

# REASONABLY RADICAL: *TERRY*'S ATTACK ON RACE-BASED POLICING

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## I. INTRODUCTION

At the heart of the Warren Court's criminal procedure revolution was the idea that the public police must be answerable to the judicial branch if we are to avoid arbitrary and capricious governance. Judicial review of police conduct prevented the Constitution from becoming "revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."<sup>1</sup> The problem, the Court recognized, was the unchecked power of the police to interfere with the public at their pleasure.<sup>2</sup> Without the judicial check, the Court recognized, policing becomes a state of nature:<sup>3</sup> "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."<sup>4</sup>

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1. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).
2. See, e.g., PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 55 (1997) (describing the elements of arbitrary government in terms of discretion to choose without responding to the affected party's interests).
3. See, e.g., THOMAS HOBBES, *LEVIATHAN* 88–89 (rev. student ed. 2012) (describing state of nature as "a warre . . . of every man, against every man").
4. *Mapp*, 367 U.S. at 659 (internal quotations omitted).

The Court's regulatory regime relied upon the judicial branch to hold the police accountable. Judges provided a front-end check on the police, through the warrant process, by requiring them to obtain from a magistrate a "neutral predetermination" of the lawfulness of their proposed conduct.<sup>5</sup> Judges also enforced a trial-oriented back-end sanction—exclusion of evidence at trial—incentivizing the police to limit themselves to magistrate-approved conduct. Indeed,

the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct . . . and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere form of words.<sup>6</sup>

One way to understand the Warren Court's jurisprudence leading up to *Terry v. Ohio*, then, is as facilitating oversight by the judiciary of executive action. Standing guard over the police is the prime function of the warrant process.<sup>7</sup> But asserting Fourth Amendment rights at trial has a more general role in bringing to light low-visibility police conduct, so that the public can participate in the process of holding the police accountable, through the democratic political process.<sup>8</sup>

Low-visibility policing is a method of social control that enables the police to act at their pleasure when deciding how to maintain or impose order on the streets.<sup>9</sup> Courts and legislatures do not get to know "the substance of these 'low visibility' . . . [activities, so] they c[an]not correct, clarify, or constrain the[ir] boundaries."<sup>10</sup> Low-visibility policing, because it avoids judicial oversight, presents an existential challenge to the Warren Court's Fourth Amendment regime of judicial oversight of the police.

The *Terry* Court recognized both that low-visibility policing was an important feature of the widespread harassment of racial minorities at the hands of the police, and that the Court was relatively powerless to do anything about it.<sup>11</sup> Because low-visibility policing targets only the socially marginal and vulnerable, few people outside of the affected groups may know or believe complaints of race-based policing, and so be willing to protest against it. And because low-visibility policing begins and ends on the street, the judiciary never gets to hold the police accountable for their conduct. Some institution other than the courts must fill this court oversight role, or the wrongs of low-visibility policing go unaddressed.

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5. *Katz v. United States*, 389 U.S. 347, 358 (1967).

6. *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (internal citations and quotations omitted).

7. *See, e.g.*, *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.").

8. *See, e.g.*, Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 290 (2010) (discussing political processes by which poor and marginalized people can hold the police accountable).

9. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s* 192 (2016).

10. *Id.* at 193.

11. *See Terry*, 392 U.S. at 13–14.

One particular form of low-level harassment—the stop and frisk—occupied a central role as both a technique of racial harassment and low-visibility policing. One of the great disappointments for supporters of the Warren Court was its refusal to prohibit the police practice of stopping and frisking suspects on the street as a form of criminal investigation.<sup>12</sup> Stop and frisk, the Court noted, caused a great deal of friction between the police and minority communities<sup>13</sup>—and continues to do so.<sup>14</sup> Despite the Court's worries about the impact of stop and frisk on minority individuals, the Court endorsed some version of that practice, prompting critiques of the *Terry* opinion as formalistic,<sup>15</sup> or race-blind,<sup>16</sup> or as conciliating the police.<sup>17</sup>

In fact, the Court's discussion of race often mirrors the radical language adopted by the 1967 President's Commission on Law Enforcement and Administration of Justice in its famous report, *The Challenge of Crime in a Free Society*,<sup>18</sup> published just one year earlier. That President's Commission called for radical, top-to-bottom reform of the police and its relationship to minority communities.<sup>19</sup> The courts and the Constitution are relatively powerless to undertake this sort of radical reform.<sup>20</sup> If *Terry*'s discussion of race and policing appears unsatisfying, that is because the Fourth Amendment's ability to address racially-biased policing is unsatisfying. The interaction of race and policing is a complex problem with a long history and no easy solutions. Thanks in part to the President's Commission, the *Terry* Court was well aware of that history.<sup>21</sup>

The problem presented by *Terry* is simply that the criminal justice system is not an integrated system, but a fragmented one. One way it is fragmented, the *Terry* Court recognizes, is between crime control and public-order policing. Crime control has high-judicial visibility, allowing illegally-gained evidence to be excluded at trial.

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12. *Id.* at 22.

13. *Id.* at 14 n.11.

14. See, e.g., Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43 (2016) (reviewing the *Terry* doctrine in light of recent litigation investigating the use of stops and frisks in New York City). See also Floyd v. City of N.Y., 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 LEGIS. & PUB. POL'Y 883 (2013); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 44 (1994) (discussing vulnerability of African-Americans to reasonableness-based stops and frisks); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U.L. REV. 243, 251 (1991); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

15. See generally Alexandra Natapoff, *A Stop is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113 (2017).

16. See, e.g., Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150 (2012) (discussing perils of *Terry*'s "colorblind" model of criminal procedure); see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. REV. 956, 964 (1999).

17. See, e.g., Tracey Maclin, *Terry v. Ohio Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1285 (1998) (arguing that racial considerations "clearly occupied a subordinate position to the Court's overriding concern about police safety and violent crime").

18. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter PRESIDENT'S COMM'N].

19. *Id.*

20. See, e.g., City of L.A. v. Lyons, 461 U.S. 95 (1983) (denying injunctive relief to victim of police brutality for lack of standing).

21. See *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968).

Public-order policing has low-judicial visibility. What happens on the street stays on the street, and rarely makes it to the courtroom. Read this way, *Terry* tells lawyers something uncomfortable. In a fragmented criminal justice system, there are some forms of police misconduct that the Court, and the exclusionary rule, just cannot remedy. Doing social activism *through law* is not enough. The Fourth Amendment lacks the resources to protect us from race-based policing.

For the most part, the race-based criticism of *Terry* focuses, understandably enough, on the Court's failure to engage with a race-conscious approach to the problems of race-based policing. Many of these critiques are urgent and important. However, in an attempt to place the blame for subsequent doctrinal novelties at the feet of the *Terry* Court, they generally embargo and explain away the Court's explicit discussion of race-based policing and the Court's references—express and implied—to the recently published *Challenge of Crime in a Free Society*.<sup>22</sup>

To reclaim a sense of *Terry*'s powerful engagement with race and reasonableness, I want to separate out *Terry* from its progeny and suggest that the Court was engaged in a conversation with the President's Commission. I shall begin by discussing the President's Commission's radical critique of race-based policing and its even more radical recommendations for reform: recommendations that have largely been ignored and unfulfilled. I shall then explain how *Terry*'s approach to stop and frisk responds to race-based harassment by, not only adopting, but rendering more stringent, the President Commission's recommendations on the use of stops and frisks. I shall suggest that *Terry*'s precise, rule-like approach to stop-and-frisk policing precludes its use as a device for low-level racial harassment and limits its use to investigating crimes of violence. This precision enabled the Court to tackle head-on a problem identified by both the *Terry* Court and the Report: the central place occupied by physical displays of police authority—often called “command presence”—to dominate racial minorities. I shall conclude by suggesting that critics frustrated at the way the reasonable suspicion standard has been co-opted by a pro-police agenda miss the Court's central regulatory claims. Three claims are particularly important: (1) that there is not one criminal justice system, but many overlapping systems; (2) that the police conduct is highly visible in minority communities; but (3) that same conduct is low visibility in the courts that are supposed to regulate their behavior. Constitutional litigation is thus a limited resource against the sort of low-visibility policing that remains separate from the process of criminal prosecution and so incapable of judicial oversight.

## II. RADICAL POLICING

The police on patrol wield a distinctive type of authority. Certainly, they represent the state's authority—indeed the authority of law as comprehensive, supreme, and effective. But unlike other legal officials—judges, prosecutors, and so on—police officers have the legal ability to deploy physical force to ensure conformity with the law. In one sense, this authority is “high-visibility”: they patrol, search and seize, negotiate solutions to public order problems and so on, in full view of the

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22. PRESIDENT'S COMM'N, *supra* note 18. The *Terry* opinion cites the President's Commission Report quite extensively. See *Terry*, 392 U.S. at 14 n.11.

public.<sup>23</sup> In another sense, however, their authority is “low-visibility,” because these activities occur out of the view of their supervisors (whether in the executive or legislative branches), and using situational and territorial expertise that neither their superiors nor the public possesses.

I will briefly consider each of these features in turn: (1) that the police have a distinctive form of *legal* authority that they exercise over those civilians under their jurisdiction; (2) that they often exercise that authority with *high-visibility* in relation to the civilian subjects of their authority but (3) *low-visibility* in relation to the *legal officials* who could call them to account, and otherwise regulate that authority, as well as the *general public*, who lack the specialized knowledge that comes from police training and experience.

### A. Perspectives on Police Authority

#### i. Distinctive Authority

The police are distinctive in the sort of authority they claim over people and institutions within its jurisdiction. The police, as agents of the state, generally claim legal authority for their actions. However, other legal officials possess the power to interpret and apply the law within a given jurisdiction, over some range of individuals. Only the police are given the power to maintain public order,<sup>24</sup> and to back up that authority through “the baton and the gun.”<sup>25</sup> The classic statement of this position is Egon Bittner’s claim that “the police are nothing else than a mechanism for the distribution of situationally justified force in society.”<sup>26</sup> While this definition of

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23. See, e.g., Charles H. Ramsey, *The Challenge of Policing in a Democratic Society*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 596–97 (7th ed., Roger G. Dunham & Geoffrey P. Alpert, eds., 2015).

