Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference

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[T]he compromise the Court may make in this area is going to last longer than a lifetime.

—Assistant District Attorney James Duggan, during oral argument in Peters v. New York, December 12, 1967

[W]e are writing a new kind of probable cause.

—Justice Abe Fortas, in the Supreme Court's conference on Terry v. Ohio, December 13, 1967

There is, of course, no reason to use the “reasonable suspicion” term unless it means something more or something less than probable cause . . . .

—Justice Hugo L. Black, in his proposed concurring opinion in Terry v. Ohio, circulated February 19, 1968

I. INTRODUCTION

In our system of constitutional decision-making, the Supreme Court makes law as an institution in its formal written opinions. The Court and its individual members make their official legal marks in the printed pages of the United States Reports. In June 1968, in Terry v. Ohio and Sibron v. New York, 4

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4 392 U.S. 1 (1968).
the two decisions that approved the constitutionality under the Fourth Amendment of police stop and frisk practices, the Court filled many official pages with rich discussion. Over the ensuing thirty years, these Court and individual opinions have shaped the course of constitutional analysis in our courts and guided the conduct of law enforcement officers on our streets.

This article looks behind the pages of the United States Reports to information that illuminates the Court's decision-making, including the specific roles that individual Justices played, in the 1968 stop and frisk cases. Seven of the nine Justices who served during the October 1967 Term have left history with extensive documentation of the Court's stop and frisk decision-making. Four of the Justices left papers and other records that are openly available in research libraries: Chief Justice Earl Warren, and Associate Justices William O. Douglas, John M. Harlan, and Thurgood Marshall. Three other Justices left papers that are available for review with the permission of the respective Justice's executor: Associate Justices Hugo L. Black, William J. Brennan, Jr., and Abe Fortas. Each of these collect-

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6 In June 1968, in addition to deciding Terry and Sibron, the Court also dismissed, as improvidently granted, the petition for writ of certiorari in a fourth case that raised stop and frisk issues. See Wainwright v. New Orleans, 392 U.S. 598 (1968) (per curiam). Five Justices filed or joined individual opinions that accompanied the dismissal of the writ in Wainwright. See id. Although those opinions, which accompanied a Court decision of no precedential force, have not surprisingly been less important than the Terry and Sibron opinions, Wainwright's timing and the content of the opinions that were filed in the case make it part of the constellation of 1968's stop and frisk cases. The Court also, in its internal deliberations during the October 1967 Term, treated Wainwright as a stop and frisk case.
8 The Black Papers are in the Library of Congress, Manuscript Division, in Washington, D.C. They do not contain Justice Black's conference notes, however, for they were burned at his instruction shortly before his death in September 1971. See infra note 187.
9 The Brennan Papers are in the Library of Congress, Manuscript Division, in Washington, D.C. The Brennan Papers contain extensive case history memoranda that Justice Brennan and/or his law clerks prepared at the end of each Court Term. In Justice Brennan's bequest to the Library of Congress, he wrote that he "anticipate[d] that access to any case histories would rarely be justified... and that if access is granted, it would be under conditions precluding public quotation of any part of any case history." Letter from William J. Brennan III to John Q. Barrett (Mar. 12, 1998) (on file with author) (quoting the terms of the writer's father's "gift of his documents to the Library of Congress").
tions contains a range of extraordinary documentary information about many topics, including the Court's consideration of the stop and frisk cases thirty years ago.11

As Justice Frankfurter once cautioned, the information about the Supreme Court that can be found in surviving documents should not be mistaken for a complete and accurate history of the Court's work.12 Frankfurter's caution was about reading too much into, or gathering too much from, the Court's reported decisions, but his advice applies equally to all of the Court's, and the Justices', written work product. Much of the Justices' work, like any human activity, gets done through private thoughts, in-person meetings, and oral conversations that are never recorded and thus are lost to history. Documents also depict events in isolation, failing to capture the full docket that is both ordinary life and the work of a Supreme Court Term.

Notwithstanding these caveats, the documents that do exist regarding the stop and frisk cases add to our understanding of the Justices' thinking, working styles and work product at particular points in time. They also illuminate the Court's decision-making, and they add to our general historical knowledge of the Warren Court and the individual Justices who comprised it. The documents also help us to understand that Terry, which we know today as a touchstone of modern Fourth Amendment jurisprudence, was, at its origin, a series of open questions that the Justices worked out for themselves in a diligent, pragmatic, some-

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11 The papers of two other members of the 1967-68 Warren Court, Associate Justices Potter Stewart and Byron R. White, may also add to this record, but they are not currently available to researchers. Justice Stewart deposited his papers at the Yale University Library, Manuscripts and Archives, but all of his Supreme Court files "are closed pending retirement of all Supreme Court justices who served with [him]." E-mail from Nancy Lyon, Librarian, Yale University, to John Q. Barrett (July 28, 1998) (on file with author). Justice White has deposited his Supreme Court case files at the Library of Congress, but they will not be opened to researchers until ten years after his death. Telephone Interview with John E. Haynes, 20th Century Political Historian, Library of Congress Manuscript Division (July 9, 1998).

what anguished and entirely human fashion. The documents, by revealing some of the choices made and the paths not taken, remind us powerfully that constitutional criminal procedure is, within the broad framework of the Fourth Amendment, as much an ongoing process of deciding as it is a business of applying known doctrinal categories.

This article is based upon the available papers of the former Supreme Court Justices.\(^\text{13}\) It chronicles the Court's deciding of the stop and frisk cases during its October 1967 Term. Part II describes the setting: the Justices of the Warren Court, the emergence of stop and frisk as a constitutional issue, and the paths by which four stop and frisk cases—Terry v. Ohio, Sibron v. New York, Peters v. New York,\(^\text{14}\) and Wainwright v. City of New Orleans\(^\text{15}\)—reached the Court. Part III tracks these cases from their acceptance for Supreme Court review, through the Justices votes in conference. It describes in detail the Justices' remarks and positions during their private conference discussions of the stop and frisk cases. Part IV chronicles the first phase of the Court's opinion-writing process. It examines Chief Justice Warren's efforts to write opinions for the Court that decided the cases under the Fourth Amendment's probable cause requirement and the varying, though generally unsatisfied, reactions he received from his colleagues. Part V describes how Justice Brennan persuaded Warren to abandon the probable cause approach in favor of an analysis based on the Fourth Amendment's first clause, which prohibits only unreasonable searches and seizures. Part VI shows how Warren garnered a Court with this "reasonableness" approach but lost the vote of Justice Douglas, who decided to dissent. It also discusses the Court's announcement of its stop and frisk decisions, and its dismissal of Wainwright. Part VII concludes the article by considering what the papers of the Supreme Court Justices tell us about the Court's process of decision-making, its diligent and capable work, its choices among differing ways to frame and resolve the constitutional questions about police stops and frisks, the openness of those questions thirty years ago, and the societal circumstances

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\(^\text{13}\) For an excellent overview of this kind of research, see Bernard Schwartz, Decision: How the Supreme Court Decides Cases vii-xii (1996).

\(^\text{14}\) 392 U.S. 40 (1968).

\(^\text{15}\) 392 U.S. 598 (1968) (per curiam) (dismissing writ of certiorari as improvidently granted).
in which the Court decided them.

II. THE SUPREME COURT SETTING FOR THE STOP AND FRISK DECISIONS

A. The Justices of the 1967 Warren Court

The Court that heard and decided the stop and frisk cases during the October 1967 Term was the Warren Court late in, but fully in, its prime. Earl Warren had been the Chief Justice of the United States since 1953, and he was beginning what he hoped would be his final Term on the Court.16 The Associate Justices who were serving with Warren were the two surviving, and long-serving, Roosevelt appointees, Hugo L. Black and William O. Douglas; three seasoned Eisenhower appointees, John Marshall Harlan, William J. Brennan, Jr., and Potter Stewart; the remaining Kennedy appointee, Byron R. White, President Johnson’s appointee Abe Fortas; and, in his first Term as the Court’s first black member, a second Johnson appointee, Thurgood Marshall.17

Although available Court papers tell much about how the Court rendered its 1968 decisions in the stop and frisk cases, the documents do not illuminate the personal experiences and relationships that were a part of each Justice who participated in the decisions. Warren was a former prosecutor with vast experience working with and around police officers.18 Black found himself

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16 In June 1968, shortly after the Court decided the stop and frisk cases, Chief Justice Warren announced his intention to resign from the Court upon confirmation of his successor. President Johnson nominated Associate Justice Abe Fortas to succeed Warren as Chief Justice. When the Fortas nomination was withdrawn later in 1968, Warren agreed to serve as Chief Justice for the Court’s October 1968 Term. He resigned from the Court when Warren E. Burger’s nomination to serve as Chief Justice of the United States was confirmed in 1969. See Tyrone Brown, Clerking for the Chief Justice, in The Warren Court: A Retrospective 276, 280-81 (Bernard Schwartz, ed. 1996) (a Warren law clerk’s memoir of the October 1967 Term, including Warren’s June 1968 decision to announce his resignation).

17 A small piece of the stop and frisk decision-making preceded Justice Marshall’s arrival on the Court. His predecessor, Justice Tom C. Clark, had been part of the Court’s votes to review the Sibron and Peters appeals, and to grant the petition for a writ of certiorari in Terry. See Docket Sheets: Sibron v. New York, Peters v. New York, Terry v. Ohio (available in William J. Brennan, Jr. Papers, cont. 415, Manuscript Division, Library of Congress).

18 See generally Leo Katcher, Earl Warren: A Political Biography (1967). Warren’s family also had been victimized by violent crime. In 1938, while he was serving as the District Attorney in Alameda County, California, Warren’s father was
during the late 1960s increasingly in disagreement with the Court's criminal procedure decisions he struggled with the disserter's role as he, the Court's oldest member, also began to show his age. Harlan, often aligned with Black in dissent, was virtually blind but continued to accomplish yeoman's work, including the writing of many separate opinions. Douglas, almost thirty years a Justice, was the Court's brilliant loner. Brennan, by contrast, was the Court's alliance-builder and the Chief Justice's closest adviser and collaborator. Stewart was truly the swing Justice; he did not, for example, write a dissenting opinion in a Fourth Amendment case until the mid-1970s. White, on the Court five years, had established himself as an independent thinker and a Justice who was deferential to the policy judgments of officials in the political branches of government, including officials in municipal law enforcement. Fortas was still

brutally murdered during an apparent robbery. See Ed Cray, Chief Justice: A Biography of Earl Warren 94-96 (1997) (describing the crime but not the police investigation). Although investigators apprehended the likely perpetrator, they interrogated him so coercively that Warren's staff, with his approval, declined to prosecute the man. See Katcher, supra, at 101-02.


See William A. Reppy, Jr., Justice Douglas and His Brethren: A Personal Recollection, 12 N.C. Cent. L.J. 412, 421, 426 n.85 (1981) (reviewing Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court (1979), by one of Justice Douglas's law clerks during the October 1967 Term); see also Sidney E. Zion, At 70, the 'Youngest' Justice of All, N.Y. Times, May 26, 1969, at 26 (describing Douglas as the Court's "most liberal member, its quickest and many feel most brilliant mind, its fastest writer and surely its most colorful and controversial character").

See, e.g., Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions That Transformed America 141 (1993) ("Each week before the Court's full conference with all nine judges, Warren called Brennan to his chambers. There they went over the cases that would be discussed the following day."); William O. Douglas, The Court Years 1939-1975: The Autobiography of William O. Douglas 229 (1980) (describing Warren's habit, shortly after he became Chief Justice, of discussing each oral argument case with Brennan prior to the Court's conference; "[t]he two of them had, so to speak, a 'mock' conference").


See, e.g., Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) (White, J., joined by Warren, C.J., and by Douglas, Brennan, and Fortas, JJ.) (holding that the Fourth Amendment requires municipal health and safety inspectors to obtain a warrant before they may enter a private residential apartment, but that constitu-
growing into the role of a Supreme Court Justice while also functioning as one of President Johnson's closest advisers on domestic, foreign, and political issues. Marshall had been sworn in during 1967 after stints as the Solicitor General of the United States, a federal appellate judge, and, before his government service began, decades as Director Counsel of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, Inc. (LDF). The Justices' papers also do not say much about the societal cauldron in which the Court considered and decided the stop and frisk cases. The events that occurred during the pendency of

tional probable cause for such an inspection will be present where “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling”); see also Lance Liebman, Swing Man on the Supreme Court, N.Y. Times Mag., Oct. 8, 1972, at 16, 95. Leibman notes:

White, the former Deputy Attorney General, is more willing than many justices to grant leeway to public officials, to accept their statements of necessity, to approve their discretionary choices. His opinions show great sympathy for the official—whether Cabinet Officer or patrolman—who is given a messy, complicated job, without the resources or training he really needs, and is then second guessed by judges after the event.


25 See generally Laura Kalman, Abe Fortas: A Biography 293-313, 316-18 (1990); see also Abe Fortas, Concerning Dissent and Civil Disobedience (1968) (published during the pendency of Fortas's nomination to be Chief Justice of the United States). One demonstration of Fortas's dual role is a handwritten note, marked "Personal," that he sent to Chief Justice Warren in February 1968. See Letter from Justice Abe Fortas to Chief Justice Earl Warren (Feb. 9, 1968) (available in Earl Warren Papers, cont. 352, Manuscript Division, Library of Congress). Fortas listed three specific items from “the President's Crime message” that “could be helped by the Judicial Conference or other appropriate agencies” and told Warren that “he [President Johnson] asks help.” Id.


