

## **NOTE**

### LOCKSTEPPING THROUGH STOP-AND-FRISK: A CALL TO INDEPENDENTLY ASSESS *TERRY V. OHIO* UNDER STATE LAW

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*Fifty-two years ago, in Terry v. Ohio, the United States Supreme Court upheld stop-and-frisk under the Fourth Amendment. At that time, stop-and-frisk had provoked substantial disagreement at the state level—leading to divergent opinions and repeat litigation. But after Terry, the state courts became silent. Since 1968, every state court has lockstepped with Terry in interpreting its own constitutional provisions.*

*This presents a puzzle, since state courts are free to provide more expansive (or less expansive) rights protections in interpreting their own state constitutions. And in other contexts, they have not been shy in doing so. In roughly a quarter of the Supreme Court's Fourth Amendment cases, state courts have read their state guarantees to exceed the U.S. Constitution's protections.*

*Terry's suspect pedigree further complicates the puzzle. Over the past few decades, stop-and-frisk has helped spark a breakdown in police-community relations. Multiple federal investigations have uncovered its connection to systemic racism. By many accounts, both the stop and the frisk have disproportionately targeted minorities. Terry has also led to nationwide unrest. A Terry stop precipitated the deaths of Eric Garner, Michael Brown, and Freddie Gray.*

*This Note proposes a change in perspective: that litigants challenge stop-and-frisk under state law. It also lays the groundwork for such*

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This Note was inspired by and is dedicated to my father, Jeffrey Sutton.

*challenges. It examines the history of stop-and-frisk at the state level before Terry. It analyzes the Terry litigation, relying especially on the NAACP’s briefing, which accurately predicted stop-and-frisk’s perverse potential. And it synthesizes this analysis into three arguments that should be raised against stop-and-frisk under state law.*

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#### INTRODUCTION

In November 2019, former New York City Mayor Michael Bloomberg launched his campaign for the presidency in unprecedented fashion—with an apology.<sup>1</sup> Speaking at a predominantly Black evangelical church in Brooklyn, Bloomberg renounced the stop-and-frisk policing strategy that had served as a “pillar of his 12-year mayoralty.”<sup>2</sup> “The fact is, far too many innocent people were being stopped while we tried to do that,” Bloomberg said, later adding, “I got something important really wrong.”<sup>3</sup>

Despite his contrition, Bloomberg was unable to shake the stigma of the city’s stop-and-frisk policy. “It’s not whether he apologized or not,”

<sup>1</sup> Shane Goldmacher, Michael Bloomberg Pushed ‘Stop-and-Frisk’ Policing. Now He’s Apologizing, N.Y. Times (Feb. 19, 2020), <https://www.nytimes.com/2019/11/17/us/politics/michael-bloomberg-speech.html> [<https://perma.cc/3H8Y-M4QD>] (“It is almost unheard-of for a former chief executive to renounce and apologize for a signature policy that helped define a political legacy.”).

<sup>2</sup> *Id.*

<sup>3</sup> Nick Timiraos, Michael Bloomberg Apologizes for ‘Stop-and-Frisk’ Policing, Wall St. J. (Nov. 17, 2019), <https://www.wsj.com/articles/michael-bloomberg-apologizes-for-stop-and-frisk-policing-11574017238> [<https://perma.cc/67ZL-4AZB>].

argued Joe Biden.<sup>4</sup> “It’s the policy. The policy was abhorrent. And it was in fact a violation of every right people have.”<sup>5</sup> Elizabeth Warren echoed these sentiments: “It targeted Black and brown men from the beginning . . . You need a different apology here, Mr. Mayor.”<sup>6</sup> The denunciations only escalated after a 2015 video emerged in which Bloomberg expounded a racist methodology for targeting minority communities. “[W]e put all the cops in the minority neighborhoods,” he said.<sup>7</sup> “Why’d we do it? Because that’s where all the crime is. And the way you should get the guns out of the kids’ hands is throw them against the wall and frisk them.”<sup>8</sup> The soundbite went viral and Bloomberg’s candidacy floundered thereafter.

The repercussions of stop-and-frisk extend beyond Bloomberg’s mayoralty in New York City. In 2015, the Department of Justice released its Ferguson Report, investigating the practices that contributed to riots in the St. Louis suburb. Among the DOJ’s cause-and-effect findings was this: an unchecked “pattern of suspicionless, legally unsupportable stops.”<sup>9</sup> The Ferguson Police Department “must fundamentally change the way it conducts stops and searches,” the DOJ concluded.<sup>10</sup> Other jurisdictions have faced similar controversies. After 250,000 stops in 2009, the Philadelphia Police Department pledged to appoint an independent monitor and retrain officers as part of a settlement agreement with the ACLU.<sup>11</sup> The ACLU has been similarly assertive in critiquing the “troubling frequency” of stops in Newark, and it has identified “similar controversies” in Miami, Baltimore, Chicago, and Detroit.<sup>12</sup>

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<sup>4</sup> Roll Call, *Candidates Attack Bloomberg’s Record on Stop-and-Frisk Policy*, YouTube (Feb. 20, 2020), <https://www.youtube.com/watch?v=4R1lhgBwCMs> [<https://perma.cc/8BQ7-E3KT>].

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

<sup>6</sup> *Id.*

<sup>7</sup> Bobby Allyn, ‘Throw Them Against the Wall and Frisk Them’: Bloomberg’s 2015 Race Talk Stirs Debate, NPR (Feb. 11, 2020), <https://www.npr.org/2020/02/11/804795405/throw-them-against-the-wall-and-frisk-them-bloomberg-s-2015-race-talk-stirs-deba> [<https://perma.cc/DL3E-C4B3>].

<sup>8</sup> *Id.*

<sup>9</sup> U.S. Dep’t of Just. C.R. Div., *Investigation of the Ferguson Police Department*, at 18 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments-2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments-2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/2MVL-RMH7>].

<sup>10</sup> *Id.* at 91.

<sup>11</sup> Michael D. White & Henry F. Fradella, *Stop and Frisk: The Use and Abuse of a Controversial Policing Tactic* 5 (2016).

<sup>12</sup> *Id.* at 5–6.

Americans have heard a lot of stop-and-frisk-related apologies from their elected officials over the past decade.<sup>13</sup> But state court judges—many of whom are elected officials in their own right<sup>14</sup>—have been conspicuously silent during this time in interpreting their state constitutions. How have they avoided this explosive controversy? In short, they have shielded themselves for decades behind federal precedent. In 1968, the United States Supreme Court constitutionalized stop-and-frisk under the Fourth Amendment in *Terry v. Ohio*.<sup>15</sup> And ever since, state courts have interpreted search-and-seizure protections in their own constitutions in lockstep with *Terry*.

This Note demands a change. State courts are free to do what they wish, but they should not hide under the umbrella of federal precedent in construing the search-and-seizure guarantees found in their own constitutions. The Supreme Court and state courts alike recognize that “[i]t is an established principle of our federalist system that state constitutions may be a source of ‘individual liberties more expansive than those conferred by the Federal Constitution.’”<sup>16</sup> Indeed, over the past few decades, state courts have adopted muscular interpretations of their state provisions to reject controversial criminal procedure decisions like *California v. Hodari D.*,<sup>17</sup> *Illinois v. Gates*,<sup>18</sup> and *United States v. Leon*.<sup>19</sup>

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<sup>13</sup> This is not to say that all are in unison. There is a sharp divide between those who support the practice and those who denounce it. All the better, this paper argues. Sharp divisions make the perfect battleground for state court decision making—allowing states to fill their role as laboratories of experimentation in contentious times.

<sup>14</sup> See, e.g., Brennan Ctr. for Just., *Judicial Selection: Significant Figures* (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/948W-VTAJ>].

<sup>15</sup> 392 U.S. 1 (1968).

<sup>16</sup> *State v. Novembrino*, 519 A.2d 820, 849 (N.J. 1987) (quoting *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980)).

<sup>17</sup> 499 U.S. 621 (1991) (holding that a Fourth Amendment “seizure” of a person only occurs upon application of physical force to the person or the person’s submission to an officer’s “show of authority”). For examples of state court decisions that independently assessed a Supreme Court decision interpreting the Fourth Amendment, see LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 Miss. L.J. 197 (2020).

<sup>18</sup> 462 U.S. 213 (1983) (replacing the previous two-part test to evaluate whether an informant’s tip constitutes probable cause with a “totality of the circumstances” balancing test).

<sup>19</sup> 468 U.S. 897 (1984) (holding that the exclusionary rule, which renders evidence inadmissible when it is the product of an unreasonable search or seizure under the Fourth Amendment, does not apply when an officer reasonably relies on a warrant issued by a magistrate that is later found to be invalid).

As Mayor Bloomberg (and the millions of citizens subjected to stop-and-frisk) can attest to, *Terry* may be the most controversial of all. And it is time that it receives reassessment in America's state court systems.

Part I of this Note examines the societal forces that shaped *Terry* and the state-level decision making that contributed to its enshrinement as Supreme Court precedent. Part II analyzes the *Terry* litigation, focusing on the problems *Terry* was designed to solve and the courts' different methodologies. Part III argues that state courts play a crucial role as guardians of individual rights and, thus, should not lockstep with Supreme Court precedent. Relying upon this analysis, Part IV raises three arguments that could be marshalled against stop-and-frisk under state law. Finally, Part V offers this Note's conclusion. Michael Bloomberg is on the record. The citizens of New York City, Philadelphia, and other American cities are too. It is time for state courts and state constitutions to have their turn. It is time to reassess stop-and-frisk under state law.

## I. HISTORICAL BACKGROUND

“What happened? Why did it happen? What can be done to prevent it from happening again and again?”<sup>20</sup> In 1968, the same questions that stumped contemporary officials in Ferguson and New York City lay in writing on President Lyndon Johnson's desk. Throughout the 1960s, American cities burst into racial violence each June, culminating in the deployment of the National Guard during “The Long Hot Summer” of 1967.<sup>21</sup> In response, Johnson appointed the Kerner Commission to produce “a profile of the riots—of the rioters, of their environment, of their victims, of their causes and effects.”<sup>22</sup> The report on his desk was bleak, citing endemic discrimination in housing, school choice, and labor markets.<sup>23</sup> But it was especially critical of law enforcement, blaming “[i]ndiscriminate street stops and searches . . . for helping to foster the ‘deep hostility between police and ghetto communities’” that led to the

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<sup>20</sup> The Nat'l Advisory Comm'n on Civ. Disorders (The Kerner Comm'n), *The Kerner Report* 32 (Princeton University Press 2016) (1968).

<sup>21</sup> Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, at 194, 267–68 (2016).

<sup>22</sup> The Kerner Comm'n, *supra* note 20, at 37.

<sup>23</sup> See, e.g., Marcus Casey & Bradley Hardy, *50 Years After the Kerner Commission Report, the Nation is Still Grappling with Many of the Same Issues*, Brookings (Sept. 25, 2018), <https://www.brookings.edu/blog/up-front/2018/09/25/50-years-after-the-kerner-commission-report-the-nation-is-still-grappling-with-many-of-the-same-issues/> [<https://perma.cc/R3UW-C9S5>].

riots.<sup>24</sup> As Johnson pondered the impact of these stops, so did the nine Justices of the United States Supreme Court.

The Justices did not write on a blank slate when they first addressed *Terry*. State courts, state statutes, and academics had all contemplated a stop-and-frisk power over the past half-century. In 1908, a California state appeals court upheld an officer's ability to "accost[]" an individual walking home from "a public entertainment" on suspicion of burglary.<sup>25</sup> A police officer could exercise this right, the court noted, "if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification."<sup>26</sup> Moreover, the officer could search the suspect for concealed weapons as a "precaution . . . whether plaintiff was under arrest or not."<sup>27</sup>

Two decades later, a couple of other states began to follow California's lead. In *State v. Hatfield*, a West Virginia court upheld the stop of an automobile on suspicion that "a car loaded with liquor would pass through . . . that night."<sup>28</sup> And in *Hargus v. State*, an Oklahoma criminal court held that it was "not unlawful for a peace officer . . . to make a reasonable inquiry of strangers" without reasonable cause or a warrant.<sup>29</sup> On neither occasion did the officers marshal evidence amounting to probable cause to support the seizure.<sup>30</sup> But perhaps due to "considerable variation" in the ways states "handled police-initiated contacts with citizens,"<sup>31</sup> such disputes surrounding stop-and-frisk raised little controversy.<sup>32</sup>

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<sup>24</sup> Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 Sup. Ct. Rev. 141, 178.

<sup>25</sup> *Gisske v. Sanders*, 98 P. 43, 44–45 (Cal. Ct. App. 1908).

<sup>26</sup> *Id.* at 45.

<sup>27</sup> *Id.* at 44.

<sup>28</sup> *State v. Hatfield*, 164 S.E. 518, 519 (W. Va. 1932).

<sup>29</sup> 54 P.2d 211, 214 (Okla. Crim. App. 1935).

<sup>30</sup> *Hatfield*, 164 S.E. at 519; *Hargus*, 54 P.2d at 213.

<sup>31</sup> White & Fradella, *supra* note 11, at 36.

<sup>32</sup> A few other cases addressed the stop-and-frisk practice during these decades. In *State v. Gulczynski*, 120 A. 88, 89 (Ct. Gen. Sess. 1922), a Delaware court held that an officer could stop and question a suspect without probable cause, as cited in John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 *Fordham L. Rev.* 211, 215–16 (1964). See also *People v. Henneman*, 10 N.E.2d 649, 650–51 (Ill. 1937) (holding that police officers had a right to stop and question the plaintiff even though he was not committing any crime at the time of arrest, nor did the officers have reason to believe he had committed a crime); *State v. Zupan*, 283 P. 671, 675 (Wash. 1929) (holding that police officers were justified in stopping the plaintiff without probable cause to inquire about his business).

