

## WHITHER THE CRIMINAL COURT: CONFRONTING STOPS-AND-FRISKS

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Two recent cases from one of New York's intermediate appellate courts suppressed evidence based on illegal searches,<sup>1</sup> and, given the present stop-and-frisk controversy, immediately became headline news. *The New York Times* ran a front-page story<sup>2</sup> and the *New York Post* printed an editorial titled "Next stop: Anarchy."<sup>3</sup> In federal court in Manhattan, a judge granted class-action status to a lawsuit challenging the New York City Police Department (NYPD) stop-and-frisk practice, and commenced a trial to determine whether the NYPD was adhering to constitutional search and seizure requirements.<sup>4</sup> *The New York Times* article even declared that judges were "the most potent critics" of stop-and-frisk practices.<sup>5</sup> These decisions, and the attention they garnered, suggest that New York courts are immersed in stop-and-frisk litigation.<sup>6</sup> That is hardly the case. The timely decisions rendered

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<sup>1</sup> *In re Darryl C.*, 98 A.D.3d 69, 79, 947 N.Y.S.2d 483, 491 (App. Div. 1st Dep't 2012); *In re Jaquan M.*, 97 A.D.3d 403, 403, 948 N.Y.S.2d 51, 52 (App. Div. 1st Dep't 2012).

<sup>2</sup> Russ Buettner & William Glaberson, *Courts Putting Stop-and-Frisk Policy on Trial*, N.Y. TIMES, July 11, 2012, at A1.

<sup>3</sup> Editorial, *Next Stop: Anarchy*, N.Y. POST, June 27, 2012, at 28. The Daily News subsequently ran its own editorial as well. Editorial, *Stop and Frisk—or Die*, N.Y. DAILY NEWS, July 6, 2012, at 32.

<sup>4</sup> *Floyd v. City of N.Y.*, 283 F.R.D. 153, 159–60 (S.D.N.Y. 2012); *see also* *Ligon v. City of N.Y.*, No. 12 Civ. 2274(SAS), 2012 WL 2125989 (June 12, 2012) (resolving a discovery dispute in a class action lawsuit challenging NYPD's implementation of Operation Clean Halls, a stop-and-frisk program that allows police officers to patrol inside and around thousands of private apartment buildings throughout Bronx County, New York); *Ligon v. City of N.Y.*, No. 12 Civ. 2274(SAS), 2013 WL 71800 (Jan. 8 2013) (finding, for purposes of preliminary injunction analysis, that plaintiff-residents had established a "clear likelihood that they will be able to prove that the City of New York and its agents displayed deliberate indifference toward the violation of the constitutional rights of hundreds and more likely thousands of individuals").

<sup>5</sup> Buettner & Glaberson, *supra* note 2.

<sup>6</sup> *See generally id.* (identifying an increase in challenges and coverage of stop-and-frisk policies).

by the federal court and the state appellate court on this contentious subject actually point to a larger issue—the invisibility and willful irrelevance of the New York City Criminal Court, the first-tier trial court.<sup>7</sup>

While many have critiqued the NYPD, its Commissioner, and the Mayor for the plague of rampant stops-and-frisks that impact young men of color in disproportionate and disturbing numbers,<sup>8</sup> few have turned their attention to the role of the criminal court. One would expect, or at least imagine, that in a city with more than 685,000 stops-and-frisks per year,<sup>9</sup> there would be innumerable suppression hearings with police officers called to testify under oath about what they did and why they did it. This is precisely the role imagined for the criminal court by the U.S. Supreme Court when it established the exclusionary rule for Fourth Amendment violations.<sup>10</sup> The Court determined that exclusion, or suppression, of the evidence was necessary in order to deter police officers from violating constitutional rights and performing unreasonable searches and seizures.<sup>11</sup>

However, suppression hearings in the criminal court are few and far between.<sup>12</sup> Just as the criminal court's longstanding and

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<sup>7</sup> See generally Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L.J.* 315, 321 (2005) (explaining that, without suppression hearings and trials, police go unchecked, rendering the court virtually irrelevant).

<sup>8</sup> See, e.g., John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, *N.Y. TIMES*, June 18, 2012, at A15; Tina Moore, *Bloomberg on Stop and Frisk: 'We Don't Racial Profile'*, *N.Y. DAILY NEWS* (May 18, 2012, 9:24 AM), [http://articles.nydailynews.com/2012-05-18/news/31769227\\_1\\_wor-am-radio-mayor-bloomberg-stop-and-frisk-program](http://articles.nydailynews.com/2012-05-18/news/31769227_1_wor-am-radio-mayor-bloomberg-stop-and-frisk-program).

<sup>9</sup> There were 685,724 reported stops-and-frisks in 2011. *Stop-and-Frisk Data*, *N.Y. CIV. LIBERTIES UNION*, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Mar. 8, 2013) [hereinafter NYCLU]. Human nature being what it is, it is safe to assume that not every “street stop” yielded a corresponding police report, so no doubt the number of actual police/citizen street stop encounters is significantly higher. See, e.g., *Fighting Police Abuse: A Community Action Manual*, *AM. CIV. LIBERTIES UNION* (Dec. 1, 1997), [http://www.aclu.org/racial-justice\\_prisoners-rights\\_drug-law-reform\\_immigrants-rights/fighting-police-abuse-community-ac](http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/fighting-police-abuse-community-ac)

<sup>10</sup> See *Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961) (applying the rule to the states); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the rule at the federal level); see also JONATHAN CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 76 (1972) (“[Procedural] guarantees—for example, protections against coercive station-house interrogation, unreasonable searches and seizures, and entrapment—are largely enforceable through trial. That is, the sanctioning mechanism that is supposed to prevent such police abuses involves the assertion by the defendant that his rights have been violated and the exclusion of evidence illegally obtained.”).

<sup>11</sup> *Mapp*, 367 U.S. at 656–57.

<sup>12</sup> In fact, there is no readily available data kept by any state agency regarding the number of suppression hearings held or the outcomes of those hearings. See Zeidman, *supra* note 7, at 321. The Criminal Court of the City of New York Annual Report lists the number of “pre-trial

overarching emphasis on efficiency and plea bargains trumps trials and meaningful determinations of guilt or innocence,<sup>13</sup> it also ignores, if not abhors, suppression hearings and careful examinations of the legality of everyday police conduct on the street. By abdicating its critical oversight role, the criminal court effectively shields police behavior from any meaningful external review or accountability and allows and encourages rampant stops-and-frisks to continue unabated.<sup>14</sup>

The criminal court's missing-in-action status on the policing issue of the day is all the more egregious when the NYPD's stops-and-frisks are examined through a constitutional lens. The very use of the phrase "stop-and-frisk" implies that the practice employed by the NYPD is somehow condoned or imbued with legality by the Supreme Court through its landmark decision from 1968 in *Terry v. Ohio*.<sup>15</sup> Although street stops must be distinguished from street stops-and-frisks, the tension and controversy<sup>16</sup> surrounding both practices has generally been subsumed under the "stop-and-frisk" heading. That makes sense since street stops in general are viewed as authorized by the Court in *Terry*, the case that gave the Court's imprimatur to the practice now known as "stop-and-frisk." Given that *Terry* is offered by proponents of stop-and-frisk as providing

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hearings commenced," but does not delineate the type of pre-trial hearing, whether the hearing was actually completed, and, most important, the outcome. CRIMINAL COURT OF THE CITY OF NEW YORK ANNUAL REPORT 2011 6 (Barry A. Kamins & Justin Barry eds. 2012), available at <http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf> [hereinafter ANNUAL REPORT 2011].

<sup>13</sup> See, e.g., Zeidman, *supra* note 7, at 321.