Being stopped by a police officer while he was walking on a public street was one of the "shocking" life experiences that Justice Marshall had before he joined the Supreme Court. See Jack Greenberg, Crusaders in the Court: How A Dedicated Band of Lawyers Fought for the Civil Rights Revolution 295 (1994). This incident occurred in 1961, while Marshall was waiting for the Senate to act on President Kennedy's nomination that Marshall serve as a Circuit Judge on the United States Court of Appeals for the Second Circuit. Marshall was stopped as he walked toward the LDF's Manhattan office by a police officer who questioned him about "why he was following a woman who was walking ahead of him." Id. "The officer demanded identification, wrote down [Marshall's] name and other information, and did nothing further." Id.
these Supreme Court cases included a crime explosion across the
country; destructive urban riots; unrest in the so-called urban
ghettos, some of it arising from racial tensions between residents
and the police,27 growing unrest, among students and, generally,
regarding the Vietnam War; Richard Nixon campaigning for the
presidency by highlighting the crime problem and attacking the
Court's criminal law decisions;28 President Johnson's efforts to
pass new anti-crime legislation; his decision not to seek reelec-
tion; and catastrophic acts of gun violence, including the assassi-
nations of Dr. Martin Luther King, Jr. and, just days before the
Court handed down its stop and frisk decisions, Senator Robert
F. Kennedy.29 The Justices' stop and frisk opinions and their
available papers mention almost none of these developments, but
they could not have been irrelevant to the Justices' thinking and
deciding.

B. The Emergence of Stop and Frisk Constitutional Issues

As Professor LaFave has described, the "road to Terry"30 was
a surprisingly long one. For a long time prior to the 1960s, police
officers had been stopping, questioning, and frisking people on
the street who they lacked probable cause or warrants to arrest,31

27 See generally Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Cri-

sis of Criminal Procedure, 86 GEO. L.J. 1153, 1156-58 (1998) (arguing that virtually
all of the Warren Court's landmark criminal procedure decisions of the 1960's arose
from contexts of institutionalized racism).

28 See generally JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT
IN

RICHARD NIXON'S AMERICA 3, 4-7, 8-9 (1973).

29 Senator Kennedy was shot in California late in the evening of Tuesday, June
4, 1968. He died on the afternoon of Thursday, June 6, 1968. The crowd of more than
2,000 people who attended his funeral on Saturday, June 8, 1968, in New York's St.
Patrick's Cathedral included Chief Justice Warren. See J. Anthony Lukas, Thou-

sands In Last Tribute To Kennedy; Service At Arlington Is Held At Night, N.Y.
TIMES, June 9, 1968, at 53. All invited dignitaries were subjected to close scrutiny as
they entered the Cathedral. See id. ("As the dignitaries walked up the steps, their
invitations were checked carefully by plainclothes men. Mrs. Martin Luther King
had her card carefully scrutinized; even Pierre Salinger, President Kennedy's press
secretary, had brief trouble getting in."); cf Seth S. King, Tight Security Catches
Man With Empty Gun Entering Cathedral, N.Y. TIMES, June 9, 1968, at 54
(describing the arrest of a man on the street outside the Cathedral, whose attaché
case was found to contain an unloaded revolver; adjacent photograph depicts a law
enforcement officer looking into the briefcase of a mourner outside the Cathedral).
Two days later, on Monday, June 10, 1968, the Supreme Court handed down its de-
cisions in Sibron, Peters and Terry.


31 One early judicial opinion describes a police officer in Brooklyn, New York,
who was shot and killed while he was "engaged in searching Italians." People v.
but the legal system was slow to focus on the constitutionality of these police practices. One explanation may be that police stops and frisks always have been "low visibility" practices.\(^{22}\) They often did not result in seizures of tangible evidence, arrests or, ultimately, prosecutions and criminal convictions. As a result, the innocent victims of stops and frisks were probably glad that their bad encounters with the police came to an end, and understandably, chose not to make issues of why and how they were stopped and frisked at all.

The litigation that was occurring concerning stops and frisks did not swiftly force the Supreme Court to confront the constitutionality of these practices. In one precursor to the 1968 stop and frisk cases, the United States Department of Justice (DOJ) asked the Court to determine only whether a warrantless police stop and detention (involving, at its inception, an automobile stop) had been an arrest based upon probable cause.\(^{33}\) Because DOJ did not claim that the law enforcement conduct at issue was something less than an arrest that lawfully could occur on some basis less than probable cause, the Court did not need to decide whether police officers may constitutionally make a non-arrest stop in the absence of probable cause.\(^{34}\) In another early case involving an automobile stop, the Court remanded the case for further development of the factual record, and thus, sidestepped the DOJ's claim that it could, in the absence of probable cause, stop

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\(^{22}\) See LAFAVE, supra note 30, § 9.1(a), at 4 (quoting Herman Schwartz, Stop and Frisk (A Case Study in Judicial Control of the Police), 58 J. CRIM. LAW, CRIMINOLOGY & POLICE SCI. 433, 463 (1967)).

\(^{23}\) See Henry v. United States, 361 U.S. 98, 103 (1959) ("The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case.") (footnote omitted).

\(^{34}\) But see Henry, 361 U.S. at 104 (Clark, J., joined by Warren, C.J., dissenting) (refusing to accept the government's concession that a car stop constituted an arrest, and concluding that "[t]he suspicious activities of the petitioner during the somewhat prolonged surveillance by the agents warranted the stopping of the car" before they acquired "indisputable probable cause for the search and arrest").
someone "for the purpose of routine interrogation, ... [with] no
intent to detain the petitioner beyond the momentary require-
ments of such a mission." In other cases, including ones arising
under the stop and frisk statute that New York enacted in
1964, the Supreme Court denied petitions for writs of certio-
rari, and thus "ducked" the constitutional issues regarding po-
lice stops and frisks.

Other legal forces and actors did not wait for the Supreme
Court to define the propriety of stops and frisks. Among the
states, New York took the lead by enacting a statute that
authorized such police activity. In 1966, the American Law
Institute promulgated a draft Model Code of Pre-Arraignment Pro-
cedure that addressed stopping of suspects for investigation. In
1967, President Johnson's Commission on Law Enforcement and
Administration of Justice recommended that more "state legisla-
tures enact statutory provisions prescribing the authority of law
enforcement officers to stop persons for brief questioning." Lower
courts, particularly in the states, also were deciding more
stop and frisk cases and offering increasingly substantive analy-
ses of the Fourth Amendment issues they raised. Scholarly re-
search and writing about law enforcement matters also was fo-
cusing attention on stop and frisk issues. It was only a matter

(authorizing a police officer to "stop any person ... whom he reasonably suspects is
committing, has committed or is about to commit" a crime and to search that person
if the officer "reasonably suspects that he is in danger of life or limb") (codified at
N.Y. CODE CRIM. PROC. § 180-a) (1964) (current version at N.Y. CRIM. PROC. LAW §
140.50 (McKinney 1992)).
37 See People v. Pugach, 204 N.E.2d 176 (N.Y. 1964), cert. denied, 380 U.S. 936
(1965); People v. Rivera, 201 N.E.2d 32 (N.Y. 1964), cert. denied, 379 U.S. 978
(1965).
38 Memorandum by Daniel P. Levitt, Law Clerk to Justice Abe Fortas, regarding
Sibron v. New York 3 (Oct. Term 1966) (available in Abe Fortas Papers, Yale Uni-
versity Library, Manuscripts and Archives) ("The Court has ducked this issue before
(see Rivera and Pugach.").
39 See supra note 36.
40 See LaFAVE, supra note 30, § 9.1(a), at 6.
41 Id. § 9.1(a), at 5 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND
ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967)).
42 See, e.g., Terry v. State, 214 N.E.2d 114 (Ohio Ct. App. 1966), aff'd, 392 U.S. 1
(1968).
43 See, e.g., LaFAVE, supra note 30, § 9.1(a), at 2 n.3 (listing various law review
articles written in the 1960s on stop and frisk issues); L. TIFFANY, ET AL., FIELD
SURVEYS IV: A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S
of time before the Court addressed the constitutional questions regarding police stops and frisks.

C. The Court Takes the Cases

1. Wainwright v. New Orleans

The first of the “stop and frisk” cases that reached the Supreme Court beginning in 1966, and that the Court accepted for review in early 1967, was Wainwright v. New Orleans. Wainwright arose from a street encounter between police and a pedestrian and, as the incident developed, it included a forcible stop by the police and their unconsented-to frisk of the pedestrian. The case is now “seldom noted” because the Court ultimately dismissed it. But the Supreme Court regarded the case, as it was pending during the October 1967 Term and in the four separate opinions that ultimately were filed with its judgment of dismissal in June 1968, as closely connected to the other June 1968 decisions that we think of as the stop and frisk cases.

The case began when Stephen R. Wainwright, a third-year law student at Tulane University, walked in New Orleans’s French Quarter from his apartment to the night club where he worked as a banjo player in October 1964. Two police officers stopped Wainwright as he walked along Bourbon Street, apparently because he matched the description of a murder suspect they were looking to arrest. In addition to having a physical description of this murder suspect, the officers knew that he had a “born to raise hell” tattoo on his left forearm, so they asked Wainwright to remove his jacket to give them a look at his arms.

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43 392 U.S. 598 (1968) (per curiam) (dismissing writ of certiorari as improvidently granted).
46 Mr. Wainwright later obtained his law degree from Tulane and was admitted to the bar. Today he is a lawyer in private practice in Massachusetts.
47 See Telephone Interview with Stephen R. Wainwright (Oct. 8, 1998).
48 See Wainwright, 392 U.S. at 600 (Warren, C.J., dissenting).
49 See id.
Wainwright refused—possibly because, as a law student, he had some sense that the Constitution limits police practices. He told the police he would not allow himself “to be molested by a bunch of cops . . . on the street.”\footnote{Id. at 601.} The police then arrested Wainwright on the “charge of vagrancy by loitering and frisked him.”\footnote{Id. at 602.} As he was being arrested on the street, Wainwright tried three times to walk away “peacefully,” to no avail.\footnote{See id.} Once he was inside the police car, Wainwright called the officers “stupid cops,” which led later to an additional charge against him.\footnote{See id. at 601-02.} At the police station, Wainwright was booked on three vagrancy-related charges, interrogated about being a possible murder suspect, and was told again to remove his jacket.\footnote{See id. at 601-02.} Wainwright still refused to do it. He scuffled with the police as they forcibly removed the jacket, only to discover that he had no tattoo.\footnote{See id. at 602.}

Wainwright’s trial commenced in December 1964.\footnote{See id. at 602-03.} After lengthy adjournments, the trial was still ongoing when, in May 1965, the state brought three new charges against him for events that allegedly occurred inside the police station.\footnote{New Orleans v. Wainwright, 184 So. 2d 23 (La. 1966), cert. dismissed, 392 U.S. 598 (1968).} The “new charges consisted of two counts of disturbing the peace by assaulting police officers, and one count of resisting an officer.”\footnote{Id. at 602.} The state then abandoned the first case and commenced a second trial on the new charges. Wainwright was convicted on all three of the new charges.\footnote{Id.} On appeal, the court reversed his conviction for resisting but affirmed his assault convictions.\footnote{See id. at 602.} The Louisiana Supreme Court denied Wainwright’s petitions for writs of certiorari, prohibition, and mandamus, and held that “[t]he ruling of the Criminal District Court for the Parish of Orleans is correct.”\footnote{See id. at 602-03.}
Wainwright petitioned the Supreme Court for a writ of certiorari on June 21, 1966. The petition asked the Court to resolve whether Wainwright’s arrest and subsequent search were lawful; whether he had a right under the Fourth Amendment to resist the arrest; and whether the lack of evidentiary support on behalf of his conviction constituted a denial of due process. The Court granted the petition on January 9, 1967, but the case could not be scheduled for oral argument until the beginning of the next Court Term, in October 1967.

2. Sibron v. New York

The second case to reach the Court raised so-called “frisk” issues more directly than did Wainwright. Nelson Sibron’s trip to the Court began in March 1965, on Broadway in Brooklyn, New York, a few blocks from the foot of the Brooklyn Bridge. A New York City police officer, Anthony Martin, had been watching Sibron for about eight hours as he walked around Brooklyn, conversing with people Martin knew to be drug addicts. Around midnight, Officer Martin saw Sibron enter a restaurant. Martin followed him inside, interrupted Sibron as he was enjoying pie and coffee, and asked him to “come outside.” On the street, Office Martin told Sibron, “You know what I am after.” Sibron “mumbled something and reached into his...
pocket." Officer Martin simultaneously thrust his hand into that same pocket. He found and seized several glassine envelopes that turned out to contain heroin, and he arrested Sibron for drug possession.

The trial court denied Sibron's motion to suppress the heroin, finding that Officer Martin had probable cause to search Sibron. Sibron pleaded guilty to a misdemeanor offense for the unlawful possession of narcotics but preserved his rights to appellate review. The appellate court affirmed the conviction without opinion. The New York Court of Appeals, which consolidated the case with another, then affirmed Sibron's conviction without opinion, over the dissenting opinions of two judges.

