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## **Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks**

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## I. INTRODUCTION

Fifty years ago, in *Terry v. Ohio*,<sup>1</sup> the Supreme Court recognized that the practice of stopping individuals for questioning and conducting frisks for weapons was “a major source of friction between the police and minority groups.”<sup>2</sup> Despite acknowledging that a frisk represents “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,”<sup>3</sup> the Court held that officers could conduct them even in the absence of probable cause to believe that the individual was armed and dangerous.<sup>4</sup> Furthermore, the Court also affirmed that “in appropriate circumstances and in an appropriate manner[, police may] approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”<sup>5</sup> Experience in the years since *Terry* was decided demonstrates that stops and frisks continue to foster negative relationships between communities of color and the police, leading many in these communities to distrust the police and to question their legitimacy.

In this Essay, I will use lessons from social psychology as a lens to explain why *Terry* and its progeny were destined to create unjustified racial disparities in policing regardless of officers’ conscious racial motivations. I will focus on police interactions with Black individuals, since the social psychological literature upon which I rely primarily studies relationships with Black people.

This Essay proceeds in three parts. Part one introduces two lessons from the field of social psychology that are of relevance to police-public interactions. First, unconscious racial biases linking Black individuals with criminality and White individuals with innocence create the risk that officers will be more likely to judge the ambiguous behaviors of Blacks as suspicious while ignoring or not even noticing the identical ambiguous behaviors of Whites. As a result, Blacks are more likely than Whites to be stopped by the police. Second, during the interaction that results, another psychological process known as racial anxiety can enable troubling racial disparities in whether a frisk will occur or force will be used.

Part two exposes how the *Terry* doctrine facilitates the influence of implicit racial bias and racial anxiety on behaviors and judgments, leading to unjustified racial disparities in police stop and frisk practices. Part III concludes that these disparities in stops and frisks are inevitable, and that the only way to prevent them is to eliminate the practice.

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<sup>1</sup> 392 U.S. 1 (1968).

<sup>2</sup> *Id.* at 14 n.11 (citation omitted).

<sup>3</sup> *Id.* at 17.

<sup>4</sup> *Id.* at 27.

<sup>5</sup> *Id.* at 22.

## II. IMPLICIT RACIAL BIAS AND RACIAL ANXIETY

Stops and frisks occur in two stages. The first is the initial judgment of suspicion that results in the stop and the second is the interaction that occurs when officers investigate their suspicions and potentially conduct a frisk for weapons. While there are instances when police deliberately stop and frisk without suspicion—either because of individualized animus, or because of their role in what Professor Tracey Meares describes as a “program” of stop, question and frisk<sup>6</sup>—this Essay assumes that officers are acting in good faith. This part reveals why, even assuming good faith, it is inevitable that *Terry* stops and frisks will result in unjustified racial disparities regardless of officers’ conscious racial motivations and even when Black and White individuals are acting identically.

### *A. Judgments of Suspicion: The Influence of Implicit Racial Bias*<sup>7</sup>

Research in the field of social psychology over the past four decades repeatedly demonstrates that most individuals of all races have implicit, i.e. unconscious, racial biases linking Blacks with criminality and Whites with innocence. These associations can lead to systematic and predictable judgment errors concerning who is and is not suspicious, a phenomenon Phillip Atiba Goff and I have previously termed the suspicion heuristic.<sup>8</sup> People possess these unconscious associations even if these associations conflict with their consciously and genuinely held beliefs. However, these implicit biases can negatively and unconsciously influence judgments of and behaviors towards Blacks, and positively influence judgments of and behaviors towards Whites in ways that people are unaware of and thus, largely unable to control. Since social psychologists have most frequently studied biases affecting judgments of individuals who appear either Black or White, this section centers on those biases and their affects.<sup>9</sup> In the policing context, implicit biases can cause officers to unintentionally judge Black civilians as more suspicious than White civilians, even when these officers are consciously egalitarian, reject racial profiling, and are Black themselves. Some effects of implicit racial biases that are relevant to

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<sup>6</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 165–66 (2015).

<sup>7</sup> For an in-depth analysis of the discussion contained in this subpart, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2089 (2011) [hereinafter Richardson, *Arrest Efficiency*].

<sup>8</sup> See L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012).

<sup>9</sup> The social psychological study of implicit racial bias of other groups is growing. See, e.g., Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) (finding implicit bias against Asian lawyers); Irene V. Blair et al., *Assessment of Biases Against Latinos and African Americans Among Primary Care Providers and Community Members*, 103 AM. J. PUB. HEALTH 92 (2013).

making judgments of suspicion are discussed next.

