Constitutional scrutiny. Accordingly, the Terry Court did not avoid placing stops and frisks in the same category as fire extinguisher inspections based on the Fourth Amendment's inapplicability.

Nor did the Court avoid placing stops and frisks in the same category as fire extinguisher inspections by applying the Fourth Amendment's probable cause test. The Court reasoned that stops and frisks constitute "an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." On that basis, the Court decided not to apply the probable cause test. Consequently, the Court lifted the Camara prohibition on applying the balancing test to criminal investigations. Instead, in applying the balancing test to stops and frisks, the Court created a test of reasonable suspicion.

The Terry Court's creation of the reasonable suspicion test fundamentally altered the Fourth Amendment in ways that opened the door to racial profiling. In concluding that the Amendment contains an intermediate category between "nothing" and probable cause, the Terry Court creates a

103. See id. at 16 n.12 (citing distinction between frisk and search in State v. Terry, 214 N.E.2d 114, 120 (Ohio 1966)); id. at 17 n.15 (citing distinction between frisk and search in People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964)).
104. Id. at 19.
105. The Court holds that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."
Id. at 16.
106. Id.
107. Id. at 20.
108. Id.
109. Id. at 20-21 (finding "necessarily swift action" justifies applying reasonableness rather than probable cause).
110. The Court's reasonable suspicion test asks whether an officer has "observe[d] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." Id. at 30.
continuum of Fourth Amendment scrutiny based on the scope of the search or seizure.111 While the lower court had suggested the Amendment only applies to searches and seizures, and that when the Fourth Amendment applies, "'probable cause is essential,'"112 the Terry Court rejected that "all-or-nothing" application.113

"In our view," declared the Court, "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."114 The Court reasoned that a continuum of Fourth Amendment scrutiny based on the scope of the intrusion is sensible only if searches and seizures are measured objectively. The Court's rationale links the entire "scheme of the Fourth Amendment" to the "imperative that the facts be judged against an objective standard."115

2. How the Terry Court's Re-Articulation of the Fourth Amendment Ignores Racial Profiling

Having noted the fact that the Terry Court overturned the Camara decision in order to create the scope continuum, it is necessary to investigate the effects of that maneuver. The Terry opinion's wide grant of officer discretion and its establishment of an objective analytical framework accomplish an act of psychological displacement.116 In the Court's desire to expand police powers, it fails to notice that its own citations contradict its reasoning. For instance, the Court cites the Kerner Commission for the proposition that police do indeed harass racial minorities.117 Nonetheless, the Court imagines race-based

111. Id. at 17 (identifying "utility of limitations upon the scope").
112. Id. at 16 n.12 (quoting State v. Terry, 214 N.E.2d 114, 120 (Ohio 1966)).
113. Id. at 17.
114. Id. at 18 n.15.
115. Id. at 21. The Court states as follows:

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. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Id. at 21-22 (citation omitted).

116. See Sigmund Freud, The Interpretation of Dreams 209 (James Strachey ed. & trans., 1965) (1900) (defining displacement as "[a] psychological process by which . . . indifferent experiences take the place of psychically significant ones").
117. See Terry, 392 U.S. at 14 n.11 (citing Kerner Commission for proposition police of
policing as something emanating solely from "certain elements of the police community." That isolation of race-based policing within a distinct, and presumptively small, group of officers contradicts the well-known truth. As will be discussed in sub-Part C, infra, police officers cannot possibly escape the lingering prejudice against racial minorities that infects the rest of society.

a) How the Terry Court Expanded Police Officer Powers

It is the Terry Court's analytical framework that prevented the Court from viewing police prejudice as a proper matter for consideration in fashioning a stop and frisk doctrine. The Court noted that "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime." Accordingly, the Court concluded that the exclusionary rule — whereby evidence obtained pursuant to an illegal search or seizure is inadmissible in a criminal prosecution — "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution[s] in the interest of serving some other goal." Apparently, the "other goal" includes "situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.' Because the goal of humiliation does not require prosecution, "[t]he 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."

The Terry Court's reasoning regarding the exclusionary rule reveals an alternative reading of the Fourth Amendment — one in which its scope includes issues of racial harassment — the Court wished to avoid. To impact prejudiced policing, the Court would have needed to either place Fourth Amendment searches and seizures on a continuum by which constitutionality is determined by the subjective intentions of the officer or determine that all stops and frisks are constitutionally infirm on the basis that they are more useful to officers seeking to humiliate than those seeking to prosecute.
Presumably, officers seeking to prosecute have information approaching the level of probable cause and soon will be able to simply make an arrest.\textsuperscript{124} Consequently, the \textit{Camara} Court required criminal investigations to be based on probable cause.\textsuperscript{125} The \textit{Terry} Court, however, accepted law enforcement’s argument that officers “are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.”\textsuperscript{126} The Court presumably found it difficult to grant those powers if it premised Fourth Amendment compliance on the intentions of officers rather than the scope of intrusions. As a result, the Court’s goal of expanding law enforcement tools carries with it the implication of ignoring prejudiced bases for stops and frisks.

As has been suggested, an alternative reading of the Fourth Amendment was available to the \textit{Terry} Court that would have made widespread racial profiling much less likely. It had previously been assumed that criminal investigations required a warrant based on a showing of probable cause to satisfy the Fourth Amendment reasonableness standard.\textsuperscript{127} Indeed, the notes from the \textit{Terry} Court’s conference show the Justices initially not only believed that McFadden had probable cause but that he was constitutionally \textit{required} to have probable cause.\textsuperscript{128} A better ruling would have declared probable cause the default standard for criminal investigations and granted McFadden an exigency exception because he lacked the time to obtain a warrant before the likely robbery. Such a ruling would have both affirmed the “mutual

\textit{same: “Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.” \textit{Id.} at 34 (White, J., concurring) (emphasis added). In other words, at least officially, a stop places officers in the same position they were in before the stop — waiting for probable cause. Still, an uninformative stop has its uses, for a frisk sends a “message” that police are keeping an eye on potential suspects. \textit{Id.} (White, J., concurring). Those statements by Justice White suggest he wants police to have a \textit{harassment} power as a means of social control. If legitimate \textit{Terry} stops are already close to having probable cause and illegitimate stops amount to harassment, I’d rather dump the stop power.

124. \textit{See} Barrett, \textit{Deciding, supra} note 17, at 785, 797 (citing evidence \textit{Terry} Court believed Officer McFadden already had probable cause).


126. \textit{Terry}, 392 U.S. at 10; \textit{see also id.} at 20 (expressing concern with officers’ “necessarily swift action”).

127. \textit{See} Sundby, \textit{supra} note 17, at 1134 (noting pre-\textit{Terry} ignoring of separate reasonableness standard).