Because Sibron was claiming that New York's stop and frisk statute, on its face, and as applied in Sibron's case, violated the United States Constitution, his case came to the Supreme Court on October 6, 1966, as an appeal rather than as a petition for a writ of certiorari. At the Court's conference on March 10, 1967, all nine Justices voted to note probable jurisdiction in the case. Three days later, the Court announced that it was granting Sibron's motion for leave to proceed in forma pauperis,

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71 Id.
72 See id.
74 See id.
75 See Sibron, 392 U.S. at 47.
76 See id.

The appeal presented two questions to the Court:
(1) Does New York "stop and frisk" law authorize unreasonable searches and seizures, in violation of Fourth and Fourteenth Amendments? (2) If statute is not unconstitutional on its face, is it unconstitutional as applied to authorize pre-arrest search and seizure of narcotics in situation where there is no probable cause to arrest without warrant and make incidental search?

78 See id. In 1966, and for many years thereafter, the Supreme Court was obligated by statute to review every case in which the highest court of a state "held that a state statute did not violate the United States Constitution." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 88 (7th ed. 1993) (citing the former 28 U.S.C. § 1257(2)). This appellate docket imposed an "unwarranted drain" on the Court's resources. See id. at 89. In 1988, new legislation repealed much of the Supreme Court's mandatory appellate jurisdiction. See id. at 88-89; Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Epitaph for Mandatory Jurisdiction, 74 A.B.A. J. 66 (Dec. 1, 1988).
79 See Handwritten note of Justice Abe Fortas, on Memorandum by Daniel P. Levitt, supra note 38 ("all 9 to note").
noting probable jurisdiction and transferring the case to the appellate docket. 81


The third “stop and frisk” case, which had been Sibron’s companion case in the New York Court of Appeals, arose from an incident in a Mount Vernon, New York, apartment complex. 82 Early in the afternoon of July 10, 1964, Samuel Lasky, an off-duty New York City police officer, had just finished showering and was toweling off when he heard a noise at his door. 83 Lasky attempted to investigate, but was distracted when his telephone rang. 84 A few moments later, he looked through the peephole in his door and saw “two men tiptoeing ... toward the stairway.” 85 Lasky called the police immediately and then returned to the peep-hole, where he saw the men still tiptoeing away. 86 Lasky, who had lived in the building for twelve years, knew that the two men were not tenants. 87 Believing that the two men had attempted a burglary, 88 Lasky decided to pursue them. He left his sixth floor apartment and slammed the door behind him. 89 This startled the men, who fled down the stairs. 90 With his service revolver in hand, Lasky chased them. 91

Between the fifth and fourth floors, Lasky “collared” a man named John Francis Peters. 92 Lasky asked him what he was doing in the building and Peters responded that he was looking for his girlfriend. 93 When Lasky asked the woman’s name, Peters responded that she was a married woman and declined to identify her. 94 Lasky then frisked Peters, looking for a weapon. 95

84 See id.
85 Id.
86 See id.
87 See id.
88 See id.
89 See id. at 49.
90 See id.
91 See id. at 49 n.7 (quoting from Officer Lasky’s testimony at the suppression hearing).
92 Id. at 49.
93 See id.
94 See id.
Lasky felt something hard in Peters's pocket and thought it might be a knife, so he removed it. The object turned out to be a sealed opaque plastic envelope containing Allen wrenches and lock picks.

Peters was arrested and charged with felonious possession of burglar's tools. Before trial, the court denied Peters's motion to suppress the tools that Lasky had seized from his pocket. Peters then pleaded guilty, but he preserved his right to seek appellate review of the denial of his suppression motion. On appeal, the Appellate Division of the New York State Supreme Court affirmed Peters's conviction without opinion. The New York Court of Appeals also affirmed, holding that the New York "stop and frisk" statute was constitutional and the motion to suppress had been properly denied.

Peters filed his jurisdictional statement, which asked the Supreme Court to resolve Fourth and Fourteenth Amendment challenges to New York's stop and frisk statute, on October 10, 1966. When the Justices considered the case in March 1967, following their decision to note probable jurisdiction in Sibron, they were not unanimous in seeing value to a second stop and frisk appeal involving the New York statute. Most Justices,

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55 See id.
56 See id.
57 See Peters, 254 N.Y.S.2d at 11.
58 See id. Under New York's law at the time, possession of burglar tools under such circumstances was generally a misdemeanor, but it was a felony if committed by anyone who previously had been convicted. See N.Y. PENAL LAW § 408 (1909). Therefore, Peters, who had been convicted previously, was charged with the felony offense. See Sibron, 392 U.S. at 48 n.5.
59 See Peters, 254 N.Y.S.2d at 13, 14.
60 See Sibron, 392 U.S. at 48.
however, ultimately voted to note probable jurisdiction in the Peters case.\textsuperscript{105} On March 20, 1967, the Court announced that it was granting Peters’s motion for leave to proceed in forma pauperis, noting probable jurisdiction and transferring the case to the appellate docket.\textsuperscript{106} The Court set Peters for oral argument immediately following Sibron.\textsuperscript{107}

4. Terry v. Ohio

The final stop and frisk case to arrive at the Supreme Court became the decision that, in the end, got top billing: Terry v. Ohio.\textsuperscript{108}

John W. Terry’s legal troubles in this case began on a street corner at Playhouse Square in downtown Cleveland, Ohio.\textsuperscript{109} On the afternoon of Thursday, October 31, 1963, a long-time Cleveland police department detective, Martin McFadden, observed Terry and another man, Richard D. Chilton, behaving suspiciously near a busy street corner in Cleveland’s downtown commercial district.\textsuperscript{110} McFadden observed Terry and Chilton for about twelve minutes as each would take a turn walking several hundred feet down the block, peering into the window of a jewelry store or an airline office, and returning to the same corner.\textsuperscript{111} During this time, detective McFadden saw a third man approach
the corner, speak briefly with the two men, and then depart. Terry and Chilton soon left the corner and proceeded down the adjacent street, where they met the third man. McFadden then approached the three men, identified himself and asked for their names. After receiving a mumbled response, he "turned [Terry] around, quickly 'patted down' the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic." McFadden then frisked Chilton, finding a gun in the pocket of his topcoat. Terry and Chilton were charged with carrying concealed weapons. Their pretrial motions to suppress the guns and the bullets they contained were denied and they were convicted at separate bench trials. The Ohio Court of Appeals affirmed the convictions and the Ohio Supreme Court denied review.

Terry and Chilton petitioned the Supreme Court for writs of certiorari on March 18, 1967. Their joint petition asked the Court to resolve whether the officer had, by frisking them, arrested them without probable cause in violation of the Fourth and Fourteenth Amendments, requiring suppression of the gun evidence. Unlike Sibron and Peters, these Ohio cases came from a jurisdiction with no statute authorizing police stops and frisks. They also involved frisks that resulted in seizures of handguns on a public street. Although the Justices considered

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112 See id.
113 See id.
114 See id.
115 Id.
116 See id.
118 See Terry, 214 N.E.2d at 122.
119 See Terry v. Ohio, 392 U.S. 1, 8 (1968).
121 See Terry v. Ohio, 35 U.S.L.W. 3357 (U.S. Apr. 11, 1967) (No. 1161). The petition presented one question to the Court: "Did [the] police officer's mid-afternoon stopping and frisking of suspects constitute unlawful arrest without probable cause, rendering evidence so obtained inadmissible under [the] Fourth and Fourteenth Amendments?" Id.
122 The unique facts of Terry and Chilton, and their implications for future litigation, led the Ohio chapter of the American Civil Liberties Union (ACLU) to file a brief as amicus curiae in support of the petitions for writs of certiorari and on the
holding these cases pending the *Sibron* decision,123 eight Justices ultimately voted to grant review.124 On May 29, 1967, the Court announced that it had granted the petitions and set the case for oral argument immediately following *Sibron* and *Peters*.125

III. INITIAL APPROACHES TO THE STOP AND FRISK CASES

A. The Justices’ Pre-Argument Consideration of the Cases

The interested legal community responded aggressively to the Court’s decisions to hear the stop and frisk cases during its October 1967 Term. The parties filed extensive briefs on the merits and, in addition, amicus curiae filed briefs with the Court. The amici who advocated affirmance of *Sibron’s*, *Peters’s*, and *Terry’s* convictions, and, thus, were urging the Court to give its constitutional imprimatur to police stops and frisks in the absence of probable cause to arrest included Americans for Effective Law Enforcement, an Illinois non-profit corporation;126 the


You will note that [*Terry*] is the “purest” of the three “stop and frisk” cases, inasmuch as it does not involve any statutory interpretation (Ohio has no stop and frisk law), the trial court as trier of fact has specifically found no valid arrest in advance of the “frisk,” and the evidence seized from the person and introduced in evidence against the accused is the weapon for which the cop was looking and not other evidence incidentally discovered. It will, therefore, take a broader rule to reverse [*Terry*] than to reverse [*Sibron*] and [*Peters*].

Id.123

See, e.g., Handwritten note of Chief Justice Earl Warren, on Memorandum by
(available in Earl Warren Papers, Manuscript Division, Library of Congress) (“Hold for *Sibron*[,] No statute involved[,] The Court used the standard of ‘reasonably suspicion’ for frisking.”).

124 See Typed note stapled to Memorandum by Lewis B. Merrifield, Law Clerk to
Justice Douglas (May 20, 1967) (available in William O. Douglas Papers, cont. 1416,
Manuscript Division, Library of Congress) (“No. 67—Grant: Full Court except
Douglas, J. would hold.”).

125 See *Terry v. Ohio*, 387 U.S. 929 (1967). Following Chilton’s death in June
1967, the Court granted Terry’s motion to proceed further in forma pauperis and to
Marshall took no part in considering or deciding these motions. See id. In the end, the
only Ohio stop and frisk case that the Court decided was *Terry’s*.

126 See Brief of Americans For Effective Law Enforcement, as Amicus Curiae,
*Terry* (No. 67) reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME
Attorney General of the State of New York;\textsuperscript{127} the National District Attorneys Association;\textsuperscript{128} and, on behalf of the United States, Solicitor General Erwin N. Griswold.\textsuperscript{129}

The Court also received a powerful amicus brief on the other side of the issue from the national, New York, and Ohio offices of the American Civil Liberties Union,\textsuperscript{130} and a separate amicus brief from the NAACP’s Legal Defense and Educational Fund, Inc. (LDF).\textsuperscript{131} The LDF’s brief, written principally by Professor Anthony Amsterdam, then a member of the University of Pennsylvania Law School faculty, argued that citizens need more protection from aggressive street police investigative tactics and urged the Court to “hold that neither stops nor frisks may be made without probable cause.”\textsuperscript{132} Although Amsterdam’s brief did not emphasize the possibility that some police officers decide which pedestrians to stop and frisk based on race, as opposed to law enforcement considerations, the anti-discrimination objectives of all LDF litigation in the 1960s were no secret. LDF’s involvement in the Terry litigation signaled that police stops and frisks were matters of great concern to racial egalitarians.
throughout the country.

After the LDF filed its amicus brief, it sought the Court's permission to participate in the Sibron, Peters, and Terry oral arguments, which the Court had scheduled together. The Court was informed that Professor Amsterdam, whose work the Supreme Court knew well, would present the oral argument on behalf of the LDF. The LDF's motion stated that "because of its long history representing Negroes—the allegedly prime victim of stop & frisk—it will provide assistance to the Court not otherwise available." A law clerk to Chief Justice Warren noted the LDF's assertion in its brief that "the power of the police on the basis of suspicion to interfere with an individual's freedom of movement and right of privacy... [is] not unconnected with the rioting which has plagued the Nation's cities in recent years" and its statement in its motion "that its argument will be on behalf of a usually voiceless majority—those individuals who are illegally stopped and frisked by police and then let go because nothing incriminating is discovered."

It seems that the Court, when it considered the LDF's motion in November 1967, voted unanimously to grant Amsterdam's request for oral argument time. On November 13, 1967, however, the Court issued an order denying the LDF's motion.

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135 Memorandum by Charles H. Wilson, supra note 134, at 2-3. In his memorandum to Warren, the clerk stated his "feeling... that these cases promise to be every bit as significant as Gideon and Miranda" and urged the Chief Justice to grant the motion. Id. at 3.

136 See Typed note ("No. 63—Grant: Full Court."), stapled to note from William A. Reppy, supra note 134; see also Handwritten note of Chief Justice Earl Warren on Memorandum by Charles H. Wilson, supra note 134, at 2-3 ("Grant Motion to argue—30 minutes—ten minutes in each case to other side.").

137 See Peters v. New York, 389 U.S. 950 (1967). The order states that Justice Marshall, who had been Director Counsel of the LDF prior to becoming a federal appellate judge, did not take part in considering or deciding its motion to participate.
Although the Court papers that are available regarding the stop and frisk cases do not explain the Court’s apparent retreat from its initial decision to grant the motion, it seems likely that the Court wanted the stop and frisk cases to be understood generally as police, but not as race, cases. Given the Court’s internal awareness of the LDF’s claim that blacks were the primary objects of police stops and frisks and the connection between that belief and urban rioting at the time, the Court, in denying LDF’s motion to participate in oral argument, may have been doing what it could to prevent its own work from increasing societal unrest. But it is striking nonetheless that the Court’s June 1968 Terry opinion mentions the connection between stops and frisks and ghetto unrest only in passing.\textsuperscript{139} The Terry opinion also does not mention the race of any individual. A reader of the Court’s opinion will not learn that Terry was a case where a white police officer saw two young black men on a public street, thought they looked suspicious, kept watching them, followed them, and ultimately questioned and frisked them.