<sup>14</sup> See, e.g., CASPER, *supra* note 10, at 76–77 (1972) (“[T]he lack of trials means that the procedural rules enunciated by the courts . . . are not the serious concern that they would be for police officers if the later had the expectation that all or most defendants would challenge illegal police practices.”); L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 675 (1998) (“[P]olice officers know that a plea of guilty is the most likely case disposition, and so the issue of police misconduct or evidence suppression will never come to light.”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 372 (“[P]olice know and count on the fact that the rule is rarely applied (for both legal and not-so-legal reasons).”).

<sup>15</sup> *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

<sup>16</sup> See, e.g., *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417, 421 (S.D.N.Y. 2011) (describing a federal class action lawsuit challenging NYPD’s stop and frisk practices as unconstitutional and premised on improper racial profiling); *Lino v. City of N.Y.*, 2011 N.Y. Misc. LEXIS 3172, at \*2–3 (Sup. Ct. N.Y. County June 24, 2011) (resolving a motion to compel and cross motion to dismiss in a state lawsuit seeking injunction requiring NYPD to seal all records of people stopped and frisked whose cases ended in dismissal or as noncriminal violations); *Daniels v. City of N.Y.*, 198 F.R.D. 409, 411, 422 (S.D.N.Y. 2001) (certifying a federal class action lawsuit charging NYPD with both racial profiling and illegal stops-and-frisks, and seeking disbandment of NYPD’s Street Crime Unit).

constitutional cover for this controversial policing tactic,<sup>17</sup> it behooves all concerned to critically examine whether, and to what extent, that is truly the case. Put simply, did the Supreme Court in *Terry* mean to authorize more than 685,000 street stops in a single city in a single year?

In *Terry*, the Court wrestled with a seemingly basic question: what, if anything, can police do to a citizen when they don't have probable cause to arrest, but they suspect that something illegal is afoot?<sup>18</sup> That question grew out of an essential truth—the explicit text of the Fourth Amendment references “probable cause,” but speaks only in terms of “reasonableness” about what the police can do in situations when they do not have probable cause.<sup>19</sup>

While the defense in *Terry* argued that the police were prohibited from interfering with a citizen in any way unless the information they possessed rose to the level of probable cause,<sup>20</sup> the prosecution countered that police/citizen encounters that stopped short of an arrest were not subject to the Fourth Amendment.<sup>21</sup> The Court seemingly split the difference and held that the police do not need probable cause for every police/citizen interaction, but every police/citizen interaction that involves a restraint on a person's liberty is indeed regulated by the Fourth Amendment.<sup>22</sup> The Court held that an officer is permitted to conduct an investigatory stop<sup>23</sup> if “specific and articulable facts . . . taken together with rational inferences from those facts”<sup>24</sup> suggest that “criminal activity may be afoot.”<sup>25</sup> Further, the officer can perform a pat-down, or frisk, for

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<sup>17</sup> See, e.g., *United States v. Brake*, 666 F.3d 800, 804 (1st Cir. 2011) (citing *Terry*, 392 U.S. at 30–31).

<sup>18</sup> *Terry*, 392 U.S. at 30.

<sup>19</sup> Providing that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>20</sup> See, e.g., Brief of the NAACP Legal Defense and Educational Fund, as Amicus Curiae, at 68–69, *Terry*, 392 U.S. 1 (No. 67) reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 644–45 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>21</sup> See, e.g., Brief of Nat'l Dist. Attorneys' Ass'n as Amicus Curiae in support of Respondent, at 6–7, *Terry*, 392 U.S. 1 (No. 67) (discussing how the Fourth Amendment could be narrowed to encompass searches, not pat-downs).

<sup>22</sup> See *Terry*, 392 U.S. at 16 (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

<sup>23</sup> See *id.* at 21–22.

<sup>24</sup> *Id.* at 21.

<sup>25</sup> *Id.* at 30.

weapons<sup>26</sup> if he or she has reason to believe the individual is “armed and presently dangerous.”<sup>27</sup> Courts reviewing the propriety of the officer’s actions must assess “whether a reasonably prudent [person in the officer’s] circumstances . . . would be warranted in the belief” held by the officer under review.<sup>28</sup>

Over time, the test has been recast in terms of “reasonable suspicion.”<sup>29</sup> If the police have “reasonable suspicion”—a phrase not found anywhere in the Constitution—that criminal activity may be afoot and that the suspect is armed and dangerous, they can engage in a “stop-and-frisk.” For the first time, the Court gave its seal of approval to forcible encounters between police officers and citizens in situations where the officer lacked probable cause or a warrant.<sup>30</sup>

Unfortunately, the Court did not provide a carefully delineated definition of this new “reasonable suspicion” standard. One could divine that reasonable suspicion is a less exacting standard than probable cause, but that the police still need some objective justification and should be able to articulate facts that lead to specific reasonable inferences of criminal activity.<sup>31</sup> At a bare minimum, it must be something more than an “inchoate and unparticularized suspicion or ‘hunch.’”<sup>32</sup> In subsequent cases, the Court instructed that reasonable suspicion should be evaluated based on the “totality of circumstances,”<sup>33</sup> and “on common sense judgments and inferences about human behavior.”<sup>34</sup> While “a showing considerably less than preponderance of the evidence”<sup>35</sup> is required, “the Fourth Amendment requires at least a minimal level

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<sup>26</sup> *Id.* at 30–31.

<sup>27</sup> *Id.* at 30.

<sup>28</sup> *Id.* at 27. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 823 (1998) (discussing how Justice Brennan persuaded Justice Warren, *Terry*’s author, to focus on stops and frisks under the “reasonableness clause” of the Fourth Amendment, as opposed to an assessment of probable cause as required by the Amendment’s “Warrant Clause”).

<sup>29</sup> Notably, the phrase “reasonable suspicion” is nowhere to be found in *Terry*. The first explicit reference by the Supreme Court to “reasonable suspicion” seems to be in *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973). See Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 951 (1998) (“Reasonable suspicion was a metamorphosis of *Terry*.”).

<sup>30</sup> See *Terry*, 392 U.S. at 30–31.

<sup>31</sup> *Id.* at 21–22, 27 (rejecting the notion that an officer’s subjective good faith that criminal activity is occurring is sufficient for a stop-and-frisk).

<sup>32</sup> *Id.* at 27.

<sup>33</sup> *Alabama v. White*, 496 U.S. 325, 330 (1990); *United States v. Sokolow*, 490 U.S. 1, 7–8 (1989).

<sup>34</sup> *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

<sup>35</sup> *Wardlow*, 528 U.S. at 123.

of objective justification for making the stop.”<sup>36</sup>

Post-*Terry*, much has been written about the impact on the victims of these stops. Stories are legion of men of color stopped for no apparent reason while walking down the street or returning home from work,<sup>37</sup> and articles have been written and videos have been made capturing the prevalent stop-and-frisk experiences of young men of color living in highly policed neighborhoods like Brownsville, Brooklyn.<sup>38</sup> None of this is especially surprising, given that almost 90% of those stopped are people of color.<sup>39</sup> More surprising, and alarming, is that the racial impact of street stops was actually one of the factors that motivated and undergirded the decision in *Terry* itself.<sup>40</sup>

More than forty years ago, Chief Justice Earl Warren, the author of the Court’s opinion in *Terry*,<sup>41</sup> understood well the incendiary interplay among police behavior, race, and stops-and-frisks. Writing in 1968, a time characterized by social unrest, racial tension, and the Civil Rights Movement,<sup>42</sup> Warren proclaimed, “[w]e would be less than candid if we did not acknowledge that this question [meaning the permissibility of stops-and-frisks] thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court.”<sup>43</sup> Later in the opinion, he referred more specifically to “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,”<sup>44</sup> and he cited presciently for that statement to the findings of the President’s Commission on Law Enforcement and Administration of Justice. In that citation, in the

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<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., Leonardo Blair, *My Crime? Just Fitting the Profile*, N.Y. POST, Dec. 2, 2007, at 20.