128. \textit{See} Barrett, \textit{Deciding, supra} note 17, at 753-54 (citing Court’s initial probable cause rationale).
‘government-citizen trust’ scholars have identified as a primary Fourth Amendment principle and properly limited police officer discretion.

b) Why the Terry Court Expanded Police Officer Powers

In light of the Terry Court’s substantial re-articulation of the Fourth Amendment, it is likely that its emphasis on the need to empower police officers served as an implicit response to the backlash against changes in the black civil rights movement at the time. Around 1969, research reports and politically-oriented journals showed dramatic decreases in racial majority support for racial minority civil rights. This resulted from resistance by whites to paying the necessary costs to implement programs effectuating real change in the ways whites and blacks interact, as well as a backlash to the new mode of civil rights protest represented by the Black Power movement.

Thus, the Terry Court was likely responding, in part, to the national majority’s desire that police powers be extended in response to pervasive fears of black civil rights riots. More than 170 cities experienced race-based disorder between 1961 and 1968. During the summer and fall of 1967, when the Court granted certiorari in Terry, the United States experienced violent black civil rights protests each week. The Martin Luther King riots followed in one-hundred cities in April 1968, while the Court considered Terry. This was also the time when Richard Nixon invented his “Southern Strategy” in which he promoted “law and order” under “a veiled antiblack appeal.”

Research conducted during the late 1960s and early 1970s showed a significant percentage of whites viewed the civil rights riots as evidence that “firm police action” was needed nationwide. That sentiment would explain Justice Douglas’s statement in dissent that “[t]o give the police greater

129. See Sundby, supra note 17, at 1135 (proposing alternative Terry rationale).
130. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 5 (1985) (reviewing perspectives); see also FAUSTINE CHILDRESS JONES, THE CHANGING MOOD IN AMERICA: ERODING COMMITMENT? 77-78 (1977) (“There [was] a changing mood in the dominant society. This changing mood [was] more negative than positive with respect to the aspirations of blacks, other minorities, and the poor . . . .”).
131. See SCHUMAN ET AL., supra note 130, at 5 (detailing backlash).
132. See id. (noting backlash against non-pacifist protest).
133. Id. at 30.
134. See id. (describing “unfinished civil rights agenda”).
135. Id.
136. See id. at 34 (reviewing Nixon civil rights stance).
137. Id. at 31 (citing statistics) (quoting Angus Campbell & Howard Schuman, Racial Attitudes in Fifteen American Cities, in SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)).
power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But . . . it should be the deliberate choice of the people through a constitutional amendment. Justice Douglas's reference to "modern forms of lawlessness" suggests that the civil rights riots inspired the Terry majority. Thus, given the cultural context of civil rights retrenchment and calls for greater policing at the time, it is not surprising that the Court chose to re-articulate the Fourth Amendment.

C. Why Application of the Terry Doctrine Can Result in Racial Profiling

Seeing why Terry doctrine ignores the potential influence of racism leads us to the question of precisely how a facially neutral doctrine leads to racially disparate results. The short answer is that cultural identity norms that promote stereotypes of racial minority criminality can cause people to misinterpret equivocal behavior. This sub-Part describes exactly how that process occurs.

That officers are members of a society suffering racism challenges the veracity of those who claim officers never use racial profiling, and calls into question the effectiveness of Terry doctrine. Scholars argue that nearly everyone in our society, be they black, white, brown, yellow, or red, has some degree of prejudice against racial minorities. Prejudicial social norms are

139. See id.
140. I am not alone in arguing the Terry decision results from racial politics. Tracey Maclin argues,

[T]he Terry Court succumbed to pressure to weaken constitutional principle when it was clear that many politicians, and a large segment of the public, had signaled their disapproval of the Court's effort to extend meaningful constitutional protection to those who needed it the most: Poor and minority persons suspected of criminal behavior.

Maclin, supra note 17, at 1287 (arguing that the Terry Court shifts unjustified stop and frisk risk).

141. See Jeffrey Goldberg, The Color of Suspicion, N.Y. TIMES, June 20, 1999, § 6, at 51 (citing racial profiling denials).

142. See, e.g., ARMOUR, supra note 10, at 135 ("[T]he Black stereotype is established in children's memories before children develop the cognitive ability to critically evaluate and decide on the stereotype's acceptability."). For example, the Reverend Jesse Jackson admits, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved." Paul Glastris & Jeannye Thornton, A New Civil Rights Frontier, U.S. NEWS & WORLD REPORT, Jan. 17, 1994, at 38 (quoting Rev. Jesse Jackson, Sr.). Armour notes the disingenuousness of various responses to Jackson's statement. ARMOUR, supra note 10, at 35-60. If a prominent black civil rights activist is affected by stereotypes of who is dangerous, how can a police officer of any race escape the initial instinct to think racial minorities are more
TERRY'S "SEESAW EFFECT"

too pervasive and strong for anyone to avoid without effort, including members of law enforcement.\(^\text{143}\)

Given the ability of stereotypes to continue without an individual’s awareness of their existence, one should ask where prejudiced desires exist. They continue in the realm of cultural identity norms at the meta-level of "background social norms,"\(^\text{144}\) influencing how people perceive the world. These cultural identity norms provide the source for the assumptions considered "common sense"; they are the perspectives on identity perceived as "just the way things are."\(^\text{145}\) Individuals assume those scripts are true because they perpetuate expectations about how individuals will behave.\(^\text{146}\) When one belongs to the normative group, one does not question those norms.\(^\text{147}\) Consequently, we apply facially neutral standards to "the facts" based on background social norms of identity.\(^\text{148}\) Because race is "socially constructed," one can subconsciously believe a person’s racial characteristics suspicious than racial majorities? The answer is, he cannot.

\(^{143}\) See ARMOUR, supra note 10, at 134-36 (detailing habit formation of prejudice). In short, "unless a low-prejudiced person consciously monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit." Id. at 137; see also FLAGG, supra note 10, at 2 (defining "transparency phenomenon" of white racism).

\(^{144}\) By "background social norms," I mean "norms of reciprocity: norms that sustain what is perceived to be 'a fair system of cooperation over time.'" Richard H. Pildes, The Destruction Of Social Capital Through Law, 144 U. PA. L. REV. 2055, 2063 (1996) (defining norms).

\(^{145}\) "Common sense" is the prevailing view on the implications of a social event or the implications of characteristics of individuals. See Jennifer Daryl Slack, The Theory and Method of Articulation in Cultural Studies, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 117 (David Morley & Kuan-Hsing Chen eds., 1996) (describing Antonio Gramsci’s concept of hegemony). Within cultural studies, "common sense" is, primarily, the set of ideas and attitudes that reflect "the ways in which dominant structures and institutions are acknowledged day-to-day by subordinated groups." Martin Barker, Stuart Hall, Policing the Crisis, in READING INTO CULTURAL STUDIES 81, 91 (Martin Barker & Anne Beezer eds., 1992) (critically reviewing STUART HALL ET AL., POLICING THE CRISIS (1978)). The core of the concept is that common sense is the mechanism by which particular viewpoints are seen as "natural," and, therefore, as distinct from the interests of a particular group. Hence, "[i]t would not be the coherence of Thatcherism that would mark it for success, but its ability to make itself appear as common sense, agentless . . . ." Id. at 93.

\(^{146}\) See Carbado & Gulati, supra note 6, at 1262 (noting racial minority employees often feel “pressured to behave in particular ways to avoid discrimination”).