\section*{B. The Wainwright Conference and Early Draft Opinions}

On the first two days of the October 1967 Term, the Court heard oral arguments in \textit{Wainwright v. New Orleans}.\textsuperscript{140} It was the first of the Term’s cases that arose out of police conduct toward a pedestrian on a public street that could be characterized, at least at its commencement, as a non-arrest stop.\textsuperscript{141}

The Court’s conference on Friday, October 13, 1967, included a full discussion of Wainwright.\textsuperscript{142} The Justices voiced their frustrations with the factual record of the case.\textsuperscript{143} Some found it

\begin{footnotesize}
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\item[\textsuperscript{139}] See \textit{Terry v. Ohio}, 392 U.S. 1, 14 (1968).
\item[\textsuperscript{141}] Later the same week, the Court heard oral arguments in another case that became a Fourth Amendment landmark. See \textit{Katz v. United States}, 389 U.S. 347 (1967) (argued Oct. 17, 1967).
\item[\textsuperscript{142}] See Appendix A, infra p. 846, for a transcription of Justice Douglas’s and Justice Fortas’s \textit{Wainwright} conference notes.
\item[\textsuperscript{143}] Even during the conference, which of course followed full briefing and oral argument, some Justices still appeared to be sorting out the facts of the case. See, e.g., Handwritten notes of Justice William O. Douglas from the Conference on \textit{Wainwright v. New Orleans} (Oct. 13, 1967) (available in William O. Douglas Papers, cont. 1413, Manuscript Division, Library of Congress) [hereinafter Douglas \textit{Wainwright} Notes] (Justice Brennan explaining, apparently to Chief Justice Warren, that
\end{itemize}
\end{footnotesize}
limited and imprecise.\textsuperscript{144} Others realized that \textit{Wainwright} did not raise the issues they had believed the case implicated when they voted to grant the petition for a writ of certiorari.\textsuperscript{145} By the end of the frustrated conference discussion, seven Justices voted to dismiss the writ as improvidently granted.\textsuperscript{146} Justice Douglas voted to dissent, however,\textsuperscript{147} so the Court's action had to await his circulation of a dissenting opinion.

Douglas immediately set to work. One of his law clerks drafted an extensive dissenting opinion.\textsuperscript{148} After heavy editing by

\textit{Wainwright's} "presence in [the] station house was [a] result of illegal arrest—his May 14 trial was dismissed—then started (App B) the trial of assaulting the officer in the station house").

\textsuperscript{144} Justice Harlan asked if the "amount of force he [Wainwright] used to resist [the] police in jail [was] beyond the pale? he can't make out the answer on this record—record too opaque so he [Harlan] would dismiss or vacate + remand for findings on amount of force used." \textit{Id.}

\textsuperscript{145} Warren, at the start of the conference discussion, "question[ed] whether [the] case is properly here[,] for he [Wainwright] was found guilty only of assaulting officer in jail house—he [Warren] thought when we took the case that he [Wainwright] was arrested and tried for vagrancy—what happened outside the jail—on that ground he would reverse—but it looks like it [the petition] was improvidently granted—no simple element of vagrancy or resisting arrest." \textit{Id.}

\textsuperscript{146} See Handwritten notes of Justice Hugo L. Black from the conference on \textit{Wainwright v. New Orleans} (Oct. 13, 1967) (available in Hugo L. Black Papers, cont. 398, Manuscript Division, Library of Congress) [hereinafter Black \textit{Wainwright} Notes]; Handwritten notes of Justice William J. Brennan, Jr., from the Conference on \textit{Wainwright v. New Orleans} (Oct. 13, 1967) (available in William J. Brennan, Jr. Papers, cont. 415, Manuscript Division, Library of Congress) [hereinafter Brennan \textit{Wainwright} Notes]. The seven Justices who voted to dismiss the petition as improvidently granted were, in order of seniority, Black, Harlan, Brennan, Stewart, White, Fortas and Marshall. \textit{See id.} Chief Justice Warren apparently did not cast a definite vote in conference. \textit{See id.} This seems consistent with his conference remarks. He had stated early in the conference discussion of \textit{Wainwright} that "it looks like it was improvidently granted." Douglas \textit{Wainwright} Notes, \textit{ supra} note 143. Later in the conference, after Harlan had mentioned the possibility of vacating the judgment and remanding the case to Louisiana for factual findings, Chief Justice Warren stated that he "would be willing to vacate for findings." \textit{Id.} Only Douglas, who voted to reverse, stated his willingness to decide the case. \textit{See Brennan \textit{Wainwright} Notes.}

\textsuperscript{147} See Douglas \textit{Wainwright} Notes, \textit{ supra} note 143. Douglas's own conference notes record his view that \textit{Wainwright} "was unconstitutionally in jail." \textit{Id.}

\textsuperscript{148} The law clerk's typed draft dissent was twelve pages of text and an additional fifteen pages of footnotes. \textit{See Justice Douglas's Law Clerk Dissenting Draft: Wainwright v. New Orleans} (available in William O. Douglas papers, cont. 1413, Manuscript Division, Library of Congress). After comprehensively reviewing the complicated factual record, the law clerk determined that because \textit{Wainwright's} initial arrest had been illegal, and thus unconstitutional, his later prosecution for resisting that arrest violated his Fourth Amendment right to use some minimal force to resist an unconstitutional search. \textit{See id. at} 10-11.
Justice Douglas's proposed opinion dissenting from the Court's impending dismissal of *Wainwright* was a brief but powerful three pages. Douglas offered a detailed account of Wainwright's street encounter with the police officers in New Orleans, his refusal to permit them to view his arms, his arrest and transportation to a police station, the scuffle that ensued when Wainwright resisted the officers' efforts to uncover his arms forcibly, and the ultimate lodging of vagrancy charges against him.

Douglas then discussed what he saw as the patent unconstitutionality of Wainwright's arrest for vagrancy. Douglas wrote that the full record of the case "[did] not even approach establishing probable cause" for this arrest. The arrest also had not been made pursuant to an arrest warrant, nor had it been based upon the officers' personal observations of Wainwright committing a crime. He was not even guilty of loitering, because the police saw Wainwright "standing still for only five to 10 seconds." In Douglas's view, Wainwright's "arrest was no more than arrest on suspicion, which of course is unconstitutional and
robs the search of any color of legality.” Douglas thus saw the case as implicating a citizen’s right to offer some resistance to an unconstitutional search of his person. Douglas concluded his proposed dissent by writing that the Justices “owe it to the police and to the public to make clear in these troubled times what are the limits of self-help against unconstitutional police action.”

Douglas’s proposed dissent had a tangible impact on the Court, which had been poised to announce its dismissal of the Wainwright petition, over Douglas’s dissent, on Monday, October 23, 1967. Warren responded to Douglas that he might join his dissent. Harlan said he wanted time to think about it, and he ultimately asked Warren to hold the case over. Harlan then circulated a proposed one-paragraph opinion. Although Harlan

156 Id. at 3 (citing Henry v. United States, 361 U.S. 98 (1959)).
157 See id. at 3.
158 Id.
161 See Memorandum from Justice William O. Douglas to Mr. John Davis, supra note 159.

Justice Fortas, by contrast, apparently was not impressed by Douglas’s proposed dissent. When the Douglas opinion circulated, Fortas’s law clerk, H. David Rosenbloom, sent it in to the Justice with the following note on its first page: “Douglas dissent from dismissal of cert as improvidently granted—he contorts the facts a bit and overstates the argument. No reason to join.” See Justice Abe Fortas’s Copy of Douglas Dissent Draft Circulated Oct. 19, 1967: Wainwright (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives). Later the same day, Fortas initialed and dated the opinion, writing only “Noted” at the top of the page. See id. When Chief Justice Warren later circulated a proposed one-sentence per curiam opinion dismissing the writ of certiorari as improvidently granted, Fortas wrote back immediately to record his continuing agreement with this disposition. See Note from Justice Abe Fortas to Chief Justice Earl Warren (Oct. 25, 1967) (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives); see also Chief Justice Earl Warren, Per Curiam Opinion Circulated Oct. 24, 1967: Wainwright (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) (with handwritten note “I agree AF”).
agreed with Douglas's identification of the ultimate "right to resist" issue,\textsuperscript{164} he said he would concur in the Court's dismissal of Wainwright's petition because the factual record was "too opaque" to adjudicate the lawfulness of Wainwright's resistance.\textsuperscript{165}

In early December 1967, as the Court was preparing to hear oral argument in \textit{Sibron, Peters,} and \textit{Terry,} Chief Justice Warren prepared and circulated his own proposed \textit{Wainwright} dissent.\textsuperscript{166} Warren began, as Douglas had in the solo dissent he had circulated in late October, by reciting in detail the facts of Wainwright's arrest and search.\textsuperscript{167} Warren then concluded, based on the factual record showing neither an arrest warrant nor probable cause to make an arrest, that Wainwright's arrest for loitering by vagrancy, and the search of his person that had flowed from it, had been illegal.\textsuperscript{168} In Warren's view, it was "apparent that the vagrancy charge . . . was used as a pretext for holding [Wainwright] for further questioning concerning a murder."\textsuperscript{169} Warren said that

\begin{quote}
the technique [the police] chose, using a minor and imaginary charge to hold [Wainwright], . . . deserves unqualified condemnation. It is a technique which makes personal liberty and dignity contingent upon the whims of a police officer, and can serve only to engender fear, resentment, and disrespect of the police in the populace which they serve.\textsuperscript{170}
\end{quote}

Unlike Douglas's proposed dissenting opinion, however, which had urged the Court to consider the parameters of a citizen's constitutional right to resist an illegal search or seizure, Warren said the Court should decide only the illegality of the ar-

\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} For reasons stated in the dissenting opinion of my Brother Douglas I agree that the dispositive federal issue in this case is whether the petitioner used an unreasonable amount of force in resisting what on this record must be regarded as an illegal attempt by the police to search his person.
\textsuperscript{167} \textit{Id.}
\textsuperscript{169} See \textit{id. at 1-5.}
\textsuperscript{170} \textit{Id. at 6.}
rest and remand the "right to resist" issue to the Louisiana courts.\textsuperscript{171}

Justice Fortas joined the \textit{Wainwright} fray in December 1967. Justice Fortas, working from a law clerk's draft, circulated a short proposed opinion concurring in the dismissal of \textit{Wainwright}.\textsuperscript{172} After stating his view that the factual record was inadequate and that it could not accurately be augmented on remand, Fortas took issue in two respects with the proposed individual opinions that had been circulated previously.\textsuperscript{173} First, in response to Justice Harlan, Fortas wrote that he was unwilling to state categorically that the police arresting and attempting to search a person is unlawful "where the arrested person produces no identification, attempts three times to walk away, and refuses to dispel any doubt by showing that his forearm is not tattooed."\textsuperscript{174} Second, in response to Justice Douglas's brief statements that citizens may use force in some circumstances to resist unlawful police conduct, Fortas urged the Court not to encourage a belief that police may not seek to identify pedestrians

\textsuperscript{171} See id. at 6-7. Douglas recognized that Warren's proposed opinion, which he was joining, required him to make some modifications in his own proposed opinion. On December 12, 1967, Douglas sent his law clerk a note during oral argument—almost surely the oral argument in \textit{Sibron}, \textit{Peters} or \textit{Terry}—instructing him to attempt such revisions. \textit{See} Typed note from Carl J. Kim Seneker II, Law Clerk to Justice Douglas (Dec. 12, 1967) (available in William O. Douglas Papers, cont. 1413, Manuscript Division, Library of Congress) ("Since you joined his [Warren's] opinion, the introduction to your opinion requires a change, as you indicated in your note from the bench."). Over the next few weeks, each of Douglas's two law clerks drafted minor modifications and inserts to his \textit{Wainwright} opinion, and he accepted some of their suggestions. \textit{See} William O. Douglas Papers, container 1413, Manuscript Division, Library of Congress, for the sequence of proposed revised opinions. Douglas ultimately decided not to join Warren's opinion. \textit{See} Memorandum from Fay Aull, secretary to Justice Douglas, to Chief Justice Earl Warren (June 12, 1968) (available in Earl Warren Papers, cont. 625, Manuscript Division, Library of Congress).

\textsuperscript{172} See Justice Abe Fortas, Concurring Draft Opinion Circulated Dec. 26, 1967: \textit{Wainwright v. New Orleans} (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) [hereinafter Fortas Concurring Draft Circulated Dec. 26, 1967: \textit{Wainwright}]. This initial Fortas circulation, which Justice Marshall joined after it had been revised slightly, see Typed note from Justice Thurgood Marshall to Justice Abe Fortas (Jan. 18, 1968) (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives), is substantially the same as the concurring opinion Justice Fortas filed when the Court dismissed the case six months later, see \textit{Wainwright v. New Orleans}, 392 U.S. 598, 598-600 (1968) (Fortas, J., concurring).


\textsuperscript{174} Id.
who they have detained lawfully. Fortas wrote, using some of his clerk's most colorful language, that he "[d]id not believe that this Court would or should, without careful analysis, endorse the right of a pedestrian accosted by the police, even under a mistake of law, to punch the policeman in the nose, kick him in the shins, or bite him."

