

“All of the Mysticism of Police Expertise”: Legalizing Stop-and-Frisk in New York, 1961–1968

By Josh Segal*

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“Rome is burning,” exclaimed Richard H. Kuh to members of the New York State Legislature in late January, 1962.¹ A mere seven months earlier, he implied, the United States Supreme Court had set fire to long-standing police practices when it extended the exclusionary rule to the states in *Mapp v. Ohio*.² That ruling barred unlawfully seized evidence from admission in state criminal proceedings.³ Kuh—Administrative Assistant to the New York County District Attorney, Secretary of the State District Attorney’s Association, and Coordinator of the Combined Counsel of Law Enforcement Officials⁴—wanted the state legislature to put out the flames before New York’s law enforcement apparatus turned to ash. “We prosecutors believe that, ultimately, the *Mapp* decision may prove a boon to law enforcement, in that it soundly mandates that the law be enforced lawfully. But what constitutes ‘lawful’ enforcement of the law depends upon our statutes,” explained Kuh.⁵ If the courts forced police officers to obey the law, then the legislature should give the police a law worth obeying.

Two years later, the legislature granted Kuh’s request when it passed the so-called “stop-and-frisk statute.”⁶ That measure authorized police officers to stop and question individuals suspected of past, present, or potential criminal conduct and, when officers reasonably suspected danger, conduct a limited search for weapons.⁷ The law rendered the fruits of such a search, whether a weapon or other contraband, admissible as evidence in state

¹ Richard H. Kuh, Sec’y, Dist. Attorneys’ Ass’n of the State of N.Y., Statement Before the Temporary Commission on the Revision of the Penal Law and Criminal Code (Jan. 31, 1962) (transcript available in Manuscripts and Special Collections, New York State Archives). Specifically, Kuh was addressing the Legislature’s Temporary Commission on Revision of the Penal Law and Criminal Code.

² 367 U.S. 643 (1961).

³ The exclusionary rule “mean[s], quite simply, that ‘conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts’” *Id.* at 648 (quoting *Weeks v. United States*, 232 U.S. 383, 392 (1914), which first applied the exclusionary rule to federal criminal courts).

⁴ Kuh would go on to serve briefly as interim New York County District Attorney following the resignation of his long-time boss, Frank S. Hogan, in 1974. Robert M. Morgenthau subsequently defeated Kuh in the primary election that same year. Kuh had served as prosecutor in the infamous Lenny Bruce obscenity case, which may have undermined his candidacy. Wolfgang Saxon & Paul Vitello, *Richard H. Kuh, Ex-Manhattan Prosecutor, Dies at 90*, N.Y. TIMES, Nov. 18, 2011, at D8.

⁵ Kuh, *supra* note 1, at 16.

⁶ See Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2011)).

⁷ See *id.* § 180-a(1)–(2).

criminal courts,⁸ thereby attempting to clear the impediment posed by *Mapp*.⁹ Guided by the careful supervision of law enforcement administrators across the state, such stop-and-frisk practices won judicial approval from the New York Court of Appeals.¹⁰ Events in New York presaged and influenced national legal developments. When the United States Supreme Court authorized stop-and-frisk practices in its 1968 opinion, *Terry v. Ohio*,¹¹ it implicitly followed the core logic of the New York statute and case law—though it obscured that mimicry with harsh dicta criticizing the New York approach.¹²

This Note narrates the familiar transition from *Mapp* to *Terry* from a novel perspective. Drawing on prescriptive literature circulating within the New York City Police Department, it analyzes the development of the Fourth Amendment as it was understood and affected by New York law enforcement administrators. In their campaign to secure the constitutionality of stop-and-frisk practices, law enforcement administrators used the rhetoric of an increasingly influential administrative program—what historians have dubbed the “police professionalization movement”¹³—to argue that the law should respect the judgments of thoroughly professionalized police officers when those officers stopped suspicious persons on the streets. By making their officers into true professionals and presenting a professional image to the courts, law enforcement administrators sought to win judicial approval of stop-and-frisk practices.¹⁴ Simultaneously, they also sought to increase their control over the police rank-and-file.¹⁵ That strategy seemed to fail;¹⁶ police officers bucked professional norms and prosecutors presented flawed cases to the judiciary.¹⁷ But ironically the courts still gave administrators exactly what they wanted: The courts condoned stop-and-frisk and, along the way, they endorsed the image of the expert police professional. The view from New York suggests that the rhetoric, if not the reality, of police professionalism helped drive the development in Fourth Amendment jurisprudence from *Mapp* to *Terry*.

⁸ *Id.* § 180-a(2); *People v. Peters*, 219 N.E.2d 595, 598 (N.Y. 1966) (citing *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964)).

⁹ See discussion *infra* Part II.A.

¹⁰ See discussion *infra* Part IV.A.

¹¹ 392 U.S. 1 (1968).

¹² See discussion *infra* Part IV.A.

¹³ See generally ROBERT M. FOGELSON, *BIG-CITY POLICE* (1977) (offering the fullest historiographic treatment of the police professionalization movement).

¹⁴ See discussion *infra* Part III.A.i.

¹⁵ See discussion *infra* Part III.A.ii.

¹⁶ The limited character of my source base requires me to qualify my conclusion by noting that this failure is only apparent. Prescriptive literature, on which I rely, documents aspiration more fully than actuality. While my sources strongly suggest the failure of the administrators' program, they do not fully describe street-level police behavior.

¹⁷ See discussion *infra* Part III.B.i.

The traditional account of the transition from *Mapp* to *Terry* perceives a very different orientation in the two decisions.¹⁸ Though *Mapp* may have initiated the so-called “criminal procedure revolution”¹⁹ in 1961, that revolution was over by 1966 or 1967.²⁰ Perhaps more than any other decision, *Terry* marked the end of a constitutional era.²¹ As the United States Supreme Court subsequently explained, “*Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.”²² In the decades since, the precedent has served as the driving wedge in “a significant expansion of police investigative power and discretion.”²³ *Terry* expressed a newly deferential mood, indicating that in the future the Court would be far more solicitous of police authority.²⁴

¹⁸ Notably, the literature is somewhat sparse. As Michael Klarman noted fifteen years ago, there is minimal literature describing the forces driving the Warren Court’s innovative criminal procedure jurisprudence. Michael Klarman, *The Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62 (1996); see also Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1364 (2004) (repeating Klarman’s point).

¹⁹ See Lain, *supra* note 18, at 1364 n.14 (citations omitted) (“The phrase ‘criminal procedure revolution’ is commonly used to refer to the Warren Court’s rulings in the 1960s that extended new constitutional protections to criminal defendants in state courts.”).

²⁰ Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 2–3 (1995).

²¹ *Id.* at 5 (“The Chief Justice’s majority opinion in *Terry v. Ohio* . . . is a dramatic demonstration of the Warren Court’s change in tone and attitude.”); see also Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *the Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* 64 (Vincent Blasi ed., 1983) (contrasting the Court’s attitudes toward the exclusionary rule in *Mapp* and *Terry*); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 95–96 (1998) (quoting Kamisar approvingly); Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010) (citing Kamisar’s account as the “standard story”).

²² *Dunaway v. New York*, 442 U.S. 200, 208–09 (1979).

²³ Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 PENN ST. L. REV. 1205, 1206 (2005); see also William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2152 (2002) (“[T]he Supreme Court inaugurated a generation-long turn toward more favorable rules for police with its decision in *Terry v. Ohio*, allowing brief stops and frisks based on reasonable suspicion of crime—a significantly softer standard than probable cause.”). More recently, however, revisionist scholarship has challenged the consensus account by emphasizing theoretical continuity in the Warren Court’s Fourth Amendment decisions or doctrinal continuity between *Terry* and pre-Warren Court jurisprudence. See Miller, *supra* note 21, at 4–5 (“[T]he central concern of the Warren Court’s Fourth Amendment jurisprudence was the republican interest in personal security, understood as non-domination. Extending security into areas hitherto unregulated by the law was a major concern of the Warren Court throughout its tenure, exemplified by its decision in *Terry*.”); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 424–31 (2006) (emphasizing doctrinal continuity).

²⁴ As Justice Frankfurter long ago noted, sometimes a “mood” is enough. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (referring to the Administrative Procedure Act, rather than the Fourth Amendment).

To most scholars, *Terry*'s new orientation reflected a shift in national attitude.²⁵ According to Corinna Barrett Lain, the decision “was a complete capitulation to law enforcement interests at a time when ‘law and order’ dominated the national mood.”²⁶ Scholars have cited rising crime rates, national rioting, campus unrest, political assassinations (and attempted assassinations), and weakening public commitment to civil rights to explain the rising salience of law and order.²⁷

Yet, for all its insight, this account explains the origins of *Terry* at an extraordinarily high level of generality.²⁸ Recounting the shift from *Mapp* to *Terry* from the perspective of the New York City Police Department glosses that transformation at a lower level of generality that is more attentive to the details of police work, administration, and intradepartmental conflict. From these lower heights, *Terry* represented more than a mere capitulation to police interests. Rather, the Court expressed a particular vision of police practice that emphasized the expert capacities of thoroughly professionalized police officers to detect suspicious behavior and enhanced the authority of law enforcement administrators vis-à-vis the police rank-and-file.²⁹

²⁵ In his dissent, Justice Douglas also recognized such strong public pressure. See *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) (“There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.”). In private correspondence, Justice Brennan also recognized such pressure. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 825–26 (1998) (citing Letter from Justice William J. Brennan, Jr., United States Supreme Court, to Chief Justice Earl Warren, United States Supreme Court (Mar. 2, 1968)).

²⁶ Lain, *supra* note 18, at 1369.

²⁷ See, e.g., Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 892–93 (1998); Kamisar, *supra* note 20, at 3; Lain, *supra* note 18, at 1444–51; Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1317–19 (1998); Stuntz, *supra* note 23, at 2150–56. The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211–25 (1968) (codified as amended at 18 U.S.C. §§ 2510–2522 (2006)), and that year’s presidential campaign were representative of these new politics. See generally MICHAEL J. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM*, 42, 55–56, 133–35, 175–76 (2005); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 236–43 (2011).

²⁸ As Bruce Ledewitz has put it, “[e]fforts to link judicial decisions to large scale social and political trends tend to be so general as to be almost useless.” Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL’Y 373, 453 (2004) (offering a kind-hearted rebuke of Stuntz’s theory that *Terry* was motivated by rising crime rates).

²⁹ In highlighting the significance of police professionalism in *Terry* and the developments in New York that preceded it, I follow the example of David Sklansky, who has recently argued that the Warren Court’s criminal procedure revolution partially expressed the influence of the police professionalization agenda. DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 33–58 (2008). Sklansky notes the link between police professionalization and Warren Court jurisprudence in passing, as part of a larger argument concerning the influence of pluralist theories of democracy on period conceptions of policing. Sklansky argues that police administrators and courts alike sought to reduce the discretion of rank-and-file officers, potentially generating judicial sympathy toward police supervisors. *Id.* at 46–47. Sklansky is correct in the broad contours of his argument but somewhat misleading in the particulars. As I will argue below, police administrators leveraged the threat of judicial review to augment their

Whatever the Court might have believed about the merits of the professionalization agenda, it followed the cue of law enforcement administrators when it decided *Terry*.

This Note proceeds in four parts. Part I very briefly reviews the police professionalization movement. Part II outlines the havoc that *Mapp* unleashed on New York City law enforcement, which partially motivated the passage of the state's stop-and-frisk statute. Law enforcement administrators subsequently sought to secure the constitutionality of that statute in a campaign that, as Part III documents, seemed to fail. Despite this failure, Part IV explains, the New York Court of Appeals and the United States Supreme Court approved police stop-and-frisk practices. In doing so, both courts exhibited substantial deference to the expert judgments of rank-and-file police officers. The courts effectively accepted the image of the police professional, even though that image failed to depict accurately the reality before them.

I. "DISCIPLINARY IN CHARACTER": POLICE PROFESSIONALIZATION

The police professionalization movement proceeded in two waves, as Robert Fogelson, the movement's most thorough historian, has documented.³⁰ The first wave drew from the good government strains of turn-of-the-century progressivism in an effort to emancipate police departments from the control of urban political machines.³¹ Led by August Vollmer—the long-time Chief of the progressive Berkeley Police Department and, according to his biographers, “the dominant spokesman for police reform in this century”³²—reformers attempted to maximize police efficiency.³³

In the 1950s, a second wave of professional reform arose, cresting in the 1960s. O.W. Wilson—Vollmer's disciple, Dean of the University of California, Berkeley's School of Criminology (the first of its kind in the nation), and reforming commissioner of the Chicago Police Department—led this second wave of reformers. Wilson brought many Progressive period ideas and attitudes into a new era, while adding his own innovations in the process.³⁴ This new generation of professional policing advocates emphasized sound bureaucratic organization; absolute political independence; rigorous recruitment, training, and personnel policies; and the application of “scien-

bureaucratic authority over the police rank-and-file. Yet, that bureaucratic supervision was intended only to inculcate professional norms in the police rank-and-file.

³⁰ See FOGELSON, *supra* note 13, at 11.

³¹ See *id.* at 67–92; see also SKLANSKY, *supra* note 29, at 35.

³² GENE E. CARTE & ELAINE H. CARTE, *POLICE REFORM IN THE UNITED STATES: THE ERA OF AUGUST VOLLMER, 1905–1932*, at 2 (1975).

³³ See generally AUGUST VOLLMER, *THE POLICE AND MODERN SOCIETY* (1936).

³⁴ Joshua A. Segal, “We Must Do Something Ourselves”: *Police Reform and Police Privatization in Chicago's Hyde Park, 1960–1970*, in *CHICAGO STUDIES* 163, 176–77 (Kathleen Neils Conzen et al. eds., 2008) (collecting sources concerning Wilson's legacy and biography); see generally WILLIAM J. BOPP, “O. W.”: *O. W. WILSON AND THE SEARCH FOR A POLICE PROFESSION* (1977).

tific,” technical knowledge to policing problems.³⁵ They were driven, above all, by a desire to improve the quality of police services and by an aspiration to “raise the status of the big-city police.”³⁶

The second wave of police professionalization in New York City, as elsewhere, originated in a crackdown on perceived corruptions, abuses, and inefficiencies within the Department.³⁷ In response to a series of scandals in the early 1950s and the ensuing community outcry, the New York City Police Department revamped its personnel policies. It established a disciplinary institution, the Civilian Complaint Review Board, and adopted rigorous personnel screening policies for recruitment.³⁸ Meanwhile, Mayor Robert F. Wagner, Jr. scrupulously respected the autonomy of the Department.³⁹ Expanding attention to recruitment was mirrored by improvements in the Department’s training programs, including an oft-cited agreement with the City College to award course credits for the completion of the Police Academy program.⁴⁰ In 1959, Governor Rockefeller spread the New York City program across the state, sponsoring legislation setting minimum recruit qualifications and training requirements, which were supervised by the Municipal Police Training Council.⁴¹ Unsurprisingly, the Council seems to have often looked to the New York City Police Department for inspiration.⁴²

Much to the displeasure of administrators, however, maximizing the quality and training of incoming recruits, as well as punishing egregiously

³⁵ On the police professionalization model and the nation-wide reform movement, see FOGELSON, *supra* note 13, at 189; Edward J. Escobar, *Bloody Christmas and the Irony of Police Professionalism: The Los Angeles Police Department, Mexican Americans, and Police Reform in the 1950s*, 72 PAC. HIST. REV. 171, 175–77 (2003).

³⁶ FOGELSON, *supra* note 13, at 157.

³⁷ See *id.* at 171–76. For a similar series of events in Chicago, see Segal, *supra* note 34, at 173–83.

