Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory

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UNDERSTANDING “DEPOLICING”: SYMBOISIS THEORY AND CRITICAL CULTURAL THEORY

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Doctrinal analyses help us understand what law does. Identity theory\(^1\) helps us understand why law operates in certain ways. Cultural studies\(^2\) can help us understand that where law operates is crucial to both how it operates, and on whom.

Nancy Ehrenreich’s Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems\(^3\) is especially valuable because her symbiosis theory expands identity theory. Ehrenreich turns our attention to the subjectivities\(^4\) of those who are partly subordinated but mostly privileged—those

\(^1\) I define identity theory broadly as including at least Critical Race Theory (“CRT”), LatCrit theory, AsianCrit theory, Feminist theory and Queer theory. See, e.g., CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela Harris eds., 2002) (combining CRT, LatCrit, AsianCrit, Feminist and Queer theories as CRT). During a Cultural Studies and Identity Theory panel at the 2002 Law, Culture and the Humanities conference, Neil Gotanda and Katherine Franke reminded me that practitioners of CRT have not always been welcoming of Feminist theory and Queer theory. I simply argue that as a matter of intellectual trajectory, CRT, especially intersectionality and multidimensionality theories, has begun to merge with feminist theory and Queer theory. See generally Francisco Valdes, Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors, 75 DENY. U. L. REV. 1409 (1998) (linking critical race theory to Queer theory and other methodologies).


\(^3\) See Nancy Ehrenreich, Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251 (2002) (expanding intersectionality theory to include analysis of mutual reinforcement of subordinating systems; object of this Symposium).

\(^4\) Subjectivity is the perception of being a distinct and coherent actor with a specific place in society. See KEY CONCEPTS IN CULTURAL THEORY 388-90 (Andrew Edgar & Peter Sedgwick eds., 1999) (defining “subjectivity”). See, e.g., Luis Althusser, Ideology Interpellates Individuals as Subjects, in IDENTITY: A READER 31 (Paul du Gay, Jessica Evans & Peter Redman eds., 2000)
who accept their own oppression in return for the “compensation” of being able to use the law to subordinate others. Nonetheless, symbiosis theory cannot fully explain why a practice develops in some places but not others even though the relevant identities are the same. To understand the difference context makes, we must use cultural studies to analyze how discourses were constructed and translated into practices in particular contexts. We need a “critical cultural theory” methodology that synthesizes doctrinal, identity theory, and cultural studies tools.

By a critical cultural theory methodology, I mean that we should start with doctrinal analysis that reveals implicit assumptions about identity. We should (contending ideology “hails” individuals as “subjects” with particular place in social order); Jacques Lacan, The Mirror Stage, in IDENTITY: A READER, supra, at 44 (contending “meconnaissances” (misrecognitions) constitute identity); DAVID CAUDILL, LACAN AND LAW 73 (1997) (utilizing Lacan, critiquing Schlag’s conception of legal subjectivity).

5 See Ehrenreich, supra note 3, at 291 (defining “compensatory subordination”).

6 For example, police refusal to proactively investigate crime in racial minority communities—“depolicing”—has developed in some cities, but not others. See, e.g., Kery Murakami, Racial Profiling: A Fine Line, SEATTLE POST-INTTELLIGENCER, April 29, 2002, at A1 (describing depolicing in Seattle); Steve Miller, Cincinnati in Grip of a Crime Wave Months After Riots: Profiling Fears Cited as Shootings Rise, WASH. TIMES, July 18, 2001, at A6 (describing depolicing in Cincinnati). See also Frank Rudy Cooper, Terry’s See-Saw Effect: Identity, Doctrine and Cultural Context, February 18, 2003 (unpublished manuscript, on file with author) (arguing that in certain cultural contexts, Terry doctrine’s grant of excessive discretion leads to x-treme racial profiling, then racial controversy over policing, then depolicing; applying theory to NYPD refusal to intervene in sexual assaults at 2000 New York City Puerto Rican Day Parade). I refer to a “see-saw” effect rather than a “seesaw” effect to emphasize the dialectical nature of the swing between racial profiling and depolicing. I distinguish the racial profiling deemed typical in big cities from its most egregious examples by calling the latter “x-treme racial profiling.”

7 “Discourses” are stories describing the meaning of social events. See KEY CONCEPTS IN CULTURAL THEORY, supra note 4, at 117 (defining “discourse”).

then use identity theories to show how enforcement practices vary when applied by particular social groups and/or to particular social groups. We should then use cultural studies to show how a particular context led to a particular social consensus about the appropriateness of a particular enforcement practice. Those analyses should be organized by considering the construction ("encoding") and reception ("decoding") of the discourses about the relationship between law and identity that were in play in a specific cultural context.9

In Part I of this essay I define and analyze the practice of "depolicing"—the withdrawal of proactive crime investigation in racial minority neighborhoods.10

In Part II, I review insights gained from Nancy Ehrenreich's symbiosis theory of identity and apply them to depolicing. In Part III, I argue that we need to join cultural studies analysis to identity theory in order to form a more comprehensive "critical cultural theory" methodology. I then briefly apply the methodology to the practice of depolicing. In Part IV, I conclude.

I. WHAT IS "DEPOLICING?"

Police officers have long used their discretion to allow individual suspects to go free.11 Qualitative research suggests officers use that discretion when they identify with the suspect.12 Yet officers' senses of self identity13 and attributions

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9 See Cooper, supra note 2, at 858 (describing encoding/decoding method). The encoding/decoding framework identifies “three vectors of ‘encoding’ (production), ‘meaningful discourse’ (text) and ‘decoding’ (reception) . . . .” Introduction, in THE MEDIA STUDIES READER (Paul Marris & Sue Thornham eds., 2d ed. 2000) (identifying organizational principles for anthology applying cultural studies to news, advertising and popular entertainment).

10 See, e.g., Murakami, supra note 6, at A1 (describing depolicing).

11 See Trish Oberweis & Michael Musheno, Policing Identities: Cop Identity and the Communicative Aspects of Policing, in BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 206 (David Theo Goldberg, Michael Musheno & Lisa Bower eds., 2001) (describing police officer’s and prosecutor’s joint decision to discard evidence of fireman’s cocaine use). For a fascinating analysis of how White officers bonded with White serial killer Jeffrey Dahmer, see Peter Kwan, Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Jeffrey Dahmer and the Cosynthesis of Categories, 48 HASTINGS L.J. 1257, 1261-92 (1997) (critiquing Dahmer's investigation; posing "cosynthesis" theory as an alternative to intersectionality theory); discussion infra notes 89-95 and accompanying text.

