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# A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit

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## ARTICLES

# A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit

FRANK RUDY COOPER\*

*President Trump has called for increased use of the recently predominant policing methodology known as programmatic stop and frisk. This Article contributes to the field by identifying, defining, and discussing five key components of the practice: (1) administratively dictated (2) pervasive Terry v. Ohio stops and frisks (3) aimed at crime prevention by means of (4) data-enhanced profiles of suspects that (5) target young racial minority men.*

*Whereas some scholars see programmatic stop and frisk as solely the product of individual police officer bias, this Article argues for understanding how we arrived at specific police practices by analyzing three levels of social activity: (1) the macro level of analysis is that of broad social discourses, (2) the meso level involves both criminal procedure doctrines and criminological policy advocacy, and (3) the*

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*micro level is where police departments engage in specific practices.*

*This new methodology, which explores what I have named the “discourse-to-practice-circuit,” allows us to conduct a genealogy of how and why programmatic stop and frisk became a predominant practice. At the macro level, the late 1960s discourse calling for law and order linked backlash against civil rights to crime control. Meso-level legal discourses, such as the general weakening of Terry doctrine and Whren v. United States pretext doctrine’s insulation of police officers’ racist motivations, allowed for more aggressive policing. Simultaneously, a meso-level backlash version of criminology, exemplified by James Q. Wilson’s call for fixing broken windows, influenced public policy. At the micro level, police departments increasingly took advantage of the doctrinal weaknesses by adapting the methodologies of backlash criminologists in the form of programmatic stop and frisk.*

*In light of that genealogy, this Article argues for challenging programmatic stop and frisk with counter-narratives that make promoting equality a primary goal of policing. For instance, the discourse supporting Whren doctrine contends that we should refuse to suppress evidence discovered when searches are based on racist motivations in order to avoid second guessing officers’ split-second decisions. This Article notes that such pretext searches are at least educated guesses based on a fair probability the particular suspect is involved in crime. However, programmatic stops and frisks are based only on specific and articulable facts, if not mere stereotypes. A counter-discourse at the meso level would thus contend that Whren doctrine should not be extended to programmatic stops and frisks because such stops and frisks are, unlike pretext searches, merely uneducated guesses. Future scholarship should consider the discourse-to-practice-circuit in other contexts.*

INTRODUCTION .....	4
I. THE PROBLEM: PROGRAMMATIC STOP AND FRISK .....	12
A. Components of Programmatic Stop and Frisk .....	14

1.	ADMINISTRATIVE DICTATION .....	14
2.	PERVASIVENESS .....	16
3.	PROFILES OF AREAS .....	17
4.	TARGETING BY RACE AND GENDER .....	18
5.	PREVENTATIVE.....	20
B.	<i>Consequences of Programmatic Stop and Frisk</i> .....	21
1.	NYPD RACIAL PROFILING.....	22
2.	GENERAL SOCIAL CONTROL OF YOUNG BLACK AND LATINX MALES .....	24
II.	TOWARD A NEW SCHOLARLY APPROACH .....	26
A.	<i>Current Approaches</i> .....	27
1.	SUPPORTERS OF PROGRAMMATIC STOP AND FRISK.....	28
2.	CRITIQUES OF PROGRAMMATIC STOP AND FRISK AS BIAS-BASED.....	32
B.	<i>The Discourse-to-Practice-Circuit: Three Levels of Analysis</i> .....	35
1.	MACRO LEVEL .....	40
2.	MESO LEVEL.....	42
3.	MICRO LEVEL .....	45
III.	CASE STUDY: A GENEALOGY OF PROGRAMMATIC STOP AND FRISK .....	47
A.	<i>Macro Level: "Law and Order" as Cultural Backlash</i> ....	47
B.	<i>Meso Level: Weakening Terry/Demonizing Young Men of Color</i> .....	54
1.	THE DISCOURSES WEAKENING <i>TERRY</i> .....	55
2.	THE DISCOURSE OF BACKLASH CRIMINOLOGY .....	58
C.	<i>Micro Level: From Theory to Policy</i> .....	63
1.	THE DEVELOPMENT OF PROGRAMMATIC STOP AND FRISK IN NEW YORK CITY .....	63
2.	LINKING BACKLASH CRIMINOLOGY TO PROGRAMMATIC STOP AND FRISK AND SOCIAL MARGINALIZATION OF BLACK AND LATINX MEN.....	66
IV.	EXAMPLE OF A COUNTER-DISDISCOURSE: AGAINST UNEDUCATED GUESSES .....	67
A.	<i>Addressing the Discourses Behind Programmatic Stop and Frisk</i> .....	68
B.	<i>Example: Recharacterizing Whren</i> .....	72
	CONCLUSION.....	77

## INTRODUCTION

When the New York Police Department (“NYPD”) choked Eric Garner to death, it was widely seen as an example of police brutality.<sup>1</sup> In fact, it reveals a larger problem: systematic harassment of young racial minority men<sup>2</sup> in cities<sup>3</sup> through the practice known as

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<sup>1</sup> See MATT TAIBBI, I CAN’T BREATHE: A KILLING ON BAY STREET 112–15, 118–22 (2017) (detailing the police killing of Eric Garner).

<sup>2</sup> It is mostly men who are stopping and frisking other men; hence, we must consider how masculinities affect both police targeting and civilian responses. See, e.g., Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 675–76 (2009) [hereinafter Cooper, *Who’s the Man?*] (applying masculinities studies to *Terry* stops and frisks); Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 242–62 (2015) (applying masculinities studies to police violence against men of color); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 131–35 (2014) (applying masculinities studies to psychological study of police violence). Many scholars continue to ignore masculinity when discussing racial profiling. See generally POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017) [hereinafter POLICING THE BLACK MAN] (collecting race-focused essays).

<sup>3</sup> See Frank Rudy Cooper, *Hyper-incarceration As a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 WASH. U. J.L. & POL’Y 67, 70–71 (2011) (discussing the intersection of geography and hyper-incarceration).

“programmatically stop and frisk.”<sup>4</sup> We need to understand the programmatic use of *Terry v. Ohio*<sup>5</sup> stops and frisks because they are the predominant form of policing in urban communities.<sup>6</sup> This Article is the first to create a systematic analysis of the components of

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<sup>4</sup> Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1505 (2014) (acknowledging that the Broken Windows theory “created the conditions under which stop and frisk would eventually thrive”). *But see* Andrew Ingram, *Breaking Laws to Fix Broken Windows: A Revisionist Take on Order Maintenance Policing*, 19 BERKELEY J. CRIM. L. 112, 151 (2014) (contending Wilson’s Broken Windows theory actually undermines rationale for the order maintenance policing methodologies that grew out of it). For further discussion and elaboration on the Broken Windows theory, see *infra* Section III.C.1.

This Article defines “programmatically stop and frisk” as administratively compelled, frequent, and profile-based targeting of young black and Latinx men for purposes of crime prevention. *See, e.g.*, Barry Friedman & Cynthia Benin Stein, *Redefining What’s Reasonable: The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286–87 (2016) (“[M]any of the searches policing officials engage in today are suspicion-less. This is the hallmark of programmatic, or deterrent, searches. They are not aimed at a suspect but at a broad body of the people—perhaps all of us—to prevent even the contemplation of offending.”); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162–63 (2016) (defining programmatic stop and frisk). *See generally* David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 80 (2018) (citing programmatic stop and frisk as a reason for changing Fourth Amendment standing requirements); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2440–43 (2017) (arguing programmatic stop and frisk reinforces racial stratification).

The American Law Institute’s (“ALI”) Policing Project’s latest draft report defines programmatic searches and seizures as those that are typically suspicion-less, like administrative searches, roadblocks, and much of the surveillance done by modern technology. *See Policing Project: Proposed Table of Contents*, A.L.I. ADVISER, <http://www.thealiadviser.org/policing/> (last visited Sept. 6, 2018). The danger of the ALI’s definition of programmatic stop and frisk is that it renders invisible technically valid, but racially selective and thus immoral, stops and frisks.

<sup>5</sup> 392 U.S. 1 (1968). Under *Terry* doctrine, “stops” are temporary and limited seizures and “frisks” are limited searches of the outside of the person for weapons. *See id.* at 30.

<sup>6</sup> The scholarly literature has recently come to this conclusion. *See, e.g.*, Huq, *supra* note 4, at 2398 (declaring “[stop, question, and frisk] likely became the modal form of police-citizen contact for many urban residents”); *see also* Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM.

the practice. It argues that programmatic stop and frisk is best defined as (1) administratively driven,<sup>7</sup> (2) pervasive, (3) data-enhanced area profiling,<sup>8</sup> using the *Terry* stop and frisk power, for (4) race-, gender-, and age-targeted<sup>9</sup> police seizure and search of civilians with (5) the purpose of crime prevention. Given President Trump's calls for the increased use of programmatic stops and

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L. REV. 181, 219 (2017) (“At least in major metropolitan areas, stop-and-frisks typically are carried out pursuant to organized policies and programs . . .”).

<sup>7</sup> See e.g., Bellin, *supra* note 4, at 1502 (suggesting police officers are stopping and frisking in response to administratively created incentives); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 62 (2015) (supporting the contention that administrators pressure officers to increase stops and frisks of certain populations).

<sup>8</sup> Police departments have increasingly used “big data” to target policing. Big data describes a variety of ways of parsing large sets of information. See Ric Simmons, *Quantifying Criminal Procedure: How to Unlock The Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 952 (2016) [hereinafter *Quantifying Criminal Procedure*] (“‘Big data’ is the practice of accumulating extraordinarily large amounts of information from a variety of different sources and then processing that information using statistical analysis.”); see also Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 125–30 (2012) (exploring how big data can produce police reform); Goel et al., *supra* note 6, at 182 (discussing how police “access to exponentially increasing amounts of information, and methods of processing and analyzing vast sets of data” will affect policing); Elizabeth Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15, 22–27 (2016) (describing police use of big data). For work on Compstat and the Fourth Amendment, see generally ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 29, 72 (2017) (discussing implications of data-based policing).

<sup>9</sup> For discussions of race and gender in *Terry* stops, see Cooper, *Who’s the Man?*, *supra* note 2, at 702–26 (applying masculinities studies to *Terry* stops); Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 752–57 (2015) (considering race-gender effects on police stops); Richardson & Goff, *supra* note 2, at 136–42 (studying link between masculinities and police violence). While the programmatic profiles generally target young men of color, women of color are sometimes targeted by the practice and sometimes especially vulnerable to sexual harassment because of the discretion that programmatic stop and frisk invests in police officers. A 2010 Cato Institute report found that sexual misconduct was the second most common type of police misconduct. NATIONAL POLICE MISCONDUCT REPORTING PROJECT, CATO INST., 2010 ANNUAL REPORT (2010).

frisks,<sup>10</sup> now is the time to analyze the practice and consider potential responses.

Scholars have tended to explain programmatic stop and frisk as the product of either efficient use of police resources<sup>11</sup> or biased analyses of suspiciousness.<sup>12</sup> This Article proposes a *discourse-to-*

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<sup>10</sup> Trump has often claimed that he will increase the use of programmatic stop and frisk. See Michael Barbaro, Maggie Haberman & Yamiche Alcindor, *Donald Trump Embraces Wider Use of Stop-and-Frisk by Police*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/politics/donald-trump-don-king-black-voters.html>; Lauren Carroll, *Donald Trump and Lester Holt Clash Over Whether Stop-and-Frisk is Constitutional in New York*, POLITIFACT (Sept. 28, 2016, 4:20 PM), <https://www.politifact.com/truth-o-meter/statements/2016/sep/28/donald-trump/debate-donald-trump-says-stop-and-frisk-constituti/>; Deb Riechmann & Michael Tarm, *President Trump Calls on Chicago to Embrace Stop-and-Frisk Policing to Curb Violence*, TIME (Oct. 9, 2018), <http://time.com/5419157/donald-trump-chicago-stop-and-frisk/> (reporting on Trump's very recent call for more use of the practice); see also Reshaad Shirazi, *It's High Time to Dump the High-Crime Area Factor*, 21 BERKELEY J. CRIM. L. 76, 104 (2016) (discussing Trump comments). Trump called for increased use of stop and frisk during the general election campaign. See *Trump: Bring Back 'Stop-And-Frisk'*, CNN (Sept. 22, 2016), <http://www.cnn.com/videos/tv/2016/09/22/trump-takes-on-race-and-policing-lead-murray-dnt.cnn> (reporting Trump references to NYPD stop and frisk).

<sup>11</sup> See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 147 (2012) (discussing New York City's police administrators' belief that programmatic stop and frisk significantly helped New York City's crime drop); Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 41 JUST. Q. 633, 658 (2014) (asserting hot spot policing worked); Lawrence Rosenthal, *Good and Bad Ways to Stop Police Violence*, 48 URB. LAW. 675, 706–13 (2016) (reviewing literature on efficacy of programmatic stop and frisk and calling for narrowing it to hot spots policing); David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?*, 15 CRIMINOLOGY AND PUB. POL'Y 31, 46–47 (2016) (contending that an aggressive stop and frisk intervention produces a crime drop).

The supposition that programmatic stop and frisk reduces crime derives from the Giuliani/Bloomberg era in New York City, when the NYPD accomplished a large crime reduction from the mid-1990s to 2010. See Bellin, *supra* note 4, at 1503–18.

<sup>12</sup> For examples of the bias-based critique, see, for example, Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 164–67 (2013) (arguing implicit bias drives police hyper-suspicion of racial minorities); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 183–85 (2016) (discussing how ra-

*practice-circuit* as a means of understanding how we end up with particular police practices. Drawing on literature from the field of cultural studies, it proposes looking at how discourses move through three levels of social interaction.<sup>13</sup> Discourses are narratives seeking

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cial insecurity could lead to police violence); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037–39, 2053 (2011) [hereinafter *Arrest Efficiency*] (contending implicit bias explains arrest rates). Meares writes that, “*Floyd[v. City of New York]* lays bare the reality of urban policing: stop-and-frisk is carried out systematically, deliberately, and with great frequency.” Meares, *supra* note 4, at 164; *see also* David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. 117 (2013) (point-counterpoint on programmatic stop and frisk); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 865–68 (2014) (critiquing programmatic use of racial profiling in stop and frisk). The proposal to do ‘race audits’ of new policing technology is the most likely the best strategy to head off implicit bias that might lead to new rounds of racial targeting. *See* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1276 n.215 (2017) (discussing potentially helpful technologies that may be used to reduce hyper-suspicion of racial minorities).

Policing programs are a new phenomena that stem from earlier practices. NAT’L ACADS. OF SCIS., ENG’G, AND MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 303 (2018). Hence, influential criminal procedure scholar Christopher Slobogin refers to a related group of “panvasive” Fourth Amendment intrusions that may sometimes be thought to include programmatic stop and frisk:

Panvasive searches and seizures, . . . are something quite different. . . . Examples of panvasive actions include residential and business inspection programs, checkpoints (aimed at detecting, inter alia, illegal immigration, drunken drivers, or drivers without licenses), drug testing programs, creation of DNA databases, collection of communications metadata, and establishment of surveillance regimes involving cameras, tracking systems, and the like.

Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 93 (2016) (proposing regulation of police under an administrative model); *cf.* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016) (noting that “[w]hile our Fourth Amendment framework is transactional, then, surveillance is increasingly *programmatic*.”).

<sup>13</sup> A discourse is a narrative about a topic. As cultural studies scholar Stuart Hall said, a discourse

influences how ideas are put into practice and used to regulate the conduct of others. 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 definition, it

to become the consensus on a topic.<sup>14</sup> The macro level is where broad cultural and political discourses seek to capture the popular understanding of how the world does, or should, operate.<sup>15</sup> At the meso level, broad discourses are elaborated upon as discipline-specific discourses, such as legal doctrines or criminology.<sup>16</sup> The micro level sees discipline-specific discourses translated into policing policies, both officially and in practice.<sup>17</sup> This is the *discourse-to-practice-circuit*.

Using this approach allows us to conduct a genealogy of programmatic stop and frisk.<sup>18</sup> At the macro level, the “law and order”

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‘rules out’, limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it.

Stuart Hall, *The Work of Representation*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 13, 44 (Stuart Hall ed., 1997).

Herein, the primary discourse discussed is the call for “law and order,” which began with the Barry Goldwater Presidential campaign in 1964 and was then taken up by President Nixon in his 1968 Presidential campaign. MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S, at 3 (2007) (defining law and order narrative). Ronald Reagan had adopted the law and order discourse to great effect in the 1966 California Gubernatorial campaign and went on to promote a War on Drugs as President in 1982. *Id.* at 11 (discussing Reagan’s use of crime as wedge issue). For further discussion on “law and order,” see *infra* Parts II, III.

<sup>14</sup> See, e.g., PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE 226–27 (1998).

<sup>15</sup> We can often identify three basic levels of social phenomena: macro, meso, and micro. See *id.* at 226 (adapting “standard sociological categories of macro-, meso-, and micro-levels of social organization” to black women’s experiences). Approaching social organization from the point of view of policing leads to defining the macro level as that at which society-wide narratives about law are created. See *infra* Section II.B.1. The macro level seeks to influence the meso level, at which social rules are created through legal doctrine. See *infra* Section II.B.2. The meso level then seeks to influence the micro level, at which police officers interact with civilians. See *infra* Section II.B.3. While Collins is correct that “all of these levels work together recursively,” the hierarchical relations in law mean that dominant narratives about what justice requires should influence doctrine more than actual police officer behaviors influence doctrine. COLLINS, *supra* note 14, at 227.

<sup>16</sup> See, e.g., COLLINS, *supra* note 14, at 227.

<sup>17</sup> See, e.g., *id.*

<sup>18</sup> This use of genealogical methodology does not follow every tenet of philosopher Michel Foucault’s approach. Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17,

discourse of the late 1960s responded to the backlash against the 1960s civil rights movements by arguing for heightened crime control.<sup>19</sup> At the meso level, an increasingly conservative United States Supreme Court weakened *Terry* doctrine.<sup>20</sup> Also at the meso level, backlash criminologists, such as James Q. Wilson,<sup>21</sup> created aggressive policing methodologies.<sup>22</sup> At the micro level, in the early 2000s, New York City proponents of aggressive policing developed practices that encouraged using big data to dictate pervasive stops and frisks seeking crime prevention by targeting black and Latinx men.<sup>23</sup>

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23 (2008) (identifying “five genealogical methodologies—reversal, marginality, discontinuity, materiality, and specificity—derived from Nietzsche by Foucault”). Part III of this Article does provide a post-structuralist critique by means of connecting ideological discourses—the call for “law and order” and backlash criminology—to police practices. *See infra* Part III.

<sup>19</sup> *See* FLAMM, *supra* note 13, at 2–3, 52–66.

<sup>20</sup> Among the most notable ways the Court gutted *Terry* was by allowing an allegation that activity occurred in a “high crime area” to be a key factor in reasonable suspicion. *See, e.g.,* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (allowing stops when a person in a “high-crime area” flees at the sight of police).

<sup>21</sup> *See infra* Section III.B.2 (connecting Wilson’s theories to cultural backlash). On Wilson’s impact, see Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183, 187–89 (2009) (discussing influence of *Broken Windows*); Franklin E. Zimring, *Will Success Spoil James Q. Wilson?*, 85 J. CRIM. L. & CRIMINOLOGY 828, 831 (1995) (reviewing CRIME (James Q. Wilson & Joan Petersilia eds., 1995)) (“Those who called for expanding imprisonment in the United States twenty years ago should consider themselves successful advocates.”). For a critique of Wilson, see Glenn C. Loury, *Much to Answer For*, BOSTON R. May/June 2012, at 48, 48 (arguing that Wilson “provide[d] academic justification” for mass incarceration).

<sup>22</sup> One such theory analogizes low-level offenses to broken windows in a neighborhood. Such offenses are said to encourage more serious crimes by suggesting that no one cares about rule breaking. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>. For background information on post-civil rights backlash, see generally Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L. L. REV. 81, 82–83 (2015) (applying discursive analysis to post-civil rights backlash); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 858 (2006) [hereinafter Cooper, *Against Bipolar Black Masculinity*] (defining “post-civil rights anxiety”).

<sup>23</sup> *See* Goel et al., *supra* note 6, at 186–88. There is a lively debate over whether to use the new term “Latinx” or something more accepted, like “Latina/o” or “Hispanic.” This Article chooses the newer term to emphasize the increasing

If we are to end such use of programmatic stop and frisk by police, which amounts to racial harassment,<sup>24</sup> we must rework the discourses supporting it from the macro level down. This Article provides an example of the work that must be done in legal doctrine. Assuming *arguendo* that *Whren v. United States* correctly refused to consider evidence of race-based pretext when an ordinary search or seizure is supported by probable cause,<sup>25</sup> what about programmatic stops and frisks? Stops and frisks are justified based on mere reasonable suspicion.<sup>26</sup> Whereas the *Whren* rule suggests that police officers should not be second-guessed, a counter-discourse would

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importance of nonconforming gender/sex orientation identities. See Tanisha Love Ramirez & Zeba Blay, *Why People Are Using the Term 'Latinx,'* HUFFINGTON POST (July 5, 2016, 5:33 PM), [https://www.huffingtonpost.com/entry/why-people-are-using-the-term-latinx\\_us\\_57753328e4b0cc0fa136a159](https://www.huffingtonpost.com/entry/why-people-are-using-the-term-latinx_us_57753328e4b0cc0fa136a159) (“Latinx in general is a way to be more inclusive of identities that go beyond the everyday gender and racial norms that are rapidly shifting and being redefined in today’s culture.”). But see Hugo Marín González, *Why I Choose to Not Be Latinx,* LATINO REBELS (July 20, 2017, 11:44 AM), <http://www.latinorebels.com/2017/07/20/why-i-chose-to-not-be-latinx/> (“To be Latinx, just like Latino, Latina, or Hispanic, is to make invisible the African and the Taíno in me.”).