³⁸ See MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POST-WAR NEW YORK CITY 202–07* (2003); FOGELSON, *supra* note 13, at 141–42, 172, 180–81; INST. OF PUB. ADMIN., *THE NEW YORK POLICE SURVEY: PREPARED FOR THE MAYOR’S COMMITTEE ON MANAGEMENT SURVEY* (1952) [hereinafter *POLICE SURVEY*]; MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 222–28* (2003); Salvatore La Barbera, *The Development of Character Screening Procedures in the Selection of New York City Policemen* (pts. 1 & 2), *POLICE MGMT. REV.*, Oct. 1963, at 13, 13–15, *POLICE MGMT. REV.*, Nov. 1963, at 17; Melvin James Grant, *An Evaluation of the New York City Police Department’s Civilian Complaint Review Board in the Field of Civil Rights 13–32* (June 1962) (unpublished M.P.A. thesis, City Univ. of New York) (on file with author).

³⁹ See *Administration Changes*, *SPRING 3100*, Dec. 1965, at 1; cf. FOGELSON, *supra* note 13, at 176.

⁴⁰ See, e.g., Gerald M. Leonard, *The Police Science Undergraduate Program*, *POLICE MGMT. REV.*, Apr. 1964, at 8; *Self-Portrait*, *SPRING 3100*, July–Aug. 1959, at 1, 42–44.

⁴¹ On the history of the Council, see Otto H. Saltenberger, *Mandated and Voluntary State Level Police Training Programs: A Comparison of Some Administrative Aspects of the New York Municipal Police Training Council and the California Commission on Police Officer Standards and Training 15–39* (July 1968) (unpublished M.P.A. thesis, City Univ. of New York) (on file with author).

⁴² The New York City Police Commissioner occupied the Council’s only permanent seat (of eight). For an example of the use of New York City Police Department training materials, see *MPTC to Distribute NYC Bulletin*, *MUN. POLICE TRAINING COUNCIL BULL.*, May 1964, at 1.

abusive or corrupt officers, were insufficient to stave off foot dragging and maximize efficiency. Incoming Police Commissioner Michael Murphy still felt the need in 1961 to admonish that, "I expect renewed devotion to duty and intensified effort to serve the city honestly and competently."⁴³ Following the cue of the nation's leading professional authorities, personnel within the Planning Bureau emphasized that discipline did not simply refer to a reactive system of punishment, but also to an organizationally sound, positive economy of inducements.⁴⁴ After all, patrol was often a lonely activity that left the beat officer on "his own and not subject to proximity supervision. It would be impossible, even if it were desirable, to direct or even immediately to supervise the major portion of his activities."⁴⁵ In response to the isolation inherent to police patrol, law enforcement administrators sought to force line officers to internalize professional norms.⁴⁶

Above all, departmental administrators attempted to make everyday behavior on patrol bureaucratically legible, even if it was physically invisible to distant supervisors. Perhaps the most essential feature of this bureaucratic project was the Department's records system. Certainly, a properly organized records system facilitated the performance of essential police functions by channeling information about crime conditions through the Department. But it also augmented supervisory authority. The Department, explained one member of the Planning Bureau, was "confronted with administrative problems equal to—if not greater than—those faced by the heads of the largest corporations."⁴⁷ And police commanders were to mimic the same bureaucratic practices as their corporate peers: "The most effective instrument which an executive can employ is a record system that accurately reflects the activities of his organization."⁴⁸ Precinct desk lieutenants

⁴³ Michael J. Murphy, *The Commissioner's Message*, SPRING 3100, Apr. 1961, at 1, 1.

⁴⁴ See, e.g., O. W. WILSON, *POLICE ADMINISTRATION* 173–77 (2d ed. 1963). For information on Wilson's reforms in Chicago, which offer a purer version of the model, see Segal, *supra* note 34, at 183–208.

⁴⁵ Matthew J. Neary, *Motivating the Foot Patrolman*, POLICE MGMT. REV., Nov. 1963, at 4, 7. For similar sentiments from a nationally prominent proponent of police professionalization, see William H. Parker, *Police Philosophy*, in PARKER ON POLICE 28 (O. W. Wilson ed., 1957). For an extended treatment of the same issue, see Matthew J. Neary, *Motivating the Foot Patrolman* (June 1968) (unpublished M.P.A. thesis, City Univ. of New York) (on file with author). On the loneliness of patrol, see *Patrol*, SPRING 3100, July–Aug. 1960, at 7, 11, 21.

⁴⁶ See, e.g., Herman Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 160, 165 (1967). According to Goldstein:

[I]t is a far more complex task to elicit conformance with established standards of conduct when one or two officers are functioning on their own in the nooks and crannies of a built-up and highly congested urban area. The only effective form of control, under such conditions, is an ingrained desire on the part of the officers to want to act properly.

Id.

⁴⁷ Adam D'Alessandro, *The Role of Forms Control in Police Work*, POLICE MGMT. REV., Jan. 1964, at 4, 4.

⁴⁸ *Id.* at 5.

regulated local police activities by monitoring and managing their personnel's paperwork, flagging incidents that required follow-up, and compiling statistical summaries to guide promotions, among other things.⁴⁹ As Bruce Smith, a leading professional policing advocate whose 1952 recommendations helped streamline the Department's records system, once put it:

[Paperwork is] disciplinary in character. In complex undertakings performed by many men, precision and certainty in action and control over far-flung operations can be secured in some degree through requirements that the manner of performance shall be so recorded that the written record can be summarized, tabulated, and otherwise adapted to the needs of administrative review. With the aid of reliable control records an alert administrator can project his policies and the driving force behind them much further than would otherwise be possible.⁵⁰

As a survey published in 1967 revealed, however, the Department's resurgent employee organization, the Patrolmen's Benevolent Association (“PBA”), often resisted administrative attempts to extract ever-greater efforts from patrolmen.⁵¹ Partially in reaction to the increasingly robust professionalization drive in the Department, the PBA overcame a period of postwar malaise and consolidated itself into a powerful force within the Department by the 1950s.⁵² In addition to struggling for personnel benefits and winning both the payroll check-off⁵³ in 1959 and formal recognition as a bargaining agent in 1963,⁵⁴ the PBA continually struggled over personnel regulations. As one perceptive observer has put it, “the Association has worked for personnel regulations that would reduce the stringency of Department supervision, establish grievance procedures, and deploy the force in a manner acceptable to the men and their organization.”⁵⁵ When reforming Commissioner Stephen P. Kennedy pressed his professionalization

⁴⁹ *Self-Portrait*, *supra* note 40, at 8–9.

⁵⁰ Bruce Smith, *Foreword* to O. W. WILSON, *POLICE RECORDS: THEIR INSTALLATION AND USE*, at vii, vii–viii (1942). For information on Smith's background, see FOGELSON, *supra* note 13, at 141–42. For information on the implementation of forms control in 1954, see *POLICE SURVEY*, *supra* note 38; D'Alessandro, *supra* note 47, at 6.

⁵¹ See INT'L ASS'N OF CHIEFS OF POLICE, *AN ORGANIZATIONAL STUDY OF THE POLICE DEPARTMENT*, NEW YORK CITY, NEW YORK 5 (1967).

⁵² James Priest Gifford, *The Political Relations of the Patrolmen's Benevolent Association in the City of New York, 1946–1969*, at 29–41 (1970) (unpublished Ph.D. dissertation, Columbia Univ.) (on file with author).

⁵³ The payroll check-off is an employee's voluntary agreement to have union dues automatically deducted from her paycheck with the consent of the employer. ELISE GAUTIER & HENRY WILLIS, *NAT'L LAWYER'S GUILD: NAT'L LABOR & EMP'T COMM.*, 2 *EMPLOYEE & UNION MEMBER GUIDE TO LABOR LAW* § 11:15 (2011).

⁵⁴ Gifford, *supra* note 52, at 104–05.

⁵⁵ *Id.* at 129.

program too aggressively and too imperiously in the early 1960s, the PBA helped force him to resign.⁵⁶

Ultimately, then, police professionalization was a top-down phenomenon that administrators sought to impose via intrusive workplace controls over subordinates. This observation has led David Sklansky to note, with some accuracy, that reformers sought to implement “a professionalism of *police forces*, not of *police officers*.”⁵⁷ Despite the prevalence of workplace controls, however, those coercions were intended to force police officers to internalize professional norms⁵⁸—that is, to make the rank-and-file genuinely professional. As I will argue below, the state legislature and the courts respected precisely that expertise.⁵⁹ When the judiciary ultimately approved stop-and-frisk practices, it overlooked strong evidence that the police rank-and-file had failed to abide by the workplace norms their superiors attempted to impose.⁶⁰

II. “TO RENDER EVIDENCE SO OBTAINED ‘LEGALLY OBTAINED’”: *MAPP* V. *OHIO* AND THE ORIGINS AND STRUCTURE OF THE STOP-AND-FRISK STATUTE

New York’s stop-and-frisk statute was passed at the behest of law enforcement officials in an effort to address policing problems in the aftermath of *Mapp v. Ohio*,⁶¹ which had extended the exclusionary rule to the states and undermined traditional police practices in New York City.⁶² To some observers, the statute’s structure reflected the legislature’s respect for the professional judgments of professional police officers.⁶³

A. “Hamstrung” Police: Responding to *Mapp v. Ohio*

To legal observers in New York City, *Mapp* wreaked havoc on the local criminal justice system. Whether they welcomed the new ruling or denounced it, all agreed that it required a revision of formerly commonplace police practices.⁶⁴ Prior to *Mapp*, the United States Supreme Court had in-

⁵⁶ See *id.* at 173–89.

⁵⁷ SKLANSKY, *supra* note 29, at 37.

⁵⁸ See, e.g., *supra* text accompanying note 46.

⁵⁹ See discussion *infra* Parts II.B, IV.

⁶⁰ See discussion *infra* Part III.B.

⁶¹ 367 U.S. 643 (1961).

⁶² See discussion *infra* Part II.A.

⁶³ See discussion *infra* Part II.B.

⁶⁴ See, e.g., NATHAN R. SOBEL, A COMMENT ON THE LAW OF SEARCH AND SEIZURE 1–5 (1961); New York Police Academy, *Evidence and Testimony (Problems and Trends)*, THE POLICE ACADEMY UNIT TRAINING MEMO, Jan. 1966, at 3, 3–4; Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York* (pts. 1 & 2), N.Y. L.J., Sept. 18, 1962, at 4 [hereinafter Kuh, *One Year After* (pt. 1)]; N.Y. L.J., Sept. 19, 1962, at 4 [hereinafter Kuh, *One Year After* (pt. 2)]; Ellsworth A. Monahan, *Search and Seizure*, 33 SPRING 3100 1, 2 (1962). Nationally prominent leaders of the policing profession aggressively denounced the exclusionary rule. William Parker, Chief of the Los Angeles Police Department and one of the

terpreted the Constitution to require the exclusionary rule only in federal courts.⁶⁵ Even after the United States Supreme Court applied the Fourth Amendment’s search and seizure provisions to the states in 1949, it refused to impose the exclusionary rule and instead allowed the states to provide their own remedies for constitutional violations.⁶⁶ New York declined to embrace the rule and left standing a 1926 judicial opinion to that effect.⁶⁷ New York had ample company: In 1960, the year preceding *Mapp*, twenty-four of the fifty states admitted unlawfully seized evidence in their criminal courts,⁶⁸ though the states were adopting the exclusionary rule at an accelerating rate.⁶⁹ Commentators noted that, in these jurisdictions, police and prosecutors would have to alter their practices dramatically in the aftermath of *Mapp*.⁷⁰

The ruling’s effect was especially robust on what one observer called the “contraband cases” concerning drugs, weapons, or gambling paraphernalia.⁷¹ This attenuation of police power in the underground economy appeared at a moment of rising police concern with drug trafficking and illicit gambling, which may have made the crisis more acute.⁷² In the first year of

most influential proponents of the professional policing model, called the exclusionary rule “catastrophic.” William H. Parker, *The Cahan Decision Made Life Easier for the Criminal*, in PARKER ON POLICE 113, 114 (O. W. Wilson ed., 1957). For more restrained views, see Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 439–44 (1964); O. W. Wilson, *How Do We Live with Mallory, Mapp and Sun?*, NEWS RELEASE, CHI. POLICE DEP’T, Aug. 13, 1963 (on file with Princeton Univ., Seeley Mudd Library).

⁶⁵ See, e.g., *Lustig v. United States*, 338 U.S. 74, 78–79 (1949) (explaining the so-called silver platter doctrine of *Byars v. United States*, 273 U.S. 28, 33 (1927)); *Byars v. United States*, 273 U.S. 28, 33 (1927) (applying the exclusionary rule only to evidence seized by federal agents or at their suggestion); *Weeks v. United States*, 232 U.S. 383, 398 (1914).

⁶⁶ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁶⁷ *People v. Richter’s Jewelers, Inc.*, 51 N.E.2d 690, 693–94 (N.Y. 1943) (reaffirming *People v. Defore*, 150 N.E. 585, 589–90 (N.Y. 1926)); see also William I. Siegel, *The New York “Frisk” and “Knock-Not” Statutes: Are They Constitutional?*, 30 BROOK. L. REV. 274, 275–76 (1964) (describing doctrinal developments from *Defore* to *Richter’s Jewelers*).

⁶⁸ *Elkins v. United States*, 364 U.S. 206, 224–25, tbl.1.1 (1960); see also E.H. Schopler, Annotation, *Modern Status of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R.2d 531, 556–68 (1956).

⁶⁹ Lain, *supra* note 18, at 1379–82.

⁷⁰ See, e.g., Arlen Specter, *Mapp v. Ohio: Pandora’s Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962); see generally Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (1962).

⁷¹ SOBEL, *supra* note 64, at 2; see also Kuh, *One Year After* (pt. 1), *supra* note 64, at 4; Kuh, *supra* note 1, at 7. National commentators agreed. See, e.g., LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 3–4, 12–14 (1967).

⁷² New York City police officials believed that underground economies in drugs and gambling implicated their habitués in other, more socially dangerous criminal activity. *The Scourge of Narcotics*, 29 SPRING 3100 6, 7–8 (1958). On the “rising tide” of drug use, and the public outcry it generated, see ERIC C. SCHNEIDER, SMACK: HEROIN AND THE AMERICAN CITY 98–115 (2008). In the mid-1960s, the Department believed that nearly 45% of individuals arrested were drug users. New York Police Academy, *Narcotics and the Law*, THE POLICE ACADEMY UNIT TRAINING MEMO, Apr. 1964, at 2, 3 [hereinafter *Narcotics and the Law*]. The Department also believed at the time that gambling funded organized crime; cf. New York

the ruling, policy prosecutions decreased by over 35% in New York City; drug convictions dropped by almost 40%.⁷³ In 1962, monthly arrests for the Department's Drug Bureau leveled off significantly below their 1960 totals.⁷⁴ As late as 1966, the Chief Judge of the New York Court of Appeals argued that *Mapp* inadvertently worked to "insure and safeguard the professional criminal, especially the narcotics dealer and the gambler."⁷⁵

As these figures suggest, police practices prior to *Mapp* regularly generated unlawfully seized evidence, especially derived from efforts to suppress underground economic activity.⁷⁶ The temporary detention of suspicious persons was central to this policing regime. The New York City Police Department's *Rules and Procedures* ordered patrolmen to "[i]nvestigate all suspicious circumstances," including "persons passing late at night with bundles or persons loitering about or acting suspiciously."⁷⁷ Officers were encouraged to "stop any person or operator of a vehicle for the purpose of identification and to satisfy himself that such person is on legitimate business."⁷⁸ If officers sometimes searched individuals unlawfully it was, as a chagrined Richard Kuh explained, "largely irrelevant" because it was usually beyond the scope of judicial redress.⁷⁹

Anecdotal evidence suggests that the Department (if not Kuh's District Attorney's Office) condoned and encouraged the search of seemingly suspicious individuals on the street. In the Department's monthly publication, a

Police Academy, *Public Morals Laws Enforcement*, THE POLICE ACADEMY UNIT TRAINING MEMO, Apr. 1966, at 3, 6 [hereinafter *Public Morals Law Enforcement*].

