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"To Corral and Control The Ghetto": Stop, Frisk, and the Geography of Freedom

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"TO CORRAL AND CONTROL THE GHETTO": STOP, FRISK, AND THE GEOGRAPHY OF FREEDOM

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Behind police brutality there is social brutality, economic brutality, and political brutality.

— *Eldridge Cleaver*[1]

INTRODUCTION

Few issues in American criminal justice have proven more toxic to police/community relations than stop and frisk. To take just one example, federal judge Shira Scheindlin recently declared that stops lacking "individualized reasonable suspicion" had become so "pervasive and persistent" in New York City that they not only reflected "standard [police] procedure," but had become "a fact of daily life" for minority residents.[2] Scheindlin promptly ordered "immediate changes to the NYPD's policies," meanwhile recalling the Supreme Court's observation in *Terry v. Ohio* that "the degree of community resentment" caused by a particular police practice could influence judicial "assessment" of that practice.[3]

Scheindlin's invocation of *Terry* as a curb on stop and frisk proved remarkable. According to most accounts, *Terry* marked a

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1. ELDRIDGE CLEAVER, SOUL ON ICE 125 (1992).

2. Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *71 (S.D.N.Y. Aug. 12, 2013).

3. *Id.* at *2, *75 (quoting Terry v. Ohio, 392 U.S. 1, 17 n.14 (1968)).

turning point in the Supreme Court's criminal procedure revolution, a move away from extending constitutional rights to minorities and towards granting increased discretion to police, through the sanctioning of stop and frisk.[4] Yet, Scheindlin's point evokes a different history, one that played out almost half a century ago on the streets of New York. At that time, *Terry* did not betray the Warren Court's revolution so much as compensate for tensions exacerbated by it, particularly issues triggered by *Mapp v. Ohio*, the landmark 1961 opinion extending the exclusionary rule to the states.[5] Praised for requiring that police procure detailed warrants before entering private homes, *Mapp* actually worsened interactions between police and minorities on the street, in part by encouraging police to develop creative means of stopping suspects, including techniques that involved intimidation and violence.[6] As news of such methods began to spread, the New York Police Department ("NYPD") itself began to lobby for more formalized stop and frisk requirements, hoping to reduce the likelihood of police/minority conflict.[7] The Supreme Court's eventual approval of such requirements in *Terry v. Ohio* and a companion case styled *Sibron v. New York,* marked a standardization of po-

4. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 1 (5th ed. 2008) (noting that the Court's procedure rulings were partly "triggered by the Supreme Court's growing appreciation of the position occupied by the 'underprivileged' of society—minority groups, the poor, and the young"); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 7 (2011) (arguing that an interest in equality animated the Warren Court's criminal procedure revolution); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106 (2005) (describing the Warren Court's criminal procedure cases as "a branch of 'race law'" that aimed to ameliorate racial inequality).

5. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

6. *See infra* Part II. The argument made here is different from Darryl K. Brown's claim that the Warren Court's criminal procedure rulings "prompted widespread opposition that took the form of political debate and reform efforts." Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1416 (2002). While Brown is correct, this article posits that the Court's criminal procedure rulings also served to obscure urban inequalities, long before engendering a conservative, legislative backlash. Also, the backlash that did ensue in New York aimed not to undo the Warren Court's decisions so much as to limit the negative effect that *Mapp v. Ohio* had on street altercations between urban minorities and police. For an argument similar to Brown's, see WHITEBREAD & SLOBOGIN, *supra* note 4, at 1 (noting that the Court's procedure rulings were partly "triggered by the Supreme Court's growing appreciation of the position occupied by the 'underprivileged' of society—minority groups, the poor, and the young"); Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1, 10–11 (2010); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 50–51, 53 (1997).

7. *See infra* Part III.

lice procedure that appeared to facilitate local policing, even as it bore larger, geographic implications.[8] No longer free to enter homes without warrants, police in New York intensified their focus on public spaces, pushing liberty indoors and setting the stage for the increased surveillance of the public sphere, a move that facilitated the apprehension and incarceration of black men.[9]

While criminal law scholar Michelle Alexander has shown that stop and frisks often serve as the gateway into the criminal justice system for young men of color, she occludes the complex forces that led to their rise.[10] This article seeks to identify those forces, relating the rise of stop and frisk rules to liberal politics, Cold War concerns, and spatial dynamics. To illustrate, this article will proceed in three parts. Part I will demonstrate how *Mapp v. Ohio* coincided with judicial frustration at police intrusions into private, intimate space—including private thought—precisely at a time when the United States sought to distinguish itself from totalitarian "thought control" regimes during the Cold War. Part II will show how the Court's effort to prevent thought control and guard intimate space in *Mapp* engendered an unanticipated public effect, leading police both to lie about arrests and to use more violent means for procuring evidence from suspects on the street.[11] Finally, Part III will show how such street-level tensions played out at the local and national levels, interiorizing liberty in ways that allowed for a narrative of expanding freedoms amidst a climate of increased police control.[12]

Though scholars tend to cite 1968 as a turning point in the Warren Court's jurisprudence, a moment when liberal impulses on the Court succumbed to a conservative "counter-revolution,"

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8. The argument that the Warren Court's criminal procedure decisions were ultimately a theatrical move to reduce police/minority tensions does not contradict Devon Carbado's claim that police/minority interactions constitute "racial theater." *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 953 (2002). On the contrary, this piece argues that the Warren Court became very interested in improving the theatrical quality of such interactions, partly to reduce the likelihood that bystanders would react negatively to police searches and arrests.

9. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 132–33 (2010).

10. *Id.* at 136.

11. Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULL. 549, 556–57, 559–60 (1968).

12. While Michelle Alexander focuses heavily on conservative backlash politics, this article places responsibility at the feet of liberal reformers as well. *See, e.g.*, ALEXANDER, *supra* note 9, at 134–36.

this article suggests a more fractured narrative—one in which liberal and conservative justices alike tolerated expansions of domestic liberty but moved increasingly, inadvertently, to heightening regulations of urban landscapes.[13] Here, concerns over state infringement on personal privacy in the 1950s help explain the Court's interest in expanding liberty in private, intimate settings, meanwhile moving quickly to contain direct action protest and violence in public spaces.[14] Over time, the Warren Court's criminal procedure revolution assumed a geographic dimension, pushing liberty into discrete spaces that posed little threat of violent crime, political disorder, or riots.[15]

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13. *See* PRISCILLA H. MACHADO ZOTTI, INJUSTICE FOR ALL: *MAPP V. OHIO* AND THE FOURTEENTH AMENDMENT 170 (2005); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 407–11 (2000); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 192 (2d ed. 1998) (noting that appointees in the early 1970s began to move the Court away from the aggressive defense of individual rights); Carbado, *supra* note 8, at 970–71 (highlighting how the Court's interpretation of the Fourteenth Amendment demonstrates a willful blindness to uncontestable facts about race and policing); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289, 1315 (1982); Dan M. Kahan & Tracy L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156–59 (1998) (noting the Court's failure to be more forthcoming about the racial dimension of criminal procedure cases); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 2–3 (1995) (suggesting that, in its final years, the Warren Court was not the same Court that decided *Mapp v. Ohio* or *Miranda v. Arizona*); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968); Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 605 (2007); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1288 (1999). For a related reading of the Warren Court's criminal procedure revolution, see Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 16–17 (2010) (arguing that the Warren Court did not extend rights to criminal defendants so much as insist on "inter-branch" regulation of police/defendant interaction). *See also* Fabio Arcila, Jr., *Suspicion and the Protection of Fourth Amendment Values*, 43 TEX. TECH. L. REV. 237, 240 (2010) (arguing that Fourth Amendment values include not simply aiding minorities but "limiting governmental discretion, protecting privacy and dignitary interests, minimizing intrusiveness, and assuring a compelling and legitimate governmental need for a search). To Miller, the Court pursued a "republican" approach to criminal justice regulation. Miller, *supra*, at 16. This article posits a more ad hoc approach: first an expansion of liberty in intimate spaces and then a move towards containing blacks in urban ghettos.

14. ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 133–34 (1988).

15. The argument in this piece tracks criminal law scholar Bernard Harcourt's effort to "expose the real stakes" in the debate over police searches, arguing that improved police procedure plays a critical role in the maintenance of structural inequality. Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL'Y 363, 365 (2004).

That the Court *interiorized* liberty in the 1960s is a point only hinted at by scholars.[16] For example, criminal procedure scholars David Sklansky and Jeannie Suk have both raised the intimacy dimensions of Supreme Court Fourth Amendment privacy jurisprudence.[17] To Sklansky, the Court's concern with the Fourth Amendment stemmed in part from an interest in thwarting police harassment of gay men.[18] For Suk, the Court's interest in the Fourth Amendment coincided with a larger interest in protecting intimate space, particularly the home—a place where "woman," as the Court put it in 1961, "is still regarded as the center of home and family life."[19] Both scholars characterize the Court's concern for regulating police in terms that evoke intimate relationships, either between same sex couples or couples of the opposite sex; pairs that bear little in common with isolated individuals on the street.

Building on Suk and Sklansky, this article posits that the Court's interest in curtailing police stemmed less from an interest in ameliorating substantive inequality than from expanding the scope of freedom in politically neutral, private spaces. Though remembered as a bid to help the poor, many of the Warren Court's criminal procedure decisions actually did little to help the less affluent.[20] Black activists in New York argued precisely this point in the 1960s, questioning the Court's concern for the poor and agreeing with police that law enforcement's function vis-à-vis minorities had shifted from "[c]rime prevention" to "peacekeeping," a role aimed primarily at controlling urban landscapes.[21] According to black writer James Baldwin, the Court's

16. *See* David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 877–78 (2008); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 492–93 (2009).

17. *See* Sklansky, *supra* note 16, at 877–78; Suk, *supra* note 16, at 492–93.

18. Sklansky suggests that the Court's interest in restricting state eavesdropping on phone lines stemmed from a spatial concern over state surveillance of intimate relations between gay men in toilet stalls. *See* Sklansky, *supra* note 16, at 879.

19. Suk, *supra* note 16, at 509 (citing Hoyt v. Florida, 368 U.S. 57, 62 (1961)). Suk shows how feminists challenged gendered tropes of privacy in the late twentieth century in JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 124–28 (2009) [hereinafter AT HOME IN THE LAW].

20. *See* WHITEBREAD & SLOBOGIN, *supra* note 4, at 1 (noting that the Court's procedure rulings were partly "triggered by the Supreme Court's growing appreciation of the position occupied by the 'underprivileged' of society—minority groups, the poor, and the young").