<sup>24</sup> The literature criticizing the programmatic nature of contemporary usage of stop and frisk is growing. See Robert Apel, *On the Deterrent Effects of Stop, Question, and Frisk,* 15 CRIMINOLOGY & PUB. POL’Y 27, 62–64 (2016) (calling for study of programmatic stop and frisk’s alleged deterrent effect); Bellin, *supra* note 4, at 1501 (referring to NYPD’s “stop and frisk” program); Friedman & Stein, *supra* note 4, at 286–87 (noting broad scope of programmatic stop and frisk); Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of Terry v. Ohio: A Content Analysis of Floyd v. City of New York,* 15 RUTGERS RACE & L. REV. 65, 83 (2014) (describing NYPD’s myopic focus on high-crime racial minority areas); Goel et al., *supra* note 6, at 187 (arguing big data can make courts more comfortable relying on evidence of discrimination); Kent Greenawalt, *Probabilities, Perceptions, Consequences and “Discrimination”: One Puzzle About Controversial “Stop and Frisk,”* 12 OHIO ST. J. CRIM. L. 181, 184 (2014) (critiquing racial profiling as immoral); Meares, *supra* note 4, at 164 (defining “programmatic stop-and-frisk”).

<sup>25</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) (allowing almost all pretextual police intrusions based on probable cause). Probable cause is required for most searches and seizures. See, e.g., *id.* Probable cause is a “fair probability” that crime is afoot and that the person to be searched or seized is involved. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>26</sup> This is the standard for, *inter alia*, *Terry* stops and frisks. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968). It is defined as the ability to state “specific and articulable facts” leading a reasonable officer to conclude that crime is afoot and that the person to be searched or seized is involved. *Id.* at 21.

say that only police officers' educated guesses—those based on probable cause—should be insulated from scrutiny for pretext.<sup>27</sup> Because stops and frisks are uneducated guesses, the trend of extending the *Whren* rule to stops and frisks should be reversed.<sup>28</sup>

Part I of this Article delineates the components of programmatic stop and frisk and summarizes the ways the practice marginalizes young black and Latinx men. Part II critically reviews scholarship analyzing programmatic stop and frisk, then sketches the tripartite approach recommended by this Article. Part III's genealogy of programmatic stop and frisk shows how macro-level discourses calling for "law and order" translated into meso-level weakening of *Terry* doctrine and a meso-level backlash criminology, which then translated into micro-level programmatic stop and frisk practices.<sup>29</sup> Part IV contends that scholars should create equality-based counter-narratives at the macro and meso levels to the call for "law and order." As an example, it proposes an argument for reversing *Whren*'s extension into *Terry* doctrine. Part V concludes.

## I. THE PROBLEM: PROGRAMMATIC STOP AND FRISK

When the *Terry* Court considered whether to allow police officers to make stops and frisks on less than probable cause a half century ago in 1968, the National Association for the Advancement of

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<sup>27</sup> See *infra* Section IV.B.

<sup>28</sup> *Id.*

<sup>29</sup> See Jennifer E. Laurin, *Terry, Timeless and Time-Bound*, 15 OHIO ST. J. CRIM. L. 1, 3 (2017) (decrying "all-too-common legal academic trap of centering the importance of judicial decision-making at the expense of grappling with the far messier and more contingent political, sociological, and institutional forces that enter the mix"); cf. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 103–05 (2001) (considering how discourses about the need for crime control brought about mass incarceration). See also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 77, 91–96 (2007) (noting use of crime control discourse for political purposes); LOÏC WACQUANT, *PRISONS OF POVERTY* 9–11 (2009) [hereinafter WACQUANT, *PRISONS OF POVERTY*] (arguing a network of conservative think tanks created a discourse dismantling the welfare state by means of mass incarceration).

Colored People (“NAACP”)<sup>30</sup> argued that it would lead to widespread harassment of blacks.<sup>31</sup> That prediction has come true. In the 2013 *Floyd v. City of New York*<sup>32</sup> trial, plaintiff-activists proved that the NYPD had targeted young black and Latinx men for aggressive use of *Terry* stops and frisks.<sup>33</sup> Likewise, a 2017 report on stop and frisk in Philadelphia found that race, not crime-rate, best explained police targeting.<sup>34</sup> Results in Baltimore were similar.<sup>35</sup>

Legal scholars have only recently identified and analyzed programmatic stop and frisk. Professor Tracey Meares published an important essay discussing the emerging phenomenon of programmatic stop and frisk in 2016.<sup>36</sup> Law and public health scholar Jeffrey Fagan and others had earlier conducted extensive research on order maintenance policing by means of stop and frisk in New York City.<sup>37</sup> This Part of the Article sets up the new scholarly approach introduced and explained in Part II, as well as the genealogy of pro-

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<sup>30</sup> The NAACP is the largest and most prominent civil rights organization focusing on African-Americans. See *Nation’s Premier Civil Rights Organization*, NAACP, <https://www.naacp.org/nations-premier-civil-rights-organization/> (last visited Sept. 8, 2018).

<sup>31</sup> See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 31–35, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67); see also *Terry*, 392 U.S. at 11–12 (identifying NAACP argument).

<sup>32</sup> 959 F. Supp. 2d 540 (S.D.N.Y.) (concluding that NYPD’s programmatic stop and frisk practices violated *Terry* doctrine and Equal Protection doctrine), *appeal dismissed*, (2d Cir. 2013).

<sup>33</sup> See *id.* at 562 (summarizing holdings); Goel et al., *supra* note 6, at 187–88 (discussing stop hit-rates of *Terry* stops in New York City).

<sup>34</sup> See Lance Hannon, *An Explanatory Multilevel Analysis of Pedestrian Frisks in Philadelphia*, RACE & JUST. (forthcoming) (manuscript at 11–19) (<https://doi.org/10.1177/2153368717730106>); Samantha Melamed, *Study: High Rates of Stop-and-Frisk Even in Philly’s Lowest-Crime Black Areas*, INQUIRER (Oct. 2, 2017, 12:32 PM), <http://www.philly.com/philly/news/crime/stop-frisk-policing-philadelphia-racial-bias-lance-hannon-villanova-20171002.html> (reporting on Lance Hannon study).

<sup>35</sup> See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 29 (2016), <https://www.justice.gov/opa/file/883366/download> (connecting stops to race).

<sup>36</sup> See generally Meares, *supra* note 4.

<sup>37</sup> See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 463 (2000); Fagan & Geller, *supra* note 7, at 68–85.

grammatic stop and frisk conducted in Part III, by first carefully describing the components and consequences of programmatic stop and frisk.

### A. *Components of Programmatic Stop and Frisk*

This Section brings together varied scholarly descriptions of programmatic stop and frisk to define the breadth of the phenomenon. Moreover, this Section contributes to stop and frisk scholarship by identifying elements of programmatic stop and frisk that have only been discussed in part by other sources.

#### 1. ADMINISTRATIVE DICTATION

The first key characteristic of programmatic stop and frisk is top-down requirements or incentives for aggressive use of stop and frisk. Today, *Terry* stops are “scripted, predictable, and deeply institutionalized.”<sup>38</sup> Programmatic stop and frisk is distinguished from a collection of *Terry* stops and frisks because programmatic stops and frisks are administratively dictated.<sup>39</sup> Meares labels these actions “exogenous”—forced from above—rather than “endogenous”—naturally occurring.<sup>40</sup> This is a problem because the *Terry* decision envisioned endogenous stops and frisks.<sup>41</sup>

Exogenous stops and frisks are also a problem because they amount to state ordered harassment of civilians.<sup>42</sup> Police departments have been accused of setting mandatory minimums for stops and frisks in a given area.<sup>43</sup> Police departments have also incentivized programmatic stops and frisks by tying promotions to getting

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<sup>38</sup> CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 36 (2014).

<sup>39</sup> Meares, *supra* note 4, at 162.

<sup>40</sup> *See id.* at 162–63 (“The stops that flow from these programs are not individual incidents that grow organically—endogenously—out of a collection of individual investigations occurring between an officer and a person that the officer believes to be committing a crime. Rather, programmatic stops are imposed from the top down and are exogenous to the fabric of community-police relations.”).

<sup>41</sup> *Id.* at 163.

<sup>42</sup> *See, e.g.,* *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556–57 (S.D.N.Y.) *appeal dismissed*, (2d Cir. 2013).

<sup>43</sup> *See* Alexander H. Kipperman, Comment, *Frisky Business: Mitigating Predictive Crime Software’s Facilitation of Unlawful Stops and Frisks*, 24 TEMP. POL. & C.R.L. REV. 215, 236 (2014) (citing ex-police officer’s testimony).

“results,” as measured by more stops and frisks.<sup>44</sup> In other words, stops and frisks are on the rise because police administrators are demanding more of them.<sup>45</sup>

The top-down nature of programmatic stop and frisk has been greatly facilitated by the development of crime statistic mapping programs, known as Compstat.<sup>46</sup> Compstat enables police administrators to track crimes by precinct and neighborhood.<sup>47</sup> As a result, administrators can pressure street officers to direct more energy, read as more frequent stops and frisks, to particular areas.<sup>48</sup> Other forms of “big data” can be put to similar uses.<sup>49</sup> In a nutshell, “[b]ig data’ is the practice of accumulating extraordinarily large amounts of information from a variety of different sources and then processing that information using statistical analysis.”<sup>50</sup> Use of big data to select target areas (or even individual targets) allows for administrative dictation of programmatic stops and frisks.<sup>51</sup>

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<sup>44</sup> See Bellin, *supra* note 4, at 1502 (suggesting police officers are stopping and frisking in response to incentives).

<sup>45</sup> See *id.* at 1502.

<sup>46</sup> See *id.* at 1506. One of the preeminent scholar on technology and the Fourth Amendment is Orin Kerr. See generally Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 806 (2004). For work on Compstat and the Fourth Amendment, see Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 323 (2012) (suggesting Compstat produced New York City’s crime drop); Joh, *supra* note 8, at 22–27 (describing police use of big data).

<sup>47</sup> Bellin, *supra* note 4, at 1506.

<sup>48</sup> See, e.g., Fagan & Geller, *supra* note 7, at 62 (supporting contention administrators pressure officers to increase stops and frisks of certain populations).

<sup>49</sup> See, e.g., Ferguson, *Predictive Policing*, *supra* note 46, at 323 (discussing Compstat); Goel et al., *supra* note 6, at 182 (discussing big data in general); Joh, *supra* note 8, at 22–27 (considering effects of big data on policing).

<sup>50</sup> *Quantifying Criminal Procedure*, *supra* note 8, at 952. Other uses of the term big data refer to particular complex algorithms. See Gil Press, *12 Big Data Definitions: What’s Yours?*, FORBES (Sept. 3, 2014, 8:01 AM), <https://www.forbes.com/sites/gilpress/2014/09/03/12-big-data-definitions-whats-yours/#f8403ec13ae8> (discussing uses of term).

<sup>51</sup> *Quantifying Criminal Procedure*, *supra* note 8, at 953–54 (noting that law enforcement is already using big data “to determine where crime is likely to occur and to allocate their resources accordingly”).

## 2. PERVASIVENESS

The second key characteristic of programmatic stop and frisk is its pervasiveness, which entails the aggressive use of the *Terry* stop and frisk power. The blanketing of certain neighborhoods is said to be necessary for the program to have its alleged deterrent effect.<sup>52</sup> The theory is that if potential felons know they are very likely to get *Terry* stopped, they will leave their guns at home.<sup>53</sup> If they then get into a conflict, they will not have a weapon with which to make it deadly.<sup>54</sup> However, in order to convince these felons-in-waiting that they will get stopped, police officers must more or less arbitrarily stop them.<sup>55</sup> The deterrent effect depends on the arbitrariness and, thus, the likely unconstitutionality of the stops.<sup>56</sup> The belief in the necessity of saturating certain neighborhoods with arbitrary stops makes it especially likely that programmatic stops and frisks will remain frequent, at least for particular populations.<sup>57</sup>

The pervasiveness of programmatic stops and frisks alone raises three concerns. First, such pervasive use of stops and frisks is not what the *Terry* Court anticipated.<sup>58</sup> Second, it is particularly troubling that the theory of programmatic stop and frisk requires frequent harassment of a circumscribed set of people in order for the deterrent to be effective.<sup>59</sup> Third, the frequency of the stops and their

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<sup>52</sup> See Bellin, *supra* note 4, at 1538 (“[T]he likelihood of a frisk determines the deterrent effect.”). See generally Apel, *supra* note 24 (calling for study of programmatic stop and frisk’s alleged deterrent effect). But see generally Fagan & Geller, *supra* note 7, at 84 (expressing doubt about measurability of deterrent effect of *Terry* stops).

<sup>53</sup> Bellin, *supra* note 4, at 1515 (identifying goal of “instilling concern in youths that they could be stopped and frisked every time they leave their homes so they are less likely to carry weapons.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1538.

<sup>56</sup> See *id.* at 1538–39, 1548.

<sup>57</sup> *Id.* at 1549.

<sup>58</sup> See Meares, *supra* note 4, at 178; see also Michael D. White et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 14 (2016) (noting frequency of stops of racial minorities in Newark, New Jersey, “Detroit, Michigan; Chicago, Illinois; Miami Gardens, Florida; New Orleans, Louisiana; and Pittsburgh, Pennsylvania”).

<sup>59</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556–57 (S.D.N.Y.), *appeal dismissed*, (2d Cir. 2013).

low hit-rate implies that the unconstitutionality of the stops is necessary to their supposed deterrent effect.<sup>60</sup>

### 3. PROFILES OF AREAS

The third key characteristic of programmatic stop and frisk is that it is profile-based.<sup>61</sup> Administratively impelled, pervasive stops and frisks would be problematic themselves, but because they are entwined with racial profiling they have spurred strong resistance.<sup>62</sup> Profiles of criminals have been around for well over three decades.<sup>63</sup> Profiles have also long been criticized as devolving into racial stereotypes.<sup>64</sup> The scholarly literature highlights concerns about the devolution of characteristics like “unusual clothing” or “furtive movements”<sup>65</sup> into “things people of color wear” and “how people of color react to the presence of the police.”<sup>66</sup>

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<sup>60</sup> Bellin, *supra* note 4, at 1548; *see also Arrest Efficiency, supra* note 12, at 2037 (defining “hit rate” as rate of finding evidence of contraband during stops). The hit-rate is the percentage of times a stop yields evidence of a crime.

<sup>61</sup> *See Slobogin, supra* note 12, at 93 (defining programmatic stop and frisk as involving profiling).

<sup>62</sup> *See Frank Rudy Cooper, Understanding ‘De-policing’: Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 361 (2002) [hereinafter Cooper, *Understanding ‘De-policing’*].

<sup>63</sup> *See, e.g., United States v. Sokolow*, 490 U.S. 1, 9–10 (1989) (allowing stops based on profiles where the stops could also be otherwise justified).

<sup>64</sup> *See, e.g., id.* at 13 (Marshall, J., dissenting) (criticizing “the profile’s ‘chameleon-like way of adapting to any particular set of observations’” (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev’d*, 490 U.S. 1 (1989))).

<sup>65</sup> Goel et al., *supra* note 6, at 188 (contending that dispensing with “furtive movements” as stop justification would make them “less discriminatory and more successful”).

<sup>66</sup> *See Lenese C. Herbert, Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. POVERTY L. & POL’Y 135, 136 (2002) (noting ease of claiming misnomer “high-crime area” based on characteristics of “high-crime people”); *see also Sokolow*, 490 U.S. at 10 (allowing profiling); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (making flight from police in “high-crime area” a basis for reasonable suspicion). *But see Commonwealth v. Warren*, 58 N.E.3d 333, 343 (Mass. 2016) (declaring that racial profiling makes it impossible to know that a black man evading police is doing so for suspicious reasons).

Local police force use of Compstat and big data to target stops and frisks is relatively new.<sup>67</sup> Departments now profile neighborhoods as “high crime” based on arrest statistics.<sup>68</sup> They also profile suspect behaviors.<sup>69</sup> The statistical analysis, combined with preexisting stereotypes, enables and encourages racial profiling.<sup>70</sup> Hence, the *Floyd* court found *as fact* that the aforementioned NYPD policy of assigning officers to specific areas and instructing them to stop the “right people” was understood to direct racial profiling of young black and Latinx males.<sup>71</sup>

#### 4. TARGETING BY RACE, GENDER, AND AGE

The fourth key characteristic of programmatic stop and frisk is further micro-targeting of young black and Latinx males in urban environments. The combination of minimal constitutional scrutiny and great administrator demand for stops and frisks means police officers cannot avoid intervening in the lives of certain civilians.<sup>72</sup> Resource scarcity virtually requires that police focus on sub-groups, usually young men of color.<sup>73</sup> That is, because the police can’t stop

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<sup>67</sup> *Quantifying Criminal Procedure*, *supra* note 8, at 950 (discussing “modern methods of data collection” as opposed to older law enforcement techniques).

<sup>68</sup> *See, e.g.,* Kelsey Finch & Omer Tene, *Welcome to the Metropticon: Protecting Privacy in a Hyperconnected Town*, 41 *FORDHAM URB. L.J.* 1581, 1602–03 (2014) (analyzing “[t]he use of historical arrest statistics for targeted law enforcement efforts”).

<sup>69</sup> *See Quantifying Criminal Procedure*, *supra* note 8, at 963 (discussing the use and meaning of “furtive movements” in ascertaining potential criminal activity).

<sup>70</sup> *See* Finch & Tene, *supra* note 68, at 1602–03 (worrying big data may hide explicit discrimination and lead to disparate racial impacts); *cf.* Goel et al., *supra* note 6, at 220–21 (describing that big data could be used to improve fairness of stop and frisk).

<sup>71</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562, 603 (S.D.N.Y.), *appeal dismissed*, (2d Cir. 2013).

<sup>72</sup> Fagan & Geller, *supra* note 7, at 54.

<sup>73</sup> *See* Bellin, *supra* note 4, at 1500 (arguing “inescapable resource constraints dictate reliance on demographic profiles, including (impermissibly) race, to narrow the program’s scope”); Meares, *supra* note 4, at 178 (noting police focus on racial minorities); *cf.* Carbado & Rock, *supra* note 12, at 167 (identifying racial profiling as a factor in police violence).

everyone, they must focus on sub-groups.<sup>74</sup> This leads them to profile the characteristics they think indicate suspiciousness—namely, being young, male, and black or Latinx.<sup>75</sup>

Of course, racial targeting is a self-confirming rationale because police officers' own behavior controls the arrest statistics.<sup>76</sup> If police officers are especially likely to arrest racial minorities, the arrest statistics will then support further racial targeting.<sup>77</sup> This is a problem because police officers' implicit bias against racial minorities necessarily influences the suspect selection process.<sup>78</sup> And many police officers also have an explicit bias that racial minorities are more crime prone.<sup>79</sup> Since racial profiling is tautological, it is likely to increase over time.

Programmatic stop and frisk targeting also incorporates gender. For example, young men of color are deemed to be more crime prone.<sup>80</sup> As a result, urban police forces focus on young *men* of color.<sup>81</sup> Furthermore, the mostly male police force is more likely to provoke, and be provoked by, young men.<sup>82</sup> Meanwhile, United States Customs officials focus scrutiny on black women.<sup>83</sup>

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<sup>74</sup> Bellin, *supra* note 4, at 1542.

<sup>75</sup> *Id.* at 1500, 1542.

<sup>76</sup> See Greenawalt, *supra* note 24, at 188 (“If the police overestimate the dangerousness of members of a race, and concentrate enforcement efforts on them, the ensuing statistics about crimes will not accurately reflect how many crimes were actually committed by members of various races.”).

<sup>77</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562, 667 (S.D.N.Y.) (“Given the NYPD’s policy of basing stops on crime data, these races may then be subjected to even more stops and enforcement, resulting in a self-perpetuating cycle.”), *appeal dismissed*, (2d Cir. 2013).

<sup>78</sup> L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1161–64 (2012) [hereinafter *Police Efficiency*].

<sup>79</sup> See Bellin, *supra* note 4, at 1543.

<sup>80</sup> See NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 20–25 (2018) (documenting criminalization of black boys from near birth).

<sup>81</sup> See, e.g., *Floyd*, 959 F. Supp. 2d at 561 (defining “the right people” as “young black and Hispanic men”), *appeal dismissed*, (2d Cir. 2013).