\(^{147}\) See FLAGG, supra note 10, at 2 ("Whiteness is the racial norm . . . . Once an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other whites.").

\(^{148}\) See id. at 4-8 (describing facially neutral, effectively race-based process). Any lawyer knows the "facts" are what you make of them, especially when you are in your everyday life, and not constrained by rules of civil procedure. See id.; see also ARMOUR, supra note 10, at 130 (noting informational inconsistency problem).
are telling him something relevant about the facts to which one applies a faci
al neutral standard.\textsuperscript{149}

Cognitive behavioral psychology posits that individuals often make as-
sumptions about people based on their identity categories without con-
ciously recognizing that they are expecting, for example, a woman to act
"feminine."\textsuperscript{150} Modern Freudian psychology contends that when one's beliefs
contradict public norms of racial equality, subconscious "defense
mechanisms\textsuperscript{151} prevent "cognitive dissonance"\textsuperscript{152} by preventing conscious
awareness of prejudiced intent.\textsuperscript{153} That is, we can think of ourselves as fitting
society's equality norms by repressing into our subconscious any ideas that
contradict those social norms, even as we continue to act based upon our
subconscious prejudiced intent.\textsuperscript{154}

\textsuperscript{149} \textit{See} FLAGG, \textit{supra} note 10, at 49 (citing studies demonstrating disparately applied
facially neutral standards).

\textsuperscript{150} \textit{See} Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckon-
cess of categorization as facilitating unconscious stereotyping). We need not ascribe to all principles
of cognitive behavioral psychology in order to accept Lawrence's thesis. The test is whether
Lawrence's argument helps explain what we see in the world. It does.

\textsuperscript{151} A defense mechanism "disguis[es] forbidden wishes and mak[es] them palatable." \textit{Id.}
at 331-32 (providing examples of defense mechanisms); \textit{see also} \textit{id.} at 326 (describing "strain
theory," in which whites construct a "defense mechanism against the anxiety felt by [holding]
power through means and with motives that they cannot comfortably acknowledge"). Lawrence
identifies defense mechanisms such as repression, denial, introjection, projection, reaction
formation, sublimation, and reversal, which "resolve the conflicts between the primary and
secondary processes [i.e., actual state versus ideal state of affairs] reality." \textit{Id.} at 331-32. For
a definition of defense mechanisms, \textit{see} \textit{DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

\textsuperscript{152} "Cognitive dissonance" is a tendency to repudiate or downplay information that
contradicts more favorable information about oneself." \textit{See} Paul Bennett Marrow, \textit{Behavioral
Decision Theory Can Offer New Dimension to Legal Analysis of Motivations}, 74 N.Y. ST. B.

\textsuperscript{153} \textit{See} Lawrence, \textit{supra} note 150, at 333 (discussing conflict "which arises when an
individual cannot master his instinctive drives in a way that fits into rational and socially
approved patterns of behavior"). Again, we need not ascribe to all principles of Freudian
psychology in order to accept Lawrence's thesis.

\textsuperscript{154} Subconscious prejudice can show through in the subtle attitudes people display to one
another. Peggy Cooper Davis argues everyday interactions between whites and historically
denigrated racial minorities are haunted by the possibility the white person will commit a
microagression against the person of color. Peggy C. Davis, \textit{Law as Microagression, in CRITICAL
\textit{THE CUTTING EDGE}] (describing "incessant" legal system microagressions against racial
minorities). A microagression is a small offense in a day-to-day interaction through which one
person expresses his belief that he is better than or takes priority over the other person. \textit{See id.}
(describing incident reflecting asserted intellectual superiority). The smallness of the offense
For example, the general social norm might be that people should not wear oversized and extremely loose-fitting jeans.\textsuperscript{155} And the very small portion of the population, regardless of race, that sells drugs may have a greater tendency to wear baggy jeans.\textsuperscript{156} It may also be a young black male subcultural\textsuperscript{157} norm to wear baggy jeans.\textsuperscript{158} Those facts could lead a police officer to produce a racially disparate result, the disproportionate stopping of innocent black males, while consciously intending only to apply a facially neutral criterion, whether one is wearing baggy jeans. Because whites constitute the majority, however, their norms will constitute the general norm.\textsuperscript{159} If whites tend to act differently than does not make it less intentional. To believe in one’s racial superiority and display that belief in an interaction expresses a desire for affirmation, and the repression of that belief from one’s conscious awareness does not change the nature of the desire. The display of a subconscious belief in one’s racial superiority may be subtle, but it is also often palpable. As a result, the racial minority may feel she must perform “comforting acts” as a means of reducing the likelihood of microaggressions. \textit{See generally} Carbado & Gulati, \textit{supra} note 6 (identifying “working identity” strategies); Camille Nelson, \textit{Breaking the Camel’s Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness}, 9 MICH. J. RACE & L. 77 (2003) (summarizing health effects of fighting racism).

It is the subconscious operation of prejudice that makes it invisible, yet simultaneously omnipresent. \textit{See} Flagg, \textit{supra} note 10, at 2 (defining “transparency phenomenon” of white racism). As Davis notes, the era of “color blindness” presents a dilemma for the scholar of identity:

\begin{quote}
The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of irresponsibility. Nonetheless, the claim is well founded. Davis, \textit{supra}, at 170.
\end{quote}


\textsuperscript{156} \textit{See} Bivens, 899 F. Supp. at 561 (associating saggy pants with gang affiliation).

\textsuperscript{157} “Subcultural norms” are the values and behaviors of a subsection of the culture that vary from the general norms. \textit{See} Linz Audain, \textit{Critical Cultural Law And Economics, The Culture Of Deindividualization, The Paradox Of Blackness}, 70 IND. L. J. 709, 718-19 (1995) (defining subcultural as “the sameness of perspectives [which] generates a sameness of the meaning of internal (e.g., ideas) and external things between and among members of the subculture”); \textit{see also} Dick Hebidge, \textit{Subculture: The Meaning Of Style} (1979) (analyzing treatment of formation of punk rock subculture).

\textsuperscript{158} \textit{See} Bivens, 899 F. Supp. at 560-61 (conceding wearing “sagging pants are a way for [the defendant] to identify and express his link with his black identity, the black culture and the styles of black urban youth”).

\textsuperscript{159} \textit{See id.} at 561 (finding that although the wearing of baggy pants is a form of expression for black urban youth, the majority population does not perceive it as such). The Bivens court finds that the majority of people, necessarily implying white people, associate negative images with the wearers of baggy jeans. \textit{Id.; see also} Audain, \textit{supra} note 157, at 720 (asserting white males control understanding of cultural norms: “In America, the white male sub-subculture is
racial minorities, the general norm will be race-specific. As reasonable suspicion turns on these differences, Terry stops, therefore, will be based on violations of the general norms, and will thus constitute both a facially neutral, majoritarian, principle and a racially disparate form of reasoning with invidious effects.