21. In June 1969, CUNY Sociology professor and former NYPD officer Arthur Niederhoffer posited that police had suddenly taken on two very different roles—"[c]rime preven-

campaign to soften police procedure sought primarily to contain black urban populations, or as he put it, "to corral and control the ghetto."[22] In fact, from 1961 to 1968, New York City police and radical black leaders alike complained that the city was heightening the risk of urban violence by focusing on procedural/privacy matters, meanwhile ignoring structural causes of poverty and inequality.[23] Rather than level the playing field between rich and poor, the Warren Court's procedure rulings struck black activists and New York City cops alike as a type of theatre aimed at preserving inequality by holstering the truncheon and improving the management of the poor rather than by fixing underlying socioeconomic problems plaguing urban communities.[24]

That criminal procedure served a theatrical function in the 1960s coincides with the argument made by criminologist Peter K. Manning that much of modern policing hinges on image management, on maintaining "public support" for police by curtailing violence and engaging in a larger "drama of control."[25] According to Manning, this drama became particularly important in the United States as "the rise of large minority populations in urban areas and their exclusion from many opportunities changed the problems of urban social integration and crime into the more serious issue of politically managing a rising underclass demanding wider access to all forms of community service."[26] Though Manning focuses his inquiry on the rise of community policing in the 1980s, his analysis can be extended further to the 1960s and extended to include the federal judiciary.[27] During that time, this

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tion" and "peace-keeping"—both of which were "antithetical." David Burnham, *The Changing City: Crime on the Rise*, N.Y. TIMES, June 3, 1969, at 35 (internal quotation marks omitted).

22. James Baldwin, *James Baldwin on the Harlem Riots*, N.Y. POST, August 2, 1964, at 3.

23. For works documenting police/Panther violence, see PAUL ALKEBULAN, SURVIVAL PENDING REVOLUTION: THE HISTORY OF THE BLACK PANTHER PARTY (2007); CURTIS J. AUSTIN, UP AGAINST THE WALL: VIOLENCE IN THE MAKING AND UNMAKING OF THE BLACK PANTHER PARTY 89–112 (2006); WILLIAM L. VAN DEBURG, NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE 1965–75, at 157–60 (1992).

24. The use of theatre described in this piece aimed to obscure larger inequalities in American society, not to act as "a morality play for those involved in the nitty gritty of law enforcement," as Scott E. Sundby argues in Mapp v. Ohio's *Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 257 (2010).

25. Peter K. Manning, *Community Policing as a Drama of Control*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 28 (Jack R. Greene & Stephen D. Mastrofski eds., 1991).

26. *Id.* at 27.

27. *Id.*

article posits, the drama of control became crucial not only to local police but also to the Supreme Court, which as we shall see, moved aggressively to improve the image of urban police even as it constrained the protest powers of urban minorities, all of which was part of a larger move to facilitate "managing a rising underclass."[28]

I. THOUGHT CONTROL

Though oft-considered an opening salvo in the Warren Court's criminal procedure revolution, *Mapp v. Ohio* began its constitutional journey as a dispute over dirty books.[29] Suspected of harboring a person involved in a local bombing, Dollree Mapp confronted police at her Cleveland home on May 23, 1957, seized a document that they proclaimed to be a warrant, and stuffed it in her shirt.[30] After a tussle, police recovered the paper and proceeded to search Mapp's house, ultimately discovering four books: *London Stage Affairs, Affairs of a Troubador, Memoirs of a Hotel Man,* and *Little Darlings,* together with "a nude pencil sketch, and several photos found in a suitcase."[31] Convinced that the items were obscene, police arrested her for "possession of obscene pictures and books."[32]

Though Mapp's attorneys fought to exclude the evidence at trial, they abandoned that position on appeal, arguing instead that Ohio's obscenity statute was unconstitutionally vague and that Mapp's arrest was so outrageous as to warrant an acquittal.[33] The latter argument followed *Rochin v. California,* a 1952 Supreme Court case chastising police for ordering a defendant's stomach pumped to retrieve heroine, something the Court found so egregious that it not only "shock[ed] the conscience," but violated the

28. *Id.* Bernard Harcourt has identified a similar irony in the imposition of curfew laws in urban parks, noting how the enforcement of such laws curtail political demonstrations but do little to silence corporate speech in the form of public advertisements. *See* Bernard Harcourt, *The Occupy Chicago Arrests: Rahm Emanuel's 'Dry Run' for G8 and Nato?*, THE GUARDIAN (Feb. 16, 2012), http://www.theguardian.com/commentisfree/cifamerica/2012/feb/16/occupy-chicago-arrests-rahm-emanuels-dry-run.

29. Mapp v. Ohio, 367 U.S. 643, 643 (1961).

30. *Id.* at 644.

31. CAROLYN N. LONG, *MAPP V. OHIO:* GUARDING AGAINST UNREASONABLE SEARCHES & SEIZURES 8–9 (2006).

32. *Id.* at 13.

33. *Id.* at 25.

Constitution.[34] Just as unconstitutional, argued Mapp's legal counsel, was Ohio's obscenity law, a relatively recent measure that expanded criminal liability from manufacturers and sellers of pornography to private citizens.[35] On this point, Mapp received support from the Ohio Civil Liberties Union ("OCLU"), which argued that the law was not rationally related to a legitimate state interest, failed to adequately define obscenity, and invaded the "private rights" of individuals.[36] Such rights, argued the OCLU, stemmed from the Fourth, Fifth, and Fourteenth Amendments—a type of emanation argument that prefigured *Griswold v. Connecticut*.[37] Also, the OCLU's First Amendment attack drew strength from a 1959 Supreme Court case, *Smith v. California,* holding that even though obscenity did not warrant constitutional protection, a state law prohibiting merchants from mere possession of obscene books violated the First Amendment.[38]

Though the First Amendment question failed to persuade a requisite majority of Ohio's Supreme Court, it did capture the attention of the nation's highest tribunal.[39] In conferences and private discussions on the case, Justice Harlan argued persuasively that the core issue of the case was "thought control."[40] Others concurred. In fact, the day after oral arguments in the case, all of the Justices "agreed" that the core concern in *Mapp* was the manner in which Ohio's obscenity law amounted to a "thought control statute."[41]

The Court's identification of Ohio's obscenity law as a thought control statute is worth noting. The term first emerged in the 1920s when word broke that the Japanese government was considering new statutory means of regulating dissent.[42] Such stories became even more prevalent during World War II, when both Japan and Nazi Germany imposed strict regulations on public thought and speech.[43] Following the war, many in the West sus-

34. 342 U.S. 165, 166, 172 (1952).
35. LONG, *supra* note 31, at 24–25, 29–30.
36. *Id.* at 27.
37. 381 U.S. 479, 484 (1965); LONG, *supra* note 31, at 27.
38. 361 U.S. 147, 155 (1959).
39. LONG, *supra* note 31, at 63.
40. *Id.* at 82–83 (internal quotation marks omitted).
41. *Id.* at 82.
42. RICHARD H. MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN 19–38 (1976).
43. Hugh Byas, *Japan's Censors Aspire to "Thought Control,"* N.Y. TIMES, Apr. 18, 1937, (Magazine), at 4; Albion Ross, *Goebbels Edits the Popular Mind in Germany*, N.Y.

pected the Soviet Union of imposing thought control on its people, inspiring author George Orwell to pen an alarming critique of totalitarianism entitled *1984*.[44] Published in 1949, *1984* resonated with concerns that the Soviet Union had established within its borders a police state denying freedom of thought to its citizens.[45]

Some Americans warned that such restraints were coming to the United States. In 1949, Princeton University President Dodds argued that were it not for the nation's sustained support of private institutions, particularly private schools, Americans might succumb to "a growing threat of Government 'thought control.'"[46] Five years later, Florida attorney John M. Coe accused the federal government of just that, declaring that the Internal Security Act "put the Government in the thought-control business by placing restraints on speech, press and assembly."[47]

Enacted over a presidential veto in 1950, the Internal Security Act, or McCarran Act, required that communists forgo employment in government, unions, and the defense industry, while registering with the Subversive Activities Control Board, a government agency formed to neutralize domestic communist threats.[48] Though the Supreme Court declared the McCarran Act constitutional in 1951, it hardened its view in 1955 as Senator Joseph McCarthy accused military officials of communist sympathies, compromising the credibility of anti-communists nationally.[49] In 1957, the Court overturned the convictions of fourteen defendants who allegedly belonged to the Communist Party, several justices complaining that their conviction represented "a political trial" in violation of the First Amendment.[50]

TIMES, Feb. 14, 1937, (Magazine), at 3.

44. *See generally* GEORGE ORWELL, 1984 (1949) (providing a graphic depiction of the dangers of absolute governmental power).

45. *Id.*; *see* Robert Harris, *60 Years After Orwell Wrote 1984 and Was Destroyed by the Book, a Chilling Reminder That His Sinister Is Almost Reality*, DAILY MAIL (June 12, 2009), http://www.dailymail.co.uk/debate/article-1192484/60-years-Orwell-wrote-1984-destroyed-book-chilling-reminder-sinister-vision-reality.html.

46. Murray Illson, *Dodds Finds Peril to Free Education: Princeton Head Warns of U.S. 'Thought-Control' in Talk at Washington & Lee Event*, N.Y. TIMES, Apr. 13, 1949, at 30.

47. *Suit Begun to Kill New Security Law*, N.Y. TIMES, Oct. 28, 1950, at 6 (internal quotation marks omitted).

48. POWE, *supra* note 13, at 77, 98–99.

49. *Id.* at 80.

50. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 280, 282 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

The Supreme Court referred repeatedly to thought control in the 1950s, always as a distinguishing characteristic of totalitarian regimes.[51] In 1950, for example, the Court made a point of refuting a charge of thought control against section 9(h) of the 1947 Labor Management Relations Act, requiring labor union officers to file an affidavit stating that they were not communists.[52] Similarly, in 1952, the Court rejected a charge that piping music into public streetcars constituted "thought control," though Justice Douglas warned of it in a dissent.[53] "Once privacy is invaded," he declared, "privacy is gone," insinuating that even though playing government-sponsored music on streetcars might have been a harmless cultural program, "[i]t may be but a short step," he prophesied, "from a cultural program to a political program."[54] Though a passing assertion in an arguably inconsequential dissent, Douglas's mention of "political program[s]" in *Public Utilities v. Pollak* revealed the manner in which he viewed "[t]he right of privacy" to be a "powerful deterrent to any one who would control men's minds."[55]

Closely linked to the Court's interest in "men's minds" was a concomitant interest in restrictions on what private citizens could read. Evidence of this emerged not simply in thought control cases like *Public Utilities v. Pollak* and *American Communications v. Douds,* but in obscenity cases like *Butler v. Michigan,* decided in 1957, where the Supreme Court struck down a Michigan statute enjoining the publication or distribution of materials "manifestly tending to the corruption of the morals of youth."[56] Though comfortable with the idea that states could control obscenity, the Court rejected the idea that standards set for children should govern adults.[57] Four months later, the Court confronted the problem of obscenity again, this time in a case challenging the conviction of Samuel Roth, a bookseller convicted of publishing a maga-

51. *See, e.g.*, POWE, *supra* note 13, at 193, 314.

52. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 385–86, 408, 411–12 (1950) (distinguishing section 9(h) from the "straw man of 'thought control'").

53. Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 460 n.6, 465–66 (1952).

54. *Id.* at 469 (Douglas, J., dissenting). In 1959, the Court overturned the suspension of a Hawaii attorney who had declared that Smith Act trials were leading the country to the "dark ages of thought control." *In re* Sawyer, 360 U.S. 622, 628 n.4 (1959) (internal quotation marks omitted).

55. *Pollak*, 343 U.S. at 469 (Douglas, J., dissenting).

56. Butler v. Michigan, 352 U.S. 380, 381–83 (1957).

57. POWE, *supra* note 13, at 114–15.

zine entitled *American Aphrodite*.[58] Here, the Court cabined what could be considered obscene, exempting works of literature and art thought to have critical merit, and aimed at more than simply "appealing to prurient interest."[59]

Ironically, even as the Court worked to liberalize restrictions on erotic literature, so too did Cold War conservatives link the cause of sexual liberation to national weakness and communism.[60] "[S]exual excesses or degeneracy," notes historian Elaine Tyler May, were considered by conservatives in the 1950s to make "individuals easy prey for communist tactics."[61] Consequently, the FBI "mounted an all-out effort to discover the personal sexual habits of those under suspicion of subversive behavior," with a particular emphasis on "homosexuals."[62] According to Nebraska Senator Kenneth Wherry, it was impossible to "separate homosexuals from subversives," a sentiment that led to an "obsession" with rooting out gays in government.[63] Also targeted were heterosexual officials living outside the "maturity" and "responsibility" of marriage, sparking a bizarrely Puritanical crusade to regulate both sexual proclivities and private thought.[64]

Notions that sexual deviance threatened national security cut against the Supreme Court's tendency towards liberalizing erotic literature and freeing "men's minds," perhaps explaining why the Court avoided striking down Ohio's obscenity law in *Mapp*, preferring instead the less salacious path of invoking the exclusionary rule against the states.[65] Though Justices Harlan, Frankfurter and Whittaker balked when Clark mentioned the exclusionary

58. THE SUPREME COURT IN CONFERENCE, *supra* note 50, at 353 n.158.

59. Roth v. United States, 354 U.S. 476, 487–88 (1957).

60. DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 38 (2004).

61. MAY, *supra* note 14, at 94.

62. *Id.* at 95–96.

63. STEPHEN J. WHITFIELD, THE CULTURE OF THE COLD WAR 43 (1991).

64. MAY, *supra* note 14, at 94.

65. While this article posits that there may have been a sexual component to *Mapp*, either frustration with federal efforts to link sexual deviance with communism or increasing federal intrusions into the private intimate lives of individuals suspected of being un-American, it is certainly also true that the Court had been looking for an opportunity to extend the rule to the states, as Thomas Y. Davies argues in his review of Carolyn Long's book *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES (2006). *See* Thomas Y. Davies, *An Account of* Mapp v. Ohio *That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 628 (2007) (reviewing CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES (2006)).

rule, an issue that Mapp's attorneys had not briefed, the impulse to sidestep sex and overturn *Wolf v. Colorado* may simply have been an effort to "hide" one train behind another, as privacy scholar David Sklansky argues the Court did six years later in *Katz v. United States,* again a case involving police and sex.[66] Indeed, Sklansky's observation that the Court sought to hide protections for gay men subjected to police surveillance in the rhetoric of Fourth Amendment privacy may itself have stemmed from judicial frustration with histrionic Cold War claims that homosexuals threatened national security.[67]

Even if the Court was not responding to Cold War sexual paranoia, the majority opinion in *Mapp* nevertheless framed the extension of the exclusionary rule to the states in decidedly intimate terms. According to Justice Clark, the police in question did not simply arrest Dollree Mapp for possessing pornographic literature, they "broke" into her home and proceeded to run "roughshod" over her.[68] In terms evoking sexual assault and even rape, Justice Clark recounted how one officer retrieved a sheet of paper from Mapp's "bosom," "grabbed her," "twisted [her] hand," and "forcibly" took her "upstairs to her bedroom," as she "yelled [and] pleaded with him" that "it was hurting."[69] Though the pornographic literature in question was ultimately found in the basement, Justice Clark focused his resuscitation of facts on the bedroom, noting how police searched "a dresser, a chest of drawers, a closet and some suitcases," even perusing "a photo album" belonging to the defendant.[70]

According to criminal law scholar Jeannie Suk, judicial articulations of privacy in gendered terms—as attacks on the privacy of women—reflected a larger "anxiety" suffered by men "about intrusion" into male dominated private space.[71] This anxiety, argues Suk, stemmed in part from the traditional "nineteenth-century bourgeois ideal" of the home as a man's castle—a place where a

66. Mapp v. Ohio, 367 U.S. 643, 672–73 (1961) (Harlan, J., dissenting); David Alan Sklansky, *A Postscript on* Katz *and Stonewall: Evidence from Justice Stewart's First Draft*, 45 U.C. DAVIS L. REV. 1487, 1492 (2012); Sklansky, *supra* note 16, at 877. For a discussion of Mapp's failure to raise the exclusionary rule, see LONG, *supra* note 31, at 73.

67. Sklansky, *supra* note 16, at 878, 906.

68. *Mapp*, 367 U.S. at 644–45.

69. *Id.* (alterations in original).

70. *Id.* at 645.

71. Suk, *supra* note 16, at 491.

man's property, including his spouse, was protected from other men.[72] This anxiety also stemmed from a concern that men be "free from government intrusion" in sexual matters, including the right to "look at images of sex and naked women," a right the Court actually came to recognize in *Stanley v. Georgia* in 1969.[73] Though *Mapp* predated *Stanley* by eight years, the gendered tone of Justice Clark's opinion, coupled with the pornography laden facts at issue in *Mapp,* suggest that preserving porn may in fact have been one of the inspirations for suddenly invoking the exclusionary rule, making it an early defense to sexual "thought control."[74]

Another, more commonly cited inspiration for the *Mapp* ruling was race, a point made by criminal procedure scholars like Tracey Meares and Thomas Davies.[75] According to Davies, the "racist police abuse" in *Mapp* together with a prior decision styled *Monroe v. Pape,* "may have convinced Justice Clark that it was past time to extend federal supervision to state criminal justice."[76] Yet, the precise manner in which *Mapp* aided racial minorities is not clear.[77] In fact, as the next section will show, initial signs that police procedure improved in the wake of *Mapp* quickly gave way to reports that the decision was pushing police to new levels of corruption in New York City, both in terms of how they procured evidence and how they treated minorities on the street. If *Mapp*'s genius was its ability to mask sexual prurience in the theatre of

72. AT HOME IN THE LAW, *supra* note 19, at 3.

73. Suk, *supra* note 16, at 489 (citing Stanley v. Georgia, 394 U.S. 557, 558–59 (1969)).

74. *Stanley*, 394 U.S. at 569. Of course, no Justice claimed to be interested in possessing porn. Instead, Warren, Brennan, and Clark all confessed to a sudden conversion, prompted in part by a string of cases involving police entry into private homes, but also by Justice Stewart's suggestion, made during an impromptu discussion in an elevator, that the Fourth Amendment be invoked. *See* LONG, *supra* note 31, at 83–84. While Stewart's success can certainly be attributed to the arrival of Warren, Brennan, and Clark—none of whom had been present in *Wolf v. Colorado* in 1949—the Cold War context may also have encouraged the majority to fight the paranoid excesses of anti-communism—including its obsession with rooting out sexual deviants—through a more robust enforcement of the Fourth Amendment. *Id.*

75. Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 983 (2010); Meares, *supra* note 4, at 106 (describing the Warren Court's criminal procedure cases as "a branch of 'race law'").

76. Davies, *supra* note 75, at 983; *see also* Meares, *supra* note 4, at 106.

77. Stuntz, *supra* note 13, at 1288.

domestic privacy, then its downfall would be what Devon Carbado calls the "racial theater" of the street.[78]

II. "SUBSTANCE NOT SHADOW"

Decided on June 19, 1961, *Mapp* appeared to have an immediately positive impact on police.[79] According to Richard Kuh, Secretary of the New York State District Attorney's Association, police did in fact become more serious about acquiring warrants before conducting searches of private homes following the ruling.[80] Prior to *Mapp,* claimed Kuh, officers rarely requested a warrant before searching an individual's private "apartment, home, flat, [or] loft."[81] "All this has changed," he argued in September of 1962, one year after the opinion was handed down; tendencies towards ignoring warrant requirements "changed overnight."[82]

Yet, *Mapp* triggered unanticipated effects as well. Over a twelve month period, for example, arrests for illegal lottery or "policy" violations dropped thirty-five percent in New York City.[83] During that same time period, convictions for "narcotics misdemeanor[]" offenses dropped nearly forty percent.[84] Similar drops could be found for contraband—"possession of weapons and for possession of obscene photographs."[85] Such declines stemmed from the fact that officers felt uncertain as to whether they could lawfully search suspects who were not officially under arrest.[86]

Even as arrests dropped, a more troubling phenomenon also emerged: police corruption appeared to increase. According to Kuh, during the year immediately following *Mapp,* police testimony became increasingly "improbable" as officers began to testify that upon seeing police, suspects simply "removed" objects from

78. Carbado, *supra* note 8, at 953.

79. *See* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring).

80. Richard H. Kuh, *The* Mapp *Case One Year After: An Appraisal of Its Impact in New York*, N.Y. L.J., Sept. 18, 1962, at 1.

81. *Id.* at 2.

82. *Id.*

83. *Id.*; *see also Policy Prosecutions Here Cut by Curb on Evidence*, N.Y. TIMES, July 16, 1962, at 1.

84. Kuh, *supra* note 80, at 2 (noting a thirty-eight percent decrease); *see also* Leonard E. Ryan, *Narcotics Case Convictions Drop Since Ban on Illegal Searches*, N.Y. TIMES, Sept. 19, 1962, at 35.