24. The patrol officer’s order-imposing authority may derive as much from their special competence to respond to disorder as from any particular rule. See, e.g., P.A.J. WADDINGTON, *POLICING CITIZENS: AUTHORITIES AND RIGHTS* 39 (1999) (describing the determinants of police decision-making in the context of public order policing as “not the law, but officers’ conception of social values to be authoritatively imposed . . . on those who are recalcitrant.”). See also JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 372 (2012) (1689) (describing the broad prerogative power of the executive to maintain order and enforce the law). The Government in *Terry* attempted (unsuccessfully) to persuade the Court to endorse something like this power. See *Terry*, 392 U.S. at 10 (characterizing the state as “argu[ing] that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses . . .” including an unconstrained power to stop and frisk suspects on the street).

25. STUART A. SCHEINGOLD, *THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION* 74 (1991).

26. EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS* 39 (1970). Bittner elsewhere argued that, “The policeman, and the policeman alone, is equipped, entitled, and required to deal with every exigency in which force may have to be used, to meet it.” Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *POLICING: KEY READINGS* 150, 165 (Tim Newburn ed., 2008). See also e.g., ROBERT REINER, *POLICING, POPULAR CULTURE AND POLITICAL ECONOMY: TOWARDS A SOCIAL DEMOCRATIC CRIMINOLOGY* 58 (2011) (“The distinctiveness of the police lies not in their performance of a specific social function, but in being the specialist repositories for the state’s symbolic monopolization of legitimate force in its territory.”). For an alternative view, see JOHN KLEINIG, *THE ETHICS OF POLICING* 19–20 (1996).

police authority is perhaps somewhat simply stated,<sup>27</sup> it contains more than a kernel of truth and is widely accepted as accurate.<sup>28</sup>

## ii. High-Visibility Authority

A second feature of patrol-police authority is that it is public and exposed, determined by status and location. In part, police authority is embodied by the uniform or the badge, which both represents and broadcasts the officer's status as a governmental official. However, patrol police authority also depends upon how the police conduct themselves *in public*.<sup>29</sup> The physical embodiment of this type of authority is referred to as “[c]ommand presence[.] . . . a quality that conveys supreme authority, confidence, competence, and the physical ability to back it up.”<sup>30</sup> In service of the publicly broadcast model of authority, “[p]olice officers dress, walk and talk in ways they feel create and enhance command presence.”<sup>31</sup> The point of command presence is to take control of the public spaces that constitute police territory.<sup>32</sup>

The flip-side of highly-visible authority, however, is intolerance of invigilators, especially civilians on the street who might see fit to challenge the officer's authority.<sup>33</sup> Command presence demands public deference to that authority and compliance with the officer's directives.<sup>34</sup> Losing command authority during an interaction with a member of the public amounts to a personal and institutional disgrace.<sup>35</sup> The stakes of such a confrontation are high:

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27. I, for one, would quibble with the “nothing else” aspect of the formulation. See, e.g., Eric J. Miller, *A Fair Cop and a Fair Trial*, in *OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS* 239 (John D. Jackson & Sarah J. Summers eds., 2018) (discussing the role of the police).

28. See, e.g., Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 ST. LOUIS U.L.J. 391, 398–400 (2016) (citing Bittner, *supra* note 26, approving Bittner's force-based understanding of police authority); see also WADDINGTON, *supra* note 24, at 15–16 (“[A] consensus has emerged in police research that the essence of policing lies not in what police do but in their potential, specifically their potential to use legitimate force”).

29. KLEINIG, *supra* note 26, at 19; Ramsey, *supra* note 23, at 597 (describing the way in which the police learn to regard the badge as a symbol—a bright and highly visible symbol—of the authority and the trust that the public places in them).

30. JOAN C. BARKER, *DANGER, DUTY, AND DISILLUSION: THE WORLDVIEW OF LOS ANGELES POLICE OFFICERS* 69 (1999).

31. *Id.* at 70.

32. See, e.g., SCHEINGOLD, *supra* note 25, at 74 (discussing ways in which “[t]he police are organized to control the streets and the successful patrolman is an informal specialist in street use. He combines his knowledge of local behavior with his conception of how the public streets are used to analyze and perform many of his routine obligations.”); see also John Van Maanen, *The Asshole* in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 143 (Roger G. Dunham & Geoffrey P. Alpert, eds. 7th ed., 2017) (discussing police territoriality).

33. On contestatory citizens as invigilators of state power, see PETTIT, *supra* note 2, at 225–26.

34. See, e.g., WADDINGTON, *supra* note 24, at 17 (“data demonstrates just how thin is the veneer of civility in police-public encounters and that the maintenance of civility relies on *members of the public* deferring to the authority of the police . . . if they refuse, then the coercive underpinnings of that authority are clearly revealed, especially when police authority is publicly and visibly challenged[.]”).

35. See, e.g., Van Maanen, *supra* note 32, at 147 (“Activity which may threaten the perceived order becomes intolerable, for it signifies to the patrolman that his advantage over the conduct of others (his “edge”) is in question. It is a source of embarrassment in front of a public audience, and sometimes it is considered a disgrace to the police uniform if it is viewed by one's peers or departmental superiors.”).

when the authority of an officer is questioned by a member of the non-police public, the officer has three broad responses available to him. He may (1) physically attack the offender; (2) swallow his pride and ignore the offender; or (3) manufacture a false excuse for the arrest of the offender.<sup>36</sup>

Accordingly, a willingness to assert authority over recalcitrant civilians just in virtue of their recalcitrance is an omnipresent threat behind every police-civilian interaction.<sup>37</sup> In a classic article on police responses to civilian challenges, John Van Maanen describes the process as moving from affront, where the civilian challenges public police authority; to clarification through confrontation, as the police officer tries to determine whether the civilian is likely to continue to resist the police, or is likely to turn to cooperation; and finally to the remedial phase, which metes out some form of degradation ceremony upon the civilian as a means of reasserting police authority.<sup>38</sup> These sanctions may be some form of threat, ridicule, or harassment, or some other form of street justice.<sup>39</sup>

### iii. Low-Visibility Authority

Despite the high visibility of police activity to observers on the street, that activity is rarely observed or reported to the various institutions charged with regulating police activity and holding patrol police accountable.<sup>40</sup> Institutionally, public-order policing is a “low-visibility” activity. Before the advent of police-worn body cameras and mobile phones, police supervisors were constrained to take police officers at their word whenever the public complained about street justice or degradation ceremonies. For the most part, what the police officer said happened during an encounter became the official version, whatever the truth.<sup>41</sup> Low-visibility policing, by its very nature, devolves a form of discretionary “final-authority” power to the patrol officer to determine how to respond to situations that arise on the street.<sup>42</sup>

Regulatory problems are particularly pressing when scrutiny is difficult or accountability unenforceable. That is often the case when policing begins and ends upon the street, rather than moving through the stationhouse to the courthouse.<sup>43</sup> Much of low-level policing is resolved by the police on the spot and rarely results in

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36. *Id.* at 149.

37. *See, e.g.*, PETER K. MANNING, DEMOCRATIC POLICING IN A CHANGING WORLD 34 (2010) (describing policing as about “making use of the capacity and authority to overpower resistance”).

38. Van Maanen, *supra* note 32, at 154.

39. *Id.*

40. *See generally* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

41. *See, e.g.*, RICHARD V. ERICSON, REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK 23 (1991) (“[Police] versions of the truth are routinely accepted by other criminal control agents, who usually have neither the time nor the resources to consider competing truths.”).

42. On final authority discretion, see Ronald Dworkin, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 29, 49 (1997) (describing a type of discretion where a decision cannot be reviewed or reversed by some superior).

43. *See, e.g.*, Miller, *supra* note 27.

a formal arrest or prosecution. According to a former police officer-turned-criminologist P.A.J. Waddington, “For most potential offenders justice is dispensed not in court, but on the streetcorner; not by a judge, but by a police officer.”<sup>44</sup> The sanction is often routine harassment and intimidation of civilians.<sup>45</sup>

Crime control, as compared with street policing, is a high-visibility activity. Criminal investigation allows officials outside the police department to interrogate police investigatory techniques. A feature of the Warren Court was rendering otherwise low-visibility policing more visible to the courts, and so more amenable to judicial oversight. *Terry* represents the limits of that process when confronted with a fragmented system of policing.

#### B. The President’s Commission and Police Authority

So far, I have suggested that policing presents problems of authority and accountability. Displays of police authority are highly visible in the communities that the police patrol, but are often invisible to the institutions charged with holding the police accountable. Police authority often relies upon coercive components: a command presence that demands compliance and penalizes—often forcibly so—individuals who question that authority. Where the police become territorial and suspicious of the public, police authority degenerates into authoritarian policing, increasing tensions between the police and the public.

In 1967, one year before the Court’s decision in *Terry v. Ohio*, the President’s Commission on Law Enforcement and Administration of Justice released its landmark report, *The Challenge of Crime in a Free Society*.<sup>46</sup> That report, chaired by President Johnson’s former Attorney General, Nicholas Katzenbach, addressed issues of resistance to policing, their causes, and the challenges these present for relations between public and state, civilian and police.<sup>47</sup> Most remarkably, the President’s Commission found that some resistance to policing was a justified response to state and municipal policies or practices that discriminated against minority individuals and communities.<sup>48</sup> The President’s Commission concluded that as members of historically marginalized and discriminated-against groups—including African-Americans, Puerto Ricans, and Mexican-Americans—marked them out as most likely to distrust the police because most subject to police harassment.<sup>49</sup>

Of central importance to the President’s Commission’s response to race-based policing is the idea that the police are an instrument of governance. A perennial feature of policing is that the nature and justification of that governance function—often referred to as the “police mandate”<sup>50</sup>—is usually poorly articulated by the states and municipalities who oversee the police, leaving it up to the police to

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44. WADDINGTON, *supra* note 24, at 36.

45. *Id.* at 42.