### 1. Increased Scrutiny

Typically, racial profiling refers to the conscious practice of targeting people for investigation of crime based on race.<sup>10</sup> However, implicit racial biases can also cause people to focus their attention on Blacks, albeit automatically and unconsciously.<sup>11</sup> This unconscious racial profiling is attributed to the fact that individuals have immediate threat reactions towards Black men.<sup>12</sup> Indeed, brain scans reveal that the amygdala, a section of the brain associated with fear, responds more when people view Black male faces as opposed to White male faces.<sup>13</sup> As I have observed in other work, this attentional bias is correlated not with conscious racial attitudes, but rather, with how strongly the perceiver unconsciously associates Blacks with danger.<sup>14</sup> Attentional bias affects both civilians and police officers. In one study demonstrating the existence of attentional bias amongst officers, researchers found that unconscious biases associating Blacks with dangerousness caused officers' attention to be drawn to Black faces over White faces.<sup>15</sup> Additionally, once their attention was captured, Black faces held their attention longer than White faces did.<sup>16</sup> This study reveals that racial profiling can occur unconsciously. As I discuss next, once attention is captured, implicit bias can also influence how ambiguous behaviors are interpreted.

### 2. Biased Evaluations of Ambiguous Behaviors

Negative stereotypes associating Blacks with criminality and danger can cause people of all races, including Blacks, to evaluate ambiguous behaviors as more threatening and suspicious when engaged in by Black individuals versus White individuals. Numerous studies demonstrate this effect. In one study, for instance, Black and White school age children rated an ambiguous bump in the

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<sup>10</sup> See, e.g., Houston Police Department Policy on Racial Profiling, <http://www.houstontx.gov/police/racialprof.htm> (last visited Sept. 24, 2017); Dallas County Sheriff's Department Racial Profiling Policy, <http://www.dallascounty.org/department/sheriff/definitions.php> (last visited Sept. 24, 2017).

<sup>11</sup> Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1326–27 (2008) [hereinafter Trawalter et al., *Attending to Threat*]; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881, 883, 885–87 (2004) [hereinafter Eberhardt et al., *Seeing Black*].

<sup>12</sup> Trawalter et al., *Attending to Threat*, *supra* note 11, at 1322.

<sup>13</sup> See, e.g., Matthew D. Lieberman et al., *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720, 721 (2005).

<sup>14</sup> See Richardson, *Arrest Efficiency*, *supra* note 7, at 2045.

<sup>15</sup> Eberhardt et al., *Seeing Black*, *supra* note 11, at 886–87.

<sup>16</sup> *Id.*

hallway as more aggressive when performed by a Black student versus a White student.<sup>17</sup> In another, an ambiguous shove was deemed more violent and dangerous when engaged in by a Black man versus a White man.<sup>18</sup> Unconscious racial biases can even influence how people read another's facial expressions, with identical expressions being evaluated as more hostile on a Black face than on a White face.<sup>19</sup>

Police officers are not immune from the influence of implicit racial biases on their perceptions. For instance, the unconscious association between Blacks and crime influences how quickly officers identify weapons. In computer simulations, officers are quicker to determine that individuals are armed when they are Black as opposed to White.<sup>20</sup> Researchers conclude that this occurs because it takes less time for the mind to process information that is congruent with racial stereotypes.<sup>21</sup> Thus, officers require less time to accurately determine that a Black individual is armed and more time to accurately determine that a White individual is armed, since this latter circumstance is not consistent with existing cultural stereotypes.<sup>22</sup>

In sum, the study of implicit bias demonstrates that race influences who will capture attention and, once attention is captured, how ambiguous behaviors are evaluated. These biases increase the likelihood that Blacks will be viewed with more suspicion than Whites even when they are similarly situated and engaged in identical behaviors. In fact, since Whites are automatically and unconsciously linked with positive, law-abiding behavior rather than with violence and criminality,<sup>23</sup> it is more difficult for people to interpret their ambiguous behaviors as indicative of danger and suspicion.<sup>24</sup> Because these effects are unconscious, people will not realize that race impacted their perceptions and judgments.

Additionally, as the studies reveal, police officers are not immune from implicit racial biases. In fact, there is evidence that officers who work in urban, majority-minority neighborhoods are more influenced by implicit racial biases than

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<sup>17</sup> H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 593–95 (1980). The subjects included both Black and White individuals.

<sup>18</sup> Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 590 (1976).

<sup>19</sup> Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640–43 (2003).

<sup>20</sup> Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1013–15 (2007) [hereinafter Correll et al., *Across the Thin Blue Line*]. See also Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1317, 1325 (2002) [hereinafter Correll et al., *The Police Officer's Dilemma*].