The Terry Court's re-articulation of the Fourth Amendment as indifferent to evidence resulting from police harassment rests on a flawed principle. The Fourth Amendment's ban on unjustified invasions of privacy exists not only to free suspects caught by unfair means, but also to deter law enforcement from trying to unjustifiably infringe upon one's security. To protect people from unjustified invasions, the Terry Court should have denied or clearly limited the reasonable suspicion rationale for stops and frisks. The Court's failure to limit stop and frisk discretion creates the very possibility for the seesaw effect discussed henceforth.

IV. First Stage of Terry's Seesaw Effect in New York City: The Rise of Support for Extreme Racial Profiling

In the closing decades of the twentieth century the pursuit of freedom has come to be overshadowed by a new sense of disorder and of dangerously inadequate controls... [A] reactionary politics has used this underlying disquiet to create a powerful narrative of moral decline in which crime has come to feature... as the chief symptom of the supposed malaise... [I]t has been a feature of these developments that they have been targeted against particular social groups rather than universally imposed.
Cultural context matters because it is the battleground on which social groups fight to articulate the varied meanings of identity that inform the legal doctrines that translate into enforcement practice.

Having demonstrated the Terry doctrine’s ample potential for racial profiling, I will now show how cultural context can activate that potential. The Terry doctrine’s potential for racial profiling is not necessarily activated in every cultural context. For example, a city with high-ranking political or police leaders who disapprove of the practice can create a greater risk of harm to the individual officer caught racial profiling, and a city where the popular consensus simply prides itself on not being prejudiced will make racial profiling less likely. Of course, a city where the popular consensus ignores or even supports race-based policing will eventually get what it asks for.

While this Part concentrates on discursive struggles, those struggles spring from enforcement doctrine. In the early 1990s, Terry stops served as the NYPD’s mode of racial profiling. Had the Terry Court chosen to bar stops and frisks altogether, the NYPD would not have been able to adopt widespread racial profiling. Further, the Court’s bar on Fourth Amendment analysis of racial pretext, coming as it did in the midst of widespread racial profiling in New York and elsewhere, implicitly endorsed the practice. Having worried about the Terry doctrine’s potential to cause extreme racial profiling, I now want to turn to the evidence that New York City did in fact adopt an extreme version of racial profiling in the mid-1990s.

That evidence is substantial. New York State Attorney General Eliot Spitzer compiled a report that found that NYPD officers disproportionately stopped and frisked blacks and Hispanics. The Attorney General found that in areas where blacks comprised 26% of the population, they accounted for 50% of the area’s stops. Hispanics, comprising 24% of the population, accounted for 33% of the stops. Whites, however, comprising 43% of the population, accounted for only 13% of the stops. The figures for Giuliani’s pet project, the Street Crimes Unit (SCU), were even more dramatic: 63% of people stopped by the unit were black. Following the Attorney General’s report, investigators for

arguments).

165. See Smith, NYPD Hit, supra note 21, at 3 (reporting race-based nature of stops and frisks).
166. Rayman, supra note 22, at A3. Officers in New York are required to fill out a UF-250 form in which the officers must describe the circumstances that led them to form “reasonable suspicion.” See id.
167. Smith, NYPD Hit, supra note 21, at 3 (reporting stop and frisk statistics).
168. Id.
169. Id.
170. Id.
New York City's Civilian Complaint Review Board determined that NYPD officers routinely failed to file paperwork, and thus the official police department statistics may have underestimated the extent of racial profiling. Furthermore, a federal investigation into the SCU also ensued after the highly-publicized shooting by police officers of Amadou Diallo, a black man. Prosecutors found that blacks and Hispanics were disproportionately stopped and frisked, and that the imbalance could not be explained by crime rates in the City's racial minority neighborhoods. This Part of the Article examines why New Yorkers initially supported the mayoral candidate who would eventually enact such an extreme form of racial profiling.

A. Giuliani's Racialized Campaign

Consider the 1993 New York City mayoral campaign between black, incumbent Mayor David Dinkins and white, former United States Attorney Rudolph Giuliani. A fundamental fact of New York City politics is that Democrats outnumber Republicans by a ratio of five to one. So why did Giuliani, a member of the Republican party, win the mayoral election? He won because racial majorities outnumber racial minorities by more than three to one.

Giuliani waged political war on blacks and Hispanics by arguing that the NYPD should be granted greater power to control crime. Giuliani made it clear he wanted more aggressive policing, stating that those who make New Yorkers

171. William K. Rashbaum, Review Board Staff Faults Police on Stop-And-Frisk Reports, N.Y. TIMES, Apr. 28, 2000, at B1. Several officials acknowledged that officers commonly failed to fill out paperwork. Id. In 228 cases where a suspect had been frisked, the forms were only filed out in 135 cases. Id. In fifty-four cases where officers frisked a person, only eighteen UF-250 forms were filled out. Id. Most importantly, in 168 cases where an arrest was made, only thirty-three forms were filed. Id. The Civilian Review Board also found that African Americans, who comprised 25.2% of New York City's population, accounted for 63.8% of the people who were stopped and frisked on the street. Id. Hispanics comprised 24.4% of the city's population and accounted for 23.8% of the stops. Id. Whites accounted for 43.2% of the city's population but were only 10.6% of the stops. Id.

172. Benjamin Weiser, U.S. Detects Bias in Police Searches, N.Y. TIMES, Oct. 5, 2000, at A1. A federal investigation was already underway regarding patterns of brutality within the department and deficiencies in disciplining problem officers. Id. Negotiations between the prosecutors and the city aimed at avoiding a formal lawsuit dragged on for months. Id.

173. Id.


175. This assertion is a matter of logic. If Democrats outnumber Republicans, some Democrats must have switched sides. Racial minority voters did not abandon Dinkins, so it must have been racial majority voters who abandoned Dinkins.
feel threatened "'have to be removed from the streets.'"\textsuperscript{176} According to Giuliani, New Yorkers had "'their eyes down'" because of a social malaise resulting from rampant crime.\textsuperscript{177} The candidate ran a series of commercials featuring "testimonials of crime-weary New Yorkers."\textsuperscript{178} As examples of the city's deterioration, the ads pointed to the menacing "'squeegee men'" and promised to crack down on street drug dealers, panhandlers, and homeless people.\textsuperscript{179} With about $1 million more in cash than Mayor Dinkins, Giuliani flooded the airwaves with images of homelessness and crime.\textsuperscript{180} Giuliani's message was rhetorically powerful. Indeed, it was effective although crime had decreased during Dinkins' term.\textsuperscript{181}

The media noted the race-based nature of Giuliani's anti-crime appeal. In an article titled \textit{A Race About Race}, New York's \textit{Newsday} declared that Giuliani was consciously cultivating a "'silent majority.'"\textsuperscript{182} Giuliani wanted that majority to associate Dinkins with favoritism towards blacks.\textsuperscript{183} Dinkins countered by arguing that the city's racial tensions would have been worse had he not been mayor\textsuperscript{184} and claimed Giuliani failed to campaign in minority neighborhoods.\textsuperscript{185} Giuliani shrewdly argued that the Reverend Al Sharpton, an extremely unpopular figure among the city's whites at the time, had been asking black church leaders not to meet with Giuliani.\textsuperscript{186} Moreover, the candidate secured a Puerto Rican running mate, self-proclaiming their candidacies a "'City of Fusion'" ticket,\textsuperscript{187} thereby insulating him from charges of ultra-conservatism.\textsuperscript{188}

