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THE UN-BALANCED FOURTH AMENDMENT: A CULTURAL STUDY OF THE DRUG WAR, RACIAL PROFILING AND ARVIZU

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THE "drug war" is the United States' attempt to eradicate illegal drug use\(^1\) by means of investigation and punishment of drug users and drug suppliers.\(^2\) In its current form,\(^3\) the drug war emanates from then newly elected President Ronald Reagan's declaration of a war on drugs.\(^4\) This Article seeks to elucidate how law enforcement interests aimed dis-

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2. See Kappler et al., supra note 1, at 149 (describing calls for enforcement-oriented anti-drug crusade). I do not argue that there are no harms from drug use— "the experience of urban terror associated with crime, violence, and drugs is articulated passionately by poor and working-class men and women, across racial and ethnic groups." Michelle Fine & Lois Weis, The Unknown City: Lives of Poor and Working-Class Young Adults 110 (1998) (analyzing results of their surveys of inner city young adults). The problem is that:

the particular standpoint that has influenced social policy . . . , that is the standpoint that is best reflected in prevailing laws . . . , is the standpoint spoken in our data almost entirely by working-class white men—those who discuss neither state-initiated violence [police brutality and mistreatment at service agencies], nor domestic violence; those who focus exclusively, almost fetishistically, on street violence initiated by men of color.

Id. at 111.

3. There have been other drug wars. See Kappler et al., supra note 1, at 7-8 (noting 1937 "disinformation campaign" against marijuana); id. at 152 (noting 1960s campaign against heroin).

4. See id. at 159 (tracing current drug war to election of President Reagan).

(851)
proportionately at people of color came to dominate the debate over drug use.\(^5\)

From the point of view of federal and state law enforcement officers, the drug war has tremendous value. First, it has been assumed that addressing drug use requires increasing the budgets of law enforcement departments.\(^6\) Second, "drug scares" have garnered media and political support for a law enforcement oriented approach to drug use.\(^7\) Third, prosecution of the drug war has been law enforcement's most persuasive argument for gaining approval of favored investigative tools,\(^8\) such as racial profiling.\(^9\)

My thesis is that law enforcement's call for a drug war has influenced the United States Supreme Court to accept racial profiling and limit appellate review of police activity. In its 1967 *Camara v. Municipal & County*  

5. Why does that matter? Because "[our communities are fractured]" and public policies that speak largely from a privileged point as if race/gender neutral—incarcerating men and women from oppressed racial groups, at unprecedented rates—contribute to the fracturing." Fine & Weis, supra note 2, at 131-32.

6. See id. at 166 (arguing drug problem falsely thought of "as strictly a criminal justice system problem"); see id. at 151 ("A 'war on drugs' offers [law enforcement] an opportunity for more money"); see also discussion infra notes 85-123 and accompanying text.


8. See, e.g., KAPPELER ET AL., supra note 1, at 166 ("A 'war on drugs' offers [law enforcement] an opportunity for . . . greater police power.").

9. See United States v. Sokolow, 490 U.S. 1, 10 (1989) (allowing stop where officer's requisite particularized reasonable suspicion was based on a profile of criminal types).

Racial profiling is best thought of as requiring three components: (1) a categorization of people with certain characteristics as a "race"; (2) a "profile" that describes the implications of someone's status as a member of a particular race; and (3) a "profiler" who links the racial categorization to a profile and applies the profile to an individual. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. Rev. 1689, 1690 (2000) (breaking down components of racial profiling). Race is thus seen as a construct, the meaning of which changes over time in keeping with dominant ideologies. See MICHAEL OMI & HOWARD WINANT, *Racial Formation in the United States: From the 1960s to the 1990s* 55 (2d ed. 1994) (exploring how concepts of race are created and changed). Most simply, a "profile" is a stereotype about the meaning of identity characteristics that people use to save time in deciding how to interact with individuals. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 963-68 (1999) (describing how people use stereotypes to cut their information costs of assessing situations). The paradigmatic case of a "profiler" is the police officer that decides whether to Terry stop someone based on assumptions about the implications of her racial identity. See Frank Rudy Cooper, *What Happened When Terry Went on Parade: Reasonable Suspicion Doctrine, Sexual Assault and Puerto Rican Identity* (unpublished manuscript, on file with author) (arguing police refused to intervene in sexual assaults following 2000 NYC Puerto Rican Day Parade because their prior over-enforcement of Terry doctrine to racial profile had "yo-yo effect" of leading to racial controversy, which incentivized them to later under-enforce Terry doctrine).
decision, the Court created the "Balanced Fourth Amendment" by finding "reasonableness," and not probable cause, to be the default standard. In its 1968 Terry v. Ohio decision, the Court created a "reasonable suspicion" test for limited searches and seizures that weighs law enforcement's interests against the individual's privacy interest.

I call the current Fourth Amendment the "Un-Balanced Fourth Amendment" because the balancing test has become unconnected from particularized suspicion and unenforceable by appellate courts. First, Terry's reasonable suspicion balancing test, effectively, no longer requires particularization. Police officers may now list characteristics thought to be correlated with abstract "profiles" of criminal types and then use those characteristics to justify suspecting a particular individual.

Second, the Un-Balanced Fourth Amendment strips appellate courts of the power to prevent police officers from invading individuals' privacy interests. In Ornelas v. United States, the Supreme Court held that appellate courts applying de novo review of Fourth Amendment determinations

11. Probable cause exists where the facts are "such as would warrant a belief by a reasonable man" that (1) as to a search, "the items sought are . . . connected with criminal activity, and . . . will be found in the place to be searched" or (2) as to an arrest (a.k.a. "seizure"), "a crime has been committed and that the person to be arrested committed it . . . ." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.3(a), (b), at 147, 149 (3d ed. 2000).
12. See, e.g., Camara, 387 U.S. at 538-39 ("But reasonableness is still the ultimate standard"); see also discussion infra notes 186-222 and accompanying text.
14. The reasonable suspicion test requires that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; see also discussion infra notes 186-222 and accompanying text.
15. See, e.g., Terry, 392 U.S. at 22-27 (opposing variety of law enforcement interests to individual's privacy interest); id. 20-21 (explicitly applying Camara's balancing test "in order to assess the reasonableness of Officer's McFadden's conduct"); see also discussion infra notes 186-222 and accompanying text.
16. The particularization requirement demands that a search be limited in scope. RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 95 (1999) (describing historical roots of Fourth Amendment). By particularization requirement, I mean requiring a police officer to justify his suspicion based on characteristics of a particular individual. See discussion infra notes 223-56 and accompanying text.
17. A "profile" describes the implications of someone's display of characteristics associated with a particular type. See Gotanda, supra note 9, at 1690 (identifying "foreignness" as popularly accepted profile of meaning of Asian-American status). Many believe the DEA has used profiles of criminal types to single out racial minorities for suspicion. See, e.g., American Civil Liberties Union, Driving While Black Is Not a Crime . . . So Why Are Incidents Like These Occurring Across the Country? [hereinafter ACLU Report] (collecting incidents of racial profiling, at http://www.aclu.org/congress/dwstories.html (last visited Apr. 12, 2002).
18. See, e.g., United States v. Sokolow, 490 U.S. 1, 10 (1989) (allowing DEA's use of profiles as basis for reasonable suspicion); see also discussion infra notes 186-222 and accompanying text.
must give "due weight" to both the trial court's and police officers' inferences. In a recent decision, *United States v. Arvizu*, the Court held that when an appellate court wishes to overturn a trial court's finding of reasonable suspicion, it must consider whether the "totality of the circumstances" justifies the police officer's drawing of inferences.

Based on my readings of law enforcement's call for a drug war and the Court's reception of that argument, I conclude that law enforcement agencies are succeeding in using the drug war to get people to prioritize law enforcement efficiency over individuals' privacy interests. Therefore, I propose that critical legal scholars must challenge the Un-Balanced Fourth Amendment by analyzing the drug war through an oppositional decoding position.

This Article provides a cultural studies approach to the encoding and decoding of the drug war that will allow us to draw important conclusions about the effects of the drug war on the Court. In Part I of this Article, I describe how the field of cultural studies reads popular culture through

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20. I place "due weight" in quotes because it is an inherently ambiguous, and therefore flexible, grant of discretionary power to officers.

21. See, e.g., *Ornelas*, 517 U.S. at 699 (requiring appellate courts to apply de novo standard of review to mixed questions of law and fact, but also give "due weight" to trial court's and police officers' drawing of inferences); see also infra notes 186-222 and accompanying text.


23. Reviewing under the "totality of the circumstances" means considering every factor in the record in conjunction with all other factors, rather than considering whether particular bases for a stop add to its justification. See Illinois v. Gates, 462 U.S. 213, 231 (1983) (reformulating probable cause standard). In this Article I sometimes place "totality of the circumstances" in quotes to emphasize its vagueness.

24. See, e.g., *Arvizu*, 122 S. Ct. at 750-52 (requiring appellate courts to both apply *Ornelas*'s deferential de novo review and consider trial court's and police officers' drawing of inferences under "totality of the circumstances"); see also infra notes 186-222 and accompanying text.


26. By culture I mean the collection of commonly accepted meanings for (and interpretations of) objects, ideas, experiences and identities that are circulated in common social interactions and mainstream media. Stuart Hall defines culture as follows:

"[C]ulture' is used to refer to whatever is distinctive about the 'way of life' of a people, community, nation or social group. . . . Alternatively, the word can be used to describe the 'shared values' of a group or of society. . . .

What has come to be called the 'cultural turn' in the social and human sciences . . . has tended to emphasize the importance of *meaning* to the definition of culture. Culture . . . is not so much a set of *things*—novels and paintings or TV programmers and comics—as a process, a set of *practices*. Primarily, culture is concerned with the production and the
the analytical tools of "encoding" and "decoding." In Part II, I analyze why and how law enforcement has encoded the drug war as requiring increased prosecution of drug users and drug dealers. In Part III, I consider how the Court's decoding of law enforcement's drug war discourse has led to the Un-Balanced Fourth Amendment, which is the Court's trend toward weighing law enforcement interests more heavily than privacy interests. In Part IV, I argue for creation of an oppositional decoding of the drug war to counteract the negative consequences resulting from the drug war discourse defined by law enforcement and sanctioned by the Supreme Court.

I. READING A DISCOURSE

A basic premise of this Article is that in order to understand the effects of the drug war, we must trace the cultural life of the discourse calling for a drug war. The first stage in that cultural life occurred when federal and state police officers encoded the argument that we need a drug war. Supportive of law enforcement's interest in a drug war are the news media and politicians; the former desires a narrative that generates

exchange of meanings—the 'giving and taking of meaning'—between the members of a society or group. To say that two people belong to the same culture is to say that they interpret the world in roughly the same ways and can express themselves, their thoughts and feelings about the world, in ways which will be understood by each other. Thus culture depends on its participants interpreting meaningfully what is happening around them, and 'making sense' of the world, in broadly similar ways.


There is a reciprocal relationship between law and culture: "law is both the means by which we continually refashion society and one of the media in which we represent and critique what we have fashioned." Guyora Binder & Robert Weisberg, The Critical Use of History: Cultural Criticism of the Law, 49 STAN. L. REV. 1149, 1219 (1997). That is, we try to shape culture through law (e.g., speed limits), yet law is also a place where we state the public values we want to define our culture (e.g., civil rights law).

27. "Encoding" is the construction of a "discourse." Stuart Hall, Encoding/Decoding, in MEDIA STUDIES: A READER 51, 51-52 (Paul Marris & Sue Thornham eds., 2d ed. 2000) [hereinafter Hall, Encoding/Decoding] (describing methodology for reading media discourses). Discourses are connected statements putting forth ideas seeking to explain the world in a particular way. See KEY CONCEPTS IN CULTURAL THEORY 116-17 (Andrew Edgar & Peter Sedgwick eds., 1999) (defining "discourse").

28. "Decoding" is the audience's response to an encoding. Hall, Encoding/Decoding, supra note 27, at 58-61. An audience might decode an encoding by encoding its own discourse. Id. at 58-61.

interesting stories, while the latter craves a narrative that symbolizes their concern and strength. The second stage in the cultural life of the drug war discourse is the Court’s decoding of law enforcement’s claim for greater authority in prosecuting the drug war. Before examining the two stages of the drug war discourse, I will describe how cultural studies analyzes the construction and reception of discourses.

A. Cultural Studies of Discourses

The cultural studies understanding of discourses opens up the field of cultural criticism to include “the ordinary social, historical world of sense, of ‘symbolic’ or meaning bearing activity in all its forms.” The new definition of culture is tied to everyday social interactions rather than seeing culture as standing above the everyday as that which is superior or reflects something timeless. It is now possible to consider news stories, movies and legal opinions to be culture, and worthy of serious study.

The significance of broadening the concept of culture is revealed by an analysis of culture’s relationship to law. One branch of the old definition of culture saw culture as “in effect, ethnic custom.” As Rosemary Coombe puts it, “[N]ascent tendencies within Enlightenment thought were elaborated to differentiate between cultures.” In the West, the conceptualization of law as a civilizing force was crucial to discriminating between “high” and “low” civilizations and “high” and “low” cultures. Those distinctions emerge from a narrative of law as “the constitutive feature of a European civilization defined in opposition to a savage other characterized by a lack of law and an excess of culture.” Law helped create the conception of culture as hierarchical; cultural studies of law can

30. Norman Fairclough, Critical Analysis of Media Discourse, in Media Studies: A Reader, supra note 27, at 308, 323 (noting that news organizations operate “under intensely competitive economic conditions”).

31. KAPPELER ET AL., supra note 1, at 151 (“The 'safe' political response to the issue of drugs is to call for more law and more order.”).