<sup>21</sup> Correll et al., *Across the Thin Blue Line*, supra note 20, at 1015.

<sup>22</sup> *Id.* at 1020.

<sup>23</sup> Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 898, 922 (2015).

<sup>24</sup> *Id.* at 898.

officers who do not work in these neighborhoods.<sup>25</sup> Thus, it is reasonable to believe that officers will unconsciously subject Blacks to more scrutiny than similarly situated Whites and once their attention is captured, that they will conclude that the ambiguous behaviors they observe are suspicious enough to warrant a *Terry* stop.

### B. *Interactions: The Influence of Racial Anxiety*

Studies of interracial interactions reveal that both White and Black individuals experience anxiety during interracial interactions.<sup>26</sup> This section focuses on interactions between Black and White individuals since the studies of racial anxiety center on these interactions.<sup>27</sup> For Whites, the concern during these interactions is that they will be evaluated as racist by their Black interaction partner,<sup>28</sup> and for Blacks, the concern is that their White interaction partner will treat them in a racially discriminatory way.<sup>29</sup>

Racial anxiety has cognitive and physiological effects.<sup>30</sup> It can cause individuals involved in interracial interactions to feel self-conscious<sup>31</sup> and to become hyper-vigilant<sup>32</sup> as they attempt to discern whether they are behaving in ways that will be perceived as racist or whether they are being treated in a racially discriminatory manner.<sup>33</sup> As individuals become increasingly uncomfortable

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<sup>25</sup> Correll et al., *Across the Thin Blue Line*, *supra* note 20, at 1020.

<sup>26</sup> For an extended discussion of racial anxiety, see Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017).

<sup>27</sup> See Samuel R. Sommers & Michael I. Norton, *Lay Theories about White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP RELATIONS 117, 119 (2006).

<sup>28</sup> Jennifer A. Richeson & J. Nicole Shelton, *Stereotype Threat in Interracial Interactions*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 231, 236–37 (Michael Inzlicht & Toni Schmader eds., 2012) [hereinafter Richeson & Shelton, *Stereotype Threat*]; Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243, 249 (2009) [hereinafter Trawalter et al., *Predicting Behavior*].

<sup>29</sup> Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. PERSONALITY & SOC. PSYCHOL. 896, 896 (2002); J. Nicole Shelton, *Interpersonal Concerns in Social Encounters Between Majority and Minority Group Members*, 6 GROUP PROCESSES & INTERGROUP RELATIONS 171, 171 (2003) [hereinafter Shelton, *Interpersonal Concerns*]; J. Nicole Shelton & Jennifer A. Richeson, *Interracial Interactions: A Relational Approach*, in 38 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 121, 127–31 (Mark Zanna ed., 2006).

<sup>30</sup> See Richeson & Shelton, *Stereotype Threat*, *supra* note 28, at 236–37.

<sup>31</sup> Derek R. Avery et al., *It Does Not Have to be Uncomfortable: The Role of Behavioral Scripts in Black-White Interracial Interactions*, 94 J. APPLIED PSYCHOL. 1382, 1383 (2009).

<sup>32</sup> Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 316, 318–19 (2007); Richeson & Shelton, *Stereotype Threat*, *supra* note 28, at 236–37.

<sup>33</sup> Mary C. Murphy & Valerie Jones Taylor, *The Role of Situational Cues in Signaling and Maintaining Stereotype Threat*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 17, 18–

during the interracial contact, their behaviors become “more rigid and less warm and friendly than [they] would be in a nonthreatening context.”<sup>34</sup>

Additionally, the stress of racial anxiety is associated with a variety of physiological responses including sweating, increased heart rate, facial twitches,<sup>35</sup> fidgeting,<sup>36</sup> and avoiding eye contact.<sup>37</sup> These responses can make each party to an interaction appear unfriendly and uncomfortable. Thus, racial anxiety causes interracial interactions to be awkward and unpleasant for both parties.<sup>38</sup>

There is evidence that police and Black individuals experience racial anxiety during their interactions. The experience of racial anxiety can negatively influence the interaction in ways that increase the potential for a frisk and the use of force. For the police, racial anxiety is experienced as the worry that they will be perceived as racist by the civilians they encounter.<sup>39</sup> This concern can influence officers, regardless of their race,<sup>40</sup> affecting their perceptions and judgments as well as how safe they feel during an interaction. For instance, if officers believe that an individual views them as racist, officers will also likely assume that the individual will not respect their authority or grant them any legitimacy. This assumption increases the likelihood that officers will feel unsafe. One study provides evidence of this. Researchers found that when officers believed that civilians did not respect them and did not view them as legitimate, officers experienced concerns that interactions with these civilians would be more dangerous than interactions with civilians who they believed respected their authority and their legitimacy.<sup>41</sup> These safety concerns will be more likely to influence officer interactions with Black civilians since the stereotype of police racism will be more salient.