12 Oberweis & Musheno, supra note 11, at 216.

13 "Self identity" is "how we define and perceive ourselves." Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. REV. 1259, 1261 n.2 (2000) (arguing necessity of "identity negotiation" between self identity and workplace norms can constitute "conduct discrimination" that should be remediable under employment discrimination law). We can have a self-identity distinct from the identity suggested for us by our culture because we each have a semi-independent "voice" inside our heads. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT xvi (2d ed. 1993) (analogizing "voice" to "core of the self"); identifying a model of personal development that is based on relationships rather than autonomous agency and more prevalent among women). A lively debate is developing among cultural studies, poststructuralist and psychoanalytic theorists as to whether we should refer to a coherent "identity" or "identifications." See, e.g., Stuart Hall, Who Needs Identity?, in IDENTITY: A READER, supra note 4, at 15-16 (summarizing debate).
of identity to others'\textsuperscript{14} can also lead them to feel divided from particular types of suspects.\textsuperscript{15} We usually associate that sense of division with the practice of racial profiling—the systematic over-policing of whole classes of suspects based on their racial status.\textsuperscript{16} Recently, we have seen police officers’ lack of identification with certain racial groups manifest itself in systematic under-policing of those communities.\textsuperscript{17}

As depolicing has yet to be analyzed in law reviews, I will define the practice’s key features and functions. I explain depolicing as a product of \textit{Terry v. Ohio}\textsuperscript{18} doctrine’s interaction with certain cultural contexts. I then describe

\begin{itemize}
  \item \textsuperscript{14} Carbado & Gulati define “attributal identity” as “how others define and perceive us.” Carbado & Gulati, \textit{supra} note 13, at 1261, n.2. Attributed identities are based on prevailing assumptions about the implications of certain identity characteristics, such as gender, race, sex orientation, class, religion, and so on. \textit{Id.} at 1268-69 (analyzing how a Korean-American might be stereotyped in a large law firm). See also Cooper, \textit{supra} note 2, at 874-75 & nn.159-60 (describing Black men’s attributed identities).
  \item While I am a proponent of a strong notion of ideological interpellation and subject misrecognition, I also believe there is “something left over” after the self has been acculturated that is capable of at least choosing amongst a set of options. I am grateful to David Caudill for reminding me of the need to acknowledge the capability for individual agency. See, e.g., \textit{CAUDILL, supra} note 4, at 81 (“[O]ur complex state of affairs provides the basis for some genuine, as opposed to illusory, choices or selections as to whom or to what we will be subject.”). Listening to Kendall Thomas has assisted my understanding of the dynamic tension between “tendencies” (instead of “social construction”) and “the something left over” (instead of “agency”).\textsuperscript{15}
  \item Oberweis & Musheno, \textit{supra} note 11, at 216.

  \item See Murakami, \textit{supra} note 6, at A1 (describing depolicing in Seattle); Miller, \textit{supra} note 6, at A6 (describing depolicing in Cincinnati).
  \item 392 U.S. 1 (1968) (creating intermediate seizure (“stop”) and search (“frisk”) category receiving “reasonable suspicion” test rather than more stringent “probable cause” test). In \textit{Terry}, a White officer’s attention is “drawn to” two Black men when he observes each of the men walk down a block, peer into a particular store window; keep walking, turn, peer into the same store window, return to, and confer with the other man. \textit{See id.} at 6 (characterizing facts). Cf. Carbado & Gulati, \textit{supra} note 13, at 1283-85 (noting racial minority professor’s palatability versus truth dilemma in discussing hidden racial elements of cases such as \textit{Terry}). The officer orders the Black men and a White man they have joined to identify themselves, then pats the outside of each man’s outer clothing in search of weapons. \textit{Terry}, 392 U.S. at 7 (characterizing facts).
\end{itemize}
depolicing’s avoidance function. Finally, I show how depolicing functions as a threat.

A. Depolicing as Stage in Terry’s “See-Saw Effect”

As a general matter, depolicing is a response to popular controversy over police tactics toward racial minorities. As the Washington Times puts it, “[s]hell-shocked or resentful, police overlook a lot of suspicious behavior. They stop trying to prevent low-level crime and simply react to 911 calls.”19 When officers are depolicing, they only investigate crimes that are at the “floor” of their Terry discretion, those incidents officers are legally required to investigate.20 When officers are depolicing, they do not investigate potential crimes falling between the “floor” and “ceiling” of Terry discretion, those apparently innocent activities that officers may investigate.21 When officers are depolicing, their resentment of public criticism causes them to ignore potential crimes between the “floor” and “ceiling” of their Terry discretion when they are in racial minority neighborhoods.
Elsewhere, I have described depolicing as the end product of a phenomenon I call “Terry’s see-saw effect.”\(^{22}\) Terry doctrine allows police officers to “stop”\(^ {23}\) people on the street for questioning and pat them down for weapons, i.e., “frisk”\(^ {24}\) them, when the officer has a “specific and articulable basis” for “reasonable suspicion” that the suspect is in the process of committing a crime.\(^ {25}\) Mere creation of a seizure and search doctrine based on reasonable suspicion, rather than the traditional and more stringent probable cause requirement, dramatically increases the powers of officers.\(^ {26}\)

Moreover, the Whren v. United States\(^ {27}\) “pretext” doctrine holds that an officer’s original motive for a stop may be racist as long as the stop is justifiable on other grounds.\(^ {28}\) The Whren Court considers, but rejects, the argument that the Fourth Amendment should be expected to prevent racist policing.\(^ {29}\) As a

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\(^{22}\) See generally Cooper, supra note 6 (defining Terry’s see-saw effect).

\(^{23}\) A stop is a restraint of a suspect’s freedom (“seizure”), but to a degree less than an arrest, briefly, and solely for investigative purposes. See Terry, 392 U.S. at 21-23 (identifying justification for stop).

\(^{24}\) A frisk entails touching a person to detect weapons, but solely for investigative purposes, and to a degree falling short of a “full blown” search. Id. at 24-25 (justifying addition of officer’s protective search to “stop” power).

\(^{25}\) Id. at 21-22 (describing test for stop). The Terry power has since been extended beyond crimes in progress.

\(^{26}\) In an earlier article, I critiqued the Terry Court’s rejection of the earlier requirement that criminal prosecutions be judged for probable cause and the subsequent weakening of limits on officer discretion. See Cooper, supra note 2, at 884-85 & nn.222-29. See Camara, 387 U.S. at 535 (creating the “balancing test” for administrative searches that the Terry decision later extended to criminal seizures and searches).

\(^{27}\) 517 U.S. 806 (1996) (allowing seizures and searches used as pretext for race-based seizure or search). In Whren, officers saw Black youths in an expensive car that had been waiting at a stop sign for an “unusually” long time. See id. at 808 (characterizing facts). The officers made a U-turn and headed back in the direction of the Black youths, at which point the Black youths made a turn without signaling and sped off at an “unreasonable” speed. See id. (characterizing facts). The Court holds an officer’s subjective racist basis for seizing a person is irrelevant whenever the officer also has objective probable cause to make a traffic stop of the individual. See id. at 813 (declaring holding). The Court was unmoved by the fact that refusing to allow evidence of a traffic stop’s subjective basis allows officers to use traffic stops as a pretext for investigations for which neither probable cause nor reasonable suspicion exists. See id. at 810 (describing, later rejecting civil liberties argument). Only a search or seizure conducted by “extraordinary means” would be tested for overall reasonableness despite objective probable cause. Whren, 517 U.S. at 818 (denying extraordinariness of traffic stop violating local police regulations). The only remedy for racial profiling is futile pursuit of an Equal Protection claim. Compare id. at 814 (providing only Equal Protection remedy) with Johnson, supra note 16, at 901 (“Equal Protection violations, however, are notoriously difficult to prove.”).