⁷³ *Policy Prosecutions Here Cut by Curb on Evidence*, N.Y. TIMES, July 16, 1962, at 1, available at ProQuest Historical Newspapers: The New York Times (1851–2008); Leonard E. Ryan, *Narcotics Case Convictions Drop Since Ban on Illegal Searches*, N.Y. TIMES, Sept. 19, 1962, at 35, available at ProQuest Historical Newspapers: The New York Times (1851–2008); see also PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 188 (1969) (citing an unpublished study that found narcotics misdemeanor cases "dropped off drastically" on the basis of quantitative analysis of arrest affidavits in narcotics possession cases in the months surrounding *Mapp*); James Booker, *Many Are Happy over Court Decision*, N.Y. AMSTERDAM NEWS, July 8, 1961, at 9, available at ProQuest Historical Newspapers: The New York Amsterdam News (1922–1993).

⁷⁴ James P. Morgan, Jr., *Drug Addiction: A Criminal or Medical Problem for the Community* 76 (Feb. 1964) (unpublished M.P.A. thesis, City Univ. New York) (on file with author).

⁷⁵ Austin C. Wehrwin, *Desmond Asserts High Court Ruling Foils Police*, N.Y. TIMES, Apr. 30, 1966, at 13, available at ProQuest Historical Newspapers: The New York Times (1851–2008). But see John F. Skelly, *Portrait of a Precinct 127* (Jan. 1969) (unpublished M.P.A. thesis, City Univ. of New York) (on file with author) (arguing that conviction rates once again returned to normal as vice officers accommodated themselves to the new legal regime, partially by perjury).

⁷⁶ According to Leonard E. Reisman, the New York City Police Department's Deputy Commissioner for Legal Matters, "prior to *Mapp*, search warrant usage was negligible; in 1963, after *Mapp*, 5,132 search warrants were used in that city." TIFFANY ET AL., *supra* note 71, at 100 n.6 (citing Letter from Leonard E. Reisman, Deputy Commissioner of Police for Legal Matters, New York City Police Department, to author (June 8, 1964)). Of these, 4,282 were for gambling cases and 682 for narcotics. *Id.* Such practices may have been common across the nation. See, e.g., Lain, *supra* note 18, at 1371–72.

⁷⁷ N.Y. CITY POLICE DEP'T, RULES AND PROCEDURES 43 (1956).

⁷⁸ *Id.*

⁷⁹ Kuh, *supra* note 1, at 17.

celebratory description of the patrolmen’s typical workaday routine urged officers to “give a quick toss to the guys you spot in the darkened doorway.”⁸⁰ The article included the photograph of a man being frisked next to a caption admonishing that “[t]he vagrant, the ne’er-do-well, the suspicious are halted and checked.”⁸¹ In a report issued in 1960, the Mayor’s Committee on Harlem Affairs recommended to the Department that “illegal searches and seizures not be condoned *as has evidently been the practice*.”⁸² Indeed, that practice was so thoroughly integrated into New York’s policing regime⁸³ that many assumed that the police had always been empowered to stop and frisk suspicious persons on the street.⁸⁴

New York’s stop-and-frisk statute was designed to vindicate that assumption by clarifying the police officer’s street-level authority in the aftermath of *Mapp*. New York Governor Nelson A. Rockefeller introduced the measure with the explanation that a remedy is “urgently needed because the present law . . . is uncertain and because the police must be provided *now* with sound tools to carry out their sworn duty to protect the public.”⁸⁵ As he acknowledged, the measure had been crafted in collaboration with the New York Combined Council of Law Enforcement Officials,⁸⁶ a recently formed lobbyist group led by the New York State District Attorneys’ Association and composed of similar organizations of publicly employed, upper-level

⁸⁰ *Patrol*, *supra* note 45, at 21.

⁸¹ *Id.* at 11.

⁸² MAYOR’S COMM. ON HARLEM AFFAIRS, INITIAL RECOMMENDATIONS SUBMITTED BY THE SUBCOMMITTEE ON LAW ENFORCEMENT AND APPROVED BY THE FULL COMMITTEE WITH REPORT OF ADMINISTRATION EVALUATION AND ACTION 3 (1960) (on file with Schomburg Center for Research in Black Culture) (emphasis added).

⁸³ Remo Franceschini, a New York City detective, recalled that he and his colleagues had frisked suspicious looking persons regularly:

That all stopped with *Mapp v. Ohio* All of a sudden you couldn’t stop a guy on the street and give him a toss [frisk]. You had to have probable cause. You couldn’t bring somebody in because you knew he was dirty, you had to see him being dirty. The exclusionary rule essentially shut down police procedure that had been going on for a hundred years.

REMO FRANCESCHINI, A MATTER OF HONOR: ONE COP’S LIFELONG PURSUIT OF JOHN GOTTI AND THE MOB 35–36 (1993), *quoted in* David A. Hartis, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 978 (1998).

⁸⁴ N.Y. STATE COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, POLICE PROTECTION: MORE OR LESS? 4 (1964) [hereinafter POLICE PROTECTION]; Letter from Julius Volker to Sol Neil Corbin (Feb. 25, 1964) (on file with New York State Library).

⁸⁵ Nelson A. Rockefeller, Annual Message to the Legislature (Jan. 8, 1964), *in* NEW YORK STATE, PUBLIC PAPERS OF NELSON A. ROCKEFELLER: FIFTY-THIRD GOVERNOR OF THE STATE OF NEW YORK 17–18 (1964).

⁸⁶ *Id.*

administrative personnel within the criminal justice system.⁸⁷ New York City-based officials figured prominently within the Combined Council.⁸⁸

The Combined Council refused to equivocate about its objectives: “Recent Judicial Interpretations on search and seizure,” it explained, “have placed a roadblock in the path of justice—an encumbrance which must be removed.”⁸⁹ As early as 1962, the Combined Council had included legislative revision of the law of search and seizure on its lobbying agenda.⁹⁰ Opponents of the bill also recognized it as an effort to avoid “the additional work required of the district attorney[']s office by the *Mapp* decision.”⁹¹

On its face, the proposed legislation was a protective measure designed to guard police officers from the potential hazards of their occupation. In the language of the bill, only when an officer “has reasonable cause to believe he is in danger of life” would he be entitled to “search . . . for a dangerous weapon.”⁹² Of course, police vulnerability to attack was a significant problem.⁹³ Few proponents of the bill, however, scrupled to deny its double purpose. As the measure’s sponsor in the Assembly put it:

The real necessity for the bill . . . is contained in paragraph 2[,] which provides that the police officer may take into his possession evidence found after the search. This is in response to the many court rulings[,] which have suppressed evidence unless it was ob-

⁸⁷ POLICE PROTECTION, *supra* note 84, at 15; N.Y. STATE COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, LET YOUR POLICE—POLICE! 1–2 (1963) [hereinafter LET YOUR POLICE—POLICE!]; Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 463 (1967) (noting that the Combined Council “sponsored and pushed through New York’s stop-and-frisk law”); Douglas Dales, *2 Bills Prepared on Police Search*, N.Y. TIMES, Jan. 21, 1964, at 18, available at ProQuest Historical Newspapers: The New York Times (1851–2008); Recollections of Dick Kuh Concerning the New York State District Attorneys’ Association (Feb. 2, 1998) (on file with New York State Library, Manuscripts and Special Collections).

⁸⁸ Included among its twelve top officials in 1964 were the District Attorneys of New York, Kings, and Richmond Counties, the New York City Police Commissioner, the New York Harbor Waterfront Commissioner, the New York County Grand Jury Association President and Kuh, who served in the New York County District Attorney’s Office when he was not coordinating the work of the Combined Council. For a list of officials in 1964, see POLICE PROTECTION, *supra* note 84.

⁸⁹ LET YOUR POLICE—POLICE!, *supra* note 87, at 1.

⁹⁰ See Kuh, *One Year After* (pt. 2), *supra* note 64; Richard H. Kuh, *Reflection on New York’s ‘Stop-and-Frisk’ Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 32, 37–38 (1965); Kuh, *supra* note 1.

⁹¹ Telegram from Andrew R. Tyler to Manfred Ohrenstein (Feb. 16, 1964) (on file with New York State Library); cf. N.Y. STATE BAR ASS’N, REPORT OF NEW YORK STATE BAR ASSOCIATION COMMITTEE ON PENAL LAW AND CRIMINAL PROCEDURE ON SENATE INTRODUCTORY NO. 1207 (ca. 1964) (on file with New York State Library) (“This bill seeks to avoid the holding of *Mapp v. Ohio*.”).

⁹² Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2011)).

⁹³ See *Patrol*, *supra* note 45, at 7, 24; *Patrol Is the Essence*, SPRING 3100, July–Aug. 1960, at 2, 7, 24; New York Police Academy, *Routine Jobs*, THE POLICE ACADEMY UNIT TRAINING MEMO, Feb. 1963, at 2, 3; *Routine Patrol*, SPRING 3100, June 1962, at 1, 1; Memorandum from George A. Murphy to Nelson A. Rockefeller (ca. 1964) (on file with New York State Library).

tained in strict accordance with the rules of the game as set up by the courts since the decision of *Mapp* against *Ohio*. The salutary effect of this bill is to render evidence so obtained “legally obtained.”⁹⁴

In the heated debate over the bill on the Senate floor, its Senate sponsor declared the police “hamstrung” by *Mapp* and cited statistics on the decrease in narcotics arrests and gambling arraignments in New York City as evidence.⁹⁵ The Combined Council’s lobbying pamphlet repeated similar statistics.⁹⁶ The *New York Times* editorialized that “narcotics and gambling slips” were “[o]bvious examples” of potential targets for these policing “frisks.”⁹⁷ In a later article, the newspaper added that the statute was reportedly “viewed by the police as [a] potential weapon[] in their drive against the numbers rackets.”⁹⁸ Ultimately, then, many participants and observers in the passage of the stop-and-frisk legislation saw it as a response to the policing problems created by *Mapp*.

B. “*Legislative Confidence in the Judgment of the Police Officer*”:
Police Expertise in Statute

The stop-and-frisk statute did more than merely restore traditional police prerogatives in the aftermath of *Mapp*. From the perspective of New York law enforcement officials, the stop-and-frisk law also endorsed police expertise. But, much like the litigation that followed it, this recognition remained unuttered, buried in statutory structure.

When Governor Rockefeller signed the stop-and-frisk measure into law on March 2, 1964, two provisions were added to the Code of Criminal Procedure. Section 180-a, which attracted all subsequent attention and litigation, authorized police stop-and-frisk practices.⁹⁹ Meanwhile, section 154-a defined the term “police officer” and, with it, the range of authorities empowered by the new legislation.¹⁰⁰ By including some authorities and excluding others, section 154-a suggested that the legislature intended only to

⁹⁴ Volker, *supra* note 84.

⁹⁵ See S. 1207-1859, 3d Reading No. 246, at 350 (N.Y. 1964) (on file with New York State Secretary of the Senate).

⁹⁶ POLICE PROTECTION, *supra* note 84, at 4.

⁹⁷ Anthony Lewis, *Bench v. Stop-and-Frisk*, N.Y. TIMES, Mar. 9, 1964, at 24, available at ProQuest Historical Newspapers: The New York Times (1851–2008).

⁹⁸ Charles Grutzener, *Dimes Make Millions for Numbers Racket*, N.Y. TIMES, June 26, 1964, at 18, available at ProQuest Historical Newspapers: The New York Times (1851–2008).

⁹⁹ Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2011)).

¹⁰⁰ Act of Mar. 2, 1964, ch. 86, sec. 1, § 154-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 154-a) (current version at N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2011)).

endow the state's best-trained, most-expert law enforcement personnel with stop-and-frisk powers.

The language of section 180-a granted stop-and-frisk authority to the "police officer," rather than the "peace officer."¹⁰¹ Elsewhere, the New York Code of Criminal Procedure entitled "peace officers" to make warrantless arrests on the basis of probable cause.¹⁰² But summary police actions on grounds of reasonable suspicion, as outlined in section 180-a, were exclusively reserved for police officers. Because they were all defined exclusively as peace officers, court officers, district attorneys' investigators, prison officials, and agents of incorporated societies and commissions were not empowered by the new bill.

Excluding those peace officers carried real consequences. In 1967, the Waterfront Commission lobbied for its investigators to be redefined as "police officers," with the goal of winning hitherto withheld stop-and-frisk powers to use against the threat of "criminal suspects who are carrying concealed weapons."¹⁰³ The Commission's complaint reveals that the legislature withheld power from at least one law enforcement agency that desired expanded authority to cope with potentially violent suspects. In other words, the legislature assigned stop-and-frisk powers by some criteria other than the dangers faced by an agency's law enforcement officials.

Within the New York City Police Department, administrators believed that the legislature historically assigned augmented police powers by agency expertise. In 1962, before the passage of the stop-and-frisk statute, didactic literature distributed to the force explained that the statutory limitation of warrantless arrests to peace officers (and not citizens) indicated that "[t]he Legislature seemingly took cognizance of and relied upon a peace officer's position, judgment, training, knowledge and ability as a law enforcement officer, in granting these broad arrest powers."¹⁰⁴

The Westchester County district attorney's office, which brought the decisive test case of the new statute, applied this interpretation of legislative intent to the stop-and-frisk statute. In a brief to the Court of Appeals, the district attorney argued that the limitation of stop-and-frisk powers to police officers "bespeaks a greater degree of legislative confidence in the judgment of the police officer in matters of this particular nature."¹⁰⁵ Though the court issued an opinion on separate grounds that avoided interpreting the structure

¹⁰¹ See § 180-a.

¹⁰² N.Y. CODE CRIM. PROC. § 177 (Gould 1968).

¹⁰³ George Horne, *Bill Is Assailed by Dock Leader*, N.Y. TIMES, Feb. 20, 1967, at 59, available at ProQuest Historical Newspapers: The New York Times (1851–2008); see also Tania Long, *Pier Agency Seeks to Restore Bill*, N.Y. TIMES, Mar. 9, 1967, at 77, available at ProQuest Historical Newspapers: The New York Times (1851–2008). The legislature granted the Commission's request two years later. See Act of May 23, 1969, ch. 953, 1969 N.Y. Laws 952–53.

¹⁰⁴ Ellsworth A. Monahan, *Search and Seizure*, SPRING 3100, July–Aug. 1962, at 4.

¹⁰⁵ Brief for Respondent at 5, *People v. Peters*, 219 N.E.2d 595 (N.Y. 1966) (No. 43).

of the New York criminal procedure code,¹⁰⁶ its decision also turned on questions of police expertise.¹⁰⁷

III. CONTROLLING COPS, CONTROLLING CASES: LAW ENFORCEMENT ADMINISTRATORS AND THE CONSTRUCTION OF CONSTITUTIONAL CHANGE

Within the New York City Police Department, administrators attempted to advance the broader goals of the police professionalization movement as they implemented the new stop-and-frisk statute.¹⁰⁸ They largely failed.¹⁰⁹ Securing judicial approval of the stop-and-frisk statute provided law enforcement administrators with an opportunity to try to tighten their control over the police rank-and-file.¹¹⁰ Those measures were intended to do more than merely restrain police discretion; they were also designed to maximize the appearance of police expertise before the bench, where police officers were to display their ethnographic knowledge of criminal subcultures.¹¹¹ No aspect of this professional program prospered. As prescriptive literature circulating within the Department suggested, police administrators recognized that patrol officers’ professional perceptions were often clouded in predominantly minority neighborhoods.¹¹² Moreover, few patrol officers seem to have respected the new bureaucratic controls. And in the decisive test cases for the new law, the arresting officers failed to respect departmental policies.¹¹³

A. “A Continued March Toward Professionalization”: *Securing Professionalism*

Within the New York City Police Department, administrators explained that the new legal regime would help them secure greater compliance with professional norms among the rank-and-file. Law enforcement would not “break down or become ineffective because of the trend in the courts,” explained the Police Academy.¹¹⁴ Instead, with proper respect for new legal requirements, “law enforcement will be the beneficiary in a continued march

¹⁰⁶ See discussion *infra* Part IV.A. In 1974, however, the New York County Supreme Court adopted a somewhat similar structural interpretation to that given in the Brief for Respondent for *People v. Peters*. Although it held that *peace* officers held the power to conduct a search for dangerous weapons, the court also noted that only *police* officers possessed the authority to stop suspicious individuals on grounds less than probable cause because “of the scope of their assigned duties and the breadth of their training and experience in observing and interpreting ‘street’ situations.” *People v. Thompson*, 353 N.Y.S.2d 698, 705 (Sup. Ct. 1974).