Having fought off Dinkins' challenges to his racial politics, Giuliani was free to link Dinkins to crime. "'Crown Heights'" became Giuliani's battle cry, ostensible evidence of Dinkins' "'soft on crime'" approach.\textsuperscript{189} The Crown Heights neighborhood had recently witnessed massive, violent riots by racial

\begin{footnotesize}
\begin{enumerate}
\item[177.] \textit{Id.}
\item[178.] Mitchell, \textit{supra} note 174, at B3.
\item[179.] \textit{Id.}
\item[180.] \textit{Id.}
\item[182.] \textit{See Michael H. Cottman, A Race About Race, NEWSDAY (New York), June 30, 1993, at 27 (detailing candidates' implicit race-based arguments).}
\item[183.] \textit{See id.}
\item[184.] \textit{Id.}
\item[185.] \textit{Id.}
\item[186.] \textit{Id.}
\item[187.] Mitchell, \textit{supra} note 174, at B3.
\item[188.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
minorities in response to a white, Jewish man’s hit-and-run killing of a black child. Giuliani contended that he would have quelled the four-day riot sooner had he been mayor. Giuliani’s attacks seemed to suggest that had the Mayor not been black, the riots would have been quelled sooner.

Dinkins’ popularity dropped dramatically when the governor of the State of New York, Mario Cuomo, ordered a report to determine whether Dinkins should have responded sooner in the Crown Heights incident. The order was probably a deciding factor in sealing Giuliani’s election. Dinkins accepted the Crown Heights report’s conclusions that he should have questioned and overruled the tactics of his police commanders before the third night of violence. Afterwards, Dinkins’ supporters reasoned that the Governor’s report might have moved the crucial white swing voters to the Giuliani camp.

B. How Liberal Whites Justified Supporting Giuliani’s Race-Based Anti-Crime Theme

Giuliani’s funding advantage does not adequately explain how he won in a city where Democrats outnumber Republicans five to one. Giuliani’s victory is explained by examining why many liberal whites switched from supporting Dinkins during the previous election to supporting Giuliani. Why would this presumably non-prejudiced group of whites vote for Giuliani? The answer is that those white liberals were oblivious to the implicit prejudice in Giuliani’s campaign.

We can consider the failure to predict Giuliani would racially profile in light of the theory of cultural norms discussed in Part II. Liberals could not see the prejudice of Giuliani’s political tactics because of the operation of background social norms. Background social norms lead whites (1) not to think of themselves as belonging to a race, (2) to think of perspectives they share with

190. Id.
191. Id.
192. Put another way, Giuliani implicitly suggested that had the Mayor been white, there would not have been any favoritism toward the riotous black community. He did not have to say that explicitly because “[t]he public knows, without having to be told” that anti-crime policies will be aimed at racial minorities. GARLAND, supra note 164, at 136 (arguing crime control often hidden racial argument). The author thanks Krystina Lopez de Quintana for suggesting this implicit argument.
195. Id.
196. Id.
198. FLAGG, supra note 10, at 2 (defining “transparency phenomenon”).
other whites but not with racial minorities as being race-neutral, and (3) not to think of problems primarily faced by racial minorities as part of their own world. Here, even though overall crime dropped during Dinkins’ term as mayor, many whites perceived crime as having recently risen. Either of two things could explain that disconnect: (1) the media tricked white liberals into believing overall crime had risen; or (2) crime had only recently moved from racial minority communities to white communities, causing an actual rise in the crime rate in white communities. While the media certainly overstated the comparative prevalence of crime during Dinkins’ term, it is the increase in crime in white neighborhoods that explains why Giuliani’s anti-crime theme had traction with white liberals.

New York City’s liberal whites ignored late 1980s crime when it was concentrated in racial minority communities. Accordingly, liberal whites honestly believed crime increased overall during the Dinkins era, even though, at worst, crime rose in white neighborhoods while falling by a greater percentage in racial minority neighborhoods. Liberal whites adopted a “Not in My Back Yard” approach to crime without feeling prejudiced because background social norms allowed them to believe crime was a new problem. Again, scholars suggest socially empowered groups, such as American whites, often think of themselves as not belonging to any particular group. Because whiteness is the epistemological norm in this country, whites have the privilege of thinking of themselves as having no racial perspective. In early 1990s New York City, background social norms allowed whites to ignore crime while it was merely a racial minority problem without feeling that blindness was itself a racial perspective.

Because the crime problem was perceived as a new problem, the crime problem served as a race-neutral justification for supporting Giuliani. White liberals believed they were responding to Giuliani’s anti-crime message rather

199. Id.
200. Id.
201. See A Broad Plan, supra note 181, at A26.
203. By this term, I mean that using whiteness as a baseline is a presupposition of our culture. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (identifying epistemology with “the nature of knowledge, its presuppositions . . . and validity”).
204. See FLAGG, supra note 10, at 2 (defining “transparency phenomenon”). Moreover, the exercise of withholding and assigning race is the “pleasure” of race. See Anthony Farley, The Poetics of Colorlined Space, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 97, 99 (Francisco Valdes et al. eds., 2002) (“Race is a form of pleasure. For whites, it is a sadistic pleasure in decorating black bodies with disdain.”). The pleasure of white privilege is in having power exercised on your behalf, but being able to deny you have exercised the power or benefitted from its exercise. See id.
than his implicitly race-based message. While the candidate's liberal, racial
majority supporters were neither intentionally nor subconsciously prejudiced,
they were normatively prejudiced. After all, "[t]he public knows, without
having to be told," that anti-crime policies will be aimed at racial minorities.205
Prevailing cultural identity norms allowed liberal, racial majority voters to
engage in an act of denial whereby they could support Giuliani without thinking
about the fact they were adopting a race-based policy.

C. Drawing Conclusions About New York's Extreme Racial Profiling

I began this Part of the Article by reviewing evidence of the wide racial
disparities in NYPD Terry stops. Racial profiling is the name for such a
department-wide use of race to determine suspicion. The extreme nature of the
NYPD's racial profiling in the mid-1900s was demonstrated by the Attorney
General's report. Federal prosecutors noted that those stop rates cannot be
explained by any racial disparity in crime rates.206 My explanation for those stop
rates is that they are a product of racial profiling. New York's cultural context
in the 1990s activated Terry doctrine's potential for racial profiling because
Giuliani's mayoral campaign exploited a cultural trend calling for crime control.
Giuliani took advantage of the general tendency toward draconian policing
measures by using the Crown Heights Riots and other racial imagery. While
these tactics should have put people on notice that his policies would have
racially disparate effects, liberal whites gave Giuliani his margin of victory.
Thus, the explanation for racial profiling in New York is that Giuliani's
racialized campaign gave him a mandate to adopt an aggressive policing
philosophy inherently susceptible to racial disparity.