85. Ryan, *supra* note 84, at 35; *see also* Kuh, *supra* note 80, at 2.

86. Ryan, *supra* note 84, at 35.

their pockets, "threw" them to the ground, and obviated the need for a search.[87] Similarly, police assigned to search private homes began to testify more frequently that they had been "invited" to search the homes of defendants, again precluding the need for a warrant.[88] Not only did *Mapp* reduce arrests, but it also encouraged police to stretch the truth, telling more elaborate "stories" to bolster the arrests they did make.[89]

In a study of almost 4000 arrests, New York Legal Services corroborated Kuh's suspicions, providing hard data that police arrest narratives changed significantly in the aftermath of the ruling.[90] For example, claims that suspects mysteriously "dropped" contraband upon sight of police rose significantly after the decision, particularly among uniformed officers who reported a 79.6% spike in such "dropsies" during the year immediately following *Mapp*.[91] Meanwhile, reports that police found contraband "hidden on the person" of suspects declined significantly at precisely the same time, indicating that police were suddenly cautious about admitting to searches.[92]

An officer provided a clue into the brave new world of evidence recovery post-*Mapp* during an illegal search trial in New York City on September 12, 1962.[93] Charged with unlawfully searching a suspect, the officer claimed that he "frisked" suspects but did not conduct actual searches of them.[94] Pressed by a judge, the officer then demonstrated a standard frisk before the court, a rela-

87. Kuh, *supra* note 80, at 1 n.2; *see also* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 214–15 (2d. ed. 1975) (arguing that police not only reported dropped evidence but "reconstruct[ed] a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards"); Barlow, *supra* note 11, at 549–50; Joseph S. Oteri & Charlotte A. Perretta, *"Dropsy" Evidence and the Viability of the Exclusionary Rule*, 1 CONTEMP. DRUG PROBS. 35, 41 (1971–1972); Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95 (1968).

88. Ryan, *supra* note 84, at 35.

89. Kuh, *supra* note 80, at 1 n.2.

90. Barlow, *supra* note 11, at 550, 553, 556.

91. *Id.* at 556. Another tactic employed to achieve dropped evidence was documented by criminal law scholar Dallin Oaks in 1970, who reported that "a police officer without a warrant may rush a suspect, hoping to produce a panic in which the person will visibly discard the narcotics and give the officer cause to arrest him." Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 699 n.90 (1970).

92. Legal Services distinguished uniformed officers from plainclothes officers and members of New York's specialized Narcotic Bureau. Barlow, *supra* note 11, at 553.

93. Jack Roth, *Is 'Frisk' Illegal? Judge to Decide*, N.Y. TIMES, Sept. 13, 1962, at 54.

94. *Id.*

tively violent maneuver that aimed to shake evidence to the ground.[95] Rather than simply pat down the outside of the suspect's clothing, for example, the patrolman "grabbed" the suspect "and practically lifted him off his feet," meanwhile shaking him to loosen any items that might be secreted in his pockets, waistband, or belt.[96] As a cigarette lighter and pair of eyeglasses "fell" to the floor, the manner in which a frisk might generate a drop suddenly became apparent, leaving open the question of whether *Mapp*'s prohibition on searches also applied to frisks, even forceful ones like the one demonstrated by the officer.[97]

Even if officers decided against frisks, other means of procuring evidence from suspects on the street emerged post-*Mapp*.[98] In New York, for example, patrolmen "rush[ed]" suspects, "hoping to produce a panic" that would then lead them to "visibly discard" evidence.[99] Here too, the Court's application of the exclusionary rule had a counterintuitive effect: increasing the likelihood that police would engage in menacing behavior to get suspects to drop evidence.[100]

Police efforts to induce dropped evidence indicate that rather than improve police conduct, *Mapp* may have only intensified the use of force, lying, and deception, pressing police to misrepresent precisely how they acquired evidence.[101] Of course, most dropsy cases did not involve the search of private homes, hence *Mapp*'s success at garnering greater warrant requests. However, even *Mapp*'s warrant data raised questions about the decision's ultimate effects. For example, New York Legal Services concluded that although police requested more warrants to search private rooms following *Mapp,* the actual location of arrests generally

95. *Id.*
96. *Id.*
97. *Id.*
98. *See* Oaks, *supra* note 91, at 699 n.90.
99. *Id.*
100. *Id.*
101. Evidence of *Mapp*'s detrimental effect was substantiated by a presidential commission appointed by Lyndon Johnson to investigate urban unrest in the 1960s, which found that "field interrogations are a major source of friction between the police and minority groups." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967) [hereinafter PRESIDENT'S COMM'N]; *see also* Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of* Terry v. Ohio, 23 FORDHAM URB. L.J. 317, 326 (1995). For a discussion of the difficulty of ascertaining the exclusionary rule's full effect, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369 (1999).

seemed to migrate out of private rooms and into public spaces following the decision. To illustrate, the location of most arrests prior to *Mapp* were streets (35%) and "unexplained rooms" (26%), meaning "rooms entered without explanation by the police."[102] Following the ruling, police reported lower numbers of arrests in unexplained rooms, dropping them from 26% to 12%, meanwhile increasing arrests in "halls," "roof landings," and "basements."[103]

What did this mean? Just as *Mapp* may have pressured officers to acquire warrants before entering homes, so too may the decision have refocused police attention on public space.[104] Rather than improve police professionalism, the decision simply transported police corruption, removing it from private homes to public areas (streets, halls, roof landings, and basements), where police could then shake down suspects for evidence.[105] This seemed a reasonable conclusion to New York Legal Services, who surmised that officers may have "stopped entering private rooms" and turned instead to spending "more time in the streets and halls."[106] Rather than "level the playing field" between rich and poor, *Mapp* simply provided more privacy to the already well-off, particularly those wealthy enough to live behind closed doors—either in spacious suburban homes or door-manned buildings—where police were unlikely to prowl.[107] Conversely, poor residents of cramped apartments and public housing projects—the very people most in need of public space—suddenly found themselves the targets of intensified police searches, albeit in their halls, landings, and basements.[108]

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102. Barlow, *supra* note 11, at 570.

103. *Id.*

104. That *Mapp* may have encouraged police to focus on public space provides an ironic backdrop to the argument made by criminal law scholar Tracey Meares that law enforcement should be "re-engineered" so that its "negative consequences [are] not visited upon weakly organized communities." Tracey L. Meares, Place *and Crime*, 73 CHI.-KENT L. REV. 669, 696 (1998); *see also* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 474 (2000) ("[P]oor, minority, inner-city communities generally conform to a place-based social organization model of crime.")

105. Barlow, *supra* note 11, at 570.

106. *Id.* at 558.

107. For the playing field analogy, see Stuntz, *supra* note 13, at 1288. For the argument that Fourth Amendment jurisprudence discriminates against the poor, see Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401–02 (2003).

108. Here, data from New York sharpens the point made by I. Bennett Capers that police procedure is tied closely to the racialization of space. *See, e.g.*, I. Bennett Capers, *Polic-*

To what extent, if any, did the Supreme Court anticipate such an outcome? Rather than predict police corruption, the Court seemed convinced that *Mapp* would diminish it. "If the Government becomes a lawbreaker," lectured the majority opinion, "it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[109] Rather than breed anarchy, the Court seemed to think it was restoring public confidence by reforming police behavior. "Nothing can destroy a government more quickly than its failure to observe its own laws," the Court concluded, implying that *Mapp* would ultimately pressure law enforcement to heightened, not lowered, lawfulness.[110]

Not everyone agreed. Only a few months after *Mapp* was handed down, the U.S. Civil Rights Commission declared that better methods of improving police conduct existed than "those which provide sanctions after the fact," like the exclusionary rule.[111] To the Commission's mind, "preventive" measures promised to be more effective at regulating police misconduct, including measures aimed at "[t]he application of professional standards to the selection and training of policemen."[112] The report asserted that such standards worked for "Federal police agents," and could be further augmented by "good pay, high recruit selection standards, and training in scientific crime detection, in human relations, and in police administration."[113] To encourage such reforms, the Commission recommended federal "grants-in-aid" to state and local governments, enabling them to develop "selection tests and standards," "training programs in constitutional rights and human relations," and "college-level schools of police administration."[114]

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ing, Race, and Place, 44 HARV. C.R.-C.L. L. REV. 43, 46 (2009). *Mapp*'s impact on police strategy in New York City calls into question the extent to which race animated the opinion. Either the Court did not anticipate the opinion's negative impact on urban minorities, or they never intended for the ruling to help African Americans, a contested point. For example, Capers argues that race animated the opinion. Capers, *supra* note 4, at 7.

109. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

110. *Id.*

111. *Excerpts from Civil Rights Unit's Report and Statement by Hesburgh*, N.Y. TIMES, Nov. 17, 1961, at 22.

112. *Id.*

113. *Id.*

114. *Id.*

While the Civil Rights Commission advocated improvements in police training, state and local courts struggled with the challenge of how, precisely, to interpret *Mapp*. "I cannot here even begin to develop all of the conflicting opinions that have been rendered by a variety of trial judges," lamented District Attorney Richard Kuh one year after the decision.[115] To take just a few examples, the Bronx County trial court or "Supreme Court" as it was called in New York, held in *People v. Salerno* that officers had probable cause to frisk a suspicious individual on the street based on the time of night he was sighted, the manner in which he was dressed, and the fact that he appeared to be carrying a weapon.[116] Meanwhile, the New York County Supreme Court held the opposite in *People v. Rivera,* a case where police stopped and "patted the outside" clothing of a suspect detected at 1:30 A.M. peering into the window of a bar and grill in a high-crime neighborhood of Manhattan.[117] According to the court, police officers were authorized to stop but not frisk such suspects prior to arrest.[118]

Not long thereafter, the New York Court of Appeals outraged police when it overturned a policy conviction in which officers had made repeated sightings of individuals handing money to a suspect on the street, searched the suspect, and found a list of numbers and cash.[119] Though considered a classic policy collector situation, Romie Moore's arrest struck the state's highest appellate court as unlawful, particularly since "mere evidence of persons handing money to another person does not prove a crime."[120] Not only did police find such an observation absurd, but the court failed to answer the question whether an officer could search a

115. Kuh, *supra* note 80, at 2.

116. People v. Salerno, 235 N.Y.S.2d 879, 885 (N.Y. Sup. Ct. 1962).

117. People v. Rivera, 238 N.Y.S.2d 620, 621 (N.Y. Sup. Ct. 1963).

118. *Id.* at 624. Two years later, the New York Court of Appeals reversed *Rivera*, holding that police were authorized to stop and frisk suspicious persons. *See* People v. Rivera, 201 N.E.2d 32, 36 (N.Y. 1964). To the court's mind, the "frisking" represented "no more than a proper balance between the constitutional rights of the officers and the public to their lives and the constitutional right of the defendant to his privacy." People v. Salerno, 235 N.Y.S. 2d 879, 887 (N.Y. Sup. Ct. 1962); *see also* John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211, 229 (1964).