32. FRANCIS MULHERN, CULTURE/METACULTURE xiii (2000) (conducting genealogy of field of cultural studies and defining metaculture as realm of discussion about meaning of culture).

33. Id.

34. See id. at 78 (describing “radical expansion of the corpus” accomplished by cultural studies’ precursors).

35. Id. at xvii.


38. Id. (citing PETER FITZGERALD, THE MYTHOLOGY OF MODERN LAW (1992)). Placing a hierarchy on cultures was a necessary precursor to colonialism. See BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 21-39 (1992) (describing commodification of racial minority culture as “Eating the Other”).
help undue that false dichotomy. In particular, cultural studies can help us analyze the stages in the cultural life of the discourse calling for a drug war.

The fundamental premise of cultural studies is that we should read discourses. Discourses are the clusters of "ideas, images and practices" that provide ways of talking about a particular topic. To analyze discourses means to analyze "ways of speaking about the world of social experience." Cultural studies sees discourse as accomplishing much more than merely speaking about the world:

Discourse, Foucault argues, constructs the topic. It defines and produces the objects of our knowledge. It governs the way that a topic can be meaningfully talked about and reasoned about. It also 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 defining, it "rules out", limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it.

The key aspect of discourse is that it "rules in" certain viewpoints and "rules out" other viewpoints. Social institutions and cultural practices, including law, are "both constituted by and situated within forms of discourse . . ." The discourses we are concerned with are the stories about the nature of law and the meaning of identity that are told in popular culture.

The concepts of encoding and decoding provide a useful framework for analyzing popular discourses about law and identity. The idea is that any discourse may be broadly described as having "three 'moments' of 'encoding' (production), 'meaningful discourse' (text) and 'decoding' (reception), each of which may be considered as 'relatively autonomous',

41. Key Concepts in Cultural Theory, supra note 27, at 117.
43. Hall, The Work of Representation, supra note 42, at 44.
44. Id.; see Naomi Mezey, Approaches to the Cultural Studies of Law: Law As Culture, 13 Yale J. L. & Human. 35, 46-47 (2001) [hereinafter Mezey, Law As Culture] (describing constitutive theories of law as ones where "law is recognized as both constituting and constituted by social relations and cultural practices") (citing Naomi Mezey, Out of the Ordinary: Law, Power, Culture and the Commonplace, 26 Law & Soc. Inquiry 145 (2001)).
but which are also understood as part of a wider... world... "\textsuperscript{45} That is, a social group encodes a discourse, thereby presenting an argument, which an audience then decodes, or more simply, reads.

For example, in writing this Article, I have sought to make a fair assessment of which aspects of law enforcement’s and the Court’s explanations of the drug war are relevant. Yet I cannot simply reprint all of the hundreds of books and articles that have been written about the drug war. I have selected portions of the discussion and organized them under my thesis. Through that filtering of the reality of the drug war, I have “encoded” a particular discourse about the drug war. By the same token, a reader will receive and respond to my text. He or she will accept, reject, or modify the message that I convey.\textsuperscript{46} Hence, he or she will “decode” my discourse about the drug war.

\textbf{B. The Encoding of a Discourse}

A discourse represents (in both senses of the word)\textsuperscript{47} an event as conveying a certain meaning. Since “[t]he same event can be encoded in more than one way,"\textsuperscript{48} we can critique the text to see why it was constructed in a particular manner. The encoding of a discourse is, therefore, always the construction of an argument.\textsuperscript{49}

When looking at how a discourse was encoded, we are best served by utilizing the concept of “articulation.”\textsuperscript{50} To say a discourse was “articulated” has the double sense of ‘expressed’ and ‘joined together.’\textsuperscript{51} The articulation of a discourse about an event “expresses” a particular view of what happened by “joining together” certain aspects of the event in a particular manner.\textsuperscript{52}

\textsuperscript{45} Introduction, in \textit{Media Studies: A Reader}, supra note 27, at xiii (describing organizational principles for collection of essays applying cultural studies to news, advertising, and popular entertainment).

\textsuperscript{46} See Hall, \textit{Encoding/Decoding}, supra note 27, at 59-61 (describing potential audience responses).

\textsuperscript{47} A discourse “represents” reality by painting a picture of reality that is meant to be taken as a true depiction. It “re-presents” reality because it creates a new reality—reality as properly understood.


\textsuperscript{49} A discourse seeks to convince its audience to perceive reality in a certain way. “Knowledge is power” in the sense that convincing people to view reality in a certain way affects what policy proposals they will accept. See Hall, \textit{The Work of Representation}, supra note 42, at 45-49 (arguing that discourse about crime produces content of criminology policies and textbooks).

\textsuperscript{50} An articulation is a characterization of the meaning of an event. I will sometimes refer to an articulation as a “rearticulation.”

\textsuperscript{51} See Introduction, supra note 45, at xiii.

\textsuperscript{52} Id.
The concept of articulation grew out of Gramsci’s theory of “hegemony,” which says that a social group will try to describe the world in a way that accounts for, but coordinates, the interests of other groups such that they will consent to a structuring of society that promotes the dominant group’s interests. That is, social groups describe an event in a particular way in order to make their understanding of the event the “common sense” viewpoint on the event. Articulation of discourses about the meaning of events and the appropriate structure of society is the primary way a group promotes its interests. Accordingly, every articulation “becomes the site of ‘negotiation,’ or cultural struggle, over meaning.”

55. Emily M.S. Houh provides an excellent definition of hegemony: The term hegemony was developed primarily by the Italian neo-Marxist Antonio Gramsci in the early 20th century “to describe the control of the dominant class in contemporary capitalism.” Gramsci’s theory of hegemony explains that because the dominant class “cannot maintain control simply through the use of violence or force,” other cultural and sociopolitical apparatuses based on consent must be implemented by the dominant class to maintain such control. The consent-based apparatuses and institutions used at various levels in society to disseminate the dominant ideology include civil rights jurisprudence, higher education, the church, school, and family. Although Gramsci’s theory of hegemony depends on consent, the transmission of the dominant ideology is not simply imposed on an opiated mass of non-elites; rather, the messages embedded in the dominant ideology are negotiated between the classes in their transmission. In the field of cultural studies, Gramsci’s theory of hegemony has been especially significant because it has “facilitated analysis of the ways in which subordinate groups actively respond to and resist political and economic domination. The subordinate class need not then be seen merely as the passive dupes of the dominant class and its ideology. Houh, supra note 26, at 40 n.168 (comparing methodologies of Critical Legal Studies and Critical Race Theory).

54. See Jennifer Daryl Slack, The Theory and Method of Articulation in Cultural Studies, in STUART HALL, CRITICAL DIALOGUES IN CULTURAL STUDIES 112, 117 (David Morley & Kuan-Hsing Chen eds., 1996) [hereinafter, Hall, CRITICAL DIALOGUES] (describing how discourses subsume disparate elements of event within unified worldview). Articulation is referred to as a concept because it is meant to be subject to constant reevaluation, rather than serving as a “sewn up” theory or method. See id. at 114.

55. “Common sense” is the prevailing view on the implications of a social event or the implications of characteristics of individuals. See id. at 117 (describing Antonio Gramsci’s concept of hegemony). Within cultural studies, “common sense” is, primarily, the set of ideas and attitudes that reflect the “way in which dominant structures and institutions are acknowledged day-to-day by subordinated groups.” Martin Barker, Stuart Hall, Policing the Crisis, in READING INTO CULTURAL STUDIES 81, 91 (Martin Barker & Annie Beezer eds., 1992). The core of the concept is that common sense is the mechanism by which particular viewpoints are seen as “natural,” and, therefore, as distinct from the interests of a particular group. Hence, “[i]t would not be the coherence of Thatcherism that would mark it for success, but its ability to make itself appear as common sense, agentless . . . .” Id. at 93.

56. Slack, supra note 54, at 117.

57. See Introduction, supra note 45, at xii.
encoding of a discourse is a social group’s attempt to win position in the struggle over cultural meaning.58

As a theory for analyzing the encoding of discourses, articulation says that any social event contains a variety of different elements and generates a variety of potential explanations, with each explanation highlighting some, but not all, of those elements.59 Articulation analysis is based on a conception of discourse as composed of building blocks put together in a particular way to form a particular type of structure. Hence, a social group’s encoding of a discourse about an event combines the disparate elements of the event into a particular structure—articulates the meaning of the event—in order to have the event interpreted as being consistent with that group’s view of how society should be organized.60 We can analyze the encoding of a discourse by breaking apart the structure of the discourse to see why its building blocks were combined in a certain way.61

As a method for analyzing the encoding of discourses, the concept of articulation calls on scholars to reconstruct the ways the encoding of a discourse chose to combine the disparate elements of a social event.62 The task of a critical cultural theory analysis is to “map the context” of the

58. See generally Omi & Winant, supra note 9, at 81 (distinguishing “war of position” from “war of maneuver” in cultural struggle for hegemony).

59. Slack, supra note 54, at 115 (stating that articulation seeks to construct unity out of disparate elements) (quoting Stuart Hall, On Postmodernism and Articulation: An Interview with Stuart Hall, 10 J. COMM’N INQUIRY 45, 53 (1986) [hereinafter Hall, Critical Dialogues, supra note 54, at 131, 141]).

60. See Hall, On Postmodernism, supra note 59, at 53 (declaring that meanings of elements of social event are ideologically implied, not inherent); see also Hall, supra note 54, at 143-44 (citing contrasting majority and minority depictions of meaning of Rastafarian identity as example of ideological struggle).

61. KEY CONCEPTS IN CULTURAL THEORY, supra note 27, at 117 (explaining that “linguistic elements are co-joined so as to constitute structure of meaning larger than sum of its parts”).

62. See Slack, supra note 54, at 115 (quoting LAWRENCE GROSSBERG, WE Gotta GET OUT OF THIS PLACE: POPULAR CONSERVATISM AND POSTMODERN CULTURE 54 (1992)) (describing articulation as process by which social group combines selected elements of event in order to create seemingly all-encompassing discourse); see also Stuart Hall, Cultural Studies: Two Paradigms, 2 MEDIA, CULTURE & SOC’Y 57, 69 (1980) (citing ability to understand how practices are ideologically constructed as advantage of concept of articulation).

63. I propose “critical cultural theory” as a general methodology for analyses of encompassing criminal procedure, identity and popular discourse. Doctrinal analysis allows us to critique a law’s underlying philosophy, but does not explain why flaws are actualized in one context, but not others. Identity theories (including Critical Race Theory, LatCrit, AsianCrit, Feminist Theory and Queer Theory) illuminate why distinct social groups would desire certain practices, but not how they are able to convince others to adopt those practices. Cultural studies explains the process of promoting a particular consensus, but is reliant on doctrinal and identity analyses to explain the full context of the event.

A critical cultural theory methodology would take the following steps: (1) compare the legal doctrine with actual practices; (2) analyze popular discourse to see how each relevant social group’s identity was constructed before and after the event; and (3) propose alterations in doctrine that address both the subordination
social event. We should ask why a social group’s encoding of a discourse emphasized certain elements of an event and de-emphasized others. The goal is to show which interests the encoding of the discourse about an event promoted and which interests it hid. By applying articulation analysis to the drug war, we can analyze how the discourse calling for a drug war was encoded by analyzing how that discourse was articulated.

C. The Decoding of a Discourse

A group’s encoding of a discourse does not end the process of creating meaning; the audience then decodes that discourse. Whereas the encoding of a discourse involves the articulation of the disparate elements of an event into a particular structure, decoding is the manner in which an


For analysis applying both identity theory and cultural studies to criminal law, see generally Gotanda, supra note 9 (arguing that popular assumptions about Asian-American identity led to false criminal accusations against Chinese-American scientist); Joan W. Howarth, Representing Black Male Innocence, 1 J. GENDER RACE & JUST. 97 (1997) (utilizing both cultural studies and critical race theory to analyze criminal conviction); Kenneth Nunn, The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform, 32 Am. CRIM. L. REV. 743 (1995) (applying cultural studies to analysis of identity issues in trials).


64. See Slack, supra note 54, at 125 (emphasis added); see also Grossberg, supra note 62, at 55 (“Understanding a practice involves ... theoretically and historically (re)-constructing its context.”).

65. See Slack, supra note 54, at 122-23 (describing goals of articulation analysis) (quoting Stuart Hall, Signification, Representation, Ideology: Althusser and the Post-structuralist Debates, 2 CRITICAL STUDIES IN MASS COMM. 91, 95 (1985)).
audience perceives that structure. The audience may decode the discourse's structure by taking apart its elements and recombining them in new ways. Accordingly, the theory of encoding does not say that a social group can simply impose its view on its audience. Rather,

\[ \text{[t]he meaning of any given communication—whether a film, a book, or a sporting event—takes place at the point where the consciousness of the viewer meets the message(s) of the transmission.} \ldots \] \text{[I]ndividuals are not simply passive receivers. To greater or lesser extents, we attempt to actively make sense of what we see for ourselves, sifting what we get through the filter of our own experience.}^{66}

While groups encode a discourse with the intent to influence an audience, the audience decodes the discourse "through the filter of [their] own experience."^{67} In order to have its desired effect, an encoding must be both understandable and persuasive to its audience. The concept of decoding helps us analyze why a discourse was or was not persuasive to its audience.