46. *See generally* PRESIDENT’S COMM’N, *supra* note 18.

47. *See id.*

48. *See id.*

49. *Id.* at 99 (“In view of the history of race relations in America and of the ghetto conditions in which most minority-group members live, doubt about American ideals and resentment against authority are to be expected among Negroes, Puerto Ricans, and Mexican-Americans.”).

50. MANNING, *supra* note 37, at 34. *See also* Peter K. Manning, *Police: Mandate, Strategies, and Appearances in THE POLICE AND SOCIETY: TOUCHSTONE READINGS 94* (Victor E. Kappeler ed., 2d. ed., 1999).



determine that mandate for themselves. As a result, the police “define and redefine in action the mandate”<sup>51</sup> without much external control.

The report tackled both the need for legislatures to define the police mandate, but also what the substantive content of that mandate should be.<sup>52</sup> The task, as the Commission envisaged matters, was to set a mandate that tempered those practices that the police considered is effective with police practices that are fair.<sup>53</sup> As a foundational initial step, the Commission recognized that, despite the traditional emphasis is on crime and arrest, most of the time the police were engaged in other social governance functions, such as peacekeeping and public welfare,<sup>54</sup> and that these other functions are a vital and equally valuable component of police work.<sup>55</sup>

Peacekeeping and public-welfare policing present a number of opportunities and challenges, the Commission found. To consider the challenges first: because these aspects of policing received little attention from police, legislatures, and courts, the police tended to be poorly trained—if trained at all—in policing practices that did not involve arrest.<sup>56</sup> The techniques of crime-fighting tend to be adversarial—the activity, as described by Justice Jackson, of “the officer engaged in the often competitive enterprise of ferreting out crime.”<sup>57</sup> These techniques are ill-suited to situations in which police officers adopt a non-adversarial, community-service role. They “assist stranded motorists, give directions to travelers, rescue lost children, respond to medical emergencies, help people who have lost their keys unlock their apartments.”<sup>58</sup> In these sorts of situations, the police act as traffic director, medic, or social worker (not crime fighter).

More challenging are the high-visibility encounters in which an officer acts as stand-in for the state. Individual officers may be targeted by disadvantaged civilians who seek to vent their resentment for current and historical failures of the state or the police.<sup>59</sup> In such circumstances, the officer should aspire to act as negotiator or

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51. Peter K. Manning, *Drama, the Police and the Sacred in Policing: Politics, Culture and Control* 184 (Tim Newburn & Jill Peay, eds., 2012).

52. PRESIDENT'S COMM'N, *supra* note 18, at 94 (“The community acting through its elected representatives must decide and state precisely what it wants the police to do, not simply admonishing them for disobeying indistinct or nonexistent commands.”).

53. *Id.* at 93 (“The struggle to maintain a proper balance between effective law enforcement and fairness to individuals pervades the entire criminal justice system”).

54. *Id.* at 91 (“A great majority of the situations in which policemen intervene are not, or are not interpreted by the police to be, criminal situations in the sense that they call for arrest with its possible consequences of prosecution, trial, and punishment.”).

55. *See id.* at 92 (“The peacekeeping and service, activities, which consume the majority of police time, receive too little consideration.”).

56. *Id.* (“policemen, who as a rule have been well trained to perform such procedures as searching a person for weapons, transporting a suspect to the stationhouse, taking fingerprints, writing arrest reports, and testifying in court, have received little guidance from legislatures, city administrations, or their own superiors, in handling these intricate, intimate human situations. . . . What a policeman does, or should do, instead of making an arrest or in order to avoid making an arrest, or in a situation in which he may not make an arrest, is rarely discussed.”).

57. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

58. PRESIDENT'S COMM'N, *supra* note 18, at 97.

59. *Id.* at 99–100. (“[M]inority-group residents have grievances not just against society as a whole, but specifically against the police. . . . [T]oo many policemen do misunderstand and are indifferent

conciliator. However, their training, especially if it emphasizes a strong command presence, tilts towards criminalizing these encounters. Poorly trained officers are likely to use the power of the law—or the gun or the baton—to dominate civilians. Instead, the President’s Commission suggested, the police should engage “understandingly and constructively”<sup>60</sup> in these complex, “intricate, intimate human situations,”<sup>61</sup> with civilians who are vulnerable, angry, and frightened.<sup>62</sup> High visibility ensures that police responses are transmitted throughout the community. Those that are violent or demeaning reinforce negative perceptions of the police that have strong historical resonance and contemporary validity.

On the other hand, the low-institutional visibility of the peacekeeping and social welfare functions renders these types of interaction difficult to regulate. Portentously for the *Terry* Court, the Commission recognized that, despite the increased judicial scrutiny of police crime-fighting activities by the courts, “most police actions are not so reviewed. Those that do not lead to arrest and prosecution almost never are reviewed for the simple reason that, short of a civil suit against the police by a citizen, there is no court machinery for reviewing them.”<sup>63</sup> The lack of scrutiny has major consequences for low-level encounters between the police and minority civilians. Where the peacekeeping function devolves from a person-to-person encounter between equals into a face-off between African-American (or other marginalized individual) versus the police—what the commission calls “black-versus-white, oppressed-versus-oppressor”<sup>64</sup>—low visibility hides the tactics of street justice from the courts and other regulatory bodies.

A major source of community friction, the President’s Commission emphasized, was police reliance on stops-and-frisks as a tool of dominance or oppression. The President’s Commission found that the race riots that exploded in American cities towards the end of the 1960s “were touched off by commonplace street encounters between policemen and citizens.”<sup>65</sup> The problem was not criminal prosecution of African-Americans, but street-level harassment. In making this finding, the President’s Commission echoed the National Advisory Commission on Civil Disorders (commonly known as the Kerner Commission) which reported that African-Americans “firmly believe that police brutality and harassment occur repeatedly in [African-American] neighborhoods.”<sup>66</sup> The Kerner Commission reported that

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to minority-group aspirations, attitudes, and customs, and that incidents involving physical or verbal mistreatment of minority-group citizens do occur and do contribute to the resentment against police that some minority-group members feel.”).

60. *Id.* at 100.

61. *Id.* at 92.

62. *See id.* at 91.

63. *Id.* at 93–94

64. PRESIDENT’S COMM’N, *supra* note 18, at 100.

65. *Id.* at 92.

66. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 158 (1968) [hereinafter CIVIL DISORDERS].

“street justice”<sup>67</sup>—acts of excessive and unjustified use of force, harassment, and verbal abuse—contributed to toxic police-community relations.<sup>68</sup>

Stopping and frisking is a high community visibility,<sup>69</sup> low institutional visibility technique of policing. While the Commission recognized that police stops were an important investigatory tool for inquiring into criminal conduct in large, anonymous, urban areas.<sup>70</sup> Nonetheless, outside of what the *Terry* Court would label “the legitimate investigative sphere[,]”<sup>71</sup> the practice of stopping and frisking was used as a tool of harassment, in particular, of minorities.<sup>72</sup> Some means of distinguishing between the investigatory and non-investigatory, order-producing uses of the stop and frisk would have to be developed, the Commission thought. But it provided little guidance on what the distinguishing features would be.<sup>73</sup>

The Commission’s discussion of the police mandate recognized that policing on patrol involves person-to-person encounters between the police and often-vulnerable civilians. The duty of the police to intervene to restore order or prevent crime.

[M]eans becoming involved in the most intimate, personal way with the lives and problems of citizens of all kinds.

It is hard to overstate the intimacy of the contact between the police and the community. Policemen deal with people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, or when they are ashamed. Every police action can affect in some way someone’s dignity, or self-respect, or sense of privacy, or constitutional rights.<sup>74</sup>

The intimate and personal nature of policing suggests that managing relationships with people and communities are core aspects of the police function. Yet the police are given too few resources to deal with the problem: they are trained in the process of arrest—the sort of process in which command authority to produce compliance is major asset—but not of other types of intervention that could defuse or

67. See, e.g., Van Maanen, *supra* note 32, at 143, 149.

68. See *id.* at 159 (“‘Harassment’ or discourtesy may not be the result of malicious or discriminatory intent of police officers. Many officers simply fail to understand the effects of their actions because of their limited knowledge of the [African-American] community.”).

69. See, e.g., CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 2 (2014) (“Police stops matter. No form of direct government control comes close to these stops in sheer numbers, frequency, proportion of the population affected, and, in many instances, the degree of coercive intrusion. . . . Drivers vividly remember the details and share stories of police stops with family and friends. . . . Across millions of stops, these experiences are translated into common stories about who is an equal member of a rule-governed society and who is subjected to arbitrary surveillance and inquiry.”).

70. PRESIDENT’S COMM’N, *supra* note 18, at 95.

71. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

72. PRESIDENT’S COMM’N, *supra* note 18, at 95 (“the kind of misuse of field interrogation that, the Commission study also indicated, occurs today in a substantial number of street incidents in some cities.”).

73. The Commission simply opined that “[s]pecific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk would prevent th[is] kind of misuse of field interrogation . . . .” *Id.*

74. *Id.* at 91.

otherwise manage situations outside the crime-fighting sphere that call for a non-criminal response.

Nonetheless, the intimate and personal nature of policing presented opportunities for the police to make a difference in communities. On the one hand, “the relationship between the police and the community is so personal that every section of the community has a right to expect that its aspirations and problems, its hopes and fears, are fully reflected in its police.”<sup>75</sup> On the other, the police were ignorant or dismissive of the ways in which the state or society failed minority civilians.<sup>76</sup> The truly radical aspect of the Commission’s report was to include that social justice orientation as an explicit part of the police mandate and propose a series of institutional innovations to put that social justice requirement into practice.