V. Second Stage of Terry's Seesaw Effect in New York: The Shift in the
Media's Discourse About Racial Profiling

'One of the most significant political moments . . . is the point
when events that are normally signified and decoded in a negotiated
way begin to be given an oppositional reading'207

Cultural context matters because it responds to the enforcement of doctrine
and eventually leads to changes in the way a doctrine is enforced.
The first stage of Terry's seesaw effect was reached in New York because the
cultural context activated Terry doctrine's inherent susceptibility to racial

205. GARLAND, supra note 164, at 136 (critiquing biologically-based criminology theories).
206. See Weiser, supra note 172, at A1.
207. Hall, Encoding/Decoding, supra note 48, at 138 (providing discourse analysis
framework challenging prevalent communications theory).
profiling. With that in mind, consider the second stage of Terry’s seesaw effect: the way opinions about extreme racial profiling can generate a shift against the practice.

This Article has shown how the cultural context of early 1990s New York led to the adoption of an extreme form of racial profiling. While Terry doctrine is an invitation to racial profiling awaiting such a cultural context to be activated, this Part of the Article analyzes why the NYPD’s extreme racial profiling itself begat a popular shift against it. While New Yorkers originally supported the City’s call for draconian policing practices, high profile cases of police brutality against racial minorities eroded that support. As Mayor Giuliani refused to acknowledge NYPD abuses, the popular media switched sides and began challenging racial profiling. By the time of the Parade, police officers admitted a reluctance to show force in racial minority communities.

A. The Rise in Criticism of Racial Profiling by the NYPD

From 1993 to 1997, Mayor Giuliani enjoyed acclaim for lowering crime rates. Using his mandate to fight crime by any means necessary, Giuliani’s NYPD conducted an experiment in full utilization of the Terry stop powers. As was noted in the last Part of the Article, those stops and frisks resulted in an extreme form of racial profiling. This sub-Part of the Article details two incidents that led to a shift in the popular consensus from support for Giuliani’s anti-crime campaign to criticism of NYPD racial profiling.

1. The Rape of Abner Louima

The focus of New York City’s citizens on plunging crime rates dissipated when reports erupted that four New York City police officers, in August 1997, had tortured Haitian immigrant Abner Louima, “a night security guard from Jamaica, Queens, [who] was arrested after a scuffle between the police and revelers leaving a Flatbush Avenue nightclub . . . . During the fighting, witnesses say, a police officer handed his gun belt to a partner and began exchanging blows with Mr. Louima . . . . Investigators said Mr. Louima knocked Officer Volpe to the ground” and was then arrested.208 Two other police officers stopped twice on the way to the station house to beat him, and, at the station house, took Louima into the bathroom and beat him again.209 One officer then anally raped Louima with the wooden handle of a toilet plunger, and chained Louima in a holding cell.210

208. See Dan Barry, 2D Police Officer Charged in Attack on Arrested Man, N.Y. TIMES, Aug. 16, 1997, § 1, at 1.
209. Id.
210. Id.
"Investigators said that the precinct called for an ambulance for Mr. Louima . . . more than an hour after [he] was booked . . . ."211 Although the ambulance arrived at 6:25 a.m., it "did not leave the station house until 7:58 a.m. . . . as paramedics waited for police officers . . . to escort them as they took Mr. Louima to the hospital."212 His condition was listed as critical.213 The first reports indicated that Louima's front teeth were knocked out and that he had suffered damage to his intestinal track.214 Later, a law enforcement official said, "'As best we can determine, a denture was knocked out in the attack.'"215

While denouncing the police officers' brutal actions against Abner Louima, Police Commissioner Safir also indicated that the incident was an isolated matter.216 The administration applauded the unnamed officer who came forward with information leading to the arrest of the guilty officers.217 The administration stressed that the incident happened behind closed doors and was clearly criminal. Painting the incident as a problem of a few deviant officers, the Mayor claimed the incident was only indicative of the need to psychologically screen officers during the hiring process.218

Critics of the Giuliani administration pointed to his unequivocal support for the police department as part of the problem. Giuliani seemed to support fighting crime by any means whatsoever:

[F]rom the beginning of Mr. Giuliani's term the dominant message to the police was get tough, assert yourself, make your presence felt. Cops were given bigger guns and pushed to adopt a super-macho persona. The problem, of course, is that if you unleash the police without adequate training and without a sophisticated system of safeguards, you will get a surge in brutality.219

The Louima incident caused many people to associate Giuliani's policies with police brutality.

211. Id.
212. Id.
213. Id.
214. See Michael Cooper, Giuliani Asks for Apologies in Louima Case Reaction, N.Y. TIMES, Jan. 16, 1997, at B4 [hereinafter Cooper, Giuliani].
215. See id.
218. See id. In defending the police department and his administration, Giuliani said, "The communities of the city have to also not fall into the excessive anti-police rhetoric that some people would lead them to because that drives the police further away." See Barry, supra note 208, § 1, at 1.
Consequently, the Louima incident represents the beginning of the second stage of Terry's seesaw effect in New York. In the first stage of that effect, New Yorkers accepted Giuliani's implicitly race-based argument for aggressive policing. The result was NYPD use of Terry stops for extreme racial profiling. Fallout from the Louima incident was the first broad-based challenge to the NYPD's enforcement practices. That challenge would be followed by an eventual shift from popular support for policing by any means necessary to a consensus against racial profiling.

2. The Slaying of Amadou Diallo

In February 1999, an unarmed West African immigrant with no criminal record was shot nineteen times by four police officers in the doorway of his New York City apartment building. Diallo had come home from work and subsequently left his apartment to purchase food, as he often did after work. Four officers of the NYPD Street Crimes Unit—a unit that Mayor Giuliani and Police Commissioner Safir heralded early in their careers—spotted Diallo and allegedly determined that he met the description of a serial rapist. It is unclear what happened next. We do know that Diallo was a "skinny guy," carrying no weapons. Although police rules explicitly demand that officers use deadly force only when they fear their lives or the lives of others are in danger, this team emptied their guns on an unarmed man.

State Assemblyman Ruben Diaz, who represented the Bronx area, called the shooting "outrageous" and said it was clear that excessive force was used. Francisco Gonzalez, president of the Bronx Puerto Rican Day Parade, said Bronx citizens lodged numerous complaints each month, claiming they were stopped and frisked without cause. Two-thirds of those complaints involved SCU officers. Gonzalez said, "['P]eople are being stopped for no reason, thrown against a fence and searched. Their cars are stopped without probable cause. Sometimes there's vulgar language to people who are just minding their

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221. See id.
222. See Cooper, Giuliani, supra note 214, at B4.
224. See id.
225. See id. When the body was recovered, investigators found Diallo had only a beeper and wallet on his person. See id.
226. See id.
227. See id.
229. See id.
business. What some of the officers are doing is just creating an atmosphere of fear."\[230\] Hence, the Diallo incident was connected to the NYPD's aggressive stop and frisk practices.