The drafting of the Uniform Arrest Act (“UAA”) by the Interstate Commission on Crime brought the issue to the fore. Designed to “harmonize arrest practices across the country,” its provisions specifically addressed “[q]uestioning and detaining suspects” and “[s]earching suspects for weapons.”<sup>33</sup> Section 2 of the Act permitted a police officer to “stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime.”<sup>34</sup> During the stop, the officer was allowed to demand that the suspect provide his name, address, business, and destination.<sup>35</sup> Section 3, meanwhile, legalized the frisk power and allowed the officer to “search for a dangerous weapon . . . whenever he has reasonable ground to believe that he is in danger.”<sup>36</sup>

Both provisions proved influential at the state level. In 1941, New Hampshire and Rhode Island passed near-verbatim versions of the UAA.<sup>37</sup> And soon after, the Interstate Commission on Crime “approved the general principles of the Act.”<sup>38</sup> Over the course of the next decade, numerous other states would enact similar statutes to legalize stop-and-frisk.<sup>39</sup> Quickly, the practice made its way into police training bulletins.<sup>40</sup> At first, the laws were met with approval. Many liberals who would later decry stop-and-frisk agreed with UAA drafter Sam Warner that the practice was “essential to proper policing” and “to the advantage of both the police and the public.”<sup>41</sup> After all, a temporary seizure avoided the “humiliat[ion]” and “inconvenience[.]” of a formal arrest.<sup>42</sup> Once the stop

<sup>33</sup> Henry F. Fradella & Michael D. White, *Reforming Stop-and-Frisk*, 18 *Criminology, Crim. Just., L. & Soc’y* 45, 46–47 (2017) (citing Sam B. Warner, *The Uniform Arrest Act*, 28 *Va. L. Rev.* 315, 317 (1942)).

<sup>34</sup> *Id.* at 47.

<sup>35</sup> Goluboff, *supra* note 21, at 198 (citing Uniform Arrest Act § 2, *in* Interstate Comm’n on Crime, *The Handbook on Interstate Crime Control* 87 (4th prt. 1942)).

<sup>36</sup> Uniform Arrest Act § 3, *in* Interstate Comm’n on Crime, *The Handbook on Interstate Crime Control* 87 (4th prt. 1942).

<sup>37</sup> Warner, *supra* note 33, at 316–17.

<sup>38</sup> *Id.* at 317.

<sup>39</sup> Ronayne, *supra* note 32, at 215 (noting statutes enacted in California, Illinois, Missouri, and Wisconsin).

<sup>40</sup> Frank J. Remington, *The Law Relating to “On the Street” Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 *J. Crim. L. Criminology & Police Sci.* 386, 387 n.4 (1960).

<sup>41</sup> Warner, *supra* note 33, at 320; Goluboff, *supra* note 21, at 199.

<sup>42</sup> Warner, *supra* note 33, at 320; Goluboff, *supra* note 21, at 199; see also Goluboff, *supra* note 21, at 198 (noting that a number of scholars argued that “[d]etention was shorter and thereby less liberty depriving or stigmatizing than arrest for vagrancy”).

was recognized, scholars believed it “follow[ed]” that officers had the power to frisk to ensure their safety.<sup>43</sup> “[I]t would often be the height of folly,” wrote Warner, “to converse with the suspect without first making certain that the latter is not fingering the trigger of a pistol.”<sup>44</sup>

But as Americans began to witness stop-and-frisk in action, their intuitions about police discretion began to change. One factor was the rising volume of seizures. In 1947, 47,029 Americans were stopped for “suspicion.”<sup>45</sup> According to the FBI Uniform Crime Reports, this classification included “persons arrested as suspicious characters, but not in connection with any specific offense, who are released without formal charges being placed against them.”<sup>46</sup> That figure would reach 84,063 by 1956, and it would outpace arrests for vagrancy.<sup>47</sup> These statistics caught the attention of Justice Douglas who tipped his hand in 1960 by writing that “[t]here is no crime known as ‘suspicion.’”<sup>48</sup>

Justice Douglas also was attuned to a second factor that ignited the controversy over stop-and-frisk—race. “The persons arrested on ‘suspicion’ . . . come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves,” he wrote.<sup>49</sup> “No police are going to stop and frisk well-dressed bankers on Wall Street,” echoed civil rights activist Bayard Rustin.<sup>50</sup> “That kind of brusque police action is reserved for the poor and minorities like Negroes and Puerto Ricans.”<sup>51</sup> The NAACP was particularly aware of this disparate impact when it filed its amicus brief in *Terry*. Acknowledging the theoretical reasonableness of deferring to police discretion, the NAACP noted that

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<sup>43</sup> Remington, *supra* note 40, at 391.

<sup>44</sup> Warner, *supra* note 33, at 324.

<sup>45</sup> U.S. Dep’t of Just., Fed. Bureau of Investigation, 18.2 Uniform Crime Reports 75, 122 (1947).

<sup>46</sup> *Id.* at 124.

<sup>47</sup> U.S. Dep’t of Just., Fed. Bureau of Investigation, 27.2 Uniform Crime Reports 67, 113 (1956). These statistics probably failed to capture the full gravity of “reasonable suspicion” seizures nationwide. As Caleb Foote asked: “What proportion of the total number of arrests is made up of persons abruptly arrested, investigated for minutes or hours or days, and as abruptly released without booking?” Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 *J. Crim. L. Criminology & Police Sci.* 402, 406 (1960).

<sup>48</sup> William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 *Yale L.J.* 1, 12 (1960).

<sup>49</sup> *Id.* at 13.

<sup>50</sup> White & Fradella, *supra* note 11, at 40.

<sup>51</sup> *Id.*



stop-and-frisk had proved to be a “delusive and unworkable proposition on . . . the streets of our ghettos where [it] does its daily work.”<sup>52</sup>

As the furor grew, state court dockets swelled with stop-and-frisk cases and spurred fierce debate.<sup>53</sup> In *People v. Martin*, Justice Traynor and the California Supreme Court, interpreting the California Constitution’s protections against unreasonable searches and seizures, held that the police acted “reasonably” in stopping a suspicious car containing two men parked on a “lover’s lane.”<sup>54</sup> Moreover, the officers “were justified in taking precautionary measures” like ordering the suspects out of the car to be frisked for weapons.<sup>55</sup> By contrast, the dissent read the state<sup>56</sup> and federal constitutions to require a baseline of probable cause before a seizure could occur.<sup>57</sup> Characterizing the state courts as guardians of individual rights, Justice Carter argued that “[t]he American way of life does not lend itself to such totalitarian practices [as stop-and-frisk]. There is no place in our body politic for the Gestapo, the storm trooper or the commissar.”<sup>58</sup> The justices conceptualized the constitutional commands in different ways. On the one hand, Justice Traynor insisted that the police

<sup>52</sup> Brief for the NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae at 34, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67) [hereinafter Brief for the NAACP].

<sup>53</sup> So did the pages of law journals. The NAACP’s brief provides nearly two full pages of critiques of stop-and-frisk doctrine. Among those mentioned are Foote, *supra* note 47, at 406 (arguing for a “reassess[ment]” of “the role the police should play in our society” focused on “stricter compliance with the [F]ourth [A]mendment”); Theodore Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 *J. Crim. L. Criminology & Police Sci.* 251, 262 (1966) (arguing that the country should look to other means of preventing crime “which do not require that we tamper with the most fundamental of our constitutional rights as citizens, our right to be free”); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 *Colum. L. Rev.* 848, 866 (1965) (contending that “the Court must proceed to develop rules on the power to stop, frisk and question suspicious persons which, based on analysis, will properly protect the individual’s right to be free from unreasonable imposition by the police”). Brief for the NAACP, *supra* note 52, at 10–11.

<sup>54</sup> 293 P.2d 52, 53 (1956).

<sup>55</sup> *Id.* Few state court decisions comprehensively addressed the frisk power before *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1964). In *State v. Collins*, 191 A.2d 253, 255 (1963) the Supreme Court of Connecticut was unable to squarely address the frisk power because “[n]othing found as a result of the frisking was offered in evidence.” But in dicta, the court adopted a reasonableness approach under the Fourth Amendment of the federal Constitution and Article I, Section 8 of the Connecticut Constitution. *Id.* And in *People v. Jones*, 176 Cal. App. 2d 265, 267 (1959), a California appeals court held that “[w]here reasonable under the circumstances, an officer may run his hands over a person’s clothing to protect himself from attack with a hidden weapon.”

<sup>56</sup> *Martin*, 293 P.2d at 54 (Carter, J., dissenting).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

had discretion to act on their suspicions, so long as they acted reasonably. Justice Carter, on the other hand, envisioned a more “ordered” system of liberty where probable cause and a magistrate were placed “between the citizens and the over-zealous law enforcement officer[s].”<sup>59</sup> The debate was not settled. Over the next decade, California state courts engaged with this issue on multiple occasions.<sup>60</sup>

Other state courts joined the fray. In *De Salvatore v. State*, the Delaware Supreme Court addressed whether the state’s version of the Uniform Arrest Act was “unconstitutional as authorizing detention without probable cause.”<sup>61</sup> Like California, the court distinguished between stops and formal arrests, holding that the statute was valid so long as the officers had “reasonable grounds” for suspicion.<sup>62</sup> Illinois concurred with this assessment in *People v. Faginkrantz*.<sup>63</sup> Citing a suspect’s presence in a crime-infested alley at 4:30 AM, the Illinois Supreme Court ruled that the officers’ decision to stop the suspect and request identification was reasonable in light of “the circumstances of this case.”<sup>64</sup>

The momentum towards *Terry* was building. In *Rios v. United States*,<sup>65</sup> the Supreme Court had been urged to address whether the police could stop individuals suspected of a crime. Instead, the Court remanded the case with instructions to determine the time of arrest, ignoring for then the issue of stop-and-frisk.<sup>66</sup> A second source of momentum came from the American Law Institute, which began writing a Model Code of Pre-Arrestment Procedure (“MCPD”) in 1963.<sup>67</sup> A draft proposal permitted

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<sup>59</sup> *Id.*

<sup>60</sup> Harvey E. Henderson Jr., Note, Stop and Frisk in California, 18 *Hastings L.J.* 623, 625 (1967) (citing *People v. Davis*, 222 Cal. App. 2d 75, 78 (1963), *People v. Hilliard*, 221 Cal. App. 2d 719, 723 (1963), *People v. Beverly*, 200 Cal. App. 2d 119, 125 (1962), and *People v. Porter*, 196 Cal. App. 2d 684, 686 (1961)).

<sup>61</sup> 163 A.2d 244, 247 (Del. 1960).

<sup>62</sup> *Id.* at 249.

<sup>63</sup> 171 N.E.2d 5 (Ill. 1960).

<sup>64</sup> *Id.* at 7; see also Wayne R. LaFare & Frank J. Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 *Mich. L. Rev.* 987, 1005–06 (1965) (noting that the decisions of a judge may vary based upon the nature of the crime. For example, what is reasonable in a narcotics case is different than what is reasonable in a gambling case).

<sup>65</sup> 364 U.S. 253 (1960).

<sup>66</sup> *Id.*; see also Remington, *supra* note 40, at 390–91.

<sup>67</sup> Goluboff, *supra* note 21, at 202.

stops limited to twenty minutes in “suspicious circumstances” and green-lighted an ancillary frisk for dangerous weapons.<sup>68</sup>

But both of these instances paled in comparison to New York’s 1964 stop-and-frisk law that “serve[d] to focus the attention of the legal world upon this particular police practice.”<sup>69</sup> “Substantially similar” to the UAA, the New York law permitted temporary detention upon reasonable suspicion.<sup>70</sup> Its timing also coincided with a rash of violence between police and African Americans in Manhattan.<sup>71</sup> The city was in two camps. On one side, New York Governor Nelson Rockefeller, backed by the city’s law enforcement<sup>72</sup> and prosecutorial lobbies, claimed that the bill was “urgently needed . . . because the police must be provided . . . with sound tools to carry out their sworn duty to protect the public.”<sup>73</sup> Rockefeller and his allies worried that the Supreme Court’s exposition of the exclusionary rule in *Mapp v. Ohio*<sup>74</sup> had subverted the police’s ability to control crime.<sup>75</sup> Stop-and-frisk was the solution. Lined up in opposition were a host of local and national organizations including the NAACP, the New York Civil Liberties Union, and the Congress for Racial Equality.<sup>76</sup> “Nowhere, in the history of Anglo-Saxon jurisprudence,” warned the New York State Bar Association, “have we so closely approached a police

<sup>68</sup> Evelle J. Younger, Stop and Frisk: “Say It Like It Is,” 58 J. Crim. L. Criminology & Police Sci. 293, 295 (1967).

<sup>69</sup> Goluboff, *supra* note 21, at 202 (quoting A. Fairfield Dana, ed., New York State Legislative Annual 67 (1964)).

<sup>70</sup> Ronayne, *supra* note 32, at 211–12.

<sup>71</sup> Goluboff, *supra* note 21, at 203. The law became effective on July 1, 1964. See Emanuel Perlmutter, New ‘Frisk’ Law Goes into Effect: Police Are Dubious About Curbs That Go with It, N.Y. Times, July 2, 1964, at 52, <https://www.nytimes.com/1964/07/02/archives/new-frisk-law-goes-into-effect-police-are-dubious-about-curbs-that.html> [<https://perma.cc/ZSW8-HK5H>]. Only two weeks later, the Harlem and Bedford-Stuyvesant Race Riots “got their impetus from the killing of a black youngster by a police officer.” Daniel J. Monti, Patterns of Conflict Preceding the 1964 Riots: Harlem and Bedford-Stuyvesant, 23 J. of Conflict Resol. 41, 43–44 n.1 (1979).

<sup>72</sup> Perlmutter, *supra* note 71.

<sup>73</sup> Josh Segal, Note, “All of the Mysticism of Police Expertise”: Legalizing Stop-and-Frisk in New York, 1961–1968, 47 Harv. C.R.-C.L. L. Rev. 573, 585 (2012) (citing Nelson A. Rockefeller, Annual Message to the Legislature (Jan. 8, 1964) *in* Public Papers of Nelson A. Rockefeller: Fifty-Third Governor of the State of New York 17–18 (1964)).

<sup>74</sup> 367 U.S. 643 (1961) (holding that the Fourth Amendment prohibits prosecutors from using evidence obtained through an unconstitutional search or seizure in a state court).