Two features stand out in the Commission’s social justice orientation. The first is the Commission’s recognition of the complex and plural sources of crime and disorder in American society: “[p]overty, racial antagonism, family breakdown, or the restlessness of young people[,]”<sup>77</sup> to name just some of the causes identified by the Commission. The second feature is the Commission’s acknowledgement that the people staffing criminal justice positions would have to adopt a social justice orientation if they were to address these legitimate social justice concerns properly.<sup>78</sup> As part of that social justice orientation, the Commission recognized that the police would have to engage in a genuine, persistent, and permanent community relations mission, from the top to bottom of the police force. Community relations could not be a marginal aspect of policing, relegated to special programs or units;<sup>79</sup> a community relations orientation is, the Commission recognized, an essential feature of the police mandate.<sup>80</sup>

The challenge of policing with a social justice orientation required major structural reforms. The first was to adopt a community planning board, to coordinate with other providers of community services to “examine whether it is . . . possible . . . for the police to devote more time than they now generally do to protecting the community against social injustices.”<sup>81</sup> Included on this board should be a high-ranking police community service officer.<sup>82</sup> Given the patrol officer’s unique position,

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75. *Id.* at 107.

76. *Id.* (“a lack of understanding of the problems and behavior of minority groups is common to most police departments and is a serious deterrent to effective police work in the often turbulent neighborhoods where those groups are segregated”).

77. *Id.* at 91.

78. PRESIDENT’S COMM’N, *supra* note 18, at 12 (“The problem of personnel is at the root of most of the criminal justice system’s problems. The system cannot operate fairly unless its personnel are fair. The system cannot operate swiftly and certainly unless its personnel are efficient and well-informed. The system cannot make wise decisions unless its personnel are thoughtful. In many places—many police departments, congested urban lower courts, the understaffed county jails, the entire prison, probation and parole apparatus—more manpower is needed.”).

79. Though the Commission recommended the creation of a specialized community-service unit, commanded by a high-ranking officer, as an essential feature of the police structure. *Id.* at 101.

80. *Id.* (“Community relations are not exclusively a matter of special programs, but a matter that touches on all aspects of police work. They must play a part in the selection, training, deployment, and promotion of personnel”).

81. *Id.* at 98.

82. *Id.* at 101.

able to observe the daily life of the community, they are able to report where the municipality is failing to serve its residents in ways that impact social justice.<sup>83</sup>

The second reform would transform police patrol from a monolithic enterprise, targeted towards crime-fighting, into one that served the community through public order and social welfare policing as well. Instead, the Commission proposed splitting the police role up into three different functions: “community service officer,” who would perform service and low-level investigative functions emphasizing personal contact with the community, *and who would be unarmed*;<sup>84</sup> “police officer,” who would continue to perform the traditional crime-fighting and peacekeeping roles of police patrol<sup>85</sup>; and “agent,” who would specialize in a diverse set of skills targeted on the distinctive needs of the community.<sup>86</sup> The agent would not be confined to the ranks of the plainclothes detective, but “might be in uniform patrolling a high-crime or restless neighborhood.”<sup>87</sup> The idea was to recognize the psychologically and socially complex nature of these types of patrol, and to value them as such rather than to devalue them as mere “social work.”

The Commission’s approach to policing recognizes that there are no simple answers to the problems of policing because the causes of police-community conflict are complex, long-standing, and implicate the structure of the police force, the distribution of policing across the community, the techniques of policing, and the people who fill the ranks of the police. The police represent, to many people, the face of a failed and unjust state. While one way in which the police encounter the public—the stop and frisk—is certainly a flashpoint, the Commission treats stops and frisks as a symptom of a much deeper set of problems, rooted in social justice and institutional inability at the state and municipal level to address the needs of disadvantaged and marginalized communities. Indeed, the Commission proposes retaining and reforming stops and frisks, even as it recommends a radical series of reforms to address the community relations aspects of policing and promotes the police’s vital social justice role in the community.

Folding these social and structural issues into a single demand for the police to act with constitutional “reasonableness” during an encounter or adhere to the standard of “probable cause” when initiating an encounter, or dispense with the practice of stopping and frisking *in toto* misses the forest for the trees. The difficult social, structural, and distributive issues surrounding the regulation of policing as a public good cannot be reduced to a single constitutional standard or policing technique. Worse, many of these problems evade constitutional scrutiny no matter what standard the Court selects: they are the stuff of peacekeeping, not crime-

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83. *Id.* at 98 (“If a park is being badly maintained, if a school playground is locked when it is most needed, if garbage goes uncollected, if a landlord fails to repair or heat his building, perhaps the police could make it their business to inform the municipal authorities of these derelictions.”).

84. PRESIDENT’S COMM’N, *supra* note 18, at 108 (“He would not have full law enforcement powers or carry arms”).

85. *Id.*

86. *Id.*

87. *Id.* at 102.

fighting, and so do not—*and ought not to*—make their way into the court-oriented system of prosecution and punishment that permits scrutiny by the courts.<sup>88</sup>

Ironically, for a Report that insists upon the criminal justice as an integrated system,<sup>89</sup> the lesson learned by the Warren Court was precisely the opposite: that the system is fragmented in ways that prevent important aspects of police activity from receiving judicial scrutiny. The Commission itself explicitly reached the conclusion that police malfeasance during its peacekeeping function was often non-justiciable.<sup>90</sup> That recognition, and its criminal procedure consequences, would become a central feature of the Warren Court’s response to stop-and-frisk policing in *Terry v. Ohio*.

### III. THE *TERRY* COURT’S CONVERSATION WITH THE PRESIDENT’S COMMISSION

One way to read the Court’s opinion in *Terry* is as part of a conversation with the President’s Commission’s Report. Certainly, the President’s Commission identified the technique of stopping and frisking as major problem for police-community relations, and more generally as a technique of racial harassment. But suggestions for reform—as compared to elsewhere in the Report—were surprisingly thin. The Report called for retaining the practice while restricting its use. Stopping and frisking should be limited to criminal investigation, the President’s Commission concluded: the task was to distinguish between “legitimate field interrogations and indiscriminate detention and street searches of persons and vehicles.”<sup>91</sup>

#### A. Ending Harassment

The *Terry* Court took up the challenge of regulating stops and frisks in much this vein, distinguishing between permissible police conduct and “police conduct outside the legitimate investigative sphere.”<sup>92</sup> The Court presented the problem of stopping and frisking in terms that mirrored the Commission’s language: “courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires”<sup>93</sup> And the Court

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88. See, e.g., *id.* at 91 (“A great majority of the situations in which policemen intervene are not, or are not interpreted by the police to be, criminal situations in the sense that they call for arrest with its possible consequences of prosecution, trial, and punishment”); *id.* at 92 (describing police departments as focused on crime-fighting and arrest, rather than “[w]hat a policeman does, or should do, instead of making an arrest or in order to avoid making an arrest, or in a situation in which he may not make an arrest”).

89. See *id.* at 8–9 (introducing a famous chart describing the segments of the criminal justice system in terms of an integrated whole). For a critique of this “systems analysis” approach, see BERNARD E. HARCOURT, *THE INFLUENCE OF SYSTEMS ANALYSIS ON CRIMINAL LAW AND PROCEDURE: A CRITIQUE OF A STYLE OF JUDICIAL DECISION-MAKING* 19–20 (2013) (“The 1967 President’s Commission is a landmark for locating criminal justice within a ‘system’ and for making recommendations based on the functions and objectives of the system.”).

90. PRESIDENT’S COMM’N, *supra* note 18, at 103–04.

91. *Id.* at 95.

92. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

93. *Id.*

recognized that such harassment had a racially discriminatory and oppressive function: “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”<sup>94</sup>

The *Terry* Court even quoted the Commission, and its finding “that '(i)n many communities, field interrogations are a major source of friction between the police and minority groups.’”<sup>95</sup> In fact, the Court went further, citing a recent book on policing for the proposition that frisking a suspect minority suspect during a field interrogation:

cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.<sup>96</sup>

So according to the *Terry* Court, the stop and frisk was a tool of racial harassment, often engaged in by patrol police officers to maintain what I have called their “command presence” as a tool of oppression rather than legitimate police investigation.<sup>97</sup> In reaching that conclusion, the *Terry* Court seems to have adopted the same approach, in almost the same language, as the President’s commission, while explicitly referencing the Commission’s Report. So far, it would seem, Chief Justice Warren, in his *Terry* opinion, places the Court on the radical and racially conscious side of police reform.

Indeed, *Terry* goes further than the Commission’s Report in its detailed fix for the problem of stops and frisks. Here again, it follows the Commission: the *Terry* Court retains the practice of stopping and frisking for *criminal investigation* and prohibits it for *peacekeeping or social welfare* purposes (that is, as a tool for community relations). On the one hand, the Court reprises the Commission’s argument that stop and frisk is a legitimate response to the prevalence of *violent crime*.<sup>98</sup> On the other, the Court recognizes that stopping and frisking is an impermissible form of intervention outside the investigative sphere.<sup>99</sup> The Court’s response is relatively clear: stopping and frisking is limited in use to police investigation of crimes involving violence only.<sup>100</sup> It is an impermissible technique for all other crimes.<sup>101</sup>

The Court’s rule in *Terry* is both more detailed than the Commission’s vague conclusions in its Report, but also more restrictive than the major competing pro-

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94. *Id.* at 14.

95. *Id.* at 14 n.11.

96. *Id.* at 14 n.11 (CITING LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 74–48 (1967)).

97. On command presence, see Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 693–98 (2009).

98. See PRESIDENT’S COMM’N, *supra* note 18, at 20 (discussing crimes of violence, including robbery); *id.* at 102; *Terry*, 392 U.S. at 24.

99. *Terry*, 392 U.S. at 15.

100. *Id.* at 27.