In his first reaction to the Diallo slaying, Mayor Giuliani urged people to withhold judgment.\[231\] He said, "'We've had terrible mistakes in this city when people have reacted to rumors and intuitions and feelings. . . . Let's let the situation run its course and then let's react to the facts.'"\[232\] A reporter from the New York Times captured Giuliani's reaction best:

> With every passing day, Mr. Giuliani struggles to bring a calmer perspective to the tragedy, to convey convincingly the pain he says he feels over this loss of life and compassion for the victim's family. Several times he has imparted heartfelt thoughts, then felt the need to defensively recite statistics showing that fatal police shootings are less frequent in New York than in other large cities. His recitation of statistics seems to linger longer than his words of sympathy.\[233\]

Giuliani's failure to convincingly convey remorse for the Diallo incident made the Mayor's response an issue in its own right.

The attitude toward Giuliani became hostile as he continually refused to meet with black community leaders. About three weeks after the fatal shooting, Giuliani and Police Commissioner Safir attended a religious ceremony at the invitation of a coalition of African immigrant groups.\[234\] However, the Guinean Association of America, the United African Congress, and the Reverend Al Sharpton all distanced themselves from the event because they planned to continue protests against police brutality.\[235\] Major black leaders were not the only ones who missed the event; Diallo's family and close friends also boycotted.\[236\] Responding to their boycott, Giuliani said he attended the event out of respect and said, "Had I not gone, all the race baiters would have said the Mayor is snubbing the event. . . . I have gone through this game with the race baiters for too long to fall prey to it."\[237\]

\[230\]. See id.
\[231\]. See Cooper, Officers, supra note 220, at A1.
\[232\]. See id.
\[233\]. See id.
\[236\]. See id.
\[237\]. See id.
Approximately two months after the event, new police statistics were released "showing the rate of violent crime creeping up."\textsuperscript{238} Giuliani suggested that "the trend might be the result of a less active police force distracted by the uproar over Amadou Diallo."\textsuperscript{239} Police Commissioner Safir added, "I can only speculate to the fact that the individuals in Street Crime are concerned about taking enforcement action for being criticized."\textsuperscript{240} After the shooting, the Mayor and the Commissioner sent the message that the "whole atmosphere" after the Diallo shooting might have affected police officers' ability to do their jobs.\textsuperscript{241} They also suggested that protesters and the media coverage after the Diallo shooting could sap officers' confidence, dangerously distracting them from their jobs. Minority officers disagreed, saying, "We've been telling the commissioner for years that Street Crimes has been just searching people at will, all in minority neighborhoods. The reason the arrests are going down is that all of a sudden, they have to play by the same rules as everybody else. The Constitution."\textsuperscript{242}

The Diallo incident solidified the second stage of Terry's seesaw effect in New York. Police brutality was blamed on the NYPD's race-based enforcement practices. There was a gathering public consensus against race-based policing that reversed implicit support for race-based policing during the first stage of Terry's seesaw effect in New York. Furthermore, Giuliani's response to criticism of the Diallo incident prefigured the third stage of Terry's seesaw effect: He argued criticism of the police would lead to underenforcement of laws.

\textbf{B. The Media Switches Sides}

The second stage in Terry's seesaw effect in New York was reached when it became clear the popular consensus now rejected race-based policing. A \textit{New York Times} poll following the shooting of Amadou Diallo showed minorities in New York were sharply critical of the Mayor's office and his police department.\textsuperscript{243} The survey found three quarters of the black population and half the Hispanic population disapproved of the way Giuliani was doing his job.\textsuperscript{244}

\begin{itemize}
\item \textsuperscript{238} See David M. Herszenhorn, \textit{The Diallo Shooting: The Statistics; Arrests Drop and Shootings Rise as the Police, Giuliani Says, Are Distracted}, \textit{N.Y. Times}, Mar. 29, 1999, at B3 [hereinafter Herszenhorn, \textit{Diallo Shooting}].
\item \textsuperscript{239} See id.
\item \textsuperscript{240} See id.
\item \textsuperscript{242} See Herszenhorn, \textit{Diallo Shooting}, supra note 238, at B3.
\item \textsuperscript{244} See id. Whites answering the same question approved of Giuliani by 62%. \textit{Id.}.
\end{itemize}
Forty-five percent of Hispanics found the city was safer in 1999 than it had been four years earlier, while 47% of blacks found the city was about the same.\textsuperscript{245} Forty-seven percent of all New Yorkers agreed that the policies of the Giuliani administration had caused an increase in police brutality.\textsuperscript{246} Most blacks and Hispanics felt that New York City police were doing a fair or poor job.\textsuperscript{247} In addition, 70% of all those polled said "the police often engage[] in brutality against blacks."\textsuperscript{248}

A similar \textit{Daily News} poll showed that Giuliani’s popularity plummeted after the Diallo shooting.\textsuperscript{249} When asked about his low figures, Giuliani responded, "‘The complexity of people's opinions are very, very hard to measure and polling is an inexact science.’"\textsuperscript{250} The NYPD was experiencing a high amount of racial tension at the time leading up to the Parade. In addition to the Louima and Diallo incidents, several of the department’s own officers attacked the NYPD just one year before the Parade assaults.\textsuperscript{251} The Latino Officers Association sought an injunction in federal court to allow them to march in uniform during the 1999 Puerto Rican Day Parade.\textsuperscript{252} The president of the Latino Officers Association, Anthony Miranda, said, "‘It's unfortunate that the NYPD continually engenders a policy of retaliation against our organization for standing against discrimination, civil rights violations and police misconduct by high-ranking members of the department.’"\textsuperscript{253}

The final straw in the unraveling of Mayor Giuliani’s ability to convince people to support aggressive policing occurred during his aborted senatorial campaign. Hillary Clinton exploited the popular shift against the NYPD, contending that "the Louima and Diallo cases were not just ‘horrific’, but symptomatic of problems in the city’s overall approach to policing.”\textsuperscript{254}

\textsuperscript{245} See id. 63% of whites felt it was more safe in 1999. \textit{Id.}
\textsuperscript{246} See id.
\textsuperscript{247} See id.
\textsuperscript{248} See id.
\textsuperscript{249} See Maureen Fan, \textit{Poll Lows Hard to Figure- Rudy}, \textit{DAILY NEWS} (New York), Mar. 29, 1999, at 52.
\textsuperscript{250} See id.
\textsuperscript{252} See id.
\textsuperscript{253} See id.
\textsuperscript{254} Bob Herbert, \textit{In America; A Delicate Balance}, \textit{N.Y. TIMES}, Mar. 9, 2000, at A29; see also Joel Siegel, \textit{I Would Help Unite Cops, People of Color}, \textit{DAILY NEWS} (New York), Mar. 4, 2000, at 12. Hillary Clinton also remarked: "We need to take steps to... create a climate in which that sort of incident doesn’t occur. I have looked all over this country and I have worked on these issues for a very long time, and there are cities where the crime rate has gone down and where relations between people of color and the police have improved at the same time." \textit{Id.}
Clinton’s attacks made the NYPD’s practices an embarrassment to their greatest ally, and may have led officers to avoid any potential racial controversies.