Decoding is essentially a process of "reading" the proffered discourse. Since a discourse "always contains more than one potential 'reading,'"^{68} we can ask why the audience accepted, rejected or modified the encoded meaning.\textsuperscript{69} How that discourse is read will depend on who is reading; "[t]he meaning of the text will be constructed differently according to the discourses (knowledge, prejudices, resistances etc.) brought to bear by the reader . . . ."\textsuperscript{70} Consequently, we can speak very broadly of two basic types of decoding: (1) the "dominant position" and (2) the "oppositional position."\textsuperscript{71}

\textsuperscript{66} \textsc{Var}da \textsc{Bur}styn, \textit{The Rites of Men: Manhood, Politics and the Culture of Sport} \textit{11} (1999) (describing how popular depictions of sports derive from and reinforce masculinity assumptions, but highlighting individual agency in accepting those assumptions).

\textsuperscript{67} \textit{Id}.

\textsuperscript{68} Morley, \textit{supra} note 48, at 473.

\textsuperscript{69} \textit{See} Hall, \textit{Encoding/Decoding, supra} note 27, at 59-61 (describing potential decodings).

\textsuperscript{70} Morley, \textit{supra} note 48, at 472; \textit{see also} \textsc{Fine} \& \textsc{Weis}, \textit{supra} note 2, at 110 (noting that "while the terror [of violence expressed by working-class inner city adults] may be universal, the \textit{articulated site of violence} varies dramatically by demographic group").

\textsuperscript{71} Hall, \textit{Encoding/Decoding, supra} note 27, at 59, 61. Hall also identifies a "negotiated position," which occurs when the audience reads the discourse in some of the ways its authors intended, but also considers other aspects of the underlying event. \textit{See id.} at 60.

We should not take Hall's three decoding positions as literal or exhaustive. Hall's encoding/decoding model has been critiqued as leaving out individuals' agency in order to emphasize structural factors. \textit{See} Barker, \textit{supra} note 55, at 88 (summarizing critiques of model's reductionist tendencies). I seek to address that critique by focusing on particular arguments made by particular actors in concrete contexts. For discussions about media depictions in New York City, see \textit{infra} notes 102-22 and accompanying text, and for a close reading of particular cases, see \textit{infra} notes 171-308 and accompanying text.
The dominant position of decoding occurs when the audience reads the discourse in exactly the way its authors intended. A discourse might be fully accepted as true—that is, decoded from the “dominant position”—because it coincides with the “preferred meanings” of the culture. All communication operates on a principle that certain ideas are “so widely distributed in a specific language, community or culture, and . . . learned at so early an age, that they appear . . . to be ‘naturally’ given.” We would not be able to understand one another if we did not share certain concepts. Preferred meanings, however, “have the whole social order embedded in them . . . the everyday knowledge of ‘how things work for all practical purposes in this culture’ . . . .” If an audience member finds the encoding of the discourse consistent with “the filter of [her] own experience,” he or she will deem it to be “common sense.”

What makes readers accept the dominant position of decoding is that they explicitly or implicitly agree with the encoding viewpoint that has led a discourse to describe events in a particular manner. I will argue that the Court’s Fourth Amendment jurisprudence shows it reads law enforcement’s drug war discourse with the sympathetic eye of the dominant decoding position.

The oppositional position of decoding occurs when the audience replaces the encoded discourse with another discourse the authors of the encoded discourse never intended. An audience member might decode from the oppositional position because “the filter of [her] own experience” resists the viewpoint expressed by the encoder. For example, British cultural theorist David Morley conducted a survey of differently situated viewers of the British Broadcasting Company current affairs program Nationwide. That program described its coverage of families as providing descriptions most people in Britain would fit. The Black students Morley interviewed, however, note the presence of cars and lack of single-
parent families, and ask "[d]on't they ever think of the average family?" 84 Thus, the students redefined the term "average family," producing an oppositional encoding. In Part IV, I will propose that critical legal scholars concentrate on creating the basis for an "oppositional position" decoding that counters law enforcement's drug war discourse.

II. LAW ENFORCEMENT'S ENCODING OF THE MEANING OF THE DRUG WAR

Having seen what it means to encode and decode a discourse, we can analyze the production and reception of the notion of a drug war. Starting with why the discourse calling for a drug war was encoded in a particular way will help us identify the issues around which the debate turns. In a nutshell, law enforcement promotes the need for a drug war because it means more money and more power.

My argument simply suggests that law enforcement benefits from calls for a drug war. I do not claim we can get inside the heads of individual officers. I do not claim there is an identifiable law enforcement conspiracy. I do show that the call for a drug war has specific effects on law enforcement methods, racial minority suspects and society's general perspective on race.

In this Part, I describe how drug enforcement budgets have exploded since President Reagan's call for a drug war and have been funneled into the general budgets of local police departments. Further, media and political support for a drug war has legitimized draconian drug policies. Next, I demonstrate how law enforcement has used the drug war to justify its preferred investigative tools of compiling gang lists and racial profiling. I note that the compilation of gang lists is a dangerous trend because it is often based on false rumors. I note that racial profiling is a dangerous trend because it is a self-justifying form of racism.

A. Law Enforcement's Drug War Agenda

The primary benefit law enforcement agencies gain from promotion of the need for a drug war is more money. From 1991 to 1999, the federal government alone spent approximately $143.5 billion dollars on the drug war. 85 Approximately 83.3% of that money was spent on domestic demand reduction or enforcement programs. 86 Just under half of that money, approximately $71 billion dollars, was spent on domestic law enforcement. 87 From 1991 to 1999, the annual drug control budget rose approximately 49%, from $12 billion to $18 billion. 88 The largest amount

84. Morley, supra note 48, at 479.
85. See GAO REPORT, supra note 1, at 22 (describing federal drug control budget).
86. See id. at 23 & fig. 1.3 (illustrating shares of drug control budget). This Article does not address international drug control.
87. See id.
88. See id. at 23.
of funds and steadiest budget increases were in domestic law enforcement, which rose by 66% from $5.4 billion dollars in 1991 to $8.9 billion dollars in 1999.89 Those numbers demonstrate the amount of money that is at stake in the argument over whether we need a drug war. They also demonstrate that the largest portions of increases in drug war budgets go to domestic law enforcement.

Federal money for the drug war also benefits local police departments. The creation of joint drug enforcement task forces between federal officials and state and local officials dates back to at least 1970.90 The Drug Enforcement Agency’s (DEA) budget for those programs increased from $45.7 million in 1991 to a budgeted $105 million in 1999.91 The actual amounts of money spent on joint task forces in 1997 and 1998 were $158 million and $146.5 million, respectively.92 Joint programs involve not only a sharing of information, but also direct provisions of money to local police departments through the sharing of assets seized as a result of drug forfeitures.93 As a consequence, the mere existence of joint task forces shifts financial resources from the federal to the local level.

A second incentive for law enforcement to promote a drug war is the way it expands jurisdiction and power by bringing federal resources to bear on local crime problems. Officially, the DEA’s responsibilities include

(1) investigating major drug traffickers operating at interstate and international levels and criminals and drug gangs who perpetrate violence in local communities; (2) managing a national drug intelligence system; (3) seizing and forfeiting trafficker’s assets; (4) coordinating and cooperating with federal, state, and local law enforcement agencies on mutual drug enforcement efforts; and (5) working on drug law enforcement programs with its counterparts in foreign countries.94

The worrisome aspect of that mission statement is that the DEA’s influence is so vast; it includes working with other federal law enforcement agencies, state law enforcement agencies and local law enforcement agencies.

The DEA’s original mission was to disrupt major drug traffickers, but it now sees its mission as involving a “seamless continuum” of drug activities.95 That continuum includes “violent, street-level drug gangs and other local community problems . . . .”96 As I will discuss, investigating

89. GAO REPORT, supra note 1, at 23.
90. See id. at 34.
91. See id. at 35 tbl. 2.1 (illustrating budgets for task forces).
92. See id.
93. See id. at 34.
94. See id. at 5 (defining DEA’s mission).
95. See id. (describing change in DEA’s mission).
96. Id.
street-level gangs means compiling racially disparate lists of gang members and then using racial prejudice to convict gang members of all manner of crimes.97

The expansion of the DEA’s mission into street-level crime also led it to become more directly connected to local police departments. In the 1990s, the DEA dramatically increased both the number and staffing of its joint task forces with state and local agencies.98 Those task forces save local departments money by providing financial resources, but also by providing federal manpower to local agency investigations. From 1991 to 1998, the number of DEA agents assigned to local investigations through task forces rose more than 80%, from 511 to 940.99 The number of local officers assigned to joint task forces increased at a much smaller rate, from 1,153 in 1991 to 1,548 in 1998.100 One consequence of the totalization of the drug war mission is that in 1998 the largest share of joint task force investigations, 38.4%, were described as “local” in scope.101 Even at the federal level, then, the drug war provides law enforcement with a justification for pursuing all manner of local investigations. Expanding the DEA’s mission characterizes the drug war as involving such a broad range of local problems that the DEA’s jurisdiction effectively includes nearly all crime at any level.

Given the economic and jurisdictional incentives for law enforcement to encode a discourse calling for a drug war, law enforcement likely will zealously pursue the drug war. In fact, a case study by Henry Brownstein demonstrates how law enforcement can convince the media and politicians to pursue the drug war.102 Brownstein describes the encoding and

97. For a further discussion of gang investigation and racial prejudice, see infra notes 124-69 and accompanying text.
98. See GAO REPORT, supra note 1, at 37-38 (citing examples of joint task forces with local police departments).
99. See id. at 35 & tbl. 2.2 (illustrating agents assigned to task forces).
100. See id.
101. See id. at 37 tbl. 2.4 (categorizing significance of drug dealers investigated pursuant to task forces).
102. Numerous scholars have pointed out that law enforcement, the media and politicians often combine to create “moral panics” about crime. See, e.g., Kappler et al., supra note 1, at 1-19 (describing “myth making” process). The process has been described as a circuit between police, judges and magistrates, newspapers and politicians, reinforcing each other in defining a problem and demanding action to solve it. Typically, the police might report their fears of losing control of some problem-group. A newspaper would editorialize on this, demanding tougher sentencing; a judge would dish out a severe sentence, noting (by reference to the press) that the public is evidently demanding tougher action; the police would then use the judge’s address (as reported in the press) to demand of their political masters new powers or new legislation.

Barker, supra note 55, at 83. While the judicial actions referenced would be more likely to occur in England (the source of this example), the process is eerily similar to the manufacturing of the “crack crisis” as described by Brownstein. See infra notes 103-18.
dominant position decoding of a discourse about a "crack crisis" in New York City between 1986 and 1990.\textsuperscript{103} He begins by noting that President Reagan's call for a drug war had captured the political discourse of the mid-1980s.\textsuperscript{104} Hence, even the reputedly "liberal" Governor Mario Cuomo felt the need to announce a campaign against crack cocaine.\textsuperscript{105} The New York media picked up on this theme and started printing stories about the horrors of crack use that were based on the opinions of the law enforcement and political officials who had started the anti-crack campaign.\textsuperscript{106} The New York media’s initial reliance on official versions of the drug war is no surprise, as "[t]o obtain the information needed to make news, the media rely on experts and public officials whose control over knowledge makes them the gatekeepers of that information."\textsuperscript{107} Hence, the New York media begins with a dominant position decoding of law enforcement’s encoding of the "crack crisis" discourse.

The New York media then began to rearticulate official reports on both drug use and rising crime rates based on a new theme: drug crime as a "threat to the middle class."\textsuperscript{108} The media’s new articulation emphasized that "[d]rug related violence was spreading and suddenly even 'innocent people' were at risk."\textsuperscript{109} That theme was actually ahead of its time, as national media were still reporting drug-related violence as primarily an inner-city (read: poor and racial minority) problem.\textsuperscript{110} The New York media then took up the theme of violence on the subway, which struck a chord with middle class New Yorkers because it is such an important mode of transportation in that city.\textsuperscript{111}

The net effect of the New York media’s coverage of drugs was to rearticulate and enhance the drug war theme of law enforcement and politicians by making it seem important to middle class New Yorkers.\textsuperscript{112} Yet, in reality, New York City’s violence had not put "average" New Yorkers at increased risk, as street violence “continue[d] to be directed at the same people it ha[d] always victimized: minorities, women, and most likely the poor and young as well."\textsuperscript{113} By showing how the media, politicians and

\textsuperscript{103} See generally Cultural Criminology, supra note 7 (collecting essays on reciprocal relationship between culture and criminology); KAPPELER ET AL., supra note 1 (describing media perpetuation of crime myths).

\textsuperscript{104} See Brownstein, supra note 7, at 46 (arguing that need to look tough on drugs captured political debate) (citing Craig Reinarman & Harry G. Levine, Crack in Context: Politics and the Media in the Making of a Drug Scare, 16 CONTEMP. DRUG PROBS. 535, 564 (1989)).

\textsuperscript{105} See id. at 47 (quoting Governor Cuomo).

\textsuperscript{106} See id. at 48 (noting media’s reliance on government sources rendered it unable to challenge official versions of drug crisis).

\textsuperscript{107} Id. at 46.

\textsuperscript{108} See id. at 50 (noting change in media coverage).

\textsuperscript{109} Id. at 51.

\textsuperscript{110} Id.

\textsuperscript{111} Id. at 53.

\textsuperscript{112} Id. at 55.

\textsuperscript{113} Id. at 57.
law enforcement combined to encode the "crack crisis," Brownstein demonstrates that “[d]rug scares are independent phenomena, not necessarily related to actual trends or patterns in drug use or trafficking.”

Yet drug scares are connected to draconian policies against drug offenders and major expansions of law enforcement. In New York, the encoding of the crack crisis led to dramatic increases in drug arrests and drug convictions. Further, New York’s prison population nearly doubled from 1983 to 1988, with most of the growth coming from drug convictions. Finally, but not surprisingly, the war on drugs "has contributed to the erosion of civil liberties." What we see in New York is that a drug war can be manufactured, and doing so inures to the benefit of law enforcement officers who want a justification for greater power.