101. *Id.* at 29–30.

posals, and in particular, the American Law Institute's *Model Code of Pre-Arrest Procedure, Tentative Draft 1*,<sup>102</sup> published in 1966, and that also made some recommendations about how to police stops and frisks. Like the President's Commission, the *Model Code's* advisory committee comprised an elite group drawn from the ranks government officials, law-enforcement officers, legal practitioners, law professors and criminologists. The Commission was chaired by Harvard Dean James Vorenberg and his colleague, Paul Bator as reporters, and included, among other notable criminal procedure specialists, Yale Kamisar of Michigan Law School.<sup>103</sup> The *Model Code's* proposed regulations for the law of stops and frisks were much more detailed than the President's Commission's.<sup>104</sup> However, the *Model Code's* position on stops and frisks was much more police-friendly than the Warren Court's.<sup>105</sup>

The *Model Code* granted police officers much more leeway to use stops and frisks as a technique of aggressive, low-level policy.<sup>106</sup> Under Model Code § 2.02, a police officer would be permitted to seize suspects *and witnesses*, including "*persons found in 'suspicious circumstances'*" and *vehicles* for up to *twenty minutes*.<sup>107</sup> In addition, the police could *order detainees to remain at or near* the place detained while the officer searched the detainees person "*and his immediate surroundings*" for dangerous weapons.<sup>108</sup> The *Model Code* did limit the offenses justifying a stop to crimes that *already* had been committed and which were more serious than misdemeanors punishable by thirty days in jail.

The *Terry* Court's limitations are notable: only crimes of violence; only suspects and not witnesses; no mention of vehicles (it would take the Court a further ten years to authorize *that* sort of stop<sup>109</sup>); no twenty-minute time period; no order to remain during that time period; and no search of objects apart from a frisk of the person.

A core purpose of the President's Commission's Report was to end police harassment of minorities. And a core tool in that practice of harassment was the use of stop and frisks. Quite clearly, the *Terry* Court recognized that stopping and frisking was a tool of harassment in the context of low-visibility public order policing.<sup>110</sup>

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102. Evelle J. Younger, *Stop and Frisk: Say it Like it is*, 58 J. CRIM. L. & CRIMINOLOGY 293, app. (1968).

103. *Id.*

104. *Id.* The rationale for stopping and frisking, however, is the same as that endorsed by the commission: "The authority to detain briefly on less than the reasonable cause justifying an arrest is granted because there are situations in which an officer may thereby determine whether he should arrest a person, possibly a dangerous offender, who might otherwise disappear."

105. Somewhat ironically, given Kamisar's later stance on *Terry's* contribution to the Warren Court's criminal justice jurisprudence. See 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* 62 (Vincent Blasi ed., 1983).

106. See, e.g., Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 52 (2010).

107. Younger, *supra* note 102. The Court, in *Sibron v. New York*, 392 U.S. 40 (1968), a companion case to *Terry*, cast serious doubt on the constitutionality of a New York statute that sought to authorize detentions in addition to the stop. *Id.* at 60 n.20.

108. Younger, *supra* note 102

109. See *Delaware v. Prouse*, 440 U.S. 648 (1979).

110. See also *Sibron*, 392 U.S. at 52 ("Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process.").



Following the President's Commission, the *Terry* Court made a clear distinction between using stops and frisks as a tool of harassment, and as a tool of police investigation.

The harassment-investigation distinction is no mere formality.<sup>111</sup> It tracks a broader distinction between crime-fighting and peacekeeping also endorsed by the President's Commission. That distinction, in turn, roughly tracks a worry about over-and-under policing articulated by both the President's Commission and the *Terry* Court.<sup>112</sup>

Over-and-under-policing occurs when communities are victimized by the state in a vicious double-whammy: on the one hand, the police respond too aggressively to minor crime; on the other, they respond too leniently, if at all, to major crime.<sup>113</sup> The socially vulnerable are susceptible to targeting by the police, often as a form of race-based dominance; at the same time they are denied essential social resources, suffering "understaffed police departments, untrained officers, and other social capital deficits."<sup>114</sup>

Critiques of under-policing recognize that security from violence is an important social good provided by the state and that the crisis of security and violence in minority communities can amount to a failed state.<sup>115</sup> The police are the central institution of governance obligated to ensure a basic level of security within our communities. The social ramifications of the state's failure to provide basic security—the vice of under-policing violent crime—are widespread and dramatic.<sup>116</sup> Under-policing is not the whole problem, but it bespeaks a wider inability to provide (or indifference towards) the basic guarantees of government for socially marginalized communities.

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111. For an argument to the contrary, see Natapoff, *supra* note 15.

112. See PRESIDENT'S COMMISSION, *supra* note 18, at 99; *Terry*, 392 U.S. at 15–17.

113. Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1719 (2006) ("understanding underenforcement in its own right as a potential site for distributive and democratic failure reveals that underenforcement is not necessarily an alternative to overenforcement but often its corollary.").

114. *Id.* at 1730. The President's Commission also thought of policing as a core social service: its response was to suggest the creation of a community planning board comprised of different municipal social service providers; a community relations unit for every police department staffed by a senior officer; the creation of community service officers specially designated to interact with vulnerable communities and persons; and adopting social justice and community service as an explicit feature of the police mandate. See *supra* Section II.B.

115. Lisa L. Miller, *What's Violence Got to Do with It? Inequality, Punishment, and State Failure in U.S. Politics*, 17 *PUNISHMENT & SOC'Y* 184, 189 (2015). ("Failed states, by definition, have largely lost the ability to ensure the physical safety of citizens in any systematic and predictable sense."). See also RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 29 (1997) ("Deliberately withholding protection against criminality . . . is one of the most destructive forms of oppression that has been visited upon African-Americans.").

116. Consider, for example, the fact that: "In raw numbers, more Black males were murdered than White males from 1989 through 1995. This a shocking fact given that Black males comprise only about 6 percent of the population, to White males' 32 percent." LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* (requires a pin) (2017). See also Natapoff, *supra* note 113, at 1729–30 (discussing underenforcement as part of a "pattern of destabilizing feedback" that harms a community's ability to govern itself).

The problem many minority communities currently face has changed little since 1967 or 1968: extreme social deprivation,<sup>117</sup> including extreme social vulnerability to violence.<sup>118</sup> Social vulnerability is a distinguishing feature of some minority, urban neighborhoods, revealing “dramatically different living conditions for African-Americans and whites in the most populated cities in the country [including] socio-economic, crime and health conditions for some black neighborhoods that can be characterized, without hyperbole, as a crisis.”<sup>119</sup> These state failures limit residents’ ability to access social capital through education and work and inflict serious psychological harm.<sup>120</sup> Increasingly, these features of social vulnerability, which are experienced within minority communities, are responsible for the massive disparities in incarceration endured by minority communities.<sup>121</sup>

Stopping and frisking occupy a central role in over-and-under-policing because of its function in targeting violent crime. If used appropriately, the President’s Commission and the *Terry* Court suggest, stopping and frisking is a resource to aid in the investigation of serious—which for the *Terry* Court means violent—crime. If used inappropriately, it is a practice that can be used to harass minority populations as part of the peacekeeping process. Misdirecting stopping and frisking to pursue peacekeeping instead of investigating serious crimes engages in both over-policing public order, and under-policing serious crime. Used to harass racial minorities, stopping and frisking is an exemplary instance of a race-based misuse of social resources.

The way to redirect the police activity in a way that appropriately delivers much-needed social services<sup>122</sup> is not to end the practice of stopping and frisking (so says the President’s Commission, and the *Terry* Court follows their analysis), but to force the police to use it appropriately, to investigate serious crime. The *Terry* Court, like the Commission, limits the use of stops and frisks to the process of criminal investigation, and only then for criminal activity that where the officer “has reason to believe that he is dealing with an armed and dangerous individual . . . [that is] whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”<sup>123</sup>

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117. See, e.g., TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (2016) (presenting a book-length series of arguments for the social injustice of socially isolated African-American communities).

118. Miller, *supra* note 115, at 187.

119. *Id.*

120. See, e.g., SHELBY, *supra* note 117, at 260 (discussing social and psychological harm inflicted by African-American social vulnerability); see also James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U.L. REV. 21, 51–52 (2012) (discussing interaction between violence and the psychological wellbeing of African-American school students).

121. See, e.g., MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 126–131 (2015) (discussing the war on drugs as one of a complex series of factors driving the racially disproportionate imprisonment of African-Americans); see also JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 5–6 (2017) (“In reality, only about 16 percent of state prisoners are serving time on drug charges—and very few of them, perhaps only around 5 or 6 percent of that group, are both low level and nonviolent); Foreman, *supra* note 120, at 52 (discussing the difficult questions that focusing on violence raises when addressing race and criminal justice).

122. See GOTTSCHALK, *supra* note 121, at 1723 (discussing under-policing as a deprivation of protection for highly victimized communities).

123. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The standard here is an interesting—and confusing—mix of reasonableness and probable cause. The latter half of the quoted section, along with its various citations,

The dangerousness limitation naturally tracks the types of offenses that are under-policed: more likely violent crimes that community members would turn to the police to protect against. In this way, the dangerousness limitation identifies an important social justice interest in policing, while precluding the socially harmful one. The *Terry* Court approach has the advantage of strictly specifying the police interest in stopping-and-frisking: dangerousness. As the President's Commission noted, "[i]f judges are to balance accurately law enforcement needs against human rights, the former must be articulated."<sup>124</sup> The *Terry* Court articulates those interests: safety only. The *Terry* Court's rationale precludes the use of stopping and frisking as a technique of aggressive street patrol.<sup>125</sup> These interests are clearly present when intervening to stop an armed robbery, and they are interests that serve, not only the police but also the under-policed community.

If the police engage in stopping and frisking for public order purposes, the practice is, under *Terry*, unconstitutional harassment, especially if it is harassment of racial minorities. Indeed, the *Terry* Court explicitly rejects the State of Ohio's argument that

the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to 'frisk' him for weapons. If the 'stop' and the 'frisk' give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal 'arrest,' and a full incident 'search' of the person. This scheme is justified [by the State of Ohio] in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.<sup>126</sup>

The *Terry* Court explicitly rejected this "minor intrusion" theory of policing, as a form of over-policing that failed to protect minority civilians.<sup>127</sup>

Indeed, the Court suggested that, considered in the context of "friction" between minority communities and the police, "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of

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articulates the probable cause standard. See *id.* (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 174–176 (1949); *Stacey v. Emery*, 97 U.S. 642, 645 (1878)).