<sup>82</sup> See Cooper, *Who’s the Man?*, *supra* note 2, at 675–76 (detailing masculinities studies’ application to *Terry* stops and frisks); McGinley, *Policing and the Clash of Masculinities*, *supra* note 2, at 242–51 (applying masculinities studies to police brutality against men of color).

<sup>83</sup> See Sherri Sharma, *Beyond “Driving While Black” and “Flying While Brown”*: Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling, 12 COLUM. J. GENDER & L. 275, 283–85 (2003).

This micro-targeting will likely continue. Programmatic stop and frisk allegedly has a deterrent effect because police intrusions are trained upon small, coherent communities.<sup>84</sup> Given police officers' explicit and implicit biases, we should expect administratively driven, pervasive, profile-based use of the *Terry* stop and frisk power to lead to disproportionate and often unconstitutional police targeting of young racial minority men.<sup>85</sup>

## 5. PREVENTATIVE

The final key characteristic of programmatic stop and frisk is that it seeks to prevent crime before it occurs. Police administrators seek to deter crime by using pervasive, profile-based stops and frisks.<sup>86</sup> Administrators predetermine both where and how frequently people will be stopped, which reveals the preventative goal: administrators send officers to the places they think will be the site of future crime.<sup>87</sup> The attempt to deter crime distinguishes the practice from prior forms of crime fighting.<sup>88</sup> Police departments are no longer satisfied with simply responding to crime by catching and punishing criminals; instead, their practices focus on preventing people they profile as "criminals" from even engaging in certain behaviors, such as carrying guns, in the first place.<sup>89</sup>

Administrators want to supersaturate certain areas with *Terry* stops and frisks because they believe that increasing the risk of get-

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<sup>84</sup> See Bellin, *supra* note 4, at 1548 (suggesting that targeting of sub-populations is an inevitable consequence of adopting programmatic stop and frisk).

<sup>85</sup> *Id.* at 1542; Meares, *supra* note 4, at 175 ("[I]n a significant percentage of cases, police do not comply with the Constitution, and when they do not, the burden falls disproportionately on racial minorities.").

<sup>86</sup> See Bellin, *supra* note 4, at 1515.

<sup>87</sup> See *id.* at 1515–16; Slobogin, *supra* note 12, at 93 (describing one aspect of "programmatic searches and seizures" as "seek[ing] to ferret out or deter *undetected wrongdoing, usually within a designated group*").

<sup>88</sup> See, e.g., Friedman & Stein, *supra* note 4, at 318 (describing preventative goal of current policing compared to "investigative" policing); Slobogin, *supra* note 12, at 93 (identifying the focus of pervasive searches as deterrence, contra police practices that "focus on a particular crime known to have already occurred").

<sup>89</sup> See e.g., Bellin, *supra* note 4, at 1515–16 (noting shift to crime deterrence goal).

ting stopped and frisked will make potential felons leave home without their guns.<sup>90</sup> They assume that fewer guns means fewer violent crimes.<sup>91</sup> Fewer violent crimes means less public criticism of the police.<sup>92</sup> Police departments always want to reduce public criticism, so they pervasively stop particular populations from carrying guns. By stopping and frisking certain populations, police departments believe they can prevent those populations from carrying guns and thus reduce public criticism of their departments. In summary, programmatic stop and frisk can best be understood by connecting the five key characteristics I have identified: (1) police departments administer (2) pervasive stops and frisks (3) in certain profiled areas and (4) of certain profiled people to (5) prevent crime and reduce public criticism of police.

### B. *Consequences of Programmatic Stop and Frisk*

Understanding the elements of programmatic stop and frisk helps us understand its consequences. Having identified the five key characteristics of the increasingly prevalent law enforcement practice of programmatic stop and frisk, it is important to understand why the practice is so problematic. This Section looks at the results of programmatic stop and frisk in the place where the practice was invented: New York City. While the evidence of racial profiling there is troubling, the Section also documents a broader concern: the use of programmatic stop and frisk as social control of young black and Latinx males. Programmatic stop and frisk, this Section argues, represents a powerful majority's segregation and subordination of a socially disfavored group.

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<sup>90</sup> See *id.* at 1538 (noting rationale for programmatic stop and frisk requires supersaturation to deter gun carrying); Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 92 (2015) (describing gun deterrence rationale). This strategy stems from Republican New York City Mayor Rudolph "Rudy" Giuliani's hiring of New York City Transit Police Commissioner William Bratton to utilize James Q. Wilson's Broken Windows theory to fight crime. Bellin, *supra* note 4, at 1503–04. Bratton seized upon statistics linking gun use to violent crime. *Id.* at 1507. Deterring gun possession by means of frequent encounters with potential felons became a key goal of the NYPD. *Id.* at 1508.

<sup>91</sup> See Bellin, *supra* note 4, at 1517 (discussing New York City's identification of "gun crimes as the driver of the City's violent-crime epidemic").

<sup>92</sup> See *id.* at 1503 (discussing the "public mood" in New York City in the early 1990s that current violent crime reduction efforts weren't working).

### 1. NYPD RACIAL PROFILING

NYPD racial profiling has long brought together several elements of programmatic stop and frisk. For instance, the existence of Compstat methods means that NYPD administrators can supersaturate racial minority neighborhoods with stops and frisks on the assumption that nearly all crime will occur in those neighborhoods.<sup>93</sup> Programmatic stop and frisk deployed in conjunction with this type of big data might thus be thought of as racial “profiling on steroids.”<sup>94</sup>

The use of racial profiling in *Terry* stops and frisks was confirmed in New York City. From the mid-1990s through the first decade of the 2000s, the NYPD conducted a reign of terror in which it systematically and aggressively used its *Terry* stop and frisk powers against young men of color.<sup>95</sup> Those stops and frisks were clearly race-based.<sup>96</sup>

The evidence produced at trial in the *Floyd* NYPD racial profiling case revealed a pervasive program of only sometimes constitutional stops and frisks.<sup>97</sup> The NYPD made over four *million* stops between 2004 and 2012.<sup>98</sup> Judge Scheindlin found as fact that a “minimum” of six percent (6%)—over 200,000—of the stops violated the United States Constitution.<sup>99</sup> This likely underestimates the percentage of unconstitutional stops.<sup>100</sup>

Moreover, the vast majority of the stops amounted to merely hassling people without providing any law enforcement benefit.<sup>101</sup> For instance, only fifty-two percent (52%) of those stopped were

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<sup>93</sup> See *id.* at 1506, 1547.

<sup>94</sup> John F. McManus, *Profiling on Steroids*, in RACIAL PROFILING 46 (Noël Merino ed., 2015).

<sup>95</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y.) (noting race-gender of victims), *appeal dismissed*, (2d Cir. 2013); White et al., *supra* note 58, at 29–33.

<sup>96</sup> *Floyd*, 959 F. Supp. 2d at 562.

<sup>97</sup> See *id.* at 560–61.

<sup>98</sup> *Id.* at 556.

<sup>99</sup> See *id.* at 579 (discussing unconstitutional stops).

<sup>100</sup> See *id.* at 578–79 (reviewing expert witness’s methodology for declaring stops unconstitutional).

<sup>101</sup> See Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 500 (2015) (referring to NYPD’s programmatic stop and frisk as hassle).

frisked.<sup>102</sup> This is a surprising statistic, given that police officers generally consider the frisk “an almost incidental facet of” stopping someone.<sup>103</sup> A stop absent a frisk might be a sign that the officer feels absolutely certain the person they are dealing with poses no potential danger.<sup>104</sup> Moreover, ninety percent (90%) of stops (including frisks) resulted in no further law enforcement action.<sup>105</sup> Programmatic stop and frisk thus mostly serves the purpose of putting particular people on notice that they are subject to frequent, sometimes unlawful, intrusions.

The people who are hassled under programmatic stop and frisk are overwhelmingly young black and Latinx men.<sup>106</sup> The race-based targeting of NYPD stops was obvious: the City was twenty-three percent (23%) black, yet a full fifty-two percent (52%) of stops were of African Americans.<sup>107</sup> Latinx people were also overrepresented: twenty-nine percent (29%) of the City was Latinx, but thirty-one percent (31%) of stops were of Hispanics.<sup>108</sup> Perhaps most glaringly, the City was thirty-three percent (33%) white, while only ten percent (10%) of those stopped were white.<sup>109</sup> Professor Fagan, the *Floyd* plaintiffs’ expert, determined that

the racial composition of a neighborhood is a statistically significant predictor of the number of police stops *even when controlling for* police-reported measures of crime, police-patrol allocations, and other social conditions in that neighborhood. . . . In fact, the level of violent crime in an area, somewhat

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<sup>102</sup> Shira Scheindlin, *A Chance to Reflect: Thoughts from the Author of Floyd v. City of New York*, 15 OHIO ST. J. CRIM. L. 35, 38–39 (2017).

<sup>103</sup> Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19, 32 (2017) (concluding this is why frisks are “forgettable” to police officers).

<sup>104</sup> Scheindlin, *supra* note 102, at 39 (“It is likely there never was reasonable suspicion of criminal activity supporting these stops . . .”).

<sup>105</sup> *Id.* at 38.

<sup>106</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y.), *appeal dismissed*, (2d Cir. 2013).

<sup>107</sup> *Id.* at 558–59 (summarizing racial compositions).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

surprisingly, did not make *any* contribution to explaining the level of stops in high crime areas.<sup>110</sup>

Accordingly, we know that race does the bulk of the work when departments programmatically stop and frisk.<sup>111</sup>

One might claim that the NYPD's racial profiling was explained by a greater propensity for racial minorities to have evidence of crime or weapons, but the hit-rates for catching racial minorities with contraband were significantly lower than for whites.<sup>112</sup> This strongly suggests that the NYPD's targeting of black and Latinx men was an inefficient use of resources because the high rates of racial minority stops in New York City were the product of a deliberate policy of stopping "the right people," which the *Floyd* court found was code for young, of color, and male.<sup>113</sup> In New York City, then, programmatic use of *Terry* stops and frisks meant racial profiling.

If programmatic stop and frisk meant racial profiling in New York City, might we expect similar results elsewhere? Undoubtedly. The question, then, is how harmful is this phenomenon?

## 2. GENERAL SOCIAL CONTROL OF YOUNG BLACK AND LATINX MALES

As sociologist Victor Rios demonstrates, programmatic stop and frisk has concrete effects on young black and Latinx men. Rios's careful qualitative investigation of the lives of young black and Latinx males in Oakland supports that conclusion.<sup>114</sup> From before

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<sup>110</sup> Meares, *supra* note 4, at 173–74 (first emphasis added).

<sup>111</sup> *Id.*

<sup>112</sup> See *Floyd*, 959 F. Supp. 2d at 559 ("Contraband other than weapons was seized in 1.8% of stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites."); see also Goel et al., *supra* note 6, at 209 (analyzing *Floyd*). Richardson sees a reasonableness problem in the low hit rates of stop-and-frisks. See *Arrest Efficiency*, *supra* note 12, at 2037–41. She would factor officer accuracy into reasonableness by requiring an articulation of the connection between officer training and/or experience and the judgment of suspiciousness. *Id.* Legal scholar Jane Bambauer notes that "NYPD's stop-and-frisk program had such a low hit rate, and was so active, that the enterprise consisted almost entirely of hassle. And that hassle had an outsize effect on minority communities." Bambauer, *supra* note 101, at 500.

<sup>113</sup> *Floyd*, 959 F. Supp. 2d at 602–04.

<sup>114</sup> VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, at xiv (2011).

puberty, the 118 subjects of his study were pervasively criminalized in interactions with the police and school authorities.<sup>115</sup> Through constant, suspicious surveillance, young black and Latinx males are constructed as always already suspect in schools and on the street.<sup>116</sup> Rios further demonstrates that “[m]inor citations for ‘little shit’ played a crucial role in pipelining many of the young men in this study deeper into the criminal justice system.”<sup>117</sup> The school-to-prison pipeline is thus a real force in the lives of young black and Latinx men.

Criminalization of young black and Latinx males should be understood as a form of social control that constitutes them as a socially marginalized population.<sup>118</sup> This Article uses “social control” to denote ways in which society marshals institutions to cabin in disfavored social groups.<sup>119</sup> We are still speaking mostly of hegemony, a dominant group’s coercion of other groups through ideology rather than brute force,<sup>120</sup> but hegemony can take a more virulent form when aimed at socially marginalized groups.<sup>121</sup> In this view,

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<sup>115</sup> *Id.* at xv, 5 (“This cycle began before their first arrest—it began as they were harassed, profiled, watched, and disciplined at young ages, before they had committed any crimes.”).

<sup>116</sup> *Cf.* Nancy Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 73 (2016) (discussing school-to-prison pipeline in relation to black boys). Of course, there are groups that are more socially controlled, such as trans men; however, recognizing this difference just illuminates how social control is tailored to the group and the context. Gia Elise Barboza et al., *Physical Victimization, Gender Identity and Suicide Risk Among Transgender Men and Women*, 4 PREVENTIVE MED. REP. 385, 385 (2016).

<sup>117</sup> RIOS, *supra* note 114, at 44.

<sup>118</sup> *See id.* at xv.

<sup>119</sup> A fuller theory of contemporary Western political structure would note that neoliberal societies are increasingly “centaur states”: They are soft on the top of society by means of deregulation and hard on the bottom through decreased social welfare programs, increased punishment regimes, and a general culture of individual responsibility. *See* Peter Squires & John Lea, *Introduction: Reading Loïc Wacquant — Opening Questions and Overview*, in CRIMINALISATION AND ADVANCED MARGINALITY: CRITICALLY EXPLORING THE WORK OF LOÏC WACQUANT 1, 6 (Peter Squires & John Lea eds., 2012) (conceptualizing centaur state).

<sup>120</sup> *See, e.g.*, Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 859 (2002) [hereinafter, Cooper, *Un-Balanced Fourth*] (defining hegemony).

<sup>121</sup> *See, e.g.*, Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2054 (2017).

social persuasion sometimes veers toward social coercion.<sup>122</sup> Social control is thus pervasive, targeted coercion of particular social groups.

Social control is more significant than discrete incidences of discrimination because it reflects and helps enforce the subordinate social status of the target group.<sup>123</sup> As legal scholar Mario Barnes puts it, “policing practices teach members of certain groups that they have no access to the privileges of full citizenship.”<sup>124</sup> So, programmatic stop and frisk should be considered part of the culture of control that governs through crime control by punishing the poor.<sup>125</sup>

Today, programmatic stop and frisk stands on the precipice of nationwide proliferation.<sup>126</sup> This should concern anyone who wishes to protect civil liberties and civil rights.<sup>127</sup>

## II. TOWARD A NEW SCHOLARLY APPROACH

To better understand the relationship between programmatic stop and frisk and social control of young black and Latinx men, we need to take a different approach. Whereas current approaches to programmatic stop and frisk concentrate on its efficacy or see it as a reflection of individual officers’ biases, we ought to move on to a discussion of how it fits within the broader social structure. While critiques of the practice as biased are accurate, they need to go further to reveal that programmatic stop and frisk was created to pro-

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<sup>122</sup> Squires & Lea, *supra* note 119, at 1.

<sup>123</sup> See Mario Barnes, *Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711, 721 (2015) (considering insights from Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 753 (2015)).

<sup>124</sup> *Id.*

<sup>125</sup> See GARLAND, *supra* note 29, at 99–100, 102. See generally KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 176–79 (2012) (tracing political discourse of “welfare cheats” to prosecutions of poor women); SIMON, *supra* note 30, at 182; LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 76–109 (2009) (arguing Western governments are managing the social costs of rolling back social safety nets by incapacitating the poor).

<sup>126</sup> Josh Saul, *America Has a Stop-and-Frisk Problem. Just Look at Philadelphia*, NEWSWEEK (May 18, 2016, 6:00 AM), <https://www.newsweek.com/2016/06/10/stop-and-frisk-philadelphia-crisis-reform-police-460951.html>.

<sup>127</sup> *Id.*

mote and does in fact promote social control. This Article's new approach presents a critical vantage point that draws upon cultural studies analysis of discourses and sociology's tripartite analysis of social phenomena. It extends the work of critical criminologists such as David Garland, Kaaryn Gustafson, Jonathan Simon, and Loïc Wacquant, with the goal of creating counter-discourses that can undo current doctrinal trends as well as the broad racial backlash that has characterized much of the post-civil rights era.<sup>128</sup>

### A. Current Approaches

Many scholars criticize programmatic stop and frisk, though some applaud it. Supporters of the practice generally assert that it reduces crime.<sup>129</sup> That supposition derives from the Giuliani/Bloomberg era in New York City, when the New York Police Department accomplished a large crime reduction from the mid-1990s to 2010.<sup>130</sup> Anti-programmatic stop and frisk scholars generally challenge the practice because it disproportionately burdens racial minority communities.<sup>131</sup> This Section of the Article critically reviews the debate over programmatic stop and frisk.

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<sup>128</sup> See GARLAND, *supra* note 29, at 5–6, 193–205 (showing crime control discourse led to greater social control); GUSTAFSON, *supra* note 125, at 43–52 (discussing workfare as the flipside of neoliberal movement to govern through crime control); SIMON, *supra* note 29, at 90–105 (demonstrating neoliberal societies govern through methods including and analogous to crime control); WACQUANT, PRISONS OF POVERTY, *supra* note 29, at 71–84 (revealing mass incarceration is a strategy for replacing welfare).

<sup>129</sup> See ZIMRING, *supra* note 11, at 100 (describing how New York City officials took credit for the city's crime drop and attributed it to a change in policing); Weisburd et al., *supra* note 11, at 46–47 (contending that aggressive stop and frisk intervention produces a crime drop); cf. Braga et al., *supra* note 11, at 658 (asserting “hot spot[] policing programs generate modest crime control gains”).

<sup>130</sup> See ZIMRING, *supra* note 11, at 147; Bellin, *supra* note 4, at 1497 (citing drop from 2,245 homicides in 1990 to 419 in 2012).

<sup>131</sup> See, e.g., Goel et al., *supra* note 6, at 185 (asserting programmatic stop and frisk is racially targeted and affects legitimacy of police in racial minority communities); Huq, *supra* note 4, at 2402 (contending programmatic stop and frisk reproduces racial stratification); Meares, *supra* note 4, at 178–79 (concluding young men of color bear burden of programmatic stop and frisk).

### 1. SUPPORTERS OF PROGRAMMATIC STOP AND FRISK

The academics who support programmatic stop and frisk generally make three types of assertions: that it reduces crime; that it is the most efficient use of resources; or that the narrower tactic of “hot spot” policing is indispensable. However, programmatic stop and frisk does not cause crime to drop, is not a more efficient allocation of resources, and is not justified under a hot spots theory when it becomes a generalized practice. Regardless, programmatic stop and frisk is not worth the social costs it inflicts on black and Latinx communities.

In the provocatively titled book *The City That Became Safe: New York's Lessons for Urban Crime and its Control*, Franklin E. Zimring's arguments exemplify the scholarly claims and arguments that crime reduction resulted from changes in police practices.<sup>132</sup> He and other scholars point specifically to unusually sharp declines in crime in New York City as evidence for their conclusions.<sup>133</sup> Perhaps unsurprisingly, some of these claims are housed in an anthology curated by James Q. Wilson, who—as this Article will later demonstrate—was motivated by a conservative racial agenda.<sup>134</sup>

There is evidence that programmatic stop and frisk does not reduce crime. Yet, despite widespread claims that programmatic stop and frisk causes crime reduction, “there are a number of studies indicating that the relationship between stop-and-frisk and the crime decline in New York City is modest at best.”<sup>135</sup> Research “suggest[s] that . . . the bulk of the investigative stops [in New York City] did not play an important role in the crime reductions.”<sup>136</sup> As described in Part I of this Article, these “investigative stops” are characterized by pervasiveness, profiling of large areas as “high

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<sup>132</sup> See ZIMRING, *supra* note 11, at 147. Zimring notes that use of stop and frisk “may add significant value to street policing efforts in New York City,” but there is no conclusive evidence. *Id.* at 149.

<sup>133</sup> See, e.g., Braga et al., *supra* note 11, at 658 (asserting hot spot policing worked); Weisburd et al., *supra* note 11, at 47–48 (contending that an aggressive stop and frisk intervention produces a crime drop).

<sup>134</sup> See *infra* Section III.B.2 (describing Wilson's role in creating a backlash criminology that rationalized programmatic stop and frisk).

<sup>135</sup> White et al., *supra* note 58, at 34.

<sup>136</sup> *Id.* at 35 (quoting John MacDonald et al., *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE, June 16, 2016, at 1, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0157223>).

crime,” and racial targeting.<sup>137</sup> Thus, the fundamental characteristics of programmatic stop and frisk were unhelpful and, despite contrary assertions from supporters, “did not play an important role in the crime reductions.”<sup>138</sup>

Logic also counsels against concluding that programmatic stop and frisk reduces crime. Although New York City experienced a precipitous drop in crime from the mid-1990s into the 2000s,<sup>139</sup> crime dropped *almost everywhere* during that time.<sup>140</sup> Most of the places that experienced a crime drop had not adopted programmatic stop and frisk.<sup>141</sup> Thus, at best, other factors were more responsible for the general crime drop, and programmatic stop and frisk merely accentuated it in New York City.<sup>142</sup>

Another group of scholars suggests that programmatic stop and frisk, including its racial targeting, is economically efficient. Economists Decio Coviello and Nicola Persico looked at the NYPD stop and frisk data used in the *Floyd* case and concluded the following: (1) police stopped blacks much more frequently than whites and (2) arrest rates of blacks and whites who were stopped are virtually identical.<sup>143</sup> With respect to the first conclusion, they found “it difficult to rule out unobservables, as opposed to officer bias, as potential explanations for this disparity.”<sup>144</sup> With respect to the second conclusion, they interpreted “this finding as inconsistent with the hypothesis that officers are biased in their stopping decisions, at least on average.”<sup>145</sup>

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<sup>137</sup> See *supra* Part I.