<sup>75</sup> See, e.g., Richard H. Kuh, Reflections on New York’s “Stop-and-Frisk” Law and Its Claimed Unconstitutionality, 56 J. Crim. L. Criminology & Police Sci. 32, 36 (1965); Arlen Specter, *Mapp v. Ohio*: Pandora’s Problems for the Prosecutor, 111 U. Pa. L. Rev. 4, 42 (1962).

<sup>76</sup> Goluboff, *supra* note 21, at 203.

state as in this proposal to require citizens to identify themselves to police officers and ‘explain their actions’ on such a meager showing.”<sup>77</sup> Rallies were scheduled, ad hoc groups formed to oppose the bill, and an Emergency Committee for Public Safety offered free legal counsel for “any persons oppressed by the . . . ‘stop-and-frisk’ measures.”<sup>78</sup>

Where did New Yorkers turn when they needed this constitutional question resolved? They looked to their state courts.<sup>79</sup> Once again, the state tribunals proved fertile ground for a fierce legal debate about the scope of police power. At the trial court level, the judges rejected the use of a frisk to search a subject for weapons.<sup>80</sup> According to the court, “however necessary and desirable” it might be, a search without probable cause was unconstitutional.<sup>81</sup> The court ordered the fruits of the search suppressed.<sup>82</sup>

On appeal, the Court of Appeals of New York reversed. Writing for the majority, Judge Bergan channeled Governor Rockefeller in claiming that “[p]rompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities.”<sup>83</sup> This “pragmatic” approach treated the stop as “reasonable” due to its necessity.<sup>84</sup> It treated the frisk the same way. The Court recognized the unique dangers faced by the police when using stop-and-frisk, noting that the response to an officer’s stop “may be a bullet.”<sup>85</sup> Balancing the harm to the public and the danger faced by the officers,

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<sup>77</sup> Douglas Dales, *Rockefeller Signs Bills Increasing Powers of Police; Bar and Civil Rights Groups Call ‘Stop-and-Frisk’ and ‘No-Knock’ Laws Illegal; Harassment is Feared; But Governor Says Judicial Safeguards Are Provided—Calls Bills Imperative*, N.Y. Times, Mar. 4, 1964, <https://www.nytimes.com/1964/03/04/archives/rockefeller-signs-bills-increasing-powers-of-police-bar-and-civil.html> [<https://perma.cc/F7YH-WPP2>] [hereinafter *Rockefeller Signs Bills*].

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

<sup>79</sup> And where did New York’s state courts look when they faced this constitutional question? They looked to other state courts. Among the decisions cited by the majority and dissent in *People v. Rivera* include those mentioned earlier: *State v. Collins*, 191 A.2d 253 (Conn. 1963); *People v. Martin*, 293 P.2d 52 (Cal. 1956); *Hargus v. State*, 54 P.2d 211 (Okla. Crim. App. 1935); *State v. Hatfield*, 164 S.E. 518 (W. Va. 1932); *Gisske v. Sanders*, 98 P. 43 (Cal. Ct. App. 1908). *People v. Rivera*, 201 N.E.2d 32, 35–37 (N.Y. 1964).

<sup>80</sup> *People v. Rivera*, 38 Misc. 2d. 586, 589 (N.Y. Misc. 1963).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Rivera*, 201 N.E.2d at 34.

<sup>84</sup> *Id.* at 35–36.

<sup>85</sup> *Id.* at 35.

Judge Bergan contended that intrusion was a “minor inconvenience and petty indignity.”<sup>86</sup>

The dissent saw it differently. While agnostic towards the stop, Justice Fuld vehemently protested the frisk as a “grave” and “objectionable” “insult to . . . individual liberty.”<sup>87</sup> Citing Justice Douglas’s law review article from 1960, Justice Fuld contended that New Yorkers would “forsake a goodly measure of [their] freedom” if they could be frisked “at any moment” because “an overly zealous or inexperienced police officer feels that [they] are acting suspiciously.”<sup>88</sup> Justice Fuld did not dispute the “risks inherent in the investigatory activities undertaken by the police.”<sup>89</sup> But he believed there were constitutional options available that would preserve the community’s “sense of dignity.”<sup>90</sup>

*People v. Rivera* was decided on July 10, 1964, six days before the streets of Harlem erupted into summertime violence.<sup>91</sup> Simultaneously, in a small courthouse in Ohio, the Court of Common Pleas of Cuyahoga County was writing an opinion due for release in the fall. Then titled *State v. Chilton*, it would later become *Terry v. Ohio*. When *Terry* was litigated, this was the state of stop-and-frisk: A vigorous debate existed at the state level, led by state courts construing the federal constitution and their state guarantees. These tribunals provided a number of models for the United States Supreme Court. Justice Traynor’s reasonableness reading commanded the most attention, receiving the approval of Illinois in *Faginkrantz* and Delaware in *De Salvatore*. His colleague, Justice Carter, provided a different framework—one that rejected the entirety of stop-and-frisk as a “totalitarian practice.” The New York trial court and Justice Fuld offered a third approach, vehemently opposing the frisk, while

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<sup>86</sup> Id. at 36. Justice Traynor had used similar language in a 1962 article: “Such a minor interference with personal liberty would touch the right to privacy only to serve it well.” Roger J. Traynor, *Mapp v. Ohio* at Large in the Fifty States, 1962 Duke L.J. 319, 334. After fifty years of stop-and-frisk, one has to imagine the New York state courts would like another look at this constitutional assessment. As Judge Scheindlin lamented in *Floyd v. City of New York*, “[w]hile it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience.” 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

<sup>87</sup> *Rivera*, 201 N.E.2d at 37 (Fuld, J., dissenting).

<sup>88</sup> Id. at 38 (citing Douglas, *supra* note 48, at 12, 13).

<sup>89</sup> Id. at 39.

<sup>90</sup> Id. The ACLU cited Justice Fuld’s “stirring language” as a conclusion to its amicus brief in *Terry*: “The loss of liberty entailed in authorizing a species of search on the basis of mere suspicion is too high a price to pay for the small measure of added security it promises.” Brief of ACLU, et al. as Amici Curiae, at 33, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67).

<sup>91</sup> *Rivera*, 201 N.E.2d.

remaining noncommittal towards the stop. And finally, the New York Court of Appeals laid out a pragmatic model of criminal procedure, justifying stop-and-frisk as grounded in necessity. For a decade, the state courts had been alive with debate, culminating in the back-and-forth that led to New York's 1964 decision in *Rivera*. Five years later, after the Supreme Court decided *Terry v. Ohio*, they fell silent.

## II. A COURT "UNDER HEAVY FIRE": THE *TERRY* LITIGATION

As far as Detective Martin McFadden could see, "it was a perfect case."<sup>92</sup> To others, like the ACLU's Bernard A. Berkman, it was "offensive to the Constitution."<sup>93</sup> Judge Bernard Friedman was less sure. In fact, as he penned a conclusion to *State v. Chilton*, he petitioned for review: "I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts."<sup>94</sup> The constitutional debate over stop-and-frisk was far from settled as *Terry v. Ohio* made its way towards the nation's capital.

The case had begun innocuously enough. On October 31, 1963, McFadden, a veteran of the Cleveland police force, observed two men—John Terry and Richard Chilton—conferring on the sidewalk.<sup>95</sup> Pausing because "they didn't look right to me," he watched as they nodded at each other, separated, then walked by a jewelry store several times, "each peering inside intently."<sup>96</sup> Eventually, a third man approached and

<sup>92</sup> Right to Frisk Gets Supreme Court OK, Cleveland Press, June 10, 1968, at A1, A12, available at [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1003&context=terryvohio\\_newspaper](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1003&context=terryvohio_newspaper) [<https://perma.cc/LG2Y-VAX7>].

<sup>93</sup> Id. at A12.

<sup>94</sup> *State v. Chilton*, 95 Ohio L. Abs. 321, 325 (1964).

<sup>95</sup> Bus Bergen, *Illegal Search is Charged at Concealed Weapons Trial*, Cleveland Press, Sept. 22, 1964, available at [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1005&context=terryvohio\\_newspaper](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1005&context=terryvohio_newspaper) [<https://perma.cc/Z5SW-XYT3>].

<sup>96</sup> Id.; Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 Miss. L.J. 423, 431 (2004). Accounts dispute the number of times the suspects "repeated this ritual." *Terry v. Ohio*, 392 U.S. 1, 6 (1968). The United States Supreme Court believed that "roughly a dozen trips" were taken. Id. But the Court of Appeals of Ohio claimed the suspects walked past the store "two to five times by both men." *State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966). It turns out Officer McFadden's memory was particularly fuzzy on this point. In his police report from the day of the incident, he claimed they looked into the store "about three times each." Katz, *supra*, at 431. Later, at a suppression hearing, he upped the ante to "four or five times apiece" and eventually to "four to six trips each." Id. Finally, at trial, he confessed "maybe four to five trips, maybe a little more, it might be a little less. *I don't know, I didn't count the trips.*" Id. For some, this pointed to a potential problem with the reasonable suspicion standard. Ambiguous evidence like the number of times a suspect walked by a store or their

mirrored their behavior. After observing this conduct for roughly ten minutes, McFadden believed the men were “casing a job, a stick-up” and decided to investigate further.<sup>97</sup> He advanced, flashed his police identification, and demanded the individuals’ names. Receiving only a “mumbled” response and already fearing “they may have a gun,” McFadden grabbed Terry and frisked him.<sup>98</sup> Feeling a pistol inside Terry’s overcoat, McFadden ordered the trio inside and removed the weapon.<sup>99</sup> He next ordered the men to face the wall with their hands raised so that he could frisk them for further firearms.<sup>100</sup> The search produced another revolver on Chilton.<sup>101</sup> Now possessing probable cause to charge the suspects for carrying concealed weapons, McFadden phoned the station and arrested all three men.<sup>102</sup>

At the trial court, the state contended that McFadden had arrested Terry and Chilton and searched them incident to arrest.<sup>103</sup> Due to the absence of probable cause, Judge Friedman rejected this argument, refusing to “stretch[] the facts beyond reasonable comprehension.”<sup>104</sup> Nevertheless, he still upheld Officer McFadden’s actions as lawful. With a *Rivera*-like pragmatism, Friedman noted that the “practical demands of . . . law enforcement” justified a “distinction between stopping and frisking, and search and seizure.”<sup>105</sup> The officer’s “reasonable cause” that Chilton and Terry were “conducting themselves suspiciously” was enough to justify this lower-order intrusion on their privacy.<sup>106</sup> Judge Friedman was also aware of the stakes. Believing that stop-and-frisk was a crucial tool to

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“mumbled response” to a question could foster suspicion when all an officer had to go on was “they didn’t look right to me.” *Id.* at 430, 434. Tellingly, these nuances were largely lost on the trial court judge, who noted, “There is no question about the facts in this case.” *Chilton*, 95 Ohio L. Abs. at 322.

<sup>97</sup> *Terry*, 392 U.S. at 6.

<sup>98</sup> *Id.* at 6–7.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 7.

<sup>102</sup> *Id.* This is a familiar story, so for the sake of brevity I have omitted many of the details. For a more comprehensive account, see, for example, *id.* at 5–8; Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 St. John’s L. Rev. 911, 912–14 (1998); Katz, *supra* note 96, at 430–34.

<sup>103</sup> See Saltzburg, *supra* note 102, at 914–15.

<sup>104</sup> *State v. Chilton*, 95 Ohio L. Abs. 321, 322 (1964).

<sup>105</sup> *Id.* at 323. Indeed, Judge Friedman cited both *People v. Rivera* and *People v. Martin* in his opinion, demonstrating that the laboratories of democracy were aware of each other’s precedent. *Id.* at 324.

<sup>106</sup> *Id.* at 322.

quell the national violence, he argued that “[w]e cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.”<sup>107</sup>

Events in Cleveland provided a context essential to understanding the Court of Appeals of Ohio’s 1966 decision in *State v. Terry*.<sup>108</sup> That year, Cleveland joined the “tapestry of racial violence sweeping the nation’s cities.”<sup>109</sup> The Hough Riots that summer were like “a battlefield.”<sup>110</sup> “I was in London in the bombings of World War II,” noted one officer. “That’s what it was like here last night.”<sup>111</sup> Judge Freidman had believed stop-and-frisk could combat this violence and protect the police. On review, the Ohio Court of Appeals agreed with that assessment. Citing a variety of state precedents, Judge Silbert concluded that “an officer may stop and question even though he has insufficient grounds to make an arrest.”<sup>112</sup> Remarking on the vigorous state debate, he considered *Martin* and *Rivera* as “great persuasive authority”<sup>113</sup> and labeled the stop a “minor interference with personal liberty.”<sup>114</sup> Like Judge Bergan, the court also justified Officer McFadden’s actions on the grounds of necessity. Once an officer had grounds to lawfully investigate, the court held that the “well accepted” frisk could follow for the officer’s safety.<sup>115</sup> As long as the officer limited his search to dangerous weapons, rather than

<sup>107</sup> *Id.* at 323.

<sup>108</sup> The name of the defendant changed because Richard Chilton was killed in a drug store holdup in Columbus in June 1867. James T. Cox, *Bullets Write Finish to Chilton Case*, *Cleveland Plain Dealer*, June 18, 1967, available at [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1015&context=terryvohio\\_newspaper](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1015&context=terryvohio_newspaper) [<https://perma.cc/C343-P2YJ>].

<sup>109</sup> Brian Albrecht, *Hough Riot, 50 Years Ago, Couldn’t Destroy a Neighborhood*, *Cleveland.com* (July 24, 2016), [https://www.cleveland.com/metro/2016/07/hough\\_riot\\_50\\_years\\_ago\\_couldn.html](https://www.cleveland.com/metro/2016/07/hough_riot_50_years_ago_couldn.html) [<https://perma.cc/Z9ZN-ZCZ9>].

<sup>110</sup> Marc E. Lackritz, *The Hough Riots of 1966*, 1, 8 (Apr. 10, 1968) (B.A. thesis, Princeton Univ.).

<sup>111</sup> *Id.* at 9. Another policeman described the riots as “like the part in an old western where you’re caught in crossfire in a box canyon.” *Id.* at 8.