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19, 24 (Michael Inzlicht & Toni Schmader eds., 2012); Richeson & Shelton, *Stereotype Threat*, *supra* note 28, at 232–34.

<sup>34</sup> Richeson & Shelton, *Stereotype Threat*, *supra* note 28, at 237–38.

<sup>35</sup> Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOLOGIST 181, 182 (2005).

<sup>36</sup> Shelton, *Interpersonal Concerns*, *supra* note 29, at 179. *See also* Trawalter et al., *Predicting Behavior*, *supra* note 28, at 244.

<sup>37</sup> Trawalter et al., *Predicting Behavior*, *supra* note 28, at 252, 256.

<sup>38</sup> *Id.* at 243, 263 n.3.

<sup>39</sup> PHILLIP ATIBA GOFF ET AL., PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE SAN JOSE POLICE DEPARTMENT 1 (2013) [hereinafter GOFF ET AL., PROTECTING EQUITY].

<sup>40</sup> *See generally* Gene Demby, *Does Having More Black Officers Reduce Police Violence?*, NPR CODE SWITCH: RACE AND IDENTITY, REMIXED (Feb. 4, 2017, 6:00 AM), <http://www.npr.org/sections/codeswitch/2017/02/04/513218656/does-having-more-black-officers-reduce-police-violence>. *See also* GOFF ET AL., PROTECTING EQUITY, *supra* note 39, at 4–5. *But see* Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 270 (2010) (noting that “black study participants . . . reported that African American officers were more likely to show concern for their well-being.”).

<sup>41</sup> Phillip Atiba Goff et al., *Illegitimacy Is Dangerous: How Authorities Experience and React to Illegitimacy*, 4 PSYCHOLOGY 340, 343 (2013).

For Black individuals, racial anxiety is experienced as the fear of being victimized by police racism. These concerns may influence their behaviors and judgments, as well as the attributions they make about an officer's conduct during an interaction, creating expectations of harsh or discriminatory treatment, including the use of lethal force.<sup>42</sup> These worries may result in Black individuals approaching police interactions with heightened suspicion and anxiety.<sup>43</sup>

During their interaction, these mutual anxieties increase the risk that officers will conduct a frisk and that force will be used unnecessarily. Because of their anxieties, individuals may fidget and avoid eye contact. Officers may interpret these behaviors as signs that the individual poses a threat. In fact, police are often trained to interpret these behaviors as suspicious and potentially dangerous.<sup>44</sup> Additionally, the officer may be acting in similar ways, thereby confirming the individual's concerns that the officer is likely to harm him or her. Furthermore, officers may enact command presence, as they are trained to do in the face of a possible threat. This means that they will attempt to establish immediate control of a situation by exercising dominance.<sup>45</sup> However, for people experiencing racial anxiety, the officer's behavior will confirm their fears of officer racism as they wonder why the officer is treating them in this aggressive manner.

Furthermore, when officers exhibit signs of racial anxiety or when they enact command presence, civilians may mirror their behaviors.<sup>46</sup> This is known as the self-fulfilling prophecy or behavioral confirmation effect. However, since officers will be unaware that their own behaviors played a role in generating the individual's behaviors, officers may interpret the individual's actions as confirmation that the individual is dangerous.

Research confirms that racial anxiety can increase the likelihood that force will be used during an interaction. In one study involving the police, researchers found that officers experience racial anxiety, regardless of their race.<sup>47</sup> They also discovered that the experience of racial anxiety predicted uses of force against

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<sup>42</sup> See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS (2002).

<sup>43</sup> See generally Duncan, *supra* note 18; Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

<sup>44</sup> Richard R. Johnson & Mark A. Morgan, *Suspicion Formation Among Police Officers: An International Literature Review*, 26 CRIM. JUST. STUD. 99, 108 (2013). See also Nick Jacobellis, *How to Spot a Concealed Firearm*, POLICE MAG. (Nov. 1, 2007), <http://www.policemag.com/channel/patrol/articles/2007/11/how-to-spot-a-concealed-firearm.aspx>.

<sup>45</sup> Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009). See also L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2969 (2015); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008).

<sup>46</sup> Gau & Brunson, *supra* note 40, at 269–70.

<sup>47</sup> GOFF ET AL., PROTECTING EQUITY, *supra* note 39, at 3–5, 17. The researchers use the term "stereotype threat" to describe what I am referring to as racial anxiety.