<sup>138</sup> White et al., *supra* note 58, at 35 (quoting MacDonald et al., *supra* note 136, at 1).

<sup>139</sup> See *id.* at 33.

<sup>140</sup> See Graham Farrell et al., *Why the Crime Drop?*, 43 CRIME & JUST. 421, 423, 425–32 (2014) (acknowledging “growing recognition of the international nature of the crime drop”).

<sup>141</sup> *Id.* at 444–45.

<sup>142</sup> See *id.*

<sup>143</sup> See Decio Coviello & Nicola Persico, *An Economic Analysis of Black-White Disparities in the New York Police Department’s Stop-and-Frisk Program*, 44 J. LEGAL STUD. 315, 317–18 (2015). A third, “tentative” finding is that there “[may be] police bias in decisions to frisk, but further research is needed.” *Id.* at 317.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

Coviello and Persico's conclusions seem unwarranted. Even Coviello and Persico find that there "[may be] police bias in decisions to frisk."<sup>146</sup> Their data might suggest that because racial targeting in stops does not lead to racially disparate arrests, over-stopping blacks is neutral in its impact on arrests.<sup>147</sup> Police departments use this type of argument to suggest that over-stopping racial minorities is resource efficient.<sup>148</sup> However, as law and economics scholar David Abrams suggests, it is strange for Coviello and Persico to absolve police officers of bias based on the small fraction of times that police officers find a weapon that warrants an arrest.<sup>149</sup> After all, the NYPD finds weapons in approximately 1 in 50 frisks.<sup>150</sup> Further, in 2012, the rate was closer to 1 in 600 in Philadelphia.<sup>151</sup> Moreover, recommending officers stop many more blacks to get the same rates of weapons hits as when stopping far fewer whites does not seem logical. The equal rates of finding weapons—despite the over-concentration of stopping blacks—suggests that police officers might be more efficient if they equalized the rates of stopping blacks and whites.<sup>152</sup>

Legal scholar Lawrence Rosenthal provides the most nuanced of the conservative defenses of programmatic stop and frisk. The Supreme Court currently allows police officers' assertions that an area is "high crime" to be considered as a factor in reasonable suspicion analysis.<sup>153</sup> One reading of Rosenthal's approach is that he only supports a narrower version of programmatic stop and frisk that would be based on policing "hot spots" of crime in order to remove guns.<sup>154</sup>

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<sup>146</sup> *Id.* at 318.

<sup>147</sup> *Id.* at 317.

<sup>148</sup> See Bellin, *supra* note 4, at 1516–17.

<sup>149</sup> See David Abrams, *The Law and Economics of Stop-and-Frisk*, 46 LOY. U. CHI. L.J. 369, 377–78 (2014) (comparing potential economics methods for analyzing stop and frisk).

<sup>150</sup> *Id.* at 378.

<sup>151</sup> *Id.*

<sup>152</sup> Cf. *Police Efficiency*, *supra* note 78, at 1179–80 (considering possibility of police incentives to over-stop racial minorities).

<sup>153</sup> *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

<sup>154</sup> Rosenthal, *supra* note 11, at 706–14.

Rosenthal's position might be palatable if he limited aggressive stops and frisks to actual spots rather than large areas.<sup>155</sup> Such a limited hot spot could be a particular small park, but not an entire large one like Central Park or Boston Common. A hot spot could also be a particular intersection or house, but not multiple city blocks or a whole neighborhood.

In practice, police departments do not circumscribe programmatic stop and frisk in the way that Rosenthal recommends. For instance, the NYPD tried to suggest that the entire boroughs, like Queens and Staten Island, could be designated high crime areas.<sup>156</sup> Unless courts limit the size of hot spots, which is highly unlikely,<sup>157</sup> it will be impossible to contain police departments' impulses to exploit the high crime area doctrine.<sup>158</sup>

One of Rosenthal's central concerns is that police violence will lead to overregulation of police departments and, in turn, to de-policing of racial minority neighborhoods.<sup>159</sup> That is a valid concern.<sup>160</sup> Nonetheless, Rosenthal's approach underestimates the costs of not addressing police bias against and violence towards racial minority communities.<sup>161</sup>

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<sup>155</sup> See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y.) (noting expansive high crime areas are "of questionable value"), *appeal dismissed*, (2d Cir. 2013).

<sup>156</sup> *Id.*

<sup>157</sup> See Andrew Dammann, *Categorical and Vague Claims That Criminal Activity is Afoot: Solving the High Crime Area Dilemma Through Legislative Action*, 2 TEX. A&M L. REV. 559, 562–66 (2015) (criticizing lack of constraints on "high crime" area); Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1597–98 (2008) (noting Supreme Court "provided no guidance as to the meaning of the term 'high crime area'"); Shirazi, *supra* note 10, at 94 (discussing courts' discussions of "high crime area").

<sup>158</sup> See Ferguson & Bernache, *supra* note 157, at 1597–98.

<sup>159</sup> Rosenthal, *supra* note 11, at 723–25.

<sup>160</sup> See Cooper, *Understanding 'De-policing,' supra* note 62, at 363–64 (identifying phenomenon of de-policing and calling for right-sized policing of racial minority communities).

<sup>161</sup> See Rosenthal, *supra* note 11, at 694–700; Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Pre-seizure Conduct, and Imperfect Self-defense*, 2018 U. ILL. L. REV. 630, 689–90 (2018) (proposing model statute regarding police use of deadly force).

Even if there were regulation reduction, efficiency of resources, or crime reduction benefits in conducting programmatic stops and frisks, they would not be worth the cost.<sup>162</sup> The costs of programmatic stop and frisk include reduced cooperation with the police<sup>163</sup> and a loss in the “perceived legitimacy of the legal system.”<sup>164</sup> As racial minority communities bring forth ever more stories of unequal and even brutal policing, the police face reduced cooperation from civilians of all backgrounds.<sup>165</sup> Police harassment of young racial minority men reduces the legitimacy of the police throughout society.<sup>166</sup>

## 2. CRITIQUES OF PROGRAMMATIC STOP AND FRISK AS BIAS-BASED

Early scholarship on *Terry* doctrine concentrated on whether it led to racial profiling; the answer soon came back in the affirmative.<sup>167</sup> Racial profiling occurs when law enforcement uses an individual’s race to stereotype him as thereby more likely to commit a

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<sup>162</sup> See Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 692 (2016) (revealing stop and frisk may have negative effects on health).

<sup>163</sup> Goel et al., *supra* note 6, at 185.

<sup>164</sup> *Id.*

<sup>165</sup> See Tracey Meares & Tom Tyler, *Policing: A Model for the Twenty-first Century*, in POLICING THE BLACK MAN, *supra* note 2, at 167 (arguing for new style of policing).

<sup>166</sup> *Id.*

<sup>167</sup> See Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1273–75 (1998) (collecting stories of racial profiling); see also 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.4(f) (5th ed. 2017) (collecting critiques of *Whren* pretext doctrine’s allowance of racial profiling). See generally Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1279 (2004) (identifying racial profiling’s “ratchet effect”); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 681, 688 (1994) [hereinafter *Factors for Reasonable Suspicion*] (demonstrating that *Terry* doctrine encourages racial profiling); Sherri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225–37 (1983) (showing cases where race motivated police intrusion); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 989 (1999) (linking racial profiling to stereotyping).

crime.<sup>168</sup> Racially disparate policing is a fact.<sup>169</sup> Justifications like those considered in the previous Section of this Article are unsatisfactory. There is no need for an exhaustive review of the racial profiling literature, but a summary of how it has focused on individual police officers' biases will be useful.

At the turn of the twenty-first century, scholars paid close attention to the process of stereotyping by police officers. They demonstrated that stereotyping is a common process of thinking that shrinks information into bite-sized packets.<sup>170</sup> Stereotyping takes perceived patterns in the behaviors of social groups and assumes that individuals from the group will fit the pattern.<sup>171</sup> Because *Terry* doctrine allows police officers to act on small bits of information,<sup>172</sup> it enhances the chance that officers will use stereotypes to make judgments about suspicion. Given preexisting stereotyping of black men as criminals, that is a problem.<sup>173</sup>

Other critics of racial profiling have pointed out how racial bias builds upon itself. They have revealed the “ratchet effect” in racial profiling. The ratchet effect describes how racial targeting by police inevitably leads to finding criminals amongst racial minorities, which in turn is used tautologically to rationalize further racial targeting.<sup>174</sup> Even though rates of drug use are roughly equal across

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<sup>168</sup> See Cooper, *Who's the Man?*, *supra* note 2, at 675, n.15 (defining racial profiling); *Factors for Reasonable Suspicion*, *supra* note 167, at 660 (providing early critique of racial profiling).

<sup>169</sup> See *Factors for Reasonable Suspicion*, *supra* note 167, at 679 (“Put in the simplest terms, the criminal justice system treats African Americans and Hispanic Americans differently than it does whites. . . . [T]hese inequalities reach down to the first level of the criminal justice process, the points at which police decide who they will investigate.”).

<sup>170</sup> See Thompson, *supra* note 167, at 983–85 (describing processes of grouping information).

<sup>171</sup> *Id.* at 985; see David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 454–55 (2003) [hereinafter *Using Race or Ethnicity*].

<sup>172</sup> See *Using Race or Ethnicity*, *supra* note 171, at 454–55; Thompson, *supra* note 167, at 986–87.

<sup>173</sup> See *Using Race or Ethnicity*, *supra* note 171, at 454–55; Thompson, *supra* note 167, at 988.

<sup>174</sup> BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 147–49 (defining ratchet effect).

racism,<sup>175</sup> police, prosecutors, and judges arrest, charge, and sentence racial minorities at dramatically higher rates than racial majorities.<sup>176</sup> Nonetheless, actors in the criminal justice system often point to the disparities in arrest and sentencing as evidence that they are right to focus on racial minorities.<sup>177</sup> They are using racial disparities produced by their own racial targeting to justify more racial targeting.

Scholars also contend that when explicit bias does not lead to racial profiling, implicit bias may be at work. Implicit bias is stereotyping we do unconsciously.<sup>178</sup> Hence, police officers may instinctively find a group of racial minority teenagers more suspicious than a group of white youths.

The problem with the bulk of the scholarship attacking programmatic stop and frisk, however, is that it focuses on bias at the micro level. For instance, L. Song Richardson, Dean of University of California, Irvine School of Law, would have us concentrate on patterns of bias as revealed by police officer hit-rates.<sup>179</sup> Conversely, the Goel et al. approach suggests using big data to evidence a pattern of discrimination cognizable under the Equal Protection Clause.<sup>180</sup> Legal scholar Aziz Huq has recently proposed moving to a disparate impact methodology, which would consider statistical evidence of biased policing.<sup>181</sup> These interventions still concentrate on the micro

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<sup>175</sup> See, e.g., William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 18 (2004) (declaring rates of drug use unsupportive of racial profiling).

<sup>176</sup> See, e.g., Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 831–35 (2003) (critiquing racial profiling in the criminal justice system).

<sup>177</sup> See Bellin, *supra* note 4, at 1515–16 (“Mayor Bloomberg and Police Commissioner Kelly . . . argue that the critics have it backwards, ‘we disproportionately stop whites too much and minorities too little.’” (quoting Jennifer Fermino, *Mayor Bloomberg On Stop-And-Frisk: It Can Be Argued ‘We Disproportionately Stop Whites Too Much. And Minorities Too Little,’* N.Y. DAILY NEWS (June 28, 2013, 6:37 PM), <http://www.nydailynews.com/new-york/mayor-bloomberg-stop-and-frisk-disproportionately-stop-whites-minorities-article-1.1385410>)).

<sup>178</sup> See *Police Efficiency*, *supra* note 78, at 1146–47 (defining implicit bias).

<sup>179</sup> See *id.* at 1165–66 (suggesting officer hit rates could provide evidence of bias).

<sup>180</sup> See Goel et al., *supra* note 6, at 222–28 (proposing using data to make Equal Protection claims).

<sup>181</sup> See Huq, *supra* note 4, at 2466–78 (contending disparate impact approach might better address police discrimination).

level by looking at the behavior of police officers, either individually or in the aggregate.

Missing from these bias-based approaches is a challenge to the macro- and meso-level discourses that encourage racial profiling policies. General societal discourses suggesting there is a hierarchy of races and specific scholarly discourses about crime and policing are promoting legal doctrines that enable police bias.<sup>182</sup> Current scholarship can reveal that bias, but not its source.<sup>183</sup> If a new remedy merely punishes bias at the micro level, the macro- and meso-level taste for bias will remain. The theory of preservation through transformation would say that after such reforms, we should expect bias to reconstitute itself in new ways.<sup>184</sup>

#### B. *The Discourse-to-Practice-Circuit: Three Levels of Analysis*

When we see a local practice like programmatic stop and frisk, we should not think of it as *sui generis*. The basic question is how does a big picture idea that has gained society-wide traction influence what the police do on the street? The answer is that big picture discourses fight for hegemony on the macro level of society and, if they achieve it, promulgate discipline-specific discourses at the meso level that may then be translated into specific micro-level practices. Consequently, this Article uses a three-layer model to describe how broad cultural discourses become instantiated in particular police practices.

Before explicating the new model for analyzing discourses, it will be helpful to define discourse. A discourse is a coherent narrative, or story, which seeks to be the dominant take on a topic.<sup>185</sup> As

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<sup>182</sup> See *infra* Sections II.B.1, II.B.2.

<sup>183</sup> See, e.g., Goel et al., *supra* note 6; Huq, *supra* note 4; *Police Efficiency*, *supra* note 78.

<sup>184</sup> See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1185 n.129 (2015) (stating that under preservation through transformation, “the older systems of status privilege are translated and transposed into a new historical period in accord with a less controversial social idiom but in a manner that effectively protects prior subordinating relationships”) (citing Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996)); see also Huq, *supra* note 4, at 2402 (declaring programmatic stop and frisk reproduces racial stratification).

<sup>185</sup> See Hall, *supra* note 13, at 44 (defining effects of a discourse); see also Cooper, *Un-Balanced Fourth*, *supra* note 120, at 864–76 (defining discourses in relation to the War on Drugs).

crucial cultural studies theorist Stuart Hall declared, “what we think we ‘know’ in a particular period about, say, crime has a bearing on how we regulate, control and punish criminals.”<sup>186</sup> Discourses are the narratives that seek to make us “know” something about a topic.<sup>187</sup> Analyzing the discourses about crime that led to programmatic stop and frisk will help us better understand and more effectively address the practice.

In a forthcoming article that takes an approach simpatico to this one, legal scholars Osagie Obasogie and Zachary Newman challenge the framing of the Fourth Amendment as exogenous to the police and community interactions on the ground.<sup>188</sup> They conducted a content analysis of policies of the police forces in the seventy-five largest cities nationwide<sup>189</sup> and found that the policies ape the ambiguity of Fourth Amendment excessive force doctrine, and further add language protecting the police from lawsuits.<sup>190</sup> Contrary to the notion that the Constitution dictates police behavior, they found that courts instead read police policies and then import police theories into the doctrine.<sup>191</sup> Hence, police departments are actually driving the doctrine that is supposedly constraining them.<sup>192</sup> This is what Obasogie and Newman call the endogenous nature of Fourth Amendment doctrine.<sup>193</sup>

While Obasogie and Newman are right to reject the idea that doctrine simply imposes its will on police practices, they miss aspects of the *discourse-to-practice-circuit*. That influence starts above the level that Obasogie and Newman concentrate upon. At the macro level, political and cultural discourses influence arguments about what the law should be.<sup>194</sup> At the meso level, politics and culture influence both discipline-specific (criminology) arguments for

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<sup>186</sup> Hall, *supra* note 13, at 49.

<sup>187</sup> See Cooper, *Un-Balanced Fourth*, *supra* note 120, at 857.

<sup>188</sup> Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 36–52 (unpublished manuscript) (on file with the *University of Miami Law Review*).

<sup>189</sup> *Id.* at 18.

<sup>190</sup> See *id.* at 7.

<sup>191</sup> See *id.* at 7–8.

<sup>192</sup> See *id.*

<sup>193</sup> *Id.*

<sup>194</sup> See *infra* Section II.B.1.

certain policing policies, as well as the legal doctrines that judges propound.<sup>195</sup> Obasogie and Newman helpfully point out that, at least in legal doctrine, discourses about what the law should allow police officers to do may be influenced by the micro-level police practices themselves.<sup>196</sup>

It is still important to note that the three levels of the *discourse-to-practice-circuit* are hierarchized, as large cultural discourses have more influence on police behavior than police departments' wishes have on the legal doctrines they must follow. Certainly, Obasogie and Newman's research on judicial acceptance and reinforcement of police department policies shows that popular discourses cannot simply dictate micro level practices. When the police are able to successfully present discourses suggesting that facts on the ground require they be granted more discretion, courts of both law and of public opinion do indeed tend to shift their perspectives.<sup>197</sup> In this sense, we are talking about a circuit where the different components influence one another in multiple directions. But Obasogie and Newman's finding is striking because it is unusual. The reason that conservative justices gutted excessive force doctrine at the meso level is because the justices were ideologically motivated by cultural discourses at the macro level.<sup>198</sup> The endogenous Fourth Amendment is thus the Fourth Amendment drunk on the call for law and order. Macro- and meso-level discourses cannot dictate practices, but they sure can influence them.

What this Article terms a *discourse-to-practice-circuit* may be diagrammed as seen in the Figure that follows on the next page. The Figure depicts the *discourse-to-practice-circuit* as a horizontal rectangle on top of a triangle on top of an upside down triangle. The first layer, the macro level, is broad and thin to show that it is a big idea that has spread throughout society. The next layer, the meso

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<sup>195</sup> See *infra* Section II.B.2.

<sup>196</sup> Obasogie & Newman, *supra* note 188, at 7–8.

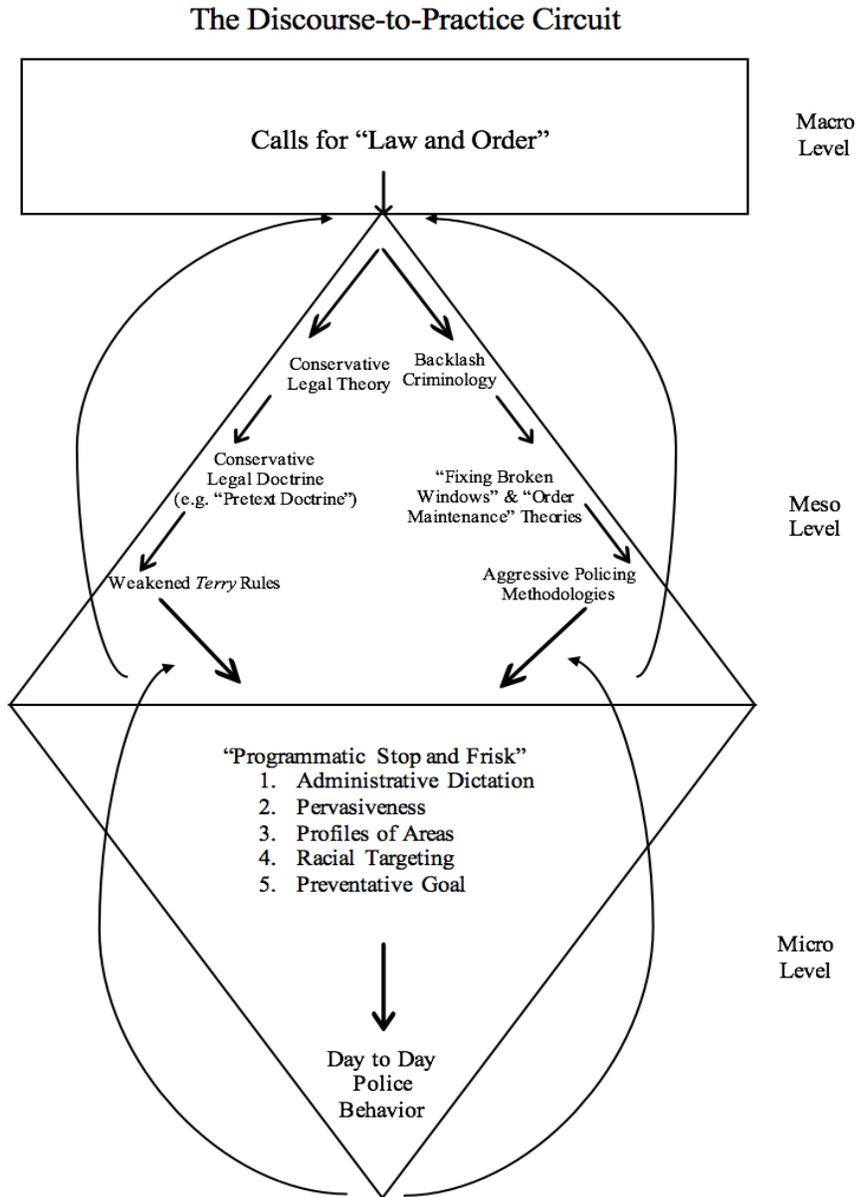
<sup>197</sup> See *id.* at 9–17 (citing John Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 161 (2016)).