124. PRESIDENT'S COMM'N, *supra* note 18, at 94. The President's Commission was quite skeptical about anecdotal law-enforcement accounts of their interests, suggesting that the police "establish through empirical research what the needs of law enforcement are [so that] they can enumerate policies and prescribe practices that meet those needs." *Id.*

125. See, e.g., *Sibron v. New York*, 392 U.S. 40, 60 (1968). *Sibron* addresses the constitutionality of New York's stop-and-frisk statute, but only considers an as-applied challenge to the constitutionality of the law. The Court nonetheless reject the claim that the statute operates as a blanket authorization to engage in peacekeeping-style stops and frisks, arguing that such a license would violate the Fourth Amendment in a number of respects. See *id.* at 61.

126. *Terry*, 392 U.S. at 10–11.

127. *Id.* at 16–17 (calling the minor intrusion view "fantastic"); and see *id.* at 16 n.12 (endorsing the view of the Ohio State Supreme Court that the frisk may not be used to find evidence).

the intrusion upon reasonable expectations of personal security caused by those practices.”<sup>128</sup> But if the stop is demanded by the risk of violence, then the police appear to be extending the social service they are historically most often accused of withholding: they would be under-policing. The emphasis on violence as the trigger for a lawful stop and frisk thus makes real sense against the backdrop of the Court’s bifurcation of policing into criminal investigating versus peacekeeping.

#### B. The Limits of Justiciability

The *Terry* Court’s most important insight is its most overlooked. Policing is a complex, plural, and fragmented business. The police reflect that complexity. Some are uniformed, some are plain clothed.<sup>129</sup> Some specialize in the investigation of specific, serious crimes; others are generalists, ready to cope with whatever comes their way.<sup>130</sup> Among uniformed officers: some specialize in responding to riots or using special weapons and tactics;<sup>131</sup> others patrol the streets by foot or in a car, responding to calls for help or aggressively stopping and frisking passersby.

*Terry v. Ohio* paid particular attention to the plural and fragmented functions of police officers who are engaged in patrolling a particular neighborhood to be on the lookout for crime or other sources of disorder or distress.<sup>132</sup> These are not the only types of police officers, and patrolling is only one of a myriad of activities in which the police engage on a daily basis. Nonetheless, patrol is the high-visibility backdrop against which most members of the public consciously interact with the police: indeed, against which most members of the public interact with the state.

However, addressing aggressive patrol and custodial encounters, without including other police business, misses out on a lot of what the patrol officer does on the street, day to day. The *Terry* Court recognized that a lot of street policing was not the sort of crime-fighting oriented towards the criminal prosecution of offenders.

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.<sup>133</sup>

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128. *Id.* at 17 n.14.

129. DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 57 (1994).

130. *Id.*

131. *See, e.g.*, JEAN-PAUL BRODEUR, *THE POLICING WEB* 139–40 (2010); *see also id.* at 17–43. Brodeur discusses the vast number of institutions, including the public police, that perform policing tasks, as the “police assemblage.”

132. WADDINGTON, *supra* note 24, at 6 (1994) (“The traditional weapon in the police armoury designed to prevent crime is patrolling.”).

133. *Terry*, 392 U.S. at 13.

In fact, it turns out that very little of what the police do is actually crime-fighting. The overwhelming majority of a beat officer's time is spent waiting, wandering, dealing with public welfare issues (such as helping people who are lost or who need medical aid) or public order issues (such as breaking up minor fights or quieting noisy neighbors):

Patrol officers spend the [majority] of their time discouraging behavior that officers view as disruptive or unseemly, such as drunks sleeping in front of doorways, teenage boys lollygagging on a street corner, prostitutes soliciting in a blue-collar residential neighborhood, or men urinating against a wall around the corner from a busy bar.<sup>134</sup>

*Terry* rejects the idea that the criminal justice system is an integrated whole organized around the process catching criminals and gathering evidence to prosecute and punish them. The *Terry* Court recognizes that criminal justice “system” is not one, integrated, system of governance, but multiple overlapping ones. That is the message of the Court’s bifurcation of policing into criminal investigation and peacekeeping functions. In asserting this distinction, the Court identifies a feature of policing, and the criminal justice system more generally, that is a staple of policing studies, but one that has generally been overlooked in the Fourth Amendment literature: often—and particularly in their peacekeeping role—the police are unconcerned with the formal system of prosecution and punishment.

As the *Terry* Court puts it:

Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.<sup>135</sup>

Until *Terry*, the Court mostly assumed that the fruits of police activity proceed in an orderly fashion from searches and seizures on the street, to interrogations in the stationhouse, to prosecutions in the courthouse.<sup>136</sup> The problem addressed by *Terry* is that there is lots of police activity that does not proceed in this orderly and court-directed manner. Lots of police activity begins and ends on the street. The goal is not a criminal conviction: it is to project police authority and control public activity on the streets. This sort of police activity is incredibly diverse:

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134. BAYLEY, *supra* note 129, at 17.

135. *Terry*, 392 U.S. at 14.

136. See, e.g., *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would ‘warrant a man of reasonable caution in the belief’ that an offense has been committed. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function.” (internal citations omitted)); see also *Miranda v. Arizona*, 384 U.S. 436, 460–61 (1966) (“The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. . . . We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning.”).

police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.<sup>137</sup>

All of these activities begin and end on the street: sometimes by moving people off or along the street, sometimes by confiscating contraband, often by putting people in their place.<sup>138</sup> This sort of low-level social control cannot be regulated through court-centered criminal processes, because police activity is over when order is restored. Criminal defendants cannot assert their Fourth Amendment rights before a judge because there is no criminal case to be brought. No civil cases ripen, so long as police harassment is kept below a certain level of brutality. As a consequence, these types of police encounter are invisible under the Fourth Amendment's court oriented exclusionary scheme.

To be sure, sometimes the police participate in aggressive patrols or face high-stakes encounters with the public. For the most part, however, the police intervene in domestic disputes, manage traffic accidents and snarl-ups, respond to medical emergencies, perform noise abatement duties, check unsecured residences and business, and undertake a myriad of other public order and "community caretaking" activities.<sup>139</sup> These activities often require the police to engage with distressed, inebriated, obstreperous, vulnerable, individuals who may welcome or resent police interference.<sup>140</sup> When engaged in this sort of activity, police officers must exhibit some mix of patience, courage, leadership, diplomacy, tolerance, wisdom and strength,<sup>141</sup> sometimes all at once and in stressful situations.

Criminal procedure scholars tend to think of policing in terms of the way the Constitution permits or restricts certain police practices; and more narrowly, in terms of a crime-fighting model that worries about what rights may be asserted by criminal suspects against the police. Often, Fourth Amendment doctrine treats beat policing as uniform and undifferentiated activity where the police are engaged in

137. *Terry*, 392 U.S. at 13 n.9.

138. *See, e.g.*, WADDINGTON, *supra* note 24, at 45. Waddington argues that the police impose order that recognizes local variations in acceptable behavior, so that "respectable order is maintained provided skid-row bums and prostitutes remain in their territorial place. . . ."

Peddlers and street musicians, sidewalk drinking, and dense late-night foot traffic can be tolerated in the right places, just as the antics long associated with Mardi Gras and Halloween are appropriate at the right time."

*Id.* (quoting WESLEY SKOGAN, *DISORDER AND DECLINE* 9 (1990)). As the quote from *Terry* recognizes, sometimes this activity escalates into an arrest and even a prosecution. But prosecution is a contingent feature of the activities listed in the long quotation from *Terry*, not the point of those activities.

139. *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (discussing caretaking role); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, (1998).

140. *See, e.g.*, Livingston, *supra* note 139, at 272.

141. *See* M.R. HABERFELD, *CRITICAL ISSUES IN POLICE TRAINING* 1 (2002).

the often “competitive enterprise of ferreting out crime.”<sup>142</sup> Yet most of what counts as policing is “low visibility:”<sup>143</sup> out of sight of the courts that could enforce these constitutional regulations. In part, that low visibility depends upon a form of social control that begins and ends on the street.

A central insight of the *Terry* Court was that low-level harassment was not justiciable through the criminal justice process.

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. . . . [A] rigid and unthinking application of the exclusionary rule [is a] futile protest against practices which it can never be used effectively to control.<sup>144</sup>

#### IV. TERRY'S CRITICS

The central insight of the *Terry* Court is that the criminal justice system is not really one system, but a set of overlapping and plural systems. In this fragmented criminal justice universe, regulating the police—and other criminal justice actors—is really complex. While the courts, the prosecutors, and the police are members of the same legal system, the law does not regulate each in the same way. Different state agents—judges, prosecutors, and police—have different roles, each subject to different modes of regulation by different regulatory bodies with different competences. Within the police, different types of officers do different jobs. For the most part, detectives investigate discrete crimes through episodic interactions with a relatively few individuals, whereas patrol officers impose order, in public, across communities. Crime-fighting is oriented towards criminal prosecutions, and so detectives—and the patrol police who arrest civilians or collect evidence—are most likely to interact with prosecutors and courts. But for the most part, the patrol officers' public order policing begins and ends on the streets. As far as prosecutors and the courts are concerned, this type of policing is low visibility and difficult to regulate.

The problem of fragmented criminal justice should generate a second insight: that other, more traditional forms of institutional reform are better than piecemeal reform through criminal defendants. Instead of relying on criminal prosecutions as proxy civil rights cases, it might be better just to bring civil rights cases directly against the police. That was the recommendation, after all, of the President's Commission. However, that avenue was foreclosed in three major cases in the 1970s, two of which directly concerned the police.<sup>145</sup> In a lot of ways, *Terry* bears the brunt of this failure of systemic police reform.

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142. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

143. See *Sibron v. New York*, 392 U.S. 40, 52 (1968) (*Sibron* was a companion case to *Terry*); see also Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *Yale L.J.* 543 (1960).

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

145. See *Rizzo v. Goode*, 423 U.S. 362 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974). *Goode* and *Davis* were both policing cases.