The conclusion we should draw from Brownstein's case study is that law enforcement is not only incentivized to encode a drug war discourse, but also empowered to do so. A study of crime reporters in New York City shows the relationship between law enforcement desires and what type of news gets printed:

Because they rely on the police for raw materials, journalists convey an image of crime that is wholly in accord with the police department’s notion of serious crime and social disorder. . . . Because their criteria for newsworthiness are inferred from media coverage, the police continue to provide the press with the same types of incidents that have been reported in the past. . . . Crime news is mutually determined by journalists, whose image of crime is shaped by police concerns, and by police, whose concerns with crime are influenced by media practices.

A drug war discourse is irresistible to the media because the stories it provides not only attract large audiences, but also fit the media's informal ideology of the appropriate elements of a news story. In addition to being spectacular, stories from the drug war are personalizable because the audience can trace one person's experience, generalizable because they can

114. Id. at 55 (citation omitted).
115. Id. at 58 (citation omitted).
116. Id. (citation omitted).
117. Id. (citation omitted).
118. Id. at 59 (citation omitted).
120. Media often misrepresents crime by focusing on individual acts that makes crime "easily comprehended by the audience." Id. at 33 (reviewing media’s role in creating popular panics about crime).
fit into the overarching war plot and credible because there is no shortage of authoritative police officers and politicians willing to serve as sources.

The role of politicians in perpetuating the drug war stems from the news media’s influence on popular opinion. The news media creates a sense that there is a war going on and politicians then feel they must signal their concern about that war in order to maintain popular support.

Law enforcement encodes the drug war for its own reasons, but finds the media and politicians to be quite cooperative, for their own reasons. Law enforcement’s incentive structure for encoding a discourse promoting the drug war, along with media and political incentives for a dominant position decoding of that discourse, helps explain the success of the drug war discourse.

**B. Racial Effects of Law Enforcement’s Drug War Discourse**

"Knowledge" is "inextricably enmeshed in relations of power" because it is "applied to the regulation of social conduct in practice . . . ." In view of the powerful confluence of factors supporting the encoding and dominant position decoding of drug scares, we should ask what social effects the drug war discourse is likely to have.

As I have noted, a primary means by which the DEA and local police pursue the drug war is through investigation of gang members. One problem with that tactic is that those files can contain false gossip and rumors about supposed gang affiliation. A second problem is that "one of the main functions of the 'antigang' dragnets . . . has been to create a rap sheet on virtually every young Black male in the city." Jerome Miller notes that "[a]lthough blacks represented only 5% of Denver's popula-

121. See id. at 35 ("Soon this ongoing publicity [of the drug war] constructed, both for the public and criminal justice agents, the view that drugs were the major driving force of crime.").

122. See id. at 33 ("Police provided stories about extreme cases of crime that were 'newsworthy,' in the sense that they fit into currently popular 'crime waves' being emphasized in the press."); Stuart Hall et al., The Social Production of News, in MEDIA STUDIES: A READER, supra note 27, at 645, 649 ("These two aspects of news production—the practical pressures of constantly working against the clock and the professional demands of impartiality and objectivity—combine to produce a systematically structured over-accessing to the media of those in powerful and privileged institutional positions.").

123. See KAPPELER et al., supra note 1, at 149 ("The rhetoric from politicians and government officials often borders on hysteria").

124. Hall, The Work of Representation, supra note 42, at 47 (describing Foucault's approach to "power/knowledge").

125. Howarth, supra note 63, at 113.

tion, they accounted for 57% (3,691) of those on the ['suspected gang member'] list."\(^{127}\) One effect of the drug war's expansion into investigation of street-level gangs, then, is that police are rounding up racial minorities and placing them into databases that make them suspects.\(^{128}\)

Coterminous with the drug war's expansion into gang management has been the acceptance in some quarters that racial profiling is an acceptable means of prosecuting the drug war.\(^{129}\) In fact, the DEA invented the "racial profile" as we know it today.\(^{130}\) Specifically, the DEA started training its officers to justify Terry stops based on characteristics of drug couriers beginning in the early 1980s.\(^{131}\) The DEA's training manuals reflect that strategy.\(^{132}\) The DEA then began training local police departments in profiling.\(^{133}\) One problem with those profiles is that they justify nearly any stop because they contain nearly every characteristic of a traveler and its opposite.\(^{134}\) A further problem with the profiles is that they appear to be aimed at justifying stops of racial minorities.\(^{135}\)

The argument for racial profiling is an articulation of the meaning of crime statistics. Law enforcement argues it needs racial profiling as a tool


\(^{128}\) In contrast to its Fourth Amendment "pretext" doctrine, the Court does invalidate vague anti-gang ordinances under the Fourteenth Amendment. See City of Chicago v. Morales, 527 U.S. 41, 53-54, 60-64 (1999) (striking down anti-gang ordinance as constraint of liberty of movement).

\(^{129}\) See, e.g., United States v. Sokolow, 490 U.S. 1, 4 (1989) (beginning substantive part of opinion allowing profiling with statement that "[t]his case involves a typical attempt to smuggle drugs"). Terry stops are used disproportionately on racial minorities. See Jeffrey Fagan & Garth Davies, Street Stops and Broken Windows: Terry, Race and Disorder in New York City, 28 Ford. URB. L.J. 457, 458 & n.5 (2000) (citing evidence); Jeffrey Goldberg, The Color of Suspicion, N.Y. TIMES, June 20, 1999, at 9 (Magazine) (quoting police officer Bobby Harris as saying that "[r]acial profiling is a tool we use, and don't let anyone say otherwise").


\(^{131}\) See, e.g., David A. Harris, Law Enforcement's Stake in Coming to Grips with Racial Profiling, 3 RUTGERS Race & L. REV. 9, 12-17 (2001) (describing initiation of profiling); ACLU Report, supra note 17, at http://www.aclu.org/congress/dwbstories.html (same).

\(^{132}\) See, e.g., Harris, supra note 131, at 25-27 (discussing Terry stops).

\(^{133}\) See, e.g., id.


\(^{135}\) See, e.g., David Rudovsky, Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause, 3 U. PA. J. CONST. L. 296, 303 (2001) (declaring that evidence leaves "little doubt about the existence of racial profiling"); Mezey, Law As Culture, supra note 44, at 53 ("The color of one's car, or more important still, the color of one's skin, will change the legally enforced speed limit and traffic laws generally.").
in order to fight the drug war based on its assumption that racial minorities are most likely to commit crimes.\textsuperscript{136} A conservative think tank takes the racial profiling argument to its logical conclusion, claiming that "Hispanics commit violent crime at approximately three times the white rate, and blacks are five to eight times more violent."\textsuperscript{137} That statement exemplifies the reasoning behind racial profiling: differences in racial minority arrest rates (nearly always cited without consideration of police officer bias)\textsuperscript{138} allow the conclusion that racial minorities are "more violent" as a characteristic of their racial status.\textsuperscript{139}

The problem with racial profiling is not in the mere description of a particular previously identified criminal. When the known criminal is, say, a "6-foot, brown-skinned Black man with short hair and earrings in both ears," the police may focus their investigation on individuals matching the particularized elements of that description. When police are racial profiling suspects, even for known crimes, they effectively excise everything but race from the description. For example, in Brown v. City of Oneonta,\textsuperscript{140} police stopped every Black male in the whole town upon a description that the previously identified criminal was "Black." Police officers thus moved from description of a known criminal to predicting the likelihood particular individuals matching the "description" were the actual criminal. Since the description lacked any detail, it should not have been deemed to satisfy the particularization requirement.\textsuperscript{141} The police tactic was based on a description, but it still amounted to racial profiling.\textsuperscript{142}

Moreover, when descriptions of known criminals are so lacking in detail, they amount to stereotypes, not descriptions. A description of a known criminal (if based on a sufficient number of details such as height, weight, race, clothing, and so on) is a "type," a "simple, vivid, memorable, easily grasped and widely recognized characterization . . . ."\textsuperscript{143} In contrast, ra-


\textsuperscript{138} See Maclin, supra note 136, at 122-24 (noting bias may explain disparate arrest rates).

\textsuperscript{139} Press Release, supra note 137; see, e.g., Rudowsky, supra note 135, at 309 (describing law enforcement's assumption that certain racial minorities commit more crimes); see also James Q. Wilson & Richard Herrnstein, Crime and Human Nature 71-72 (1985) (using explicitly racist phrenological scientists to associate racial minority phenotypes with propensity to commit crimes).

\textsuperscript{140} 221 F.3d 329 (1999).

\textsuperscript{141} Cf. Brown, 221 F.3d at 337-40 (recognizing plaintiff's contention of lack of particularity).

\textsuperscript{142} I thank my colleague Steve Chanenson for pointing out the need to explicitly make this argument.

\textsuperscript{143} See Gays and Film 28 (Richard Dyer ed., 1977) (identifying differences between "types" and "stereotypes").
racial profiling of suspects is a "stereotype." Stereotypes take a few of a person's traits, "reduce everything about the person to those traits, exaggerate and simplify them, and fix them without change or development to eternity." Racial profiling does not provide information; it collapses all potential information around the assumptions about behavior derived from the stereotype about one characteristic.

Whereas a description of a suspect simplifies merely for purposes of proper identification, a racial profile takes very broadly defined characteristics and associates any individual owning those characteristics with bad behavior. Because racial profiling of suspects is based in stereotyping of likely future behavior rather than mere description, racial profiling divides the world into "normal" and "suspect" people. Because racial profiling is stereotyping, it turns "knowledge" (assumptions about the implications of racial status) into power (police interference with any given minority individual). Because racial profiling is stereotyping, it is an attempt by a dominant group (Whites) to establish their hegemony over subordinated groups (Blacks, Latinos and sometimes Asians). Hence, racial profiling is an articulation of the implications of an individual's racial status.

The assumption that certain racial minorities are "more violent" is what yields the conclusion that racial profiling is appropriate. When such discourses yield practice, we should ask "how this knowledge about the topic acquires authority, a sense of embodying . . . 'the truth of the matter . . . ." What we find is that the argument for racial profiling is a tautology. As Tracey Maclin notes,

"The logic is entirely circular. . . . [P]olice reliance upon the fact that minorities are disproportionately represented among those arrested and convicted for narcotics offenses as justification for racial profiling ignores the critical issue at hand: Do officers treat black and Hispanic motorists differently from white motorists?"

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144. See Stuart Hall, The Spectacle of the "Other", in Representation: Cultural Representations and Signifying Practices, supra note 26, at 223, 258.

145. See infra notes 256-91 and accompanying text for a discussion of correlative racism.

146. See Hall, The Spectacle of the "Other", supra note 144, at 258 (describing effects of stereotyping).

147. See id. at 258-59 (linking stereotyping to Foucault's concept of "power/knowledge").

148. See id. at 259 (linking stereotyping to Gramsci's concept of "hegemony").

149. See id. at 143-44 (castrating mainstream and sub cultural articulations of implications of Rastafarian identity).

150. Press Release, supra note 137.

151. Hall, The Work of Representation, supra note 42, at 45 (describing questions to ask when studying discourses about, inter alia, punishment).

152. Maclin, supra note 196, at 122.
If police focus on racial minorities, and evidence suggests they do, they will end up arresting more racial minorities.

The drug war arguments for gang enforcement powers and racial profiling tools show that "[k]nowledge linked to power, not only assumes the authority of 'the truth' but has power to make itself true." The tautology of the (assumed) need for racial profiling is an example of "knowledge" becoming true. The assumed correlation between racial minority status and drug offenses becomes "true" not just because it is applied as if true, but also because its application helps justify it as true.

Joan Howarth examines some of the broader social effects of the drug war's uses of gang lists and racial profiling. Howarth analyzes patterns of law enforcement reflected in the conviction of a Black male and shows how those patterns rely on the attributed identity of Black manhood.

153. Id. at 123 & nn.13-14 (summarizing results of studies in New Jersey and Maryland); see also ACLU Report, supra note 17, at http://www.aclu.org/congress/dwbstories.html.

154. Hall, The Work of Representation, supra note 42, at 49; see also Michel Foucault, Discipline and Punish 27 (Alan Sheridan trans., 2d ed. 1995)) ("There is no . . . knowledge that does not presuppose and constitute at the same time, power relations"). See generally Thomas L. Dumm, Democracy and Punishment (1987) (applying Foucault's theories to U.S. penal system's development).

155. See generally Howarth, supra note 63 (examining use of gang lists and racial profiling).

156. Attributed identity is how others perceive an individual. See Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1259 n.2 (2000) (analyzing how people form their personal sense of identity in response to stereotype types of identity they encounter in workplace). Attributed identities are based on prevailing assumptions about the implications of certain identity characteristics, such as gender, race, sex orientation, class, religion, and so on. Id. at 1268-69 (analyzing how Korean-American might be stereotyped in large law firm).