<sup>38</sup> See, e.g., Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, Four Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1.

<sup>39</sup> In 2011, 87% of those stopped-and-frisked were Black or Latino. NYCLU, *supra* note 9. Only 9% of those stopped-and-frisked were described as “white.” *Id.*

<sup>40</sup> See *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968); Michael R. Juviler, *A Prosecutor’s Perspective*, 72 ST. JOHNS L. REV. 741, 743 (1998); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) (stating that discussions of race regarding Fourth Amendment case law will not occur if, as opposed to reasonableness, courts define Fourth Amendment standards through warrants, probable cause, and exclusion). *But see* *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417, 422, 423, 456 (S.D.N.Y. 2011).

<sup>41</sup> *Terry*, 392 U.S. at 4.

<sup>42</sup> See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHNS L. REV. 975, 981 (1998).

<sup>43</sup> *Terry*, 392 U.S. at 9–10.

<sup>44</sup> *Id.* at 14.

form of a lengthy footnote, Warren wrote:

The President's Commission on Law Enforcement and Administration of Justice found that "in many communities, field interrogations are a major source of friction between the police and minority groups." It was reported that the friction caused by "[m]isuse of field interrogation" increases "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, it 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>45</sup>

Warren's candor led one scholar to observe that "*Terry* was a landmark ruling for many reasons, not the least of which was the fact that the Court, for the first time, openly acknowledged the tensions between urban blacks and the police caused by street investigations and stop and frisk techniques."<sup>46</sup>

It was against this backdrop—law enforcement officials' demands for authority to police outside of probable cause strictures; civil rights advocates' pleas for people to be free from hyper-vigilant and unnecessarily intrusive policing; and minority communities' burgeoning resentment and anger over random, disproportionate

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<sup>45</sup> *Id.* at 14–15 n.11 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183–84 (1967); LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

<sup>46</sup> Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1283 (1998) (footnote omitted); *see also* Juviler, *supra* note 40, at 743 ("One of the strengths of the *Terry* opinion is that it directly addresses the impact of its ruling on race relations."); Harris, *supra* note 42, at 984; *see Amar, supra* note 40, at 808 (stating that one of the most open discussions regarding race and the Fourth Amendment occurred in *Terry*). Some argue that the Court's opinion mentions the connection between stops and frisks and minority community unrest only in passing. *See, e.g.*, Barrett, *supra* note 28, at 772 (noting how the *Terry* court never mentioned the race of any individual in the case, and that the court only briefly mentions the relationship between stop-and-frisk and ghetto unrest).

and abusive stop-and-frisk practices—that the Court attempted to fashion a compromise by giving police authority to perform stops-and-frisks, and by simultaneously trying to set parameters for the exercise of this power.<sup>47</sup> As one commentator put it:

[T]he case stands out—for its attempts at crafting a reasonable balance between law enforcement and individual freedom, for its acknowledgement that police had used aggressive techniques to control minority communities, and for its attempt to assert some measure of judicial control over, and place practical limits on, what previously had been a nearly invisible police practice.<sup>48</sup>

For present purposes, the critical point, articulated by the commentator quoted above, is that the *Terry* decision emphasized the need for “judicial control” over what “had been a nearly invisible police practice.”<sup>49</sup> While many would take issue with the idea that massive numbers of street-stops of people of color was ever “invisible”—as it was certainly heard, seen, discussed, and intimately experienced in the communities where it was practiced—it is indisputable that the courts were now to play a critical role in policing this police practice.<sup>50</sup> Street stops were now to be “visible” and subject to external review, examination and oversight in court hearings.<sup>51</sup>

In the years after *Terry*, New York’s Court of Appeals also explicitly recognized the compelling need to regulate interactions between police officers and civilians.<sup>52</sup> Already having recognized that “[s]treet encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees,”<sup>53</sup> the court in *People v. DeBour*<sup>54</sup> grappled with the balance between civil rights and the role of law enforcement.<sup>55</sup> Harkening directly to *Terry*, the court’s decision began by noting that the case raised “very sensitive and troublesome issues relating

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<sup>47</sup> Harris, *supra* note 42, at 981; *see Terry*, 392 U.S. at 10–12.

<sup>48</sup> Harris, *supra* note 42, at 1022. But others believe the Court’s decision deserves critical attention and subverts the Fourth Amendment rights of Blacks. *See Maclin, supra* note 46, at 1276–77.

<sup>49</sup> Harris, *supra* note 42, at 1022.

<sup>50</sup> *See id.* at 981.

<sup>51</sup> *Terry*, 392 U.S. at 15–18.

<sup>52</sup> *People v. Cantor*, 36 N.Y.2d 106, 112, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975).

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

<sup>54</sup> *People v. DeBour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

<sup>55</sup> *See id.* at 218, 352 N.E.2d at 568, 386 N.Y.S.2d at 381.



to the nature and extent of police conduct toward private citizens.”<sup>56</sup> While endorsing the reasonable suspicion to stop-and-frisk standard, the court took its constitutional analysis of the propriety of police street-stop behavior further, and discussed four escalating levels or gradations of permissible police authority.<sup>57</sup>

Now, more than forty years after *Terry*, it becomes necessary to ask, “What has *Terry* wrought?” In New York City, NYPD stops-and-frisks were thrust to the fore in 1999 following the shooting of Amadou Diallo by several NYPD officers from a specialized unit that accounted for a majority of the stops-and-frisks in New York City.<sup>58</sup> It quickly became apparent that the number of stops-and-frisks had exploded,<sup>59</sup> and the seemingly inherent racial disparity remained in full force and effect.<sup>60</sup> Entities as varied as the

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<sup>56</sup> *Id.* at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378. The court seemed to lift language almost verbatim from former Chief Justice Warren’s opinion in *Terry*. *Terry*, 392 U.S. at 9 (1968) (“[T]his question [meaning, the permissibility of stops-and-frisks] thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity.”).

<sup>57</sup> The court articulated:

The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the [law] authorizes a forcible stop and detention of that person. A corollary of the . . . right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed. Finally a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.

*DeBour*, 40 N.Y.2d at 223, 352 N.E.2d at 571–72, 386 N.Y.S.2d at 384–85 (citations omitted). See also *People v. Hollman*, 79 N.Y.2d 181, 185, 196, 590 N.E.2d 204, 206, 213, 581 N.Y.S.2d 619, 621, 628 (1992) (reaffirming *DeBour* and its four-tiered framework). The court was well aware that it was digging deeper than did the Supreme Court in *Terry*—“even the majority of the Supreme Court in the *Terry* trilogy explicitly avoided resolving the constitutional propriety of an investigative confrontation.” *DeBour*, 40 N.Y.2d at 219, 352 N.E.2d at 569, 386 N.Y.S.2d at 382. Stops-and-frisks in New York State are subject as well to the state constitution and the New York State Criminal Procedure Law. N.Y. CONST. art. I, § 12; N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2012).

<sup>58</sup> See, e.g., William K. Rashbaum, *Ads Seek City Cops’ Stop-&-Frisk Victims*, N.Y. DAILY NEWS, Aug. 3, 1999, at 10; William K. Rashbaum, *Spitzer Broadens Cop Frisk Probe*, N.Y. DAILY NEWS, Aug. 2, 1999, at 8 [hereinafter Rashbaum, *Spitzer Broadens Cop Frisk Probe*]; Kit R. Roane, *Giuliani Agrees to Give the State Police Documents on Frisking*, N.Y. TIMES, May 26, 1999, at B5.