\(^{28}\) See Whren, 517 U.S. at 809-10 (upholding seemingly race-based seizure and search by officers administratively prohibited from making original traffic stop).

\(^{29}\) See id. at 810-15 (considering argument for limiting Terry discretion when applied to routine traffic stops but providing only Equal Protection remedy). But see Thompson, supra note 16, at 961, n.17 (declaring Court’s racial profiling remedy “virtually impossible”); Davis, supra note 16, at 435-38 (finding remedy quixotic); Sklansky, supra note 16, at 323-24 (contending Court’s racial profiling remedy misdirected).

The Terry Court had already made a similar move, contending that it simply could not prevent officers from harassing racial minorities. See Terry, 392 U.S. at 11 (rejecting civil libertarians’
consequence, officers do not fear repercussions for using their *Terry* discretion to racially profile.

Yet doctrine can only create the potential for x-treme racial profiling. In certain cultural contexts, police officers will activate that potential by utilizing the *Terry* doctrine’s excessive discretion to institute an especially pervasive regime of racial profiling. Some officers may already be racist, but it is popular support for reducing crime by any means necessary that allows widespread racial profiling. The emergence of a popular consensus implicitly supporting officers’ use of their *Terry* discretion for x-treme racial profiling is the first stage of *Terry’s* see-saw effect.

In turn, incidents of racial profiling can themselves generate calls for police reform. A dialectical shift can occur whereby the media first support racial profiling as a means of crime reduction, then reject the practice as racist and brutal. In those cases, popular culture can become dominated by criticism of police tactics toward racial minorities. In certain cultural contexts, therefore, the *Terry* doctrine’s initial encouragement of x-treme racial profiling can itself lead to a popular controversy over police tactics. That popular controversy is the second stage of *Terry’s* see-saw effect.

When x-treme racial profiling leads to popular controversy over police tactics, officers will have an incentive to alleviate public pressure for reform. Officers may choose to “de-police” a racial minority community by refusing to proactively investigate potential crimes. Thus, depolicing should be understood as the third stage of *Terry’s* see-saw effect, whereby x-treme racial profiling and popular controversy over police tactics culminate in depolicing of racial minority communities.

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Arguments for maintaining limits on police officers); *id.* at 13-14 & n.9 (calling racial minority police harassment complaints “inevitable” and undeterable).


31 See *id.* at 458 & n.5 (describing public support for racial profiling as means of prosecuting drug war). See also Cooper, supra note 2, at 866-69 & nn. 102-22 (citing significance of media support to developing draconian policing policies).


33 This dialectical shift is evident in media coverage of NYPD tactics. The media first supported the NYPD’s “tough on crime” tactics. See, e.g., Graham Rayman, *Stats Show City’s Safer Than Most*, NEW YORK NEWSDAY, May 17, 1996, at A3 (lauding NYPD). After officers fought, handcuffed, beat, and then anally raped African immigrant Abner Louima, the media tripped over itself to support racial minority views of the NYPD as racist. See, e.g., Bob Herbert, *In America: Hear the Blue Wall Crack*, NY TIMES, Aug. 17, 1997, § 4, at 15 (“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.”).

34 See, e.g., Murakami, supra note 6, at A1 (describing how Seattle depolicing was response to racial controversy over police tactics).
B. Depolicing’s Avoidance Function

Often depolicing practices manifest themselves in forms of neighborhood avoidance. An example of depolicing’s avoidance function is provided by the Seattle Police Department (“SPD”). Popular controversy over SPD methods began with violent protests of the first Rodney King verdicts and continued in response to shootings of Blacks and Latinos and ticketing of Asian youths for jaywalking. After receiving substantial evidence of racial profiling, the Seattle City Council debated a measure to study racial profiling that included tracking the actions of individual officers. In response, the SPD’s union suggested that officers might become less willing to make traffic stops. Officer Donnie Lowe describes how officers avoid the space between the “ceiling” and “floor” of Terry discretion:

“If somebody flies past us right now at 60 miles an hour, or if a radio call says a car with this particular license plate number is stolen, then you have to stop the car,” Lowe said.
But if a car has a broken taillight, or if someone doesn’t signal before making a right turn, it’s a judgment call.

Lowe claims many SPD officers are avoiding the latter situation because they are “worried about getting into trouble.” Yet SPD officers’ crime avoidance is targeted; it is far more likely to occur in racial minority neighborhoods.

Cincinnati provides a more egregious example of depolicing’s avoidance function. Black Cincinnatians rioted in response to the shooting of unarmed petty suspect Timothy Thomas, the fifteenth police shooting of a Black male in five years, which was also the fourth in six months. After the riots, Cincinnati’s political leaders required officers to identify the race of Terry-stop suspects on a form. In response, Cincinnati Police Department (“CPD”) officers developed an explicit policy of avoiding most crime in Black neighborhoods.

In a written statement to union members, the President of the CPD Fraternal Order of Police (“FOP”) essentially calls for police officers to use their Terry discretion for the purpose of avoiding crime:

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36 See Murakami, supra note 6, at A1 (reviewing controversy over racial profiling).
37 See id. (describing incentive to depolice).
38 See discussion supra notes 20-21 and accompanying text.
39 Murakami, supra note 6, at A1 (quoting and paraphrasing Lowe).
40 Id. (paraphrasing Lowe).
41 See Newswatch: Pacific Northwest, SEATTLE TIMES, June 20, 2002, at B3 (reporting Seattle Mayor’s order to cease depolicing).
44 See Miller, supra note 6, at A6 (quoting police union president’s letter urging depolice).
If you want to make 20 traffic stops a shift and chase every dope dealer you see, you go right ahead. Just remember that if something goes wrong, or you make the slightest mistake in that split second, it could result in having your worst nightmare come true for you and your family, and City Hall will sell you out.45

The depolicing in Cincinnati is not merely a reaction to racial profiling’s creation of a popular controversy over police tactics, but also a reversal of the tendency to use Terry discretion for the purpose of racial profiling. Whereas police officers often use their Terry discretion to focus on racial minorities,46 Cincinnati depolicing presents Terry discretion used to avoid racial minorities.

Note as well that Terry discretion is actually the enemy in the CPD-FOP President’s argument for depolicing. In the Court’s description of Terry doctrine, the necessity of split-second decision-making justifies granting police officers wide discretion to interfere with citizens.47 In the CPD-FOP President’s call for depolicing, split-second decision-making is the source of “mistakes” (such as murdering an unarmed man?).48 The political result of a mistake is a social “nightmare” for the officer. In that sense, exercising Terry discretion to make traffic stops or chase petty criminals results in popular criticism. Depolicing’s first function, then, is to avoid social sanctions for racist policing by avoiding any exercise of Terry discretion in racial minority communities.