C. The Court's December 1967 Conference

The Supreme Court scheduled the Sibron, Peters, and Terry oral arguments, in that order, as part of a cluster of thirteen cases that would be argued during the weeks of December 4 and 11, 1967. Although there is very little documentation of each Justice's preparation to hear these oral arguments, Justice Fortas did preserve a page of short "Pre Argument" handwritten notes that reflect his careful reading of the briefs and his good instincts for recognizing the issues that most of his colleagues would come to see as the core concerns in the cases.

On December 11 and 12, 1967, the Supreme Court heard nine attorneys argue for more than the scheduled four hours in

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175 See id. at 2.
176 Id.
177 See Hearings Scheduled, 36 U.S.L.W. 3232 (Dec. 5, 1967). Unlike today's Court, which generally schedules cases for oral argument on specified days for defined blocks of time and then sticks to that schedule, the 1967 Court announced only the sequences in which cases would be argued and how long each argument was scheduled to last. In practice, this meant that counsel often had to be present and ready to argue on days when the Court fell behind schedule and did not get to hear argument in the later cases.

178 See Fortas Pre-Argument Terry Notes, supra note 129. Regarding Sibron, Fortas wrote that he intended, based on his reading of the briefs, to vote to "Reverse (as Dist Atty concedes) because this is search—not frisk." Id. Fortas was less certain about how to vote going into the Peters oral argument, because he saw "[a]mbiguity as to whether this was a frisk—Maybe remand under our opinion." Id. Regarding Terry, Fortas wrote that he "would affirm this one—It is [a] stop on reasonably suspicious conduct, frisk—discovery of weapon & prosecution for weapon concealment." Id.

Justice Fortas also made and then preserved a page of handwritten notes during each of the three oral arguments. See Handwritten pages headed "63—Sibron v N.Y.," "#74" and "67—Terry v Ohio," (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives). These pages are Fortas's notes of selected arguments by counsel, not his own reflections on the cases. See id. The only other Justice who made notes during the oral arguments, that now are available, was Justice Harlan. His only note was "[c]ase is moot" written during the Sibron oral argument. Handwritten note of Justice John M. Harlan, made during Oral Argument on Sibron v. New York (No. 63) (available in John M. Harlan Papers, cont. 305, Seeley G. Mudd Manuscript Library, Princeton University).
the three “stop and frisk” cases. The *Sibron* argument began on Monday, December 11, but the Court recessed for the day before the argument was completed. On Tuesday, December 12, the Court heard the remainder of the oral argument in *Sibron* and then the complete oral arguments in *Peters* and in *Terry*. The other Justices’ active questioning during the oral arguments and their comments during the Court’s conference later that week establish that they too were well-prepared to decide these significant cases.

The Court then met to consider numerous pending matters on Wednesday, December 13, 1967, rather than on its customary conference day of Friday. The December 13th conference, which of course included no one but the nine Justices, lasted more than four full hours. During this time, the Justices voted on ten jurisdictional statements in docketed appeals, twenty-one petitions for writs of certiorari, eleven motions in pending matters, and eight petitions seeking rehearing in decided matters. They


180 See Supreme Court Hearing List for the Session Beginning December 4, 1967 at 7 (including handwritten notes indicating that *Sibron* was argued on both December 11 and 12) (available in Thurgood Marshall Papers, cont. 40, Manuscript Division, Library of Congress). The first day’s arguments in *Sibron* were made by two counsel for appellant Sibron and, on behalf of appellee, by a prosecutor from the Office of the District Attorney for King’s County, New York. See J. SUP. CT., Dec. 11 & 12, 1967, at 200 (available in Thurgood Marshall Papers, cont. 40., Manuscript Division, Library of Congress).

181 See J. SUP. CT., supra note 180, at 200-01. The second day, arguments in *Sibron* were made by the deputy chief of appeals from the Office of the District Attorney for New York County, as amicus curiae on behalf of appellee, and in rebuttal by one of Sibron’s attorneys. See id.

182 See id. Although audiotapes or transcripts of the *Sibron* and *Peters* oral arguments have not been published, an audiotape of the *Terry v. Ohio* oral arguments is available on the Internet. See The Oyez Project: U.S. Supreme Court Multimedia Database (visited Oct. 15, 1998) <http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=378> (containing a digital audio (RealAudio) version of the *Terry* oral argument); cf. 66 LANDMARK BRIEFS, *supra* note 126, at 693, 706-07 (containing an imperfect transcript of the oral argument).


also voted on ten cases, including the four stop and frisk cases, that had been briefed, argued, and submitted for decision.\footnote{See \textit{id}. at 6.}

The Justices apparently discussed the four stop and frisk cases in the order in which they had been argued. In \textit{Wainwright}, the Court voted again to dismiss the petition as improvidently granted. In \textit{Sibron}, the Justices voted eight to one to reverse the conviction. In \textit{Peters} and \textit{Terry}, the Justices voted unanimously to affirm the respective criminal convictions.\footnote{See \textit{id}.}

Based upon the handwritten notes that Justices Douglas, Brennan, and Fortas created during the conference, preserved and later made available to researchers, it is possible to recreate much of the Justices' private discussions regarding these cases.\footnote{The Appendices to this article contain my transcriptions of the conference notes of Justices Douglas, Brennan and Fortas. Chief Justice Warren and Justices Harlan and Marshall appear not to have created and/or not to have preserved conference notes on the stop and frisk cases. Justice Black probably did take notes during the Court's conference on the stop and frisk cases, but shortly before his death in September 1971 he ordered the destruction of all of his conference notes. See Memorandum from Justice Hugo L. Black to Mrs. Lamb, secretary to Justice Black (undated) (available in Hugo L. Black Papers, cont. 63, Manuscript Division, Library of Congress) (instructing his secretary to burn his conference notes); Handwritten notes by Frances Lamb, secretary to Justice Black, on Letter from Julius Paul to Mr. John F. Davis, Clerk of the Supreme Court (Jan. 10, 1972) (available in Hugo L. Black Papers, cont. 63, Manuscript Division, Library of Congress) ("He [Black] sent me a personal note from his hospital bed even before retirement, to destroy what we had discussed."). See generally BLACK, supra note 183, at 276 (describing the paper burning that Black's family called "Operation-Frustrate-the-Historians" from the diary entry for September 11, 1971). The papers of Justices Stewart and White, including any conference notes that they may have made and preserved, are not currently available to researchers. See supra note 11.}

1. \textit{Wainwright}

The stop and frisk portion of the Court's December 13, 1967, conference seems to have begun with a renewed, but apparently a very brief,\footnote{Based upon the complete absence of notes of any substantive discussion, I conclude that the December 13 \textit{Wainwright} discussion was very brief. For example, Justice Douglas's page for conference notes, typed with the \textit{Wainwright} case caption and the December 13, 1967 conference date, is completely blank (available in William O. Douglas Papers, cont. 1413, Manuscript Division, Library of Congress).} discussion of \textit{Wainwright v. New Orleans}. The Justices reaffirmed their conference decision of October 13, 1967, to dismiss Wainwright's petition for a writ of certiorari as improvidently granted,\footnote{See Handwritten note of Justice Hugo L. Black on the Conference List for}
stop and frisk cases had been argued, to hold *Wainwright* until they were decided.  

2. *Sibron*

Following their brief consideration of *Wainwright*, the Justices seem to have turned to *Sibron*, which was the first of the stop and frisk cases that had been newly argued. The Justices had little to say about the so-called stop and frisk in that case. Each Justice agreed that Officer Martin's conduct toward Sibron had been unconstitutional. The Justices' discussion, and the disagreement among some of them, focused on identifying the correct procedure by which the Court should dispose of the case.

Chief Justice Warren led off the conference discussion of *Sibron*.  

Although this appeal had asked the Court to decide the constitutionality of New York's stop and frisk law,  

Warren told his colleagues that he favored not reaching that question. In Warren's view, the *Sibron* case did not raise a question of the statute's constitutionality. Warren believed that Officer Martin's treatment of Sibron in the restaurant and on the street in Brooklyn had not been the kind of stop and frisk that the New York law purported to permit. It had been, instead, a "plain arrest" and a "search without probable cause." Warren thus voted to reverse Sibron's conviction.

Although a representative of the Brooklyn District Attor-
ney's Office had "confessed" during oral argument that the New York Court of Appeals had erred in finding that Officer Martin had the required legal basis under New York's statute to stop and frisk Sibron, Warren said he would not vote to dismiss the case as moot or to remand it to let New York's Attorney General confess error in a lower court. **196** Warren favored reversing outright. **197**

Justice Black, the senior Associate Justice, spoke next. Although Black agreed with Warren that Sibron had been searched illegally, Black did not vote to reverse. **198** Based upon the prosecutor's oral argument, Black said that the conviction should be vacated and the case remanded to the New York Court of Appeals for it to consider the "confession of error." **199**

Justice Douglas, speaking next, focused on the different remedies that Warren and Black were advocating. Douglas said he was following Warren, **200** but he stated a refinement of the Warren position. Douglas said he was voting to reverse, but he advocated a remand solely to the New York Court of Appeals. **201** Douglas seems to have been concerned to state with precision that Sibron's case should not be remanded below the New York Court of Appeals, which would have made retrial a possibility.

Justice Harlan spoke next. Although he agreed with Warren that the police conduct in *Sibron* had been illegal, **202** Harlan articulated a new view of the Court's proper response. Harlan did not believe that the Court should credit the local prosecutor's statement at oral argument that New York's highest court had erred when it determined that Officer Martin's conduct fell within the ambit of the state's stop and frisk law. **203** In Harlan's

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**196** See Douglas *Sibron* Notes, supra note 193 (Warren: "would not go on mootness—would not remand to let AG confess error below.").

**197** See id.

**198** See Handwritten notes of Justice Abe Fortas from the Conference on *Sibron v. New York* (Dec. 13, 1967) (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) [hereinafter Fortas *Sibron* Notes].

**199** Douglas *Sibron* Notes, supra note 193.

**200** See Fortas *Sibron* Notes, supra note 198.

**201** See id. (Douglas: "Follow Chief—reverse but just to send back to Ct of Appeals").

**202** See Douglas *Sibron* Notes, supra note 193 (Harlan: "on merits he would agree with CJ"); Fortas *Sibron* Notes, supra note 198 (Harlan: "If reached merits, would agree with Chief").

**203** See Douglas *Sibron* Notes, supra note 193 (Harlan: "can't take DA confession of error against by Ct of A"); Fortas *Sibron* Notes, supra note 198 (Harlan: "Wouldn't take DA's confession of error in face of highest court of state").
view, rather, the case was moot\textsuperscript{204} because Sibron had finished serving his six month prison sentence before his case reached the Supreme Court. Harlan thus voted to dismiss.\textsuperscript{205}

The remaining Justices added little to the discussion. Justice Brennan said simply that he voted to reverse.\textsuperscript{206} Justice Stewart urged his colleague to “forget” the possibility of mootness and voted to reverse “on [the] merits.”\textsuperscript{207} Justices White, Fortas, and Marshall voted similarly.\textsuperscript{208}

3. Peters

Following the discussion of Sibron, the conference turned to Peters. Chief Justice Warren began by expressing his amazement that Officer Lasky’s conduct—a police officer, armed with his service revolver, draws his gun, chases two men through an apartment building hallway and down a staircase, catches one, questions him at gunpoint, pats the surface of his clothing and, feeling something hard, reaches into his pocket to seize objects that turned out to be burglar’s tools—could be considered a “stop and frisk.”\textsuperscript{209} According to Warren, if this was a stop and frisk then “anything can be.”\textsuperscript{210} In Warren’s view, Lasky’s treatment of Peters was plainly an arrest. It was nonetheless fully legal, in Warren’s view, because Lasky had, and acted upon, “probable cause to believe [Peters and his colleague] were committing a crime.”\textsuperscript{211} Warren said that the case thus was not an occasion for the Court to consider the constitutionality of police conduct

\textsuperscript{204} See Douglas Sibron Notes, supra note 193; Fortas Sibron Notes, supra note 198.

\textsuperscript{205} See Douglas Sibron Notes, supra note 193; Fortas Sibron Notes, supra note 198. Harlan also said, apparently voicing his secondary preference for disposing of Sibron, that he would vacate the conviction based upon the prosecutor’s “confession of error.” Douglas Sibron Notes, supra note 193.

\textsuperscript{206} See Douglas Sibron Notes, supra note 193; Fortas Sibron Notes, supra note 198.

\textsuperscript{207} Douglas Sibron Notes, supra note 193.

\textsuperscript{208} See id.; Fortas Sibron Notes, supra note 198.


\textsuperscript{210} Id.

\textsuperscript{211} Id.; accord Handwritten notes of Justice Abe Fortas from the Conference on Peters v. New York, No. 74 (Dec. 13, 1967) (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) [hereinafter Fortas Peters Notes] (Warren: “He had probable cause”).
permitted by New York's stop and frisk law.  

Justice Black agreed with Warren that Peters's conviction should be affirmed. Justice Douglas also voted to affirm, noting that Lasky had probable cause to believe that he had interrupted Peters's commission of a burglary.