<sup>198</sup> Mark Joseph Stern, *The Conservatives vs. Sonia Sotomayor*, SLATE (Apr. 2, 2018, 7:11 PM), <https://slate.com/news-and-politics/2018/04/sonia-sotomayor-has-become-a-lonely-voice-fighting-against-the-supreme-courts-rightward-turn.html>.

level, starts at a point and fans out to show that meso-level discourses stem from a particular macro-level discourse, but act upon multiple domains, such as both legal doctrine and criminology. The final layer, the micro level, starts broad but narrows to a point because it is influenced by multiple meso-level discourses that come together in a specific policy and particular police officer behaviors. There are arrows from the micro level to the meso level and from the meso level to the macro level because police behaviors do exercise some influence on the further development of discipline-specific discourses, which in turn influence broad cultural ideologies.

This Article's basic message is that criminal procedure scholars need to pay more attention to the macro and meso levels of discourses about policing. This Section of the Article provides a methodology for engaging in that process.

Figure 1.



## 1. MACRO LEVEL

When we are trying to discern why a particular policing practice developed, the macro level is where we consider society-wide cultural discourses. Society-wide discourses are usually spread by politicians and other important popular figures with a national profile.<sup>199</sup> Hence, it is no surprise that groups like the National Rifle Association (“NRA”) used popular entertainers such as actor Charlton Heston and basketball player Karl Malone to promote their pro-gun agenda through their “I’m the NRA” campaign.<sup>200</sup> In the present context, it took people of the stature of presidential candidates Barry Goldwater and Richard Nixon to help make the “law and order” discourse pervasive.<sup>201</sup>

Such broad macro-level discourses are ideologies: they are arguments about how society does or should work.<sup>202</sup> However, there are often multiple visions of society at a given time. The goal of creating or maintaining a particular type of society must be promoted through discourses.<sup>203</sup> The discourses that compete on the macro level are essentially arguments about how we should view phenomena occurring in the social world.<sup>204</sup> Macro-level discourses thus take the form of arguments making claims as if they are facts.

For instance, in the broad sense, police racial targeting traces its roots to a macro-level discourse arguing that there is or ought to be a racial hierarchy.<sup>205</sup> Philosopher Iris Marion Young refers to this as the Western philosophical assumption that there is a “scaling of bodies.”<sup>206</sup> The scaling of bodies is a metaphor about the presumption

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<sup>199</sup> See, e.g., Charlie Allenson, *NBA’s Karl Malone: The Mailman or the Gunman?*, HUFFINGTON POST (Jan. 21, 2016, 10:56 AM), [https://www.huffingtonpost.com/charlie-allenson/nbas-karl-malone-mailman-or-the-gunman\\_b\\_8934940.html](https://www.huffingtonpost.com/charlie-allenson/nbas-karl-malone-mailman-or-the-gunman_b_8934940.html); Margot Hornblower, *Have Gun, Will Travel: But Can Heston’s Celebrity and Rhetoric Revive the N.R.A.?*, TIME, July 6, 1998, at 44, 46.

<sup>200</sup> See Allenson, *supra* note 199; Hornblower, *supra* note 199, at 46.

<sup>201</sup> See JEREMY D. MAYER, *RUNNING ON RACE* 45–68, 96–122 (2002).

<sup>202</sup> See Cooper, *Un-Balanced Fourth*, *supra* note 120, at 857.

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

<sup>205</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 126 (1990).

<sup>206</sup> See generally *id.*

that humans can scientifically (really ideologically) categorize groups of people and assign values to them.<sup>207</sup> Early in Western epistemology, bodies were categorized and hierarchized along various axes: race, sex, religion, age, and economic status.<sup>208</sup> White Anglo-Saxon Christian men, who had wealth and were neither too young nor too old, were at the top of this hierarchy.<sup>209</sup> But the fundamental problem is the very assumption that there can be a scaling of bodies.

The assumption that there is a scaling of bodies is connected to the long-running ideology of white supremacy and continues to have influence. Consider how racial hierarchy has been hardwired into United States culture through different discourses over time. The assumption of white supremacy animated the following ideologies that rationalized slavery from 1619 to 1864<sup>210</sup>: “manifest destiny” is characterized by the theft of Mexican territory and marginalization of former Mexicans,<sup>211</sup> post-bellum terrorism attempting to reinstate slavery,<sup>212</sup> Jim Crow segregation,<sup>213</sup> Chinese exclusion,<sup>214</sup> Japanese

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<sup>207</sup> *Id.* at 125, 128.

<sup>208</sup> *Id.* at 127.

<sup>209</sup> *See id.* at 128.

<sup>210</sup> *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 104–32 (3d ed. 2014) (summarizing eighteenth- and nineteenth-century legal and social rationale for chattel bondage in the United States).

<sup>211</sup> *See id.* at 284–87 (summarizing United States taking of several states’ worth of land from Mexico under banner of “manifest destiny” of Anglo-Saxons).

<sup>212</sup> *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II, at 3–4 (2008).

<sup>213</sup> “Most of the literature sees the Supreme Court’s adoption of the ‘separate but equal’ doctrine in 1896 as ushering in the era of Jim Crow segregation.” Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the “Separate but Equal” Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17, 18–20 (1984) (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>214</sup> *See generally* Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22–38 (1998) (contextualizing Chinese Exclusion Acts).

alien land laws,<sup>215</sup> whites-only affirmative action,<sup>216</sup> “massive resistance” to civil rights,<sup>217</sup> and so on.

This Article points to the broad cultural discourse calling for “law and order” as a recent way in which racial hierarchy has been maintained. The law and order discourse occurs at the macro level because it is an ideological statement about how society should be and because it is capacious enough to encompass an array of sub-statements. It supports meso-level discourses claiming that civil rights have gone too far, judges ought not “handcuff” the police, racial profiling is rational,<sup>218</sup> and so on.<sup>219</sup> The next Part of this Article will analyze how the law and order discourse at the meso level first spurred meso-level doctrinal and criminological discourses and then the micro-level practice of programmatic stop and frisk. For now, we must remember that macro-level discourses are broad social narratives that seek to organize the thinking on a topic.

## 2. MESO LEVEL

When analyzing the macro level of policing discourses, we concentrate on broad cultural narratives, but those narratives have sub-plots. The meso level of policing discourses contains two broad types of discourses. In legal discourse, meso-level narratives set a tone for more conservative or more progressive doctrine. In scholarship about policing, meso-level narratives set a tone for more crime control or more civil liberties-oriented policy proposals.

The key to understanding how macro-level discourses affect legal doctrine is realizing the fact that doctrine is contingent upon history. There was no inexorable march to conservative *Terry* doctrine.

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<sup>215</sup> See PEREA, *supra* note 210, at 410–16 (summarizing bars on Japanese-American property ownership).

<sup>216</sup> See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 10–11 (2005).

<sup>217</sup> See generally Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 167–69 (1997) (discussing Southern Manifesto against desegregation).

<sup>218</sup> See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 180–81 (2003).

<sup>219</sup> See FLAMM, *supra* note 13, at 2–3.

Instead, macro-level discourses, like the call for law and order, propelled Nixon into office.<sup>220</sup> Nixon then appointed conservative Supreme Court Justices who substantially reworked the progressive Warren Court doctrine.<sup>221</sup> Therefore, legal doctrine can be influenced by macro-level discourses.

Moreover, legal doctrines themselves are meso-level discourses subject to contestation. An example is the argument<sup>222</sup> between majority and dissent in *United States v. Robinson*, where the majority held that police may fully search someone they are arresting as a matter of right.<sup>223</sup> The Court held such searches incident to lawful arrests were constitutional even if the officer admittedly knew the suspect posed no threat to anyone.<sup>224</sup> The *Robinson* decision rejected considering an officer's state of mind on the grounds that "[a] police officer's determination as to how and where to search . . . is necessarily a quick ad hoc judgment."<sup>225</sup> This theory provided the core rationale for the later *Whren* pretext rule.<sup>226</sup> But the *Robinson* narrative did not go unremarked.<sup>227</sup> Justice Marshall wrote a stinging dissent noting the substantial precedent for limiting the search incident to arrest rule.<sup>228</sup> However, the Marshall discourse lost.<sup>229</sup>

Doctrinal discourses, such as the argument that police must have easily administrable rules,<sup>230</sup> influence the realm of possibilities for

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<sup>220</sup> See MAYER, *supra* note 201, at 96.

<sup>221</sup> Gerald A. Reamey, *Up in Smoke: Fourth Amendment Rights and the Burger Court*, 45 OKLA. L. REV. 57, 60–63 (1992).

<sup>222</sup> Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's Views of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 390 (1994).

<sup>223</sup> 414 U.S. 218, 235 (1973).

<sup>224</sup> *Id.* at 236.

<sup>225</sup> *Id.* at 235; see *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001) ("Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.").

<sup>226</sup> See Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 114 (2012) (detailing this connection).

<sup>227</sup> See, e.g., *Robinson*, 414 U.S. at 248 (Marshall, J., dissenting) (challenging "misguided" application of bright line rule allowing searches incident to arrests); Green & Richman, *supra* note 222, at 390 (explaining why Marshall differed on use of rules versus standards).

<sup>228</sup> See *Robinson*, 414 U.S. at 238, 241–48 (Marshall, J., dissenting) (discussing how "the majority's reasoning [is] at odds with [Fourth Amendment] fundamental principles").

<sup>229</sup> See *id.* at 238–59.

<sup>230</sup> See *Atwater*, 532 U.S. at 348.

police officers. The *Robinson* rule means police officers can choose to go on “fishing expeditions” for evidence as long as they can point to an arrestable offense.<sup>231</sup> Had the *Robinson* Court accepted Justice Marshall’s argument, police would have to find other means of justifying searches or simply forego such fishing expeditions.<sup>232</sup> The *Robinson* Court’s conservative doctrine expanded the range of micro-level practices police officers could engage in on the street. Doctrinal discourses are thus both contingent upon history and materially consequential.

Non-legal discourses about policing at the meso level are obviously more contingent upon history. These are the discourses that apply a broad cultural narrative to the specific topic of crime and policing. Criminologists, public policy think tanks, journalists, and similar “authorities” propound theories of what causes crime and how policing does or should work. Those theories and policy proposals influence the micro-level practices of police officers.

Criminological discourses influence practices by creating a public consensus that certain police behaviors are, or are not, appropriate. Hence, during the “crack crisis,” the preexisting trend toward law and order led journalists to convince the public there was such a crisis and that it required strong medicine.<sup>233</sup> While the facts on the ground supported the idea there was a crisis, the framing of the issue as a matter of crime control was contingent upon history.<sup>234</sup> Note that today, even a law and order president occasionally supports rehabilitative measures regarding the opioid crisis.<sup>235</sup> Times have changed, as have the complexion and class of the paradigmatic victims of drug abuse.<sup>236</sup> Unsurprisingly, the narrative about what to do regarding the crisis has changed as well.<sup>237</sup>

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<sup>231</sup> See David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 824 (2002) (blaming *Robinson* for promoting harassment of motorists).

<sup>232</sup> See *Robinson*, 414 U.S. at 248.

<sup>233</sup> See Cooper, *Un-Balanced Fourth*, *supra* note 121, at 866–67.

<sup>234</sup> See *id.* at 867.

<sup>235</sup> See *The Opioid Crisis*, WHITE HOUSE, <https://www.whitehouse.gov/opioids/> (last visited Aug. 25, 2018).

<sup>236</sup> See generally Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE MED. & PSYCHIATRY 664, 665–70 (2016) (comparing responses to crack crisis and opioid crisis).

<sup>237</sup> See *id.*

The bottom line at the meso level is that doctrinal and criminological sub-discourses come together to create both the range of practices police officers may engage in at the micro level and the likelihood that officers will choose to engage in a particular practice. The meso level thus is influenced by the macro level and influences the micro level.

### 3. MICRO LEVEL

The micro level of policing discourses is that of actual police officer behaviors. In short, broad cultural discourses at the macro level that spur legal doctrines and policy arguments at the meso level influence the extent to which officers feel supported in using (or abusing) their discretion at the micro level. While Obasogie and Newman are right that police practices can feed ideas back up to the meso level, police try to influence legal doctrine precisely because it has such an impact on what they feel free to do.<sup>238</sup>

In this sense, legal doctrine creates a group of potential police practices.<sup>239</sup> Police officers can make choices, but mostly within the range of options created by the Supreme Court. While officers can and do act outside of that valid range of choices, they risk exclusion of the evidence, admission of which is generally the point of the action.<sup>240</sup> To the extent that officers act outside their valid scope and do not care about evidence, they still lose the law's stamp of approval.<sup>241</sup> They can abuse someone just to "maintain the power image of the beat officer,"<sup>242</sup> but they risk triggering a popular backlash against their behavior.

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<sup>238</sup> See Obasogie & Newman, *supra* note 188, at 24–25, 52–53.

<sup>239</sup> Frank Rudy Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 139, 152 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) [hereinafter Cooper, *The "Seesaw Effect"*] (contending that "any legal doctrine creates a range of potential enforcement practices").

<sup>240</sup> See Cooper, *Un-Balanced Fourth*, *supra* note 120, at 877.

<sup>241</sup> *Id.*

<sup>242</sup> *Terry v. Ohio*, 392 U.S. 1, 14–15 n.11 (1968) (quoting LAWRENCE P. TIFANY & DANIEL L. ROTENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* 47–48 (Frank J. Remington ed., 1967)).

While legal doctrine sets a range of practices for police officers, popular opinions and prevailing policing policies affect the likelihood that officers will choose to act in particular ways. As I have said elsewhere, “[w]ith respect to police officers, we wish to understand why they might investigate people with more or less frequency in a specific community at a particular time. One influence upon that choice is the prevailing set of discourses about the appropriateness of law enforcement methods.”<sup>243</sup>

To understand the micro-level practice of racial profiling, we should look at the meso-level discourses that influence police officer behavior. The question then is, why do officers racially profile? The answer, at the micro level, is that officers do not expect to receive an unbearable amount of pushback from people who can potentially influence their lives.<sup>244</sup> That answer can also be traced back to the meso level, where the *Whren* doctrine promotes racial profiling<sup>245</sup> and where authoritative opinions on policing policy are hardly staunchly against the practice. Micro-level police behaviors are thus ultimately the product of macro- and meso-level attempts to marshal public opinion for, or against, practices like programmatic stop and frisk.

The reason that the bottom of Figure 1 depicts an upside down triangle is to illustrate that things come to a head in a particular policing practice, but only after being influenced by broader phenomena. Consequently, while the micro level is where the action is in terms of programmatic stop and frisk, that level is heavily influenced by the macro and meso levels of discourse on policing. To demonstrate the utility of using this new scholarly model, and to better understand why programmatic stop and frisk has become so pervasive, the next Part of the Article will conduct a genealogy of the practice.

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<sup>243</sup> Cooper, *The “Seesaw Effect,”* *supra* note 239, at 152–53.

<sup>244</sup> See Obasogie & Newman, *supra* note 188, at 52–53.

<sup>245</sup> Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1050 (2010) [hereinafter *Profiling in America*].

### III. CASE STUDY: A GENEALOGY OF PROGRAMMATIC STOP AND FRISK

So far, this Article has revealed that programmatic stop and frisk is a means of social control of young black and Latinx men and that prior scholarship has not taken the right approach to fully understand the problem. A better approach would conduct a genealogy of how the micro-level practice of programmatic stop and frisk is the product of macro- and meso-level discourses. This Part of the Article conducts that genealogy.

What we will discover is that the broad, social narrative at the macrolevel that spawned programmatic stop and frisk is the political call for law and order. That call is a macro-level ideology; it is a view of how United States society *is* (too crime-ridden) and *ought to be*—too crime-ridden and aggressively authoritarian in law enforcement, respectively. At the meso level, larger conservative legal doctrines—for example, acceptance of the pretext doctrine—and aggressive theories of policing—such as fixing “broken windows”—more directly led to programmatic stop and frisk. Programmatic stop and frisk still required micro-level decisions by police departments to take advantage of weakened doctrine and adopt aggressive methodologies. This genealogy helps us better understand the relationship between broad calls for law and order, conservative legal and criminological theories, and programmatic stop and frisk practices.

#### A. Macro Level: “Law and Order” as Cultural Backlash

This Section of the Article considers the macro level of the move toward programmatic stop and frisk and argues that programmatic stop and frisk is a means by which the white majority has accomplished a larger subconscious goal of putting young black and Latinx males in urban environments “under lock and key.”<sup>246</sup> Law enforcement justifies this “New Jim Crow” through calls for law and order.<sup>247</sup>

Calls for law and order of the type we see today began in the 1960s.<sup>248</sup> That is no coincidence, as sudden social change helped create consternation for those used to (and invested in) the status

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<sup>246</sup> CHRIS HAYES, *A COLONY IN A NATION* 32 (2017).

<sup>247</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010).

<sup>248</sup> See MAYER, *supra* note 201, at 69–70.

quo.<sup>249</sup> The civil rights movements of the 1960s were thus soon followed by a post-civil rights anxiety.<sup>250</sup> “That anxiety spr[ang] from the conflict between the nation’s tradition of excluding [racial minorities] from the mainstream of society and its more recent commitment to providing the opportunity for some [racial minorities] to be included.”<sup>251</sup> If racial minorities are suddenly moving too fast, both physically and figuratively, the answer is for whites to slow the racial minorities down.<sup>252</sup> This Section of the Article shows how calls for law and order served the goal of resolving post-civil rights anxiety.

Scholars have documented that arguments for law and order emerged as coded racial appeals to whites.<sup>253</sup> Nixon’s law and order narrative capitalized on white anger over three things: (1) civil rights protests; (2) the Supreme Court’s expansion of defendants’ rights; and (3) public welfare programs that “rewarded undeserving minorities.”<sup>254</sup> John Ehrlichman, who was then one of Nixon’s top aides, acknowledged that the call for law and order was meant to make blacks enemies of the state.<sup>255</sup> According to Ehrlichman, “[w]e

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<sup>249</sup> See *id.* at 69–73.

<sup>250</sup> See *id.*

<sup>251</sup> Cooper, *Against Bipolar Black Masculinity*, *supra* note 22, at 888; see also Cook, *supra* note 22, at 83 (applying discursive analysis to post-civil rights backlash). Dean L. Song Richardson discusses a different type of racial anxiety. Dean Richardson says that in police-civilian encounters, “[f]or Whites, the concern during these interactions is that they will be evaluated as racist by their Black interaction partner, and for Blacks, the concern is that their White interaction partner will treat them in a racially discriminatory way.” L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 78 (2017) (internal citation omitted); see also Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2248–53 (2017) (discussing racial anxiety police officers and suspects feel in interactions).

<sup>252</sup> See HAYES, *supra* note 246, at 32–33, 37; see also Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 185 (1997) (“The model minority myth was developed in the mid-1960s to provide a counter-example to politically active African Americans.”).

<sup>253</sup> See, e.g., FLAMM, *supra* note 13, at 2–4.

<sup>254</sup> *Id.*

<sup>255</sup> See Erik Sherman, *Nixon’s Drug War, an Excuse to Lock Up Blacks and Protestors*, *Continues*, FORBES (Mar. 23, 2016, 6:00 AM), <https://www.forbes.com/sites/eriksherman/2016/03/23/nixons-drug-war-an-excuse-to-lock-up-blacks-and-protesters-continues/#48b312342c88>.

knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities."<sup>256</sup> In light of this evidence, we have to consider calls for law and order to be suspect.

In the law and order era, white people's lack of empathy for young black and Latinx men who are racially targeted by police is driving punitive policies. Social commentator Ta-Nehisi Coates illuminates this connection:

The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country's criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses that have followed from these polices—the sprawling carceral state, the random detention of black people, the torture of suspects—are the product of democratic will.<sup>257</sup>

Coates's statement asserts that if our police officers are pervasively racially profiling—and they are—it can only be because the public generally supports such tactics. The law and order discourse thus helps justify a policy that reflects and expresses a profound lack of empathy for young, urban, racial minority men.

Sadly, we see strong echoes of the law and order narrative today. As political commentator Chris Hayes bluntly puts it, “[i]n the Nation [or white communities], there is law; in the Colony [or black communities] there is only a concern with order.”<sup>258</sup> Scholars have recognized that the law and order narrative set the tone for the War on Crime and War on Drugs.<sup>259</sup> Hence, in keeping with the three aspects of Nixon's law and order narrative,<sup>260</sup> President Trump associates blacks with criminality,<sup>261</sup> calls for a conservative Supreme

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<sup>256</sup> *Id.*

<sup>257</sup> TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 78–79 (2015).