<sup>59</sup> See generally NYCLU, *supra* note 9 (showing statistical information regarding the amount of New Yorkers stopped by police due to stop and frisk procedure); see also Rashbaum, *Spitzer Broadens Cop Frisk Probe*, *supra* note 58, at 8.

<sup>60</sup> See Harris, *supra* note 42, at 1019; Roane, *supra* note 58 (“According to police officials, a preliminary analysis of reports filed last year in more than 20 precincts where the Street Crime Unit has been active shows that 63 percent of all people frisked were black.”).

Department of Justice, the United States Commission on Civil Rights, the Office of the New York State Attorney General, and the New York City Civilian Complaint Review Board embarked on exhaustive studies of NYPD stops-and-frisks.<sup>61</sup> The Attorney General's finding that Black and Latino men accounted for an overwhelming number of the reported stops-and-frisks led him to conclude that this was "the most serious civil rights issue . . . facing the city."<sup>62</sup>

Did all, most, many, or some of the reported 685,724 stops-and-frisks in 2011 comport with the reasoning, standards, and intent of the Court? The stop-and-frisk data is troubling on other metrics in addition to race. From 2004 to 2011, only between 10–14% of those stopped were arrested or even given a summons.<sup>63</sup> Put another way, in 2011, of the 685,000 reported stops-and-frisks, only approximately 75,000 people were arrested or ticketed, and 610,000 were simply sent on their way.<sup>64</sup>

That certainly begs the constitutional question of whether reasonable suspicion existed to legally justify the stops-and-frisks of those 610,000 people. A post hoc analysis of reasonable suspicion without access to the underlying facts of each case is a risky proposition, yet one can attempt to draw conclusions from the available data. Obviously, there were many scenarios where officers, based on the totality of circumstances, did in fact have the requisite reasonable suspicion, but the stop and/or frisk did not yield anything to justify an arrest or even a summons. It is also surely true that officers acted without the necessary reasonable suspicion in some number of the cases where there was no arrest or summons. Assume for argument's sake that the police did have reasonable suspicion in half of the 610,000 cases that failed to yield an arrest or even a ticket. That still leaves 305,000 stops where the police lacked reasonable suspicion. In fact, even if one were to assume a whopping 90% reasonable suspicion rate, it still results in 68,500 unconstitutional, illegal stops—or, put another way, about

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<sup>61</sup> See, e.g., Benjamin Weiser, *Federal Authorities Grow More Aggressive in Examining Police Nationwide*, N.Y. TIMES, Mar. 28, 1999, at 46; Julia Vitullo-Martin, *Lessons and Legacy of Amadou Diallo*, GOTHAM GAZETTE (N.Y.), Feb. 2001, available at <http://old.gothamgazette.com/article/crime/20010201/4/179>.

<sup>62</sup> Richard Pérez-Peña, *Police May Have Understated Street Searches, Spitzer Says*, N.Y. TIMES, Mar. 23, 1999, at B5.

<sup>63</sup> See NYCLU, *supra* note 9 (defining between 86–90% of people stopped between 2004 and 2011 as "completely innocent").

<sup>64</sup> *Id.* (noting that 88% were "completely innocent").

190 illegal stops every day.<sup>65</sup> The editors of a recent report from the Urban Institute’s Justice Policy Center cited to studies finding that “officers are not necessarily aware of, nor do they routinely comply with, the limitations of [stops-and-frisks]; officers also do not always meet the criteria of a lawful search,”<sup>66</sup> and that “an alarming share of stops do not meet constitutional standards, with 14% of documented stops in New York City failing to meet the original reasonable suspicion standard.”<sup>67</sup> No matter how you parse the numbers, it is indisputable that huge numbers of people, almost exclusively men of color, are subjected to illegal police activity in the streets of New York City.

The NYPD, in relying on *Terry* to justify its stop-and-frisk practices, has turned the carefully circumscribed stop-and-frisk on its head. Although commentators have suggested that the Court sought to bring stops-and-frisks within the ambit of Fourth Amendment protection precisely because of the issue of race, the NYPD brazenly uses *Terry* to defend, and perpetuate, vast numbers of stops-and-frisks and enormous racial disparities in who gets stopped.<sup>68</sup> The Court in *Terry*, however, was trying to regulate and reign in the police—particularly with respect to policing practices in minority communities.<sup>69</sup> Instead, the result has been a massive

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<sup>65</sup> The Center for Constitutional Rights, which has been embroiled in ongoing litigation with the NYPD over stop-and-frisk practices, believes that 30% of the stops are unconstitutional. CTR. FOR CONSTITUTIONAL RIGHTS, STOP-AND-FRISK: FAGAN REPORT SUMMARY (2010), available at <http://ccrjustice.org/files/Fagan%20Report%20Summary%20Final.pdf>; see also Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police Were Legally Unjustified, a Study Finds*, N.Y. TIMES, Oct. 27, 2010, at A22. As a former police officer noted, “there is no industry standard as to what would comprise an acceptable batting average, or how many false positives occur.” James J. Fyfe, *Terry: A(n) Ex-Cop’s View*, 72 ST. JOHN’S L. REV. 1231, 1243 (1998). While the Supreme Court has opined that “*Terry* accepts the risk that officers may stop innocent people,” that hardly can be seen as a support for tens of thousands of improper stops. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

<sup>66</sup> URBAN INST., JUSTICE POLICY CTR., KEY ISSUES IN THE POLICE USE OF PEDESTRIAN STOPS AND SEARCHES 3 (Nancy La Vigne et al. eds., 2012), available at <http://www.urban.org/UploadedPDF/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.pdf> [hereinafter URBAN INSTITUTE].

<sup>67</sup> *Id.* See also Slobogin, *supra* note 14, at 403 n.174.

<sup>68</sup> There is a unique New York connection to *Terry*, one that underscores the longstanding racial disparity in NYPD stops-and-frisks. The Court decided *Sibron v. New York*, on the same day it decided *Terry*. *Sibron v. New York*, 392 U.S. 40, 43 (1968). Michael Juviler, discussing the brief and oral argument prepared on behalf of the New York County District Attorney in *Sibron*, recounted reviewing 1600 NYPD stop-and-frisk reports, and observed that they revealed a “disproportionate racial impact.” Juviler, *supra* note 40, at 743.

<sup>69</sup> See *Terry v. Ohio*, 392 U.S. 1, 14–15 n.11 (1968) (“[I]n many communities, field interrogations are a major source of friction between the police and minority groups.’ . . . While the frequency with which ‘frisking’ forms a part of field interrogation practice varies . . . it cannot help but be a severely exacerbating factor in police-community tensions. This is

explosion in the number of police stops of men of color.<sup>70</sup>

While *Terry* did indeed expand police power, fault for the runaway stop-and-frisk train lies to a great extent with the trial courts for failing to perform the role the Supreme Court envisioned and commanded if the doctrine was to have any practical and constitutional effect.<sup>71</sup> By consistently refusing to review and regulate the police, the courts have paved the way for *Terry* to become what it has—an unrealized constitutional protection. Even as we learn about the staggeringly high number of stops-and-frisks inflicted on innocent people of color, the criminal court plows ahead with business as usual and nary a suppression hearing in sight. Almost thirty years ago, a scathing report by the Association of the Bar of the City of New York observed that less than one-half of 1% of all misdemeanors results in a trial in the criminal court,<sup>72</sup> and asked rhetorically whether such an institution rightfully could be called a “court.”<sup>73</sup> While that ignominious statistic remains,<sup>74</sup> it is now appropriate to ask as well whether a court that fails to hold a meaningful number of suppression hearings can rightfully be called a “court.”