As he had in the conference discussion of Sibron, Justice Harlan again took his own tack. Harlan said that the Court was not free to find that Lasky had probable cause to seize Peters because the New York courts had not treated the case that way. Harlan told his colleagues that the legality of this conduct rested on the New York stop and frisk statute. Harlan said that Lasky's conduct would be "OK" if it conformed to the statute, but the available notes do not indicate that Harlan stated any conclusion as to whether Lasky's conduct fit the statute.

The remaining Justices apparently had little interest in discussing the case further. Justice Brennan said that he was voting to affirm, leaving the details in Warren's hands. Justices Stewart, White, Fortas, and Marshall simply stated their votes to affirm.

4. Terry

The Justices' notes suggest that, among the stop and frisk cases they considered in conference on December 13, 1967, their discussion of Terry filled the longest period of time.

Chief Justice Warren, beginning the discussion, viewed the case as an instance of "question and frisk" rather than "stop and frisk." Warren said that the issue in the case was whether Detective McFadden, the Cleveland police officer, had probable cause at two moments in time: (1) when he first spoke to Terry and Chilton on the downtown street; and (2) when McFadden subsequently frisked them on the street and inside a downtown

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212 See Douglas Peters Notes, supra note 209.
213 See id.; Fortas Peters Notes, supra note 211.
214 See Douglas Peters Notes, supra note 209 (Douglas: "[affirms]—probable cause for believing a burglary was under way").
215 See id. (Harlan: "can't find probable cause—NY courts did not treat it that way").
216 See id.
217 Fortas Peters Notes, supra note 211 (Harlan: "ok if under stop + frisk").
218 See Douglas Peters Notes, supra note 209 (Brennan: "affirms in CJ's hands").
219 See id.; Fortas Peters Notes, supra note 211.
store. Warren told his colleagues that, with regard to the first moment (i.e., the approach to question), McFadden had probable cause to investigate Terry and Chilton. Warren said that an officer who sees what McFadden saw has "a duty to pursue it," which means that he has to talk to the people he has been observing. In making this point, Warren recognized that a trained police officer may see things, and thus have probable cause (and thus a duty) to take action, in a situation where an "ordinary citizen" might not. Warren went on to say, however, that people who are questioned by a police officer "don't have to answer" the officer's inquiry, and they may even "walk away," which would leave the officer with "no probable cause" to do anything further.

Regarding the second moment, the frisk, Warren said that McFadden had probable cause "to fear he might be endangered." Warren stated that an officer in that situation "can

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220 See Handwritten notes of Justice William J. Brennan, Jr. from the Conference on Terry v. Ohio (Dec. 13, 1967) (available in William J. Brennan, Jr. Papers, cont. 415, Manuscript Division, Library of Congress) [hereinafter Brennan Terry Notes] (Warren: "Did police officer have prob cause to talk to these + did he have prob cause to believe his life was in danger"); Handwritten notes of Justice William O. Douglas from the Conference on Terry v. Ohio (Dec. 13, 1967) (available in William O. Douglas Papers, cont. 1416, Manuscript Division, Library of Congress) [hereinafter Douglas Terry Notes] (Warren: "did police have 'probable cause' (1) to talk to them (2) to think he was in danger of his life").

221 Douglas Terry Notes, supra note 220.

222 See Brennan Terry Notes, supra note 220 (Warren: "Having in mind that a trained policeman may read it differently from [an] ordinary citizen").

223 Douglas Terry Notes, supra note 220; accord Brennan Terry Notes, supra note 220; Handwritten notes of Justice Abe Fortas from the Conference on Terry v. Ohio (Dec. 13, 1967) (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) [hereinafter Fortas Terry Notes].

224 Douglas Terry Notes, supra note 220.

225 Id. Although Warren did not explain what, in his view, gave McFadden probable cause to fear that Terry, Chilton and Katz endangered the detective's safety, Warren did state generally that a detainee's "actions" may give rise to this kind of probable cause. See id. Warren also said that "a trained policeman may read" such actions differently than would an "ordinary citizen." Brennan Terry Notes, supra note 220.

In addition to his comments on danger-based frisks, Warren also told the conference that an officer may frisk "if there is a crime about to be committed." Douglas Terry Notes, supra note 220. In context, the Chief Justice's statement seems to have been connected to his view that an officer may frisk someone who he has stopped, if the officer believes he is endangered by the detainee's presence. However, it does not appear that Warren was asserting that an officer could frisk someone he had stopped merely because the detainee had been, at the time of the stop, on the verge of committing a criminal act.
Based on his analyses of the approach and the frisk, and notwithstanding Detective McFadden's conceded lack of probable cause at either of those moments to make a constitutional arrest, Warren stated that he was voting to affirm Terry's conviction. Warren's response to the analytical tension that might exist in finding probable cause to frisk but not probable cause to arrest was merely to urge his colleagues to adhere to the Fourth Amendment's probable cause requirement. Warren stated that he opposed the idea that the Court "should disregard probable cause" in determining the constitutionality of police stops and frisks. He apparently did not, in other words, attempt to define that constitutional requirement in any of the operative contexts. Warren simply voiced his conclusion that McFadden had probable cause to approach and to frisk Terry and Chilton.

Justice Black spoke next. He described McFadden's questioning—the moment when McFadden started "talking to" Terry, Chilton, and a third man, Carl Katz—as an appropriate exercise of the officer's right to investigate and interrogate people he saw doing peculiar things.

Justice Marshall, who apparently spoke little during the Court's conference on these cases, interrupted Justice Black's comments on Terry to challenge his view of McFadden's dealings with Terry, Chilton and Katz. Marshall said that McFadden had not gone up to the three men in Cleveland "to question them." Although Marshall apparently saw the police conduct as more "stops to frisk" than as "stops to question," his conference vote to affirm and his later decision to join Chief Justice Warren's majority opinion, suggest that his remark in conference—that McFadden had not gone up to Terry, Chilton, and Katz "to question them"—was a sardonic expression of doubt about what the officer's true purpose was. My guess that Marshall was wise-cracking is consistent with Douglas's note of Marshall's remark. The way in which Douglas recorded the remark suggests that Douglas was annoyed that the junior Associate Justice spoke out of turn. See id. (drawing a circle around "TM interrupts to say that police did not go up to them to question them").

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226 Douglas Terry Notes, supra note 220.
227 See id.
228 See id. (Warren: "affirms—he rests solely on 'probable cause'—would not disregard probable cause"); Fortas Terry Notes, supra note 223 (Warren: "Wouldn't put it on any basis other than probable cause—not suspicion or reasonable grounds").
229 See Douglas Terry Notes, supra note 220 (Warren: "There was probable cause (1) to talk to the man [Terry] (2) to fear he [McFadden] might be endangered").
230 Id.
231 See Brennan Terry Notes, supra note 220 (Black: "Does officer have [a] right to interrogate people doing peculiar things? Don't know that this is forbidden by anything in Const.").
police conduct was not an "arrest," it did not raise any Fourth Amendment issue. Indeed, Black said that the police officer's right to stop and question people on the street arose from a body of common law, and thus did not implicate any constitutional provisions at all. Black saw McFadden's frisks as simply an officer exercising his common law right to defend himself. Black thus concluded that any evidence obtained through a frisk would be admissible in a criminal case.

Although Justice Black saw the Terry case during conference as raising no constitutional issues, he recognized that a majority of his Court colleagues believed otherwise. He therefore urged that, in writing a majority opinion finding no Fourth Amendment violation, the Court should "stick by 'probable cause'" rather than resorting to the New York statute's alternative rubric of "reasonable suspicion." Looking ahead to issues that courts would confront following a Terry affirmation, Black also urged the Court not to suggest that an officer who properly has started to question someone may not "make [the] guy stay" to answer questions. In Black's view, the police right to question was also a stop power. It was a right to "delay" someone "temporarily," at least to the point of eliciting some intelligible response. Black thus did not want "anything said [in the opinion] that police can't make [a] guy stay until he answers or he

232 Black said that McFadden had arrested the men "only when he told them to go into [the] store [and] put their hands on [the] wall." Fortas Terry Notes, supra note 223; accord Douglas Terry Notes, supra note 220; Brennan Terry Notes, supra note 220.
233 See Douglas Terry Notes, supra note 220; Fortas Terry Notes, supra note 223.
234 See Douglas Terry Notes, supra note 220.
235 See id. (Black: "agrees with CJ to stick by 'probable cause'-he [Black] would construe reasonable suspicion in NY law to mean ... probable cause"); Brennan Terry Notes, supra note 220 (Black: "Agree that should use 'probable cause' + not reasonable suspicion.").

In his account of the Terry conference, Professor Bernard Schwartz claimed that Justice Black urged the Court, in something of a non sequitur, to "use 'probable cause' and 'reasonable suspicion.' " BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 686 (1983) (emphasis added). Schwartz' account was based upon Justice Brennan's conference notes, which he quoted from but did not identify. See generally id. at xi (referring to documents "made available upon a confidential basis"). The confusion regarding Justice Black's conference position is explained by Schwartz' omission of the word "not" in his transcription of the Brennan notes.

236 Brennan Terry Notes, supra note 220.
237 Douglas Terry Notes, supra note 220.
stubbornly refuses.\textsuperscript{228}

Justice Douglas spoke next, but only briefly. He agreed with Warren and voted to affirm Terry's conviction.\textsuperscript{229}

Justice Harlan, speaking next, expressed some misgivings about the constitutionality of Detective McFadden's frisks of Terry and the others. Harlan was concerned that the frisks had occurred before there was probable cause to believe that a crime was being committed.\textsuperscript{240} He also disagreed with Black's view that Terry and his companions had been properly stopped for questioning, and that the frisks were merely an officer defending himself during the questioning.\textsuperscript{241} Notwithstanding these concerns, however, Harlan said that, he too, was voting to affirm.\textsuperscript{242}

Justice Brennan, the next speaker in conference, also said that he was voting to affirm.\textsuperscript{243} Brennan stated that a police stop of a person—whether to arrest, or to question, or to frisk—is a seizure under the Fourth Amendment.\textsuperscript{244} In his view, the police thus may not make the stop unless they comply with the Fourth Amendment's probable cause requirement.\textsuperscript{245}

Brennan then asked whether there was probable cause for this stop.\textsuperscript{246} His question apparently was a rhetorical one. Beyond the affirmative answer to this question that his vote to affirm implies, there is no record that he stated or explained his answer to the question he posed. He did, however, list collateral issues that should be mentioned in the Court's opinion.\textsuperscript{247}

\footnotesize{\textsuperscript{228} Brennan Terry Notes, supra note 220.  
\textsuperscript{229} See Douglas Terry Notes, supra note 220.  
\textsuperscript{230} See id. (Harlan: "frisking took place pretty early—cop can't do that i.e. frisk without probable cause that a crime is committed").  
\textsuperscript{241} See id. ("he [Harlan] does not look at this as a questioning case."). Harlan may have been picking up on Marshall's earlier, similar statement. See supra note 231.  
\textsuperscript{245} See Douglas Terry Notes, supra note 220; Fortas Terry Notes, supra note 223.  
\textsuperscript{246} See Douglas Terry Notes, supra note 220; Fortas Terry Notes, supra note 223.  
\textsuperscript{247} See Douglas Terry Notes, supra note 220 (Brennan: "there is a seizure not for purpose of booking him for a crime but for purposes of frisking ").  
\textsuperscript{248} See id.; Fortas Terry Notes, supra note 223.  
\textsuperscript{249} According to the notes, Justice Brennan made four drafting suggestions: (1) that the Court not address whether police may continue to detain someone who has been stopped, frisked and found to be carrying "nothing," see Douglas Terry Notes, supra note 220; (2) that the Court not address whether the government may use in evidence "other things" (probably meaning non-weapons) that are found in a frisk, see Fortas Terry Notes, supra note 223; (3) that the Court should refer to its Miranda v. Arizona decision, see Douglas Terry Notes, supra note 220; and (4) that the Court should say that a frisk is a permitted component of custodial detention. See
Justice Stewart spoke next, and briefly. He said that, he too, was voting to affirm Terry's conviction. He also offered some views about issues that the Court's opinion should avoid.

Justice White spoke briefly. He said, he too, was voting to affirm. He then said, connecting back to a topic that Justice Black had raised earlier in the conference, that police "questioning" is not an activity that is governed by the Fourth Amendment. White added, however, that the Fourth Amendment is involved in a "frisk or search."

The newest Justices, Fortas and Marshall, spoke last. Each said he was voting to affirm, which made the Terry decision unanimous. Fortas addressed at some length the type of opinion that he wanted the Court to issue. He called for "a precisely refined opinion[,] not a Miranda[-]type" opinion. Fortas also said that they were "writing a new kind of probable cause." He urged his colleagues to "go case by case." Marshall agreed with Fortas that the opinion should be "narrow" and "precise."

To wrap up the conference discussion, Chief Justice Warren, who was assigning himself to write the Court's opinions in Si-born, Peters, and Terry, stated some of his own ideas about how...
he would write Terry. Warren stated his intention to “write at length.” He said that he planned to explain that the police power to stop and frisk stems from the Fourth Amendment and that, accordingly, a state statute “can’t enlarge a policeman’s rights” to stop and frisk. Warren said he would “use the case to lay down hard rules for stop and frisk” practices.