<sup>258</sup> HAYES, *supra* note 246, at 37–38.

<sup>259</sup> See 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, 381–86 (2002) (arguing war on drugs targeted blacks).

<sup>260</sup> See *supra* text accompanying note 254.

<sup>261</sup> See Valeria Vegh Weis, *A “New War on Crime”? The United States & Its History of Emergency-Based Crime Policies*, 53 CRIM. L. BULL. 1069, 1069 n.3

Court,<sup>262</sup> and argues Latinx immigrants are taking “our” jobs.<sup>263</sup> Accordingly, the law and order narrative is as relevant today as it was in the early 1970s.

To fully understand how the law and order narrative became the dominant discourse on crime, we must recognize that it is really about white fear and post-civil rights anxiety. White fear is based in the subconscious belief that “[t]hey”—the black and brown subjects of the Colony, the denizens of the ‘anarchic province of the poor’—are angry and wild and uncivilized and are coming for us, to take what ‘we’ have.”<sup>264</sup> White fear is evidenced in laboratory studies, wherein whites see all children as innocent until about age ten, then only see white children, and not black children, as innocent.<sup>265</sup> For

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(2017) (“Trump wrongfully stated that the majority of homicides of White people are committed by Black-Americans . . . . However, statistics show that most of the crimes are intra-racial.”).

<sup>262</sup> See Jonathan Easley, *WH Press Secretary: Trump’s Mark on the Judiciary Will Last for ‘Decades and Decades,’* HILL (Nov. 30, 2017, 10:34 AM), <https://thehill.com/homenews/administration/362546-huckabee-sanders-trumps-mark-on-the-judiciary-will-last-for-decades>.

<sup>263</sup> See Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 148, <http://cardozolawreview.com/wp-content/uploads/2018/07/HONG.38.symposium.pdf> (“The full embrace of nativism by President Trump in targeting immigrants for deportation and exclusion must be met with factual and emotional reasons for why we—as Americans—will be much worse off if that were to occur.”).

<sup>264</sup> HAYES, *supra* note 246, at 132.

<sup>265</sup> *Id.* at 115; see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1596–97 (2013) (suggesting expert testimony on shooter bias could help make trials fairer); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 807–08 n.52 (2012) (noting whites erroneously “shoot” blacks at higher rates). Similar results are seen throughout the implicit bias literature, as employers devalue resumes with black-sounding names. See Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakeisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1283–84 (“[Marianne Bertrand and Sendhil Mullainathan’s] study revealed that simply having an African American-sounding name significantly decreased one’s opportunity to receive a job interview, regardless of occupation or industry.”). Hayes notes that fear of blacks is not limited to whites, writing: “In fact, while white participants have higher levels of racial bias than nonwhite subjects, even African Americans consistently show anti-black suspicion. Racial fear lives in the deepest part of our psyches.” HAYES, *supra* note 246, at 116.

Hayes, this represents whites' "simple inability to recognize, deeply, fully, totally, the humanity of those on the other side."<sup>266</sup>

White dehumanization of blacks should not be surprising given that today's Baby Boomer whites, who currently run the country,<sup>267</sup> are in privity with prior groups of whites who dehumanized blacks. Baby Boomer whites are often the descendants of slaveholders.<sup>268</sup> Baby Boomer whites are the progeny of people who either created Jim Crow *de jure* segregation or allowed it to continue.<sup>269</sup> Baby Boomer whites' grandparents were immigrants who did not have to compete with blacks for jobs because blacks were not hired, either out of custom or due to white immigrant lobbying.<sup>270</sup> Baby Boomer whites are also the children of people who benefitted from the white-oriented GI Bill and the creation of racially segregated suburbs.<sup>271</sup> In short, to be a Baby Boomer white today is to presently benefit from the past subordination of blacks based on white ideologies of genetic and/or cultural inferiority.<sup>272</sup>

However, dehumanization of blacks alone does not explain white fear. "Othering" of blacks becomes fear of blacks because it

<sup>266</sup> HAYES, *supra* note 246, at 127.

<sup>267</sup> *American Generation Fast Facts*, CNN (Sept. 4, 2018, 4:32 PM), <https://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts/index.html> ("Bill Clinton was the first baby boomer to serve as president. George W. Bush, Barack Obama and President Donald Trump are also baby boomers.")

<sup>268</sup> See, e.g., EDWARD BALL, *SLAVES IN THE FAMILY* 7–11 (1998).

<sup>269</sup> See, e.g., *id.*

<sup>270</sup> See, e.g., RICHARD ARCHER, *JIM CROW NORTH: THE STRUGGLE FOR EQUAL RIGHTS IN ANTEBELLUM NEW ENGLAND* 3–16 (2017) (describing black oppression in the North); JENNIFER RITTERHOUSE, *GROWING UP JIM CROW: HOW BLACK AND WHITE SOUTHERN CHILDREN LEARNED RACE* 1–21 (2006) (exploring racial formation in Jim Crow South).

<sup>271</sup> See ARCHER, *supra* note 270, at 3–16; KATZNELSON, *supra* note 216, at 113–41; RITTERHOUSE, *supra* note 270, at 1–21.

<sup>272</sup> "White people in North America live in a society that is deeply separate and unequal by race, and white people are the beneficiaries of that separation and inequality." ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 1 (2018) Barbara Flagg argues that "[t]he most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any." BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 1 (1998). Flagg terms this characteristic as "the *transparency phenomenon*," which is "the tendency of whites not to think about whiteness." *Id.* ("Whites' 'consciousness' of whiteness is predominantly *unconsciousness* of whiteness.").

is related to a fear that blacks will try to change the status quo.<sup>273</sup> The leap from “othering” to fear occurs because of an implicit recognition that whites are privileged compared to blacks.<sup>274</sup> White privilege is acknowledged in what Hayes calls “the forbidden knowledge that all white people carry with them: *We’ve got it better.*”<sup>275</sup> That forbidden knowledge of privilege is a burden because it means recognizing there is racial inequality in a country that aspires to full equality.<sup>276</sup> That is why whites have such a hard time acknowledging privilege.<sup>277</sup>

More importantly, the knowledge of white privilege produces a sense of vulnerability. As Hayes continues, “if white people have it better, then isn’t it only logical that black people will try to come and take what they have?”<sup>278</sup> The logical movement is from “othering” blacks, to knowing they are subordinated, then to knowing that subordination provides blacks with a reason to overthrow the system.<sup>279</sup> Accordingly, whites may subconsciously assume that, if they have it better than blacks, blacks must want to reverse that hierarchy.<sup>280</sup> That thought process is the ultimate source of white fear.<sup>281</sup>

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<sup>273</sup> See HAYES, *supra* note 246, at 126–33.

<sup>274</sup> See *id.*

<sup>275</sup> *Id.* at 131.

<sup>276</sup> See *id.* at 133 (“[W]e do know that having it ‘better’ isn’t permanent, that it could collapse. We know equality might someday come, and it might mean giving up one’s birthright or, more terrifyingly, having it taken away. That perhaps our destiny is indeed a more equal society, but one where equality means equal misery, a social order where all the plagues of the ‘ghetto’ escape past its borders and infect the population at large.”).

<sup>277</sup> See *id.* (“White fear emanates from knowing that white privilege exists and the anxiety that it might end. No matter how many white people tell pollsters that ‘today discrimination against whites has become as big a problem as discrimination against blacks’ (60 percent of the white working class in one poll), we know that this story of antiwhite bias is not true.”). “Privilege” is “built-in advantages.” Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1374 (2015). Privileges often stem from identities. *Id.* at 1375.

<sup>278</sup> HAYES, *supra* note 246, at 131.

<sup>279</sup> See *id.* at 133.

<sup>280</sup> See *id.* at 126–33.

<sup>281</sup> See *id.*

The law and order discourse thus owes some of its success to the way it taps into whites' psychological needs.<sup>282</sup>

The law and order discourse also helps resolve post-civil rights anxiety. Racial majorities may want at some level to be egalitarian, but also fear that the consequence of true equality would be racial minorities replacing them at the top of the hierarchy.<sup>283</sup> Hence, the white supremacist Charlottesville protestors recently chanted, "you will not replace us."<sup>284</sup> The anxiety regarding replacement is partially resolved by the law and order narrative, which promises to keep potentially unruly populations in check.<sup>285</sup>

Put another way, a fundamental influence on society today is the fact that the 1960s wrought sudden and thoroughgoing social change, especially in race relations.<sup>286</sup> Change made some people nervous.<sup>287</sup> Tension between egalitarian norms and racially hierarchized realities led some to call for progressive social change.<sup>288</sup> It also led some people to promote a conservative racial agenda built around calls for law and order.<sup>289</sup>

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<sup>282</sup> The vulnerability that some whites feel has sometimes been referred to as "White Fragility"—"a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves." Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54, 54 (2011) (discussing this concept). See also Jones & Norwood, *supra* note 121 at 2051–55 (applying term to treatment of black women).

<sup>283</sup> See HAYES, *supra* note 246, at 126–33.

<sup>284</sup> Brandon Carter, *Ryan Denounces 'Repugnant' Views of Virginia White Nationalist Marchers*, HILL (Aug. 12, 2017, 12:36 PM), <https://thehill.com/home-news/house/346314-ryan-denounces-repugnant-views-of-virginia-white-nationalist-marchers> (reporting marchers also shouted "white lives matter").

<sup>285</sup> See Cook, *supra* note 22, at 82.

<sup>286</sup> See generally MAYER, *supra* note 201, at 9–95 (discussing racial politics in the 1960s during the civil rights movement).

<sup>287</sup> See HAYES, *supra* note 246, at 126–33.

<sup>288</sup> See, e.g., FLAMM, *supra* note 13, at 1–11; Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 987–88 (1990).

<sup>289</sup> See, e.g., FLAMM, *supra* note 13, at 1–11; Jones & Norwood, *supra* note 121, at 2054 ("When White racial hegemony is challenged, as it is by the changing demographics of the United States and movements like #SayHerName and #BlackLivesMatter, backlash often results.").

B. *Meso Level: Weakening Terry/Demonizing Young Men of Color*

The call for law and order in the late 1960s was a broad, cultural discourse at the macro level that gained predominance in the 1970s and 1980s and has been revived in the Trump era.<sup>290</sup> That discourse set a tone for discussions of crime at the meso level of doctrine. With society, including some Supreme Court justices, generally convinced we needed law and order, the Supreme Court was less likely to accept doctrines that prioritized due process rights.<sup>291</sup> This caused the doctrinal shift in criminal procedure following the Warren Court.<sup>292</sup> President Nixon appointed several justices who spurred a counterrevolution against the Warren Court.<sup>293</sup> That counterrevolution bore the fruit of the permissive *Terry* doctrine.<sup>294</sup>

As we have seen, doctrinal discourses at the meso level can travel along with public policy discourses about policing.<sup>295</sup> The law and order discourse at the macro level inspired not just conservative legal doctrine, but a conservative version of criminology.<sup>296</sup> The backlash criminologists mixed a general distaste for 1960s liberalism with biological and cultural arguments about black inferiority.<sup>297</sup> Their product was the set of rationales for aggressive policing

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<sup>290</sup> See Chris Hayes, Opinion, *Chris Hayes: What 'Law and Order' Means to Trump*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/opinion/sunday/chris-hayes-trump-law-order.html>.

<sup>291</sup> See Reamey, *supra* note 221, at 57–61 (“The Warren Court stood for certain principles; the conservative element of the Burger Court appeared to stand for one: find a way to put the criminal defendant in jail and keep him there.”).

<sup>292</sup> See *id.* (“[T]he Fourth, Fifth, and Sixth Amendments had been seriously damaged by the Burger Court, but . . . the principle-laden decisions of the Warren Court era remained at least as symbolic reminders of better times.”).

<sup>293</sup> See *id.*; see also Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4–5 (2010) (“Rather than a left-liberal egalitarian, or privacy-protecting rights regime, the central concern of the Warren Court's Fourth Amendment jurisprudence was the republican interest in personal security, understood as non-domination. Extending security into areas hitherto unregulated by the law was a major concern of the Warren Court throughout its tenure, exemplified by its decision in *Terry*.”).

<sup>294</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>295</sup> See *supra* Section II.B.2.

<sup>296</sup> See *supra* Section III.A.

<sup>297</sup> See *id.*

that would eventually yield the macro-level practice of programmatic stop and frisk.

### 1. THE DISCOURSES WEAKENING *TERRY*

Programmatic stop and frisk can be summarized as the aggressive application of the *Terry* doctrine. The facts of *Terry* are iconic. McFadden, a white police officer with over thirty years on the force, observed two black men, Terry and Chilton, walk back and forth in front of a store window a dozen times.<sup>298</sup> When Terry and Chilton went to consult with Katz, a white man, McFadden halted all three men and patted down the outside of each man's clothing.<sup>299</sup> Finding weapons on Terry and Chilton, Officer McFadden arrested them for illegal possession of the firearms, while eventually releasing Katz—the only white man.<sup>300</sup>

The activity approved in the *Terry* decision was potentially modest.<sup>301</sup> The Court concluded that when a police officer has what is now known as “reasonable suspicion,” the officer may stop people by requiring them to halt so that the officer may see if they are willing to answer questions.<sup>302</sup> Likewise, if the officer can articulate further reasonable suspicion that the suspects are armed, the officer may then frisk suspects by patting down the outside of their clothing to uncover weapons posing a danger to herself or bystanders.<sup>303</sup>

Yet the *Terry* test has become little more than a speed bump for aggressive police departments.<sup>304</sup> The current reasonable suspicion

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<sup>298</sup> *Terry*, 392 U.S. at 5–6; see also Cooper, *The “Seesaw Effect,” supra* note 239, at 152 (illustrating the underlying racial disparities that the Court failed to acknowledge in its justification of reasonable suspicion).

<sup>299</sup> *Terry*, 392 U.S. at 6–7; see also Cooper, *The “Seesaw Effect,” supra* note 239, at 152.

<sup>300</sup> *Terry*, 392 U.S. at 7; see also Cooper, *The “Seesaw Effect,” supra* note 239, at 152.

<sup>301</sup> See Bellin, *supra* note 4, at 1502–03.

<sup>302</sup> *Terry*, 392 U.S. at 21, 30. Reasonable suspicion is defined as the ability to state “specific and articulable facts” leading a reasonable officer to conclude a crime is afoot and this person is involved. *Id.* at 21.

<sup>303</sup> *Id.* at 30.

<sup>304</sup> The creation of *Terry* doctrine and its slow but inevitable deterioration exemplifies the Court's withdrawal from policing the police. See Cooper, *Un-Balanced Fourth, supra* note 120, at 885–86 (arguing reasonable suspicion test was bound to deteriorate); Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43, 45 (noting *Terry*'s inherent vulnerability to “facially subjective rationales such

test for stops and frisks requires less proof than the probable cause standard.<sup>305</sup> The Court has gone so far as to allow a stop and frisk based on articulation of as few as two factors: (1) a person's flight upon sight of the police when (2) the person is in a neighborhood the police designate as "high crime."<sup>306</sup> Numerous scholars have identified "high crime area" as the principal rationale for blanketing black and Latinx communities with stops and frisks.<sup>307</sup>

An important and insidious aspect of the weakening of *Terry* doctrine has occurred slowly as *Whren* pretext doctrine has migrated into the reasonable suspicion doctrine. Skipping forward to the mid-1990s reveals why the *Terry* stop and frisk power can be so pervasively used for racial profiling. In *Whren*, the Court dealt with a claim that District of Columbia undercover vice officers had stopped

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as "furtive movements"). As legal historian Thomas Davies documents, "the majority justices have pursued a multi-prong campaign to free police of constitutional constraints by restricting the coverage of Fourth Amendment protections, by weakening or even eviscerating the substance of search and seizure standards, and by largely eliminating the consequences of unconstitutional intrusions." Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 939 (2010).

<sup>305</sup> *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("[T]he level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause."); *Alabama v. White*, 496 U.S. 325, 329–30 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."). Professor Fagan recently cited esteemed scholar William (Bill) Stuntz for the proposition that probable cause requires a "more-likely-than-not," or a 50.1% chance, while reasonable suspicion only requires 20–25% chance. Fagan, *supra* note 304, at 52–53 (quoting William J. Stuntz, *Terry and Substantive Law*, 72 ST. JOHN'S L. REV. 1362, 1362 (2012)).

<sup>306</sup> *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (concluding that running at sight of police in a high-crime neighborhood can give rise to reasonable suspicion). *But see Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (holding that black men might flee police for reasons other than criminality).

<sup>307</sup> *See, e.g., Fagan & Geller, supra* note 7, at 70 tbl.1, 71 tbl.2, 73 tbl.3; Laurin, *supra* note 29, at 8 ("[High crime area] is a primary basis for police justifying enormously high (and not enormously fruitful) numbers of stops in urban minority neighborhoods.").

two black suspects because of their race.<sup>308</sup> The *Whren* Court held that as long as the police have probable cause, their intrusion satisfies the Fourth Amendment's reasonableness clause, except in extraordinary circumstances.<sup>309</sup> The Court found this necessary to avoid investigating police officers' motivations, which it claimed are difficult to discern.<sup>310</sup> Regardless, the Court found that the Fourth Amendment's reasonableness requirement means that certain actions are acceptable no matter what their motivations.<sup>311</sup> The Court thus ignored the fact that no reasonable officers would have made this stop and that the officers in this case violated department regulations in doing so.<sup>312</sup>

Because *Whren* doctrine makes pretextual arrests and searches "reasonable" under the Fourth Amendment, defendants challenging racial profiling must make the almost always quixotic trip to Fourteenth Amendment doctrine in search of relief.<sup>313</sup> It is difficult to make an Equal Protection claim against police in a context where evidence of purposeful discrimination is hard to gather.<sup>314</sup>

Most importantly for our purposes, the *Whren* pretext rule, which technically only applied to intrusions based on probable cause, is seeping into *Terry* doctrine. As will be discussed, state courts generally take *Whren* to mean that police officers may use a *Terry* stop that is valid on any grounds as a pretext to investigate

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<sup>308</sup> *Whren v. United States*, 517 U.S. 806, 808–09 (1996).

<sup>309</sup> *Id.* at 817.

<sup>310</sup> *See id.* at 814–15.

<sup>311</sup> *Id.* at 813.

<sup>312</sup> *Id.* at 815 (“[Petitioners’] claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.” (internal quotation marks omitted)).

<sup>313</sup> *Profiling in America*, *supra* note 245, at 1075; *see also* *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y.) (approving racial profiling claim under Fourteenth Amendment), *appeal dismissed*, (2d Cir. 2013).

<sup>314</sup> *See* Goel et al., *supra* note 6, at 198–99 (describing difficulties created by the intent requirement).

other potential crimes for which they lack even reasonable suspicion.<sup>315</sup> Such an approach insulates the race-targeted nature of stop and frisk from judicial scrutiny.

The *Terry* and *Whren* decisions were necessary enablers of programmatic stop and frisk. No other tool, especially not arrests under a probable cause standard as understood in 1968,<sup>316</sup> could be so easily used for widespread harassment of young racial minority men. Nor can *Terry*'s use for programmatic racial targeting be explained away as largely the product of subsequent social changes.<sup>317</sup> The usefulness of *Terry* stops for programmatic policing played a significant role in inspiring the racially targeted approach to policing.<sup>318</sup> Further, the *Whren* pretext approach sent a signal to both policymakers and police officers that the Court did not care about police racial profiling.<sup>319</sup> The political call for law and order, as well as policy proposals of backlash criminologists, could not have attained predominance in the form of programmatic stop and frisk without both the insufficiently limited *Terry*-stop power and *Whren*'s tacit approval of racial targeting.

## 2. THE DISCOURSE OF BACKLASH CRIMINOLOGY

The law and order discourse argued that society needed to be more heavily policed in general, but specific criminology theories justified the particular methods of programmatic stop and frisk. Consider, for instance, James Q. Wilson's policing theories, which justified aggressive policing that was known to be likely to target racial minorities.<sup>320</sup> Wilson was so influential in conservative and policing circles that President George Bush awarded him the Medal

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<sup>315</sup> For a detailed state court application of pretext doctrine to stops and frisks, see Margaret M. Lawton, *State Responses to the Whren Decision*, 66 CASE W. RES. L. REV. 1039, 1047–48, 1050–53 (2016).

<sup>316</sup> See Laurin, *supra* note 29, at 7 (noting that “a range of now-regular police-civilian contacts . . . would have been far less frequent under a probable cause standard”).

<sup>317</sup> For a contrary view, see Laurin, *supra* note 29, at 12.

<sup>318</sup> See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 363 (1998) (linking weak Fourth Amendment doctrine to racial profiling).

<sup>319</sup> See Darrell D. Jackson, *Profiling the Police: Flipping 20 Years of Whren on Its Head*, 85 UMKC L. REV. 671, 696 (2017) (suggesting *Whren* supports profiling by police officers).