<sup>112</sup> *State v. Terry*, 214 N.E.2d 114, 117 (Ohio Ct. App. 1966). The citations included *Gisske*, *Faginkrantz*, *Rivera*, and *Martin*. *Id.*

<sup>113</sup> *Id.* at 118 (looking to various other state tribunals because “[t]he courts of Ohio do not appear to have been squarely presented with this problem before”).

<sup>114</sup> *Id.* The NAACP took particular exception to this phrase in its amicus brief. Over the course of five pages, the Association explained how even the most discrete of police encounters—a “hey, there”—might be interpreted as a threat by “the man in the ghetto.” Brief for the NAACP, *supra* note 52, at 35. Compounding the injustice was the fact that these stops would occur “day in day out, and for the same reasons.” *Id.*

<sup>115</sup> *Terry*, 214 N.E.2d at 120.



“contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest,” it was a permissible practice.<sup>116</sup> Officer McFadden was two for two in the Ohio courts. His confidence in the “perfect case” was paying off.

But now, that case would have to withstand its toughest test. As late as 1960, the United States Supreme Court had treated state criminal procedure decisions with deference.<sup>117</sup> The ascendance of Chief Justice Warren and Justice Brennan shifted this judicial mentality.<sup>118</sup> During the 1960s, the Court had engaged in a searching oversight of state practices, “dislodg[ing] old law enforcement practices that had become tarnished with . . . injustices.”<sup>119</sup> Moreover, the Chief Justice had been especially willing to scrutinize local law enforcement. While reading his opinion in *Miranda v. Arizona*, for instance, Warren digressed that the police “can become as great a menace to society as any criminal we have” if they abandoned fair methods.<sup>120</sup> The response from the state police forces was telling: 90% of those surveyed believed the Supreme Court had “gone too far in making rules favoring and protecting criminal offenders.”<sup>121</sup> If there were a match for the “local police legend,” Martin McFadden, it was the Supreme Court of the United States.<sup>122</sup>

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<sup>116</sup> *Id.* at 120. See also Saltzburg, *supra* note 102, at 916 (“The court was careful to distinguish a frisk for dangerous weapons from a ‘search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest.’”).

<sup>117</sup> Goluboff, *supra* note 21, at 200.

<sup>118</sup> *Id.*; see, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule against the states); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (mandating the appointment of counsel under the Sixth Amendment in all state court prosecutions); *Escobedo v. Illinois*, 378 U.S. 478, 479, 484 (1964) (holding that Illinois denied a suspect in custody the assistance of counsel in violation of the Sixth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that a defendant “must be warned prior to any questioning that he has the right to remain silent . . .”).

<sup>119</sup> Earl Warren, *The Memoirs of Chief Justice Earl Warren* 316 (Madison Books 2001) (1977); see also Michal R. Belknap, *The Supreme Court under Earl Warren, 1953–1969*, at 218 (2005) (detailing the Warren court’s creation of new constitutional rules of criminal procedure applicable to the states); Paul Moke, *Earl Warren and the Struggle for Justice* 209–11 (2015).

<sup>120</sup> Jack H. Pollack, *Earl Warren: The Judge Who Changed America* 267–68 (1979); see also Leo Katcher, *Earl Warren: A Political Biography* 440 (1967) (noting Chief Justice Warren’s concern about abusive police practices).

<sup>121</sup> Goluboff, *supra* note 21, at 201 (citing 2 Albert J. Reiss, *Studies of Crime and Law Enforcement in Major Metropolitan Areas* 112 (1967)).

<sup>122</sup> Goluboff, *supra* note 21, at 205. McFadden had thirty-nine years of experience at the time of the arrest.

The briefs supporting Terry tailored their arguments to this jurisprudential shift. The ACLU echoed the Court's skepticism of local law enforcement, citing an earlier decision by Justice Douglas for the proposition that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted."<sup>123</sup> The country would not need decisions like *Mapp v. Ohio*, the ACLU contended, if the police stayed within constitutional bounds.<sup>124</sup> The NAACP, meanwhile, argued that granting deference to state decisions would resurrect the same injustices the Court had previously sought to prevent.<sup>125</sup> Particularly concerned with the exercise of police discretion in African-American communities, the Association pinned its brief on the "indisputable clarity" of probable cause.<sup>126</sup> A malleable reasonableness standard was effectively a general warrant, precisely the "unbounded discretion" the Fourth Amendment was supposed to guard against.<sup>127</sup> The NAACP also fiercely disputed *Rivera's* characterization of stop-and-frisk as necessary.<sup>128</sup> In fact, the practice was the opposite—a "trigger[]" for the violence that had plagued the country during the 1960s.<sup>129</sup> "It is no accident," the brief

<sup>123</sup> Brief for the ACLU, *supra* note 90, at 31 (citing *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

<sup>124</sup> *Id.* at 31–32.

<sup>125</sup> Brief for the NAACP, *supra* note 52, at 24.

<sup>126</sup> *Id.* at 21. Demonstrating its complete distrust of the local officer, the NAACP drew a clear line: "Concerning both the occasions and extent of police intrusion upon the individual, 'nothing is left to the discretion of the officer.'" *Id.* (citing *Berger v. New York*, 388 U.S. 41, 58 (1967)). Part IV addresses the NAACP's analytical approach to the Fourth Amendment and probable cause in more detail.

<sup>127</sup> Brief for the NAACP, *supra* note 52, at 22–24. In fact, the NAACP already had evidence of the malleability of the stop-and-frisk framework. Simultaneously, litigation was ongoing regarding whether the police could seize contraband from a suspect "wholly within" an officer's control, whether a policeman could reach into a suspect's pocket to grab evidence without first frisking the defendant, and whether a frisk could "encompass the search of an automobile in which the 'stopped' suspect is riding." *Id.* at 49–50.

<sup>128</sup> *Id.* at 51, 58.

<sup>129</sup> *Id.* at 62. The NAACP tried to convey to the Justices how stop-and-frisk played out in practice, citing to specific police manuals and instructions. See, e.g., *id.* at 45–46. One such manual encouraged officers to: "Be suspicious. This is a healthy police attitude . . ." *Id.* at 45. Another provided a list of individual qualities that might justify field interrogation, like "known trouble-makers" or "unescorted women or young girls in public places." *Id.* at 46. In case the list was not exhaustive enough, number twenty conferred complete discretion: "Many others. How about your own personal experiences?" *Id.* Goluboff, *supra* note 21, at 207 called my attention to this part of the brief.

argued, “that many major riots suffered since 1964 have been sparked by a public confrontation between the police and Negroes.”<sup>130</sup>

There was “hydraulic pressure” on the state’s side too.<sup>131</sup> And some of it was aimed directly at the Supreme Court. Earl Dudley, one of the Chief Justice’s law clerks during the term *Terry* was decided, remarked that the Court “had come under heavy fire” for curtailing law enforcement over the past decade.<sup>132</sup> In fact, the Republican presidential campaign of 1964 had led a direct assault on *Mapp* and its progeny.<sup>133</sup> A key constituency for the Republicans were police officers like McFadden who faced the brunt of nationwide riots.<sup>134</sup> Moreover, as *Terry* was decided, the looming 1968 election only intensified this political crucible.<sup>135</sup> A second factor, one far less hydraulic, was the Court’s “loss of impetus.”<sup>136</sup> “[D]uring the Warren Court’s final years,” notes Michal Belknap, “it repeatedly balanced law enforcement against the Bill of Rights . . . beg[inning] to move in a more conservative direction in criminal-procedure cases.”<sup>137</sup> Just months before *Terry* was set for argument, two decisions signaled this shift. In *McCray v. Illinois*, the Court affirmed a state court’s ruling that it was “under no absolute duty” to “require disclosure of an informer’s identity at a pretrial hearing” where there was “ample evidence” the informant had proven reliable in the past.<sup>138</sup> The Court deferred to the officer’s judgment and testimony because it thought his

<sup>130</sup> Brief for the NAACP, *supra* note 52, at 62. (As the *New York Times* noted: “[T]he script was familiar. Some minor incident begins it all, often the arrest of a Negro by a policeman.”). Americans outside the ambit of the Court’s briefing also understood the stakes. The *Cleveland Plain Dealer* would note after oral arguments that the case was heard “against a background of day-by-day stop-and-frisk actions by police that are increasingly resented by Negroes and others in the big-city ghettos.” Sanford Watzman, High Court Sifts Street Search Arguments, *Cleveland Plain Dealer* 5 (1967), available at [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1004&context=terryvohio\\_newspaper](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1004&context=terryvohio_newspaper) [<https://perma.cc/Y97X-YC6E>].

<sup>131</sup> *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

<sup>132</sup> Earl C. Dudley, *Terry v. Ohio*, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective, 72 *St. John’s L. Rev.* 891, 892 (1998).

<sup>133</sup> *Id.* Title II of the Omnibus Crime Control and Safe Streets Act, which included provisions designed to overturn *Miranda*, was also passed in 1968. Belknap, *supra* note 119, at 255.

<sup>134</sup> In 1967, the year before *Terry* was decided, “one out of eight policemen across the country was assaulted.” Goluboff, *supra* note 21, at 268.

<sup>135</sup> Dudley, *supra* note 132, at 892.

<sup>136</sup> Katz, *supra* note 96, at 440 n.88 (citing Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 *U. Ill. L.F.* 518, 538).

<sup>137</sup> Belknap, *supra* note 119, at 256.

<sup>138</sup> *McCray v. Illinois*, 386 U.S. 300, 300 (1967).

oath and cross-examination were sufficient indicators of his reliability.<sup>139</sup> A few months later, *Warden v. Hayden* went further, discarding longstanding Fourth Amendment precedent and holding that police could seize items of “only evidential value” during a search.<sup>140</sup>

The briefs supporting the state of Ohio catered to the Court’s new leanings and heaped on the political pressure with statistical evidence about the necessity and effectiveness of stop-and-frisk.<sup>141</sup> Pinning its brief on “the deadly realism” of crime, the state asked the Court to defer to the “experiences of those who have been confronted with this . . . reality.”<sup>142</sup> That meant shelving the strict probable cause command the NAACP preferred for a reasonableness standard that gave “[d]ue regard for the practical necessities of effective law enforcement.”<sup>143</sup> As already evidenced, the Justices were avid consumers of the turbulent news cycle. But as a parting shot, the state reminded them of the stakes. Days before the brief was submitted, a local officer in pursuit of four robbery suspects had pulled over a matching automobile. He “dismounted” his squad car, approached, and was “met with a bullet.”<sup>144</sup> If not for a fortuitous deflection off his belt, “this officer would have been killed.”<sup>145</sup> Necessity. Experience. Reasonableness. “To those who have beat the drums of fear” about unlimited police discretion, this was Ohio’s response: officers’ lives depended on the framework of stop-and-frisk.<sup>146</sup>

Reflecting decades later, Warren’s clerk, Earl Dudley, believed that this closing argument won the justices over. While each justice may have felt “differing degrees of sympathy with the arguments of the police,” he contended, “collectively they were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets.”<sup>147</sup> The ACLU and NAACP’s concerns had caught the justices’ attention. In fact, in a memo

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<sup>139</sup> *Id.* at 304.

<sup>140</sup> *Warden v. Hayden*, 387 U.S. 294, 294, 307–08 (1967).

<sup>141</sup> Goluboff, *supra* note 21, at 206. Between 1960 and 1965, the national violent crime rate jumped 24.4%. Katz, *supra* note 96, at 435 n.79. Then, from 1965 to 1970, it spiked 81.6%. *Id.* This was precisely what the government felt that field interrogations were designed to solve.

<sup>142</sup> Brief for the State of Ohio at 40, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67).

<sup>143</sup> *Id.* at 15.

<sup>144</sup> *Id.* at 41.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Dudley, *supra* note 132, at 893.

to Chief Justice Warren, Justice Brennan echoed the Association's concerns about police discretion: "the mere fact of our affirmance . . . will be taken by the police all over the country as our license to them to . . . widely expand[] present 'aggressive surveillance' techniques."<sup>148</sup> It also created "the terrible risk that police will conjure up 'suspicious circumstances,' and courts will credit their versions."<sup>149</sup> But these concerns could not trump the hydraulic pressures that Ohio marshalled in its brief.

The Court's inner conflict played out in its opinions. In fact, Chief Justice Warren, writing for the majority, led off his opinion with a robust conception of the Fourth Amendment's protections. "This inestimable right of personal security," he argued, "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."<sup>150</sup> Warren did not view the frisk as a minor intrusion on a citizen's rights,<sup>151</sup> as Justice Traynor and Judge Bergan had suggested. Instead, he saw the practice as a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."<sup>152</sup> This language mirrored the dissenters from New York and California. But the tenor of the sixties was not lost upon the Chief Justice, who cited the "rapidly unfolding and often dangerous situations on city streets" that confronted America's police.<sup>153</sup> In this era—and there is no denying *Terry* was a product of its times—law enforcement required flexibility and discretion more than ever.<sup>154</sup> The police needed to be able to act on suspicion to serve the government's goal of "effective crime

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<sup>148</sup> Goluboff, *supra* note 21, at 210. Around this time, the Court expressed a similar concern about unbounded police discretion in the context of the vagueness doctrine. See Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 Va. L. Rev. 347, 356 (2021) (observing that the Court invalidated an ordinance prohibiting loitering in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) "because of the excessive authority it granted to police" and "enabled them to make their own decisions about when loitering would and would not be allowed").

<sup>149</sup> *Id.*

<sup>150</sup> *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968).

<sup>151</sup> David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. Pa. J. Const. L. 367, 373–74 (2001).

<sup>152</sup> *Terry*, 392 U.S. at 17. Dudley recalls that Chief Justice Warren was also skeptical of the "scope of the authority claimed by the police." The power to "detain" on suspicion seemed "susceptible of major abuse" given the Kerner Commission's reports about "aggressive patrol" tactics and the "political tensions" that "ran high" during the Cold War. Dudley, *supra* note 132, at 893.

<sup>153</sup> *Terry*, 392 U.S. at 10.