D. Observations on the Justices’ Conference Discussions

Although the Justices’ handwritten notes that are available today are an incomplete, and thus imperfect, record of the conference discussions of the stop and frisk cases, the notes are informative. Their relative length and complete consistency with each other indicates their reliability. The notes support the following observations about the conference discussions:

• Of the four stop and frisk cases that the Justices considered in their December 1967 conference, Terry was the only one that sparked debate about central Fourth Amendment issues.

papers, cont. 398, Manuscript Division, Library of Congress) (showing that Sibron, Peters and Terry were assigned to the Chief Justice).

Although the notes do not specify when Warren made the remarks about opinion-drafting in the conference discussion of Terry, it seems unlikely that he would have discussed the opinion he planned to write—an opinion approving the constitutionality of McPadden’s conduct—before he had heard that a majority of the Court favored that outcome. Warren’s remarks also seem, in context, to build upon Justices Fortas’s and Marshall’s own comments, made late in the conference, about the kind of opinion the Court should issue. The physical arrangements of both Justice Douglas’s and Justice Fortas’s notes of these remarks by Warren also suggest that he made them at a point in the conference after he had completed his turn as the first Justice to speak. See Douglas Terry Notes, supra note 220 (“CJ would use the case to lay down hard rules for stop + frisk[;] statute can’t enlarge a policeman’s right” is squeezed in, across the typed date and case name heading, above the rest of his chronological notes of each Justice’s comments during the conference); cf. Fortas Terry Notes, supra note 223 (notes of Justices’ statements made on printed sheets with a labeled box for each Justice, four boxes per page; “Would write at length + say rights of police stems from 4th amendment + not from a statute.” is the final note in the Warren box).

Fortas Terry Notes, supra note 223.

See id.

Douglas Terry Notes, supra note 220; accord Fortas Terry Notes, supra note 223 (“Would write at length + say rights of police stems from 4th amendment + not from a statute.”).

Douglas Terry Notes, supra note 220.

The Supreme Court should, like other public institutions, keep a permanent record of deliberative meetings such as the Justices’ conferences and, on a systematic basis after some appropriate period of time, make that fuller record available to the public.
Wainwright was still a case that the Justices were resolved not to decide, and it could wait for decisions in the stop and frisk cases that the Court would be deciding. Sibron raised some ancillary issues that divided the Justices in conference, but they agreed that the police conduct at issue in the case was plainly unconstitutional. Peters, at the other end of the spectrum, involved constitutional police conduct. But Terry raised a constellation of Fourth Amendment issues that the Justices saw very differently.

- Notwithstanding these differences, the Court’s vote to affirm Terry’s conviction was, unlike the ultimate opinion of the Court, unanimous. Justice Douglas, who in the end wrote a biting dissenting opinion, did not say much in the conference, but he did state his agreement with the Chief Justice’s view of the case.

- The Court did not discuss clearly how Detective McFadden approaching, detaining and questioning these men (what we today call the Terry “stop”), did or did not implicate the Fourth Amendment. Were the stops “seizures” of these three persons? Most of the Justices implied that the stops were seizures, for the Justices discussed whether McFadden’s reasons for stopping the men amounted to “probable cause”—which is Fourth Amendment phraseology. Only Justices Black and White spoke squarely to the issue, however, and they said that the questioning did not raise Fourth Amendment issues.

- There was no serious debate about the constitutional status of the frisks in the Terry case. They were, in the view of each Justice, Fourth Amendment “searches.”

- Under the Fourth Amendment as it applies to such stops (seizures) and frisks (searches), what level of justification must a police officer have for such conduct? In conference, the Justices answered this question emphatically with a clarity that is not to be found in the majority opinion that came six months later. Their answer in conference was also stunningly at odds with what we have come to understand, down through the decisions that followed, as the “reasonable suspicion” holding of Terry. The Justices’ answer in conference was the language of the Fourth Amendment itself—“probable cause.”

- There is no record that any Justice mentioned that the Fourth Amendment prohibits only “unreasonable” searches and seizures, or that the concept of reasonableness had any bearing
on their analysis in conference of the constitutionality of Detective McFadden’s conduct.

- Where was McFadden’s probable cause for the questioning? In Chief Justice Warren’s view, McFadden had probable cause to “talk to” the men based on “what he saw,” which Warren described as “a crime about to be committed.” Both Marshall and Harlan disputed this view of the facts. Marshall stated flatly—and out of turn, in this conversation by order of seniority—that McFadden “did not go up to [the men] to question them.” Harlan voiced his agreement, saying he “did not look at this as a questioning case.” In their views of the record, McFadden simply saw what he saw and then frisked the men.

- How may a person respond when an officer, with probable cause to believe that a crime is about to be committed, stops him or her to talk? Chief Justice Warren believed that, in the absence of some additional development that gives the officer probable cause to frisk or, going further, probable cause to arrest, people “don’t have to answer [and] they can walk away—[and] at that point there would be no probable cause.” Justice Black disagreed strongly, although he also thought that this issue did not need to be decided in Terry. Black said he would say affirmatively “this citizen can’t just walk away [and] refuse to talk to the police when questioned.” Black said that he did not want the Court to say “anything . . . that police can’t make [a] guy stay until he answers or he stubbornly refuses.” Justice Brennan said he would “reserve on questions of whether [a] fellow may walk away.” Justice Stewart also recommended that the Court not say that “a citizen can refuse to answer a cop.”

- Given the Court’s view that the frisks McFadden conducted were Fourth Amendment searches, where was his probable cause for those actions? Warren said that McFadden had “probable cause . . . to fear that he might be endangered,” but no one recorded the Chief’s reason for reaching that conclusion. Black said similarly that a “policeman has [the] right to defend himself [and] to frisk them to save his life,” but we do not know how or why he applied that reasoning to this particular police conduct. Harlan voiced his skepticism, stating that this “frisking took place pretty early.” Marshall, however, seemed less troubled in finding a constitutional justification for this piece of police activity. Marshall said he “might put it on suspicion of heist,” which apparently meant that the suspected robbers are
likely to be armed.

- Notwithstanding the social context of the times, the obvious racial tension over street policing practices and the written arguments of the LDF's amicus brief, there is no record that any Justice mentioned race at any point in the conference.

IV. EFFORTS TO DECIDE THE CASES WITHIN THE "PROBABLE CAUSE" FRAMEWORK

A. Chief Justice Warren's Initial Proposed Opinions for the Court

1. The Drafting Process

In Chief Justice Warren's chambers, the lead responsibility for drafting the Terry opinion, and also for drafting a combined opinion in the Sibron and Peters cases, fell to law clerk Earl C. Dudley, Jr. Although he had been hired by retired Justice Stanley Reed, Dudley effectively was detailed to Warren's chambers and served as the Chief Justice's law clerk during the October 1967 Term.265

Dudley had worked for Warren on the stop and frisk cases prior to the December 1967 oral arguments. Dudley wrote Warren an extensive bench memorandum that recommended reversals of the convictions in Sibron, Terry, and Peters.266 On the days of the oral arguments, the Chief Justice scheduled special meetings with Dudley to discuss the cases.267 At Warren's request, Dudley next wrote him a supplemental memorandum, following the three oral arguments but before the Justices had discussed the cases in conference, that summarized the Court's "present approach to the stop-and-frisk problem."268

Following the Court's December 13, 1967, conference, Chief

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265 See BROWN, supra note 16, at 276.
267 See Calendar of The Chief Justice (Dec. 11, 1967) (available in Earl Warren Papers, cont. 35, Manuscript Division, Library of Congress) (showing a 4:30-5:00 p.m. meeting with "Mr. Dudley"); Calendar of The Chief Justice (Dec. 12, 1967) (showing a 4:30 p.m. meeting with "Mr. Dudley").
Justice Warren met with Dudley to discuss the opinion-writing assignments. Warren described the Court's views and votes and assigned Dudley to draft opinions for the Chief's review.

Chief Justice Warren's strong preference was to decide the stop and frisk cases by drafting a model statute that defined proper police conduct in this area. Warren's personal preference, in other words, was for the Court to proceed in these cases much as it had two Terms earlier in *Miranda v. Arizona*. Warren agreed to defer, however, to those who did not want the Court to take a *Miranda*-style approach to the stop and frisk problem. As a result, he was concerned that police would interpret a decision that did not spell out rules for proper stops and frisks as Supreme Court license to stop people at will. His response was to instruct his law clerk to draft an opinion that avoided the "stop" question altogether. *Terry* would be, as Warren saw things, a decision that gave the Court's limited approval solely to Detective McFadden's frisks of the three men.

Dudley performed his assignments with dispatch. Before the end of January 1968, Dudley gave Chief Justice Warren two extensive proposed opinions that had been reviewed by his fellow Warren clerks. One affirmed the conviction in *Terry*. The other, treating the two New York cases together, reversed in *Si- bron* and affirmed in *Peters*.

Chief Justice Warren then reviewed and edited the draft opinions, aided by the input of his closest friend and colleague on the Court, Justice William J. Brennan, Jr. Brennan focused his efforts on the *Terry* draft, sending Warren a six-page typed letter.

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270 *See Memo...11:00-11:30 a.m. meeting with "Mr. Dudley").

271 *See Memo...1-2.

containing his comments.\textsuperscript{275}

Brennan’s letter asked whether the draft reached and, if so, whether it addressed sufficiently, the constitutionality of the “stop” that preceded the \textit{Terry} frisk.\textsuperscript{276} Brennan quoted passages in the draft opinion that said, more or less explicitly, that the only issue being decided was the constitutionality of the frisk. He urged Warren to evaluate whether the stops that preceded the frisks were Fourth Amendment “seizures” and, if they were, to determine whether they had been based upon probable cause.\textsuperscript{277} Brennan wrote that, in his view, the stops certainly had been seizures, but they had been based upon probable cause because of the “circumstances” that McFadden observed prior to making the stops.

In addition to this fundamental issue regarding the constitutionality of the stop, Justice Brennan offered his input to the Chief Justice on a range of other issues. Brennan suggested that Warren move from a footnote into the text the “very important point” that police abuses of stops and frisks that are not followed by criminal prosecutions cannot be remedied by judicial enforcement of the exclusionary rule.\textsuperscript{278} According to Brennan,


\textsuperscript{276} See id. at 1-4. Justice Brennan wrote that he:

\begin{quote}
read the [draft] opinion as in effect not dealing at all with what for me is the basic threshold question which must be answered before we reach the “search” [i.e., the frisk] issue: was the “stop” for the purpose of requiring petitioner to give an account of himself a “seizure” of the person consistent with the Fourth Amendment? I think that in the circumstances of this case it was both a “seizure” and a “seizure consistent with the amendment.” \ldots My problem is that I don’t read the opinion as providing the analysis which justifies this conclusion.
\end{quote}

\textsuperscript{277} Warren’s draft opinion was consistent with the opinions expressed by a majority of Justices in the Court’s December 13, 1967 conference. The opinion stated that the constitutionally-required justification for “searches” such as McFadden’s frisks of Terry, Chilton and Katz was probable cause, rather than some lesser level of justification, such as reasonable suspicion. See Chief Justice Earl Warren, Majority Draft Opinion Circulated Feb. 9, 1968: Terry v. Ohio (available in Earl Warren Papers, Manuscript Division, Library of Congress). Justice Brennan was fully in accord with this view. See Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren, \textit{supra} note 275, at 2. Indeed, Brennan’s letter to Warren noted that his draft opinion risked creating confusion on this point because it twice used the phrase “reasonable grounds” as an inartful synonym for probable cause. See \textit{id}.

\textsuperscript{278} Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren, \textit{supra} note 275, at 5-6.
“[n]ow that the Court is rejecting the extreme position that an officer may stop a citizen only if he has probable cause to arrest him, critics of police abuses ought to be told that they should turn to other agencies of government for the cure.”

Brennan also suggested that the Court explicitly not decide whether contraband that turned up in a proper frisk for weapons would be admissible evidence. Additionally, Brennan urged Warren to consider saying that police need not give someone who they have “stopped” a Miranda warning, because a street stop is not custodial detention, and to reserve the question of how stop and frisk doctrine would apply to motor vehicle stops.

Brennan accepted the basic framework of Warren’s draft, however, which identified “probable cause” as the constitutionally-required basis for police stops and frisks.

2. The First Circulation of Terry

With the benefit of Justice Brennan’s input, Chief Justice Warren modified his Terry draft opinion, had it printed and circulated it to the other Justices on February 9, 1968. Warren’s proposed opinion was lengthy (twenty-seven pages) and, in places, quite acerbic. It began with an extensive introductory
review of the facts and procedural history of Terry's case. Warren then reviewed the Fourth Amendment framework that would be applied to the case. In this section, Warren followed Brennan's advice to discuss in the text the limits of the exclusionary rule as a remedy that can deter police violations of the Constitution. Warren then explained that a police stop of a pedestrian is a "seizure," and a frisk that carefully explores the outer surfaces of his clothing is a "search," that must, under the Fourth Amendment, be reasonable.

Turning to the question of what level of justification the police must have to undertake such actions, Warren wrote that the constitutional requirement is probable cause, explicitly rejecting the view that police only need a "reasonable suspicion." Warren then focused on the frisk, explaining that the probable cause required to justify a search for weapons is probable cause to believe that someone is armed and dangerous, even though that belief does not constitute probable cause to make an arrest.

In its concluding sections, Warren's proposed opinion evalu-
ated the nature and scope of Detective McFadden's conduct toward Terry, Chilton, and Katz. Warren wrote that McFadden's observations of the men's activities on the street warranted further investigation, that McFadden had probable cause to believe that they were armed and casing a store for robbery and that he quite properly seized the defendants and searched them for weapons. His conduct was reasonable in scope, Warren wrote, because he seized them based on probable cause, and because his search was limited to searching the men for weapons.