## A. Fragmented Criminal Justice

In the context of the criminal justice system, convictions orient policing towards crime-fighting: an arrest begins a criminal process culminating in a trial or a plea-bargain. However, the police may also treat arrests as oriented towards administrative targets set by the police themselves.<sup>146</sup> The goal is administrative closure: satisfying the administrative metrics necessary to gain institutional credit for official actions relevant to some case (whether or not the case is taken up by a prosecutor).<sup>147</sup> Whatever happens after that does not affect the fact that the arrest was made.<sup>148</sup> Finally, the police may intervene with the public, including by making arrests, simply to extend law-enforcement contacts with the public.<sup>149</sup> The contact metric recognizes that a lot of law enforcement is concerned with marking out and supervising individuals.<sup>150</sup> Such activities need not result in an arrest or a conviction. Of course, a contact can result in an administrative arrest leading to conviction. But the processes need not progress in this neat or linear fashion and the different types of intervention—contact, administrative intervention, and criminal prosecution—are independently valuable means of disposing of criminal offenders.

Attending to the institutional structure of the criminal justice system reveals a fragmented, plural, and competing set of administrative agencies, each with its own separate sphere of influence, goals, and incentives, some of which are at best tangentially related to criminal conviction. A fragmented model of criminal justice suggests that the police, prosecutors, and the courts often have a more complicated relationship with each other than that of inferior and superior in an integrated institutional hierarchy. Rules that apply in or to one organization may not apply in a direct or easily enforceable manner to other organizations.<sup>151</sup> Fragmentation of this

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146. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 376–78 (1999) (discussing why the police metric of “collars” or arrest rates are not particularly influenced by the admission or exclusion of evidence at trial).

147. *Id.*

148. For example, celebrated criminologist Jerome Skolnick discusses the way the police use clearance rates to assess performance. The clearance rate is a “police organizational term bearing no *direct* relation to the administration of criminal law . . . [i.e.] statistics on arrest and prosecution.” JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 168 (4th ed. 2011). Rather, it is the metric by which officers measure each other’s and the institution’s performance. *Id.* A clearance does not depend upon some feature of the criminal justice system outside the officer’s control, such as conviction at trial or by plea bargain.

149. Jeffrey A. Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *FORDHAM URB. L.J.* 539, 547–550 (2016) (discussing low-level control features such as information gathering that need not involve contact with civilians); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2061 (2017) (discussing social control function of criminal justice system); AMY E. LERMAN, & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014).

150. See note 149 and accompanying text. See also Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 *AM. J. SOCIOLOGY* 351, 644 (2013) (discussing the use of criminal justice system to mark, rather than convict, criminals as part of system of low-level social control documenting the frequency of police contacts).

151. Slobogin, *supra* note 146, at 383 (discussing police officer’s refusal to comply with norms they think are unfair).



sort shapes and limits the structures of influence that nominal superiors exercise over their putative subordinates.<sup>152</sup>

Even this separate-spheres model may understate the problems of regulating law-enforcement through judicially-generated norms of criminal procedure. Fragmentation may exist, not only *between*, but also *within* a criminal justice institution. For example, criminal justice theorists widely accept that there is a rift between the goals and interests of “management” cops and “street” cops working in the same department.<sup>153</sup>

Fragmented institutions tend to develop alternative normative perspectives that compete with the perspectives of other institutions or officials whose jurisdiction overlaps theirs. The police may regard constitutional interpretations developed by the judiciary,<sup>154</sup> or rules of conduct regulating street patrol,<sup>155</sup> as overly technical and unresponsive to the substance of policing. Rather than seeking to comply with such norms, law-enforcement officials may honor the letter but not the spirit, or worse, ignore or subvert them. Accordingly, patrol officers may treat incentives to make administrative arrests or engage social control in ways that compete with and confound the norms established by their superiors inside the police force and the prosecutors and courts that seek to influence their conduct.

The trial- or conviction-oriented regulation may just miss a lot of what policing is about. Regulation through exclusion of evidence applies well to criminal investigation oriented towards trials and convictions. But it does not obviously apply to administrative arrest goals or low-level social control, where criminal prosecution is at best a byproduct of the policing regime. That is the central insight of *Terry*. The exclusionary rule regulates criminal investigation more-or-less effectively by denying law enforcement officials the use (at trial) of the evidence they have gathered (on the street). But the exclusionary rule does not work to regulate police conduct if no evidence is gathered, because there is no evidence to exclude.

Worse, the classic move of the Warren Court—to use the criminal defendant as a proxy for the rights of all civilians—does not work if the defendant is not prosecuted but released on the street. The Fourth Amendment protects the public one defendant at a time, by using individual cases to set the limits of police conduct. Three features of this process are worth emphasizing: first, there are no proxies without criminal prosecutions. If the system of criminal justice is one of “street justice,” in which civilians are targeted and punished without prosecution, there are no cases through which to regulate the police. Criminal justice fragmentation places lots of police conduct beyond the ability of the courts to remedy because the courts never get to see it.

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152. See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (discussing police and prosecutors as sharing a “bilateral monopoly” over the investigative process); Slobogin, *supra* note 146, at 394 (describing inability of superiors to enforce rules as a systemic deterrent on patrol police conduct).

153. Elizabeth Reuss-Ianni & F.A.J. Ianni, *Street Cops and Management Cops-The Two Cultures of Policing*, in CONTROL IN THE POLICE ORGANIZATION 251 (Maurice Punch ed., 1983).

154. Slobogin, *supra* note 146 at 757–58. For some worries about whether the police properly understand the constitutional rules that apply to their conduct, see Stephen L. Wasby, *Police Training about Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461–468 (1978) (discussing transmission of constitutional norms to officers through training).

155. *Id.* at 383.

The problem of the low-judicial visibility of most policing is a deep one. On the one hand, it means that the courts are likely to be ignorant of many of the tactics that the police use on the street. Only the most high-visibility public order policing practices are likely to register. Stop and frisk as a category of mass policing becomes high-visibility because of its widespread use as a form of criminal investigation. Other tactics remain low visibility and outside the ken of the courts, even though they may be as destructive of community life as stopping and frisking. Even stops and frisk become invisible when they are used only intermittently as a technique of public order policing: that is, at lower rates than in jurisdictions like New York and Chicago. The Fourth Amendment, and indeed the whole system of criminal prosecution, is a poor tool to bring problematic police tactics to light.

What matters, at this level, are governance decisions about the goals of policing, whom to police, and the sorts of techniques to use to police them. For the public order policing, what matters are contacts rather than arrests: both the nature of those contacts and how they are distributed across communities. It has taken a really long time for Fourth Amendment focused criminal procedure jurisprudence to catch up to this fact.

Where the jurisprudence has caught up, sometimes the claim is that these contacts are not covered by the constitution but are part of the police's community caretaking role, and so are wholesale permissible. Others claim that such contacts are constitutionally unreasonable because individual decisions about whom to police implicitly or explicitly engages the discrimination harm of race-based targeting, and so are retail impermissible constitutional violations.

Both arguments miss the fact that criminal prosecution is a contingent feature of this sort of policing: the goal is a contact that begins and ends on the street, not one that ends up in the courthouse. A style of regulation that depends upon criminal defendants as proxies for the people who are targeted will fail to register this type of policing.

Many of the bad things that the police do are not even Fourth Amendment wrongs. As the President's Commission recognized, the features of an encounter that may most matter to the civilian are associated with the demeanor of the officer, and her disrespectful treatment during an interaction that may completely satisfy the requirements of the Fourth Amendment. The frisk is a particularly intrusive and humiliating aspect of these interactions; but frisking is not the only way to stigmatize the public.

A focus on defendants who are subject to criminal prosecution necessarily minimizes these slights. Partly, discourtesy seems insignificant compared to even very low-level criminal activity. But even if discourtesy was relevant to the harm of disproportionately "targeting" certain groups for differential treatment (a "discrimination" harm), such discourtesy is only punishable if the case comes to trial. Most policing, as a form of social control, depends primarily upon *contacts* between the police and public, rather than criminal *prosecution*. These contacts are much more frequent than prosecution, and their reverberations spread just as widely throughout the community. In most of these public order and low-level criminal contacts, the police decline to prosecute. That does not entail that the police failed to mete out a form of street justice. It means only that the process of policing stays hidden from the courts.

## B. The Failure of Systemic Reform

There is a much better system of criminal justice regulation and reform that does not depend upon criminal prosecution. That system would use widespread injunctive relief to mandate top-to-bottom reform of state and local police forces. This sort of injunctive relief was both typical of civil rights reform throughout the 1970s and is well tailored to accomplishing the sort of reforms identified in the President's Commission.

Tragically, however, the Court rejected this sort of police reform in three major cases that denied criminal defendants the power to demand reform of structurally racist police departments: the sort reform of the sort of departments targeted by the President's Commission. The Court's justification for distinguishing police targets from other civil rights litigants was lack of standing: the claim that injunctive relief was unavailable because the litigants were unable to demonstrate that the injury was likely to be repeated.

A focus on the Fourth Amendment overlooks a range of race-based policing cases, about the structural reform of policing than never make it into our policing canon. Three from the 1970s concern the subject-matter of the President's Commissions reform agenda.<sup>156</sup> In none of them does the Supreme Court mention, let alone continue its conversation with, the President's Commission. Yet at the trial phase, federal district courts, citing the President's Commission recognized that the central issue raised by the plaintiffs was that presented by the President's Commission: reforming the police in a manner that could address the expanded mandate of community justice.<sup>157</sup>

In all of these cases, plaintiffs asserted comprehensive racial discrimination on the part of the state or municipal criminal justice apparatus. In *O'Shea v. Littleton*, for example, the plaintiffs were civil rights protesters who were arrested and prosecuted. They alleged that the whole criminal justice system, from the Police Commissioner to the municipal court judges, "deliberately applied [the criminal laws and procedures] more harshly to black residents of Cairo and inadequately applied to white persons who victimize blacks, to deter respondents from engaging in their lawful attempt to achieve equality."<sup>158</sup>

The problem identified by the *Littleton* plaintiffs was precisely the sort identified by the President's Commission: as Justice Douglas put matters in his dissent:

What has been alleged here is . . . a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them, to keep from the blacks the protection of the law in their lawful activities, to weight the

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156. *Rizzo v. Goode*, 423 U.S. 362 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

157. See *Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo*, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973), *aff'd sub nom. Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976) (citing PRESIDENT'S COMM'N, *supra* note 18); *Davis v. Washington*, 348 F. Supp. 15, 18 (1972), *rev'd* 512 F.2d 956 (1975), *rev'd* 426 U.S. 229 (1976) (citing PRESIDENT'S COMM'N, *supra* note 18).