119. Kuh, *supra* note 80, at 2 (citing People v. Moore, 183 N.E.2d 225, 225–26 (N.Y. 1962)).

120. *Moore*, 183 N.E.2d at 226.

defendant even if he did not have "conclusive proof" that a crime was being committed.[121]

By March of 1962, Governor Nelson Rockefeller joined police in declaring that "confusion" had become *Mapp*'s primary contribution to the law of search and arrest.[122] To aid patrolmen on the street, Rockefeller endorsed a wave of measures aimed at improving working conditions, training, and pay for police, many of which echoed the Civil Rights Commission's recommendations of 1961.[123] To take just a few examples, the Governor endorsed additional appropriations for state police so that they would not have to work more than forty hours a week.[124] Rockefeller also announced a fifty percent increase in the number of required training hours for police, going from eighty to one hundred twenty, and recommended uniform standards of "age, education, and physical and character qualifications" for all new recruits.[125] For older police officers "who [had] never received formal training," he endorsed the creation of courses that paralleled the "mandatory basic course" required of entry-level police.[126]

Despite Rockefeller's best hopes, police found calls for increased training to be on par with measures like the exclusionary rule—superficial checks that ignored the root causes of inequality. According to New York Police Commissioner Vincent Broderick, large percentages of New York's "Negro and Spanish-speaking" populations were "being discriminated against in housing and forced to live in ghetto areas."[127] Addressing such structural issues, argued Broderick, was more important than correcting superficial matters of training or procedure.[128] To his mind, the "devastating" poverty of the ghetto, including poor "educa-

121. Kuh, *supra* note 80, at 2.

122. Governor Nelson D. Rockefeller, *Law Enforcement Message* (Mar. 23, 1962), *in* NEW YORK STATE LEGISLATIVE ANNUAL 295, 297 (1962) [hereinafter Rockefeller, *Law Enforcement Message*].

123. *See id.* at 301; Governor Nelson D. Rockefeller, *Annual Message* (Jan. 9, 1963), *in* NEW YORK STATE LEGISLATIVE ANNUAL 410, 431–32 (1963) [hereinafter Rockefeller, *1963 Annual Message*].

124. Rockefeller, *Law Enforcement Message*, *supra* note 122, at 301.

125. Rockefeller, *1963 Annual Message*, *supra* note 123, at 431; Governor Nelson D. Rockefeller, *Annual Message* (Jan. 8, 1964), *in* NEW YORK STATE LEGISLATIVE ANNUAL 461, 468 (1964) [hereinafter Rockefeller, *1964 Annual Message*].

126. Rockefeller, *1964 Annual Message*, *supra* note 125, at 469.

127. Letter from Vincent L. Broderick, N.Y. Police Comm'r, to John V. Lindsay, Mayor of N.Y. 7 (Feb. 8, 1966) (on file with New York Municipal Archives).

128. *Id.* at 8.

tion," "housing," and "employment," were "the pressing issue[s] of [that] time."[129] "Is it not time," declared Broderick on February 8, 1966, "for us to stand up and say that we intend to deal with substance and not with shadow?"[130] Only the "marshalling of all of the resources of the State and Federal Governments," continued Broderick, could "help these, our fellow citizens."[131]

In the absence of structural reform, police pushed for more limited gains, including a statute authorizing officers "to search and question a person" suspected of committing a crime "without making an arrest."[132] An early reference to stop and frisks, the measure gained endorsements from the Combined Council of Law Enforcement Officials, a body made up of the State District Attorneys Association, the State Sheriffs' Association, the Municipal Police Training Council and the State Association of Chiefs of Police.[133] All four agencies hoped to carve out exceptions to *Mapp* via state legislation, a point they made clear in a pamphlet entitled *Let your Police—Police!* arguing that *Mapp* had "rendered good police work meaningless and police experience as worthless."[134] To illustrate, the pamphlet cited the facts in *People v. Cassone,* a case involving a police officer who noticed two men "lugging a heavy object into the trunk" of a car, only to find that it was a Western Union safe.[135] Unbelievably, the trial court held that the arrest was unlawful "because it was based 'on mere suspicion,'" not probable cause.[136]

To remedy such problems, the NYPD joined the Combined Council and endorsed four bills that would correct certain inequities in the law of criminal procedure.[137] Two of the four bills authorized officers to arrest suspects in cases where they had "reasonable grounds" or "reasonable cause" for believing that a crime

129. *Id.* at 7–8.

130. *Id.* at 8.

131. *Id.*

132. John Sibley, *Governor to Offer Legislature a Program to Prevent Crime,* N.Y. TIMES, Jan. 7, 1964, at 23.

133. Memoranda of Combined Council of Law Enforcement Officials, *in* NEW YORK STATE LEGISLATIVE ANNUAL 68 (1964) [hereinafter Memoranda].

134. COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, LET YOUR POLICE—POLICE! 1–2 (1963).

135. *Id.* at 4 (citing People v. Cassone, 230 N.Y.S.2d 822, 823 (N.Y. Sup. Ct. 1962)).

136. *Id.* (citing *Cassone,* 230 N.Y.S.2d at 825).

137. *Id.* at 6.

either was being committed or had just been completed.[138] The third facilitated "the execution of [search] warrants" where property risked being destroyed, and the fourth authorized police "to stop, temporarily detain, question and search a person for weapons where there [was] reasonable ground to suspect a crime."[139]

That the NYPD would push for a state law authorizing officers to stop and frisk suspects who appeared armed was not, on its face, a revolutionary move. The genesis of formalizing stop and frisks had emerged as early as 1939, when the Interstate Commission on Crime appointed a committee to draft a model code governing the law of arrest.[140] Prior to that point, a disorganized blend of common law and statute governed how police could handle suspicious persons on the street.[141] Often, this left officers confused about whether stops were technically arrests or not, leading some to avoid questioning suspicious individuals for fear of "a suit for false arrest."[142] At other times, police extended stops to the point that they became unregulated detentions, or "imprisonment ex communicado," a phenomenon that the Uniform Arrest Act sought to contain by placing a two-hour limitation on the time that police could detain someone.[143]

In addition to regulating stops, the Uniform Arrest Act also governed frisks, or searches, authorizing officers to search suspects if they had a reasonable fear that they were dangerous.[144] By holding that a law enforcement officer could search someone whenever he had "reasonable ground to believe that he is in danger," the Uniform Arrest Act settled one of the many questions raised by *Mapp*, namely whether officers could stop and search suspects without a warrant, and without having to lie and say that the suspect had dropped contraband.[145] Rather than encour-

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138. *Id.*

139. *Id.*

140. Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 316 (1942). The committee completed its recommendations in 1942. *See* COUNCIL OF STATE GOVERNMENTS, THE HANDBOOK ON INTERSTATE CRIME CONTROL 86–89 (rev. ed. 1949); *see also* Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 43 (1968).

141. *See* CODE OF CRIMINAL PROCEDURE § 21(a) cmt. A (1930); Warner, *supra* note 140, at 316.

142. Warner, *supra* note 140, at 320.

143. *Id.* at 322.

144. *Id.* at 324–25.

145. *See id.* at 325 (quoting 48 Del. Laws ch. 304, § 51 (1951)) (internal quotation marks omitted).

age corruption, the Act sought to reinforce "respect" for the law among police, meanwhile reducing the odds that suspects might feel "unjustly treated," and less willing to "cooperate."[146]

To its backers, the "stop and frisk" law reinforced the emerging image of the police officer as a professional and an "expert," the very kind of individual that Governor Rockefeller sought to produce with higher standards, in-house training programs, and better hours.[147] Further, the Combined Council promoted the statute as a much needed safety measure for police, not just a tool for better, more effective law enforcement. "Under present law," declared the Council, stopping and frisking a subject would not only amount to an unlawful arrest, but could even invite suspects to "use as much force as necessary" to stop the officer in question, even harming them.[148] Convinced that a stop and frisk law would improve police work conditions, the Combined Council also argued that it benefited those who were searched.[149] Recognizing that police might arrest individuals who they would otherwise only stop and frisk, the Council noted that "[w]henever an innocent person is arrested, charged with a crime, and brought before a magistrate, his reputation is harmed, he is humiliated, greatly inconvenienced and put to considerable expense."[150] Better that suspects simply get patted down on the sidewalk and set free.

Not everyone agreed. Black assemblymen objected to the stop and frisk legislation, arguing "that it would help create 'a police state' by subjecting the people of their districts to 'even greater abuse than they now suffer at the hands of police.'"[151] At the time, the "highest concentration" of arrests in New York occurred in predominantly black neighborhoods, most notably Harlem.[152] Aware of such geographic concerns, black politicians argued that New York's stop and frisk law would "allow policemen to 'push around' citizens and permit them to operate as 'the Gestapo,'" precisely the type of totalitarianism that the Court had tried to

146. *Id.*
147. Memoranda, *supra* note 133, at 64.
148. *Id.* at 67.
149. *Id.* at 66–67.
150. *Id.* at 67.
151. Layhmond Robinson, *Assembly Votes Anticrime Bills*, N.Y. TIMES, Feb. 12, 1964, at 41.
152. Barlow, *supra* note 11, at 579.

address in *Mapp*.[153] Yet, the terrain had shifted. While *Mapp* created a zone of freedom within the home, it intensified police surveillance of the street, a move perfected by the normalization of stop and frisks.[154] As the next section demonstrates, support for stop and frisk only intensified as urban unrest grew, creating a stark disconnect between national narratives of expanding rights for criminal defendants and state sponsored policies of ghetto control.

III. "TO CORRAL AND CONTROL THE GHETTO"

Black complaints about New York's stop and frisk law underscored the complexity of police/minority relations in the city, a relationship that would only become more strained as the 1960s progressed. For example, in June 1963 racial unrest exploded when over one thousand African Americans gathered to protest the arrest of a "Negro vendor of ices" in Harlem as officers "swinging nightsticks" quelled the crowd.[155] According to James Farmer, national director of the Congress of Racial Equality ("CORE") such violence threatened to "boil up 'in Harlems throughout the country'" as black frustration over increased joblessness and "slum conditions" threatened "racial turmoil."[156] To avoid such turmoil, borough legislators met "to enact stronger laws curtailing job discrimination against Negroes and other minorities," prompting city leaders to acknowledge the challenge that structural inequalities posed to black life.[157] Yet, even as New York officials discoursed about long term goals like employment, housing, and education, so too did they recognize the short term necessity of keeping things calm. According to New York City Mayor Robert F. Wagner, "[c]onstructive changes [were] taking place in both the North and the South," but this did not change

153. Robinson, *supra* note 151, at 41.

154. *See id.*

155. THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 304 (2008); *Harlem 'Normal' After Outbreak: Extra Policemen on Street—27 Are Arraigned*, N.Y. TIMES, June 19, 1963, at 20.

156. *Negro Leader Says Unrest May Cause Violence in Harlem*, N.Y. TIMES, June 17, 1963, at 14.