<sup>320</sup> Meares, *supra* note 4, at 169.

of Freedom in 2003.<sup>321</sup> However, as Wilson's long-time colleague Glenn C. Loury noted, Wilson's work "provide[d] academic justification for" hyper-incarceration in general and programmatic stop and frisk in particular.<sup>322</sup>

In multiple publications, Wilson argued that blacks were crime prone. In *Crime and Human Nature*, which he co-wrote with Richard Herrnstein, Wilson does not quite say that blacks are biologically crime prone; he just says that blacks are more likely to have a certain body type, and that that body type is crime prone.<sup>323</sup> In his book chapter, *Crime*, published in a conservative think tank's anthology on race, Wilson contended that being from a single-parent family, which is significantly more likely among blacks, made one crime prone.<sup>324</sup> In the famous essay on policing called *Broken Windows*, Wilson, with George L. Kelling, blended a nurture argument about lower-class people not following mainstream social norms with an implicit nature argument that blacks were predisposed to be over-represented amongst those groups.<sup>325</sup> Be it by nature or nurture, Wilson consistently saw blacks as crime prone.

Wilson's nature mode was evident in *Crime and Human Nature* where he associated certain body types with criminality.<sup>326</sup> He disfavored large men and associated that body type with black and Latinx people.<sup>327</sup> Wilson's rationalization of treating large black

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<sup>321</sup> Loury, *supra* note 21, at 48.

<sup>322</sup> *Id.* at 48, 50; *see also* Zimring, *supra* note 21, at 831–32 ("A reader can make the long journey from scholarship to salesmanship and back in the space of a single Wilsonian paragraph.")

<sup>323</sup> JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 69–90 (1985); *see also* SHAUN L. GABBIDON & HELEN TAYLOR GREENE, *RACE AND CRIME* 61–98 (2d ed. 2009) (summarizing theories that racial minorities, especially blacks, are more crime-prone).

<sup>324</sup> James Q. Wilson, *Crime*, in *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 115, 120–22 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

<sup>325</sup> *See* Kelling & Wilson, *supra* note 22.

<sup>326</sup> *See* WILSON & HERRNSTEIN, *supra* note 323, at 69–90.

<sup>327</sup> "[C]riminals on the average differ in physique from the population at large. They tend to be mesomorphic (muscular) and less ectomorphic (linear), with the third component (endomorph) not clearly deviating from normal. Where it has been assessed, the 'masculine' configuration called andromorphy also characterized the average criminal." *Id.* at 89. "Among whites, being a mesomorph is an indicator of a predisposition to crime. Young black males are more mesomorphic . . . than are young white males . . ." *Id.* at 469; *see also* THOMAS L. DUMM,

men as criminogenic is not new,<sup>328</sup> but it adds fuel to the fire of racial stereotypes. In fact, a recent study found that police officers continue to be hyper-suspicious of such men.<sup>329</sup> Note as well that Wilson's co-author in *Crime and Human Nature* is a confirmed biological racist and the author of the infamous book, *The Bell Curve: Intelligence and Class Structure in American Life*,<sup>330</sup> which cites Nazi scientists for the proposition that certain races are genetically inferior.<sup>331</sup> Lounsbury also recalls that Wilson was silent in the face of racist proclamations of biological inferiority.<sup>332</sup>

In nurture mode, Wilson opens his book chapter *Crime* with these words: "A central problem—perhaps *the* central problem—in improving the relationship between white and black Americans is the difference in racial crime rates."<sup>333</sup> Was Wilson claiming that the misbehaviors of a small percentage of black people justify white people in being racist toward all black people? Seemingly, yes. Seemingly because he thought black culture promotes crime.

For instance, in *Crime*, Wilson goes on to contend that blacks commit more crime than whites, which he says is because blacks have many more children out of wedlock than whites.<sup>334</sup> The higher crime rate among blacks, according to Wilson, is why whites fear blacks, refuse to live with them or send their kids to school with them, and support aggressive policing of them.<sup>335</sup> He declares, "[o]f

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UNITED STATES 101–04 (William E. Connolly ed., 1994) (critiquing the racism behind Wilson and Herrnsteins' argument).

<sup>328</sup> See, e.g., WILSON & HERRNSTEIN, *supra* note 323, at 69–90 (discussing previous studies comparing body type with criminality).

<sup>329</sup> Adrienne N. Milner et al., *Black and Hispanic Men Perceived to Be Large Are at Increased Risk for Police Frisk, Search, and Force*, PLOS ONE, Mar. 11, 2015, at 1, 5–9, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0147158> ("Results indicated that for most height and weight categories, black and Hispanic suspects were at increased risk of being frisked or searched compared to their white counterparts even when controlling for the circumstances of the stop.").

<sup>330</sup> RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996).

<sup>331</sup> See Charles Lane, *The Tainted Sources of 'The Bell Curve'*, N.Y. REV. BOOKS, Dec. 1, 1994, at 14, 14–19.

<sup>332</sup> See Lounsbury, *supra* note 21, at 49.

<sup>333</sup> Wilson, *supra* note 324, at 115.

<sup>334</sup> *Id.* at 120–22.

<sup>335</sup> *Id.* at 118.

course whites avoid blacks; of course police officers stop and question blacks. What can you expect?”<sup>336</sup> This attitude would explain white support for putting black communities “under lock and key.”<sup>337</sup>

In that light, we can see Wilson’s perspectives on criminology as part of the backlash against the black civil rights movement of the 1960s. Loury notes that Wilson was greatly influenced psychologically by the movement to critique the liberalism of the 1960s.<sup>338</sup> Perhaps that is why Wilson held on to his 1970s views rationalizing hyper-incarceration into the 2000s, despite the mounting evidence that it was unjustifiably race-based<sup>339</sup> and tremendously harmful to racial minority communities.<sup>340</sup> Even the relatively conservative scholar Franklin Zimring found Wilson unpersuasive because of Wilson’s stubborn refusal to acknowledge change.<sup>341</sup> Wilson’s need to revolt against 1960s liberalism seems to have animated his backlash version of criminology.

The result of backlash criminology was an assumption that over-policing of young racial minorities was an expected and acceptable cost of aggressive policing. It is thus unsurprising that Meares understands Wilson to have endorsed programmatic stop and frisk. “It is critical to understand,” says Meares, that what Wilson sought “[was] a program.”<sup>342</sup> According to Meares, Wilson’s criminology supports the view that “good policing is articulated from the top

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<sup>336</sup> *Id.*

<sup>337</sup> HAYES, *supra* note 246, at 32.

<sup>338</sup> See Loury, *supra* note 21, at 48–49 (connecting Wilson to like scholars).

<sup>339</sup> See Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow: The Racist, Classist Origins of Broken Windows Policing*, SLATE (Dec. 5, 2014, 6:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2014/12/edward\\_banfield\\_the\\_racist\\_classist\\_origins\\_of\\_broken\\_windows\\_policing.html](http://www.slate.com/articles/news_and_politics/crime/2014/12/edward_banfield_the_racist_classist_origins_of_broken_windows_policing.html) (“In their *Atlantic* article, Kelling and Wilson recognized the racial implications of order policing. ‘How do we ensure, in short, that the police do not become the agents of neighborhood bigotry?’ they asked, before essentially shrugging and moving on. ‘We can offer no wholly satisfactory answer to this important question.’”).

<sup>340</sup> See Loury, *supra* note 21, at 48–50 (decrying Wilson having “stubbornly reiterated” debunked ideas).

<sup>341</sup> See Zimring, *supra* note 21, at 831–32 (criticizing Wilson’s downplaying of the conservative turn in criminal justice policy from the mid-1970s to mid-1990s as well as his unsubstantiated claim that mass incarceration prevented crime during that period).

<sup>342</sup> Meares, *supra* note 4, at 168.

down throughout the entire agency to include aggressive, systematic, ‘legalistic’ field interrogations designed to suppress crime.”<sup>343</sup> One can certainly say that Wilson and Kellings’s Broken Windows theory was meant to get a certain population, the kind that was expected to offend, to behave by harassing it over petty crimes such as selling single cigarettes without a license—the cause of Eric Garner’s death.<sup>344</sup>

To emphasize that Wilson, who often co-authored works, was not a lone wolf, let us consider one other example of backlash criminology. The bad guy in this tale is Princeton political science professor John DiIulio, who coined the term “super-predator.”<sup>345</sup> Shortly before President George W. Bush awarded Wilson the Presidential Medal of Freedom, he appointed DiIulio as his head of faith-based initiatives.<sup>346</sup> DiIulio’s theory was that black neighborhoods were raising children “surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings.”<sup>347</sup> This description of a coming generation of super-predators became a national phenomenon referenced on the covers of popular magazines.<sup>348</sup> That thesis was thoroughly disproven, as crime went down in the next generation.<sup>349</sup> Nevertheless, the image of young men of color as paradigmatic criminals remained.<sup>350</sup>

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<sup>343</sup> *Id.* at 168–69. Meares later defines “legalistic” policing as concentrating “on issuing many citations and questioning disorderly people at high rates in order to reduce the overall crime rate.” *Id.* at 171.

<sup>344</sup> See Ronald Wheeler, *Michael Brown, Eric Garner, and Law Librarianship*, 107 L. LIBR. J. 467, 467–68 (2015) (describing police killing of Eric Garner in investigation for selling loose cigarettes); see also TAIBBI, *supra* note 1, at 112–15, 118–22 (detailing the police killing of Eric Garner under order-maintenance policing).

<sup>345</sup> See John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

<sup>346</sup> See D. MICHAEL LINDSAY, FAITH IN THE HALLS OF POWER: HOW EVANGELICALS JOINED THE AMERICAN ELITE 50 (2007). Although DiIulio was supposedly a “life-long Democrat” to that point, he was also “a self-described ‘born-again Catholic.’” *Id.* at 49 (emphasis in original).

<sup>347</sup> DiIulio, *supra* note 345, at 25.

<sup>348</sup> Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 296–97 (2012).

<sup>349</sup> See *id.* at 297.

<sup>350</sup> *Id.* at 297–300 (discussing public concern over “super-predators” between the 1990s and early 2000s).

Scholars have demonstrated that police assumptions that racial minorities are crime prone are stoked by a conservative machinery seeking to sway public opinion toward racial profiling. Conservative foundations, scholars, Fox television commentators, and Paul Ryan (Speaker of the United States House of Representatives from October 2015 to January 2019) all promote the belief that blacks are necessarily crime prone because they marry less frequently.<sup>351</sup> This grossly simplifies the causes of crime, making such theories “highly intentionally dishonest.”<sup>352</sup>

Treatment of young black and Latinx men is related to cultural discourses about their criminogenic nature. For example, calls for law and order and the accompanying backlash theories of criminology led to the Wars on Crime and Drugs<sup>353</sup> and, in turn, helped make young black males the paradigmatic criminal in the popular imagination.<sup>354</sup> This caused a cultural shift at the end of the twentieth century that broke the century-long view that when dealing with juveniles, the criminal justice system’s prime directive should be rehabilitation, not punishment.<sup>355</sup>

### C. *Micro Level: From Theory to Policy*

#### 1. THE DEVELOPMENT OF PROGRAMMATIC STOP AND FRISK IN NEW YORK CITY

When conservative criminologists Kelling and Wilson created Broken Windows theory in 1982, they linked conservative ideologies at the macro level to the permissiveness of *Terry* doctrine at the meso level, thereby rationalizing a set of aggressive policing practices at the micro level. Kelling and Wilson’s theory analogizes low-level offenses to broken windows in a neighborhood.<sup>356</sup> Broken windows are assumed to encourage more serious crimes by suggesting

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<sup>351</sup> See Garrison, *supra* note 24, at 129–33; see also Lauren Fox et al., *House Speaker Paul Ryan Won't Seek Re-Election: 'I Like to Think I've Done My Part,'* CNN (Apr. 11, 2018, 1:43 PM), <https://www.cnn.com/2018/04/11/politics/paul-ryan-retirement-house-speaker/index.html>.

<sup>352</sup> Garrison, *supra* note 24, at 134–35.

<sup>353</sup> See ALEXANDER, *supra* note 247, at 5 (connecting the Wars on Crime and Drugs to preservation through transformation of racial hierarchy).

<sup>354</sup> Moriearty & Carson, *supra* note 348, at 295–96.

<sup>355</sup> See *id.* at 294.

<sup>356</sup> See Kelling & Wilson, *supra* note 22.

that no one cares about rule breaking.<sup>357</sup> Adherents of Broken Windows theory developed the meso-level public policy of “order maintenance” policing.<sup>358</sup> Order-maintenance policing, sometimes known as “quality of life” or “zero tolerance” policing,<sup>359</sup> involves arresting people for petty offenses.<sup>360</sup> Previously ignored *de minimis* offenses, such as jumping turnstiles to gain free rides on public transit or littering, are approved bases for order-maintenance arrests.<sup>361</sup> The stated goal of Broken Windows policing is to improve everyone’s quality of life by preserving order.<sup>362</sup> In reality, Broken Windows policing appears to accomplish that goal mostly from the point of view of affluent whites.<sup>363</sup>

With the conservative criminological theory of Broken Windows and order-maintenance policing in place, all programmatic stop and frisk needed was a catalyst. It received this catalyst when a crime wave instigated calls for law and order by any means necessary. The stage for movement toward programmatic stop and frisk practices was set in the early 1990s, when a spike in violent crime

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<sup>357</sup> *Id.*; see also Tanya Erzen, *Turnstile Jumpers and Broken Windows: Policing Disorder in New York City*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 19, 20 (Andrea McArdle & Tanya Erzen eds., 2001) [hereinafter ZERO TOLERANCE] (“Kelling and Wilson believe that an area that appears disorderly implicitly sanctions more serious crimes.”).

<sup>358</sup> Bellin, *supra* note 4, at 1504 (stating that “order maintenance policies [were] designed to implement [Broken Windows]”).

<sup>359</sup> Andrea McArdle, *Introduction*, in ZERO TOLERANCE, *supra* note 357, at 1, 4–5.

<sup>360</sup> Bellin, *supra* note 4, at 1504.

<sup>361</sup> *Id.*; see Erzen, *supra* note 357, at 19.

<sup>362</sup> See Erzen, *supra* note 357, at 19–21.

<sup>363</sup> See Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect,”* 56 OKLA. L. REV. 833, 865–68 (2003) (postulating that crime’s movement into white areas during the Dinkins Mayoral years in New York City caused calls for aggressive policing), as reprinted in SEARCH AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND CONTEMPORARY DEBATE (Cynthia Lee ed., 2011). For further background on order-maintenance policing, see, for example, Fagan & Davies, *supra* note 37, at 461–63; K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276–80 (2009). In fact, some have said that all order-maintenance policing seeks to do is to reduce the public perception of criminality, not to reduce crime itself. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 305–08 (1998).

engulfed the United States in general and New York City in particular.<sup>364</sup> That allowed conservatives to rationalize aggressive policing of certain neighborhoods.<sup>365</sup>

When Republican Mayor Rudy Giuliani took office, New York City Transit Police Commissioner William Bratton had recently gained accolades for using the Broken Windows theory to fight crime.<sup>366</sup> Giuliani hired Bratton as the police commissioner.<sup>367</sup> Bratton adopted order-maintenance policing,<sup>368</sup> but NYPD methods soon morphed into a gun deterrence theory.<sup>369</sup> Aggressive, top-down policing aimed at deterring gun use, especially when targeted at racial minorities, is basically programmatic stop and frisk.<sup>370</sup>

The discourse surrounding Kelling and Wilson's Broken Windows theory is acknowledged to have been enormously influential in policing circles.<sup>371</sup> NYPD Commissioner Bratton is known to have adapted his policing theories from the order-maintenance policing methodologies, which are themselves a product of Broken Windows theory.<sup>372</sup> The eventual NYPD methods—which blended administrative dictations of pervasive, profile-based stops and frisks targeted at young black and Latinx men in order to confiscate their

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<sup>364</sup> See Bellin, *supra* note 4, at 1503–07, 1507 n.54.

<sup>365</sup> See *id.* at 1503–07.

<sup>366</sup> *Id.* at 1503–04.

<sup>367</sup> *Id.* at 1503.

<sup>368</sup> *Id.* at 1503–04.

<sup>369</sup> See *id.* at 1504–05; see also Fagan & Davies, *supra* note 37, at 471–72.

<sup>370</sup> See Bellin, *supra* note 4, at 1504–05 (contrasting programmatic stop and frisk from order maintenance). Bellin is correct about the distinctness, but inadequately emphasizes that Broken Windows theory and order-maintenance methodologies were a *historically significant and necessary precursor* to programmatic stop and frisk. *Id.* In New York City, programmatic stop and frisk developed out of a desire to expand from the goal of order maintenance into violent crime reduction by taking guns away from civilians presumed likely to offend. See *id.* at 1503–04. While it is not the same as order maintenance, programmatic stop and frisk developed out of Broken Windows theory and order-maintenance methodologies.

<sup>371</sup> See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272–75 (2006) (reporting results of study debunking Broken Windows theory's efficacy, but acknowledging “[t]he ‘broken windows’ theory produced what many observers have called a revolution in policing and law enforcement”).

<sup>372</sup> For a historical account of programmatic stop and frisk, see Bellin, *supra* note 4, at 1500–20.

guns (programmatic stop and frisk)—are a natural extension of Broken Windows theory.<sup>373</sup> So, responsibility for programmatic stop and frisk can easily be laid in the lap of backlash criminology.

## 2. LINKING BACKLASH CRIMINOLOGY TO PROGRAMMATIC STOP AND FRISK AND SOCIAL MARGINALIZATION OF BLACK AND LATINX MEN

Having seen how backlash criminology was translated into policy, we are better able to see its connections to the social marginalization of black men. A prominent example is the way theories like DiIulio's helped fuel the school-to-prison pipeline. Rios notes that "[i]f institutions of social control believe that all young people follow the 'code of the street' or that defiant or delinquent poor, urban youth of color are 'superpredators'. . . then policies, programs, and interactions with marginalized youths will be based on this false information."<sup>374</sup> This Section of the Article demonstrates how backlash criminology leads to social marginalization of young black and Latinx men.

Discourse has played a central role in the social marginalization of young black and Latinx males. Narratives that hypercriminalize young black and Latinx boys dominate media coverage of these groups. Rios reveals a truth about the media coverage of hypercriminalization: "the perspectives of social-control agents [are] commonly represented in the media and institutional discourses and practices," while youths' experiences are rarely conveyed.<sup>375</sup> Just as local news generally smuggles implicit biases into its watchers' minds, the media normalizes the specific idea that young black and Latinx men are crime prone.<sup>376</sup> Media discourses are thus a prime

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<sup>373</sup> See *id.* at 1509 (noting the NYPD's adoption of James Q. Wilson's theory that stop and frisk should be used to remove guns from potential violent offenders).

<sup>374</sup> RIOS, *supra* note 114, at 9–10; see also WILLIAM G. STAPLES, EVERYDAY SURVEILLANCE: VIGILANCE AND VISIBILITY IN POSTMODERN LIFE 3 (2000) (stating "the intent of social control is to mold, shape and modify actions and behaviors").

<sup>375</sup> RIOS, *supra* note 114, at 9.

<sup>376</sup> See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1551, 1553–54 (2005) (considering local news a kind of virus transmitting prejudices).

machinery by which young black and Latinx men are hypercriminalized.

In socially marginalizing young men of color, programmatic stop and frisk does what it was designed to do. It was born of the *Terry* Court's refusal (under a claim of inability) to prevent use of stops and frisks for racial harassment.<sup>377</sup> The discourse of backlash criminology meant that programmatic stop and frisk gradually became the tool recommended by leading scholars of crime prevention.<sup>378</sup> Those scholars may have endorsed programmatic stop and frisk's tendency toward racial profiling because they were motivated by a desire to respond to what they saw as the excessive liberalism of the Great Society/Civil Rights era.<sup>379</sup> The result of backlash criminology and programmatic stop and frisk is social marginalization of young men of color.<sup>380</sup>

But what can we do?

#### IV. EXAMPLE OF A COUNTER-DISOURSE: AGAINST UNEDUCATED GUESSES

The preceding genealogy of programmatic stop and frisk is an intervention into the common practice of criminal procedure scholarship. We have mostly focused on judicial doctrines and police practices without linking them to society-wide ideological discourses. We must make that connection because discourses drive practices. This genealogy of programmatic stop and frisk shows that discourses calling for law and order as a backlash to civil rights drove the desire to create doctrinal discourses justifying police racial harassment.<sup>381</sup> The criminology of backlash then fueled the policing

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<sup>377</sup> See *Terry v. Ohio*, 392 U.S. 1, 13–15 (1968) (contending racial harassment non-deterrable); Bellin, *supra* note 4, at 1502. *But see, e.g.*, David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 984–85 (1998) (criticizing Court's acquiescence to racial harassment via *Terry* stop).

<sup>378</sup> See *supra* Section III.C.2. (detailing link between backlash criminology and programmatic stop and frisk).

<sup>379</sup> See, e.g., Loury, *supra* note 21, at 49.

<sup>380</sup> There is a long history of marginalization of black men. See generally Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *POLICING THE BLACK MAN*, *supra* note 2, at 3–30. Programmatic stop and frisk is merely a more recent mean.

<sup>381</sup> See Loury, *supra* note 21, at 49.

method of programmatic stop and frisk.<sup>382</sup> Accordingly, we must understand discourses to understand practices.