<sup>154</sup> *Id.*

prevention.”<sup>155</sup> And they needed to be able to protect themselves from “a weapon that could . . . fatally be used against [them]” when doing so.<sup>156</sup>

The Chief Justice tried to compromise. While his majority opinion has been cited for decades as green-lighting the stop-and-frisk framework, Warren seemed to intend a lesser breadth. At no point in his opinion did Warren “give the Court’s explicit blessing” to the “power of investigative detention.”<sup>157</sup> Instead, the Chief Justice grounded his opinion in the reasonableness of a frisk for weapons “strictly circumscribed by the exigencies which justify its initiation.”<sup>158</sup> Officer McFadden met that standard, according to the Court. His suspicion had been piqued by a potential robbery, giving him reason to believe that Terry was armed and that he “presented a threat to [McFadden’s] safety.”<sup>159</sup>

Concurring, Justice Harlan believed that the frisk “flowed as a matter of logic from” the police’s power to make a lawful stop.<sup>160</sup> Regarding the frisk, Harlan cited the state courts with approval, noting that the reasonableness of McFadden’s actions “[sprang] only from the necessity of the situation.”<sup>161</sup> But before that search could occur, Harlan argued, the officer needed the authority to “insist on an encounter.”<sup>162</sup> Like Traynor, Harlan saw the touchstone of Fourth Amendment authority as reasonableness. And McFadden, “an experienced, prudent policeman,” was “warranted forcing an encounter with Terry” based on his suspicion of an impending robbery.<sup>163</sup> Harlan’s opinion complemented Warren’s

<sup>155</sup> *Id.* at 22.

<sup>156</sup> *Id.* at 23. As Dean Goluboff notes, “[c]ertainly, the guns McFadden found on Terry and Chilton illustrated the need for the police to have authority to protect their own lives.” Goluboff, *supra* note 21, at 209–10.

<sup>157</sup> Dudley, *supra* note 132, at 895; see also Saltzburg, *supra* note 102, at 922 (“This analysis virtually ignored the potential ‘stop’ aspect of the case . . . . Were they free to leave? Was this a seizure? The Court neither asked nor answered these questions.”).

<sup>158</sup> *Terry*, 392 U.S. at 26. In other words, the officer had to limit the scope of his search to a protective “pat-down” “reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Id.* at 29–30. He could not conduct a full-on search incident to arrest for contraband or evidence relevant to the crime. Moreover, the officer could not “place his hands in their pockets or under the outer surface of their garments until he had felt weapons.” *Id.*

<sup>159</sup> *Terry*, 392 U.S. at 28.

<sup>160</sup> *Id.* at 33 (Harlan, J., concurring); Dudley, *supra* note 132, at 895.

<sup>161</sup> *Terry*, 392 U.S. at 32 (Harlan, J., concurring).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 33–34.

and produced the constitutional standard for stop-and-frisk utilized to this day: reasonable suspicion.<sup>164</sup>

Meanwhile, Justice Douglas's views had not changed since his 1960 law review article. Still puzzled by the idea of a junior varsity search or seizure, Douglas argued for textual respect for both terms and for a probable cause requirement.<sup>165</sup> Citing the British general warrants and writs of assistance that had prompted the adoption of the Fourth Amendment, he worried that deference to police intuitions marked a "step down the totalitarian path."<sup>166</sup> Douglas also lamented that the Court had been influenced by the historical context of its jurisprudence.<sup>167</sup> "There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees," he warned.<sup>168</sup> "That hydraulic pressure has probably never been greater than it is today."<sup>169</sup>

The Justices had spoken and had done so in a commanding 8-1 fashion. But obscured behind the votes was a Court—and multiple court systems—with "an almost complete lack of consensus."<sup>170</sup> The case had troubled the Ohio trial court to such a degree that it requested review. Moreover, the New York and California systems had upheld stop-and-frisk over vigorous dissenting opinions. New York had required a reversal to do so. Even the United States Supreme Court's opinion had been chameleonic. It began as a probable cause draft, then morphed into a reasonableness opinion that did not adopt the reasoning of a single state court.<sup>171</sup> Many state tribunals had not even spoken on the issue yet.

A day after the Court's opinion, a proud Martin McFadden was back in the news. "I knew I was right," he boasted, "and I was, because the

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<sup>164</sup> But see Katz, *supra* note 96, at 457 n.144. Harlan's assessment that the right to frisk flowed automatically from the stop has not been adopted by courts. The two remain separate inquiries.

<sup>165</sup> *Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

<sup>166</sup> *Id.* at 37, 38.

<sup>167</sup> *Id.* at 39. In *Terry*, the Chief Justice cited statistics demonstrating the assaults, injuries, and deaths that policemen had incurred over the past decade. *Terry*, 392 U.S. at 24 n.21. These were the same type of statistics cited by the law enforcement associations in their briefs.

<sup>168</sup> *Id.* at 39.

<sup>169</sup> *Id.*

<sup>170</sup> Dudley, *supra* note 132, at 893.

<sup>171</sup> While the state courts agreed with the Justices' evaluation of the frisk, none of them had uncoupled the frisk and the stop like the Chief Justice.

U.S. Supreme Court in Washington said I was.”<sup>172</sup> He was also right in the long term. Since June 10, 1968, every state court in the country has accepted *Terry* as a given. No one bothers to challenge Martin McFadden anymore. No one challenges his contemporaries. The Supreme Court of the United States said he was right.

### III. “DOUBLE SECURITY”: STATE GUARANTEES AND THE FOURTH AMENDMENT

Justice Robert Jackson famously described the United States Supreme Court as “infallible” because it was “final,” not as “infallible” because it was beyond reproach.<sup>173</sup> Federalism and Article III support this assessment. Article III vests the Justices with the highest appellate authority in the federal system and binds inferior courts to their interpretations of federal law.<sup>174</sup> With respect to the U.S. Constitution, what the Court says goes—even for state tribunals. But outside the federal system, separate sources of constitutional law exist: state constitutions.<sup>175</sup> And with respect to those documents, the Supreme Court is *neither* final nor infallible. State courts are free to “safeguard individual rights above and beyond the rights secured by the U.S. Constitution.”<sup>176</sup>

Take the Fourth Amendment litigation in *Michigan Department of State Police v. Sitz*. In that case, the Supreme Court reversed the Court of Appeals of Michigan and upheld the state’s “use of highway sobriety

<sup>172</sup> E.J. Kissell, Court Ruling is Gratifying to Detective in Frisk Case, *Cleveland Press* (June 11, 1968), [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1002&context=terryvohio\\_newspaper](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1002&context=terryvohio_newspaper) [<https://perma.cc/84MB-XPYU>].

<sup>173</sup> *Brown v. Allen*, 344 U.S. 443, 540. (1953) (Jackson, J., concurring).

<sup>174</sup> U.S. Const., art. III, § 1.

<sup>175</sup> This section draws generally on insights from Jeffrey Sutton, 51 *Imperfect Solutions* (2018).

<sup>176</sup> Justice Kavanaugh offered this reminder to litigants in a recent Establishment Clause blockbuster, *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). Even though the individuals challenging the Bladensburg cross had lost at the federal level, Justice Kavanaugh reminded them that they still could appeal to their state constitution. Maryland courts were free to provide more expansive protections for religious liberty under their founding document. The Supreme Court “is not the *only* guardian of individual rights in America.” *Id.* (citing Sutton, *supra* note 175). Both sides of the Court are in agreement on this point. In *Robinette v. Ohio*, 519 U.S. 33, 42 (1996) (Ginsburg, J., concurring), a Fourth Amendment case, Justice Ginsburg agreed that “a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.” (citing *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).



checkpoints” as “consistent” with the federal constitution.<sup>177</sup> A six-justice majority contended that the state’s “interest in preventing drunken driving” outweighed the minor “degree of intrusion upon individual motorists who are briefly stopped.”<sup>178</sup> For purposes of federal law, Sitz had no Fourth Amendment right. But on remand, the Michigan Supreme Court had a second crack under Michigan law.<sup>179</sup> Noting the greater historical protections under the Michigan Constitution, the justices decided that state law barred “suspicionless criminal investigatory seizures.”<sup>180</sup> Michigan’s “commitment to the protection of liberty” and its “history of . . . jurisprudence” compelled a rejection of the roadblocks.<sup>181</sup> A Michigan court, not the United States Supreme Court, had the last word in this litigation.

Early American history confirms this vision of the federal-state relationship. One reason James Madison endorsed the “double security” of a “compound republic” was its ability to ensure “security for civil rights.”<sup>182</sup> This pluralistic vision encouraged states to create an independent will in their communities so they could impede the “unjust combination” of a national majority.<sup>183</sup> Having states lockstep with federal interpretations of individual rights would defeat this structural protection. Indeed, when the federal Bill of Rights was proposed, some of the framers deemed it unnecessary because the states were “the guardians of our rights, the objects of our confidence.”<sup>184</sup> This role suited the states because they were more familiar with *their* citizens, possessing “ties of personal acquaintance and friendship, and of family and party

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<sup>177</sup> Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990).

<sup>178</sup> Id. at 455.

<sup>179</sup> The Michigan Supreme Court reminded litigants that the “appropriate analysis of our constitution does not begin from the conclusive premise of a federal floor.” Sitz v. Dep’t of State Police, 506 N.W.2d 209, 217 (Mich. 1993).

<sup>180</sup> Id. at 225.

<sup>181</sup> Id. at 223–24.

<sup>182</sup> The Federalist No. 51 at 339 (James Madison); see also William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 504 (1977) (“[W]e may be confident that [Madison] would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model . . .”).

<sup>183</sup> The Federalist No. 51 at 339 (James Madison); see also The Federalist No. 10 at 61 (James Madison) (“The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”).

<sup>184</sup> Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights* 15 Lewis & Clark L. Rev. 799, 801–02 (2011). (quoting James Wilson, *Of Government*, in *The Works of the Honorable James Wilson, L.L.D.* 383, 398 (1804)).

attachments.”<sup>185</sup> State courts, in other words, have a unique window into their local citizenry that the federal courts lack. Which is why it would have surprised the founders to have seen a “national,” rather than a “local spirit,” prevailing in the courts of the particular states.<sup>186</sup>

It would have also shocked the revolutionary generation to see unanimity among the several state courts.<sup>187</sup> The Constitution places a premium on disagreement—on Madison’s hope in Federalist 51 that “[a]mbition must be made to counteract ambition.”<sup>188</sup> In fact, disagreement produces some of the crucial virtues that justify federalism. As Madison suggested in Federalist No. 46, it promotes individual choice. Because the federal and state governments serve as “different agents and trustees,” the people can choose allegiance to the jurisdiction that offers them the best policy package (and rights).<sup>189</sup> This naturally leads to competition, with states striving to attract the allegiance of their citizens.<sup>190</sup> The consequence is what Justice Brandeis famously labeled laboratories of experimentation: states trying “novel social and economic experiments” to satisfy their citizens and compete with their peers.<sup>191</sup> Justice Brennan recognized the virtues of state experimentation as he saw the Warren Court wane into the Burger Court.<sup>192</sup> Although the Justices had “pull[ed] back” their expansive interpretation of the federal Bill of Rights, the state courts had “step[ped] into the breach” and safeguarded individual rights.<sup>193</sup> To encourage this experimentation, some federal judges have declined, in close cases, to impose a national rule—what

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<sup>185</sup> The Federalist No. 46 at 305 (James Madison).

<sup>186</sup> *Id.* at 307.

<sup>187</sup> *Id.* Professor Micah Schwartzman deserves credit for many of the insights in this paragraph. The organization of the virtues of federalism section into the categories of individual choice, competition, experimentation, prevention against tyranny, and protection of liberty stems from one of his class lectures.

<sup>188</sup> The Federalist No. 51 at 337 (James Madison).

<sup>189</sup> The Federalist No. 46 at 305 (James Madison).

<sup>190</sup> For instance, one can imagine a jurisdiction that strikes down stop-and-frisk under its state constitution proving particularly appealing for minorities who have been the subject of profiling or allies who hope to live in a jurisdiction that embraces their concern for social justice. Independent interpretation of state constitutions also is neutral, as it applies equally to liberty and property rights, individual rights, and structural rights.

<sup>191</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>192</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 503 (1977).

<sup>193</sup> *Id.* at 495, 503.

Robert Williams coined a “federalism discount.”<sup>194</sup> By erring on the side of recognizing fewer national rights, the federal courts leave the field open to state experimentation. States can recognize the rights that are particularly valued among their citizens or adopt rights that have proven foundational in other jurisdictions. When state tribunals do not take up this mantle, as with *Terry*, the discount is for naught.<sup>195</sup>

Americans should expect disagreement for other reasons. For one, the terms of the federal and state constitutions are often so general that they invite debate.<sup>196</sup> Just look to the arguments marshalled in the *Terry* litigation. Some courts clashed over the breadth of “seizure” and “search.” Did the former term contemplate a “minor inconvenience” like a stop? Did the latter cover a pat-down? Vigorous disagreement persisted for almost a decade. Meanwhile, other courts tussled over whether the reasonableness clause or the warrant clause marked the gravamen of the Fourth Amendment. A prolixity of scholarship has been devoted to this subject, with legal luminaries on both sides.<sup>197</sup> Even assuming identical

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<sup>194</sup> Robert Williams, *The Law of American State Constitutions* 137 (2009); Goodwin Liu, *State Constitutions and the Protections of Individuals Rights: A Reappraisal*, 2018 Forum for State Appellate Court Judges, Pound Civil Justice Institute 51 (2019), [http://www.poundinstitute.org/wp-content/uploads/2019/04/2018\\_forum-report\\_2.26.19.pdf](http://www.poundinstitute.org/wp-content/uploads/2019/04/2018_forum-report_2.26.19.pdf) [<https://perma.cc/T2QY-AHVR>]; see also, *State v. Hempele*, 576 A.2d 793, 800 (N.J. 1990) (“Cognizant of the diversity of laws, customs, and mores within its jurisdiction, the United States Supreme Court is necessarily ‘hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.’” (citing *State v. Hunt*, 450 A.2d 952, 962 (N.J. 1982) (Pashman, J., concurring))).