¹⁰⁷ See discussion *infra* Part IV.A.

¹⁰⁸ See discussion *infra* Part III.A.ii and Part III.A.iii.

¹⁰⁹ See discussion *infra* Part III.B.

¹¹⁰ See discussion *infra* Part III.A.ii.

¹¹¹ See discussion *infra* Part III.A.iii.

¹¹² See discussion *infra* Part III.B.ii.

¹¹³ See discussion *infra* Part III.B.ii.

¹¹⁴ New York Police Academy, *supra* note 64, at 13.

toward professionalization.”¹¹⁵ The stop-and-frisk law was implemented with exactly that objective. For law enforcement administrators, that implementation strategy was as necessary as it was desirable, because substantial legal challenges loomed over the statute. In this section, I outline those legal challenges and law enforcement strategies for overcoming them. Those strategies advanced the cause of professionalism both by increasing administrative control over patrol officers and by providing officers with a forum in which to display their ethnographic expertise.

i. “Precedent Is of Little Value”: Law Enforcement’s Legal Strategy

From the very beginning, supporters of the new stop-and-frisk statute knew that it rested on legally uncertain grounds. Opponents questioned its constitutionality.¹¹⁶ On the Senate floor, the bill’s sponsor admitted:

[T]here will be litigation with respect to the interpretation of that Supreme Court case [*Mapp*] and the interpretation of all the cases that have come down since, and will come down, and I am certain that when we pass this legislation, as somebody suggested, someone will probably take it up, there will be appeals, maybe it will get to the Supreme Court, maybe there will be a decision, but this has never been a deterrent to passing legislation in this Legislature of ours.¹¹⁷

In their defense of the new law, proponents of the stop-and-frisk powers regularly looked to common law and statutory precedents to authorize the measure. They frequently cited Sir Matthew Hale¹¹⁸ and William Haw-

¹¹⁵ *Id.* at 14.

¹¹⁶ For examples of opposition to the bill on constitutional grounds, see, for example, Legislative Memorandum #14 from George E. Rundquist to Comm. on Codes, N.Y. State Senate & Comm. on Codes, N.Y. State Assembly (Jan. 25, 1964) (on file with New York State Library) (regarding temporary questioning of persons in public places and search for weapons); THE ASS’N OF THE BAR OF THE N.Y.C. COMM. ON THE CRIMINAL COURT OF THE N.Y.C., 1964 LEGIS. BULL., no. 2 (ca. 1964) (on file with New York State Library); N.Y. STATE BAR ASS’N, *supra* note 91; BUDGET REPORT ON BILLS, CODE OF CRIMINAL PROCEDURE § 154-a (N.Y. 1964) (on file with New York State Library). See also Martin Arnold, *N.A.A.C.P. and CORE to Fight Bills Increasing Police Powers*, N.Y. TIMES, Feb. 29, 1964, at 24, available at ProQuest Historical Newspapers: The New York Times (1851–2008); Douglas Dales, *Rockefeller Signs Bills Increasing Powers of Police*, N.Y. TIMES, Mar. 4, 1964, at 1, available at ProQuest Historical Newspapers: The New York Times (1851–2008); *NAACP Pickets Rocky*, N.Y. AMSTERDAM NEWS, Mar. 7, 1964, at 6, available at ProQuest Historical Newspapers: New York Amsterdam News (1922–1993).

¹¹⁷ S. 1207-1859, 3d Reading No. 246, at 347 (N.Y. 1964) (on file with New York State Secretary of the Senate).

¹¹⁸ See, e.g., 2 HALE, HISTORIA PLACITORUM CORONAE 89, 96 (1847) (“The constable may arrest suspicious night walkers by the statute of 5 E. 3 cap. 14. . . . Their [watchmen’s] power is to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered, and if suspicion be touching them, they shall be deliver[e]d to the sheriff . . .”).

kins¹¹⁹ as common law authorities.¹²⁰ Long before *Mapp*, the New York Court of Appeals itself had recognized police power to temporarily detain a suspect “for the purpose of searching him, presumably to ascertain whether he had a weapon upon his person,”¹²¹ and the Second Circuit had approvingly cited a separate portion of that case as recently as 1961.¹²² Meanwhile, the new statute substantially mirrored the slightly more aggressive language of the Uniform Arrest Act of 1942, which had been drafted by the Interstate Commission on Crime.¹²³ The fact that statutes based on the Uniform Arrest Act had been promulgated in other states¹²⁴—and often upheld¹²⁵—was sometimes cited for additional authority.¹²⁶

Nevertheless, the United States Supreme Court had never ruled on the constitutionality of a police officer’s power to stop-and-frisk suspicious persons on grounds less than probable cause. As Earl C. Dudley—who served as Chief Justice Earl Warren’s clerk when *Terry* was decided—has recalled, the “Warrant Clause’s standard of ‘probable cause’ had been taken to define the ‘reasonableness’ of a search and seizure, even when obtaining a warrant was excused as impracticable.”¹²⁷ None of the Court’s recent jurisprudence

¹¹⁹ 2 HAWKINS, PLEAS OF THE CROWN ch. 12, § 20 (1739) (“Yet it is holden by some, that any private Person may lawfully arrest a suspicious Night-walker, and detain him till he make it appear that he is a Person of good Reputation.”); *id.* at ch. 13, § 5 (“As to the power of watchmen, it is further enacted by the said statute of Winchester, c. 4 ‘That if any Stranger do pass by the Watch, he shall be arrested until Morning. And if no Suspicion be found, he shall go quit [sic]; and if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff’”).

¹²⁰ See, e.g., Brief for Appellant at 5, *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1964) (No. 97) (citing Hawkins); Richard H. Kuh, *Reflections on New York’s “Stop-and-Frisk” Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 32, 33 (1965) (citing Hale and Hawkins); John A. Ronayne, *The Right to Investigate and New York’s “Stop and Frisk” Law*, 33 FORDHAM L. REV. 211, 213–14 (1964) (citing Hale, Hawkins, and other English common law authorities); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 851–52 (1965).

¹²¹ *People v. Marendi*, 107 N.E. 1058, 1060 (N.Y. 1915); see also *People v. Esposito*, 194 N.Y.S. 326 (Special Sess. 1922); *People v. Morgan*, 13 N.Y.S. 448 (Gen. Term. 1891).

¹²² *United States v. Vita*, 294 F.2d 524, 530 n.2 (2d Cir. 1961). Proponents of the new law frequently cited this string of precedent. See, e.g., Brief for Appellant, *Rivera*, 201 N.E.2d 32 (N.Y. 1964) (No. 97); Siegel, *supra* note 67, at 281.

¹²³ Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 321, 325 (1942) (quoting the relevant statutory language and arguing for its constitutionality).

¹²⁴ See, e.g., DEL. CODE ANN. tit. 11, §§ 1902, 1903 (2011); MASS. GEN. LAWS ch. 41, § 98 (2011); N.H. REV. STAT. ANN. §§ 594:2, 3 (2011); R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (West 2011).

¹²⁵ *De Salvatore v. State*, 163 A.2d 244, 249 (Del. 1960); *Kavanagh v. Stenhouse*, 174 A.2d 560 (R.I. 1961). But see *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964).

¹²⁶ See, e.g., Kuh, *supra* note 120, at 34–35; Ronayne, *supra* note 120, at 215–19.

¹²⁷ Dudley, *supra* note 27, at 894; see also Paul Butler, “A Long Step Down the Totalitarian Path”: Justice Douglas’s Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 26–27 (2009) (celebrating Douglas’s dissent in *Terry* for refusing to condone the majority’s disaggregation of the Warrant Clause and Reasonableness Clause of the Fourth Amendment); Lain, *supra* note 18, at 1439 (citing Dudley approvingly). But see Lerner, *supra* note 23, at 424–31 (rehearsing arguments that pre-*Terry* statutory and common law precedents justified police stop-and-frisk practices). Strictly speaking, the rearrangement of the Warrant Clause and the Reasonableness Clause slightly predated *Terry*. The previous term, in *Camara v. Municipal Court of San*

seemed especially promising for proponents of stop-and-frisk powers. In 1959, for example, the Court explained that “[w]hen . . . officers interrupted” suspicious persons and “restricted their liberty of movement,” they completed an arrest—which could only be sustained upon probable cause.¹²⁸ Sitting Supreme Court Justice William O. Douglas had stated his position rather clearly in a 1960 law review article: “Arrests for suspicion are not countenanced by the Bill of Rights. The Fourth Amendment allows arrests—as well as searches—only for ‘probable cause.’”¹²⁹ An informed legal observer reading the tea leaves after *Mapp* might be excused for doubting that the Court would sustain the stop-and-frisk law. After reviewing the available authorities, even as steadfast a supporter of the law as Richard Kuh could only claim that “[j]udicial precedent is of little value.”¹³⁰ “At best,” he concluded, “this is an exceedingly murky area, with the existing decisions letting through precious little light.”¹³¹ In that constitutional darkness, Kuh and his colleagues would have to look outside the law books to find their way.

At stake was the definition of constitutionally legitimate police activity. In the legal struggle over the constitutionality of the stop-and-frisk statute, law enforcement officials had certain strategic advantages. After all, judicial controls relied on an essentially negative power to proscribe by excluding unlawfully seized evidence, while police administrators exercised positive power to prescribe new procedures. Put more simply, police administrators could command behavior while courts could only disapprove it. Correctly deployed, this prescriptive power was capable of partially circumventing *Mapp*.¹³²

Francisco, 387 U.S. 523 (1967), the Court used the Reasonableness Clause to define the Warrant Clause’s probable cause standard, thereby inverting the historical relationship between the two clauses. See *id.* at 535 (“In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.”). *Camara* did not, however, wholly disaggregate the two Clauses, as *Terry* would do. See generally Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386–97 (1988) (reviewing the doctrinal development of *Camara* and *Terry*, as well as the two decisions’ relationship). In any case, *Camara* was not available to the drafters and defenders of the stop-and-frisk statute until it was handed down in June 1967.

¹²⁸ *Henry v. United States*, 361 U.S. 98, 103 (1959); see also *Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964); *Ker v. California*, 374 U.S. 23, 34–35 (1963) (plurality opinion) (“The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause. . . .”); *id.* at 53 (Brennan, J., dissenting) (assuming that probable cause was necessary). But see Recent Statute, *Criminal Law—New York Authorizes Police to “Stop-and-Frisk” on Reasonable Suspicion*, 78 HARV. L. REV. 473, 475 (1964) (discussing possible mechanisms for distinguishing *Henry*).

¹²⁹ William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13 (1960).

¹³⁰ Kuh, *supra* note 120, at 35.

¹³¹ *Id.*

¹³² Anecdotal evidence suggests that law enforcement officials probably recognized the potential influence of that prescriptive power. “Aside from any misinterpretation of what a word means,” noted a department publication in a humorous aside, “the meaning of words

The most erudite strategist of the ensuing campaign was Richard Kuh, who had already helped guide the stop-and-frisk bill through the legislature in his capacity as coordinator of the Combined Council of Law Enforcement Officials.¹³³ In response to commentary denouncing the bill as unconstitutional,¹³⁴ he published his own rumination on the new measure.¹³⁵ He argued that critics erred when they assumed that “constitutionality—or the lack of it—is fixed and readily discoverable. . . . [C]ertain predictability on an issue of constitutionality is rare.”¹³⁶ Instead, judicial interpretation should be guided by the changing “facts of community life,” Kuh continued, invoking the reality of police and criminal activity on “the overcrowded streets that are crime’s seedbeds.”¹³⁷ Kuh believed that this reality affected constitutional decision-making in addition to what he called “fine-spun legal theory.”¹³⁸ He cited Louis D. Brandeis’s famous brief¹³⁹ in *Muller v. Oregon*¹⁴⁰ as a case in point and urged his colleagues to write similar pleadings.¹⁴¹

Properly worded and sociologically colorful briefing, however, was only the last and perhaps the least effective mechanism by which law enforcement could affect and communicate the reality of the “crowded streets.” Prior to briefing came prosecutorial decisions about which cases to litigate up the appellate ladder. Repeating the old saw that “[h]ard cases make bad law,”¹⁴² Kuh urged his colleagues in district attorneys’ offices across the state to exercise their discretion wisely:

It is to be hoped that district attorneys will throw in the towel in those cases (if any develop) that stem from police [misconduct]

changes with usage.” *Here’s Mud in Your Eye!*, POLICE MGMT. REV., Oct. 1964, at back cover. “There is no meaning in language itself; there is meaning only as a word is used and someone reacts to it,” mused the same publication. *What Do You Mean?: The Nature of Words*, POLICE MGMT. REV., Dec. 1963, at 12, 13. In law as in language, meaning is partially derived from usage. By controlling police behavior—“usage”—administrators would seek to alter legal meaning.

¹³³ See discussion *supra* Part II.A.

¹³⁴ See sources cited *supra* note 116.

¹³⁵ See Kuh, *supra* note 120.

¹³⁶ *Id.* at 32.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Brief for Respondent, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

¹⁴⁰ 208 U.S. 412 (1908).

¹⁴¹ Kuh, *supra* note 120, at 36. In *Muller*, the Court praised the utility of Louis D. Brandeis’s brief, which supported a law limiting women’s working hours with rich, sociological evidence concerning women’s labor. In doing so, the Court “signaled a recognition that judges had a creative, legislative role, that they were properly concerned with the evaluation of the factual basis for legislation.” Kenneth L. Karst, *Brandeis Brief*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 224, 225 (Leonard W. Levy & Kenneth L. Karst eds., 2000).

¹⁴² Kuh, *supra* note 120, at 35; see also BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 403 (3d ed. 2011) (“This catchphrase refers to the danger that a decision operating harshly on the defendant may lead a court to make an unwarranted exception or otherwise alter the law.”). It is a cliché. *Id.* Some attribute the phrase to Lord Tenterden. See M. FRANCES McNAMARA, 2,000 CLASSIC LEGAL QUOTATIONS 65 (1992) (citing JAMES RAM, THE SCIENCE OF LEGAL JUDGMENT 116 (1871)).

. . . . Otherwise, remote appellate courts will be prompted to believe that police in practice view the new statute as a blank check, justifying capricious stopping and high-handed search.¹⁴³

In his emphasis on briefing and case selection, Kuh's proposed strategy turned largely on lawyerly craftsmanship.

Yet the peculiar alliance of prosecutors and police administrators—instigated by their workaday mutual dependence and by institutions like the Combined Council—empowered law enforcement officials in ways that transcended mere lawyering. Kuh praised his colleagues for taking “steps to train every single enforcement officer in the State as to the limitations inherent in the new legislation.”¹⁴⁴ Through positive action and proper administration, law enforcement officials might “minimize the chance that a single constable, in any remote township in the state, misguided by the calamitous [sic] interpretations of the new laws, might arrogate unto himself powers that the statutes clearly did not bestow.”¹⁴⁵ This was both a moral and a strategic imperative that sought to bend police behavior to the necessities of the constitutional struggle and to contradict the predictions of concerned civil libertarians. In other words, controlling the law meant controlling the cop on the beat¹⁴⁶—precisely as proponents of police professionalism might have desired.

ii. *“A Competent, Thoroughly Professional Police Manner”:
Increasing Administrative Control*

Aside from judicial approval of the new law, the strategic implementation of section 180-a had the power to augment administrative authority over the police rank-and-file. At least within the New York City Police Department, the bureaucratic mechanics of the ongoing transformation of the Fourth Amendment tightened top-down administrative control. Mostly, that meant increasing bureaucratic supervision over the force via paperwork.¹⁴⁷

Guidelines for implementing the stop-and-frisk statute pressed novel reporting obligations on the force. Following the passage of the stop-and-frisk amendment, the Combined Council issued a memorandum addressed to “All Law Enforcement Officers in New York State,” advising them on the “powers conferred” by the new laws.¹⁴⁸ The memorandum was redistributed

¹⁴³ Kuh, *supra* note 120, at 35–36.