The lack of suppression hearing litigation is especially troubling in light of *Terry* itself. While the Court did recognize the limitations of suppression as a means to control police behavior,<sup>75</sup> it nevertheless stated that “[u]nder our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the

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particularly true 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.’” (citations omitted).

<sup>70</sup> While *Terry* was focused on what law enforcement officers could do in the moment to address an unfolding scenario, the NYPD presently emphasizes stop-and-frisk as a way to deter people from carrying weapons. See David Cole, *The Outrage of Stop-and-Frisk Policing*, NATION (July 14, 2012), <http://www.thenation.com/article/168389/outrage-stop-and-frisk-policing> (“[T]he tactic has been employed not, as the Supreme Court originally conceived it, to disrupt ongoing criminal activity but as a generalized deterrence strategy.”) The theory is that people are unlikely to be armed if they know they are likely to be stopped-and-frisked. See *id.*

<sup>71</sup> See *Terry*, 392 U.S. at 15, 21–22.

<sup>72</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 3 (1983) (analyzing data from 1982).

<sup>73</sup> *Id.* at 19.

<sup>74</sup> The trial rate has actually fallen slightly, to less than one-third of 1%. Zeidman, *supra* note 7, at 321 n.35.

<sup>75</sup> *Terry*, 392 U.S. at 14.

Constitution requires.”<sup>76</sup> As federal court Judge Jack Weinstein wrote regarding *Terry*, “[a]ctive policing of the police by trial courts was noted as serving a ‘vital function.’”<sup>77</sup> Of course, the idea that courts can promote police officers’ fealty to the Constitution by holding their feet to the fire and conducting suppression hearings is not new or limited to *Terry*.<sup>78</sup> As then-Chief Justice Burger stated forty years ago, “suppression of evidence in these [cases is] imperative to deter law enforcement authorities from using improper methods to obtain evidence,”<sup>79</sup> and that “law enforcement . . . would [indeed] be deterred . . . if . . . evidence was suppressed often enough.”<sup>80</sup>

Criminal courts have traditionally been more concerned with efficiency—moving the calendar and resolving cases—than in overseeing the police and insuring constitutional rights.<sup>81</sup> The New York City Criminal Court is a prime example. In 2011, approximately 50% of all cases were “disposed of” at arraignment—the accused’s initial appearance before a judge.<sup>82</sup> The prosecution for its part also has not shown much appetite for subjecting its cases

<sup>76</sup> *Id.* at 15.

<sup>77</sup> Jack B. Weinstein & Mae C. Quinn, *Terry, Race and Judicial Integrity*, 72 ST. JOHN’S L. REV. 1323, 1328 (1998) (quoting *Terry*, 392 U.S. at 12).

<sup>78</sup> See *Sibron v. New York*, 392 U.S. 40, 46 (1968); *Terry*, 392 U.S. at 12–13 (citing *Linkletter v. Walker*, 381 U.S. 618, 629 (1965); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Weeks v. United States*, 232 U.S. 383, 391–93 (1914)) (other citations omitted).

<sup>79</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

<sup>80</sup> *Id.* at 415.

<sup>81</sup> See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 43–47 (1979) (“[P]rosecutors will complain about poor police practices . . . [but] the prosecutor’s office has not made any concerted effort to reduce these problems.”); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 938 (1983) (“90% of all criminal convictions in America are by guilty plea.”); John P. Gross, *Dangerous Criminals, The Search for Truth and Effective Law Enforcement: How the Supreme Court Overestimates the Social Costs of the Exclusionary Rule*, 51 SANTA CLARA L. REV. 545, 567–68 (2011) (“The criminal justice system’s current reliance on plea bargaining significantly reduces the chance that an officer’s conduct will ever be scrutinized by a court.”); Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 245 (2010) (“Many of the most problematic searches and seizures are never judicially reviewed because the claims are bargained away as part of guilty plea arrangements.”); Slobogin, *supra*, note 14, at 375 (“[T]he search issue frequently is not litigated . . . because the case is resolved through a plea or in some other fashion that avoids or undermines a hearing on the Fourth Amendment issue.”); *id.* at 375 n.37 (“[M]any Fourth Amendment issues never get raised because of the pressure to resolve cases quickly through plea bargaining.”); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 41 n.138 (1997) (“Exclusionary rule litigation is rare in the sense that *all* criminal litigation is rare—the huge majority of convictions are obtained by guilty plea, and in most of those cases there is, basically, no litigation at all.”).

<sup>82</sup> ANNUAL REPORT 2011, *supra* note 12, at 20.

to independent judicial, constitutional scrutiny, and often threatens heavier plea offers if the defense insists upon litigating constitutional issues.<sup>83</sup> The longstanding prosecutorial and judicial abdication of the “vital function” of policing the police is of even greater concern in the face of unprecedented numbers of stops-and-frisks and the ever-present racial disparities.

If the stop-and-frisk pain were shared equitably across a wide swath of New Yorkers of all races, the rampant and ongoing constitutional violations would likely be deemed intolerable, and there would be little, if any, patient and ultimately fruitless debate concerning the recalibration of the balance between civil liberties and security concerns. Instead, something would be done, and done sooner rather than later. Yet something must, and can, be done now. The criminal court can transform itself from a system that powerfully and persuasively discourages litigation and rewards guilty pleas, into one that ensures that constitutional dictates, beginning with *Terry* itself, are enforced.

In the aftermath of the litigation following the Diallo shooting, the NYPD was required to submit to the City Council detailed quarterly reports based on information provided in the Department’s “Stop, Question and Frisk Report Worksheet[s].”<sup>84</sup> These worksheets, also known as UF-250 forms, contain a list of categories from which an officer can select the basis for his/her stop-and-frisk.<sup>85</sup> The categories—for example, “[a]rea [h]as [h]igh [i]ncidence [o]f [r]eported [o]ffenses [o]f [t]ype [u]nder [i]nvestigation,” “[f]urtive [m]ovements,” “[i]nappropriate

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<sup>83</sup> See Slobogin, *supra* note 14, at 375 n.37 (citing to a study that found that “in some cases prosecutors would only offer a bargain if the motion [to suppress on] were dropped”); Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 472 (2010).

<sup>84</sup> See N.Y.C., N.Y., ADMIN. CODE § 14-150(a)(5) (2012); Al Baker & Emily Vasquez, *Police Report Far More Stops and Searches*, N.Y. TIMES, Feb. 3, 2007, at A1 (“The guidelines to monitor stop-and-frisks in detail were set forth in a city law signed in 2001, and in a federal court case settled by the Bloomberg administration in 2004. Both called for the Police Department to release to the City Council, four times a year, basic data about the people who are stopped and questioned by officers, and the reasons for such encounters.”). However, NYPD officers have been required since 1986 to complete departmental forms (“UF-250 forms”) documenting stop-and-frisk encounters under certain specified circumstances. ELIOT SPITZER, ATTORNEY GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 65 (1999), available at [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil\\_rights/stp\\_frsk.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf).

<sup>85</sup> DELORES JONES-BROWN ET AL., STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER 8 (2010), available at [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf).

[a]ttire<sup>86</sup>—are too vague to allow for much by way of constitutional analysis, and offer little guidance regarding the well-documented racial disparities.<sup>87</sup> To what extent is race a, or the key, factor in stops-and-frisks, and are NYPD officers engaging in some version of racial profiling? While the NYPD steadfastly denies any unlawful racial basis for its behavior,<sup>88</sup> these critical questions cannot be answered in the absence of full-blown testimonial hearings. Certainly, the NYPD stands to benefit if allegations of racially based stops-and-frisks are aired fully in court and found to be untrue.<sup>89</sup>

To put the “reasonable” back in “reasonable suspicion” means focusing with laser-like precision on what the NYPD is doing out on the street. While it is critical to hear the victims’ stories of being stopped and frisked for no apparent reason, it is time to hear from the police officers who do these stops; to call them to answer, under oath, about how many stops-and-frisks they performed and on what basis they conducted them. In 2006, 2756 police officers accounted for 54% of all stops-and-frisks.<sup>90</sup> Those officers must be called to explain their actions and be judged accordingly. To date, individual police officers have been insulated from any kind of meaningful scrutiny.<sup>91</sup>

The primary argument against subjecting each and every arrest to serious constitutional examination is efficiency. Specifically, with almost one thousand people arrested in New York City each day,<sup>92</sup> it

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<sup>86</sup> *Id.* at 9.