After the popular discourse shifted against racial profiling, the NYPD took a hands-off approach to racial minority events. Sources have claimed enforcement was much stricter at parades in which the majority of participants were white, where “you can’t sip a beer in the doorway of a bar,” as opposed to racial minority parades, where “you can smoke a joint on the street and they won’t touch you because the politicians are afraid of a backlash.” Veteran officers who worked the Puerto Rican Day Parade blamed department policies for the violence that ensued. The officers said the Puerto Rican Day Parade was treated with a softer touch than other events — even those less populated — to prevent a predominantly white police force from provoking a race riot. Some suggest that police are “told to treat the Puerto Rican Day Parade and West Indian American Day Carnival Parade with kid gloves while they’ve cracked down on the St. Patrick’s Day Parade.” Some Officers claim that “there is an unspoken double standard in patrolling the National Puerto Rican Day Parade — a practice of soft enforcement that may have enabled the sexual mayhem in Central Park.”

VI. Third Stage of Terry’s Seesaw Effect in New York: The Discourse Shift Encourages the NYPD to Depolice Racial Minorities

[L]aw is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings through the medium of those ideas.

Cultural context matters because it is always the precursor to the changes in enforcement practices that reflect changes in how particular identity groups are viewed.

There is substantial evidence that police officers refused to exercise their Terry powers while women were harassed and physically assaulted by groups

255. See Alice McQuillan, Cops Hurt By Lack of Force, DAILY NEWS (New York), June 14, 2000, at 3.

256. Alice McQuillan et al., ‘Cops Just Stayed There’: Witnesses Say Police Didn’t Stop Assaults, DAILY NEWS (New York), June 14, 2000, at 3.

257. Id.


260. AMSTERDAM & BRUNER, supra note 2, at 6 (denying anyone could view law from above).
of men following the Parade. For instance, a man running laps around Central Park stated that on three different occasions he alerted police officers that groups of men had sprayed water on women's shirts and made lewd comments. The jogger stated police never intervened. A woman who was physically stripped and groped stated that police officers ignored her request for assistance. The mother of a teenaged victim claims police officers responded to her daughter's cries for help by merely pointing toward a nearby ambulance.

Officers have told reporters they refused to act at the Parade to avoid political controversy. Essentially, the officers claimed they were suffering from "motivational distress." As one officer put it, "'[Y]ou're never going to get in trouble by not doing anything.'" The thinking was rooted in conflict avoidance: "'Are you the one who is going to precipitate a riot? The political fallout would be a career-ender. You'd be doing midnights in the Bronx.'" Perhaps then, the police officers' non-response to post-Parade assaults was simply a matter of individuals seeking to "keep their heads low."

In fact, police officers' claims of "motivational distress" can be situated within the recent racial criticisms of the Giuliani administration. One officer stated the NYPD failed to respond to the violence at the Parade because of the racial controversy over the police slayings of racial minorities. The same officer stated that police decisions during the Parade were affected by tensions between the NYPD and racial minority communities. Police officers had recently been tried on charges in the slaying of Diallo. Additionally, Puerto Ricans have been "African Americanized" in New York City, so police action

261. Barstow & Chivers, supra note 19, at A1 (describing incidents of sexual assault following the Parade).

262. See id.


264. See id.


266. Id. (quoting Deputy Chief Thomas P. Fahey).

267. See id. (quoting Deputy Chief Thomas P. Fahey).

268. See id. (quoting Deputy Chief Thomas P. Fahey). The same officer stated there was a Department policy of backing off during demonstrations to avoid controversy with racial minority communities. Id.

269. Four NYPD officers were tried but acquitted of the New York City slaying of unarmed African immigrant Amadou Diallo by an Albany, New York jury. See generally Susan Sachs, U.S. Decides Not to Prosecute 4 Officers Who Killed Diallo, N.Y. TIMES, Feb. 1, 2001, at B1 (discussing charges remaining against the officers).

270. See Grosfoguel & Georas, supra note 32 (comparing treatment of Cubans, Dominicans and Puerto Ricans in New York City).
against Puerto Ricans would be associated with prior police actions against African Americans. As previously noted, Giuliani had consciously tied his political future to the performance of the police department.\textsuperscript{271} He had run for Mayor on a platform of "cleaning up" the city's "crime problem,"\textsuperscript{272} while implicitly racializing the crime problem.\textsuperscript{273} Thus, the officers' explicit statements about their need to "lay off" racial minorities following the Parade—in other words, to not exercise their Terry powers—are grounded in that political context.\textsuperscript{274}

The conclusion we should draw from Terry's seesaw effect in New York is that granting police officers excessive discretion has a high cost. Officers will be tempted to take advantage of a cultural context supporting crime fighting by overenforcing the doctrine against racial minorities. Such overenforcement can itself lead to popular controversy over racial profiling and a shift to popular criticism of the police. In response, officers will be tempted to swing to the other extreme and underenforce the doctrine in racial minority communities. That is the "seesaw effect" we saw occur in New York.

\textbf{VII. Conclusion}

Cultural context matters.

I concluded my Article on the Drug War's deleterious effects on Fourth Amendment law by declaring, "It is past time to start a 'Fourth Amendment war.'"\textsuperscript{275} This Article's explication of the Terry doctrine's ability to lead to not only extreme racial profiling, but also depolicing, makes the urgency of that call all the more apparent. In answering the call, however, we must not fail to consider the ways that cultural context matters in the translation of doctrines into particular enforcement practices. Our re-articulation of the Fourth Amendment must include a re-articulation of cultural expectations. Consider the words of journalist Clarence Page:

\begin{quotation}
\textsuperscript{272} See, e.g., Tom Robbins, \textit{The Con and the Mayor}, VILLAGE VOICE, Aug. 1, 2000, at 45 (noting Giuliani's continued role in the Republican Party as a voice for its "get-tough-on-crime" policies).
\textsuperscript{273} See generally Cotts, supra note 20, at 32 (blaming Giuliani's policies for increased racial profiling).
\textsuperscript{274} See Jill Smolowe et al., \textit{Unanswered Cries: Victims of a Central Park Sexual "Wilding" Say Police Ignored Their Pleas For Help}, PEOPLE MAGAZINE, July 3, 2000, at 63 ("'These cops were told in no uncertain terms, 'Hands off.' The last thing the city and the politicians can afford is a picture in the papers . . . .'").
\textsuperscript{275} See Cooper, \textit{The Un-Balanced Fourth Amendment}, supra note 2, at 895 (concluding scholars must re-articulate meaning Fourth Amendment doctrine).
\end{quotation}
Police officers have a tough job, but it is not made any easier by a populace that is frightened or resentful of them. To do their jobs better, police should have more selections on their crime-fighting menus than a) excessive force or b) complete indifference.\textsuperscript{276}

That call for policing that simultaneously avoids both racial profiling and depolicing is the type of re-articulation of what constitutes appropriate popular expectations of officers that needs to be encouraged.

\textsuperscript{276} Clarence Page, \textit{Critics of Cops Still Need the Cops}, CHI. TRIB., June 18, 2000, at 17.