¹⁴⁴ *Id.* at 37.

¹⁴⁵ *Id.*

¹⁴⁶ Cf. TIFFANY ET AL., *supra* note 71, at 87 (noting that approval of police stop-and-frisk practices “may depend upon the willingness and capacity of police to develop and adhere to appropriate field interrogation policies”).

¹⁴⁷ This was consistent with the overwhelmingly bureaucratic orientation of the police professionalization movement more generally. See discussion *supra* Part I.

¹⁴⁸ Memorandum from the N.Y. State Combined Council of Law Enforcement Officials to All Law Enforcement Officers in N.Y. State (June 1, 1964) [hereinafter Memorandum to All Officers] (on file with author) (regarding the “Stop-and-Frisk” and “Knock, Knock” Laws);

within the New York City Police Department as Circular No. 25 less than a month later and reiterated during an in-service training later that year, and again in 1966.¹⁴⁹ Training personnel emphasized that whenever an officer used force to effect a stop or conducted a frisk or a search, she was required “*immediately*” to inform the desk lieutenant and fill out U.F. 250, “Report of Stopping by Force or Stopping Accompanied by Frisk.”¹⁵⁰ The purpose of these reports was emphatically disciplinary; they were to be reviewed by supervisory personnel who were commanded to “hold a critique with the members of the force concerned. Further instructions in the manner of exercising this legal authority should be given when study of reports indicates a need therefor [sic].”¹⁵¹

As the New York County District Attorney would later argue in an *amicus curiae* brief to the United States Supreme Court, this form served “a valuable educative function . . . [B]y its detail alone, it reminds the officer that the authority granted by the statute is to be used with care.”¹⁵² Discourse circulating among Department administrators corroborated the claim. According to the Department’s former Forms Control Officer, “[a] form is *actually an outline of a job to be done*.”¹⁵³ Careful consideration accompanied the design of new forms, with the goal of “[p]lacing the items on the form in logical sequence, or in the same sequence as the source from which the information is obtained or to which the information is transferred.”¹⁵⁴ In other words, the relevant police officials believed that forms exerted a subtle normative influence on those responsible for completing them. They helped shape behavior by diagramming certain minimal actions necessary to obtain the relevant information, and in a prescribed order to boot. Presumably, U.F. 250, too, was designed with these considerations in mind.

But U.F. 250 didn’t appear in a vacuum; it required cooperation if it was to have any effect. Patrolmen certainly grumbled about the new report-

see also Peter Kihss, *Police Get Advice on ‘Frisking’ Law*, N.Y. TIMES, June 2, 1964, at 39, available at ProQuest Historical Newspapers: The New York Times (1851–2008); Memorandum from Dick Kuh to All District Attorneys (June 8, 1964) (on file with New York State Library).

¹⁴⁹ Brief for the New York Civil Liberties Union as Amicus Curiae Supporting Appellant, *People v. Peters*, 219 N.E.2d 595 (N.Y. 1966) (No. 43); *Frisk-Law Advice Is Given to Police*, N.Y. TIMES, June 28, 1964, at 28, available at ProQuest Historical Newspapers: The New York Times (1851–2008); New York Police Academy, *New Laws—1964*, THE POLICE ACADEMY UNIT TRAINING MEMO, Sept. 1964; New York Police Academy, *Stop and Frisk*, THE POLICE ACADEMY UNIT TRAINING MEMO, May 1966 [hereinafter *Stop and Frisk*].

¹⁵⁰ *Stop and Frisk*, *supra* note 149, at 12.

¹⁵¹ *Id.* at 12–13. These reporting functions comported with best practices nationally. See, e.g., TIFFANY ET AL., *supra* note 71, at 14 (“A reporting system may, on the other hand, serve as a means of administrative control over the work of individual officers, and this may in turn contribute to the efficiency of the over-all program.”).

¹⁵² Brief for N.Y. Cnty. Dist. Attorney as Amicus Curiae Supporting Respondent, *Sibron v. New York*, 392 U.S. 40 (1968), 1967 WL 113675, at *33–34.

¹⁵³ D’Alessandro, *supra* note 47, at 5.

¹⁵⁴ *Id.* at 8–9.

ing burdens.¹⁵⁵ By enlisting the rank-and-file in their common struggle against the judiciary, administrators attempted to win their cooperation. “[W]hether or not these sorely needed enactments will withstand the attacks that will be made upon their constitutionality, and will stand as laws upon the books of this State,” they admonished, “will depend in large measure upon the fashion in which they are carried out.”¹⁵⁶ With such claims, administrators shifted blame for the new reporting requirements to the legal system and the strategic imperatives of influencing it. “There have been no adverse decisions in the almost two years of utilization of the statute,” the Police Academy trainers congratulated the force during an in-service training session held only one month before *Peters* came down from the Court of Appeals.¹⁵⁷ “[I]f the same judicious and responsible police action is taken in the future, *with adequate, complete and legible reports submitted*, there should be no fear of repercussions.”¹⁵⁸ Administrators reassured their personnel that cooperation with the new guidelines might serve as “a definite precedent for legislation which will further broaden police power to cope with lawlessness” in the future.¹⁵⁹

Nevertheless, as administrators took pains to emphasize, the requirements of appropriate reporting transcended this vague, abstract struggle for the soul of the Fourth Amendment; they were also necessary to win convictions under the new legal regime inaugurated by *Mapp*. Even after the passage of the stop-and-frisk statute, *Mapp* threatened to undermine police action. Although the formal burden of proof remained with the defendant in suppression hearings,¹⁶⁰ such proceedings invariably demanded the testimony of the arresting officer. Following the model of traditional probable cause analysis, officers were required to particularize and articulate their internal cognitive processes, whether those thoughts rose to the level of belief or reasonable suspicion.¹⁶¹ “No officer should stop anyone,” explained guidelines distributed to the New York City Police Department, “unless he is prepared to explain, with particularity, his reasons for stopping such person.”¹⁶² Officers were instructed to expect close examination of their reasoning: “In instances in which evidence is produced as a result of a search, the superior officers, the prosecutors, and—it is anticipated—the courts, will

¹⁵⁵ Emanuel Perlmutter, *New ‘Frisk’ Law Goes into Effect*, N.Y. TIMES, July 2, 1964, at 52, available at ProQuest Historical Newspapers: The New York Times (1851–2008).

¹⁵⁶ Memorandum to All Officers, *supra* note 148, at 1. Administrators repeated this plea in all four distributions of the new guidelines, and it was repeated in newspaper coverage. See also *supra* notes 146, 148.

¹⁵⁷ *Stop and Frisk*, *supra* note 149, at 13.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ On the defendant’s burden of proof, see *People v. Entralgo*, 245 N.Y.S.2d 850, 853 (App. Div. 1963); *People v. Lombardi*, 239 N.Y.S.2d 161, 162–63 (App. Div. 1963); *People v. Allen*, 257 N.Y.S.2d 757, 760 (Sup. Ct. 1965).

¹⁶¹ See Harris, *supra* note 83, at 982.

¹⁶² *Stop and Frisk*, *supra* note 149, at 4.

scrutinize particularly closely all the circumstances relied upon for justifying the stopping and searching.”¹⁶³

Pragmatically, the success of the state’s case lay with the officer’s performance on the stand. “The arresting officer, through faulty testimony,” warned administrators, “may easily be the cause of losing a case that took much time and effort to prepare.”¹⁶⁴ Police trainers attempted to prepare their charges for the rigors of the adversarial justice system in the age of *Mapp*. “In practically all cases, the defense attorney will try to exclude all evidence the officer has gathered in his investigation . . . inferring that the officer has violated his client’s rights,” they warned.¹⁶⁵

When facing such a wily adversary, the best defense was proper preparation, which often meant thorough recording practices. “Preparation for trial should begin. . . . even before the start of his tour of duty,” explained police trainers.¹⁶⁶ “A good pen and a pencil and required forms or knowledge of the information needed therefor [sic], are a must, to name a few.”¹⁶⁷ Supervisors were urged to check their subordinates’ recording practices to ensure compliance with procedure and, with it, their capacity “to testify with confidence in a competent, thoroughly professional police manner.”¹⁶⁸ Even under the new law, “[t]he officer should be prepared to spell out the reasonableness of his actions to the hearing magistrate. His entire case may hinge upon how he tells his story.”¹⁶⁹ By such reasoning, proper recording practices “take on added importance, and should be invaluable in assisting him, when reviewed in advance, in relating his actions in the proper sequence.”¹⁷⁰ In short, the new reporting requirements pressed on patrol officers by administrators were not mere exercises in micro-management; they were legal necessities.

iii. “Sound and Objective Suspicions”: Police Ethnography

Yet, if the new legal regime encouraged administrators to tighten their bureaucratic control over the police rank-and-file, suppression hearings also provided line officers with an opportunity to express their hard-won expertise. At suppression hearings, police officers had to be ready to explain their suspicions.

Instead of simply being claimed in a suppression hearing, suspicion had to be broken down into its constituent elements and argued in a professional manner. To the trainers charged with explaining the concept to departmental

¹⁶³ *Id.* at 8.

¹⁶⁴ New York Police Academy, *Courtroom Conduct and Procedure*, THE POLICE ACADEMY UNIT TRAINING MEMO, Jan. 1965, at 3, 10.

¹⁶⁵ New York Police Academy, *supra* note 64, at 11.

¹⁶⁶ New York Police Academy, *supra* note 164, at 3.

¹⁶⁷ *Id.*

¹⁶⁸ *Write It Right!*, POLICE MGMT. REV., Mar. 1964, at 23, 24.

¹⁶⁹ New York Police Academy, *supra* note 64, at 11.

¹⁷⁰ *Id.*

personnel, “reasonable suspicion” in the new law derived from the specialized cultural knowledge of patrolmen combined with their observational skills. This was police ethnography: Through “training” and “experience,” patrolmen gained an unusually sensitive awareness of the urban streetscape and the subcultures (criminal and otherwise) that traversed it. The good beat cop was endowed with “Knowledge of crimes and elements,” “Knowledge of Modus Operandi,” “Knowledge of persons stopped” and “Knowledge of location’s crime incidence.”¹⁷¹ These understandings of criminality turned on an implicit understanding of normal behavior.¹⁷² Deviation from that norm was enough to excite a police officer’s suspicion. Only through “Knowledge of persons in your area,” for instance, was the beat officer capable of identifying “strangers.”¹⁷³

Close observation was essential—indeed, administrators considered it “[t]he most important” aspect of patrol¹⁷⁴—but it was useless without the well-cultivated capacity to interpret the sensory inputs of the complicated urban streetscapes. The street was the site of a dense human traffic whose cultural logics patrol officers struggled to understand. In the evening, explained the Department’s monthly magazine, “[t]he night people emerge. Fathers and mothers who’ve gotten baby sitters for the evening, teenagers, lovers, strollers, drifters, drunks, muggers, rapists, waiters, musicians, night students, prostitutes, watchmen, truckers, all sizes, all colors, all shapes. The cop walking his post, the radio car crew, continue their vigilance.”¹⁷⁵ But how would those vigilant officers distinguish the night students from the prostitutes? The rapists from the waiters? After all, as the Department’s trainers intoned, “eye (and mind) sees only what it is *consciously* looking for.”¹⁷⁶ It was only cultural expertise—knowing the norm and recognizing deviation from it—that allowed officers to decode the confusions of urban life. “Such knowledge,” trainers lectured, “will permit [an] officer. . . . [to] form a basis for suspicion.”¹⁷⁷

Officials within the Department recognized that they could not define suspicion precisely. Instead, the departmental guidelines considered it “such a combination of factors as would merit the sound and objective suspicions

¹⁷¹ New York Police Academy, *Stops—Persons and Cars*, THE POLICE ACADEMY UNIT TRAINING MEMO, Apr. 1968, at 3, 4–5.

¹⁷² Cf. N.Y. CITY POLICE DEP’T, *supra* note 77, at 43 (ordering patrol officers to familiarize themselves with the persons who typically frequented their posts and the typical practices of area businesses).

¹⁷³ New York Police Academy, *Review of Basic Patrol Tactics*, THE POLICE ACADEMY UNIT TRAINING MEMO, Jan. 1968, at 3, 10.

¹⁷⁴ *Id.* at 9; see also N.Y. CITY POLICE DEP’T, *supra* note 77, at 43 (requiring the patrol officer to “[b]e constantly alert, observing everything that takes place within his sight or hearing”).

¹⁷⁵ *Patrol*, *supra* note 45, at 19.

¹⁷⁶ New York Police Academy, *Gambling Enforcement Review*, THE POLICE ACADEMY UNIT TRAINING MEMO, Feb. 1969, at 3, 16.

¹⁷⁷ New York Police Academy, *supra* note 173, at 5.

of a properly alert law enforcement officer.”¹⁷⁸ To at least one observer of stop-and-frisk policies across the nation, this imprecision was enough to discredit the practice.¹⁷⁹ But departmental officials simply set about codifying the ethnographic knowledge that they believed formed the basis of good policing, including stop-and-frisk. “The majority of persons who have criminal tendencies seek similar companions,” argued one academic policing expert in a nationally distributed stop-and-frisk manual.¹⁸⁰ “These groups become clannish, developing their own special language, hair style and clothing preferences, and districts of residence. By learning these various physical indications the officer may be better guided in his field interrogation.”¹⁸¹

Both before and after the passage of the new law, officials within the Department regularly distributed literature describing criminal subcultures, usually centered on drugs or gambling.¹⁸² In keeping with the assumptions that had motivated the passage of the bill in the first place, officials believed that close observation on patrol was particularly useful when it came to “Gambling, Narcotics and other Public Morals violations.”¹⁸³ “Our mind’s eye must be ‘jogged’ every now and then if we are to consciously look for addiction signs and narcotic traffic action,” explained trainers.¹⁸⁴ Patrolmen were instructed to recognize “track[]” marks; that “schmeck” referred to heroin; that a “cheesebox” referred to a special telephone technology used by gamblers; and that a place with “bent spoons or bottle caps with scorch marks” on the ground might be a “shooting gallery.”¹⁸⁵ Officials urged beat officers to marshal this ethnographic knowledge on patrol, to add it together until it rose to the level of reasonable suspicion or probable cause, and then to take appropriate action and communicate their newfound knowledge to their professional colleagues via the reporting system—or as, one training guide concluded, “observe, act, arrest, report and educate.”¹⁸⁶ Such practices would advance the cause of police professionalism.

¹⁷⁸ See *Stop and Frisk*, *supra* note 149, at 6.

¹⁷⁹ TIFFANY ET AL., *supra* note 71, at 40 (“It is doubtful whether these administrative statements of the necessary evidentiary standard are either designed to or serve to control police practice.”).

¹⁸⁰ ALLEN P. BRISTOW, *FIELD INTERROGATION* 31 (2d ed. 1964).

¹⁸¹ *Id.*

¹⁸² See, e.g., *Narcotics and the Law*, *supra* note 72; New York Police Academy, *supra* note 176; *Public Morals Law Enforcement*, *supra* note 72; *The Curse of Addiction*, *SPRING* 3100, May 1965, at 11, 24–27; *The Illegal Alcohol Menace*, *SPRING* 3100, June 1960, at 5–8; *The Scourge of Narcotics*, *supra* note 72, at 17.

¹⁸³ New York Police Academy, *supra* note 173, app. at 6.