Considering how macro-level discourses influence police practices shows us that we cannot challenge calls for law and order by means of programmatic stop and frisk if we accept, as some do, the idea that racial hierarchy is inevitable.<sup>383</sup> Such broad discourses about cultural deficiencies can lead people to conclude that it is acceptable for police officers to harass young racial minority men.<sup>384</sup> Consequently, scholars concerned about police racial harassment cannot just seek to reform policing at the micro level; we must create counter-narratives at both the macro and meso levels to make equality a priority in policing. Only then can we proceed to connect those ideas to revising judicial doctrines and police practices.

Positive change could be promoted by one of three types of responses. First, we could resist at the macro level by challenging cultural narratives that rationalize programmatic stop and frisk. Second, we could fight back at the meso level by attacking the legal doctrines (themselves often prompted by discourses about crime policy) that enable racial targeting. Finally, we could advocate for change at the micro level by proposing policies that would alter police officer behavior. This Article endorses an all-levels response, but the remainder concentrates on an example from the meso level: legal discourse about the *Whren* doctrine.

#### A. *Addressing the Discourses Behind Programmatic Stop and Frisk*

At the macro level, we must insist on substantive equality as the proper grounding for our society. The focus of a macro-level response would be on the cultural reasons why the populace should withdraw its support for programmatic stop and frisk. The goal would be to confront white fear and post-civil rights anxiety in order to turn the majority away from tacitly assenting to policing focused on racial harassment. A simple statement of this argument would be

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<sup>382</sup> *Id.* at 49–50.

<sup>383</sup> *See supra* Section II.B.1.

<sup>384</sup> *See* Garrison, *supra* note 24, at 67 (concluding that by “placing the stop-and-frisk policy in context with a historical and social perception within the United States that black males are more criminogenic than other people, and thus, it is to be expected that they are disproportionately arrested and incarcerated”).

to say that police racial targeting is morally wrong.<sup>385</sup> Significant political work would have to be done to turn a large swath of the population against programmatic stop and frisk.

At the meso level, progressive reform would require undoing the mischief of backlash criminology. The point here is that there is an ongoing fight over what is appropriate policing that is currently occurring at the meso level of discourse.<sup>386</sup> Again, what we think we *know* about crime affects what we *do* about crime.<sup>387</sup> That is why the criminology of backlash is so important. It yielded programmatic stop and frisk because it won the clash of discourses about policing policy at the meso level.

To accomplish change in meso-level discourses about policing policy, we also need to change legal scholarship by attempting to influence both discourses and doctrine on policing policy. We will need a vigorous and effective scholarly response to the reemergence of the law and order narrative in the form of support for programmatic stop and frisk.

Current criminal procedure scholarship seems somewhat equivocal on the question of whether police officers need to have a right to conduct programmatic stop and frisk. Even some scholars who are critical of programmatic stop and frisk's racial targeting nonetheless seem to accept former NYPD commissioner Bratton's worldview that "[s]top-and-frisk is not something you can stop. It is an absolutely basic tool of American policing."<sup>388</sup>

Consider Meares's statement on the link between James Q. Wilson's theories and racial profiling:

Of course, when police engage in this kind of policing it is inevitable—at least without randomization—that certain groups will have more contact with police than will other groups. James Q. Wilson himself

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<sup>385</sup> See, e.g., Goel et al., *supra* note 6, at 221 (clarifying that “an interest in general deterrence or sending a message cannot justify a *Terry* stop in the absence of particularized suspicion. . . . [A] desire to demonstrate the power and authority of the police is a dubious objective for stop-and-frisk”).

<sup>386</sup> See, e.g., Loury, *supra* note 21, at 49.

<sup>387</sup> See Hall, *supra* note 13, at 44.

<sup>388</sup> David Feith, *William Bratton: The Real Cures for Gun Violence*, WALL STREET J. (Jan. 18, 2013, 10:31 PM), <https://www.wsj.com/articles/SB10001424127887323968304578246721614388346> (quoting Bratton).

acknowledged the antagonistic potential of his strategy in a journalistic version of his argument, called *Just Take Away Their Guns*. He wrote there, “Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race.”<sup>389</sup>

This statement is tricky because it aims solely to show that Wilson endorsed programmatic stop and frisk, including its racially disparate impact. But Meares’s own claim that racial disparity is “inevitable” is troubling.<sup>390</sup> Such statements could be used to rationalize racial profiling.

Likewise, scholarly statements implicitly endorsing preordained and/or pretextual intrusions are not rare. For instance, Professor Barry Friedman and attorney Cynthia Benin Stein say “the very nature of policing has shifted from a reactive crime-solving model towards intelligence-gathering, regulation, and deterrence. ‘Cause,’ once the *sine qua non* of policing, makes little sense in this deterrent context.”<sup>391</sup> That statement puts forth the very controversial idea that particularized suspicion—long the heart of Fourth Amendment doctrine—is now irrelevant in most cases.<sup>392</sup>

In a similar vein, Meares seems to accept the idea of pretextual searches. “Ideally,” says Meares, “an officer will keep an eye on the person who exhibits enough suspicious characteristics and wait until that person engages in some kind of activity that justifies the officer’s interference.”<sup>393</sup> This statement accepts the *Whren* doctrine’s implication that almost any police intrusion upon civilians is automatically constitutional if there is also probable cause that any of-

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<sup>389</sup> Meares, *supra* note 4, at 169 (quoting James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG., Mar 20, 1994, at 46, 47).

<sup>390</sup> *Id.*

<sup>391</sup> Friedman & Stein, *supra* note 4, at 285.

<sup>392</sup> See Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 392–93 (1988) (accusing Court of having drastically altered Fourth Amendment by watering down particularized suspicion requirement).

<sup>393</sup> Meares, *supra* note 4, at 169. Meares is somewhat critical of this result, noting this “comes very close to the constitutional line.” *Id.*

fense was committed, regardless of the officer's admitted impermissible motive.<sup>394</sup> The *Whren* decision is regarded as enabling most police racial profiling,<sup>395</sup> as most officers can eventually catch any civilian looking like they might be committing some offense.<sup>396</sup> What officers sometimes do, therefore, is pick a suspect because they are a young racial minority male, then come up with a *de minimis* offense that justifies whatever seizure and search they would like to make.<sup>397</sup>

Scholarly statements supporting programmatic stop and frisk might be valuable if they are neutral assessments of the practice. Still, such statements might be dangerous in reactionary times.

What we need now is a new macro- and meso-level set of discourses establishing equality as a central principle of policing. Responding to renewed law and order discourses will be an important part of getting civilians to withdraw their consent from aggressive, race-based policing. We must continuously engage in that war over the long haul. In the meantime, we should argue that police should not just be making us feel safe, they should be making us feel like equal citizens. For instance, what if we thought civilians had an inherent right to be treated respectfully by the police, even when they challenged the officer's authority or decisions?<sup>398</sup> Such a right of

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<sup>394</sup> See *Whren v. United States*, 517 U.S. 806, 810 (1996) (dismissing the notion that “the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible”); see also *Profiling in America*, *supra* note 245, at 1075 (“[T]he U.S. Supreme Court has effectively authorized racial profiling in law enforcement. The Court’s decisions, thus, are in no small part responsible for the fact that race dominated much of modern U.S. law enforcement.”).

<sup>395</sup> Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884, 884 n.2 (2015).

<sup>396</sup> See, e.g., Shea Denning, *Traffic Violations You May Not Even Know You Are Committing*, U.N.C. SCH. GOV’T: N.C. CRIM. L. (Apr. 29, 2014, 2:55 PM), <https://nccriminallaw.sog.unc.edu/traffic-violations-you-may-not-even-know-you-are-committing/> (naming common violations).

<sup>397</sup> See, e.g., Timothy P. O’Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 LOY. U. CHI. L.J. 745, 750 (2009) (referring to ubiquitous use of “minor offenses” as a “legal ‘foot in the door’ for police officers to ask questions, use drug-sniffing dogs, or ask consent to search”).

<sup>398</sup> See Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 551 (2015) (seeking a “republican” form of policing wherein “community policing”

protest would make explicit the idea that police officers ought to treat all civilians as equals.

B. *Example: Recharacterizing Whren*

This Article has made the argument that scholars have not adequately appreciated the discursive roots of programmatic stop and frisk. The last Section thus argued for scholarly creation of macro- and meso-level narratives making equality the primary mission of policing. Without delving too deeply into a topic worthy of a full article of its own, we can say that at the meso level we need to revise legal doctrines that enable programmatic stop and frisk. For instance, legal scholar Gabriel J. Chin and attorney Charles J. Vernon have done admirable work in suggesting that *Whren* itself can and should be overturned.<sup>399</sup>

This Article challenges the fact that courts often apply the *Whren* pretext rule to stops and frisks by providing a counter discourse at the meso level. The extension of *Whren* into *Terry* might be termed “pretext-creep.”<sup>400</sup> As part of challenging racially targeted policing, we must advocate for nothing less than barring application of the *Whren* rule to programmatic stops and frisks.

While a full analysis of *Whren* doctrine is beyond the scope of this method-oriented piece, halting pretext-creep will involve creating a counter-discourse that explains why *Whren* should not apply to programmatic stop and frisk. Two potential arguments are obvi-

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would mean “the police were to consult with residents, community members, and civic organizations to develop policing priorities” (internal citations omitted).

<sup>399</sup> See Chin & Vernon, *supra* note 395 (arguing for overturning the *Whren* decision).

<sup>400</sup> The following federal courts have extended *Whren* to *Terry* stops: *United States v. Brigham*, 382 F.3d 500, 507–11 (5th Cir. 2004); *United States v. Gomez Serena*, 368 F.3d 1037, 1041 (8th Cir. 2004); *United States v. Saucedo*, 226 F.3d 782, 789 (6th Cir. 2000); *United States v. Lopez-Soto*, 205 F.3d 1101, 1104–05 (9th Cir. 2000); *United States v. Williams*, 106 F.3d 1362, 1366 (7th Cir. 1997). The following state courts have extended *Whren* to *Terry* stops: *People v. Robinson*, 767 N.E.2d 638, 641–42 (N.Y. 2001); *State v. Akuba*, 686 N.W.2d 406, 415 (S.D. 2004); *State v. Vineyard*, 958 S.W.2d 730, 731 (Tenn. 1997). Two states clearly reject pretext doctrine in *Terry* stops: *State v. Gonzales*, 257 P.3d 894, 897 (N.M. 2011); *State v. Ladson*, 979 P.2d 833, 839–40 (Wash. 1999).

ous. First, scholars should emphasize that the original *Whren* opinion explicitly excludes *Terry* stops from its ambit.<sup>401</sup> Second, scholars should point to the lack of truly particularized suspicion in programmatic stops and frisks as making them especially distinct from the intrusions anticipated in the *Whren* decision.<sup>402</sup> But those arguments get into the nitty gritty of pretext doctrine without changing its basic premises.

What we need is a counter-discourse that makes the fact that *Whren* involved educated guesses the center of the opinion. We can make that argument by pointing out that *Whren* considered its intrusion to be based on probable cause.<sup>403</sup> Very early in its analysis, the Court highlighted the fact that “Petitioners accept[ed] that Officer Soto had probable cause.”<sup>404</sup> As in many traffic cases, the petitioners had no basis to contest probable cause: the police asserted they saw the petitioners break a traffic law.<sup>405</sup> It matters that the undercover

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<sup>401</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) (explaining away prior Court statements criticizing pretextual policing).

<sup>402</sup> See, e.g., Chin & Vernon, *supra* note 395, at 884–87 (contending “the rationale for *Whren*'s immunization of racial discrimination has collapsed. The Court has recently offered additional explanations for the objective approach, creating an opportunity to scrutinize the reasons for the rule, and therefore how far it should extend”); Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 781–82 (2010) (arguing that “a narrow reading of *Whren* and its ilk—as foreclosing consideration of police motives in ruling on Fourth Amendment challenges—is not inconsistent with taking into account an officer's knowledge and beliefs, either in assessing probable cause or in evaluating the reasonableness of a *Terry* frisk”).

<sup>403</sup> See *Whren*, 517 U.S. at 810.

<sup>404</sup> *Id.*

<sup>405</sup> The “reasonableness” of the stop could certainly be questioned, for the offense is described as follows: “The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.” *Id.* at 808. The phenomenon of “testilying” complicates allegations of probable cause. See, e.g., Larry Cunningham, *Taking on Testilying: The Prosecutor's Response to In-Court Police Deception*, 18 CRIM. JUST. ETHICS 26, 26–27 (1999) (“When an officer is deceptive in court, the rationale goes, he is ‘not quite lying’ but ‘not quite testifying truthfully and completely’ either. Testilying is seen as a middle ground between pure honesty and pure dishonesty. Officers feel that they can tread ethically within this middle ground because they feel that they have society's best interests at heart: the conviction of the guilty.”).

vice officers in *Whren* had the suspects dead-to-rights, as it shows they were not just guessing as to the existence of an offense.<sup>406</sup>

We must next remember that probable cause was once credibly thought to require something akin to “more likely than not.”<sup>407</sup> As an intuitive, and perhaps insightful, 2017 commenter on EvidenceProf Blog said, “[t]he meaning of the word ‘probable’ itself is ‘likely to occur or prove true.’”<sup>408</sup> The commenter then provocatively noted, “The [Fourth] Amendment of the Constitution sets the standard of ‘probable cause,’ and what gives us the right to change the meaning of the word ‘probable’ to include ‘probably not’?”<sup>409</sup> Moreover, law professor Ronald Bacigal contended that, as late as 2005, whether probable cause requires a 50.1% probability was “arguably unsettled.”<sup>410</sup> In *Whren*, the officers had more than a “hunch,” more than “specific and articulable facts” (reasonable suspicion), and even more than a “fair probability” (probable cause).<sup>411</sup>

The conservative Court that emerged in the wake of Presidents Nixon and Reagan eventually defined probable cause as “a fair probability.”<sup>412</sup> Such a probability is based on common sense and “is incapable of precise definition or quantification into percentages.”<sup>413</sup> Moreover, according to then-Justice Rehnquist, probable cause is “not readily, or even usefully, reduced to a neat set of legal rules.”<sup>414</sup> This last statement may have led legal scholar Ric Simmons to assert

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<sup>406</sup> See *Whren*, 517 U.S. at 808.

<sup>407</sup> Fagan, *supra* note 304, at 52–53 (quoting Stuntz, *supra* note 304, at 1362).

<sup>408</sup> Greg, Comment to *Beast of Burden: Probable Cause vs. Preponderance of the Evidence in Ferguson*, EVIDENCEPROF BLOG (Nov. 26, 2014), <http://lawprofessors.typepad.com/evidenceprof/2014/11/best-of-burden-probable-cause-vs-preponderance-of-the-evidence-in-ferguson.html> [hereinafter *Beast of Burden*] (discussing standard of proof for Michael Brown’s family’s suit of his slayer, officer Darren Wilson). Accord Fagan, *supra* note 304, at 52–53 (quoting Stuntz, *supra* note 304, at 1362).

<sup>409</sup> *Beast of Burden*, *supra* note 408. The commenter does conclude that one could resolve the difficulty by saying that probable cause means that some reasonable person could conclude it was more likely than not the suspect was involved in a crime, even though that might not establish a 50.1% probability. *Id.*

<sup>410</sup> Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 280 (2005).

<sup>411</sup> See *Whren*, 517 U.S. at 810.

<sup>412</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>413</sup> *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

<sup>414</sup> *Gates*, 462 U.S. at 232.

that the probable cause standard has “been intentionally kept vague by the courts.”<sup>415</sup>

While probable cause can be established with less than a preponderance of the evidence, it is always at least an educated guess.<sup>416</sup> In light of the natural reading of probable cause as more likely than not, probable cause seems to require at least something close to a fifty percent (50%) chance.<sup>417</sup> Bacigal convincingly labels “[f]air probability,” or probable cause, as ranging between a forty to forty-nine percent (40% to 49%) chance.<sup>418</sup>

In contrast, reasonable suspicions are really just uneducated guesses.<sup>419</sup> Bacigal thus pins specific and articulable facts, or “reasonable suspicion,” at no higher than a forty percent (40%) chance and as low as a twenty percent (20%) probability.<sup>420</sup>

Moreover, the Supreme Court itself has said that the reasonable suspicion standard, which applies to *Terry* stops, is lower than probable cause. In *Alabama v. White*, the Court quoted *United States v. Sokolow* in specifying that reasonable suspicion is “*considerably less than* proof of wrongdoing by a preponderance of the evidence.”<sup>421</sup> The Court then went on to create a significant gap between probable cause and reasonable suspicion:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.<sup>422</sup>

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<sup>415</sup> *Quantifying Criminal Procedure*, *supra* note 8, at 987.

<sup>416</sup> *See* Bacigal, *supra* note 410, at 308–09, 339.

<sup>417</sup> *Id.* at 281.

<sup>418</sup> *Id.* at 338. Bacigal does acknowledge that the threshold might vary by category of potential crime or nature. *See id.* at 339–40.

<sup>419</sup> *See id.* at 309–10.

<sup>420</sup> *Id.* at 338.

<sup>421</sup> *Alabama v. White*, 496 U.S. 325, 330 (1990) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)) (emphasis added).

<sup>422</sup> *Id.*

So, probable cause not only requires a greater quantum of evidence, but it is also qualitatively distinct in that more reliable evidence must be adduced to support it.

The strong version of what probable cause requires makes sense in light of the *Whren* decision. The *Whren* Court said, “[w]here probable cause has existed, the only cases in which we have found it necessary actually to perform the ‘balancing’ analysis involved searches or seizures conducted in an extraordinary manner.”<sup>423</sup> In non-extraordinary intrusions, which include stops and frisks, probable cause stands as a distinct guarantor of Fourth Amendment reasonableness.

Although many lower courts have extended the *Whren* pretext rule to stops and frisks,<sup>424</sup> probable cause should be understood to warrant that treatment only because it is an educated guess. This is justified by the fact that probable cause should also be understood as akin to “more likely than not” and as both quantitatively and qualitatively different from reasonable suspicion. That reversal of the lower courts’ views would accomplish a meso-level reworking of the current doctrinal discourse.

While some might argue that whatever applies to probable cause should apply to reasonable suspicion, such an argument contradicts the seriousness of the probable cause standard. Remembering that the *Terry* Court itself declared that stops and frisks are no mere “petty indignit[ies],”<sup>425</sup> police cannot be excused from establishing the probable cause that existed in *Whren* on grounds that stops and frisks are *de minimis*. Rather, stops and frisks are serious intrusions that are exempted from the usual requirements.<sup>426</sup> If we take the language in *Whren* seriously, it was the existence of probable cause that made a consideration of pretext unnecessary in that case. Hence, the Court distinguished cases involving pretext precisely because “[i]n each case [the Court] address[ed] the validity of a search conducted in the *absence* of probable cause.”<sup>427</sup> The Court’s elaboration upon

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<sup>423</sup> *Whren v. United States*, 517 U.S. 806, 818 (1996).

<sup>424</sup> *See supra* note 400.

<sup>425</sup> *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

<sup>426</sup> *See id.* at 17 (“It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”).

<sup>427</sup> *Whren*, 517 U.S. at 811.

its statement—that administrative searches only get a reduced standard because of their “purpose”—reinforces the idea that probable cause is different.<sup>428</sup> If we may consider the purpose of the search when it is administrative in nature but not for the “run-of-the-mine” case, it must be because “run-of-the-mine” cases are supported by probable cause.<sup>429</sup> Hence, our meso-level response to pretext doctrine is to point out that its own terms prevent its extension to uneducated guesses, such as stops and frisks. At a minimum, though, pretext-creep should be frowned upon because it inoculates uneducated guesses.

### CONCLUSION

This Article has argued that fixing programmatic stop and frisk requires dismantling the discursive supports for social control of young black and Latinx men. The *discourse-to-practice-circuit* helps us understand why police departments developed data-driven, aggressive profiling of young men of color in the name of crime prevention. Two contradictory facts yield concern and hope. First, the white majority is currently tacitly assenting to hyperpolicing of racial minority communities.<sup>430</sup> Second, many whites want to be egalitarian.<sup>431</sup> The genealogy of programmatic stop and frisk shows why we ought to be concerned that aggressive policing of young black and Latinx men will continue.<sup>432</sup> Nonetheless, we should be hopeful that bedrock American values will prevail, and programmatic stop and frisk will eventually be eliminated.<sup>433</sup>

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<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 819 (“For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.”).

<sup>430</sup> See *supra* Section III.A; see also ALEXANDER, *supra* note 247, at 2–7 (arguing current hyper-incarceration of blacks effectively continues Jim Crow era); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 9–15 (2017) (arguing white America tacitly supports social marginalization of black men); HAYES, *supra* note 246, at 31, 127 (arguing white America is colonizing black America).

<sup>431</sup> See, e.g., FLAMM, *supra* note 13, at 1–11; HAYES, *supra* note 246, at 126–33.

<sup>432</sup> See *supra* Part III.

<sup>433</sup> See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 261–264, 280 (2002) (contrasting the American Creed of equality with the American Caution of liberty to exercise privilege).