While I largely discuss racial identity in relation to Blacks, reconfiguration of racial norms and ideology is re-conceptualizing particular Asian and Latino identities as a "middleman minority" between Whites and Blacks. See, e.g., Neil Gotanda, Tales of Two Judges: Joyce Karlin in People v. Soon Ja Du; Lance Ito in People v. O.J. Simpson, in The House That Race Built 71 & n.6 (Wahneema Lubiano ed., 1998) (revealing construction of Asians as "middleman minority"); see also Ramon Grosfoguel & Chloe Georas, Coloniality of Power and Racial Dynamics: Notes Toward a Reinterpretation of Latino Carribeans in New York City, 7 (1), in Identities 1, 28 (2000) (noting pre-Mariel boatlift Cubans were distinguished from Puerto-Ricans and Dominicans as "model minority") (citing Silvia Pedraza-Bailey, Political and Economic Migrants in America: Cubans and Mexicans (1985)); Juan Perea, The Black/White Binary Paradigm of Race, 85 Cal. L. Rev. 1213, 1219-32 (1997) (criticizing both scholars and popular culture for using Black/White binary as paradigm for discussing race); see also Sumi K. Cho, Korean Americans vs. African Americans: Conflict and Construction, in Reading Rodney King, Reading Urban Uprising, supra note 126, at 196, 203, 211 & n.17 (showing connection between construction of Koreans as "model-minority" and L.A. police department's conscious placement of Koreans into conflict with other racial minorities angered by first Rodney King verdict). Treatment of Asians and Latinos as middleman minorities varies widely even within those groups, but has a common effect of using representations of some racial minorities to discipline other racial minorities who are calling for substantive change. See id. at 203. The re-conceptualization of some racial minorities as examples of "good minorities" fits with an ideological strategy of cor-
Howarth’s goal is to “reveal and explain the very ordinary way that honest, careful people interpreted competing narratives presented to them, using the powerful constructed identity of a Black gang leader to take them past reasonable doubt.” The jurors did not have to be explicitly racist; they simply had to accept the common sense meaning of Black identity. Howarth demonstrates that the term “Black male gang member” prevents a defendant associated with that identity from being acquitted, regardless of actual innocence.

Howarth begins by noting the fact that the popular construction of Black male identity is as frightening, associated with crime and associated other racial minorities’ phenotypic and cultural characteristics with bad behavior that justifies their continuing institutional subordination. See generally Carbado & Gulati, supra (discussing employer encouragement of employees to fit certain models). See also infra note 169 and accompanying text.

157. Howarth, supra note 63, at 100 (citing Kimberlé Williams Crenshaw & Gary Peller, Real Time/Real Justice, in READING RODNEY KING, READING URBAN UPRISING, supra note 126, at 56, 59-60.
158. Id. at 100-01.
159. Id. at 103 (citations omitted).
160. Id. (citation omitted). This author can attest to the continuing power of that construction, even after you reach your thirties and become a law professor. I tried to describe this experience to students as follows:

On October 28, I rode the Acela Regional from Boston to Philadelphia. We stopped in New York. After smoking a cigarette on the platform, I went to the restroom to wash my hands. As I returned to my seat, a burly white man hailed me. He waved his badge in my face and told me I had to show him my ticket and identification. My conservative sweater and slacks would not have made me a good suspect for a crime, absent my race. Against the better judgment of the reasonable black male, I asked the officer why he suspected me of a crime. He said something about credit card fraud and again insisted on seeing my ticket and identification.

Knowing the official law, I made the officer acknowledge I was not under arrest, that he did not have reasonable suspicion, and that he was merely asking for my consent to a search. His response was more effective: I could cooperate or he would pull me off the train, which was about to leave. According to the U.S. Supreme Court’s Bostick decision, we have a right to refuse police questioning. The reality is that despite the official law, I had no choice but to “voluntarily” consent to the search. So I handed over my ticket and my credit card.

I felt humiliated. People stared at me, most with sympathy, a couple with snide pleasure. The officer was just doing his job. He paid the price of wasting time searching a law-abiding citizen. I had to pay the price of an indignity based on my race. I wish I could express how much this hurt. It is not just a matter of this incident; it is a matter of constantly being aware that I CAN be subjected to indignity based on my race at ANY time. What hurts me about racial profiling is that each of my incidents reminds me I am less than equal. It does not matter that I obey the law. It does not matter that I have worked hard and accomplished much. It does not matter that I am a good person. I am constantly subject to suffering indignities merely because of my appearance.

I am well aware that fellow citizens may often interpret any of my actions in light of my race. What makes this different is that my government is telling me I am a second-class citizen. This incident is the type of
associated with gang membership.\textsuperscript{161} The prosecutor used those popular articulations of Black male identity during voir dire to distance the all-White jury from Blacks.\textsuperscript{162} The jurors demonstrated their acceptance of those articulations of the meaning of Black male identity by accusing a Black police officer of being a spy for the defendant’s gang.\textsuperscript{163} Howarth connects those individual articulations to her overall conclusion that the content of the attributed identity “Black male gang member” brought about the convictions and death penalty in this case.\textsuperscript{164}

In light of Howarth’s analysis, we should recognize the reciprocal relationship between the legal and cultural effects of the calls for a drug war. Law enforcement’s encoding of the drug war as requiring racial profiling does not stand alone; it relies on and reinforces certain views of race.\textsuperscript{165} Acceptance of the need for a drug war becomes acceptance of the need

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small indignity to which police regularly subject racial minorities in gross disproportion to our representation in crime statistics (which are already biased by choices of whom to investigate and prosecute).

This is what the Court refuses to consider: When you are a black male, being profiled is not merely a one-time incident. Suffering a humiliating confrontation with the police is not “random” for me. This was hardly the first, nor the most intrusive, of my experiences of racial profiling. I am paying much more than my fair share of liberty for a racial profiling policy that stops law-abiding people like me many times more often than it stops actual criminals.

If police officers would lose any evidence gained by searching people based on a pretext, this officer would not have subjected me to the indignity of a racially motivated search on the train. I hope that someday everyone will realize this is not “just” a race issue. As long as I can be racially profiled, everyone’s civil liberties are at stake.

See Frank Rudy Cooper, \textit{Race, Humiliation, and Everyone’s Liberty,} in \textsc{Gavel Gazette}, Nov. 19, 2001, at 4. I am not sure such statements actually change students’ minds, but we are obligated to make the attempt.

161. Howarth, \textit{supra} note 63, at 113 (citation omitted).

162. \textit{Id.} at 124 (citation omitted) (describing prosecutors “us versus them” tactics). The prosecutor himself accepted negatives stereotypes of Black male identity. \textit{Id.} at 128 (noting prosecutor’s written remark that he “can’t believe a 20s Black in Compton wouldn’t be a gang member”) (citation omitted). While the prosecutor’s preemptory strikes might have raised a \textit{Batson} objection, the prosecutor was easily able to proffer an “objective basis” for the strike and the appellate standard of review would not allow reversal of the conviction. Howarth, \textit{supra} note 63, at 128.

163. \textit{Id.} at 119-14.

164. \textit{Id.} at 140.

165. For example, note that in Fine and Weis’s interviews with working-class inner city adults,

[T]he only group [including White women, Black men, Black women, Latino men and Latino women] committed to an analysis of violence in which they take no responsibility for the growth of violence is white men. With some exceptions, white men, as a group, identified the source of the “problem” to be boys/men of color.

\textsc{Fine & Weis, supra} note 2, at 130. Such answers rely on particular assumptions about race.
for racial profiling. Acceptance of racial profiling expands the power of police officers by allowing them to focus on individuals on the basis of suspicion of criminality as to a whole group. In turn, racial assumptions reinforce racial profiling by helping produce convictions in particular cases. That tautological cycle of race and justification helps explain how law enforcement is able to encode a drug war discourse that legitimates its preferred investigative tools.

166. Fine and Weis note White men's support for over-incarceration of racial minority men: "The "solution" [to drug crime] for white men is the containment/confinement of these same [Black] boys/men." Id.
168. Howarth, supra note 63, at 140; see also Maclin supra note 136, at 122 (declaring racial profiling tautology).
169. There is another way of explaining the acceptance of racial profiling in both popular culture and the Court. Racial profiling may be justified based on its being a tool for fighting the drug war, but it has broader and more frightening implications. An emergent ideology of correlative racism is replacing old biological bases for racism in order to justify ongoing race-based social stratification in the United States. Correlative racism takes supposedly objective social criteria, such as scores on intelligence tests or arrest rates, and associates them with phenotypic racial minority status. See, e.g., Wilson & Herrnstein, supra note 139, at 148-72 (using statistics to argue Blacks and Latinos have low intellect); see Kevin R. Johnson, U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law, 47 VILL. L. REV. 897, 899-904 (2002) (arguing that use of statistical evidence of crime is racist).

Correlative racism can flourish because popular discourse acknowledges racism only where the offender has classified people based on biology. See Dumm, supra note 154, at 181 (arguing that "theories of biological inferiority have migrated to the social sciences, where the logic of strict causality is abandoned and statistical-probability tests are used to validate claims concerning inferiority"); Omi & Winant, supra note 9, at 14-21 (describing move from using "ethnicity" to deny racism to using "ethnicity" to justify racism against Blacks). The purportedly objective basis for correlative reasoning allows it to satisfy a deep need to justify continuing race-based social stratification while retaining "built-in deniability" against claims of racism. See, e.g., Dumm, supra note 154, at 181 (noting Wilson and Herrnstein's correlative justifications for racism satisfy a need to justify continuing stark racial inequality). Equal protection law's intent standard also allows denials of racism. See generally Neil Gotanda, A Critique of "Our Constitution Is Colorblind", 44 STAN. L. REV. 1 (1991) (arguing "colorblind" equal protection doctrine uses intent standard as substitute for avoiding acknowledging continuing racism); Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 325 (1987) (arguing that equal protection's intent standard fails because of psychological instincts not to consider oneself racist).

Note that Daniel Patrick Moynihan's report on the 1960s civil rights riots, in conjunction with developments in sociology's ethnicity theory, began to associate the norms of certain racial minority groups with their failure to advance in the United States. See Omi & Winant, supra note 9, at 18-21; see also Cho, supra note 156, at 203-11 (describing "hateful love" of 1960s "model minority" stereotype used to discipline other racial minorities). Moynihan's association of the norms of certain racial minority groups with their failure to advance in the United States, shows "theories of biological inferiority have migrated to the social sciences, where the logic of strict causality is abandoned and statistical-probability tests are used to validate claims concerning inferiority." Dumm, supra note 154, at 181. The advent of statistical correlation theories of the relationship between race and crime corresponds with the "neoclassical revival" in criminology. Id. at 191 (citing Sir Leon
III. THE UN-BALANCED FOURTH AMENDMENT: THE COURT’S DECODING OF LAW ENFORCEMENT’S DRUG WAR DISCOURSE

In addition to relying on media and political support, law enforcement’s encoding of the drug war relies on a dominant position decoding by the Court. The courts stand as the greatest potential barrier to law enforcement’s use of its preferred means of investigating drug users and drug dealers. The Court recognizes this in the reasoning behind its exclusionary rule, which prohibits the introduction at trial of evidence that was obtained in violation of the Constitution.170 While the Court no longer justifies that rule based on judicial integrity171 or public confidence,172 it does exclude evidence where doing so will deter police from unconstitutional conduct.173 The Court can alter the means of prosecuting the drug war, and will do so when it determines that police activity exceeds constitutional bounds.

We should not believe, however, that the scope of constitutional constraints is held constant and is simply applied to the drug war. The Constitution is purposely broad in its prohibitions so as to be adaptable to present needs and responsive to evolving social norms.174 More importantly, judges are members of their culture and thereby subject to the vicissitudes of public opinion. They are taught “how things are” before they


Exploring the possibility that we are shifting to a new form of racism highlights the fact that “what we think we ‘know’ in a particular period about, say, crime has a bearing on how we regulate, control and punish criminals.” Hall, The Work of Representation, supra note 42, at 49 (describing Foucault’s concept of “power/knowledge”). Law enforcement’s argument that we are in a “drug war” not only expands budgets, but also expands jurisdiction (gang management) and accepted investigative methodologies (racial profiling). Racial profiling not only justifies itself, but also comports with a general ideology of correlating racism. The drug war has not only brought us racial profiling, but also a new justification for racism.


171. The Court does not want to be an implicit participant in constitutional violations. See Elkins v. United States, 364 U.S. 206, 222 (1960) (discussing impropriety of judicial admission of unconstitutionally seized evidence at trial).

172. The Court is assuring people that police also obey the law. See id.


are old enough to form their own opinions,\textsuperscript{175} and they read newspapers. Without making the entire argument for legal realism,\textsuperscript{176} we can say that it is possible for courts to be influenced by the encoding of a drug war discourse.

It must be remembered that as members of this culture, judges cannot but be aware that law enforcement has encoded a discourse calling for a drug war.\textsuperscript{177} When the Court encodes its own discourse about the proper meaning of the Fourth Amendment, it does so in the context of a culture that is also decoding discourses about the drug war. The goal of this Part of the Article is to see how the Court has chosen to articulate the meaning of the Fourth Amendment since the drug scares of the 1960s.\textsuperscript{178} I contend that the Court has chosen to un-balance the Fourth Amendment in favor of law enforcement and has done so, at least partly, in response to law enforcement’s encoding of a drug war discourse.

\textsuperscript{175} We are inculcated with senses of the implications of our own and other people’s identity prior to our development of individual agency. See Devon W. Carbado, \textit{Black Men on Race, Gender, and Sexuality} 425 (1999) ("[P]eople who are body-coded female cannot experience their personhood outside of the social construction of gender"); Deaux & Stewart, supra note 74, at 88 (arguing that children cannot select their gender identity); Thompson, supra note 9, at 988 (discussing social scientific research showing how individuals’ stereotypes shape perception).

\textsuperscript{176} See, e.g., Oliver W. Holmes, \textit{The Common Law} 1 (1881), quoted in A. Leon Higginbotham, Jr., \textit{Shades of Freedom: Racial Politics and Presumptions of the American Legal Process} 216 n.5 (1996) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, \textit{even the prejudices that judges share with their fellow-men}, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

Emily M.S. Houh provides an excellent summary of legal realism:

The CLS [Critical Legal Studies] movement originated in the late 1970s as a derivative of Legal Realism, whose followers in the 1920s and 1930s criticized the rule of law and its application as being overly-formalistic and as cloaking in the myths of neutrality and objectivity a legal system that in reality was driven by policy, economics, and politics. The Realists sometimes manifested this critique in the form of "rule skepticism," which was not so much a disavowal or denial of the rule of law (as it is often mistakenly represented), as it is a recognition that legal rules are "not what they appear to be." In more concrete terms, the Realists argued that the formalistic notion of the rule of law created an illusion of certainty that masked the unspoken social and political assumptions which in fact guided much judicial decision making.