<sup>195</sup> Furthermore, as Justice Brandeis warned, “[d]enial of the right to experiment may be fraught with serious consequences to the Nation.” *New State Ice Co.*, 285 U.S. at 311. Indeed, one of the benefits of state experimentation is that it would serve as an essential check against tyranny and a separate source of liberty for the people. State courts can prevent tyranny by serving as an intermediary against federal overreach—a separate forum for Americans to air their grievances. And they can protect liberty by enforcing separate state legal regimes to protect Americans from laws passed in excess of governmental power. For a cautionary story of how state courts have served this role, see Sutton, *supra* note 175, at 84–132 (describing how state courts initially voided a number of early eugenics laws as unconstitutional, before ceding the field to the Supreme Court’s interpretation of the Due Process and Equal Protection Clauses of the federal Constitution in *Buck v. Bell*, 274 U.S. 200 (1927)).

<sup>196</sup> In the words of Jacob Landynski, the Fourth Amendment has “both the virtue of brevity and the vice of ambiguity.” Tracey Maclin, *The Central Meaning of the Fourth Amendment* 35 Wm. & Mary L. Rev. 197, 247 (1993) (quoting Jacob W. Landynski, *Search and Seizure and the Supreme Court* 42 (1966)).

<sup>197</sup> Compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 759 (1994) (“We need to read the Amendment’s words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.”); Telford Taylor, *Two Studies in Constitutional Interpretation* 91–92 (1969) (critiquing the Court for “treat[ing] warrantless searches as disreputable second

language in the state and federal guarantees,<sup>198</sup> one would expect different tribunals to reach different conclusions—especially with the varying historical context of each state constitution.<sup>199</sup>

For another, state courts often have methodological differences with their federal counterparts' jurisprudence. Although strands of originalism have commanded majorities in Washington for the past few decades, state courts with pragmatic or living constitutionalist leanings need not feel constrained when interpreting their own constitutions. In *People v. Sundling*, for instance, the Michigan Court of Appeals adopted the *dissent's* logic in *United States v. Leon*, arguing that a “good-faith” exception to the exclusionary rule would “remove the probable cause requirement” from its state constitution.<sup>200</sup> Similarly, in *State v. Quino*, the Supreme Court of Hawaii largely ignored Justice Scalia's originalist interpretation in *Hodari D.* and decided to adhere to the *United States v. Mendenhall* approach to seizures.<sup>201</sup> If there were any doubt about this interpretative disagreement, Justice Levinson laid it to rest, labeling the

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cousins” while recognizing that “I am swimming against the current of opinion.”); Richard Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 75 (“Probable cause, a phrase from the second clause of the Fourth Amendment, is a limitation on the issuance of warrants; it is not part of the definition of reasonableness”), with Maclin, *supra* note 196, at 202 (“At a minimum, the Fourth Amendment commands compelling reasons, or at least a substantial justification, before a warrantless search or seizure is declared reasonable.”); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“When the Fourth Amendment outlawed ‘unreasonable searches’ and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”); *Harris v. United States*, 331 U.S. 145 (1947) (Jackson, J., dissenting) (“[N]o search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate.”).

<sup>198</sup> Which may not always be a given, although state protections do closely mirror the Fourth Amendment.

<sup>199</sup> In the context of the right to counsel, for instance, states that provided broader protections than the United States Supreme Court cited historical evidence from their state ratifying conventions to justify their interpretation. See Louis J. Capozzi III, Sixth Amendment Federalism, 43 Harv. J.L. & Pub. Pol’y 645, 684 (2020) (observing that the Iowa Supreme Court studied the debates surrounding the state's right-to-counsel provision to “justify the court's holding that the state constitution guaranteed the right to counsel to all defendants charged with a jailable offense”). Originalist judges should do the same with respect to their state search and seizure provisions.

<sup>200</sup> *People v. Sundling*, 395 N.W.2d 308 (Mich. Ct. App. 1986). Many of the state cases I cite in the next few pages were found in: Faulkner & Green, *supra* note 17.

<sup>201</sup> *State v. Quino*, 840 P.2d 358, 362 (Haw. 1992).

Supreme Court's jurisprudence a "surreal and Orwellian world."<sup>202</sup> As a justice with "final, unreviewable authority to interpret and enforce the Hawaii Constitution," Levinson made a perfectly appropriate assertion.<sup>203</sup> Hawaii and Michigan are not alone in this respect.<sup>204</sup>

Finally, given states' differing cultural norms, interpretational variance should not come as a surprise. Some states elect judges, rendering them even closer to popular concerns. And even for those appointed judges, proximity to the litigants makes a judge more conscious of local concerns and unique constitutional protections.<sup>205</sup> Comparing the United States Supreme Court's decision in *California v. Greenwood* to the Supreme Court of New Jersey's opinion in *State v. Hempele* illustrates this phenomenon. In *Greenwood*, the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left . . . outside the curtilage of a home.<sup>206</sup> Because the residents had voluntarily conveyed their trash to a third party, they had discarded any reasonable expectation of privacy in its contents. A California state law did not counsel to the contrary. "The reasonableness of a search . . . does not depend upon privacy concepts embodied in the law of the particular state," the Court held. "It turns upon the understanding of society as a

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<sup>202</sup> Id. at 365 (Levinson, J., concurring).

<sup>203</sup> Id.

<sup>204</sup> See, e.g., *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992) (rejecting *Leon's* deterrence rationale for the exclusionary rule. Under state law "this Court has held that the exclusionary rule does more than merely deter police misconduct." It is also "a constitutionally mandated remedy for illegal searches and seizures."); *State v. Oquendo*, 223 Conn. 635, 651 (Conn. 1992) ("We are persuaded that the distinction made by the United States Supreme Court between an arrest and an attempted arrest at common law does not guide our determination of what constitutes a seizure under . . . our state constitution."); *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) ("[W]e reject [*Hodari*] because . . . we are not persuaded by the arguments favoring the *Hodari* approach, and . . . we are persuaded that there is no need to depart from the pre-*Hodari* approach."); *Commonwealth v. Upton*, 394 Mass. 363, 373 (1985) (stating that the *Gates* totality-of-the-circumstances test "is flexible, but [it] is also 'unacceptably shapeless and permissive.' The Federal test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause." (citation omitted)); *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) ("After carefully reviewing the majority's reasoning in *Gates*, we conclude [it] does not provide the constitutional protection against unreasonable searches and seizures required by [the Alaska constitution].").

<sup>205</sup> State courts, after all, can weigh geographic and demographic considerations unique to their jurisdictions. Crime rates and police practices vary between cities and states. For a thoughtful study of this factor in the context of the right to appointed counsel, see Capozzi III, *supra* note 199, at 709–10, 712–13.

<sup>206</sup> *California v. Greenwood*, 486 U.S. 35, 37 (1988).

whole.”<sup>207</sup> Two years later, in an “almost identical case,”<sup>208</sup> the New Jersey high court evaluated trash searches under its state constitution. Responding to an argument that state regulation of garbage reduces any expectation of privacy, the justices conducted a localized analysis.<sup>209</sup> Citing ordinances that prohibited “garbage-picking” and “scavenging without a license,” the court concluded that “[s]uch regulations are likely to increase people’s expectation [of privacy].”<sup>210</sup> Moreover, by barring the “stockpiling of garbage” and “the burning of garbage,” the state had eliminated an alternative way to maintain privacy in its contents.<sup>211</sup> New Jersey’s regulations “[did] not make an expectation of privacy in garbage unreasonable.”<sup>212</sup> Unlike in *Greenwood*, the context of local laws and practices influenced the court’s assessment of the constitutional question.<sup>213</sup>

As cases like *Hempele*, *Sundling*, and *Quino* suggest, state courts have not been timid in accepting the federal framers’ invitation by interpreting their state equivalents to provide broader protections than the Fourth Amendment.<sup>214</sup> A comprehensive study by Christopher Green shows that “125 [Supreme Court] cases have triggered a total of 306 such state-level departures.”<sup>215</sup> Put differently, more than a quarter of the Supreme Court’s Fourth Amendment cases diverge from a state constitutional decision.<sup>216</sup> *Leon* accounts for seventeen. *Hodari D.* accounts for sixteen.

<sup>207</sup> *Id.* at 36, 43.

<sup>208</sup> In *Greenwood*, police acquired the garbage from a trash collector. 486 U.S. at 37. In *Hempele*, the police themselves removed the garbage. *State v. Hempele*, 576 A.2d 793, 796 (N.J. 1990).

<sup>209</sup> *State v. Hempele*, 576 A.2d 793, 807–08 (N.J. 1990).

<sup>210</sup> *Id.* at 808.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 814.

<sup>214</sup> See, e.g., *State v. Brown*, 930 N.W.2d 840, 847 (Iowa 2019) (quoting *State v. Brooks*, 888 N.W.2d 406, 410–11 (Iowa 2016)) (“We jealously guard our right to construe a provision of our state constitution differently than its federal counterpart, though the two provisions may contain nearly identical language and have the same general scope, import, and purpose.”); *Interest of B.C.*, 683 A.2d 919, 926 (Pa. Super. Ct. 1996) (“[I]t is well settled that our courts are free to establish greater protection of such rights in the provisions of the Pennsylvania Constitution.”); *State v. Oquendo*, 613 A.2d 1300, 1309 (Conn. 1992) (“[W]e have at times determined that the state constitution affords greater protections to the citizens of Connecticut than does the federal constitution, as interpreted by the United States Supreme Court.”).

<sup>215</sup> Faulkner & Green, *supra* note 17, at 198.

<sup>216</sup> I use Green’s estimate, taken from Harold Spaeth’s databases (available at <http://scdb.wustl.edu/index.php>), of 342 “Fourth Amendment” cases. *Id.*

*Gates* accounts for ten. *Terry v. Ohio* accounts for zero.<sup>217</sup> Stop-and-frisk has helped torpedo a presidential candidacy, contributed to a breakdown in police-community relations, and been labeled “an abomination.”<sup>218</sup> But no state court has seen fit to jettison it or at least independently reassess it under state law. Why not *Terry*?

#### IV. CHALLENGING STOP-AND-FRISK UNDER STATE LAW

A half-century later, it is time to reawaken the dormant state court debate. And litigants should look to the mid-century litigation in the California, New York, and Ohio tribunals as a roadmap. From those cases, at least three arguments could be raised to challenge or modify stop-and-frisk under state law. First, from Justice Carter in *Martin* and the NAACP in *Terry*: probable cause could serve as a baseline requirement for searches and seizures.<sup>219</sup> Although *Martin* and *Rivera* upheld stop-and-frisk, their reasoning turned on the necessity of the practice and a “minor interference” with individual liberty. Given that both assumptions have been proven wrong by breakdowns between the police and the communities they protect in various cities, defense attorneys should argue that their state provisions require probable cause before a search or seizure can occur. Second, litigants could channel Justice Fuld’s “stirring language” and scrutinize the frisk requirement. Already possessing a flimsy constitutional foundation, frisks have sparked community resentment and proven to be exactly what Justice Fuld prophesized: an “insult to individual liberty.” Third, even if a “reasonable suspicion” standard applies to stop-and-frisk, defendants should argue that their state constitutions provide greater protections than their federal counterpart—or that they simply impose more stringent reasonableness requirements. Given the varying contexts of fifty state constitutions and fifty state courts, this vague standard may demand more of the police in different jurisdictions.

<sup>217</sup> *Id.* at 200. Faulkner & Green cite one case, *State v. Lopez*, 896 P.2d 889 (Haw. 1995), in which they contend Hawaii departed from *Terry*. But the case is not about stop-and-frisk; it is about the unconstitutional search of a home. Moreover, in cases like *State v. Ugalino*, 107 Haw. 144, 150 (2000), Hawaii courts have “applied the standards set forth in *Terry* in determining whether police conduct complied with” the Hawaii constitution.

<sup>218</sup> Benjamin Zycher, Michael Bloomberg and the Stop-and-Frisk About Face, *Am. Enter. Inst.* (Nov. 19, 2019), <https://www.aei.org/politics-and-public-opinion/michael-bloomberg-and-the-stop-and-frisk-about-face/> [https://perma.cc/B47W-YBEX].

<sup>219</sup> Maclin, *supra* note 196, at 202.

A. *The “Genius of Probable Cause”: A Baseline for Search and Seizure*

Although the Supreme Court characterized stop-and-frisk as a “reasonable” practice in *Terry*, decades of state experience have undercut its reasoning and validated the concerns raised by the NAACP, Justice Carter, and Justice Douglas. As a result, litigants should consider arguing that their state constitutions set a higher floor than *Terry* and demand probable cause before a search or seizure can occur.

The majority in *Terry* grounded its opinion in the notion that reasonable suspicion could provide a meaningful constraint on police discretion. Chief Justice Warren promised that although the frisk was a “serious intrusion upon the sanctity of the person,” it would be “strictly circumscribed.”<sup>220</sup> Justice Harlan agreed, making it “perfectly clear” that reasonableness could adequately limit forcible stops.<sup>221</sup> This reasoning echoed Justice Powers in *Kavanagh v. Stenhouse* and Judge Bergan in *Rivera*. They couched stop-and-frisk as a necessary delegation of police discretion, with reasonable suspicion setting the bounds for that discretion.<sup>222</sup>

Others—namely, the NAACP—were more skeptical. As noted, the Association argued that the “genius of . . . ‘probable cause’” lay in its ability to constrain police officers.<sup>223</sup> “Probable cause” provided at least some clarity for Black Americans.<sup>224</sup> Over decades, it had taken on an “operative meaning” that helped “to objectify, to regularize, the reasoning process by which the judgment of . . . police intrusions [were] made.”<sup>225</sup> Probable cause made demands of the police, setting a stricter quantum of evidence that officers had to produce. Reasonable *suspicion*, on the other hand, deferred to “the policeman’s inexplicable ‘hunches’” and “value judgments.”<sup>226</sup> Rhetorically, the Association asked: “[A]s to what citizen

<sup>220</sup> *Terry*, 392 U.S. at 17, 26.

<sup>221</sup> *Id.* at 33 (Harlan, J., concurring).

<sup>222</sup> See *Kavanagh v. Stenhouse*, 174 A.2d 560, 562 (1961); *People v. Rivera*, 201 N.E.2d 32, 34–35 (1964).

<sup>223</sup> See Brief for the NAACP, *supra* note 52, at 26–27.