¹⁸⁴ New York Police Academy, *Narcotics and the Law*, THE POLICE ACADEMY UNIT TRAINING MEMO, Jan. 1969, at 3, 14.

¹⁸⁵ *Narcotics and the Law*, *supra* note 72, at 4 (track marks); *id.* at 17 (shooting gallery); New York Police Academy, *supra* note 182, at 27 (schmeck); New York Police Academy, *supra* note 176, at 20 (cheesebox).

¹⁸⁶ New York Police Academy, *supra* note 184, at 14.

B. “*Confessed Error*”: *The Limits of Professional Norms*

In New York City, the law enforcement administrators’ program ran up against at least two obstacles: First, few police officers seem to have respected the Department’s administrative controls and the decisive test cases of the new law were based upon police behavior that seemed to contradict departmental standards.¹⁸⁷ Second, prescriptive literature circulating within the police department suggested that rank-and-file police rarely possessed the ethnographic competence to evaluate norms in minority communities.¹⁸⁸ Indeed, stop-and-frisk practices were often implemented in a biased manner in other cities across the nation.¹⁸⁹

i. “*Simply a Suggestion*”? *Rank-and-File Intransigence*

To the patrol officers applying the new law, neither the novel reporting procedures, nor the norms they were designed to express were especially appealing. Almost two years after the passage of the stop-and-frisk law, administrators noted that “[t]he monthly average of U.F. 250’s submitted by members of the force since July 1964 shows a gradual decline.”¹⁹⁰ Administrators remained uncertain about the causes of the trend. Perhaps patrolmen were employing the procedure less frequently. Or perhaps “they are ignoring the provisions . . . relative to the preparation of form U.F. 250.”¹⁹¹ As one officer with years of supervisory experience explained in a separate context, it was common to ignore reporting “legitimate but minor jobs.”¹⁹² After all, 70% of patrolmen found the stop-and-frisk statute either very helpful or fairly helpful to their work in 1968, indicating that they invoked its powers frequently.¹⁹³ Whether patrolmen were using the new law appropriately or not remains uncertain. But few seemed to have respected administrative commands about reporting.

Still more problematic, district attorneys ignored Kuh’s strategic advice that “hard cases make bad law.”¹⁹⁴ Both of the New York test cases turned on police behavior that contravened departmental guidelines. In *People v.*

¹⁸⁷ See discussion *infra* Part III.B.i.

¹⁸⁸ See discussion *infra* Part III.B.ii.

¹⁸⁹ See discussion *infra* text accompanying notes 217–220.

¹⁹⁰ *Stop and Frisk*, *supra* note 149, at 3. Indeed, one contemporaneous scholarly observer refused to believe that the Department’s stop-and-frisk records accurately depicted street-level practice, finding them “so defective” that he refused to reproduce them in a law review article concerning New York stop-and-frisk practices. Schwartz, *supra* note 87, at 444 n.63.

¹⁹¹ *Id.*

¹⁹² Skelly, *supra* note 75, at 110. This observation was based on Skelly’s experience of police work rather than rigorous empirical study. Based on a very small sample of fewer than half a dozen patrolmen (who had volunteered for the study and almost certainly shaped their behavior accordingly), he found significant adherence to the stop-and-frisk regulations. *Id.*

¹⁹³ N.Y. CITY POLICE DEP’T & VERA INST. OF JUSTICE, POLICE-COMMUNITY RELATIONS: A SURVEY AMONG NEW YORK CITY PATROLMEN 47 (1968).

¹⁹⁴ See Kuh, *supra* note 120, at 35.

Peters,¹⁹⁵ an off-duty officer in plainclothes “collared” a suspected burglar in the stairwell of an apartment building and frisked him at gunpoint.¹⁹⁶ In *People v. Sibron*,¹⁹⁷ an officer approached a suspected drug dealer after observing the suspect for several hours, during which time the suspect socialized with alleged addicts.¹⁹⁸ After the “officer stated to defendant that defendant knew what [the] officer was looking for,” the officer followed the defendant’s hand into the defendant’s pocket, where he discovered cocaine.¹⁹⁹

In their pleadings for *Peters*, the defense and the New York Civil Liberties Union (“NYCLU”), acting as amicus curiae, went so far as to quote from the guidelines to demonstrate the unreasonableness of police conduct on the part of an off-duty New York City officer.²⁰⁰ In drawing a gun on the defendant, failing to declare himself a police officer, and stopping an individual within the public area of a private building, the arresting off-duty (and out-of-uniform) officer violated Department regulations barring the use of weapons to enforce a temporary detention under the new law, requiring plainclothes officers to identify themselves as police, and prohibiting stops in the public areas of private buildings.²⁰¹ Indeed, the state was forced to argue that the guidelines were neither binding nor authoritative. They represented “simply a suggestion to law enforcement officers.”²⁰² The argument may have been legally sound, but it was still a startling admission of the inability of law enforcement administrators to inculcate professional norms in their personnel. In any case, such deviations from the guidelines were common in New York’s reported stop-and-frisk cases.²⁰³ Meanwhile, the fact pattern in *Sibron*, the other test case, was so questionable that, after the United States Supreme Court consented to hear the case on appeal, the Kings

¹⁹⁵ 219 N.E.2d 595 (N.Y. 1966).

¹⁹⁶ *Id.* at 241–42.

¹⁹⁷ 219 N.E.2d 196 (N.Y. 1966).

¹⁹⁸ *Id.* at 604–06.

¹⁹⁹ *Id.*

²⁰⁰ Brief for Appellant at 10–11, *People v. Peters*, 219 N.E.2d 595 (N.Y. 1966) (No. 43); Brief for the New York Civil Liberties Union as Amicus Curiae Supporting Appellant at 19–20, 23–24, *People v. Peters*, 219 N.E.2d 595 (N.Y. 1966) (No. 43).

²⁰¹ Compare Brief for the New York Civil Liberties Union as Amicus Curiae Supporting Appellant at app. A, *Peters*, 219 N.E.2d 595, with *Peters*, 219 N.E.2d at 596–97. The Court of Appeals not only overlooked this infraction of departmental regulations; it praised him. *Peters*, 219 N.E.2d at 599. The court’s inattention to the arresting officer’s deviation from departmental regulations may have stemmed from a conviction that the case itself did not require invocation of stop-and-frisk powers. Indeed, when *Peters* made it to the United States Supreme Court, the justices unanimously affirmed on the grounds that the facts of the case rose to the level of probable cause. See *Sibron v. New York*, 392 U.S. 40, 66 (1968); see also Barrett, *supra* note 25, at 783–84.

²⁰² Brief for Respondent at 4, *Peters*, 219 N.E.2d 595.

²⁰³ See Schwartz, *supra* note 87, at 449 n.118 (listing likely departures from police guidelines in reported New York cases).

County District Attorney “confessed error” and attempted (unsuccessfully) to withdraw its opposition.²⁰⁴

ii. “*No Adequate Means of Differentiation*”: *The Problem of Racial Difference*

Still more important, stop-and-frisk theory, as it was understood within the New York City Police Department, recognized that it was least cogent when white officers patrolled minority communities. As the Department’s internal rhetoric suggested, police ethnography in minority communities threatened to collapse into prejudice, undermining any claim to professionalism. Law enforcement officials took this threat seriously. Yet, if data from other cities are any indication, it would appear that here, too, New York law enforcement officials perhaps failed to achieve their goals.²⁰⁵

Police invoked stop-and-frisk powers only at the margins of police ethnographic knowledge. Stop-and-frisk procedures acted on what the Department’s monthly magazine called the “intangibles” of everyday patrol work:

These are the things that are carefully hidden behind the faces of the people you see. These are the things you can’t know anything about until they suddenly erupt into violence, wickedness, evil. The fellow slowly walking along the avenue with the shifty eyes. Is he an addict, or is he ill? The man walking past the bar and grill, furtively peering inside. Is he looking for a friend, or is he casing the place?²⁰⁶

Stop-and-frisk practices helped officers to resolve whatever suspicions unusual street behavior aroused. At least in those few instances that ended up in court, the process resolved upward, transforming reasonable suspicion into the stuff of probable cause and an arrest.²⁰⁷ This, then, was the essential irony of stop-and-frisk: Though the technique was predicated on cultural expertise, it was only resorted to in moments of uncertainty, where ethnographic knowledge was thinnest, where it was suggestive but still insufficient to decipher the confusing cultural codes that surrounded the of-

²⁰⁴ Brief for Respondents, *Sibron v. New York*, 392 U.S. 40 (1968), 1967 WL 113673, at *48; Barrett, *supra* note 25, at 781–82; Sidney E. Zion, *Koota Concedes ‘Frisking’ Error*, N.Y. TIMES, Dec. 2, 1967, at 45, available at ProQuest Historical Newspapers: The New York Times (1851–2008).

²⁰⁵ See discussion *infra* text accompanying notes 223–25.

²⁰⁶ *Patrol*, *supra* note 45, at 21.

²⁰⁷ As many observers then and now have noted, only a very small fraction of police actions were initiated with the intention of securing a successful prosecution. See, e.g., TRIFANY ET AL., *supra* note 71, at 11; Douglas H. Ginsburg, *Hunches and Mere Hunches: Two Cheers for Terry*, 4 J.L. ECON. & POL’Y 79, 81 (2007); Herman Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 160, 168 (1967). Even the United States Supreme Court has recognized as much. See *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968).

ficer on the beat. And nowhere was police ethnography thinner than around notions of presumed racial difference.

At least as it was understood in the New York City Police Department, the professional policing model was formally colorblind and entirely objective. In a widely circulated statement of the Department’s position towards civil rights protests, the Commissioner explained that, “[t]he police have a sworn duty to enforce the laws—impartially, objectively and equally.”²⁰⁸ The Department’s official code of ethics prescribed this attitude and its human relations curriculum, which occupied approximately one-fifth of incoming recruits’ training, further inculcated officers.²⁰⁹ The language of rationality—“science and fact”—was to replace “the mixture of bigotry and ignorance that too often can lead to ineffective law enforcement,” explained officials.²¹⁰ But, as departmental administrators recognized, such impartiality did not come easily to a Department composed primarily of white officers.²¹¹ A pamphlet used in human relations trainings counseled that “a man must discipline himself to do it. He must put all his personal prejudices aside and become purely an instrument of logic.”²¹² By such self-discipline, explained the commissioner, patrolmen would demonstrate “that the New York City policeman is truly a devoted and dedicated professional policeman.”²¹³

In this sense, police ethnographic training required more than specific knowledge of subcultures; it required self-examination, too. Police were taught to recognize and regulate their affect so as to remain objective. “The problem of police-community relations,” emphasized one Commissioner, “is much more one of attitude than of anything else.”²¹⁴ Attitudes, argued another official, could only be modified if each officer cultivated “a frank

²⁰⁸ MICHAEL J. MURPHY, CIVIL RIGHTS AND THE POLICE: A COMPILATION OF SPEECHES BY POLICE COMMISSIONER MICHAEL J. MURPHY 1 (1964). For similar sentiments, see Vincent L. Broderick, *An Atmosphere of Liberty*, POLICE MGMT. REV., Sept. 1965, at 3, 3. For two examples of this statement’s wide circulation, see *The Police Position: To Preserve the Public Peace*, SPRING 3100, July–Aug. 1963, at 2; *The Police Position on Preserving the Public Peace*, MUN. POLICE TRAINING COUNCIL BULL., July–Aug. 1964, at 2.

²⁰⁹ See New York Police Academy, *Basic Ethics (Justice)*, THE POLICE ACADEMY UNIT TRAINING MEMO, Mar. 1964, at 2, 9; Frank X. Zullo, The Effect of the Civil Rights Movement on Administration in the New York City Police Department ch. 5 (June 1967) (unpublished M.P.A. thesis, City Univ. of New York) (on file with author).

²¹⁰ *Prejudices and Police Action*, MUN. POLICE TRAINING COUNCIL BULL., July 1963, at 2.

²¹¹ In 1966, only 5–6% of the Department was composed of black officers. See Andrew T. Darien, *Patrolling the Borders: Integration and Identity in the New York City Police Department, 1941–1975*, at 275 (May 2000) (unpublished Ph.D. dissertation, New York Univ.) (on file with author).

²¹² ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH & INT’L ASS’N OF CHIEFS OF POLICE, . . . WITH JUSTICE FOR ALL: A GUIDE FOR LAW ENFORCEMENT OFFICERS 24 (1959). On the use of the pamphlet in trainings, see Mayor’s Committee on Harlem Affairs, *Initial Recommendations Submitted by the Subcommittee on Law Enforcement and Approved by the Full Committee with Report of Administration Evaluation and Action 2* (Feb. 1, 1964) (on file with Schomburg Center for Research in Black Culture).

²¹³ MURPHY, *supra* note 208, at 21.

²¹⁴ *An Atmosphere of Liberty*, POLICE MGMT. REV., Sept. 1965, at 3.

understanding of himself”²¹⁵ Indeed, formally trained academic ethnographers underwent similar regimens.²¹⁶ One outline for in-service training instructors even came with suggested consciousness-raising questions to help guide discussion.²¹⁷

Introspection, however, had its limits. Administrators recognized that personal understanding and self-discipline were meaningless without significant cross-cultural competence. “Attempting to measure the customs and traditions of a particular community by those of the police officer’s own background, if different, will most certainly result in misunderstanding and resentment.”²¹⁸ Departmental deployment practices reveal that administrators partially sought to resolve the problem by distributing patrol officers according to their presumed cultural competencies. Often, this presumption turned on essentialized notions of racial difference. To name one example, New York City Police Department’s cadet training program for black and Puerto Rican teens represented a policy of “integration based on difference.”²¹⁹ To name another, many black and Puerto Rican-origin officers in the Department were detailed to minority communities based on the assumption that their backgrounds “facilitated their infiltration of black and Puerto Rican criminal organizations and networks.”²²⁰

These assumptions about cultural difference and the limits of police ethnography affected the Department’s stop-and-frisk program, too—even though stop-and-frisk was supposed to be based on police cultural expertise. There was often “[n]o adequate differentiation between genuine suspicious behavior and behavior which is suspicious to a particular officer because he is unfamiliar with area norms, [and] culture,” admitted police trainers.²²¹ Insofar as stop-and-frisk and racial knowledge both appeared at the limits of police ethnographic competence, African Americans were especially vulnerable to summary police action.

To some observers, the New York police indeed implemented the stop-and-frisk powers in a racially biased manner. “No police are going to stop-and-frisk well-dressed bankers on Wall Street,” explained Bayard Rustin, “but they don’t hesitate to stop well-dressed Negro businessmen in Harlem

²¹⁵ *Prejudices and Police Action*, *supra* note 210, at 2.

²¹⁶ The path-blazing anthropologist Margaret Mead urged that an incoming doctoral student’s “preliminary training must . . . include a systematic experience of enhanced awareness of his own culture, and his place . . . within his own culture.” Margaret Mead, *The Art and Technology of Field Work*, in *A HANDBOOK OF METHOD IN CULTURAL ANTHROPOLOGY* 247–48 (Raoul Naroll & Ronald Cohen eds., 1970). Equipped with such self-awareness, she continued, the ethnographer “will be a better-prepared recording instrument when he is asked to use his own responses as ways of recognizing, diagnosing, and analyzing the behavior of the members of a strange culture.” *Id.*

²¹⁷ New York Police Academy, *Professional Police Attitudes*, THE POLICE ACADEMY UNIT TRAINING MEMO, Nov. 27, 1970, at 3, 19.

²¹⁸ *Id.* at 17.

²¹⁹ Darien, *supra* note 211, at 161.

²²⁰ *Id.* at 259; *see also id.* at 261, 276, 289–92.