Houh, supra note 26, at 38-39 (describing how Legal Realism led to Critical Legal Studies, then to Critical Race Theory).

\textsuperscript{177} See Brownstein, supra note 7, at 46-55 (noting drug war discourses had captured public debate); Kappler et al., supra note 1, at 159 (noting omnipresence of drug war discourse in 1980s).

\textsuperscript{178} In addition to being popularly regarded as a time of heavy drug use, the 1960s saw the initiation of President Richard Nixon’s war on heroin use. See Kappler et al., supra note 1, at 152-53 (connecting President Nixon’s campaign against heroin to President Reagan’s “drug war”).
Specifically, in its 1967 *Camara* decision, the Court created the balancing test and made that test—not probable cause—the default standard for Fourth Amendment analysis.\(^{179}\) In its 1968 *Terry* decision, the Court extended the balancing test in order to create a “reasonable suspicion” test for limited police searches and seizures.\(^{180}\) While that discussion was not directly related to a drug war, the Court consciously adopted the balancing test as a means of giving police more tools for investigating crime.\(^{181}\) Further, the *Terry* decision opened the door for future weakening of civil liberties in the name of the drug war.

After showing how the Fourth Amendment became balanced, I will demonstrate that the *Terry* reasonable suspicion test has become unbalanced in favor of law enforcement interests. I will show that *United States v. Sokolow*\(^{182}\) and *Whren v. United States*\(^{183}\) have effectively condoned racial profiling by abrogating the particularization requirement in reasonable suspicion cases. I will then analyze two of the Court’s recent decisions governing appellate review of a trial court’s determination that a police officer had reasonable suspicion to make a stop. In *Ornelas*, the Court created a deferential de novo standard of review for mixed questions of law and fact in Fourth Amendment cases.\(^{184}\) The Court stipulated in *Arvizu*, however, that appellate courts must grant “due weight” to both the trial court’s and police officers’ drawing of inferences from the facts, and must do so under the “totality of the circumstances.”\(^{185}\) The *Ornelas* and *Arvizu* decisions allow police to consider nearly any act to provide the necessary reasonable suspicion and prevent reviewing courts from suppressing any evidence so gained.

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\(^{179}\) *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (declaring balancing test ultimate standard).

\(^{180}\) See id. at 20-21 (rejecting probable cause test in favor of reasonableness test).

\(^{181}\) See id. at 10 (noting police request for intermediate search that can serve as investigative tool). Prior to *Terry*, the Court championed the rights of the individual in encounters between a civilian and a police officer. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (holding that statements obtained from defendants who were not informed of their constitutional rights were inadmissible); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (protecting defendants’ Sixth Amendment right to counsel); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (holding incriminating statements by defendant inadmissible because government agent had obtained statements in absence of defendant’s retained counsel and without defendant’s knowledge); *Henry v. United States*, 361 U.S. 98, 104 (1959) (holding that arrest is not justified by what subsequent search discloses); see also *Thompson*, supra note 9, at 972 n.75 (noting sharp contrast between *Terry* and previous cases).

\(^{182}\) 490 U.S. 1 (1989).


\(^{184}\) See *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (requiring appellate courts to apply de novo review of reasonable suspicion and probable cause determinations but give trial court and police officer inferences “due weight”).

\(^{185}\) See *United States v. Arvizu*, 122 S. Ct. 744, 747 (2002) (reversing appellate court for failing to judge police officer’s determination of reasonable suspicion both deferentially and under totality of circumstances).
A. The Balanced Fourth Amendment

To establish that the Fourth Amendment has become unbalanced, it is necessary to explore how the Amendment became subject to balancing. The traditional view was that police contact with citizens was either "nothing"—based solely on consent—186—or an arrest, which required a showing of probable cause.187 Hence, the Court said, "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Therefore, in general, the Fourth Amendment's "reasonableness" requirement had to be satisfied by a showing of probable cause sufficient to justify a warrant.

Variation of the probable cause requirement began in the context of "administrative" searches. In Frank v. Maryland,189 the Court upheld a criminal conviction based on a property owner's refusal to allow a city health inspector to enter his premises without a warrant. The Court held that fire, health and housing inspections "touch at most upon the periphery" of Fourth Amendment interests.190 That was so because such inspections are not undertaken for the purpose of criminal, as opposed to civil and administrative, investigation.191 Consequently, administrative searches were deemed an "exception to the rule that warrantless searches are unreasonable under the Fourth Amendment."192 Warrantless arrests still required a showing of probable cause.193 At the beginning of 1967, therefore, warrants based on probable cause were the rule, and lesser requirements were an exception.

In 1967, the Court altered its interpretation of the relationship between reasonableness and probable cause. In Camara, a property owner sought a writ of prohibition to prevent his criminal prosecution for refusing to allow a housing inspector warrantless entry into one of his apart-

186. See Terry v. Ohio, 392 U.S. 1, 11 (1978) (summarizing historical basis of argument against creation of intermediate level of searches and seizures); see also Cole, supra note 134, at 27-34 (discussing consent searches and waivers of constitutional rights both "knowingly" and by law enforcement's exploitation of ignorance of rights).

187. See Terry, 392 U.S. at 11 (requiring probable cause for arrest). Today, a magistrate determines probable cause based on "whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 231 (1983) (reformulating probable cause test for issuance of warrant based on anonymous tip).


190. See Frank, 359 U.S. at 367.

191. See id. at 365.

192. See Camara, 387 U.S. at 529 (citation omitted).

ments. The Court overturned its Frank decision and held that administrative searches are subject to the warrant requirement. As I will show, however, the Court's disavowal of the notion that administrative searches are an exception to the warrant requirement came at the cost of a reinterpretation of Fourth Amendment reasonableness.

In the second section of the Camara decision, the Court made a slight, but significant, change in the way it described Fourth Amendment reasonableness. In the first section of the Camara decision, the Court begins with the premise that a search is "unreasonable" unless it has been authorized by a warrant based on probable cause. The Court thought it significant that the inspector in Frank had acted based on a statutory requirement of "cause" that had been evidenced by his own observation of a likely code violation. That statement suggests the Court believed the Frank inspector had satisfied the "probable cause" requirement. Hence, in the first section of the Camara decision, the Court suggests that probable cause is the default requirement for all searches.

At the beginning of the second section of the Camara decision, however, the Court switches from a default probable cause requirement to a more general declaration of "the constitutional mandate of reasonableness." When determining reasonableness, it is necessary "first to focus upon the governmental interest . . . ." If the governmental interest is based in criminal investigation, probable cause is the standard. If, instead, the governmental interest is based in public safety, "the need for the inspection must be weighed in terms of [the] goals of code enforcement." In such an administrative case, one conducts the "test for determining reasonableness" by "balancing the need to search against the invasion which the search entails." This is the "balancing test" for Fourth Amendment reasonableness: weigh the government's interest against the individual's privacy interest.

The balancing test is not the same as the probable cause test. Hence, the Camara Court concludes the second section of its opinion by putting the probable cause test into quote marks:

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194. See Camara, 387 U.S. at 525-26.
195. See id. at 534.
196. See id. at 529. The Court has since elaborated on how administrative, or "special needs," searches relate to probable cause. See, e.g., Ferguson v. City of Charleston, 532 U.S. 67, 71-86 (2001) (invalidating hospital's transmission of drug test results for use in criminal prosecutions).
197. See Camara, 387 U.S. at 529 n.4.
198. See id. at 534.
199. See id.
200. See id. at 535.
201. See id.
202. See id. at 536-37.
203. The balancing test is less demanding than the probable cause test. See Terry, 392 U.S. at 19, 27 (allowing stops and frisks on less than probable cause).
“probable cause” to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. . . . But reasonableness is still the ultimate standard.204

Accordingly, the Camara Court’s adoption of the balancing test should be viewed as both an abandonment of the probable cause standard in some cases and a reorientation of the Fourth Amendment. The Camara decision makes reasonableness, and not probable cause, the default standard for searches and seizures. Thus, the Camara decision ushers in the era of the Balanced Fourth Amendment.

If the Court had limited the balancing test to the administrative context, that test would be an exception, rather than the norm of Fourth Amendment analysis. The next year, though, the Court used the balancing test to create a whole new type of search and seizure: the Terry “stop”205 and “frisk.”206 The Terry Court’s alteration of the Fourth Amendment begins with its description of the Fourth Amendment itself. Rather than quote the entire Fourth Amendment, the Terry Court says only that “[t]he Fourth Amendment provides that ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . .’”207 In contrast, the Camara Court had quoted the full text of the Fourth Amendment, including its probable cause requirement.208 The Terry Court’s rhetorical halving of the Fourth Amendment is reflected in its withdrawal of a whole arena of searches and seizures from the realm of the probable cause requirement.

In Terry, a veteran police detective saw two men peer into a store window two dozen times and also confer with a third man.209 The officer then halted the men, grabbed each and patted down their outer clothing

204. See Camara, 387 U.S. at 538.

205. A stop occurs when an officer, for investigative purposes, restrains a suspect’s freedom of movement, but to a degree falling short of formal arrest. See Terry v. Ohio, 392 U.S. 1, 22 (1968) (describing interests justifying stops based on less than probable cause).

206. A frisk occurs when an officer touches a person’s outer surfaces for investigative purposes and in a manner falling short of a “full blown” search. Id. at 24-25 (holding officers making stops must be allowed protective searches). Nonetheless, that search can include an extensive intrusion. See id. at 17 n.13 (describing police search of “groin” during frisks).

207. Id. at 8. The ellipse in this quote from Terry is a direct quote.


209. See Terry, 392 U.S. at 6. The unlikelihood that a White man (the third man) would confer with two Black men for innocent reasons played a crucial, but unacknowledged, role in the decision. See Thompson, supra note 9, at 964-68 (arguing that Terry Court validated officer’s suspicion because of race, but then meticulously hid race from face of opinion); cf. Carbado & Gulati, supra note 156, at 1283-85 (noting that racial minority professors have very legitimate fears that students will “punish” them on their evaluations if they discuss racial elements of cases such as Terry).
for weapons. What we see in the Terry decision is the resolution of a debate that had been raging over whether the Fourth Amendment ought to accommodate the desire of police for expanded power to investigate suspects. Proponents argued that "in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in response to the amount of information they possess." Civil libertarians argued that "the authority of police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." The Court sided with law enforcement and used the balancing test to expand police powers.

The Terry Court explicitly applied the Camara balancing test in order to limit application of the probable cause test and create a new "reasonable suspicion" test. After Terry, an officer may make a stop whenever "the facts available to the officer at the moment of the seizure" would "warrant a man of reasonable caution in the belief that the action taken was appropriate[]." In justifying the stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The officer may also make a Terry frisk whenever "a reasonably prudent man in the circumstances would be warranted in the belief that his safety

210. See Terry, 392 U.S. at 7.

211. See id. at 10. That argument has racial implications. One could replace "city streets" with "racial minority neighborhoods." Housing segregation in the U.S. is so extreme (and remains so rigidly enforced by bank policies) that city streets are inevitably where one finds racial minorities. See generally Clarence A. Cooper & Frank R. Cooper, Where the Rubber Meets the Road: CRA's Impact on Distressed Communities, in PUBLIC POLICIES FOR DISTRESSED COMMUNITIES REVISITED 159-60 (F. Stevens Redburn & Terry F. Buss eds., 2002) (detailing failure of Community Reinvestment Act to address bank "redlining" of racial minority neighborhoods).

212. See Terry, 392 U.S. at 11 (footnote omitted); see Thompson, supra note 9, at 965-66 (citing Terry, 392 U.S. at 38 (Douglas, J., dissenting) for themes similarly voiced by Civil Libertarians).

213. Of course, the Court could have decided "stops" and "frisks" did not trigger any Fourth Amendment analysis. The fact it did not do so does not mean we "got" something from the Terry decision. Under Camara, any criminal investigation was supposed to require probable cause. See Camara v. Mun. Court of San Francisco, 387 U.S. 523, 535 (1967). Hence, the Court's decision may not have been the worst-case scenario, but it does side with law enforcement. I thank my colleague Anne Bowen Poulin for pointing out the need to make this argument explicit. Frank Bowman challenged me on similar grounds after a presentation to the faculty at Indiana University Indianapolis-Purdue Law School.

214. See Terry, 392 U.S. at 20-21 (applying Camara's balancing test "in order to assess the reasonableness of Officer's McFadden's conduct").

215. See id. at 21-22 (citing Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Carroll v. United States, 267 U.S. 132 (1925)).

216. See id. at 21.
or that of others was in danger."217 When courts review an officer's justifications for a frisk,218 they must give "due weight" "to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience."219 With respect to either a stop or frisk, "the inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."220 If the stop or frisk exceeds the scope of the Terry doctrine, the probable cause test applies.221 Consequently, the Terry decision makes the balancing test the default standard for limited searches and seizures and the probable cause test an exception.

Thus, the Court has articulated the meaning of the Fourth Amendment as the Balanced Fourth Amendment. The Camara Court could have simply applied its Frank holding that warrantless administrative searches constitute an exception to traditional Fourth Amendment rules. When the Camara Court chose to replace the probable cause test with the balancing test, it articulated a new meaning for the Fourth Amendment as a whole. Likewise, the Terry Court could have treated the Camara balancing test as an exception limited to administrative cases. When the Terry Court applied the balancing test to criminal investigations, it articulatated the balancing test as the core meaning of the Fourth Amendment. Although the Camara Court had said criminal investigations should be tested for probable cause,222 the Terry decision applied the balancing test. The Court could have left the probable cause test as the default standard for all Fourth Amendment seizures and searches, but chose not to do so. Consequently, the Camara and Terry decisions rearticulated the Fourth Amendment as the Balanced Fourth Amendment.