157. *Special Session on Rights Asked: 22 Democrats Seek Action on Job Discrimination*, N.Y. TIMES, June 18, 1963, at 22.

the fact that police bore a particularly "difficult and delicate responsibility" to preserve "peace and order."[158]

Precisely the kind of threat to order that Wagner alluded to emerged in New York on July 9, 1963, when civil rights activists initiated a sit-in on the steps of Manhattan's City Hall.[159] Initially, Wagner allowed the demonstrators to "conduct their sit-in without hindrance," declaring that he had "deep sympathy" for their effort to "focus public attention on the basic problem of civil rights."[160] However, the demonstrators quickly began to engage in activity that Wagner later characterized as "outright provocation," including "outbursts of shouting, chanting, and littering" that created "an unjustifiable interference with the orderly operations of Government at its very seat and center."[161] On August 22, violence between the demonstrators and police erupted, resulting in the injury of three officers.[162] Outraged, Mayor Wagner ordered the "immediate removal" of the protestors.[163] To his mind, the fight to maintain order in the face of what was quickly becoming a "social revolution" taxed police in ways that the fight against "crime and evil" did not.[164] Suddenly, law enforcement had to be versed not simply in "police tactics," but also in "civil rights," precisely so that they could better communicate with potential demonstrators, hopefully diffusing demonstrations without sparking violence.[165] From this came a need for a "well-educated and professionally trained" force, made up of what Wagner referred to as "professional soldiers."[166]

That Wagner wished for professional police/soldiers versed in rights rhetoric underscored the manner in which police professionalism related to the successful management of political demonstrations and minority communities in New York. If police were better educated and better trained, Wagner implied, then they might be less prone to aggravating urban crowds, and less

158. Robert F. Wagner, Mayor of N.Y., Remarks at Swearing in of 600 Policemen at City Hall Plaza (June 26, 1963) (transcript on file with New York Municipal Archives).

159. Press Release, Robert F. Wagner, Mayor of N.Y. (Aug. 22, 1963) (on file with New York Municipal Archives).

160. *Id.* (internal quotation marks omitted).

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* Wagner, *supra* note 158, at 2, 7.

165. *See id.* at 3–4.

166. *Id.* at 3, 7.

likely to incite riots—whether structural factors changed or not.[167] Dramatic evidence of the link between police and riots emerged in the summer of 1964, when violence broke out in New York after a white police officer shot a fifteen-year-old black male in Harlem.[168] During a demonstration protesting the boy's death, "[t]housands" of African Americans "raced through the center of Harlem, attacking white persons, pulling fire alarms and looting stores."[169] Violence continued for three days, eventually spreading to the Bedford-Stuyvesant neighborhood of Brooklyn where a "full-scale riot" exploded after CORE "staged another rally to protest the shooting of the Negro youth."[170]

In an editorial commenting on the violence, black writer James Baldwin confirmed the relationship between police procedure and ghetto containment. "There is a very good reason for the Negroes to hate the police in Harlem," declared Baldwin; their "competence" was "abysmal" and "they know no other way of coping with the forces to which they are exposed" than to engage in "brutality."[171] Such brutality, continued Baldwin, formed a critical part of their efforts "to corral and control the citizens of the ghetto."[172] Baldwin's accusation that the NYPD sought primarily to "corral" the ghetto coincided eerily with the police's own complaints that judicial insistence on procedural reform simply obscured the unfair burden placed on police to maintain urban harmony, meanwhile ignoring the need for substantive political and economic change.[173] Here, a prominent black voice corroborated police complaints, underscoring procedure's role in preventing urban unrest.

That urban unrest threatened the nation became apparent to many during the early months of 1964 as metropolitan areas across the United States erupted in violence.[174] In Jackson, Mis-

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167. Though the pressures of joblessness and "slum conditions" provided the root causes of such riots, Wagner realized that it was all too often police action that triggered them. SUGRUE, *supra* note 155, at 327.

168. *Background of Northern Negro Riots*, N.Y. TIMES, Sept. 27, 1964, at 81.

169. *Id.*

170. *Id.*

171. Baldwin, *supra* note 22, at 3.

172. *Id.*

173. *See supra* text accompanying notes 131–33.

174. *See, e.g.*, Peggy Robinson, *First Race Riot of 1964: 2 Chicago Schools Tangle*, CHI. DEFENDER, Jan. 25, 1964, at 1; *Negroes Riot over K.K.K.; 30 Jailed*, CHI. TRIB., Jan. 19, 1964, at 20 [hereinafter *Negroes Riot over K.K.K.*]; *Police in Jackson Break Up Protest: Use Tear Gas and Shots to Quell Negro Students*, N.Y. TIMES, Feb. 4, 1964, at 22 [hereinafter *Police in Jackson*].

sissippi, for example, "hundreds of [black] students threw rocks, bricks and bottles," at "helmeted officers" after a white man struck a black coed with his automobile in February.[175] Meanwhile in Chicago, "[a]ngry Negroes set fire" to a convenience store and proceeded to "rampage" for two nights after a white shopkeeper accused a black woman of "stealing a bottle of gin."[176] In Atlanta, upwards of 300 black protestors engaged in a "brawling sidewalk demonstration" against "[t]en robed Ku Klux Klansmen" who had entered a downtown Krystal's restaurant.[177] Among the demonstrators was John Lewis, chairman of the Student Non-Violent Coordinating Committee, who allegedly "kicked and elbowed officers" as they placed him under arrest.[178]

The worst rioting stemmed directly from police action. Not only did violence explode in Harlem and Bedford-Stuyvesant after police shot a black teenager in July 1964, but rioting began north of the city in Rochester after "white police moved into a Negro neighborhood" to arrest a man "who had been creating a disturbance at a dance" that same month.[179] Not long thereafter, rioting exploded for three consecutive nights in Paterson, New Jersey after police arrested "a Negro woman on a disorderly conduct charge."[180] Ninety miles south, in Philadelphia, the arrest of "a Negro woman whose car was blocking an intersection" led to "[d]isorders" that lasted three nights in August as "[r]ioters broke store windows, looted shops [and] hurled bricks from roofs at police."[181]

The alarming spike in black violence caught the attention not only of average Americans, but of international audiences. Soviet newspapers like *Isvestiia* and *Pravda* boasted headline coverage of American race riots, charging America of being a land of racial discrimination and political tyranny.[182] Similarly, "leaders of African nations denounced the United States" for its perceived treat-

175. *Police in Jackson, supra* note 174, at 22.

176. *Background of Northern Negro Riots, supra* note 168, at 81.

177. *Negroes Riot over K.K.K., supra* note 174, at 20.

178. *Id.* (underscoring the explosive nature of this particular protest, the Klansmen "remained inside the restaurant because they didn't feel safe leaving while the Negroes were outside").

179. *Background of Northern Negro Riots, supra* note 168, at 81.

180. *Id.*

181. *Id.*

182. ANN K. JOHNSON, URBAN GHETTO RIOTS, 1965–1968: A COMPARISON OF SOVIET AND AMERICAN PRESS COVERAGE 94–95 (1996).

ment of racial minorities, transforming America's ghetto riots into a Cold War liability warranting quick and effective state control.[183]

Public embarrassment over riots spurred government officials across the country, including police, prosecutors, and judges to find ways of quelling the urban disorder.[184] In Philadelphia, for example, officials deliberately curtailed a local tradition, the annual Mummer's Parade, to minimize rioting.[185] Traditionally held on New Year's Day, the parade featured upwards of "15,000 mummers" belonging to thirty-one different marching clubs, including "22 string band units, four fancy groups in satin-covered floats and huge capes, and five brigades of comics."[186] The comics, in a manner that would prove explosive in 1964, often performed "in 'blackface,'" a practice that roused white concern when city officials learned of "an active recruiting program being conducted in Harlem for persons to come here and protest."[187] Local CORE chairman Louis Smith warned that police should "look out for the rooftops because that is the way the people of New York operate," implying that outside demonstrators would come to Philadelphia from New York and hurl missiles down onto paraders.[188] Philadelphia's "400 Negro ministers" concurred, warning that "rioting along the route of the parade" was likely to occur.[189]

To prevent violence, local ministers filed suit in city court, arguing for an injunction banning anyone in blackface from participating in the march.[190] During hearings before a three-judge panel, police officials warned that "there might be 'physical violence' unless blackface marchers were barred [from] the parade."[191] Though attorneys for the parade countered that "blackface . . .

183. *See* RICHARD LENTZ & KARLA K. GOWER, THE OPINIONS OF MANKIND: RACIAL ISSUES, PRESS, AND PROPAGANDA IN THE COLD WAR 1, 162 (2010).

184. *See generally* Jack Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L.J. 1520, 1533–34 (1968) (outlining in Part II the Supreme Court's response to urban unrest which evolved from particularly narrow holdings that appeased protestors to a more authoritarian law and order approach as violence increased).

185. William G. Weart, *Blackface Is Barred in Mummers Parade*, N.Y. TIMES, Jan. 4, 1964, at 1.

186. *Id.* at 19.

187. *Id.*

188. *Id.*; *3 Judges Ban Blackface Make-Up for Mummers*, CHI. TRIB., Jan. 4, 1964, at 1.

189. Weart, *supra* note 185, at 19.

190. *Id.* at 1.

191. *Id.* at 1, 19.

was 'traditional' and [that] the marchers had no intention of belittling Negroes," the three judges presiding over the case decided that a real threat of violence existed, warranting an end to the city's blackface tradition.[192]

As Philadelphia judges regulated Mummers, New York police focused on radical black leaders, among them William Epton, an activist arrested for conspiracy to riot and criminal anarchy in August 1964.[193] Epton's conviction stemmed from the 1964 riots in Harlem, during which Epton publicly called for "organized resistance to the police and the destruction of the State."[194] Epton objected to his conviction, arguing that while he had been an outspoken critic of the United States' "paramilitary police force," his primary concerns were structural, focused on the "inhumane conditions" of ghetto life, including the persistence of high "infant mortality rate[s]," "tuberculosis," and "unemployment."[195]

New York authorities showed little sympathy, positing that the black radical not only voiced interest in encouraging riots, but presented a clear and present danger to the state—a critical element in the charge of criminal anarchy.[196] Not invoked since the prosecution of Communist Benjamin Gitlow in 1920, criminal anarchy seemed a poor fit for Epton, who at best appeared to represent a radical fringe of city politics.[197] Yet, the very fact that Epton became the subject of criminal prosecution underscored at least two interconnected phenomena relating to criminal procedure and radical politics in New York at the time.