C. Depolicing’s Threat Function

Depolicing’s second function is to create an implicit threat that if racial minorities criticize the police, officers will allow crime to go unchecked in racial minority communities. Recall that the Cincinnati riots were a response to extreme racial profiling.49 It was only after the riots generated a City Council requirement of explaining Terry stops that the CPD developed its policy of refusing to intervene in crimes in Black neighborhoods.50 The message was clear: criticize our policing and you will get no policing. Black Cincinnatians recognized the depolicing as an attempt to discipline critics of the police.51

A more dramatic example of depolicing as a threat is provided by the Rodney King riots. In Los Angeles, citizens rioted in response to a racial controversy over police tactics. After release of the videotape of the Los Angeles Police Department’s (“LAPD”) brutal beating of Rodney King, citizens expected

45 Id.
46 See Murakami, supra note 6, at A1 (describing depolicing in Seattle); Miller, supra note 6, at A6 (describing depolicing in Cincinnati); discussion supra note 16 and accompanying text.
47 Terry, 392 U.S. at 10 (accepting respondent’s argument that “in dealing with the rapidly unfolding . . . situations on city streets the police are in need of an escalating set of flexible responses”).
48 See Aldridge, supra note 42, at 47 (describing how CPD’s killing of unarmed petty suspect Timothy Thomas prompted riots).
49 See, e.g., id. at 47 (describing how riots were preceded by non-violent criticism of CPD tactics).
50 See Miller, supra note 6, at A6 (describing how depolicing was response to criticism of police).
51 See id. (describing Black criticism of CPD depolicing).
convictions of the officers.\textsuperscript{52} Black and Latino residents of Los Angeles had long accused the LAPD of racial profiling and police brutality.\textsuperscript{53} The Rodney King riots were a citizen response to a racial controversy over policing that went unaddressed.\textsuperscript{54}

The LAPD’s response to the Rodney King riots is telling. The LAPD chose to merely contain the riots within racial minority neighborhoods.\textsuperscript{55} They lined up a safe distance from the riots at points where rioters could have gained access to White neighborhoods.\textsuperscript{56} That left Blacks and Latinos to turn their anger on Koreatown, which the police knew was heavily armed.\textsuperscript{57} The implication was obvious: We will protect Whites, but not Blacks, Browns and Yellows. As a result, Black, Brown and Yellow neighborhoods were looted and burned, causing millions of dollars of damage, deaths and injuries.\textsuperscript{58} Depolicing of the Rodney King riots threatened critics with not only the allowance of crime, but also the allowance of deaths.

Based on the law enforcement practices in Seattle, Cincinnati, and Los Angeles, I argue we should conceive of depolicing as a police response to popular criticism of police tactics toward racial minorities. That response reveals the Terry doctrine’s see-saw effect of yielding the enforcement practices of first racial profiling and then depolicing. Further, we should see depolicing as having the functions of avoiding further racial controversy over police tactics and threatening critics of the police. How this new practice fits into ongoing identity subordination remains to be explained.


\textsuperscript{53} See \textit{COVERT ACTION INFORMATION BULLETIN, Uprising and Repression in L.A.}, in \textit{READING RODNEY KING, READING URBAN UPRISING}, supra note 52, at 142, 148 (interviewing Mike Davis describing prior incidents).

\textsuperscript{54} Id.


\textsuperscript{56} See id. (discussing LAPD response to Rodney King riots).

\textsuperscript{57} See id. (arguing LAPD consciously funneled rioters toward heavily armed Koreatown as means of revenge against Black and Latino critics). Note as well that by allowing mostly racial minority men to sexually assault women, depolicing of the 2000 New York City Parade ended up pitting anti-sexists (pro-policing) against anti-racists (anti-policing). See discussion infra note 88 and accompanying text. See also G. Kristian Miccio, \textit{Male Violence—State Silence}, 51 GENDER, RACE & JUST. 339, 341 (2002) (“One hot Sunday during the summer of 2000, Central Park was transformed into a gender battleground.”).

\textsuperscript{58} The economically depressed state of those neighborhoods was at least partially a result of pervasive “redlining” of racial minority neighborhoods by banks. See Clarence A. Cooper and Frank R. Cooper, \textit{Where the Rubber Meets the Road: CRA’s Impact on Distressed Communities}, in \textit{PUBLIC POLICIES FOR DISTRESSED COMMUNITIES REVISED} 159, 160 (F. Stevens Redburn & Terry F. Buss eds., 2002) (describing pervasive racial discrimination in bank lending). Koreans had only been able to obtain lending through intra-community financing, but their greater financial success had created tension with Blacks and Latinos. See Cho, supra note 55, at 200 (describing Koreans’ means of financing stores).
II. HOW SYMBIOSIS THEORY HELPS US UNDERSTAND DEPOLICING

My doctrinal analysis in the preceding part of this essay has helped us understand what law does. Specifically, the Terry doctrine leads to the law enforcement practices of racial profiling and depolicing. To understand why the doctrine works in that way, we need to utilize identity theory. The basic questions are, who would desire such practices, and why?

A. Integrating Symbiosis Theory and Intersectionality Theory

Nancy Ehrenreich’s symbiosis theory helps us understand why the perpetrators of racial profiling and depolicing feel they gain from those practices. Ehrenreich expands upon intersectionality theory, which recognizes the uniqueness of the self-identity formed at the crossroads of multiple categories of identity.\(^{59}\) Being both Black and female creates a different sense of self-identity than being either Black and male or White and female.

For Ehrenreich, intersectionality theory’s insight that supposedly coherent subordinated identity groups are fractured by their overlap with other subordinated identity groups creates both perils and promise.\(^{60}\) The peril is that identity theory will lead to factionalism.\(^{61}\) The promise is that symbiosis theory’s recognition of mechanisms of mutual support between subordinating systems will allow distinct identity groups to recognize the need to form effective coalitions.

Why might intersectionality theory itself create a peril of factionalism? Consider what Ehrenreich calls the “zero sum problem.” This is the apparent substantive conflict among the interests of different subgroups that seems to make it impossible “to simultaneously further the interests of all . . .”\(^{62}\) That peril is exacerbated by right-wing appropriation of identity theory as a weapon against reform.\(^{63}\) For example, in a sexual harassment case, the right-wing might


\(^{60}\) Ehrenreich, supra note 3, at 266.

\(^{61}\) See id. at 266-67 (defining problem).

\(^{62}\) Id. at 267.

\(^{63}\) See id. at 268. See generally JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA (1996) (describing how right-wing think tanks influence policy). Several scholars have analyzed the way right-wing think tanks, politicians and judges have constructed identity in ways that produce subordinating laws. For example, Emily Houh is analyzing right-wing appropriation of anti-essentialism theory in recent attacks on affirmative action in education. See Emily Houh, Antiesentialism and Affirmative Action, July 1, 2002 (unpublished manuscript on file with author) (arguing right-wing appropriation of identity theory has made it difficult to explain harms of prior racism and benefits of diverse classroom). Danielle Kie Hart is analyzing historical patterns in
claim one cannot value both working-class culture’s “down-home courtin’” style and a woman’s right to be free of a hostile work environment. As a result of that pitting of subordinated groups against one another, “[w]hat sifts into public consciousness . . . is the image of discrete and warring groups and the perception that such groups necessarily compete with each other for a finite amount of rights in a zero-sum universe.”