<sup>224</sup> This is not to say that the NAACP was at all comfortable with the current state of criminal procedure or the functioning of probable cause in American society. Asking if the standard “function[ed] unerringly, or with perfect clarity,” the brief responded sharply: “Of course, it does not.” Even in the progressive sixties, Black and brown Americans were still fighting a rearguard action to protect “the *only* standard which [the] Court ha[d] ever developed under the Fourth Amendment for judicial regulation of the police.” *Id.* at 29–30.

<sup>225</sup> *Id.* at 27.

<sup>226</sup> *Id.* at 29.



is it not reasonably possible that he has committed some crime?”<sup>227</sup> With this sort of discretion, the NAACP knew where the burden would fall: upon the “ill-dressed young men on a ghetto street corner,” upon the “Negro abroad on the streets in a ‘white’ neighborhood late in the day.” “The finger of suspicion is a long one,” they feared.<sup>228</sup> “In an individual case it may point to all of a certain race, age group or locale.”<sup>229</sup>

The NAACP was not alone in its concerns about police discretion. Justice Carter had previously questioned the practical impact that “reasonable suspicion” would have on American communities: “[T]o permit an officer to justify a search on the ground that he ‘didn’t feel’ that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were.”<sup>230</sup> The New York Bar Association similarly predicted that police would scale the “meager showing” of reasonable suspicion—engaging in stops and frisks with near-impunity.<sup>231</sup>

The decades since *Terry* have borne out these fears. Between January 2004 and June 2012, the NYPD alone made 4.4 million stops.<sup>232</sup> Eighty-eight percent of these stops “resulted in no further law enforcement action.”<sup>233</sup> Striking down the city’s policy as unconstitutional, Judge Scheindlin noted, “It would take multiple lifetimes of many judges to try each of [these] stops.”<sup>234</sup> And even assuming the personnel were available, officers often provided incomplete information to justify their stops.<sup>235</sup>

As the NAACP predicted, the burden of stop-and-frisk has fallen predominantly on poor communities of color.<sup>236</sup> Of the 4.4 million stops

<sup>227</sup> *Id.* at 39.

<sup>228</sup> *Id.* at 39–40.

<sup>229</sup> *Id.* at 40 (citing Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 *Geo. L.J.* 1, 22 (1958)).

<sup>230</sup> *People v. Martin*, 293 P.2d 52, 55 (1956) (Carter, J., dissenting) (quoting *People v. Simon*, 290 P.2d 531, 534 (1955)).

<sup>231</sup> See *Rockefeller Signs Bills*, *supra* note 77.

<sup>232</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 575 (S.D.N.Y. 2013).

<sup>233</sup> *Id.* at 558–59.

<sup>234</sup> *Id.* at 578.

<sup>235</sup> *Id.* at 559. In fact, this trend was only increasing when *Floyd* was decided. From 2004 to 2009, “the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.” *Id.*

<sup>236</sup> See, e.g., The National Association for the Advancement of Colored People, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America*,

cited in *Floyd*, 52% targeted Black Americans, while 10% involved white Americans.<sup>237</sup> Yet, in 2010, New York City had a population that was 23% Black and 33% white.<sup>238</sup> An African American or Latino in New York City during 2009 was “nine times as likely to be stopped by the police compared to white residents.”<sup>239</sup> Justice Carter was also correct to fear that stop-and-frisk would wreak havoc on specific communities. In Brownsville, a Brooklyn neighborhood of only eight square blocks, the police stopped 52,000 people between January 2006 and March 2010.<sup>240</sup> During that time, the arrest rate was “less than 1 percent.”<sup>241</sup> Confirming the NAACP’s fears from decades before, one resident noted that the “finger of suspicion” repeatedly pointed to a single race in Brownsville. “When they give a description, it’s, ‘Young black man, black pants, blue shirt, black hat,’ . . . That’s mostly everybody.”<sup>242</sup>

New York City is not *sui generis* in this respect.<sup>243</sup> A recent study in Philadelphia demonstrated that Black residents were “three times as likely as white residents to be stopped while either walking or driving.”<sup>244</sup> In Chicago, the police department has also disproportionately targeted Black Americans—72% of stops “involved black Chicagoans . . . and trust in police remains low in that community.”<sup>245</sup> Black residents make up 42%

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(2014), [https://www.prisonpolicy.org/scans/naacp/Born\\_Suspect\\_Report\\_final\\_web.pdf](https://www.prisonpolicy.org/scans/naacp/Born_Suspect_Report_final_web.pdf) [<https://perma.cc/MML3-HUVV>].

<sup>237</sup> *Floyd*, 959 F. Supp. 2d at 559.

<sup>238</sup> *Id.*

<sup>239</sup> Ashley Southall & Michael Gold, Why ‘Stop-and-Frisk’ Inflamed Black and Hispanic Neighborhoods, *N.Y. Times* (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> [<https://perma.cc/F67P-Y29X>].

<sup>240</sup> Ray Rivera, Al Baker, & Janet Roberts, A Few Blocks, 4 Years, 52,000 Police Stops, *N.Y. Times* (July 11, 2010), <https://www.nytimes.com/2010/07/12/nyregion/12frisk.html> [<https://perma.cc/W4EE-8JVB>].

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> One reason that state constitutions provide a helpful mechanism to question stop-and-frisk is that the practice’s ramifications differ across the country. The examples below are from major cities, where Black Americans have been disproportionately stopped. Perhaps stop-and-frisk would be more palatable in a rural state where the same discriminatory practices are not as common.

<sup>244</sup> Chad Pradelli & Cheryl Mettendorf, Racial Disparities in Philadelphia Police’s Use of Stop-and-Frisk, Data Shows, 6 ABC Philadelphia (Sept. 9, 2020), <https://6abc.com/stop-and-frisk-philadelphia-data-philly/6413942/> [<https://perma.cc/8H9R-8ATC>].

Black residents make up 40% of Philadelphia’s population, but roughly 70% of the stops targeted Black Americans. *Id.*

<sup>245</sup> A.D. Quiq & Sarah Zimmerman, ‘Stop and Frisk’ Still Disproportionately Impacting Black Chicagoans: Study, *Crain’s Chicago Business* (Oct. 24, 2019), <https://www.chicagobusiness.com/government/stop-and-frisk-still-disproportionately->

of Washington, D.C.’s population, but, in a recent study, accounted for 72% of stops within the district.<sup>246</sup> The NAACP, still active a half-century later “in preventing the importation of stop-and-frisk abuse,” has uncovered similar patterns in Newark, Miami Gardens, and Baltimore.<sup>247</sup>

Decades of experience in these jurisdictions have undermined a central premise of *Terry*: that reasonable suspicion could meaningfully constrain officers. For judges and justices with living constitutionalist leanings, this is persuasive evidence that state constitutions should set a higher floor of probable cause. It should also catch the attention of courts committed to originalism. Broad terms like “reasonableness” in state constitutions invite debate over the text’s meaning.<sup>248</sup> New experiences, context, and perspectives—“the common sense of common people”—can give shape to that debate.<sup>249</sup> In this case, a half-century of searches has confirmed the NAACP’s concerns that stop-and-frisk would resemble the British general warrants and writs of assistance that “left government officers free to heed every urging of . . . arbitrariness and discrimination.”<sup>250</sup> Such

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impacting-black-chicagoans-study [https://perma.cc/Z2S7-FPUC]. But see Monu Bedi, Commentary: Stop-and-Frisk Is Not Racist, and We Need to Stop Saying It Is, *Chicago Tribune* (Mar. 2, 2020), https://www.chicagotribune.com/opinion/commentary/ct-opinion-stop-and-frisk-police-bloomberg-20200302-6skrfrw5ujcppjdmq2jkwymnya-story.html [https://perma.cc/5YPE-3MZX].

<sup>246</sup> Elliot C. Williams, New Stop-And-Frisk Data Still Shows Wide Racial Disparities in D.C., *DCist* (Mar. 5, 2020), https://dcist.com/story/20/03/05/new-stop-and-frisk-data-still-shows-wide-racial-disparities-in-d-c/ [https://perma.cc/RT5X-F4HJ]. See also Brianne K. Nadeau, Opinion, End Stop and Frisk in D.C., *Wash. Post* (Feb. 15, 2019), https://www.washingtonpost.com/opinions/localopinions/end-stop-and-frisk-in-dc/2019/02/14/cdd59c2c-2fab-11e9-8ad3-9a5b113ecd3c\_story.html [https://perma.cc/FY9F-78YV] (calling on officials to “end the practice of stop and frisk in the District.”). But see Peter Newsham, Opinion, Yes, D.C. Police Use Stop and Frisk, but in a Legal Manner, *Wash. Post* (Feb. 22, 2019), https://www.washingtonpost.com/opinions/yes-dc-police-use-stop-and-frisk-but-in-a-legal-manner/2019/02/22/b85f6518-35f9-11e9-8375-e3dcf6b68558\_story.html [https://perma.cc/GLA2-SFML].

<sup>247</sup> NAACP, *supra* note 236.

<sup>248</sup> See discussion *supra* Part III.

<sup>249</sup> Akhil Reed Amar, *Terry* and Fourth Amendment First Principles, 72 *St. John’s L. Rev.* 1097, 1125 (1998).

<sup>250</sup> Brief for the NAACP, *supra* note 52, at 22–23; Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 *Minn. L. Rev.* 349, 366 (1974) (“[T]he primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause . . .”). For a more in-depth study, see generally William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* (2009) (surveying the history of unreasonable searches and seizures stemming from the traditional British maxim of privacy within the home and shaped by early use of the general warrant).

concerns animated many states as they drafted their constitutions.<sup>251</sup> It also seems like a shell game to substitute “stop” and “frisk” for the only words in the state constitutions—“search” and “seizure”—and the more rigorous meaning customarily given to them. All of this leaves stop-and-frisk vulnerable to challenge under originalist methodologies.

*B. The Frisk: An “Insult to Individual Liberty”*

The NAACP and Chief Justice Warren agreed on a second point—even as they differed in their approaches to it. The ability of police officers to frisk a suspect marked a “serious intrusion upon the sanctity of the person.”<sup>252</sup> In this sense, they echoed Justice Fuld’s prediction that the frisk would be a “grave” “insult to . . . individual liberty.”<sup>253</sup> Nevertheless, the Court permitted the frisk in *Terry* as an intrusion “confined in scope” to discover hidden weapons.<sup>254</sup> Characterizing the frisk as “narrowly drawn,” the Court tried to curb police discretion by instructing courts to discredit “inchoate and unparticularized suspicion[s]” or “hunch[es].”<sup>255</sup>

That effort has been unsuccessful. Rather than serving a circumscribed role in protecting officers, the frisk has habitually followed from the stop in the majority of cases.<sup>256</sup> Frisks became such a regular occurrence among the NYPD that a survey of New York youth indicated 71% had been frisked by an officer.<sup>257</sup> The NAACP predicted as much, warning that the state courts would be “unable to restrain police subversion of the purpose of the ‘frisks’ . . . .”<sup>258</sup> Instead, frisks devolved into a shorthand

<sup>251</sup> See Cuddihy, *supra* note 250, at 602 (“[T]he laws and constitutions of most states abrogated general warrants and searches years before the Fourth Amendment did so.”). Cuddihy also noted, “Not only did those [state] constitutions disallow general warrants, they also elevated specific warrants, probable cause, and the idea of unreasonable search and seizure to the position of higher law.” *Id.* at 603. In particular, “John Adams articulated the most far-reaching repudiation of general warrants in the constitutions of 1776–84.” *Id.* at 609.

<sup>252</sup> *Terry v. Ohio*, 392 U.S. 1, 17 (1968); see also Brief for the NAACP, *supra* note 52, at 35–38.

<sup>253</sup> *People v. Rivera*, 201 N.E.2d 32, 36 (1964) (Fuld, J., dissenting).

<sup>254</sup> *Terry*, 392 U.S. at 29.

<sup>255</sup> *Id.* at 27.

<sup>256</sup> A study by the New York Civil Liberties Union showed a frisk occurring in 66% of stops. NYCLU, Stop-and-Frisk in the De Blasio Era 14 (2019), <https://www.nyclu.org/en/publications/stop-and-frisk-de-blasio-era-2019> [<https://perma.cc/5U2X-QHAT>].

<sup>257</sup> White & Fradella, *supra* note 11, at 110.

<sup>258</sup> Brief for the NAACP, *supra* note 52, at 50.

to “obtain inculpatory evidence” without probable cause.<sup>259</sup> Evidencing this fact, one study of the NYPD demonstrated that weapons were discovered in only 1.5% of frisks.<sup>260</sup> Gun seizures occurred in only 0.15% of stops.<sup>261</sup> Instead of dangerous weapons, frisks have increasingly discovered drugs—and one in particular. During the height of stop-and-frisk, “marijuana charges roared back” and accounted for New York City’s highest arrest percentage.<sup>262</sup> Black and Hispanic Americans were disproportionately impacted by these arrests.<sup>263</sup>

As with the stop, evidence suggests that officers “use race or ethnicity as a proxy for suspicion” to enable the frisk.<sup>264</sup> In Philadelphia, one study demonstrated that Blacks and Hispanics were twice as likely to get searched as whites.<sup>265</sup> In D.C. the data was starker. Black citizens were seven times more likely than whites to be frisked by the police.<sup>266</sup> Minorities have also been disproportionately targeted by uses of force subsequent to the frisk.<sup>267</sup> This is no mystery to Black and brown

<sup>259</sup> *Id.* (quoting *People v. Taggart*, 229 N.E.2d 581, 586 (N.Y. 1967)).

<sup>260</sup> White & Fradella, *supra* note 11, at 63. A more recent study in the De Blasio era found weapons discovered in 7% of frisks. NYCLU, *supra* note 256.

<sup>261</sup> White & Fradella, *supra* note 11, at 104 (citing Report of Jeffrey Fagan, Ph.D., at 4, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)).

<sup>262</sup> *Id.* See also Benjamin Mueller, *It Wasn’t a Crime to Carry Marijuana. Until the Police Found a Loophole.*, N.Y. Times (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/nyregion/marijuana-police-nyc.html> [<https://perma.cc/8QE9-VCUV>] (describing how “police officers stopping and frisking people [would] ask[] them to empty their pockets, and when marijuana fell out, [the police officers would] arrest[] them because their hidden stash had suddenly become ‘open to public view’”).