Black men.<sup>48</sup> The more officers were concerned with appearing racist, the more likely they were to have used greater force against Black individuals, relative to individuals of other racial groups, in the previous two years.<sup>49</sup>

In conclusion, over four decades of research provide troubling evidence that implicit racial biases can influence people's judgments about and behaviors towards Black individuals. These effects occur spontaneously and without conscious intention, and are not dependent upon whether people consciously endorse negative racial stereotypes or hold consciously racist attitudes. Furthermore, racial anxiety influences interactions in negative ways, affecting the behaviors and judgments of both parties to the interaction. In the context of policing, implicit racial bias and racial anxiety can result in officers stopping, frisking and using force more often against Black civilians than White civilians. This can occur even when officers are not consciously racist and Blacks are not engaged in criminal activity. Next, this Essay will discuss how implicit racial bias and racial anxiety can influence police-public interactions and the implications for Fourth Amendment doctrine.

### III. IMPLICATIONS FOR POLICING AND THE FOURTH AMENDMENT

Both implicit racial bias and racial anxiety are relevant to police-public interactions and the Fourth Amendment doctrine that attempts to regulate them. Subpart A studies the problems with *Terry*, the case that sanctioned police stop-and-frisk practices, demonstrating that the decision permits police to act on their racial hunches. Subpart B exposes how Fourth Amendment doctrine enables negative interactions between the police and people of color, allowing officers to create a reasonable suspicion of criminal activity in ways that sustain the stereotype of police racism.

#### A. Acting on Racial Hunches<sup>50</sup>

In *Terry*, the Court held that officers could detain individuals and conduct a limited frisk for weapons in the absence of probable cause that individuals were armed and engaged in criminal activity.<sup>51</sup> Instead, the decision authorizes officers to conduct stops and frisks as long as they can “point to specific and articulable facts which . . . lead[] [them] reasonably to conclude . . . that criminal activity may be afoot[,]”<sup>52</sup> and that the individual with whom they are interacting is armed and dangerous.<sup>53</sup>

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.*

<sup>50</sup> For an in-depth analysis of the discussion contained in this subpart, see Richardson, *Arrest Efficiency*, *supra* note 7.

<sup>51</sup> *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

<sup>52</sup> *Id.* at 21, 30.

<sup>53</sup> *Id.* at 27.

The reasonable suspicion test was meant to safeguard an individual's right to be free from unjustified invasions of their liberty and bodily integrity, while also giving police the ability to investigate suspicious people. To protect individuals, the Court prohibited officers from acting on their "inchoate and unparticularized suspicion[s] or 'hunch[es],'" including racial hunches.<sup>54</sup> Instead, the Court required that officers "point to specific and articulable facts" to justify the *Terry* stop.<sup>55</sup> The Court cautioned that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."<sup>56</sup> Furthermore, the Court was concerned both with the negative perceptions of police that existed within communities of color and with the problem of racially targeted policing.<sup>57</sup> This highlights the irony of what the *Terry* decision has produced. When the probable influence of implicit biases on police-public interactions is considered, it illuminates why the reasonable suspicion test cannot prevent intrusions based upon nothing more than racial hunches.<sup>58</sup> Rather, the test facilitates policing that inadequately protects liberty while simultaneously failing to further effective law enforcement.

First, as a result of implicit bias, officers' attention will be drawn more quickly to Blacks than to Whites, even if officers are not engaged in conscious racial profiling. Once this occurs, officers will be more likely to evaluate the ambiguous behaviors of Black civilians as aggressive, violent, or suspicious. Meanwhile, the impact of implicit white favoritism will make it more difficult for officers to evaluate the identical behaviors of White individuals as potentially criminal, even if Whites captured their attention. Rather, it would take more unambiguous evidence of criminality before officers will judge the behavior of Whites to be suspicious. Thus, implicit biases can result in police targeting, stopping, and searching Blacks more often than Whites, even in the absence of conscious racial bigotry on the part of officers and criminality on the part of individuals.

Second, "by allowing officers to act on their interpretation of ambiguous behaviors, the reasonable suspicion test actually permits, rather than prevents, actions based upon racial hunches."<sup>59</sup> As a result, the standard insufficiently protects the Fourth Amendment rights of Blacks. They will be stopped and frisked more often than similarly situated Whites, not because they are acting more suspiciously, but because implicit biases will impact how police interpret their ambiguous behaviors.<sup>60</sup>

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

<sup>55</sup> *Id.* at 21.

<sup>56</sup> *Id.* at 22.