First, Epton's conviction for criminal anarchy not only invoked memories of the persecution of communists like Benjamin Gitlow in the 1920s, but pointed to persistent concerns with the kind of structural change that communists continued to endorse into the 1960s. Like Gitlow, for example, Epton also identified with the

192. *Id.*

193. Frank Donner, *The Epton Case: Southern Justice in New York*, 24 GUILD PRAC. 1, 1 (1965).

194. People v. Epton, 227 N.E.2d 829, 835 (N.Y. 1967).

195. William Epton, We Accuse: Bill Epton Speaks to the Court (Jan. 27, 1966), *available at* http://www.mltranslations.org/us/epton.htm.

196. *Epton*, 227 N.E.2d at 835; Jack Roth, *Criminal Anarchy Charged to Epton in Indictment Here*, N.Y. TIMES, Aug. 6, 1964, at 1.

197. *Gitlow Convicted in Anarchy Trial*, N.Y. TIMES, Feb. 6, 1920, at 17; *Gitlow's Defense Is a 'Red' Speech*, N.Y. TIMES, Feb. 5, 1920, at 3; *see* Peter Kihss, *Plot Is Laid to Harlem Witnesses*, N.Y. TIMES, Apr. 6, 1965, at 79.

communist cause, serving as the "vice chairman" of Harlem's Progressive Labor Movement, a Maoist organization boasting upwards of 1200 members.[198] Though not a union leader, Epton's concern with structural inequality paralleled police concerns with structural inequality, underscoring the fact that both police and advocates for the poor viewed procedural reforms simply as superficial salves to much deeper, structural wounds.

Not only did Epton's identification with radical labor point to police/poor parallels, but Epton's conviction itself suggested a contested relationship between the Supreme Court's criminal procedure rulings and civil rights. When *Mapp v. Ohio* was decided in 1961, for example, many assumed that the Court's criminal procedure rulings stemmed from an interest in civil rights, an interest articulated in rulings like *Brown v. Board of Education* in 1954 and *Cooper v. Aaron* attacking massive resistance to civil rights in 1958.[199] Yet, the Court's zeal for such cases cooled in 1964 even as it blazed ahead with its regulation of police, indicating a disconnect between heightened social control and national narratives of expanding freedoms.[200]

To illustrate, the Court's early interest in protesters' rights culminated in a series of rulings overturning the convictions of black demonstrators from 1961 to 1964.[201] One such demonstrator, Janette Hoston, entered a Kress Department store in Baton Rouge on March 29, 1960, and proceeded to sit at a lunch counter reserved for whites.[202] When Hoston refused a request to leave, local police arrested her for disturbing the peace.[203] Though a relatively minor criminal charge, Hoston's breach of the peace conviction nevertheless made it to the United States Supreme Court, who found the case "barren of any evidence that would support a

198. *See* Kihss, *supra* note 197, at 79.

199. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Cooper v. Aaron, 358 U.S. 1, 15–17 (1958); Brown v. Bd. of Educ., 347 U.S. 483, 493, 495 (1954); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 540–41 (1986); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 12 (1962).

200. Escobedo v. Illinois, 378 U.S. 478, 490, 492 (1964) (holding damaging statements inadmissible when defendant was refused his right to counsel).

201. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 163 (1961); *see also* Greenberg, *supra* note 184, at 1531.

202. *Garner*, 368 U.S. at 159–60.

203. *Id.* at 160.

finding that the petitioners' conduct would even 'foreseeably' have disturbed the public."[204] The conclusion was dubious. Sit-in demonstrations had in fact provoked violence and "fist fights between members of the two races" across the South, as the respondents argued in their brief,[205] but the Court ignored such calamities in a bold statement of support for Hoston's protest.[206]

The Court continued its support for protest from 1961 to 1964, deciding upwards of twenty cases in favor of black demonstrators.[207] In one of the last such cases decided in 1964, the Court overturned another breach of the peace conviction, this time in Columbia, South Carolina. In a case styled *Barr v. City of Columbia,* the Court reviewed the arrest of "five Negro college students" for breach of the peace, holding that their sit-in demonstration had been "polite, quiet, and peaceful," and unlikely "to move onlookers to commit acts of violence."[208] Though opposing counsel disagreed, arguing that the demonstration had been "quite tense," and that "everyone was on pins and needles . . . for fear that it could possibly lead to violence," the Court once again downplayed any relationship between demonstrations and unrest.[209]

Barr was the last protest case to hit the Court before the Harlem, Rochester, and Paterson riots that summer. As pitched violence between urban blacks and white police intensified from June to August, the Court reevaluated its position on civil rights demonstrations generally, gradually moving against protesters in a batch of cases originating in the South, two of which involved protests in a church and one of which involved a demonstration in a school.[210] In all, the Court denied certiorari, leaving the convictions intact without a pronouncement of law.[211] Subsequent refusals to grant certiorari followed, coupled with articulations of concern about black demonstrators in cases like *Cox v. Louisiana* in

204. *Id.* at 166.

205. *See* Brief on Behalf of Respondent State of Louisiana at 2, Garner v. Louisiana, 368 U.S. 157 (1961) (Nos. 26, 27, 28); *see also* Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 336, 346 (1960).

206. *Garner*, 368 U.S. at 163.

207. Greenberg, *supra* note 184, at 1529–30.

208. Barr v. City of Columbia, 378 U.S. 146, 147, 150 (1964).

209. City of Columbia v. Barr, 123 S.E.2d 521, 522 (S.C. 1961).

210. Greenberg, *supra* note 184, at 1534.

211. *See* Jones v. Georgia, 379 U.S. 935 (1964); Ford v. Tennessee, 377 U.S. 994 (1964); Diamond v. Louisiana, 376 U.S. 201 (1964); *see also* Greenberg, *supra* note 184, at 1534.

1965. There, the Court held that the exercise of free speech had to be tempered with the need for "maintaining public order, without which liberty itself would be lost in the excesses of anarchy."[212] One year later, the Court upheld the conviction of thirty-two black college students who had gathered in protest at the Leon County jail in Tallahassee, Florida.[213] Though the students were charged with malicious trespass, a conviction the Court had overturned in earlier cases like *Bouie v. City of Columbia* and *Hamm v. City of Rock Hill*,[214] Justice Black held that the demonstrators no longer possessed the right to protest "wherever they please," maintaining instead that local municipalities—"no less than a private owner of property"—retained the "power to preserve the property under its control for the use to which it is lawfully dedicated."[215] Subsequent anti-protest rulings followed; some clearly upholding convictions that would, according to civil rights lawyer Jack Greenberg, "have been reversed" under the Court's early, enthusiastic civil rights phase.[216] By the close of 1967, the Supreme Court had so tired of civil rights that it even upheld the conviction of black civil rights leader Martin Luther King, Jr. for violating an injunction not to march in Birmingham, Alabama four years earlier, noting that "[t]his Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets."[217] Forgetting that the "battle [in] the streets" in Birmingham had in fact been one of the movement's most significant victories, the Court sided instead with what King referred to as the "recalcitrant forces in the Deep South that will use the courts to perpetuate the unjust and illegal system of racial separation."[218]

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212. Cox v. Louisiana, 379 U.S. 536, 554 (1965).

213. Adderley v. Florida, 385 U.S. 39, 40, 48 (1966).

214. Hamm v. Rock Hill, 379 U.S. 306, 307, 317 (1964) (overturning convictions of black demonstrators for violation of trespass statutes); Bouie v. City of Columbia, 378 U.S. 347, 348, 363 (1964) (overturning convictions of black demonstrators for violation of a trespass statute).

215. *Adderley*, 385 U.S. at 47–48 (upholding convictions of black demonstrators for violation of a trespass statute). As Arnold Loewy noted in 1969, "a reasonable would-be demonstrator in the position of Miss Adderley, who read a statute proscribing malicious trespass, would not be likely to conclude that his conduct would come within the ambit of the prohibition." Arnold H. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1226 (1969).

216. Greenberg, *supra* note 184, at 1536.

217. Walker v. City of Birmingham, 388 U.S. 307, 321, 341 (1967).

218. GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS

As the Court curtailed southern streets, so too did it constrict urban landscapes in the North. One year after upholding King's conviction, for example, the Supreme Court upheld the conviction of William Epton in New York, again for violating an injunction not to march.[219] Though Epton was ultimately charged with criminal anarchy, New York's corporation counsel Leo Larkin had also acquired a "temporary injunction" banning black protest.[220] As in Alabama, such injunctions proved a practical tool for containing black protest, one of the many "legal means" that New York Governor Nelson Rockefeller invoked "to maintain order in the state."[221] Though Epton and King differed in their rhetoric,[222] King endorsing non-violence and Epton exhorting blacks to "smash" the state, both leaders fell victim to the same phenomenon: a growing consensus on the Court that black protest in public space needed to be contained.[223]

One possible explanation for the Court's move against civil rights demonstrators just as the nation was celebrating civil rights gains may have been political. While early civil rights demonstrations in the American South curried national sympathy for the black plight, later protests in the North and West sent tendrils of fear through the nation, causing many to fear large-scale disorder and unrest.[224] As Supreme Court Justice Hugo Black put it in 1965, "the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends."[225] Assistant Attorney General for Civil Rights Burke Marshall agreed, declaring that while it was one thing to demonstrate against unjust Jim Crow laws in the South, it was another to take the strategy of civil disobedience and apply it to the "complex and deep-rooted economic and social problems" plaguing minority communities in the

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IN THE CIVIL RIGHTS STRUGGLE 238 (1997).

219. Epton v. New York, 227 N.E.2d 829 (N.Y. 1967), *cert. denied*, 390 U.S. 29 (1968).

220. *Id.* at 29 (Stewart, J., concurring); R.W. Apple, Jr., *Protest Leaders Seized in Harlem*, N.Y. TIMES, July 26, 1964, at 40.

221. Apple, *supra* note 220, at 1.

222. Apple, *supra* note 220, at 40; *The King Philosophy*, THE KING CENTER, http://www.thekingcenter.org/king-philosophy (last visited Apr. 14, 2014).

223. *See* Greenberg, *supra* note 184, at 1536; Apple, *supra* note 220, at 40.

224. *See* Burke Marshall, *The Protest Movement and the Law*, 61 VA. L. REV. 785, 801 (1965).