Ehrenreich unlocks the affirmative potential of identity theory by showing how mechanisms of mutual support between subordinating systems provide distinct identity groups with incentives to simultaneously combat all forms of oppression. In order to make that point, she distinguishes “pure” intersectionality from “hybrid” intersectionality. Pure intersectionality is when an individual overlaps with multiple subordinated categories of identity. Hybrid intersectionality is when an individual’s identity is “a combination of one (or more) dominant status with one (or more) subordinated status.” Hybrid intersectionality creates the peril of “compensatory subordination”—the “tendency of individuals who are subordinated along one axis [of identity] to compensate for that subordination by exerting the power they hold along another axis.” By concentrating on hybrid individuals we can demonstrate to those who might choose to see themselves as privileged that they actually reinforce their own subordination if they do not fight other forms of oppression.

For example, Ehrenreich identifies a mechanism of mutual support between subordinating systems that she terms “vulnerability.” Vulnerability is the way exercising “oppression along one axis actually makes possible [one’s own] oppression along another axis.” Vulnerability reinforces one’s own subordination because “[f]ear of losing one’s privilege along one axis can make one hesitant to challenge one’s subordination along another.”

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right-wing rhetoric about law and race. See Danielle Kie Hart, The Myths of Equality and The Rhetoric of Race, July 1, 2002 (unpublished manuscript on file with author) (arguing certain themes recur in right wing rhetoric on race and law since 1865).


66 Id. The maintenance of a “finite amount of rights” is precisely what right-wing rhetoric seeks. See generally Houh, supra note 63 (arguing right-wing appropriates antessentialism in order to empty rights discourse of its connection to reform); Hart, supra note 63 (arguing true goal of conservative race rhetoric has been maintenance of White privilege).

67 See Ehrenreich, supra note 3, at 289 (defining term).

68 Id. at 273.

69 Id. at 276.

70 Id.

71 Id. at 283.

72 Ehrenreich, supra note 3, at 290.
feels oppressed by the hierarchy at his job, exercising gender power may feel like compensation. Such behavior actually works against him:

Rather than exploding in rage at his supervisor, he takes out his anger on a female co-worker, or goes home and abuses his wife. By serving as a safety valve for the frustrations he feels due to his subordination along one axis, his high status position along another axis actually makes it less likely he will ever effectively resist that subordination. In addition, one could speculate that the traditional gender attitudes of such a man, and the behavior those attitudes prompt, might actually help to maintain his subordinated status at work, identifying him as "unprofessional," "redneck" or "low class." So, the working-class man’s exercise of “compensatory subordination” over women makes him more vulnerable to subordination by distracting him from the need to resist. Simultaneously, his exercise of compensatory subordination makes him more vulnerable by marking him as an appropriate object for class subordination. The promise of symbiosis theory, then, is that it will allow us to counter the right-wing’s divide-and-conquer tactic with the revelation of the ways distinct identity groups can benefit from joining forces.

B. Symbiotic Analysis of Depolicing

Applying symbiosis theory to depolicing helps us understand the practice. First, officers are engaging in a form of compensatory subordination. Even in major cities, the majority of “beat” police officers are working-class White

73 Cultural context matters in whether a working-class man’s harassment will be accepted as normal. A working-class man’s sexual harassment is expected at an oil refinery. See generally Nancy Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177 (1990) (discussing court’s acceptance of sexual harassment as normal behavior). Sexual harassment is not expected (today) in professional environments. Yet the United States Senate accepted a Supreme Court Justice’s sexual harassment when it was a Black-on-Black crime. See generally RACE-ING JUSTICE, EN-GENDERING POWER, supra note 64 (collecting essays critiquing confirmation of Clarence Thomas).

74 Ehrenreich, supra note 3, at 293.

75 Iris Marion Young provides a good example of the way the expectation of “professional” comportment can operate as a form of subordination. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 140 (1990) (posing hypothetical of working-class man being welcomed in upper-class boutique only until he speaks and reveals his “low-class” status).

76 The structural effects of “material Whiteness” mean realization of shared interests will come slower to some. See Sumi Cho, Understanding White Women’s Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions, 71 UMKC L. REV. 399, 406 (2002) (analyzing White women’s resistance to affirmative action plans that benefit them more than racial minorities). Nonetheless, a first step in overcoming such resistance is revealing the symbiosis and “cosynthesis” of forms of oppression. See Kwan, supra note 11, at 1263-92 (applying cosynthesis theory); Peter Kwan, The Metaphysics of Metaphors: Symbiosis and the Quest for Meaning, 71 UMKC L. REV. 325, 329 (2002) (comparing and contrasting cosynthesis, symbiosis theories); discussion infra notes 89-95 and accompanying text. Only then are we likely to convince people to “disclaim privilege.” See Chang & Culp, Jr., supra note 59, at 489 (identifying disclaiming privilege strategy).
males. Working-class White males tend to base their self-identities on conceiving of themselves as superior to men of color. The remaining minority of beat officers who are female or racial minority find their cop identity tends to squeeze out their other identities. Since all police officers have vast discretion to interfere in citizens’ lives, that “Blue” identity includes a psychological sense of privilege. Yet “Blue” identity can also include a sense of subordination since rank-and-file officers will be regarded as working-class rather than professional-class regardless of how much money they make. Accordingly, all beat officers, but especially the White males who constitute the majority, are “hybrids.”

The hybridity of cops’ identities explains why they racially profile and then depolice. Exercising power over people lower on the food chain by means of racial profiling allows cops to compensate for their denigrated working-class identities. When racial profiling yields a popular controversy over police tactics, hybridity helps explain officers’ desire to utilize depolicing’s avoidance function. Politicians’ calls for reform emphasize officers’ beliefs that they are subordinated by demonstrating that they are not in control of their own decisions. Officers experience public criticism as a loss of their usual privilege to exert authority in relations with fellow citizens. Hybridity also explains officers’ use of depolicing’s avoidance function since it allows them to exercise