<sup>87</sup> See generally CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS: THE CENTER FOR CONSTITUTIONAL RIGHTS PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008 19 (2009), available at <http://www.ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf> (describing the role race plays in NYPD stop-and-frisks).

<sup>88</sup> Baker & Vasquez, *supra* note 84.

<sup>89</sup> See, e.g., *United States v. Marquez*, 946 F. Supp. 257, 258–59, 260 (S.D.N.Y. 1996) (denying the defendant’s suppression motion based in part on the fact that the officer improperly stopped him because of his race). *But see United States v. Stone*, 73 F. Supp. 2d 441, 447 (S.D.N.Y. 1999) (“[B]ased on [the officers’] experience, and given the defendant’s race . . . the officers concluded that Stone was likely to be carrying a weapon.”).

<sup>90</sup> Al Baker, *City Police Stop Whites Equally but Frisk Them Less, a Study Finds*, N.Y. TIMES, Nov. 21, 2007, at B1.

<sup>91</sup> Dasha Kabakova, Note, *The Lack of Accountability for the New York Police Department’s Investigative Stops*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 539, 574 (2012).

<sup>92</sup> See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2002–2011 (2012), available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkCity.pdf>. In 2011, there were 338,314 total arrests throughout New York City, 249,211 of which were for misdemeanor offenses. *Id.* Note, however, that the total number of arrests reported by the Division of Criminal Justice Services excludes arrests for “violations,” such as disorderly conduct and certain classes of marijuana possession and trespass. *Id.*

would be impossible to hold suppression hearings for all of them. First and foremost, the Constitution must not give way to concerns about efficiency.<sup>93</sup> Even if it is not viable to require suppression hearings in every case, judges should at a bare minimum demand to be informed by the prosecutor, early and often in the proceedings, of the factual predicate for the search and seizure in each case they hear. That inquiry need not be particularly long or time-consuming, and in any event would at least minimally address the criminal court's present head-in-the-sand response to the stop-and-frisk conflagration that is swirling in and around the court. Just as the NYPD is now required to keep and disseminate stop-and-frisk data,<sup>94</sup> so, too, should the criminal court document police-citizen encounters of constitutional significance. As it is, the criminal court already records, analyzes and distributes all kinds of data (*e.g.*, the disposition rates of individual judges,<sup>95</sup> the time each case takes to move from arrest to arraignment)<sup>96</sup> but it is time to move past data-gathering that is focused solely on judicial and institutional efficiency.

While it has borne the brunt of the stop-and-frisk outrage and legal, political, and social challenges, the NYPD is but one institutional variable in the equation. Police conduct is supposed to be evaluated by judges entrusted with enforcing constitutional rights. The right to be free from unlawful searches and seizures is under attack in the form of hundreds of thousands of stops-and-frisks. As the New York State Attorney General concluded back in 1999, the stop-and-frisk disparate racial impact was the "the most

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<sup>93</sup> Similar arguments were raised about the right to counsel in the Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. Opponents of a constitutional right to counsel for all persons charged with a crime that included the possibility of imprisonment asserted that mandating the appointment of counsel in all these cases would impose too great a burden on state and local governments. *See Argersinger v. Hamlin*, 407 U.S. 25, 61–63 (1972) (Powell J., concurring in the judgment). That concern, no matter how realistic, gave way to the constitutional rights of the accused. *Id.* at 40 (majority opinion).

<sup>94</sup> *See* N.Y.C., N.Y., ADMIN. CODE § 14-150(a)(5) (2012).

<sup>95</sup> Email from Elissa Krauss, Office of Court Research (Oct. 15, 2012, 2:59 PM) (on file with author) ("Disposition data by judge is available for Supreme Civil, Supreme Criminal and Lower Civil Courts. The data are by year and include: total dispositions broken down by manner of disposition along with total pending").

<sup>96</sup> *See* ANNUAL REPORT 2011, *supra* note 12, at 21.



serious civil rights issue . . . facing the city.”<sup>97</sup> And yet, the criminal court was, and still remains, silent.<sup>98</sup> That silence can no longer be tolerated. Silence in this context is more than merely looking the other way; silence conveys tacit approval and can only serve to encourage the NYPD to conduct more and more unjustified stops.<sup>99</sup> Further, on the occasions when judges do weigh in, it is all too often to threaten the accused with harsher punishment should that individual deign to reject a plea bargain and insist on asserting his constitutional rights.<sup>100</sup> To have any legitimacy as a “court,” the criminal court must finally fulfill the role of constitutional watchdog as long envisioned by the Supreme Court.

To be sure, suppression hearings will not reach anywhere near the majority of unlawful stops-and-frisks. Stops-and-frisks that fail to result in an arrest or a ticket do not end up in criminal court—after all, in those situations no charges are filed.<sup>101</sup> As a result, the 610,000 innocent people who were stopped-and-frisked last year have no recourse in the criminal court; they are unable to avail themselves of a suppression hearing to put the officer’s actions on public display.<sup>102</sup> Still, about 12% of the stops do yield criminal charges,<sup>103</sup> and that in raw numbers is a lot of people (e.g., 12% of 685,000 is 82,200).<sup>104</sup>

<sup>97</sup> Pérez-Peña, *supra* note 62 (internal quotations omitted).

<sup>98</sup> See Margaret Raymond, *Police Policing Police: Some Doubts*, 72 ST. JOHN’S L. REV. 1255, 1264 (1998).

<sup>99</sup> See Slobogin, *supra* note 14, at 396–97.

<sup>100</sup> See, e.g., George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 1000 (2000); Richard Klein, *Judicial Misconduct in Criminal Cases: It’s Not Just Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 211 (2006); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 246 (2006).

<sup>101</sup> See, e.g., *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (“Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence . . . . If the officers . . . find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.”); Perrin et al., *supra* note 14, at 674 (“[I]llegal searches and seizures that do not result in prosecution are completely outside the operation of the [law].”).

<sup>102</sup> To address this omission, one scholar suggests limiting the applicability of the exclusionary rule and using instead a damages remedy whereby people subjected to illegal searches and seizures could seek monetary penalties from the offending officers and/or the police department. See Slobogin, *supra* note 14, at 405–06; see also Perrin et al., *supra* note 14, at 675 (“Individuals who are injured by police illegality, but who fall outside the court system, have no viable options in seeking relief.”).

<sup>103</sup> N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING 15 (2012) (stating that out of 685,724 stops, 605,328 did not result in summons or arrest).

<sup>104</sup> *Id.*

It is also true that constitutional principles inevitably are explored on behalf of the “guilty.”<sup>105</sup> Evidence was ostensibly recovered, and we evaluate the constitutionality of the police behavior in that context. Nevertheless, it behooves us to hear those 82,200 and to listen very carefully as they provide a window into the depth and breadth of present day policing and its impact on civil rights for all New Yorkers.<sup>106</sup>

Furthermore, suppression hearings are not a panacea to cure all stop-and-frisk ills. Police officers know well how to tailor their testimony to meet and overcome constitutional objections,<sup>107</sup> and

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<sup>105</sup> See, e.g., *Draper v. United States*, 358 U.S. 307, 314–15 (1959) (Douglas, J., dissenting) (“Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.” (footnotes omitted)).