B. Un-Balanced Terry Analysis

The fundamental problem with current reasonable suspicion doctrine is that it grants individual police officers vast discretion in deciding whether to invade the privacy of citizens.223 The Court now requires great

217. See id. at 27 (citing Beck, 379 U.S. at 91; Brinegar v. United States, 338 U.S. 160, 174-76 (1949); Stacey v. Emery, 97 U.S. 642, 645 (1878)).
218. The original Terry decision only grants "due weight" to the officer's decision to frisk. The Court has since granted "due weight" to his decision to stop. See, e.g., Brown, 442 U.S. at 52 n.2 (allowing officer to construe innocent activity).
220. See id. at 20.
221. See id. The Court has sometimes suggested it would hold police to the particularization requirement under Terry. See, e.g., United States v. Sharpe, 470 U.S. 675, 686 (stating that courts would consider "whether the police diligently pursued a means of investigation"). But Ornelas and Arvizu leave little hope of such enforcement. See infra notes 257-92 and accompanying text.
223. I do not seek here to make the comprehensive argument for the inappropriateness of the Un-Balanced Fourth Amendment. Rather, I briefly show that current reasonable suspicion doctrine is weighted in favor of law enforcement.
deference to police officers' *Terry* stop decisions, even when they use their discretion to racially profile. First, the very descriptions of the standard make it difficult to second-guess an officer's decision to stop and frisk a suspect. While the reasonable suspicion requirement is grounded in the language of the Fourth Amendment,\(^{224}\) it need not satisfy the probable cause requirement of other Fourth Amendment searches and seizures.\(^{225}\)

The precise quantumness of evidence required for a *Terry* stop as opposed to a probable cause arrest is indefinable. As the Court puts it, reasonable suspicion is "'not readily, or even usefully, reduced to a neat set of legal rules.'"\(^{226}\) Moreover, a court hearing a motion to exclude evidence based on a *Terry* stop must scour the "totality of the circumstances" to see if it can find a basis for reasonable suspicion.\(^{227}\) The "totality of the circumstances" is inherently difficult to define negatively.\(^{228}\) That is, what would not be included in the "totality of the circumstances"? Consequently, reasonable suspicion is a fluid concept that takes its "content from the particular contexts in which [it] is being assessed."\(^{229}\) The very terminology of the reasonable suspicion doctrine, therefore, prevents meaningful review of an officer's decision to stop or frisk a suspect.

Second, when reviewing a police officer's decision to *Terry* stop an individual, judges are to defer to a police officer's experience in the field.\(^{230}\) Courts assume an officer might be able to "perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."\(^{231}\) For example, in *United States v. Cortez*,\(^{232}\) the Court held officers could gain reasonable suspicion based on having seen footprints with a distinctive design seeming to lead illegal aliens across the border.\(^{233}\) The officers then hypothesized that this person would be driving a certain

\(^{224}\) See *Terry*, 392 U.S. at 9 (noting Fourth Amendment entitles people to be free from unreasonable government intrusion).

\(^{225}\) See *id.* at 19, 27 (noting that officer may satisfy "reasonable suspicion" requirement despite lacking probable cause to arrest or conduct "full blown" search).


\(^{228}\) See *id.;* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1414-16 (2000) (arguing variety of potential bases for stop allowing police to cover for racial animus).

\(^{229}\) *Gates*, 462 U.S. at 232, quoted in *Ornelas*, 517 U.S. at 696.

\(^{230}\) See *Ornelas*, 517 U.S. at 699 (granting officer "due weight" for specific inferences he draws from the facts based on his experience).

\(^{231}\) See *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (allowing officer to use his experience to construe apparently innocent conduct, but denying reasonable suspicion may be based solely on Mexican ancestry); *see also Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (declaring "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot").


\(^{233}\) *See Cortez*, 449 U.S. at 413.
type of vehicle.234 When the officers saw a partial license number for the hypothesized type of vehicle, they followed it and made a stop.235 The Cortex Court held the Terry test allows police officers to make “inferences and deductions that might well elude an untrained person.”236 Accordingly, innocent activity not only does not weigh in the defendant’s favor, but also may be relied on by officers to justify reasonable suspicion. It is important to note that Cortex was decided at the inception of President Reagan’s call for a drug war.237

Third, if the Terry doctrine is an intentionally low standard that defers substantially to police officers, that standard becomes especially dangerous when racial identity is also part of the context.238 For example, in its Sokolow decision, the Court gave its blessing to the DEA’s use of “profiles.” DEA agents paid attention to Sokolow because he “had all the classic aspects of a drug courier” that were provided in a profile of such individuals the DEA had previously constructed from statistics.239 Sokolow had traveled from Honolulu to Miami and stayed only forty-eight hours even though the trip takes twenty hours.240 His Miami destination was suspicious because it had been identified as a “source city” for illegal drugs.241 Sokolow had also paid cash for his plane ticket, which came to $2,100.00.242 Additionally, Sokolow traveled under a name that did not match his telephone number and did not check any of his luggage.243 Those facts reduce a variety of innocent characteristics associated with

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234. See id. at 415 (describing officers’ investigative methods).
235. See id. (describing facts). The officers did find evidence of crime, but that should not affect Fourth Amendment rights.
236. Id. at 418 (summarizing steps in Terry analysis).
237. See KAPPELER ET AL., supra note 1, at 149 (discussing explosion of anti-drug discourse in 1980s).
238. See Terry v. Ohio, 392 U.S. 1, 14-15 (1968) (briefly acknowledging discretion afforded officers had potential to negatively impact police/racial minority relations); Fagan & Davies, supra note 129, at 462 (suggesting NYPD’s disproportionate focus on minorities created subsequent racial minority hostility toward police).
239. United States v. Sokolow, 490 U.S. 1, 10 n.6 (1989) (citing record of officers’ basis for stop). Profiles are so broad they include traits such as arriving late at night, early in the morning, or in the afternoon. See Cole, supra note 134, at 47-49 (listing traits federal agents use in drug-courier profile); Erika L. Johnson, “A Menace to Society”: The Use of Criminal Profiles and Its Effects on Black Males, 38 How. L.J. 629 (1995) (analyzing use of drug courier profile, asserting black men have become targets of law enforcement).
240. See Sokolow, 490 U.S. at 3.
241. See id.
242. See id.
criminal types to the conclusion that a particular individual must be guilty of a crime. Hence, the facts suggest the DEA operated from a stereotype, albeit a sophisticated one.

The question before the Sokolow Court was whether the fact the DEA had initially focused on Sokolow only because of its use of a non-particularized profile made the stop unreasonable. The Court held its determination that reasonable suspicion existed is not "changed by the agent's belief that [Sokolow's] behavior was consistent with one of the DEA's 'drug courier profiles.'"244 By allowing the use of profiles, the Court turned a blind eye to the fact that profiles are primarily used as "racial profiles" that disproportionately single out minorities for invasions of privacy.245 Apparently, racial bias is not unreasonable.246 That determination is unsurprising given that it occurs at a point when the drug war has captured the political debate.247 A determination that the DEA could not use profiles would have deprived them of one of their favorite tools for prosecuting the drug war.

244. Sokolow, 490 U.S. at 10. But see id. at 13 (Marshal, J., dissenting) (characterizing officers' suspicion as based on "mechanistic application of a formula for personal behavior traits").

245. See, e.g., Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. MIAMI L. REV. 425, 430-31 (1997) (discussing inherent racial disparity in use of profiles) (citation omitted); see also Harris, supra note 131, at 9-12 (describing racial profiling and singling out of blacks); David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 677-88 (1994) (arguing current criteria for police stops lead to targeting of minority neighborhoods); David A. Harris, Frisking Every Suspect: The Withering of Terry, 28 U.C. DAVIS L. REV. 1, 43-46 (1994) (citing evidence that police often use race as criteria for suspicion when deciding whether to stop person).

246. To the contrary, the Court holds that police officers may admit they originally suspected someone based solely on race as long as they can also point to any minor traffic violation, which may itself be rarely enforced except against racial minorities. See Whren v. United States, 517 U.S. 806, 810, 815 (1996) (stating that probable cause for traffic stop vitiates need to inquire into basis for prior Terry suspicion); United States v. Robinson, 414 U.S. 218, 222 n.1 (1973) (validating traffic arrest admittedly used as pretext for narcotics search); cf. Illinois v. Wardlow, 528 U.S. 119, 139 (2000) (holding flight from police caravan in "high crime" area constituted reasonable suspicion); Lenese Herbert, Can't You See What I'm Saying?: Making Expressive Conduct a Crime in "High Crime Areas", 9 GEO. J. ON POVERTY L. & POL'Y (forthcoming 2002) (arguing Wardlow ignores fact that racial minority flight is often expression of political protest against police conduct). Instead, the Court provides only a quixotic Equal Protection remedy. Compare Whren, 517 U.S. at 814 (providing only Equal Protection remedy), with Johnson, supra note 169, at 901 ("Equal Protection violations, however, are notoriously difficult to prove."). See also State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (deciding ethnic background of defendant properly considered where person appears out of place in neighborhood); City of St. Paul v. Uber, 450 N.W.2d 623, 628-29 (Minn. Ct. App. 1990) (holding that presence of white person from suburban town in racially mixed, high-crime neighborhood does not constitute basis for detention); Davis, supra note 245, at 429 (1997) (indicating that courts have explicitly permitted inclusion of suspects' race in building drug courier profiles with respect to minorities but not Whites) (citing United States v. Weaver, 966 F.2d 391, 394-96 (8th Cir. 1992)).

247. See Brownstein, supra note 7, at 46 (citation omitted).
The crucial aspect of the Sokolow decision is the way it absolves police officers of the particularization requirement. The particularization requirement is supposed to prevent officers from making a seizure or search when they cannot tie their suspicion to a specific individual. Despite replacing the probable cause test with the balancing test, the Terry test was supposed to maintain the particularization requirement. Yet the Sokolow decision allows police officers to develop suspicion based on the abstract qualities of criminal types. The particularity of the suspicion is garnered only by applying the non-particularized profile to a specific individual. While observations of factors listed in a profile in a specific individual’s activities might justify reasonable suspicion, it cannot be said that the initial placement of particular factors in a profile used to justify suspicion were themselves derived from individual observation. Instead, the factors were derived from probabilities of criminality within groups of people. The use of general suspicion as to groups is precisely what the Fourth Amendment’s particularization requirement was supposed to avoid.

Nonetheless, the Court further infers the particularization requirement in its Whren decision. The Whren Court established the “pretext doctrine”: An officer’s objectively reasonable basis for an intrusion may be used as a pretext for a biased initial subjective motivation for the intrusion. In Whren, young Black males were in an expensive car with temporary plates. The officers claimed their suspicion was aroused by the fact that the youths had “stopped at [an] intersection for what seemed an unusually long time.” The officers then made a u-turn toward the youths. In response, the youths made a “sudden” turn and drove at an “unreasonable speed,” before stopping at a light. The youths then supposedly had vials of crack in plain view when the officers approached the car. Even if that fact is true (and it is conveniently stupid behavior), the youths’ Fourth Amendment rights do not turn on their being actually innocent.

Accordingly, the Whren Court had to consider whether an initial racial basis for a stop would require exclusion of evidence gained in a subsequent valid traffic stop. The potentially racist basis of the stop was suggested by the fact that department regulations prohibited the vice officers

248. I am grateful to my colleague Steve Chanenson for pointing out the need to make this argument explicit.

249. See Tu RKINGTON & ALLEN, supra note 16, at 96 (providing example of law enforcement’s inability to sweep whole area bank robber is known to have entered, despite efficacy of tactic, as evidence of what Fourth Amendment prevents). See generally David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Cr. Rev. 271 (critiquing Court’s Fourth Amendment doctrine as implicitly approving of racial profiling).


251. Whren, 517 U.S. at 808.

252. See id.

253. Id.

254. See id.
from making the traffic stop. The Court held the Fourth Amendment was satisfied by the subsequent objective basis for the traffic stop and that initial subjective racial motivations for a stop are irrelevant. Consequently, the Court again allowed police officers to satisfy the particularization requirement with their traffic stop basis after initially focusing on the suspects based on their having characteristics associated with a general criminal type—being young, Black and male. By allowing police officers to initiate suspicion based on racial pretext, the Court articulated the particularization requirement as capable of being satisfied after use of an initial un-particularized basis for suspicion. Worse yet, Whren covered for stereotyping by allowing the particularization requirement to be satisfied after the racially-biased formation of an initial suspicion.

C. Un-Balanced Review of Terry Stops

Today, the Court has rearticulated the Fourth Amendment by placing a layer of trial court discretion to find reasonable suspicion on top of street-level officer discretion to avoid the particularization requirement. In its Ornelas decision, the Court assisted prosecution of the drug war by making it more difficult for appellate courts to overturn a trial court's finding of reasonable suspicion.

At the first stage of the facts, the Ornelas Court followed Sokolow's holding that officers may profile types of activity as suspicious. In Ornelas, a police officer was conducting surveillance in downtown Milwaukee in 1992 when he noticed a 1981 two-door Oldsmobile with California license plates parked in front of a motel. According to the officer, drug couriers favor such cars because it is easy to hide drugs in them. Further, the State of California is apparently a "source" of drugs. The officer called his partner, who checked the petitioners' names in a federal database of "known and suspected drug traffickers." Both petitioners were listed in the database. The Ornelas Court, however, did not mention that law enforcement databases are racially biased and contain many false rumors. At the first stage of the facts, then, stereotypes of the characteristics of criminals allowed the officers to focus on these individuals.