77 See Ehrenreich, supra note 3, at 292.
79 See Oberweis & Musheno, supra note 11, at 209-12 (describing officers’ experiences of dominance of their cop identity over their other identities).
80 See id. at 209-10 (citing sense of power implied by position’s authority).
81 See id. at 212-15 (describing tension between “beat” officers and their “professional” supervisors). See also Young, supra note 75, at 139-40 (linking professional status to dress and speech, not money).
82 Note that this incentive to racially profile will hold true for racial minority and female officers as well. The difference is that racial minority officers may be more likely to bond to the occasional racial minority suspect. See Oberweis & Musheno, supra note 11, at 215-17 (describing Latino officer’s desire to give a break to petty Latino drug dealer who had been victim of an attack). Still, racial minority officers could not single-handedly change the system of racial profiling, even if they wanted to do so. See id. (describing White supervisors’ desire to charge petty Latino drug dealer who had been victim of attack). Highlighting the differences between choices of how to exercise discretion and abilities to change law enforcement policies is my response to the refrain of “but Black cops do it too.”
83 See supra notes 35-48 and accompanying text.
84 See generally Murakami, supra note 6, at A1 (describing Seattle City Council’s proposal to make officers explain exercise of Terry discretion); Miller, supra note 6, at A6 (describing Cincinnati City Council’s requirement that officers explain exercise of Terry discretion); id. at A6 (“City Hall will sell you out”).
85 See Miller, supra note 6, at A6 (quoting officer’s complaint that “our discretion has been limited . . .”).
86 See supra notes 35-48 and accompanying text.
their privilege of discretion in a way that is beyond political control. Political authorities cannot punish officers for abuses of Terry discretion if no “stop” reports are filled out.\footnote{Depolicing has often been a response to the requirement of filling out explanations of Terry stops. See, e.g., Murakami, supra note 6, at A1 (describing Seattle anti-racial profiling proposal); Simon & Slater, supra note 43, at A14 (describing Cincinnati anti-racial profiling policy).}

A second symbiotic aspect of depolicing is that it serves as a divide-and-conquer tactic. Depolicing relieves political pressure for reform by pitting interest groups against one another. Officers make City Hall choose between racist policing or no policing, with the latter possibly resulting in less pressure on politicians. Depolicing also pits those who imagine themselves as likely victims of racial profiling against those who imagine themselves as potential victims of crime.\footnote{Many delighted in the irony of Reverend Al Sharpton, a leading critic of racial profiling, calling for more policing after NYPD depolicing of sexual assaults at the 2000 New York City Puerto Rican Day Parade. See, e.g., Clarence Page, Critics of Cops Still Need the Cops, CHI. TRIB., June 18, 2000, § Commentary, at 17 (criticizing both Sharpton and NYPD). Note that women of color often find themselves caught between law enforcement accountability and anti-crime movements. See generally Anannya Bhattacharjee, Private Fists and Public Force: Race, Gender, and Surveillance, in Policing the National Body: Race, Gender, and Criminalization 1 (Jael Silliman & Anannya Bhattacharjee eds., 2002) (urging unified anti-racist, -sexist police reform movement); Judith A.M. Scully, Killing the Black Community: A Commentary on the United States War on Drugs, in Policing the National Body, supra, at 55 (critiquing non-intersectional responses to drug war).}

Hence, symbiosis theory helps us understand the benefits of depolicing from the perspective of its perpetrators.

What symbiosis theory is not inherently oriented toward explaining is why depolicing occurs in some places but not others. Why depolicing in Seattle and Cincinnati, but not Philadelphia and Boston? To understand that fact, we need to understand the difference cultural context makes. Consequently, the next section explains the need to add cultural studies analysis to identity theory.

III. WHY WE ALSO NEED CRITICAL CULTURAL THEORY

The preceding part of this essay showed how identity theory can help explain why doctrine leads to particular practices. Identity theory forces us to ask who is acting, and on whom. Ehrenreich’s symbiosis theory facilitates that process by providing a framework for understanding the perpetrator’s perspective. I have written this essay, however, because I want to say “yes, and….” The “and” is the need to recognize the importance of cultural context.

Peter Kwan provides an example of how differing cultural contexts can cause the same identity to be construed in different ways. Kwan identifies an attributed identity of Asian men as effeminate (think, “M. Butterfly”).\footnote{See Kwan, supra note 11, at 1288-89 (noting depictions of Asian men as feminine and passive) (citing Richard Fung, Looking for my Penis: The Eroticized Asian in Gay Video Porn, in How Do I Look? Queer Film and Video 145, 156 (1991)). In “M. Butterfly,” the White male convinces himself his Asian male lover is female (I am using those terms as though sex and gender were straightforward matters).} He identifies a simultaneous but conflicting attributed identity of Asian men as sinister and
dangerous (think, "Ming the Merciless" from "Flash Gordon"). When White police officers were called to the home of White serial killer Jeffrey Dahmer, they construed his bleeding and naked Asian male victim, Konerak Sinthasomphone, as effeminate rather than sinister and dangerous, and chose not to investigate further. If the officers had applied the "sinister and dangerous" stereotype to Sinthasomphone rather than the "effeminate" stereotype, they might have worried they needed to investigate further and discovered Dahmer’s deceit. The reason the officers chose not to investigate was the context: Dahmer’s Whiteness and maleness granted him authority to depict the relationship as voluntary; the Blackness and femaleness of the complaining witnesses deprived them of authority; and Sinthasomphone’s Asian male identity made his opinion irrelevant. Only viewing that cultural context in its entirety allows us to understand why homophobic officers bonded with Dahmer.

Ehrenreich’s symbiosis theory is not inherently directed toward analyzing cultural context, but I believe it is compatible with that perspective. For example, Sherene Razack challenges Ehrenreich’s theory of compensatory subordination with an excellent essay analyzing a Canadian peacekeeper’s murder of a Somali. In replying to Razack, Ehrenreich shows how the “scripts” for taking compensatory subordination that are available to a peace-keeper and, say, an oil refinery worker, differ based on their different cultural contexts.

90 See id. at 1292 (noting depictions of Asian men as sinister and dangerous) (citing John Kuo Wei Tchen, Believing is Seeing: Transforming Orientalism and the Occidental Gaze, in CONTEMPORARY ASIAN AMERICAN ART 13 (1994)). “Ming the Merciless” is Flash Gordon’s sinister arch-enemy.
91 See id. at 1261-62. The officers’ construction of Dahmer’s victim as his “wife” caused them to treat it like a domestic abuse case, and leave it alone. See id. at 1278 (citing Mary Eaton, Homosexual Unmodified: Speculations on Law’s Discourse, Race, and the Construction of Sexual Identity, in LEGAL INVERSIONS 46, 51 (Didi Herman & Carl Stychin eds., 1995)). See generally Anderson, supra note 20 (detailing police sexism).
92 See Kwan, supra, note 11 at 1266 (discussing Dahmer’s conscious manipulation of stereotypes about gay male relationships).
93 See id. at 1267-68 (describing officers’ inattentiveness to Black complaining witnesses’ mother).
94 See id. at 1266 (noting officers ignored victim). Had the suspect lacked authority, the witnesses owned authority or the victim’s opinion mattered, the officers almost certainly would have investigated further. Because of the “prejudices judges share with their fellow men,” law often accepts something under one set of circumstances that it would not accept under another set of circumstances. OLIVER W. HOLMES, THE COMMON LAW 1 (1881) (arguing for “legal realism” in doctrinal analysis).