158. *O'Shea*, 414 U.S. at 491.

scales of justice repeatedly on the side of white prejudices and against black protests, fears, and suffering. This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen.<sup>159</sup>

In rejecting their claim, the Supreme Court found that the civil rights protesters lacked standing to challenge the police and courts because they lacked standing: they were not currently on trial for as a result of the discriminatory practices they had identified;<sup>160</sup> and in any event, the Court thought that the requested relief—having the federal judiciary supervise ongoing criminal cases—ensured that state proceedings were not racially biased.<sup>161</sup>

While the claims in *Littleton* were primarily addressed against two municipal court judges,<sup>162</sup> the claims in the next two cases were asserted directly against the police. In *Rizzo v. Goode*,<sup>163</sup>

The central thrust of respondents' efforts in the two trials was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers. This mistreatment was said to have been directed against minority citizens in particular and against all Philadelphia residents in general.<sup>164</sup>

Once again, the Supreme Court denied standing. Once again, the Court opined that the link between the individual complainants and the pattern of police misconduct was too tenuous: the named plaintiffs could not show that they, personally, would be affected by police misconduct, even if other members of the group they represented might be.<sup>165</sup> Worse, the Court noted that the types of discriminatory conduct alleged by the plaintiffs was typical of police departments around the country. Quoting one of the trial courts' opinions, the Supreme Court noted that

there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere; indeed, the District Court found "that the problems disclosed by the record . . . are fairly typical of (those) afflicting police departments in major urban areas."<sup>166</sup>

There is a brutal irony in this part of Justice Rehnquist's opinion for the Court. The typical problems are just those disclosed by the President's Commission: as the trial court noted:

Two presidential commissions have addressed themselves extensively to

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159. *Id.* at 509 (Douglas, J., dissenting).

160. *Id.* at 495–96.

161. *Id.* at 500 ("the order [plaintiffs sought] would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of state criminal proceedings").

162. *Id.* at 505.

163. 423 U.S. 362 (1976).

164. *Id.* at 366–67.

165. *Id.* at 371.

166. *Id.* at 375 (quoting Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973)).

these issues: The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967), at pp. 178-207 (in which, incidentally, the Philadelphia Highway Patrol is described as a "skull-cracking division"); Report of the National Advisory Commission on Civil Disorders, Ch. 11 (1968). A review of this material suggests that the problems disclosed by the record in the present case are not new, and *are fairly typical of the problems afflicting police departments in major urban areas*.<sup>167</sup>

While the district court engaged in an explicit conversation with the President's Commission, using its findings to emphasize the racially disparate and violent nature of policing in Philadelphia, the Supreme Court squashed and ignored that discussion. Instead of emphasizing the social justice mandate of the police, the Court instead emphasized that discriminatory policing was typical of the American criminal justice system. Instead of calling for a race-based transformation, the Court entrenched the discriminatory practices of individual officers, simply because their superiors had played no "affirmative part" in producing the discrimination.<sup>168</sup> As Justice Blackmun complained in dissent, the Court refused to do anything to correct systemic police "violations of citizens' constitutional rights, of a pattern of that type of activity, of its likely continuance and recurrence, and of an official indifference as to doing anything about it."<sup>169</sup>

Six months after the Court decided *Goode*, it struck a further blow to police reform. At the heart of the reform movement was the transformation of the police department by overhauling its recruitment and training practices. Criminal procedure scholars tend to think of policing in terms of the way the Constitution permits or restricts certain police practices; and more narrowly, in terms of a crime-fighting model that worries about what rights may be asserted by criminal suspects against the police. Of much more importance to policing are the rules and policy decisions affecting who gets to be a police officer and what training they receive.<sup>170</sup>

Police selection and training tells us a lot about who we think the police are and what we think they do. We select people because they possess certain physical, psychological, and characterological capabilities we believe are tailored to the job: skills or other competencies that they currently possess or that we can train them to possess by the time they graduate. The criteria we use to screen individuals into and out of the police tell us a lot about our own understanding of the police role and functions.

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167. *Rizzo*, 357 F. Supp. at 1318 (emphasis added).

168. *Goode*, 432 U.S. at 376-77.

169. *Id.* at 382 (Blackmun, J., dissenting).

170. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 599 (2006) ("police forces across the United States take the constitutional rights of citizens seriously. There have been 'wide-ranging reforms in the education, training, and supervision of police officers.'" (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* 51 (1993)).

The core case on police selection and training is *Washington v. Davis*.<sup>171</sup> That case examined whether the District of Columbia's Municipal Police Department engaged in race discrimination through its hiring and promotion practices.<sup>172</sup> *Davis* addressed the standards that the Municipal Police Department used to screen out candidates for training as a police officer. In *Davis*, the core battle was over the impact of a Test 21, a test applied to *all* applicants for civil service positions in the federal government, police and civilians alike.<sup>173</sup>

*Davis* is often overlooked in discussions of policing—it is often characterized solely as a Title VII and civil rights case. *Davis* was, however, a police selection and training case. Hidden within the equal protection elements of *Davis* is a battle over the standards used to select and train the officers serving in the D.C. Metropolitan Police Department, and so to characterize what criteria are definitive of policing on the street.

The plaintiff claimed Test 21, which tested verbal ability, vocabulary, reading and comprehension, and logical reasoning,<sup>174</sup> was not tailored to test police activity. Instead, the test applied more generally to every public official, not just the police—a claim supported by the fact that the test was developed by the Civil Service Commission, not the Police Department. Because African-Americans disproportionately failed the test as compared to Whites,<sup>175</sup> plaintiffs claimed that the test had a discriminatory impact upon that class of applicants. Under pre-existing Supreme Court doctrine, such an impact could only be permitted by a showing of job-relatedness: whether the test tracked the requirements of police training or police activity in the field.<sup>176</sup> Because Test 21 did not track police work in the field, *Davis* argued, and because African-Americans failed the test at disproportionate rates, then the test discriminated on the basis of race and therefore violated the Equal Protection Clause of the United States Constitution, and various anti-discrimination statutes.

The district court, in ruling against the plaintiffs, rejected a monolithic, crime-fighting conception of the police role, one that ignored the social welfare aspects of policing on the street. Instead, the district court cited to the President's Commission, suggesting that

[l]aw enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city. . . .

. . .

. . . The training program . . . needs to emphasize different aspects of a policeman's complex responsibilities are perceived. The day may soon be at hand when a college degree will be a prerequisite and advancement will depend in large part upon graduate degree experience. The FBI and the

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171. 426 U.S. 229 (1976).

172. *Id.*

173. *Id.* at 234.

174. Test 21 is included as an appendix to the Circuit Court's opinion in *Davis v. Washington*, 512 F.2d 956, 967–76 (1975).

175. *Davis v. Washington*, 348 F. Supp. 15 (Dist. D.C. 1972).

176. *Davis v. Washington*, 512 F. 2d 956 (D.C. Cir. 1975).

military have moved in this direction, and the President's Crime Commission has urged that police recruiting and training take this course.<sup>177</sup>

The district court thus emphasized one half of the President's Commission's recruiting reforms: more college-educated students. Although the district court ignored another alternative—hiring community service officers without even a high-school diploma. However, the President's Commission had recognized that standardized written tests reflecting “rigid higher education standards” posed a problem for potential minority recruits educated in still-desegregating education systems.<sup>178</sup> Minority candidates were less likely to have a high school diploma, and so standardized tests would likely screen out such candidates even though they could have engaged in many police tasks. Furthermore, the President's Commission on Law Enforcement thought that minority recruits were particularly important to law-enforcement's community relations function: minority officers could serve as mediators between the police and the minority community. That function appeared particularly important given the recent racial and political unrest culminating in a series of riots across the country.

The President's Commission had, for example, proposed an alternative route to entry into the police, by which individuals who could not satisfy the written exam would nonetheless be admitted as Community Support Officers: essentially a lower position, bereft of a firearm but also not requiring clerical work.<sup>179</sup> The Community Support Officer would focus on community relations, but the position could also function as an apprenticeship to a full police officer position for some individuals admitted through this route.<sup>180</sup> The *Davis* plaintiffs did not adopt this proposal or propose some other alternative recruiting stream into the police. Instead, they simply wished to dispense with the written test altogether as irrelevant to police activity.

These radical suggestions are mostly forgotten. Instead, the story of the last forty years has been, for the most part, a loosening of judicial controls on the police and an abandonment of federal attempts to promote root and branch reform of police training. As a result, police training in America has failed to follow through on many of the more radical and progressive insights and recommendations of the past, but has instead concentrated on increasing a soft liberal agenda of diversity, improving community contacts, and establishing rules governing the use of force.<sup>181</sup>

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177. *Davis*, 348 F. Supp. at 17.

178. PRESIDENT'S COMM'N, *supra* note 18, at 107.

179. *See supra* note 84 and accompanying text.

180. *See* PRESIDENT'S COMM'N, *supra* note 18, at 108.

181. For an impassioned critique of the soft liberal agenda in the context of criminal justice, see NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 11 (2010) (“In this sense, liberal law-and-order agendas flowed from an underlying assumption of racism: racism was an individual whim, an irrationality, and therefore racism could be corrected with ‘state-building’ in the Weberian sense— that is, the replacement of the personalized power of government officials with codified, standardized, and formalized authority.”).

## V. CONCLUSION

The *Terry* doctrine and the extended use of stopping and frisking as a means of harassing minority community members has been the subject of much perceptive criticism over the past fifty years. But in criticizing the doctrine, many scholars have lost sight of the most perceptive aspects of the case. These include the *Terry* Court's important insight that the criminal justice system is fragmented among many institutions, with overlapping but competing interests. No one institution, and no one technique of regulation could hope to control them all; and that is especially true of such an internally fragmented institution as the police.