<sup>57</sup> *Id.* at 14 & n.11.

<sup>58</sup> Richardson, *Arrest Efficiency*, *supra* note 7, at 2059.

<sup>59</sup> *Id.* at 2062–63.

<sup>60</sup> *Id.* at 2075.

To be sure, the reasonable suspicion test requires officers to justify their suspicions by articulating the facts that led them to feel suspicious. However, this does nothing to prevent actions based on racial hunches arising out of implicit bias. Implicit bias is not only unconscious, but it is also a heuristic the brain uses to discern the meaning of information. By its nature, implicit bias—the “suspicion heuristic”—will always operate in the presence of other *information*, which will nearly always offer a neutral articulable basis for the suspicion. Moreover, officers will not realize that their feelings were based on a racial hunch caused by the operation of implicit racial bias. In other words, officers will not realize that if the individual they observed had been White, they may not have noticed the behavior or may not have interpreted it as indicative of potential criminality. And, the record of their decisionmaking will not contain evidence permitting an outside observer to identify the racially influenced decisionmaking.

It is in this way that the effect of implicit bias on the officer’s interpretation of ambiguous behaviors can be understood as an inarticulable racial hunch. The officer’s feelings of suspicion will not be based upon some objectively suspicious behavior that he or she would inevitably have considered suspicious regardless of the race of the person engaged in it. Rather, his or her evaluation of the behavior as suspicious may be unintentionally influenced by unconscious, inarticulable racial biases—in other words, an unconscious racial hunch.<sup>61</sup> Hence, the reasonable suspicion test fails to prevent the police from acting on their racial hunches and thus fails to protect the Fourth Amendment rights of Black civilians in a manner that is comparable to Whites.

Furthermore, there is every reason to believe that officers on the street—not just in the laboratory—are affected by implicit bias. For one, simply thinking about crime can trigger unconscious racial biases.<sup>62</sup> Additionally, officers primarily conduct stops and frisks in indigent, urban, majority-minority communities, and officers working in these environments exhibit higher levels of implicit bias than those who do not.<sup>63</sup> Moreover, perceptions of disorder increase when a community is majority Black instead of majority White, even when the neighborhoods are otherwise similarly situated.<sup>64</sup> Thus, an officer patrolling an indigent, urban, majority Black neighborhood is more prone to judge ambiguous behaviors as suspicious, causing him or her to stop more individuals who are innocent. Finally, implicit biases are most likely to influence judgments in situations where decisionmaking is highly discretionary, information is limited and ambiguous, and individuals are cognitively depleted.<sup>65</sup> These are the conditions under which most police conduct stops and frisks.

Gathering more information and slowing down decision-making can mitigate

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<sup>61</sup> *Id.* at 2062.

<sup>62</sup> Eberhardt et al., *Seeing Black*, *supra* note 11, at 876–77, 883.

<sup>63</sup> Correll et al., *Across the Thin Blue Line*, *supra* note 20, at 1020.

<sup>64</sup> Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 *SOC. PSYCHOL. Q.* 319, 319–21, 336 (2004).

<sup>65</sup> *See, e.g.*, Eberhardt, *Seeing Black*, *supra* note 11, at 876.

the influence of these biases.<sup>66</sup> However, the *Terry* doctrine encourages officers to act on their initial suspicions under circumstances where an individual's appearance and demeanor, as well as the neighborhood they are located, are the main sources of information. Exacerbating this situation is the training officers receive and the methods for evaluating their performance. For at least the past decade, officers have been trained to resolve situations quickly.<sup>67</sup> Moreover, officers are often evaluated based on how many stops and frisks they complete during their shift. Both of these factors create incentives for officers to make quick decisions based on incomplete information. In sum, implicit biases can influence behaviors and judgments in systematic and predictable ways that can cause unjustified racial disparities and the *Terry* doctrine exacerbates their influence.

### B. *Fostering Negative Interactions and Constructing Reasonable Suspicion*

Upon interpreting ambiguous behaviors as potentially criminal, officers will confront the individual to confirm or dispel their suspicions. When approaching the individual, racial anxiety may cause both officers and individuals to exhibit behaviors that are consistent with aggression. The officer may interpret the person's behavior as evidence that the individual is armed, resulting in an invasive and humiliating frisk.<sup>68</sup> The individual may interpret the officer's behaviors as signaling that the officer poses a threat to their well-being. Thus, during the interaction, each will feed off the other's anxiety, causing each to interpret the other's ambiguous behaviors through a biased lens and increasing the chances that the interaction will escalate into the use of force. Consideration of racial anxiety thus reveals how racial disparities in frisks and uses of force can occur even in the absence of bad actors on either side of the interaction.