²²¹ New York Police Academy, *supra* note 217, at 12.

and go through their attaché cases. That kind of brusque police action is reserved for the poor and minorities.”²²² The overwhelming evidence from studies of stop-and-frisk practices in other cities, where the police disproportionately focused on minorities, lends Rustin’s observation additional plausibility.²²³ Though none of these studies focused on New York, an informed observer considered the state’s experience sufficiently analogous to invoke them in his examination of the implementation of the New York stop-and-frisk law.²²⁴ Indeed, roughly contemporaneous reports found that New York City police used greater violence against minorities than other citizens,²²⁵ much as racial bias persisted in other police departments attempting to implement colorblind professional reforms.²²⁶

Concerns over the discriminatory implementation of stop-and-frisk similarly motivated the National Association for the Advancement of Colored People’s Legal Defense Fund (“LDF”) to participate in the stop-and-frisk litigation before the United States Supreme Court.²²⁷ Acting as *amicus curiae*, the LDF’s brief turned less on claims of intentional discrimination than on a strongly phrased attack on the cultural logic of stop-and-frisk and the distorting character of police expertise that mimicked the concerns outlined in the Department’s own prescriptive literature. Citing liberally from published presidential commission reports and academic studies,²²⁸ the LDF reminded the Court that the police most often subjected poor and minority city residents to stop-and-frisk procedures. Police suspicions are “intensified in the ghetto. The policeman on patrol in the inner city has *little understanding*

²²² See Maclin, *supra* note 27, at 1280 (quoting NAT’L CTR. ON POLICE & CMTY. RELATIONS, A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS 18 (1967)).

²²³ See, e.g., Maclin, *supra* note 27, at 1279–87 (reviewing this contemporaneous literature and concluding that it suggested “widespread use of a police practice that was causing perilous friction between the police and minority communities and making a mockery of the Fourth Amendment rights of minority citizens”).

²²⁴ See Schwartz, *supra* note 87, at 446–48.

²²⁵ See CHEVIGNY, *supra* note 73, at 26–29, 138, 286. There was ample evidence of racial bias within the police force. Historian Michael Flamm notes that the New York City Patrolmen’s Benevolent Association used white racial antipathy to successfully pass a city referendum abolishing a new disciplinary institution, the Civilian Review Board, that was partially intended to improve police-minority relations. FLAMM, *supra* note 27, at 76–80. Similarly, in the late 1960s, a faction of “right-wing police” in the Department joined forces with sympathetic citizens to found the “Law Enforcement Group,” which some associated with racially inflected violence against black nationalists. JOHNSON, *supra* note 38, at 266–69.

²²⁶ See, e.g., FOGELSON, *supra* note 13, at 256–60.

²²⁷ Barrett, *supra* note 25, at 770–71 (suggesting that the LDF’s participation marked the great interest of civil rights activists in stop-and-frisk practices).

²²⁸ Brief for NAACP Legal Def. and Educ. Fund, Inc. as *Amicus Curiae* Supporting Appellant at 5 n.7, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74, 67), 1967 WL 113672, at *23–24 (citing, among other reports, D.C. COMM’RS’ COMM. ON POLICE ARRESTS FOR INVESTIGATION, REPORT AND RECOMMENDATIONS (1962); PRESIDENT’S COMM’N ON CRIME IN D.C., REPORT ON THE METROPOLITAN POLICE DEPARTMENT (1966); PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967); Wayne LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L. Q. 331 (1962); Note, *Detention, Arrest and Salt Lake City Police Practices*, 9 UTAH L. REV. 593 (1965)).

of the way of life of the people he observes, and he believes (with considerable justification) that they are hostile to him.”²²⁹

In other words, the LDF opined, police knowledge was limited. Recognition of that limitation was intended to inoculate the Court from recognizing police expertise. As the brief put it, “the essence of the doctrine of stop and frisk on less than probable cause is judicial abdication to police judgment.”²³⁰ To recognize police discretion and the expertise that justified it was to sanction “the dangerous mysticism of police professional, and professionally motivated, intuition”²³¹ By reference “to [the] policeman’s, to the judge’s and to the citizen’s common thought processes as rational men,” rather than as experts, the probable cause standard avoided these distortions.²³²

After submitting its brief, the LDF moved to be included in the oral arguments before the Court. Although initially amenable to the idea,²³³ the Court ultimately denied the motion without explanation.²³⁴ Indeed, by the time it issued its own opinion in the case, the Court almost wholly ignored the LDF brief. It mentioned the racial implications of stop-and-frisk only in passing, commenting on the resentment it sometimes provoked in poor minority communities.²³⁵

Ultimately, then, the Court’s refusal to credit the LDF’s argument partially enabled judicial recognition of stop-and-frisk practices, despite police administrators’ expression of similar concerns within the Department’s prescriptive literature. Moreover, the constitutionality of stop-and-frisk practices was decided on the basis of police actions carried out in clear contravention of administrative orders. We turn now to those rulings.

IV. “THE POLICE OFFICER’S INTUITIVE KNOWLEDGE”: POLICE EXPERTISE IN INTERPRETATION

Both New York and federal courts approved police stop-and-frisk practices. When the stop-and-frisk issue appeared before New York’s highest court, the Court of Appeals, the majority explicitly recognized the significance of police expertise in their analysis.²³⁶ By the time the issue made its way to the United States Supreme Court in *Terry*, the Court rejected the New York approach, even as it displayed substantial deference to police expertise

²²⁹ Brief for NAACP Legal Def. and Educ. Fund, Inc. Supporting Appellant, *Terry*, 392 U.S. 1 (Nos. 63, 74, 67) (emphasis added).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Barrett, *supra* note 25, at 771 (relying on the handwritten conference notes of Justices Douglas, Brennan, and Fortas).

²³⁴ *Id.* at 771–72 (attributing the decision to an effort to attenuate the linkage between the stop-and-frisk issue and civil rights).

²³⁵ *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968).

²³⁶ See discussion *infra* Part IV.A.

in its interpretation of the facts of the case before it.²³⁷ Although the Court did not openly acknowledge this deference, it prefigured later decisions that would explicitly evaluate police actions on grounds less than probable cause from the perspective of the expert police officer. *Terry* was decided alongside two New York cases, which were disposed of on the basis of traditional probable cause analysis, rather than the novel standard elaborated in *Terry*.

A. “An Adequately Defined Standard”: Reasonable Suspicion in the New York Court of Appeals

New York’s highest court, the Court of Appeals, recognized police stop-and-frisk authority before it upheld the constitutionality of the new statute. In *People v. Rivera*,²³⁸ the Court of Appeals established the right of police officers to stop and question individuals engaged in “suspicious or unusual street action” and subject them to a frisk for weapons if the officer suspected danger.²³⁹ The case was decided after the passage of the stop-and-frisk law but on the basis of a fact pattern that predated its authority.²⁴⁰ Legally, the opinion distinguished between a “stop” and an “arrest,” and a “frisk” and a “full-blown search.”²⁴¹ Unlike arrests or searches, stops and frisks represented limited police actions that fell beneath the evidentiary requirements of probable cause. Assessments of the reasonableness of the police intrusion, rather than the imperatives of probable cause, governed such police actions. “[W]hat is reasonable always involves a balancing of interests,” explained the court.²⁴² “[H]ere the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity.”²⁴³ To the majority, the former evidently outweighed the latter.

Justice Stanley H. Fuld, writing in solitary dissent, disagreed. He was “not persuaded that a frisk is as slight an affront to privacy and liberty as my brethren make it out to be”²⁴⁴ and referred to the majority’s distinction between a search and a frisk as a mere “exercise in semantics.”²⁴⁵ Far more important, however, Fuld was unwilling to abandon the imperatives of probable cause, which supplied the constitutional definition of reasonableness.²⁴⁶ In holding otherwise, the majority ratified “a method . . . by which the Fourth Amendment’s prohibition against unreasonable searches may be

²³⁷ See discussion *infra* Part IV.B.

²³⁸ 201 N.E.2d 32 (N.Y. 1964).

²³⁹ *Id.* at 34.

²⁴⁰ *Id.* at 33. The court was almost certainly influenced by the legislature’s decision to act. At the very least, it was persuaded by legal commentary attempting to establish the constitutionality of the new provision, which the court cited. See *id.* at 36.

²⁴¹ *Id.* at 34–35.

²⁴² *Id.* at 36.

²⁴³ *Id.*

²⁴⁴ *Id.* at 37 (Fuld, J., dissenting).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 38–39.

evaded and the exclusionary rule of *Mapp v. Ohio*, to a large extent, written off the books.”²⁴⁷

Whatever the legitimacy of *Rivera*'s abandonment of traditional probable cause analysis, the majority failed to define the terms of its novel reasonableness test with any precision. By what criteria would the court evaluate the reasonableness of an officer's perception of “suspicious or unusual street action” and the dangers that permitted a frisk?²⁴⁸ Several cases following in *Rivera*'s wake similarly failed to clarify the issue.²⁴⁹ That legal duty ultimately fell to *People v. Peters*.²⁵⁰

Together with *People v. Sibron*,²⁵¹ a case summarily affirmed on the same day, *Peters* stamped the stop-and-frisk statute with the constitutional authority of the New York Court of Appeals. Although the court argued that the fact pattern in *Peters* could be adequately disposed of with the vague reasonableness test demonstrated in *Rivera*,²⁵² *Peters* completed *Rivera*'s analysis by filling in the omissions that had inhered in the earlier opinion. By incorporating the language of “reasonable suspicion” found in the statute into its evaluation,²⁵³ the court elaborated what it called “an adequately defined standard” at a level of certainty less than probable cause.²⁵⁴ “The phrase ‘reasonable suspicion,’” explained the court, “provides a defined standard and is, in fact, no less endowed with an objective meaning than is the phrase ‘probable cause.’”²⁵⁵ By loosening probable cause requirements, *Rivera* enabled New York's criminal procedure counter-revolution. But it was *Peters* that sketched the contours of the new regime.

In codifying a theory of reasonable suspicion, the *Peters* court did far more than downgrade its object of evaluation from “belief” to “suspicion.” It also reconfigured the standard's evaluative criteria. Canonical definitions of probable cause promulgated by the United States Supreme Court had turned on the belief of “a reasonably discreet and prudent man” that the facts available to the officer justified a certain standard of certainty.²⁵⁶ Evaluating probable cause rested on considerations that were emphatically “not

²⁴⁷ *Id.* at 36.

²⁴⁸ *Id.* at 34.

²⁴⁹ *See, e.g.,* *People v. Pugach*, 204 N.E.2d 176, 177–78 (N.Y. 1964).

²⁵⁰ 219 N.E.2d 595 (N.Y. 1966).

²⁵¹ 219 N.E.2d 196 (N.Y. 1966).

²⁵² *Peters*, 219 N.E.2d at 597.

²⁵³ The stop-and-frisk statute permitted temporary questioning of those whom the police officer “reasonably suspect[s] is committing, has committed or is about to commit” certain specified crimes and permitted a search for dangerous weapons if the officer “reasonably suspects that he is in danger.” Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2011)).

²⁵⁴ *Peters*, 219 N.E.2d at 599.

²⁵⁵ *Id.*

²⁵⁶ *Husty v. United States*, 282 U.S. 694, 701 (1931); *see also* *Carroll v. United States*, 267 U.S. 132, 162 (1925).

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”²⁵⁷

But the *Peters* court abjured this populist celebration of lay authority and democratically distributed commonsense. Instead, the “experienced police officer’s intuitive knowledge and appraisal of the appearances of criminal activity” would guide the evaluation of reasonableness.²⁵⁸ “Again,” the court repeated, “the standard is the reasonable suspicion of *the officer an officer* of reasonable caution.”²⁵⁹ In the lower courts, law enforcement officials had argued that the “reaction” of the experienced arresting officer was “significant.”²⁶⁰ Much like attorneys or doctors acquire professional instincts over time, so too “do policemen acquire over a period of years an acute sensitivity to crime and criminals.”²⁶¹

The evaluative standard no longer referred to the perception of a layperson; rather, it referred to the expert capacities of a professional observer, whose presumed experience was incorporated into the analysis. The court did not relinquish its authority to review police action by assessing the reasonableness of police behavior or the demand that police particularize and articulate their internal cognitive processes. But henceforth judicial perceptions of police experience would shape judicial review of stop-and-frisk practices. The police officer’s “evaluation of the various factors involved insures a protective, as well as definitive, standard.”²⁶² With *Peters*, police expertise won its judicial imprimatur.

B. “*Sheer Torture of the English Language*”: *Terry v. Ohio*’s Strategic Language

When the United States Supreme Court took up the stop-and-frisk issue, it, too, reproduced the New York bench’s reliance on police expertise, albeit only implicitly. Reading the Court’s hallmark opinion, *Terry v. Ohio*,²⁶³ against New York’s case law reveals the strategic omissions that inhered in the Court’s reasoning. Indeed, *Terry* was decided in explicit and often heated dialogue with the evolution of New York’s judicial standards. *Terry*’s inability to evade partial reliance on police expertise—despite efforts to the contrary—revealed the essential role of specialized police knowledge in stop-and-frisk practices.

Terry began by criticizing, explicitly and by name, the theory animating *Rivera*. Specifically, the Court denounced *Rivera*’s analytical distinction be-

²⁵⁷ *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

²⁵⁸ *Peters*, 219 N.E.2d at 599.

²⁵⁹ *Id.* at 599, 600 (emphasis added).

²⁶⁰ Record on Appeal at 33, *People v. Peters*, 265 N.Y.S.2d 612 (App. Div. 1965) (Affidavit of James J. Duggan, Read in Opposition to Motion to Suppress, Etc.) (No. 43).

²⁶¹ *Id.*

²⁶² *Peters*, 219 N.E.2d at 599. To one observer, *Peters* signified that “deference to police expertise is now mandatory in New York.” Schwartz, *supra* note 87, at 445.

²⁶³ 392 U.S. 1 (1968).

tween “stop” and “seizure” and “frisk” and “search”: “We emphatically reject this notion [I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”²⁶⁴ But such linguistic pyrotechnics were only so much flash and smoke, a theatrical effect that cloaked *Terry*’s implications beneath rhetoric about the reach of the Fourth Amendment and, with it, the Court’s own authority. “‘Search’ and ‘seizure’ are not talismans,” argued the Court.²⁶⁵ “We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest’ or a ‘full-blown search.’”²⁶⁶

But this emphatic language exposed a seemingly willful misreading of *Rivera*’s central holding. After all, *Rivera* never argued that stop-and-frisk practices were beyond the reach of the Constitution, only that they were governed by the constitutional “restriction . . . against unreasonable searches” rather than the probable cause imperative of the Warrant Clause.²⁶⁷ *Rivera*’s linguistic pirouettes were simply an effort to dissociate Fourth Amendment case law’s use of “probable cause” to define constitutional “reasonableness” by highlighting the relatively limited character of the police actions at issue. The Supreme Court derided this analytical maneuver as only so much sophistry even as it rehearsed the same outcome. Without deigning to explain its logic in significant detail, the Supreme Court simply severed the link between reasonableness and probable cause by judicial fiat.²⁶⁸

The closest the Court came to an explanation for its holding was that it was dealing with “an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”²⁶⁹ Why the exigencies of stop-and-frisk

²⁶⁴ *Id.* at 16.

²⁶⁵ *Id.* at 19.

²⁶⁶ *Id.*

²⁶⁷ *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964).

²⁶⁸ Some recent legal scholarship has urged heavier reliance on reasonableness tests in the Fourth Amendment context, considering it a return to “first principles.” No such reasoning, however, occupied the *Terry* Court. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that the Court should discard its emphasis on warrants, probable cause, and the exclusionary rule in the Fourth Amendment context as inconsistent with constitutional text, history, and common sense, and suggesting that it instead rely on reasonableness and tort-based remedies); see also Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1098 (1998) (celebrating *Terry* for, among other things, “insist[ing] that the Fourth Amendment means what it says and says what it means: All searches and seizures must be reasonable. Reasonableness—not the warrant, not probable cause—thus emerged as the central Fourth Amendment mandate and touchstone.”). But see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (defending the Court’s Fourth Amendment record as a pragmatic accommodation to historical developments).