<sup>263</sup> Mueller, *supra* note 262; see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 170 (2010) (noting that stop-and-frisk operations “amount to much more than humiliating, demeaning rituals for young men of color” and “often serve as the gateway into the criminal justice system”).

<sup>264</sup> Stop-and-Frisk: The Facts, ACLU N.J., <https://www.aclu-nj.org/theissues/-police-practices/newark-stop-and-frisk-data/stop-and-frisk-facts> [<https://perma.cc/KH7K-722K>].

<sup>265</sup> Pradelli & Mettendorf, *supra* note 244.

<sup>266</sup> Eric Flack & Jordan Fischer, *DC Police Search and Frisk Black People 6 Times More Often During Stops, Data Shows*, WUSA9 (June 15, 2020), <https://www.wusa9.com/article/-news/crime/stop-and-frisk/blacks-6-times-more-likely-to-be-searched-in-dc-than-whites-stop-and-frisk-black-lives-matter/65-379ed07f-bc94-45c0-a7a8-2193601c6df0> [<http://perma.cc/VH47-V3U2>].

<sup>267</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013) (“In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.”); see also ACLU of Ill., *Stop and Frisk in Chicago* 23 (2015), [https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU\\_-\\_StopandFrisk\\_6.pdf](https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_-_StopandFrisk_6.pdf) [<https://perma.cc/XJL2-ZKHV>] (“A study prepared for the ACLU of Southern California found that during a one-year period from 2003 to 2004, black and Hispanic residents were far more likely to be stopped, frisked, searched and arrested than

Americans—just as it was not in 1968. When surveyed, 57% of New York City youth alleged that they were “treated worse than others because of race and/or ethnicity.”<sup>268</sup> Not surprisingly, this has contributed to a breakdown in trust between officers and their communities.<sup>269</sup> As Professors White and Fradella note, the frisk has led minorities to “distrust the police, feel uneasy when they see the police, and view contact with the police as negative and adversarial.”<sup>270</sup>

The “ever-present threat of police violence” and excessive force has only exacerbated distrust.<sup>271</sup> A 2012 study by the Center for Constitutional Rights demonstrated that New York officers often exceeded the “narrowly drawn” pat-down that *Terry* had promised. Citizens reported being slapped, thrown up against walls, and sexually assaulted during frisks.<sup>272</sup> That same year, the Seattle Police Department entered a consent decree with the DOJ for its use of excessive force during pedestrian encounters and street stops.<sup>273</sup> The City of Los Angeles had previously done the same under DOJ pressure.<sup>274</sup> Victims reported feeling “violated,” “humiliated,” “disgusted,” and “of course very scared” after these encounters.<sup>275</sup> The effects were long lasting, compounding the distrust towards officers in some communities. As one interviewee said:

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white residents, and that black and Hispanic residents who were searched were less likely to have contraband than white residents.”).

<sup>268</sup> White & Fradella, *supra* note 11, at 110.

<sup>269</sup> *Id.* (“88 percent of young people surveyed believe that residents of their neighborhood do not trust the police.”).

<sup>270</sup> *Id.* at 109.

<sup>271</sup> Center for Constitutional Rights, *Stop and Frisk: The Human Impact 5* (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [perma.cc/7DEF-WWK4]; see also Jason Meisner, *Chicago Sued Over Police Department’s Alleged Stop-and-Frisk Practices*, *L.A. Times* (Apr. 21, 2015), <https://www.latimes.com/nation/ct-stop-and-frisk-lawsuit-met-20150421-story.html> (describing alleged constitutional abuses like excessive force) [<https://perma.cc/N2G7-2JZG>].

<sup>272</sup> Center for Constitutional Rights, *supra* note 271, at 5. These are a few accounts of NYPD encounters during the *Floyd* era. “It’s the difference between frisking somebody and going in [their] underwear or like putting gloves on outside, checking other people’s private areas, and people’s rectal area to see if they have drugs in them. It’s just too much, outside—that’s embarrassing.” *Id.* (alteration in original). Another said:

My jeans were ripped. I had bruises on my face. My whole face was swollen . . . I felt like I couldn’t defend myself, didn’t know what to do. No witnesses there to see what was going on. I just wish someone was there to witness it. I felt like no one would believe me. I couldn’t tell anyone. I kept it in till now . . . I still am scared.

*Id.* (second alteration in original).

<sup>273</sup> ACLU of Ill., *supra* note 267, at 21.

<sup>274</sup> *Id.* at 22–23.

<sup>275</sup> Center for Constitutional Rights, *supra* note 271, at 5–6.

“I get nervous, I get paranoid ‘cause you never know what’s going to happen, and I don’t feel safe . . . .”<sup>276</sup> In this environment, it may not be surprising that a suspect might flee the police—just as Freddie Gray did when Baltimore police officers attempted to stop him in 2015.<sup>277</sup>

In *Minnesota v. Dickerson*, Justice Scalia argued that the founders would have chafed at these intrusive practices.<sup>278</sup> He “doubt[ed]” that “the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.”<sup>279</sup> And he accused the Warren Court of making “no serious attempt to determine compliance with traditional standards.”<sup>280</sup> Justice Douglas, whose jurisprudence no one would confuse with Scalia’s, agreed: “if the police can pick [an individual] up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime.”<sup>281</sup> The NAACP made a similar contention in 1968, arguing that “[w]e think that the intrusiveness of ‘frisk’ hardly needs demonstration.”<sup>282</sup> After five decades of “demonstration”—to the detriment of Black and brown Americans—it’s time for litigants to raise the arguments in state court that Justice Scalia, Justice Douglas, and the NAACP have long encouraged.<sup>283</sup>

### *C. Reasonableness Sets a Higher Bar*

Even if state courts agree with *Terry* that a “reasonable suspicion” standard comports with their constitutional guarantee, litigants are free to argue for a stricter standard of reasonableness at the state level. In doing so, they should encourage state tribunals to hew more closely to the Court’s original conception of *Terry*. Chief Justice Warren, after all, never explicitly approved of an investigative stop and he circumscribed the frisk. He expected limitations on the doctrine would “be developed in the

<sup>276</sup> *Id.* at 6.

<sup>277</sup> White & Fradella, *supra* note 11, at 10–11.

<sup>278</sup> 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 380.

<sup>281</sup> *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

<sup>282</sup> Brief for the NAACP, *supra* note 52, at 38.

<sup>283</sup> See *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (“The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court’s decisions.”) (citing Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 Va. L. Rev. 1963, 1971–77 (2008)).

concrete factual circumstances of individual cases.”<sup>284</sup> The state court justices who addressed the issue before Chief Justice Warren also characterized the stop-and-frisk power as limited. Both Justice Traynor and Judge Bergan approved of the practice because it exacted a “minor inconvenience and petty indignity.”<sup>285</sup> Yet, as the preceding discussion illustrates, that has hardly been the case. As Silas Wasserstrom observed, “[C]learly, the *Terry* Court would not have approved of the extensive balancing that now goes on in its name. Nor would it have struck the balance so consistently in favor of law enforcement interests . . . .”<sup>286</sup>

Litigants, consequently, should argue for a reevaluation of the reasonableness standard. Akhil Amar provides one conception of what that might look like. He argues that reasonableness should include a proportionality requirement: “more intrusive government action requires more justification.”<sup>287</sup> Furthermore, he contends that reasonableness should better account for concerns of bodily integrity and personal dignity—alongside those of privacy and secrecy.<sup>288</sup> Finally, he notes that reasonableness must “factor[] race into the equation[:]. . . the spacious concept of reasonableness allows us to look race square in the eye, constitutionally.”<sup>289</sup>

Amar’s is just one approach. But the beauty of state constitutions is that each jurisdiction can decide for itself. As Section III suggests, methodological differences between courts can lead to different definitions of reasonableness. So can cultural variation between the states. States like New York with large urban centers may define reasonableness in different ways than a rural state like Montana. A third virtue of state constitutions, experimentation, should also be encouraged in this area. *Terry* has halted the development of the law—with negative implications for police-community relations. Creative approaches are particularly worth considering as tensions have escalated in some communities.

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<sup>284</sup> *Terry*, 392 U.S. at 29; see also *People v. Faginkrantz* 171 N.E.2d 5, 7 (1960) (“What the constitution prohibits is an unreasonable search and seizure, and the circumstances of this case do not establish that the search was unreasonable.”).

<sup>285</sup> See *supra* note 86 and accompanying text.

<sup>286</sup> Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 *Am. Crim. L. Rev.* 257, 264 (1984).

<sup>287</sup> Amar, *supra* note 249, at 1098.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*



*D. Terry Is Ripe for Assessment under State Constitutions*

After decades of evidence, it is inconceivable that the state court judges in all fifty states would survey their state guarantees and agree that Chief Justice Warren got the better of his debates with the NAACP. The looser standard of reasonable suspicion has not “strictly circumscribed” police discretion; it has led, too often, to discrimination against minorities<sup>290</sup> and a breakdown in police-community relations. The ability of the police to lay their hands on American citizens has been front and center in this controversy, leaving the frisk especially vulnerable to challenge. And even if stop-and-frisk should survive, judges in different jurisdictions are free to adopt a more muscular reading of reasonable suspicion under their state constitutions. Unfortunately, this Note cannot pretend to survey the guarantees in all fifty state constitutions. As Section III instructs, public defenders and other criminal defense lawyers will have to evaluate the terms and histories of their founding documents, community relations with the police in their states, and the methodological differences in their courts’ jurisprudence—shaping their arguments within the unique constitutional culture of their states. A state court can customize such rulings to local circumstances; a national court cannot. Given the general terms of Fourth Amendment equivalents and the controversy surrounding stop-and-frisk, *Terry* is ripe for reconsideration at the state level. It is long past time.

## CONCLUSION

The summer of 2020, like the summer of 1968, erupted in protests and calls for equal justice. Following George Floyd’s death, Americans flooded city streets across the country demanding change and lamenting the still-fractured relationship between police and communities of color. Calls to abolish or defund the police underscored just how toxic this relationship had become. Alongside calls for change were pleas to listen. A chorus of commentators urged Americans to listen to Black voices. Allies pledged to “stop talking” and commit to understanding the perspective of minority communities.<sup>291</sup>

<sup>290</sup> Brief for the NAACP, *supra* note 52, at 45.

<sup>291</sup> See, e.g., Opinion, Stop Talking and Start Listening, White People, Wash. Post (June 9, 2020), [https://www.washingtonpost.com/opinions/stop-talking-and-start-listening-white-people/2020/06/09/7071da24-a9a2-11ea-a43b-be9f6494a87d\\_story.html](https://www.washingtonpost.com/opinions/stop-talking-and-start-listening-white-people/2020/06/09/7071da24-a9a2-11ea-a43b-be9f6494a87d_story.html) [perma.cc/Q8J6-M5NU].

This Note, too, hopes to spur change, while also encouraging Americans to listen to long-silent perspectives. Let us start with listening. A half-century ago, NAACP leaders filed their brief in *Terry*. “Reasonable suspicion” could not constrain the police, they insisted. Stop-and-frisk would target members of “a certain race,” they worried. The burden would fall on minority communities, they pled. Those pleas fell on deaf ears. Yet, for the past half-century, precisely what the NAACP predicted has come to pass. Stop-and-frisk sometimes has not provided a meaningful constraint on police discretion, mostly to the detriment of Black and brown Americans nationwide.

It is also worth listening to the state courts that addressed stop-and-frisk before *Terry*. The vibrant debates in New York, Ohio, and California identify the doctrine’s fault lines and provide a roadmap to critique *Terry*. Some courts may side with the dissenters in California and reason that their state provisions provide a baseline of probable cause before search or seizure. Others may look to New York—with an assist from Justices Scalia and Douglas—and scrutinize the frisk as unconstitutional. And still others may favor an overhaul of the reasonableness standard at the state level. But no one is making these arguments in America’s state courts.

Which brings us to change. As this summer’s protests indicate, *Terry* has not solved the problems it was designed to solve. Too often, stop-and-frisk has eroded trust between police and local communities. It has contributed to concerns about systemic racism. It has “humiliated” countless Americans. It has played a part in the deaths of Eric Garner, Michael Brown, and Freddie Gray, sparking nationwide unrest.<sup>292</sup> And yet, state courts continue to lockstep—parroting *Terry* under their unique constitutional commands. This is hardly desirable. The “double security” of dual sovereignty is premised on state experimentation and creativity. When the U.S. Supreme Court fails to safeguard individual rights, state courts and state constitutions have the option and the obligation to consider whether to step in with more expansive protections. So far, they do not seem to be doing that.

Over the past few decades, state courts have been increasingly touted as guardians of individual liberty. In *American Legion v. American Humanist Association*, Justice Kavanaugh observed that the Supreme Court “is not the *only* guardian of individual rights in America” because state courts “possess authority to safeguard individual rights above and

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<sup>292</sup> White & Fradella, *supra* note 11, at 10–11.

beyond the rights secured by the U.S. Constitution.”<sup>293</sup> More recently, then-Judge Amy Coney Barrett testified before Congress and made a similar argument: “[M]any states interpret their versions of the Fourth Amendment or other provisions to be even more protective of rights than is the United States Constitution.”<sup>294</sup> “We allow those differences to flourish,” she later added.<sup>295</sup> In 1968, Martin McFadden could confidently assert that the country’s key rights innovator—the United States Supreme Court—said he was “right.” In this era of federalism, Justices Kavanaugh and Barrett instruct Americans to look elsewhere for the final word on individual liberty. State courts, it is said, can “step into the breach”<sup>296</sup> and serve as “first responders in addressing innovative rights claims.”<sup>297</sup> With that in mind, here is my proposal, echoing the NAACP and state judges at mid-century. Litigants: Start challenging stop-and-frisk. State courts: Prove it.

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<sup>293</sup> *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

<sup>294</sup> Confirmation Hearing on the Nomination of Amy Coney Barrett To Be an Associate Justice on the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 116th Cong. (2020) (statement of Amy Coney Barrett, Judge).

<sup>295</sup> *Id.*

<sup>296</sup> Brennan, *supra* note 182, at 503.

<sup>297</sup> Sutton, *supra* note 175, at 212.