Furthermore, although the reasonable suspicion test purports to cabin officer discretion by prohibiting officers from seizing individuals based on their inchoate suspicions of criminality, post-*Terry* doctrine allows officers to create the very reasonable suspicion that is meant to limit their behaviors. The doctrine gives officers the ability to turn their racial hunches into reasonable suspicion to conduct a forcible seizure in the following way. In theory, all people have the right to avoid police contact so long as police do not have reasonable suspicion or probable cause to restrict their freedom of movement. As the Court has acknowledged, "an attribute of personal liberty protected by the Constitution" is the "right to remove from one place to another according to inclination[.]"<sup>69</sup> However, this right is illusory, especially for Black individuals who live in urban, majority-minority

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<sup>66</sup> Patricia G. Devine & Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 61, 72 (Todd D. Nelson ed., 2009).

<sup>67</sup> POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 5, 21–22 (2016).

<sup>68</sup> Richardson, *Arrest Efficiency*, *supra* note 7, at 2080.

<sup>69</sup> *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion) (citations and internal quotations omitted).

communities.

If officers want to engage with individuals, and those individuals choose to exercise their right to avoid them, officers often find this behavior to be suspicious.<sup>70</sup> In *Michigan v. Chesternut*, the Supreme Court made it clear that officers can pursue individuals who arouse their suspicions in this way without the necessity of reasonable suspicion or probable cause.<sup>71</sup> In *Chesternut*, four officers in a patrol car decided to pursue Chesternut after he ran away upon observing them.<sup>72</sup> Once they caught up to him, the officers drove alongside him for an unspecified amount of time.<sup>73</sup> Eventually they developed probable cause to arrest him for drug possession.<sup>74</sup>

Chesternut challenged the police pursuit, arguing that it constituted a seizure unsupported by the requisite level of suspicion. However, the Court held that no seizure had occurred.<sup>75</sup> Instead, it concluded that

the police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement. . . . While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, . . . [it] was not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.<sup>76</sup>

Thus, the decision endorsed the practice of officers following individuals, either in their patrol car or on foot, based solely on a mere hunch of criminality. Because implicit bias increases the chances that officers will view the ambiguous behaviors of Blacks with more suspicion than identical behaviors engaged in by Whites, police pursuits of people in the absence of articulable suspicion are more likely to burden Black individuals than White individuals. Furthermore, being pursued by the police, especially when they are exercising their right to avoid police contact, increases perceptions of police racism that contributes to racial anxiety.

Moreover, the Court also has limited the ability of certain groups to exercise their right to avoid police contact. In *Illinois v. Wardlow*, officers were patrolling a "high crime neighborhood" in search of criminal activity.<sup>77</sup> Upon noticing the

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<sup>70</sup> See *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

<sup>71</sup> 486 U.S. 567, 575–76 (1988).

<sup>72</sup> *Id.* at 569.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 572–73.

<sup>76</sup> *Id.* at 575–76 (citations omitted).

<sup>77</sup> 528 U.S. 119, 119 (2000).

police, Wardlow fled and officers pursued him.<sup>78</sup> The Court held that flight upon noticing the police in a high crime neighborhood gives rise to a reasonable suspicion of criminal activity.<sup>79</sup> This is the case even if prior to the civilian's flight, officers did not have the requisite suspicion to conduct a forcible seizure. Thus, in so-called high crime neighborhoods, officers can create a reasonable suspicion of criminality in order to act on their racial hunches simply by goading people into fleeing. They can do this by engaging in aggressive shows of authority such as shouting at people to halt or using their lights and sirens to pursue individuals walking down the street. The more aggressive they are, the more likely people might be to flee. If they flee, then officers have successfully created reasonable suspicion to conduct a forcible seizure. Thus, in high crime neighborhoods, officers can turn their inchoate hunches into reasonable suspicion to conduct a seizure simply by engaging in aggressive shows of force that scare people into fleeing.

This decision is more likely to affect Black individuals than White individuals. First, the phrase "high crime neighborhood" often is not based upon empirical proof or other objective measures that a particular neighborhood is actually high in crime. Rather, it is typically used to describe urban, majority-minority neighborhoods.<sup>80</sup> Second, as previously discussed, despite being similarly situated, majority Black neighborhoods are viewed as more disordered than majority White neighborhoods.<sup>81</sup> Third, even without being goaded by the police, the history of racialized law enforcement gives Blacks much more reason to worry about being victimized by police racism and thus, to want to avoid police contact more than Whites have. Thus, fleeing from police is completely consistent with innocence instead of guilt for Black individuals and other groups that have borne the brunt of stops and frisks and other similar proactive policing practices.