²⁶⁹ *Terry*, 392 U.S. at 20.

practices authorized departure from probable cause, while similarly exigent warrantless arrests did not,²⁷⁰ remained a mystery—unless a “protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person,”²⁷¹ much as the *Rivera* court had suggested. In the absence of probable cause, the Court explained, the Constitution controlled search and seizure by inquiry into “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security”²⁷²—the selfsame evaluation employed in *Rivera*.²⁷³ Such a determination would weigh the “purpose, character, and extent”—the “scope”—of a search and seizure against its initial justification—namely, the investigating officer’s risk of harm.²⁷⁴

Nevertheless, the Court’s dramatic rejection of *Rivera*’s purported logic may have served important strategic purposes. Many observers, lay and expert alike, read the decision as a sort of compromise between law enforcement interests and civil libertarians.²⁷⁵ That characterization has been common, though by no means universal, in scholarly literature analyzing *Terry*.²⁷⁶ Judge Douglas Ginsburg, for example, has recently drawn on the decision’s language in rehearsing the common wisdom that *Terry* “reflected a compromise between delegitimizing every police stop that does not meet the rigorous standard of ‘probable cause’ and holding that an investigative stop is not a ‘seizure,’ and hence not limited at all by the constitutional prohibition of ‘unreasonable searches and seizures.’”²⁷⁷

Yet, the decision’s language is deeply misleading. As legal scholar Corinna Barrett Lain has pointed out after reviewing the appellate briefs, “no one in *Terry* was arguing that the police ought to be able to stop and frisk at will, so the option of holding stop and frisk practices completely outside the reach of the Fourth Amendment was never seriously on the table to start with.”²⁷⁸ In suggesting otherwise—and mischaracterizing *Rivera*—the Court perhaps sought to limit the rhetorical force of its concession to law enforcement interests.

Though speculating about the Court’s motivation is a necessarily uncertain enterprise, the point comports with existing documentation concerning the *Terry* Court’s deliberations. At their initial conference, the nine justices unanimously voted to affirm in *Terry* on the basis of the arresting officer’s

²⁷⁰ *Ker v. California*, 374 U.S. 23 (1963).

²⁷¹ *Terry*, 392 U.S. at 26.

²⁷² *Id.* at 19–21.

²⁷³ *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964).

²⁷⁴ *See Terry*, 392 U.S. at 25–26.

²⁷⁵ *See, e.g.*, Recent Cases, 21 VAND. L. REV. 1109, 1114–15 (1968) (expert observer); Editorial, *Balancing Order With Liberty*, WASH. POST, June 12, 1968, at A16 (lay observer).

²⁷⁶ *See Lain, supra* note 18, at 1440 n.396 (gathering examples, and counter-examples, of law review literature characterizing *Terry* as a compromise, along with counter-examples from those who dispute that characterization).

²⁷⁷ Ginsburg, *supra* note 207, at 79.

²⁷⁸ Lain, *supra* note 18, at 1442–43 (emphasis added).

probable cause to frisk the defendants.²⁷⁹ Yet, the Court split over the initial draft of Chief Justice Earl Warren's opinion, which unconvincingly advanced a probable cause theory of the case.²⁸⁰ The Court's subsequent abandonment of probable cause and disaggregation of the Reasonableness Clause from the Warrant Clause was initially proposed by Justice William J. Brennan, who extensively reworked Warren's earlier draft.²⁸¹ After accepting and tweaking Brennan's proposed revisions, Warren re-circulated the proposed opinion, this time winning substantial endorsement from all but Justice William O. Douglas,²⁸² who was unwilling to condone police searches on the basis of anything less than probable cause.²⁸³

In a note to Warren explaining his motivations for the revision, Brennan expressed significant concern that "*Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present 'aggressive surveillance' techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit + other ghetto cities [sic]."²⁸⁴ Egging on the police threatened "to aggravate the already white heat resentment of ghetto Negroes against the police—+ the Court will become the scape goat [sic]."²⁸⁵ In light of this concern with the Court's perceived message to lay people, Brennan urged great attention to "the tone of our opinion" because it "may be even more important than what we say."²⁸⁶ Given Brennan's significant influence over Warren's drafting process, it is reasonable to suspect that similar concerns motivated the opinion's heated rejection of *Rivera's* supposed rationale—and its misleading tone of compromise.

Those concerns may also have informed the Court's obfuscation concerning the evaluative criteria included in its new reasonableness test. If probable cause no longer defined the Fourth Amendment's reference to "unreasonable searches and seizures," what did? *Terry* failed to elaborate clearly a new standard to guide determination of reasonableness at levels of certainty less than probable cause. Instead, the Court temporized, hiding a transformation of evaluative criteria in language that seemed to respect and repeat traditional probable cause analysis.²⁸⁷ Police claims of reasonableness—much like police claims of probable cause—had to "be subjected to the more detached, neutral scrutiny of a judge And in making that assessment it is imperative that the facts be judged against an objective stan-

²⁷⁹ Barrett, *supra* note 25, at 784–90 (relying on the handwritten conference notes of Justices Douglas, Brennan, and Fortas).

²⁸⁰ *Id.* at 800–16.

²⁸¹ *Id.* at 822–25.

²⁸² *Id.* at 827–29.

²⁸³ *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

²⁸⁴ Barrett, *supra* note 25, at 825–26 (quoting in full Letter from Justice William J. Brennan, Jr., United States Supreme Court, to Chief Justice Earl Warren, United States Supreme Court (Mar. 2, 1968)).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Dudley, *supra* note 27, at 896.

dard: Would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”²⁸⁸ In its gloss of this evaluative process, however, the Court injected new and outwardly unacknowledged analytic assumptions that marginalized probable cause’s reliance on the perspective of a “man of reasonable caution.” Evaluations of a police officer’s conduct instead turned on “the specific reasonable inferences *which he is entitled to draw from the facts in light of his experience.*”²⁸⁹

Representative examples of traditional probable cause analysis, too, sometimes cited police experience. But such invocations had turned on precise and identifiable facts. In the case cited in *Terry*, *Brinegar v. United States*²⁹⁰—and *Carroll v. United States*,²⁹¹ on which *Brinegar* itself relied—police “experience” referred to special knowledge of the defendants based upon prior interaction²⁹² or surveillance²⁹³ of their criminality and that criminality’s close relationship with their present behavior.²⁹⁴ In those cases, police experience was particularized and articulable and entered into the evaluative process at precise and identifiable moments.²⁹⁵

By contrast, the arresting officer possessed no such prior knowledge of the defendant in *Terry*.²⁹⁶ Instead, his experience referred to the more general knowledge and observational skills acquired on the job. It could not be discreetly identified and instead it entered into the evaluative process imprecisely, coding a general assumption rather than a precise set of facts.²⁹⁷ Indeed, as legal scholars Tracey Maclin and Lewis R. Katz have argued, the Court’s reading of the fact pattern in *Terry* was highly instrumental, omitting

²⁸⁸ *Terry*, 392 U.S. at 21–22.

²⁸⁹ *Id.* at 27 (emphasis added).

²⁹⁰ *Brinegar v. United States*, 338 U.S. 160 (1949).

²⁹¹ *Carroll v. United States*, 267 U.S. 132 (1925).

²⁹² *See id.* at 134–35.

²⁹³ *Brinegar*, 338 U.S. at 162–64, 169–70.

²⁹⁴ In both cases, the defendants—known liquor runners—were observed along highways that the arresting officers knew were frequently used to smuggle alcohol. Their behavior at the time of observation corresponded tightly with their past criminality. *See id.* at 166–70; *Carroll*, 267 U.S. at 160–61.

²⁹⁵ *See Brinegar*, 338 U.S. at 167–71.

²⁹⁶ *Terry v. Ohio*, 392 U.S. 1, 7 (1968) (“[The investigating officer] was not acquainted with any of the three [suspicious] men by name or by sight, and he had received no information concerning them from any other source.”).

²⁹⁷ The arresting officer in *Terry* believed that the defendants were casing a jewelry store for a hold up. He acknowledged, however, never having observed criminals “casing a place” in preparation for any such hold up. When asked why the defendants seemed unusual to him, he responded as follows:

Well, to be truthful with you, I didn’t like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again.

John Q. Barrett, *Appendix B: State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN’S L. REV. 1387, 1420, 1456 (1998).

and distorting relevant facts.²⁹⁸ The most important of these turned on police experience. Though the officer in *Terry* had never arrested anyone for the relevant crime, had never observed anyone preparing for it, and had no prior knowledge of the defendants,²⁹⁹ the Court recognized few of these deficiencies and instead highlighted his thirty-nine years of experience on the force.³⁰⁰ Moreover, as legal scholar Anthony C. Thompson has argued, this emphasis on police expertise was partially an effort to deny the racial dynamics that may have raised the white arresting officer's suspicions about the activities of the black defendants.³⁰¹ Whatever its factual vulnerability, the Court cited police experience to stabilize the volatile logic of its indeterminate reasonableness test. Properly invoked, expertise made the crooked places straight and the rough ways smooth. This was an implicit endorsement of police expertise that imported judicial perceptions of specialized knowledge into the evaluative process.³⁰²

At the outset of the Court's conference on *Terry*, Warren had invoked the expert perceptions of the arresting officer. According to Brennan's conference notes, Warren remarked "that a trained policeman may read [an individual's behavior] differently from [an] ordinary citizen."³⁰³ In failing to explicitly rely on police expertise in the opinion he authored, Warren may

²⁹⁸ Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 *Mts. L.J.* 423, 430–41 (2004); cf. Maclin, *supra* note 27, at 1300–05 (reviewing the arresting officer's testimony and arguing that it was insufficient to justify his actions).

²⁹⁹ Brief for Petitioner, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113684, at *6.

³⁰⁰ *Terry*, 392 U.S. at 5. The Court noted:

[The arresting officer] had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years.

Id.

³⁰¹ Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 *N.Y.U. L. REV.* 956, 966–73 (1999) ("The 'police officer as expert' narrative allowed the Court in *Terry* to present a coherent, raceless narrative about why [the arresting officer] acted as he did.").

³⁰² This is not to say, however, that the Court deferred to all police judgments. Much as the New York Police Department had instructed its officers that mere suspicion would not sustain frisk, *supra* notes 149, at 4, so too did the Court bar officers from invoking stop-and-frisk authority on the basis of "inarticulate hunches" or an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 22, 27. See generally Harris, *supra* note 83. Some have interpreted the Court's reversal in *Sibron* as a signal that mere suspicion would not sustain police actions before the courts. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 *IND. L.J.* 659, 663–65 (1994).

³⁰³ Barrett, *supra* note 25, at 785 n.222 (quoting handwritten notes of Justice William J. Brennan, Jr., from the Conference on *Terry v. Ohio* (Dec. 13, 1967)). Barrett evaluated the handwritten notes of Justices Brennan, Fortas, and Douglas. Barrett cogently asserts that these three sets of notes' "relative length and complete consistency with each other indicates their reliability." *Id.* at 790. Nevertheless, only Brennan's notes record Warren's reference to police expertise. Compare *id.* at 869 (transcription of Brennan's conference notes), with *id.* at 859 (transcription of Douglas's notes), and *id.* at 864 (transcription of Fortas's conference notes).

have sought to modulate the tone of his opinion in tacit recognition of the concerns Brennan articulated in his letter to the Chief Justice.³⁰⁴

Not all on the Court were so misleading. In a concurrence written with the purpose of “fill[ing] in a few gaps, as I see them,” and “mak[ing] explicit what I think is implicit” in the majority opinion, Justice John M. Harlan expressed what would later evolve into the *Terry* standard: “articulable suspicion less than probable cause.”³⁰⁵ By Harlan’s prescient lights, the standard turned not on the democratic language of the traditional probable cause standard but on the expertise of the “experienced, prudent policeman.”³⁰⁶

A little over a decade after *Terry*, the Court would explicitly shift its standard away from the reasonable person analysis, borrowed from *Brinegar* and its kin, and adopt the perspective of a reasonable police officer. In 1979, the Court formally recognized Warren’s respect for police expertise in the *Terry* conference, observing that a “trained, experienced police officer . . . is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.”³⁰⁷ The following term, three justices interpreted the *Terry* standard to include “objective facts upon which the law enforcement officer relied in light of his knowledge and expertise.”³⁰⁸ “In applying a test of ‘reasonableness,’” they concluded, “courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience.”³⁰⁹ And, in 2002, the Court confirmed that reasonable suspicion analysis was a totality-of-the-circumstances test that “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”³¹⁰

Arguably, however, such formal, doctrinal recognition of police expertise was irrelevant. As the Court has recognized, “the legal rules for probable cause and reasonable suspicion acquire content only through application.”³¹¹ The Court had already signaled its deference to police expertise in its application of the reasonableness test to the facts in *Terry*. And, in applying that same test, the lower courts have certainly followed the Court’s lead in providing substantial latitude to police discretion.³¹²

³⁰⁴ See Barrett, *supra* note 25, at 784–90, 800–16, 822–25.

³⁰⁵ *Terry*, 392 U.S. at 31–33 (Harlan, J., concurring).

³⁰⁶ *Id.* at 32.

³⁰⁷ *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979).

³⁰⁸ *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring in part and concurring in the judgment).

³⁰⁹ *Id.* at 565–66.

³¹⁰ *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citations omitted).

³¹¹ *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

³¹² See, e.g., Ginsburg, *supra* note 207, at 85 (“The case law is consistent with the hypothesis that, under the totality of circumstances approach, courts regularly side with the police.”); Harris, *supra* note 83, at 987–1012 (gathering evidence that despite “the Supreme Court’s

When the Court turned to *Peters* and *Sibron*, it declined to rule on the basis of the novel rule described in *Terry*, issued concurrently, or to consider the constitutionality of New York's stop-and-frisk statute. Instead, in a consolidated opinion, the Court subjected each to traditional probable cause analysis. It affirmed *Peters* and overturned *Sibron* without touching the New York Court of Appeals' holdings in its *Peters* opinion.³¹³ So far as the majority was concerned, it would fall to some lesser authority to lay "the extraordinarily elastic categories of s. 180-a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible."³¹⁴

So far as Harlan was concerned, however, it would be little more than an academic exercise. In another concurrence, he argued that *Terry* confirmed the statute's constitutionality to the extent that "a right to stop may indeed be premised on reasonable suspicion and does not require probable cause."³¹⁵ Indeed, judges in New York read the case the same way: *Terry*, *Peters*, and section 180-a were frequently cited together.³¹⁶

CONCLUSION

With *Terry*, law enforcement officials won precisely the legal authority they sought. Yet, if the New York experience is any indication, that victory was won on the basis of something other than demonstrated merit. The police claimed professionalism and, with it, ethnographic expertise. Ironically, they substantiated neither claim. As internal departmental literature and the LDF made clear, police ethnography was clearly limited by the racial difference it presumed. Ultimately, the stop-and-frisk bill survived the judicial gauntlet on the basis of police behavior that ignored departmental guidelines and the professional norms those guidelines were designed to express. Though professional norms may have failed to command New York City's finest, the Court nonetheless acted as if they had.

rhetorical reassurances," the lower courts have interpreted *Terry* in a manner "that allows the police to make forcible stops and do searches almost entirely at their discretion").

³¹³ *Sibron v. New York*, 392 U.S. 40, 44 (1968).

³¹⁴ *Id.* at 59.

³¹⁵ *Id.* at 71 (Harlan, J., concurring).

³¹⁶ See, e.g., *People v. Arthurs*, 249 N.E.2d 462, 465 (N.Y. 1969); *People v. Jackson*, 319 N.Y.S.2d 731, 735 (App. Div. 1971); *People v. Joslin*, 301 N.Y.S.2d 212, 213 (App. Div. 1969); *People v. Weis*, 301 N.Y.S.2d 186, 190 (App. Div. 1969); *People v. Beltrand*, 314 N.Y.S.2d 276, 280 (Crim. Ct. 1970).