Kwan contends intersectionality theory would have to depict the officers’ acceptance of an interracial homosexual relationship as a positive development. Kwan, therefore, critiques intersectionality theory’s inadequate attention to the contextual, or “cosynthetic,” nature of identity. See Kwan, supra note 11, at 1280-81 (critiquing intersectionality theory).
95 See id. at 1273 (describing homophobic jokes about Dahmer investigation in police station).
97 See Ehrenreich, supra note 3, at 298-99(responding to Razack). The difference between Razack’s and Ehrenreich’s perspectives is that Razack’s analysis is imbued with postcolonial theory’s focus on the way Nation binds together identities, while Ehrenreich’s is imbued with a more poststructuralist focus on how individuals are encouraged to divide themselves from other identities. On post-colonial methodology, see generally GAYATRI CHAKRVORTY SPIVACK, A
A. Analyzing Culture

I argue for incorporating cultural studies into identity theory because it helps us understand how those “scripts” are constructed and then translated into practices. First, we must understand how the field of cultural studies analyzes discourses. Discourses are arguments. They are “ways of speaking about the world.” The basic unit of a discourse is an utterance; say, a sentence describing the meaning of a social event. Yet discourses are full blown stories, they connect a group of statements that explain a whole series of social events or ideas. As a consequence,

discourse constructs the topic . . . . Just as a discourse “rules in” certain ways of talking about a topic, defining an acceptable and intelligible way to talk, write, or conduct oneself, so also, by defining, it “rules out”, limits and restricts other ways of talking, of conducting oneself in relation to the topic or constructing knowledge about it.

Discourse, therefore, is not just a way of talking, but a way of thinking. When successful in persuading others, it is also a way of doing. If we wish to understand why law acts in certain ways on people with certain identities, we must understand how people construct the arguments that lead to those practices.

Second, we must understand that discourses are “intertextual”; they respond to one another. That means new discourses are not simply created afresh, but conditioned by prior discourses. Consequently:

A discourse is produced in response to other discourses, and it has meaning only in its relation to complex networks of meanings.

. . . . . . Discourses are embedded in contemporaneous networks of meanings and social relationships, with their own histories of transformation, that come together in a specific combination and are thereby mutually reconfigured.
An example of discourses responding to one another is the new Planned Parenthood campaign emphasizing that the abortion pill prevents pregnancy. If the right to choice were not threatened by right-wing rhetoric about the inappropriateness of terminating a life, there would be no need to emphasize prevention of life. Hence, Planned Parenthood's arguments in favor of pregnancy prevention are conditioned by the arguments that have preceded them. Similarly, we must understand how the cultural contexts of discourses conditioned the forms of those discourses in order to understand how discourses produce laws and practices that subordinate particular identity groups.

Third, we must understand how discourses are related to cultural power. For example, Gramsci's theory of hegemony holds that power is exercised through the winning of consent. To understand the concept of hegemony, we must ask the following questions: "How then does a particular discourse become dominant and how are meanings fixed, however temporarily? How is it possible for discourses to produce systematic effects?" The answer is that "any discourse is constituted as an attempt to dominate the field of discursivity, to arrest the flow of difference, to construct a center." Thus moral discourses specify a single standard of virtue, while denigrating or marginalizing alternative practices. Morality, in other words, is elaborated in a struggle over symbolic power, which is ultimately the power to define social categories and groups and to establish as legitimate a particular vision of the social world. . . . [T]he power that any set of social actors has to define categories and to identify groups depends on social authority acquired in previous struggles; it is, therefore, the result of a long process of institutionalization. In contemporary society, the media have been primary institutional arenas in which moral authority is established and contested.

That quote identifies the cultural goal of a discourse: the silencing of alternative views. If a discourse can gain wide acceptance, it can succeed in "ruling in"

105 See David Abel, RU-486 Access Divides College Campuses, BOSTON GLOBE, Jan. 27, 2001, at A1 (discussing political and moral controversy surrounding college campuses' refusal to distribute abortion pill RU-486).
107 See Cooper, supra note 2, at 859-61 & nn. 53-65 (discussing how discourses are "encoded" with purpose of influencing conceptions of "common sense"). See generally Houh, supra note 8 (critically reviewing Gramsci's hegemony theory in comparing Critical Race Theory and Critical Legal Studies).
108 Rose, supra note 104, at 230 (discussing Gramsci's concept of "articulation").
109 Id. (internal citations omitted) (comparing Gramscian "articulation," Bourdieu's concept of "symbolic power").
certain ways of looking at the world and "ruling out" others. As with discourse in general, symbolic power might be described as intertextual. Certain social groups have the power to influence popular representations of how the world ought to be because they won earlier social battles. The people who can influence the media today can do so because their forefathers owned slaves, established monopolies, inflated stock prices, and so on. Their financial power translates, albeit indirectly, into cultural power.

A discourse is the means by which individuals or groups convince others to consent to a certain ordering of society. We will not understand why the media promote certain views or the general populace adopt those views if we do not understand how particular discourses were constructed at particular times.

B. Toward Critical Cultural Theory of Depolicing

Based on the preceding insights about cultural studies, we can identify the broad structure of a "critical cultural theory" methodology. We should start by explicating the underlying assumptions of a doctrine. We should then use identity theories to show how enforcement practices vary when applied by particular social groups and/or to particular social groups. We should then use cultural studies analysis to show how a certain context led to a particular social consensus about the appropriateness of various law enforcement methods.

10 See Hall, The Work of Representation, supra note 97, at 44 (describing Michel Foucault's view of discourse).

11 Cultural studies analysis of how legal doctrines become enforcement practices should concentrate on mass media representations of the meaning of law enforcement events. Media representations are the way law enforcement events are "mediated, with elements added and subtracted in the service of group myth." Carolyn Marvin, Media Rituals: Follow the Bodies, in AMERICAN CULTURAL STUDIES, supra note 98, at 182, 188. Media representations serve a vital function by informing people of who they are in relation to the rest of the world and, thereby, how they should view the rest of the world. Cf. id. at 182 (contending media helps maintain social groups' coherence). Mass media accomplish that goal by depicting potentially disruptive social events in ways that are either generally unifying or productive of consolidating social divisions. See James W. Carey, The Sense of an Ending: On Nations, Communications, and Culture, in AMERICAN CULTURAL STUDIES, supra note 98, at 196, 216-17 (summarizing Dayan & Katz's theory of media events); id. at 217 (critiquing Dayan & Katz). What cultural studies helps us understand, then, is why and how culture tends to interpret law enforcement events in ways that benefit certain identity groups and harm other identity groups. Reading through the filter of media representations is valuable for two reasons: it allows us to interpret how officers sought to have their story told and it allows us to critique the "spin" the media placed on officers' stories. As I have noted elsewhere, police officers have a great deal of influence over the content and characterizations of news stories about crime. See, e.g., Cooper, supra note 2, at nn.119-122 and accompanying text (citing police influence theories). Likewise, media characterizations of crime have a great deal of influence over policy making. See generally VICTOR E. KAPPELER, ET AL., THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE (1993) (identifying and debunking popular assumptions about various crimes). Consequently, my theory of Terry's see-saw effect views the media as playing a role as fulcrum in the shift from public support for crime reduction by any means necessary to racial controversy over police tactics. See, e.g., DAVID GARLAND, THE CULTURE OF CONTROL 145-56 (2001) (linking media depictions to authoritarian populism).