<sup>106</sup> *People v. Elam*, 179 A.D.2d 229, 233–34, 584 N.Y.S.2d 780, 782–83 (App. Div. 1st Dep’t 1992) (“When all is said and done, it is apparent that the police officers simply had a hunch that the defendant had stolen the car he was driving. Although, as is hardly surprising, the hunch proved inaccurate, the police did manage quite fortuitously to ferret out evidence of an entirely different crime. Undoubtedly, if the police are to be permitted to pursue their vaguest intuitions of criminal activity in so aggressive a manner, there will be instances in which some wrongdoers who might otherwise go free will be apprehended; indeed, there may be instances such as the one at bar in which completely unsuspected crimes are brought to light. The instances will be more numerous, however, in which the free rein given the police will result in baseless intrusions upon the innocent. This latter consequence of inadequately grounded police activity is unfortunately one which the judicial perspective tends to minimize, since Fourth Amendment jurisprudence has evolved almost exclusively in the context of cases in which police action, however baselessly initiated, has uncovered evidence of crime. It is, however, a consequence which must be kept scrupulously in mind, for otherwise a court in its zeal to see the guilty punished will end up by sanctioning the erosion of fundamental constitutional guarantees, the predominant and absolutely essential purpose of which is to shield innocent individuals from the arbitrary assertion of the state’s formidable power.”).

<sup>107</sup> See, e.g., Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1376–77 (2008); Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 391 n.3 (1999) (“This Article makes a strong case that police lying, particularly in search and seizure litigation, is pervasive.”); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043 (1996) (“[T]he most common venue for testilying is the suppression hearing.”); CMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT 36 (City of New York 1994) (“Our investigation indicated . . . that [police falsification] . . . is probably the most common form of police corruption facing the criminal justice system, particularly in connection with arrests for possession of narcotics and guns. Several officers told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: ‘testilying.’”), available at [http://www.parc.info/client\\_files/Special%20Reports/4%20-%20Mollen%20Commission%20-](http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-)

many judges view reasonable suspicion as a remarkably elastic concept. Only four years after *Terry*, in his dissent in *Adams v. Williams*, Justice Marshall wrote, “[t]oday’s decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.”<sup>108</sup> As Professor Margaret Raymond observed, Justice Marshall came to bemoan how the interpretation of reasonable suspicion had a “chameleon-like way of adapting to any particular set of observations,”<sup>109</sup> and how “numerous contradictory observations [were] all suggestive of reasonable suspicion: deplaning first, deplaning last, or deplaning in the middle; purchasing one-way tickets or purchasing round-trip tickets; traveling with no luggage, little luggage, or new luggage.”<sup>110</sup>

Even when applying firm definitions of reasonable suspicion, judges are often loath to suppress evidence. In some cases, this is because of hindsight bias and the impact of the knowledge that the police officer was “right.”<sup>111</sup> In other cases, it is a matter of being concerned about a letting a “criminal” off the hook<sup>112</sup> and the adverse publicity and potential impact on reappointment or re-election.<sup>113</sup>

For all these reasons, defendants rarely prevail at suppression hearings.<sup>114</sup> These truths, however, are not sufficient reasons to eschew suppression hearings. The rationale for suppression

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<sup>108</sup> *Adams v. Williams*, 407 U.S. 143, 162 (1972) (Marshall, J., dissenting).

<sup>109</sup> Raymond, *supra* note 98, at 1263 (quoting *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting)) (internal quotation marks omitted).

<sup>110</sup> Raymond, *supra* note 98, at 1263 n.30 (citing *Sokolow*, 490 U.S. at 13–14).

<sup>111</sup> Slobogin, *supra* note 14, at 376 (“[The exclusionary rule’s] punch is reduced considerably by . . . the hindsight biasing effect of judicial knowledge that criminal evidence was found[] and judicial reticence in excluding dispositive evidence.” (footnotes omitted)).

<sup>112</sup> For the shortsightedness of such reasoning, see *supra* notes 105–106.

<sup>113</sup> See, e.g., Amar, *supra* note 40, at 799 (“Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 959 (1983) (“The expectation that the community will perceive his or her actions to be wrong, or to be a threat to public safety, or both, is also a cost to a judge who chooses to suppress evidence. If judges have no lifetime tenure, as is typical on the state trial court level, such perceptions may adversely affect the judge’s chances of remaining on the bench.”); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 132 (2003) (“[M]any judges will feel tremendous pressure to admit the illegally seized evidence and will often find a way to do so.”).

<sup>114</sup> See Alschuler, *supra* note 107, at 1375; Cicchini, *supra* note 83, at 470–71 (“Even if the police were to commit egregious misconduct and violate a suspect’s constitutional rights, the probability that the evidence would be suppressed . . . is still very low. . . . [I]n order for the evidence to be suppressed, a long chain of events must occur.”).

hearings transcends deterrence. Given the present crisis caused by stops-and-frisks, it is incumbent upon all concerned to expose the practice, case-by-case, to the clear light of day. At present, as the authors of the Urban Institute report on stop-and-frisk concluded, “[t]he field . . . remains uninformed regarding the manner in which stops are conducted.”<sup>115</sup>

Further, the worm may be turning. Recently, the Court of Appeals for the Fourth Circuit overturned a conviction for a drug offense.<sup>116</sup> Finding that the evidence was recovered unlawfully, the court stated “[w]e . . . are extremely wary of accepting the Government’s argument that an officer may acquire a reasonable suspicion of criminal wrongdoing simply because a person suddenly becomes observable.”<sup>117</sup> The court then took the opportunity to weigh in more generally regarding reasonable suspicion:

We are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone—whether he or she is one of the most affluent or most vulnerable members of our community. We appreciate that police are often called upon to make very difficult decisions about when to conduct *Terry* stops, and, for that reason, we give them leeway to make these determinations. Nonetheless, the Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.<sup>118</sup>

The aforementioned two recent cases from New York’s Appellate Division<sup>119</sup> provide further hope that courts may now be ready, willing, and able to strictly and carefully review Fourth Amendment claims, as is demanded by the present climate. In each case, the court found that the police officers acted unconstitutionally and illegally, without the requisite reasonable suspicion, and, as a

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<sup>115</sup> URBAN INSTITUTE, *supra* note 66, at vi.

<sup>116</sup> *United States v. Foster*, 634 F.3d 243, 244, 245 (4th Cir. 2011).

<sup>117</sup> *Id.* at 245, 247.

<sup>118</sup> *Id.* at 248–49 (citations omitted).

<sup>119</sup> *In re Darryl C.*, 98 A.D.3d 69, 947 N.Y.S.2d 483 (App. Div. 1st Dep’t 2012); *In re Jaquan M.*, 97 A.D.3d 403, 948 N.Y.S.2d 51 (App. Div. 1st Dep’t 2012).

result, the evidence had to be suppressed.<sup>120</sup> The cases received an uncharacteristic amount of press owing to the present front-page attention devoted to stop-and-frisk,<sup>121</sup> but little, if any, consideration was paid to the larger question they raised: in the ongoing stop-and-frisk juggernaut, how many other similar cases are out there?

To be clear, the issue should not be whether there are additional appellate cases on point. While appellate rulings create precedents and set standards for the law governing police-civilian encounters, the appellate courts hear few criminal cases on an annual basis.<sup>122</sup> Further, it is an open question whether those courts can, should, or will look beyond the facts of the individual case under review to make larger points about far-reaching policies like stop-and-frisk. With *In re Darryl C.*, the majority decision explicitly referred to the stop-and-frisk greater context,<sup>123</sup> but the dissent took issue with that approach.<sup>124</sup> With *In re Jaquan M.*, there was no direct reference to the stop-and-frisk imbroglio.<sup>125</sup> When an opportunity arose for the Court of Appeals to weigh in on stops-and-frisks, the court declined to do so despite the strenuous objection of its Chief Judge.<sup>126</sup> On the other hand, the trial level criminal courts hear

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<sup>120</sup> *Darryl C.*, 98 A.D. at 79, 947 N.Y.S.2d at 491; *Jaquan M.*, 97 A.D.3d at 408–09, 948 N.Y.S.2d at 56.