225. Cox v. Louisiana, 379 U.S. 559, 584 (1965) (Black, J., dissenting in part).

urban north.[226] Such an approach, Marshall warned, risked spreading both disrespect for law and an ensuing "crisis in law enforcement."[227]

Of course, New York police had long claimed that precisely such a crisis was brewing, only growing more deadly as structural causes of inequality went unaddressed.[228] However, the Court showed less interest in ameliorating structural inequality than it did in regulating face-to-face interactions on the street, both by sanctioning the use of injunctions against black demonstrators and, as urban unrest grew, continuing its campaign to reform police procedure.[229] For example, just as the Court began to uphold the convictions of black demonstrators in the South, so too did it impose even more stringent requirements on how police handled criminal suspects in the North, including a requirement that officers alert defendants to their rights prior to questioning.[230] Though liberals celebrated this move, consecrated in a decision styled *Miranda v. Arizona,* few squared it with the Court's anti-protest cases, preferring instead to read the opinion as a victory for the poor.[231] However, the Court's demand that police inform suspects of their Fifth and Sixth Amendment rights promised little in the way of structural reform for poverty, sounding instead like an eerie parallel to calls for a "professional army" well-versed in rights rhetoric like the one endorsed by New York Mayor Robert Wagner in 1963.[232] To Wagner, a more rights-savvy police promised a solution to urban discord, not an end to poverty, a matter that the Supreme Court did not address directly in its *Miranda* opinion, though the implications were clear once read beside its protest rulings.[233] For example, the Court's decisions in *Adderley, Walker,* and *Epton* all indicate that the nation's highest tribunal was becoming increasingly interested in corralling black anger, just as James Baldwin had warned in 1964.[234]

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226. Marshall, *supra* note 224, at 801–02.

227. *See id.* at 785.

228. *See supra* text accompanying notes 8, 9, 131–33.

229. *See supra* text accompanying notes 8, 9, 131–33, 221, 222.

230. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

231. *See, e.g.*, POWE, *supra* note 13, at 397.

232. *See supra* text accompanying notes 167–69.

233. *See supra* text accompanying notes 168–69.

234. *See* Epton v. New York, 390 U.S. 29, 29 (1968); Walker v. City of Birmingham, 388 U.S. 307, 315 (1967); Adderley v. Florida, 385 U.S. 39, 47–48 (1966).

Though *Miranda* provided no guarantee that criminal defendants would actually have their rights upheld, its part in a larger drama of control was even more subtle, particularly as police departments themselves took cosmetic measures to improve the appearance of police action. For example, the NYPD deliberately hired a black officer named Lloyd Sealy to head its Harlem precinct in 1964, a direct response to the riots there that summer.[235] One month later, New York Police Commissioner Michael J. Murphy warned his men not to adopt a "rough manner" when interacting with civilians, particularly racial minorities, noting that harsh manners only bred "hatred and disrespect," amounting to nothing less than "verbal brutality."[236] Not long thereafter, the Department organized a "two-day conclave" attended by chiefs of police from San Francisco, St. Louis, Boston, and Atlanta—a nod to a burgeoning North/South convergence—that aimed to "develop guidelines for police in their daily contacts with the public."[237] Among such guidelines was a need for police to "understand the problems," and the "frustrations . . . of the people living in the communities they serve."[238] Such attention to sensitivity dovetailed nicely with the Supreme Court's requirement in 1966 that police respect the dignity of criminal suspects by publicly reading them their rights.[239]

Yet, many patrolmen still felt mugged, particularly at decisions like *Miranda* that interfered with their ability to fight crime.[240] To them, the ruling threatened the critical process of questioning suspects, a method central to the discovery of evidence.[241] However, police officials like NYPD Commissioner Vincent Broderick took a broader view, explaining to officers that the police function had changed and that patrolmen were suddenly required to do "much more in the community than prevent crime."[242] According to Broderick, they were also required to protect the citizen's right "to peaceful assembly and protest" meanwhile preserving a "cli-

235. *See Harlem Police Leader: Lloyd George Sealy*, N.Y. TIMES, Aug. 15, 1964, at 18.

236. *Police Cautioned on Rough Manner*, N.Y. TIMES, Sept. 12, 1964, at 27 (internal quotation marks omitted).

237. *On Community Relations*, SPRING 3100, Sept. 1965, at 1.

238. *Id.*

239. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

240. LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 176–78, 404–06 (1983).

241. *Id.* at 404–05.

242. *On Community Relations*, *supra* note 237, at 1.

mate of law and social order."[243] Just as some had predicted earlier, "crime-prevention" had gradually taken a back seat to "peacekeeping."[244]

Though the new police function rankled some, preserving order did not always mean infringing on police discretion. To illustrate, the Supreme Court lifted a significant burden from police in 1968 when it decided *Terry v. Ohio,* allowing officers to stop and frisk anyone suspected of actively committing a crime or possessing a weapon.[245] In a related case styled *Sibron v. New York*, the Court held that New York police officers could rely on the Empire State's "Stop and Frisk Law" so long as they possessed "reasonable suspicion" that individuals were either "engaged in criminal activity" or posed "a danger."[246] Though civil rights groups like the NAACP argued that the New York law should be invalidated because it promoted "uncontrolled and uncontrollable discretion by law enforcement officers,"[247] the Court disagreed, heralding a major victory for New York police unions.[248] However, the Court did signal an interest in curbing the excesses generated by *Mapp,* particularly its disapproval of police tactics aimed at creating the illusion of dropped evidence, a move achieved by overturning the conviction of a suspect who police initially claimed "pulled out a tinfoil envelope and did attempt to throw same to the ground."[249] Further, the Court also acknowledged that "frisking" had indeed become "a severely exacerbating factor in police-community tensions," a point underscoring the link between post-*Mapp* policing and urban riots.[250]

Though lamented by liberals, both *Sibron* and *Terry* continued efforts to normalize the streets in New York, marking the culmination of a much larger campaign to address urban inequality

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243. *Id.*

244. *See* Burnham, *supra* note 21, at 35.

245. Terry v. Ohio, 392 U.S. 1, 27 (1968). Criminal procedure scholar David Harris shows how judicial interpretation of *Terry* has significantly expanded police discretion to stop and frisk suspects. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 IND. L.J. 659, 665–66 (1994).

246. Sibron v. New York, 392 U.S. 40, 60 (1968).

247. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, Sibron v. New York, 392 U.S. 40 (1968) (Nos. 63, 74, 67), 1967 WL 113672, at *3.

248. *Sibron*, 392 U.S. at 66.

249. *Id.* at 46 (internal quotation marks omitted).

250. *Terry*, 392 U.S. at 14 n.11 (citing PRESIDENT'S COMM'N, *supra* note 101, at 183–84).

through strategies of riot-avoidance and containment. As we have seen, such strategies did not involve structural reforms to ameliorate poverty so much as procedural rules aimed at scripting police/minority conduct. Nor did such strategies impinge on the larger narrative of expanding rights that came with *Mapp v. Ohio*. In fact, one year after the Supreme Court handed down *Terry*, it revisited a fact scenario uncannily similar to the one in *Mapp* but ruled directly on the obscenity question, allowing individuals to possess obscene materials in their homes, further expanding freedoms germane to domestic space.[251] Even as urban minorities complained of heightened police surveillance on the street, the Court continued to bolster a national narrative of expanding constitutional freedoms, albeit from within the private, interior confines of the home.

CONCLUSION

Three months before the Supreme Court handed down its decision in *Terry v. Ohio*, a commission appointed by President Lyndon Johnson to investigate the causes of urban riots in the United States issued a report, positing that the "abrasive" manner in which police handled ghetto residents posed "a major—and explosive—source of grievance, tension, and disorder," in the United States.[252] Of particular concern to the "Kerner Commission," as it was called, were the "tension-creating effects" of "stop-and-frisk" searches, particularly those conducted at random with little eye to whether individuals were either armed or dangerous.[253] Though the report did not mention *Mapp v. Ohio*, it corroborated the findings of New York Legal Services who had claimed five years earlier that the Supreme Court's extension of the exclusionary rule to the states had worsened police conduct towards minorities.[254] *Terry*, ironically, corrected for this, restricting police to only frisking individuals suspected of being armed or engaged in criminal activity.[255]

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251. Stanley v. Georgia, 394 U.S. 557, 559–60, 568 (1969).

252. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT ON CIVIL DISORDERS 1, 8 (1968).

253. *Id.* at 159–60 (internal quotation marks omitted).

254. *See supra* Part II.

255. *Terry*, 392 U.S. at 30.

That *Terry* might have benefited minorities by undoing *Mapp*'s negative effect on urban policing is generally not recognized by historians of criminal procedure in the United States.[256] Instead, *Terry* tends to be framed as a turn against the civil rights focus of *Mapp,* a coda to the Warren Court's criminal procedure revolution.[257] Yet, recovering *Terry*'s role in correcting *Mapp* is important both for what it says about the exclusionary rule and for what it says about the Warren Court's criminal procedure revolution generally. As this article has shown, the Court framed the exclusionary rule in *Mapp* in terms of intimate privacy rather than racial parity, a point that helps explain why the Court failed to anticipate its negative, urban effects.[258] Second, as this article has also sought to demonstrate, both police unions and black activists lamented the Court's move into procedure not as a liberal effort to help the poor so much as a deliberate attempt to sidestep the need for more extensive, structural reform.[259] Some, like James Baldwin, even accused the Court of simply trying to "corral and control" the "ghetto."[260]

Reframing the Court's criminal procedure revolution as an effort to control the ghetto, though at first glance cynical, actually helps to establish two important points. First, the Supreme Court's curtailment of police behavior in opinions like *Mapp v. Ohio* did not help criminal defendants evenly, proving much more useful to defendants in private houses than public spaces.[261] In fact, *Mapp* worsened police/minority conduct in public spaces, so much so that police themselves began to lobby for formalized stop and frisk rules.[262] As the Supreme Court reviewed such rules, so too did it interiorize liberty, thwarting police invasions of the home meanwhile sanctioning heightened police surveillance of the street.[263]

While criminal law scholar Michelle Alexander has shown that stop and frisks contribute to the incarceration of minorities, she

256. *See supra* note 13. *See generally* Cover, *supra* note 13 (discussing judicial activism in the protection of minorities without mentioning the effect of *Terry v. Ohio*).

257. *See* POWE, *supra* note 13, at 406–07.

258. *See supra* Part I.

259. *See supra* Part II.

260. Baldwin, *supra* note 22, at 3.

261. *See supra* Part III.

262. *See supra* Part III.

263. *See supra* Part III.

fails to account for the liberal/geographic forces that contributed to such a result.[264] Like many historians of criminal procedure, Alexander roots the rise of stop and frisk in a conservative backlash to the Warren Court's criminal procedure revolution, a backlash that extended through the War on Drugs.[265] While this was certainly a factor, the Warren Court's criminal procedure revolution contributed to incarceration as well, first in the privacy frame that inspired *Mapp v. Ohio*, and later in efforts to curb police malfeasance in urban landscapes.[266] That liberal reform joined conservative backlash in compartmentalizing liberty remains one of the least understood, but still important lessons to be learned from criminal procedure reform in the 1960s, a lesson demonstrating clearly how a narrative of expanding liberty could coincide with mass incarceration.

264. ALEXANDER, *supra* note 9, at 133.
265. *Id.* at 5, 59–61.
266. *See supra* Part II.

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