Those approaches should be organized under an “encoding/decoding” framework. That is, we should assume that, at the general level, any discourse has this structure: “a social group encodes a discourse, thereby presenting an argument, which an audience then ‘decodes,’ or more simply, reads.” So, the encoding/decoding framework identifies discourses as having “three ‘moments’ of ‘encoding’ (production), ‘meaningful discourse’ (text) and ‘decoding’ (reception)...”

For example, Cincinnati police officers initially “encoded” a discourse explaining their shooting of Timothy Thomas as an understandable mistake flowing from a valid exercise of police officer discretion. Black Cincinnatians “decoded” that explanation from an “oppositional” position by completely rejecting the police explanation. The Cincinnati City Council decoded the Black explanation of the Thomas shooting from a “negotiated” position by accepting the idea that officers should explain their Terry stops, but rejecting defining Thomas’s shooting as racist. Officers rejected the Council’s re-encoding of a solution with an oppositional decoding of the Council as “selling out” officers. We may, therefore, read depolicing as officers’ re-encoding of a new argument: “Support us unconditionally or suffer crime.”

Critical cultural theory will analyze how discourses about (1) doctrine, (2) the meanings of identities and (3) the appropriateness of various potential enforcement practices, were “encoded” and “decoded” in particular cultural contexts. My project herein, however, is simply to indicate the nature of a critical cultural theory methodology. I will reserve full analysis of the relationship between doctrine, racial profiling, depolicing and discourses about identity for a later article. At this point, I simply identify a series of questions that will be germane to the study of any law enforcement practice:

1. What social practices does a specific doctrine encourage or discourage?
2. How has the doctrine been translated into practices in specific contexts?
3. Whom does the doctrine affect as practiced in specific cultural contexts?
4. What counter-discourses emerged from the practices?

See Cooper, supra note 2, at 858 (describing encoding/decoding methodology).

Introduction, in THE MEDIA STUDIES READER, supra note 9, at xiii (endorsing framework as general cultural studies methodology).

See Aldridge, supra note 42, at 47 (describing shooting and explanation).

See Hall, Encoding/Decoding, supra note 9, at 60-61 (defining “oppositional” decoding as rejecting both general premise and specific application).

See Aldridge, supra note 42, at 47 (describing response).

See Hall, Encoding/Decoding, supra note 9, at 60 (defining negotiated position as accepting general premise but rejecting specific application).


See Miller, supra note 6, at A6 (quoting police officer resentment).

See Cooper, supra note 6.
(5) How did the discourses about a doctrine and its effects relate to struggles for cultural power?  

Those questions will point us toward a fuller understanding of both law enforcement practices in general and depolicing in particular.

First, it is important to recognize that Terry doctrine is the source of both racial profiling practices and depolicing practices. The Whren decision’s grant of absolution to racist officers basically invites extreme racial profiling. Terry doctrine, in conjunction with limits on officers’ liability, allows officers to use their discretion to depolice. In that sense, the depolicing aspect of Terry’s seesaw effect is a logical corollary of the doctrine’s grant of excessive discretion.

Second, the discourse of depolicing is the discourse of the downtrodden. Officers feel put upon by the requirement to explain Terry stops. While officers are in fact over-empowered, they feel subordinated. Officers’ imaginations of themselves as “hybrid” privileged and subordinated individuals allow them to justify depolicing. Terry doctrine allows officers’ discretion to depolice, but the discourse of being put upon is what allows them to justify the practice.

Third, racial profiling and depolicing do not simply “happen” to target racial minorities, they are uniquely suited to that purpose. Racial profiling works best on people who are politically powerless to respond. Ditto depolicing. Moreover, officers’ chief complaint about anti-racial profiling reforms is that they remove discretion. Officers depolice in order to reacquire the sense of privilege deriving from having the discretion of whether or not to interfere in fellow citizens’ lives. Hence, depolicing serves as a form of “compensatory subordination.”

Fourth, Terry’s see-saw effect demonstrates how the dialectical nature of discourse is a cause of depolicing. Racial profiling generates popular controversy over police tactics, which, in turn, generates depolicing. Each term of the dialectical process of the debate over police tactics has generated its own counter-discourse. The media supported racial profiling, then supported criticism of racial profiling, and is now suggesting that public criticism of police tactics is the cause of depolicing. The way those discourses have built upon one another is in keeping with the intertextual nature of discourse. Hence, our proposals for reforming depolicing practices must consider police officers’ likely discursive responses.

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122 For additional methodological suggestions, see Cooper, The Un-Balanced Fourth Amendment, supra note 2, at 856-64 & nn.32-84 (summarizing cultural studies’ encoding/decoding methodology).
123 See discussion supra notes 19-34 and accompanying text.
124 See discussion supra notes 27-9 and accompanying text.
125 C.f. Kimmel, supra note 78, at 136 (arguing that, despite actual privileged status, men feel powerless).
126 See COLE, supra note 16, at 21 (concluding that police officers Bostick search buses and trains, not planes, because victims’ class status prevents repercussions). The Court has recently given its blessing to “consent” searches. See United States v. Drayton, 121 S. Ct. 2105 (2002) (construing search requests within public transportation non-coercive and absolving officers of rights warning).
Finally, depolicing is the result of a series of exercises of cultural power. Protests against racial profiling have been attempts to alter law enforcement practice through politics. Likewise, depolicing seeks to change politics by pitting City Hall’s interest in non-controversial policing against its interest in crime prevention. The see-saw of discourses about appropriate police tactics is a battle for cultural hegemony. Consequently, calls for reforming depolicing must be sensitive to what is possible in local cultural climates.

In this part of this essay, I have argued we need to supplement identity theory with cultural studies analysis. I summarized cultural studies as showing how discourses constrict topics, build upon prior discourses, and translate into cultural power. Based on those insights, I generated several basic questions for critical cultural theory. I then briefly suggested what that methodology tells us about depolicing. I hope that application of cultural studies analyses has demonstrated the potential of a critical cultural theory.

IV. CONCLUSION

As Chang and Culp, Jr. so aptly put it in their contribution to this Symposium, “[o]ppression or subordination cannot be understood outside of the context in which it occurs.”127 I advance critical cultural theory as a means of examining those contexts. I hope my doctrinal analysis has shown that doctrines can produce complex dialectical movements between different potential enforcement practices. I hope my application of Ehrenreich’s symbiosis theory has demonstrated the benefits of considering identity formation from the perpetrator’s perspective. I hope my generation of cultural studies questions for instances of depolicing have suggested the utility of discourse analysis.

I am grateful to Nancy Ehrenreich for describing a symbiosis theory because it teaches us a great deal about how people form their senses of self identity. Her analyses of divide-and-conquer tactics and compensatory subordination are especially useful for understanding why doctrine is translated into subordinating practices. Nonetheless, understanding depolicing, and understanding the general relationship between law and identity, requires understanding something more. It requires understanding how and where discourses are constructed. I advance critical cultural theory as another method for our collective project of enriching identity theory.

127 Chang & Culp, Jr., supra note 59, at 489.