<sup>121</sup> *See, e.g., supra* notes 2–3.

<sup>122</sup> *See* N.Y. STATE UNIFIED COURT SYS., ANNUAL REPORT 2010 14 (2011). The Appellate Division, First Department (the court that heard *Darryl C.* and *Jaquan M.*), decided 528 criminal cases after argument or submission in 2010. *Id.* In the same year, the Court of Appeals decided ninety-nine criminal cases. *Id.* at 13. In contrast, there were 913,365 arrest and summons filings in the New York City Criminal Court. *Id.* at 15.

<sup>123</sup> *Darryl C.*, 98 A.D.3d at 71, 947 N.Y.S.2d at 485 (“The ramifications go beyond this single case. Widespread, aggressive police tactics in street encounters have recently raised concerns in other judicial forums.”).

<sup>124</sup> *Id.* at 80 n.1, 947 N.Y.S.2d at 492 n.1 (Richter, J., dissenting) (“The majority . . . seeks to turn this family court appeal, in which we disagree over whether the officer’s observations were sufficient to support a reasonable concern for his safety, into a referendum on the NYPD’s policing tactics. It is nothing of the sort.”).

<sup>125</sup> *See Jaquan M.*, 97 A.D.3d at 403, 948 N.Y.S.2d at 51 (App. Div. 1st Dep’t 2012).

<sup>126</sup> *People v. Holland*, 18 N.Y.3d 840, 841, 962 N.E.2d 261, 261, 938 N.Y.S.2d 839, 839 (2011). *See also id.* at 845, 962 N.E.2d at 264, 938 N.Y.S.2d at 842 (Lippman, C.J., dissenting) (“When courts with the factual jurisdiction to make attenuation findings employ facile analytic shortcuts operating to shield from judicial scrutiny illegal and possibly highly provocative police conduct, an issue of law is presented that is, I believe, this Court’s proper function to resolve. The alternative is to turn a blind eye to ‘tactics . . . [under which] any person might be approached, detained, intimidated, harassed, even provoked into a display of aggression and thereupon arrested, effectively eviscerating Fourth Amendment protections and ‘abandon[ing] the law-abiding citizen to the police officer’s whim or caprice.’” This is not an exaggerated or purely academic concern in a jurisdiction where, as is now a matter of public record, hundreds of thousands of pedestrian stops are performed annually by the police, only a very small percentage of which actually result in the discovery of evidence of

hundreds of cases every day that are rife with stop-and-frisk issues, if judges would take the time and make the effort to listen and inquire.<sup>127</sup>

About two years ago, there was a newspaper article quoting a former NYPD official suggesting that officers needed to “[s]ell the stop” to explain, nicely, to the victim after the fact why he or she was stopped and frisked.<sup>128</sup> In 2009, the NYPD created an explanatory stop-and-frisk card for officers to give out to those they stopped and frisked.<sup>129</sup> While perhaps the motivation behind the card was well-intentioned, the language of the card reflects a profound lack of understanding. At the bottom of the card, after listing reasons why people are stopped and frisked, it says, “[i]f you have been stopped and were not involved in any criminal activity

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crime.” (footnotes omitted) (citations omitted) (alterations in original). In a footnote, Chief Judge Lippman made specific reference to the stop-and-frisk federal class action case of *Floyd v. City of New York*. *Id.* at 845 n.4, 932 N.E.2d at 264 n.4, 938 N.Y.S.2d at 845 n.4.

<sup>127</sup> Parenthetically, if the criminal court is unwilling, or incapable, of meaningfully supervising and ensuring that constitutional mandates are being obeyed, then the legislative branch should step into the breach and hold hearings of its own. Given the popular unrest occasioned by stops-and-frisks, perhaps some kind of Truth and Reconciliation process is warranted to fully vent the purported justifications for, and give voice to the consequences of, the practice. A central component of any effort must be hearing the officers who conduct the majority of the stops-and-frisks explain, under oath, exactly what they did and why they did it. Presently, the New York City Council is considering four bills, known collectively as the Community Safety Act (CSA), aimed at curbing stop-and-frisk abuses and increasing police transparency. Wendy Ruderman, *Sharp Words at Hearing Over Tactics of the Police*, N.Y. TIMES, Oct. 11, 2012, at A22; see *Requiring Law Enforcement Officers to Provide Notice and Obtain Proof of Consent to Search Individuals*, Int. 0799-2012 (N.Y.C. 2012), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1078152&GUID=5620B6EC-8234-4F5C-9BE9-ADE64168FF7A&Options=&Search=>; *Prohibiting Bias-Based Profiling by Law Enforcement Officers*, Int. 0800-2012 (N.Y.C. 2012), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1078151&GUID=D1949816-2C35-46C8-B8A9-897A3E9FAFFD&Options=&Search=>; *Requiring Law Enforcement Officers to Identify Themselves to the Public*, Int. 0801-2012 (N.Y.C. 2012), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1078153&GUID=02B79C55-AD32-4F26-9D51-01670A68253C&Options=&Search=>; *Establishing an Office of the Inspector General for the NYPD*, Int. 0881-2012 (N.Y.C. 2012), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1138391&GUID=46EF84F3-F4D4-4B84-BCB2-042A5AC7E674>. The centerpiece of the CSA is the creation of an Inspector General to monitor the NYPD, a proposal that shows not only the dire need for independent oversight and police accountability, but also, implicitly, the lack of public faith in the criminal court’s ability and willingness to fulfill that role. Ruderman, *supra*, at A22.

<sup>128</sup> Al Baker, *Selling the ‘Stop’ in ‘Stop and Frisk’*, N.Y. TIMES CITY ROOM BLOG (Sept. 16, 2010, 10:37 AM), <http://cityroom.blogs.nytimes.com/2010/09/16/selling-the-stop-in-stop-and-frisk>.

<sup>129</sup> Erica Pearson et al., *NYPD Hands Out Informational Cards to Pedestrians Who Are Stopped and Frisked*, N.Y. DAILY NEWS, Apr. 30, 2009, available at [http://articles.nydailynews.com/2009-04-30/news/29435659\\_1\\_stop-and-frisk-practices-card-policy-answer-questions](http://articles.nydailynews.com/2009-04-30/news/29435659_1_stop-and-frisk-practices-card-policy-answer-questions).

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Confronting Stops-and-Frisks

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the NYPD regrets any inconvenience.”<sup>130</sup> Being spread-eagle on a police car in front of family and friends as police officers go through your pants and pockets is not what most people would call an “inconvenience.”<sup>131</sup> Instead of—or in addition to—demanding more and better of the police, it is essential and long overdue to make demands of the criminal court. Giving the accused his day in court, listening to the evidence, and granting suppression as warranted will go a lot further toward restoring constitutional faith and rights than turning a blind eye or even handing out an informational card.

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<sup>130</sup> *Id.*

<sup>131</sup> Indeed, the NYPD’s choice of words is as inapposite as it is bitterly ironic. The Supreme Court, in *Terry v. Ohio*, refused to characterize a stop-and-frisk as merely a “minor inconvenience and petty indignity,” and instead stated, prophetically: “[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” *Terry v. Ohio*, 392 U.S. 1, 10, 16–17 (1968) (quoting *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964)).