For many Black individuals, the constant stopping, questioning, and frisking of individuals within their communities is perceived as harassment, and foments distrust, anger, and other feelings not conducive to fostering good community-police relationships or perceptions of police legitimacy.<sup>82</sup> Empirical evidence consistently demonstrates that Black individuals bear the brunt of stops and frisks and other similar investigatory proactive policing practices. For instance, they are disproportionately asked for consent to search and are disproportionately the subjects of canine sniffs after stops are made.<sup>83</sup> As a result, people in these

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<sup>78</sup> *Id.* at 121.

<sup>79</sup> *Id.* at 121, 123–24.

<sup>80</sup> Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crimes Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 136 (2002).

<sup>81</sup> Sampson & Raudenbush, *supra* note 64.

<sup>82</sup> Richardson, *Arrest Efficiency*, *supra* note 7, at 2074; I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 843 (2008).

<sup>83</sup> Jeremy Gerner & Matthew Walberg, *Cops Still Stopping More Black and Hispanic Drivers than Whites*: ACLU, CHI. TRIB. (Aug. 13, 2014, 8:25 AM), <http://www.chicagotribune.com/news/ct-racial-profiling-traffic-stops-met-20140813-story.html>.

communities often view the police “as just another gang.”<sup>84</sup> These negative attitudes about law enforcement “begin crystallizing during adolescence when youths have greater opportunities for direct and indirect contact with officers . . . .”<sup>85</sup> Furthermore, distrust of the police can occur vicariously. For instance, high school students “observ[ing] other students [being] stopped and treated with disrespect” were less likely to trust police.<sup>86</sup>

As a result of *Chesternut* and *Wardlow*, the ability to avoid police contact is denied to the very Black individuals who have the most reason to believe that the police are racist—those living in indigent, urban, majority-minority neighborhoods overrun by police. If they walk away, they can be followed and if they run away, they can be chased and forcibly restrained. Thus, the implication of these decisions is that Black individuals do not have the same rights to avoid the police. Instead, they must submit or risk being pursued until they do.

Permitting officers to force interactions with Black individuals, primarily through shows of authority, exacerbates racial anxiety. First, being followed or chased by the police, especially when they are not engaged in criminal activity, provides individuals with evidence to confirm the stereotype of police racism.<sup>87</sup> Second, officers are more likely to use physical force against Black individuals after a chase.<sup>88</sup> Then, the racially disparate uses of force that result solidifies the stereotype of police racism, creating a reinforcing cycle of distrust and suspicion.

#### IV. CONCLUSION

Consideration of implicit bias and racial anxiety highlights why it is highly unlikely if not impossible for stops and frisks to be conducted in a manner that does not result in unjustified racial disparities. Instead, this practice decreases police-public trust and understanding, as well as community views of police legitimacy. Additionally, the racial disparities in police judgments of suspicion and uses of force that can result from both implicit bias and racial anxiety reinforce Black individuals’ perceptions that the police are racist and police concerns that they will be negatively stereotyped. Furthermore, although the *Terry* Court

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<sup>84</sup> David K. Shipler, Opinion, *Living Under Suspicion*, N.Y. TIMES (Feb. 7, 1997), <http://www.nytimes.com/1997/02/07/opinion/living-under-suspicion.html>.

<sup>85</sup> Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 181 (2009). See also Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 125–26 (2016).

<sup>86</sup> Flexon et al., *supra* note 85, at 186.

<sup>87</sup> As Justice Stevens noted in his *Wardlow* dissent, “[t]he resentment engendered . . . is aggravated, not mitigated, if the officer’s entire justification for the stop is the belief that the individual is simply trying to avoid contact with the police or move from one place to another—as he or she has a right to do (and do rapidly).” *Illinois v. Wardlow*, 528 U.S. 119, 128 n.1 (2000).

<sup>88</sup> See Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 11:00 AM), <https://www.motherjones.com/politics/2014/12/science-of-racism-prejudice/>.

expressly attempted to address the problem of distrust of the police in communities of color by permitting but regulating stops and frisks, the study of the *Terry* doctrine through the lens of implicit bias and racial anxiety demonstrates why that compromise was bound to fail.

In sum, the *Terry* doctrine facilitates a feedback loop of police-public suspicion and violence even when officers are consciously egalitarian and individuals are not engaged in criminal activity. Ending this cycle will require more than simply exhorting officers to treat individuals with courtesy and respect during stops and frisks, although this should be encouraged so long as stops and frisks continue. Rather, repairing the broken police-public relationship will require abandoning the practice.