255. See id. at 808.
256. See id. at 809-10.
258. See id. at 691-92.
259. See id. at 692.
260. See id.
261. Id.
262. See id.
263. See Howarth, supra note 63, at 113; see also supra notes 124-69 and accompanying text.
At the second stage of the Ornelas facts, the Court followed its Cortez holding that police officers may construe apparently innocent conduct as suspicious. In Ornelas, the officer checked the motel’s registry and discovered that the petitioners had checked into the motel at four o’clock in the morning, “without reservations.” When the petitioners emerged from the motel, another officer approached them and asked for their consent to search the car. “The men appeared calm,” but simultaneously, “Ismael was shaking somewhat.” The officer claimed to have found a rusty screw in the 1981 car, which he claimed indicated a panel had been removed. After removing the panel he discovered drugs. At the factual level as a whole, the Ornelas Court combined its profiling and innocent activity doctrines to allow the officers vast discretion in deciding whom to stop.

The Ornelas Court then went on to add a new level of discretion for trial courts to find reasonable suspicion to its previous allowance of street-level police officer discretion. The Court requires the usual rule that appellate courts overturn a trial court’s determination of pure fact (what happened and whose account was more credible at the hearing) only if they find “clear error.” Likewise, the Court applies the usual rule that appellate courts review pure questions of law (which legal standard applies) de novo, or with full discretion to change the trial court’s determination. The Court then holds an appellate court should also review mixed questions of law and fact (what result is required when the legal rule is applied to the facts) de novo. Simultaneously, however, the reviewing court must “give ‘due weight’” to inferences drawn from the facts by both the trial court judge and police officers.

The Ornelas opinion drew a stinging dissent from Justice Scalia. In arguing for a clear error standard of review for mixed questions of law and fact, Scalia points out that typically when an appellate court undertakes de novo review, it does not defer “to a trial court’s finding that an officer’s inference of wrongdoing (i.e., his assessment of probable cause to search) was reasonable.” Such a deferential de novo standard is contradictory

265. *See id.* at 692-93.
266. *Id.* at 693.
267. *See id.*
268. *See id.* Again, remember that Fourth Amendment rights do not depend on actual innocence.
270. *Ornelas*, 517 U.S. at 697 (calling for independent review of legal principles) (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)); *see also* First Options, 514 U.S. at 948 (reviewing legal questions de novo).
272. *Id.*
273. *Id.* at 705 (Scalia, J., dissenting).
since "the finding of 'reasonableness' is precisely what [the majority] has told us the appellate court must review de novo; and in de novo review the 'weight due' to a trial court's finding is zero."\textsuperscript{274} Consequently, "due weight" to factual inferences is inconsistent with de novo review.

Therefore, the \textit{Ornelas} majority created a new standard of review. That deferential de novo standard of review appears to have the goal of ensuring that appellate courts grant broad discretion to both trial court findings of reasonable suspicion and police officers' factual inferences.\textsuperscript{275} The result-oriented purpose of that standard is shown by the fact that an appellate court must defer to a trial court's finding of reasonable suspicion, but would still have to apply "due weight" to an officer's inferences if the trial court suppressed evidence.

The \textit{Arvizu} Court assists prosecution of the drug war by making it even more difficult for an appellate court to overturn a trial court's finding of reasonable suspicion. In \textit{Arvizu}, the Court also used its profiling doctrine to find the facts unremarkable. Therein, a border agent was patrolling an Arizona highway near the Mexican border.\textsuperscript{276} The border agents had placed sensors on the roads to indicate the passage of a vehicle that could be consistent with smuggling activities.\textsuperscript{277} The border agent received a call that one of the sensors had been triggered.\textsuperscript{278} The signal came at a time when there is usually a shift change that leaves the roads unpatrolled.\textsuperscript{279} Upon investigating, the agent discovered a minivan.\textsuperscript{280} Apparently, minivans are potentially indicative of crime because they are popular with smugglers.\textsuperscript{281} Here again, correlation with an abstract profile of criminal types allows officers to focus on particular individuals.\textsuperscript{282}

In \textit{Arvizu}, the minivan contained a family of five, but the driver "appeared stiff" and did not look at the agent or give him "a friendly wave," as most people in the area would do.\textsuperscript{283} Moreover, the knees of two of the children were unusually high, "as if their feet were propped up on some cargo on the floor."\textsuperscript{284} When the agent followed the vehicle, the children eventually waved to him, but they were "still facing forward," and their

\begin{itemize}
  \item \textsuperscript{274} \textit{Id.}
  \item \textsuperscript{275} \textit{But see} Maclin, \textit{supra} note 136, at 124 (criticizing standard because police "almost always win the swearing contest between officer and defendant").
  \item \textsuperscript{277} \textit{See id.} at 748.
  \item \textsuperscript{278} \textit{See id.}
  \item \textsuperscript{279} \textit{See id.}
  \item \textsuperscript{280} \textit{See id.} at 749.
  \item \textsuperscript{281} \textit{See id.}
  \item \textsuperscript{282} \textit{See id.} at 751 (approving of probabilistic evidence to keep reasonable suspicion and probable cause "relatively simple concepts") (quoting United States \textit{v. Sokolow}, 490 U.S. 1, 7-8 (1989)).
  \item \textsuperscript{283} \textit{Id.} at 749.
  \item \textsuperscript{284} \textit{Id.}
\end{itemize}
waving was "odd" as it continued on and off for five minutes.285 Finally, the minivan turned onto a dirt road that did not lead to a recreational area.286 The agent stopped the minivan and discovered illegal drugs.287 The Arvizu Court thus emphasized that even innocent activities are fair game for justifications of reasonable suspicion.288

The Arvizu decision enforced Ornelas's second layer of trial court discretion to allow reasonable suspicion stops by adding emphasis to the "totality of the circumstances" factor.289 The Arvizu Court's primary concern is that the appellate court declined to give seven of ten factors for the stop any weight on the basis that they were susceptible to an innocent explanation.290 The Court found independent weighing of the factors would "seriously undercut the 'totality of the circumstances' principle which governs the existence vel non of 'reasonable suspicion.'"291 Since the consideration of the totality of the circumstances must govern the ultimate question of whether there is reasonable suspicion, the appellate court could not refuse to consider any factor, including "the children's idiosyncratic actions . . . ."292

The interplay of the Ornelas and Arvizu decisions creates a layer of trial court discretion to approve reasonable suspicion stops that will prove insurmountable. The Ornelas decision requires appellate courts to give "due weight" to a trial court's finding of reasonable suspicion. The Arvizu decision requires an appellate court to give "due weight" to the trial court's decision and emphasize the "totality of the circumstances." Accordingly, a trial court's finding of reasonable suspicion is doubly insulated from judicial review by both the trial court and police officers' drawing of inferences from the facts. In contrast, a trial court's finding of lack of reasonable suspicion would still be subject to the "due weight" of the officer's inferences and emphasis on the "totality of the circumstances."

As I have said, pre-Ornelas and Arvizu reasonable suspicion doctrine would constitute an Un-Balanced Fourth Amendment all by itself. An officer's ability to construe innocent acts as suspicious grants him even wider discretion to invade people's privacy. An officer's ability to use racial profiles effectively absolves him of needing particularized suspicion before focusing on a suspect. When that street-level discretion is combined with

285. Id.
286. See id.
287. See id. at 749-50. Remember that a defendant's Fourth Amendment rights do not turn on actual innocence.
288. See id. at 751 (citing United States v. Sokolow, 490 U.S. 1, 9 (1989); Terry v. Ohio, 392 U.S. 1, 22 (1968)).
289. Note that the Ornelas decision had gone largely unnoticed until Chief Justice Rehnquist revived it as the basis for the Arvizu decision. See e.g., LaFave et al., supra note 11, at 1382 (failing to list Ornelas in table of cases).
290. See Arvizu, 122 S. Ct. at 749 (citation omitted).
291. Id. at 752.
292. Id.
trial court discretion to find reasonable suspicion, we cannot say individuals' privacy interests have any real weight in the balancing test. We can say that the Fourth Amendment has become un-balanced.

D. The Drug War As the Source of the Un-Balanced Fourth Amendment

The Court's rearticulated Fourth Amendment arguably relates to the drug war.293 The Terry era began against the backdrop of President Richard Nixon's anti-heroine drug war.294 The Court's broad grants of street-level police discretion in Sokolow and Whren occurred at a time when the current drug war had captured the public debate.295 The Court's broad grants of trial court discretion in Ornelas and Arvizu occurred in the context of both media fomenting of a drug war and the reality that law enforcement relies on its ability to utilize certain techniques to conduct the drug war.296

Moreover, the Court's Fourth Amendment opinions contain clues to their roots in a desire to support the drug war. The Terry Court, while not facing a drug case, does evince a desire to assist the police: "[I]t is frequently argued that . . . the police are in need of an escalating set of flexible responses . . . ."297 The first substantive sentence in the Sokolow opinion reveals a motive for allowing profiles: "This case involves a typical attempt to smuggle drugs through one of the Nation's airports."298 Moreover, the Sokolow court goes so far as to declare that "[w]e granted certiorari to review the decision . . . because of its serious implications for the enforcement of the federal narcotics laws."299 And, again, in Arvizu, the Court says, "We granted certiorari to review the decision . . . because of its importance to the enforcement of federal drug and immigration laws."300 Such rare admissions of a pro-law enforcement bias suggest something special is occurring when the Court considers cases linked to the drug war.

To those implicit statements of a drug war bias, we can add the explicit accusations of dissenting justices. Justice Wiener of the Fifth Circuit declares civil liberties are "hors de combat [spoils of war] of the government's so-called War on Drugs and its efforts to interdict illegal immigra-

293. As in the case of law enforcement, I do not claim we can get inside the heads of Supreme Court Justices or that the Court has an identifiable conspiracy to support the drug war.

294. See Kappeler et al., supra note 1, at 152 (noting President Nixon's campaign against heroin).

295. See Brownstein, supra note 7, at 46 (noting that "crack crisis" captured political discourse).

296. See generally GAO Report, supra note 1, at 81 (describing DEA's budget increases and techniques); Cultural Criminology, supra note 7 (collecting essays describing popular culture's affect on criminology); Kappeler et al., supra note 1, at 8 (describing "myth-making" effects on law enforcement patterns).

297. Terry v. Ohio, 392 U.S. 1, 10 (1968).


299. Id. at 7.

tion, which together have produced a kind of public hysteria that has in turn impeded rational judgment and logic."\textsuperscript{301} That statement, particularly its linkage of public hysteria to judicial illogic, is exactly what I fear has been the result of law enforcement's encoding of its drug war discourse. Justice Stevens ties the rhetoric to results:

In the years since \textit{Ross} \ldots the Court has heard argument in 30 Fourth Amendment cases involving narcotics. \ldots All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure. \ldots No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, \ldots this Court has become a loyal foot soldier in the Executive's fight against crime.\textsuperscript{302}

So, even before \textit{Whren}, \textit{Ornelas} and \textit{Arvizu}, the Court was approving 90\% of defective drug war searches. The Court's un-balancing of the Fourth Amendment means law enforcement will almost invariably get its way in drug war searches and seizures. Without calling the correlation between the drug war and the Un-Balanced Fourth Amendment causation, we can say that it is more than coincidence.

\textbf{IV. Conclusion: Toward an Oppositional Decoding of the Un-Balanced Fourth Amendment}

Even those who believe the Court's current obsession with objective rules\textsuperscript{303} is necessary must acknowledge that the harm of unfettered police discretion is much greater than is commonly acknowledged. The drug war is not just a matter of policing, it has vast cultural effects. As Henry Brownstein has noted, "\textit{[d]}rug scares are independent phenomena, not necessarily related to actual trends or patterns in drug use or trafficking."\textsuperscript{304} Law enforcement argues it needs racial profiling because racial minorities "are \ldots more violent."\textsuperscript{305} On that basis, the argument for ra-


\textsuperscript{304} Brownstein, \textit{supra} note 7, at 55 (citing Reinarman & Levine, \textit{supra} note 104, at 537).

\textsuperscript{305} Press Release, \textit{supra} note 137.
cial profiling becomes self-justifying. Moreover, the cultural construction of the implications of race turns racial profiling into convictions. The Court's articulation of the Un-Balanced Fourth Amendment represents a "dominant position" decoding of law enforcement's drug war discourse. It is up to critical legal scholars to construct an "oppositional position" decoding of the Un-Balanced Fourth Amendment. I suggest that we start at the end—challenging Ornelas and Arvizu. We should argue that the result of the Ornelas and Arvizu decisions is perverse. That is, if the trial court finds reasonable suspicion, but the appellate court is inclined to disagree, the "due weight" credited to both the trial court's and police officers' drawing of inferences militates against reversal. Nonetheless, if the trial court finds reasonable suspicion lacking, the appellate court must still scour the "totality of the circumstances" to see if the "due weight" credited police officer inferences militates for reversal. In either event, the process is irrational, and the oppositional decoding position provides a framework to dispute such outcomes.

The Ornelas and Arvizu decisions do not constitute the whole of the Un-Balanced Fourth Amendment, but they do put the final nails in the coffin. We must remove those nails because the Fourth Amendment is still something worth fighting for. It is past time to start a "Fourth Amendment war."

306. See Maclin, supra note 136, at 122 (contending argument for racial profiling is tautology).
307. See Howarth, supra note 63, at 100-01 (arguing attributed identity of Black males precludes innocence).
308. See supra notes 72-79 and accompanying text.
309. See supra notes 80-84 and accompanying text.