3. The First Circulation of Sibron and Peters

On the same date that he circulated this proposed Terry opinion, Chief Justice Warren also circulated a proposed opinion that would decide both New York cases, Sibron and Peters, together. It too was lengthy—eighteen pages. Warren's opinion began by describing the New York stop and frisk law. It then reviewed the facts of the arrest, trial, and subsequent litigation in each case. Warren noted, as he introduced the facts of Sibron, that the government's basis for claiming that the heroin evidence was admissible had shifted a few times during the case, and that the New York stop and frisk statute had not been invoked as a justification for the frisk until the appeal to the Supreme Court. Warren also mentioned the prosecutor's confession of error to the Court, and the prosecutor's assertion at oral argument that the case was now moot because Sibron had already served his full sentence and been released from custody. Warren's opinion rejected this mootness claim. The opinion also explained that the Court would not accept the advocate's attempted confession of error.

The remainder of Warren's opinion addressed, in order, New York's stop and frisk law, the Sibron case, and the Peters case.
Regarding the New York law, Warren wrote that the Court would not evaluate its facial constitutionality. He explained that the Court was unable to determine the meaning of its phrase "reasonable suspicion," and that the applications of the law in these two cases demonstrated that its facial meaning was particularly inaccessible. Instead, Warren wrote, the Court would determine what police conduct the Fourth Amendment permits. The label that a state places on such conduct is irrelevant to that inquiry.

Warren then turned to Sibron's particular case. The heroin evidence was inadmissible, Warren wrote, because it had been seized illegally. Sibron was not searched incident to a lawful arrest because Officer Martin never had probable cause to arrest him. Martin's inference that someone who talks to known drug addicts is engaged in crime was, according to Warren, unreasonable and "unacceptable." Warren also wrote that the frisk of Sibron was illegal because Martin never had probable cause to believe that Sibron was armed and dangerous. Even if he had, Warren wrote, the search Martin conducted (reaching into Sibron's pocket to find drugs) would have been impermissible because it was not a frisk for weapons.

Warren wrote that Peters, in contrast to Sibron, had been searched properly. Whatever its status under the New York law, the search of Peters was fine constitutionally because Officer Lasky had probable cause to arrest the men he observed in his apartment hallway. Lasky in fact arrested Peters before he frisked him, and he conducted a frisk that was limited in scope. It thus was a proper search incident to arrest under the Fourth Amendment.

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301 See id. at 10-13.
302 See id. at 11-12 & n.7.
303 See id. at 12-13.
304 See id. at 13.
305 Id.
306 See id. at 14-15.
307 See id. at 15-16.
308 See id. at 16.
309 See id. at 17. Warren's draft does not explain how or why "scope" would be a relevant concern during a search of a person incident to a lawful arrest.
310 See id. at 16.
4. Private Reactions of Justices Black and Fortas

Chief Justice Warren received comments, through his law clerk, on specific aspects of the proposed opinions. Justice Douglas had his clerk raise with Warren's clerk a concern about the implications of one sentence in the Terry opinion. One of Justice Marshall's clerks complained to Warren's clerk about the accuracy of the Terry opinion's citation to an earlier decision.

Most Justices, however, apparently kept their more stinging reactions to themselves, at least pending their own writing and formal circulation of their views. For example, Justice Black's copy of the Terry circulation contains his underlinings, drawn in a quavery hand, on most pages of the opinion. It also contains his handwritten marginal notes, which mostly highlight key concepts alongside Warren's treatment of them, but also, in a few spots, record Black's own tartly critical reactions to aspects of the draft. Black's copy of Warren's Sibron opinion contains fewer notations, but it generally presages Black's effort to write a separate opinion addressing the New York cases.

Justice Black's underlinings and marginal notations show his disagreement with four aspects of Warren's Terry draft. Black disagreed vehemently whenever Warren described the Fourth Amendment as protecting personal privacy. Black also

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311 See Memorandum by Earl C. Dudley, Law Clerk to Chief Justice Earl Warren, regarding Stop & Frisk Opinions 3-4 (Feb. 20, 1968) (available in Earl Warren Papers, cont. 623, Manuscript Division, Library of Congress) [hereinafter Dudley Memorandum, Feb. 20, 1968]. Douglas was concerned that the opinion not undermine “the established doctrine” that a search incident to an arrest is not constitutionally proper unless all of the particular state's legal requirements were met, “even if these are more stringent than the minimum standards of the [Fourth] Amendment.” Id. at 4. Dudley proposed, and Warren accepted, a minor wording change to address this concern. See id. Douglas later sent Warren some additional comments and suggested language for the Terry draft. See infra notes 367-72 and accompanying text.

312 See Dudley Memorandum, Feb. 20, 1968, supra note 311, at 4-5.


315 See, e.g., Justice Black’s Copy of Warren Majority Draft Circulated Feb. 9, 1968: Terry, supra note 313, at 5 (Black underlined “privacy” in Warren's text and wrote a question mark in the margin; Black also wrote “But it does protect places” next to Warren's quotation of the contrary statement in Katz v. United States); id. at 18 (Warren wrote: “Thus, the standard for any invasion of a person's reasonable ex-
rejected Warren's view that a balancing process should be used to
determine when the Fourth Amendment restricts proposed
government conduct. Black also objected to Warren's endor-
sement of the exclusionary rule as a remedy for Fourth
Amendment violations. And Black questioned Warren's state-
ments that police practices were a source of discontent in minor-
ity communities.

Justice Fortas also gave a very close reading to Warren's
*Terry* opinion. Fortas aggressively marked and wrote comments
throughout his copy of the Warren circulation. Fortas's com-
ments suggest his puzzlement and disagreement with state-
ments and phrases throughout the Warren opinion. Fortas ob-
jected particularly to Warren's references to statements in *Katz
v. United States* that the Fourth Amendment is not implicated
where police activity has not infringed on a person's subjective
expectation of privacy. Fortas also noted his strong disagree-
ment of privacy protected by the Amendment must be probable cause."; Black underlined "person's reasonable expectations of privacy" and wrote, in one margin, "X X Does not rest at all on 'a person's reasonable expectation of privacy.' " and, in the other margin, "no"; *id.* at 23 (Warren mentioned "privacy or personal security"; Black underlined the phrase and wrote "The Fourth Amend refers to 'security' not 'privacy' " in the adjacent margin); *id.* at 24 (Black bracketed and wrote "no" next to Warren's citation to Justice Fortas's concurring opinion in *Warden v. Hayden*).

316 *See* *id.* at 6 (Warren wrote: "The determination of reasonableness under the Fourth Amendment can only be made in particular cases, 'by balancing the need to search against the invasion which the search entails' ") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 527 (1967)). Black underlined part of Warren's text and wrote "no" in one margin and "Effort to define unreasonable is futile" in the other. *Id.* at 21. Black wrote "No" next to a virtually identical statement by Warren. *Id.*

317 *See* *id.* at 8 (Warren wrote: "This Court is committed to the exclusionary rule as an absolutely indispensable device in the enforcement of the Fourth Amendment, without which the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.' " (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)); Black underlined "indispensable device" and "would be a 'mere form of words'" and wrote "no not true" in the adjoining margin).

318 *See* *id.* (Black marked the passage and wrote a question mark next to War-
ren's mention of "wholesale harassment by certain elements of the police commu-
nity, of which minority groups, particularly Negroes, frequently complain"); *id.* at 11 n.11 (Black wrote "NO" next to Warren's statement that " 'field interrogations are a major source of friction between the police and minority groups' ") (quoting *PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE TASK FORCE REPORT: THE POLICE* 183 (1967)).

319 *See* *Justice Abe Fortas's Copy of Warren Majority Draft Opinion Circulated Feb. 9, 1968: Terry v. Ohio* (available in *Abe Fortas Papers*, *Yale University Library, Manuscripts & Archives*) thereinafter Fortas Copy of Warren Majority Draft Circu-
lated Feb. 9, 1968: *Terry*).

320 *See* *id.* at 5-6. Next to the discussion of *Katz*, Fortas wrote, "Katz is really out
ment with Warren's proposed statements about the limited value of the exclusionary rule as a remedy for police conduct in violation of the Fourth Amendment.\footnote{See id. at 7-9 ("I don't understand this - + to the extent I do, I Disagree.").}

But Fortas's most central concerns about Warren's Terry opinion pertained to the adequacy of his explanation of the probable cause that Detective McFadden possessed, and also the adequacy of Warren's explanation of when a police officer constitutionally may frisk a person who he has stopped. On the first page of Warren's opinion, Fortas noted these "Basic problems" as follows:

1. Where, in this case, is probable cause to believe Ps [Petitioners Terry and Chilton] were armed or officer was in danger[?]

2. Is the theory here approved that where police have right to stop + individual must respond, the police may frisk—or does it go beyond that—or stop short of it[?]\footnote{Id. at 1.}

In the margins at various points, Fortas formulated his own answers to the "basic" questions he saw. Regarding probable cause, Fortas wrote that:

There may be probable cause short of p.c. to arrest—ie where there are observed or known to the police facts which a reasonable law enforcement officer would regard as indicating that the person or persons have committed or may be in the course of committing a crime or engaged in some part of the process of criminal action (ie, casing a store, approaching a house with tools of entry).[33]

Fortas continued to believe, in other words, what he had stated in conference: The Court needed to explain that the basis for constitutional stops and frisks was "a new kind of probable cause."\footnote{Id. at 10.}

Regarding the circumstances in which police properly may frisk a stopped person, Fortas wrote the following:

I think [the] rule should be . . . Where police have a right to stop a person and require him to answer satisfactorily or be arrested, they may frisk. This does not cover the many cases where police

\footnotesize{of focus here—because the [right here under discussion exists regardless of an 'expectation of privacy' . . . This doesn't fit. "Id.}

\footnote{Douglas Terry Notes, supra note 220.}
may (are privileged to) stop a person if the police identify themselves—but may not require an answer.\textsuperscript{325}

Fortas saw \textit{Terry} as a case in the latter category, because McFadden lacked probable cause to arrest. His frisks of Terry and his companions nonetheless were proper, in Fortas's view, because as the stop based on the "new" probable cause unfolded, McFadden acquired a proper basis to frisk the men.\textsuperscript{326}

There is no indication that Justice Fortas, who put so much effort into reading and thinking critically about Warren's \textit{Terry} draft,\textsuperscript{327} ever communicated any of his comments to the Chief Justice. In the end, Fortas simply joined Warren's majority opinion in \textit{Terry}. Unlike Black, who started drafting immediately and soon circulated his own proposed opinions, Fortas chose not to write.

\textbf{B. Justice Black Writes Separately}

In the week following his receipt and close reading of Chief Justice Warren's proposed opinions for the Court, Justice Black wrote, in longhand, his own proposed opinions in \textit{Sibron} and \textit{Peters} together,\textsuperscript{328} and separately in \textit{Terry}.\textsuperscript{329}

\textsuperscript{325} Fortas's Copy of Warren Majority Draft Circulated Feb. 9, 1968: \textit{Terry}, supra note 319, at 10.

\textsuperscript{326} See id. at 23 ("The reasonable cause was r.c. to stop these men and make inquiry. Their reactions then in the circumstances gave reason to search for weapons.").

\textsuperscript{327} Fortas also seemed to consider the argument, suggested by the penultimate sentence of Warren's proposed opinion, that McFadden's belief that the men were carrying concealed weapons gave him probable cause to do what he did (and more). See id. at 27 ("If this is the case [that an investigative stop that does not dispel the officer's safety concerns justifies his patting persons for weapons], why all the talk—Why not say he had reasonable cause to believe they were violating law by carrying concealed weapons—").


In the New York cases, after noting his agreement with the Court's decision to affirm Peters's conviction, Justice Black's dissent from the reversal of Sibron's conviction emphasized his different view of the inferences to be drawn from the factual record. In Black's view, Officer Martin's observations of Sibron talking for eight hours to known drug addicts and his reaching into his jacket pocket ("a pocket where weapons are known to be habitually carried") constituted probable cause to believe that he was armed and might use the weapon. Although Martin had not stated this concern in his suppression hearing testimony, Black noted that the officer's basis to believe that Sibron was reaching for a weapon that he might use, unless it was taken from him, had been the basis of the lower court decisions to admit the drug evidence. Black criticized the Supreme Court majority for presuming, at its great distance from the trial atmosphere, to second guess these findings about Martin's unspoken inner thoughts.

This opinion, which Black circulated to his colleagues on February 15, 1968, is, with very minor editorial changes, the separate opinion that he filed when the Court announced its stop and frisk decisions four months later.

In Terry, Justice Black used his heavy markings and marginal notations throughout his copy of Chief Justice Warren's proposed majority opinion to draft his own proposed concurring opinion. Justice Black began his opinion by reciting some of the facts regarding Detective McFadden's stops and frisks of Terry and his companions. Black then noted his "agreement with the Court that under the circumstances [t]here the policeman had probable cause to believe that the men were armed, and

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330 See id. at 6.
331 See id. at 3-4.
332 See id. at 5.
333 See id.
336 See supra notes 314-18 and accompanying text.
337 See Black Concurring Draft Opinion: Terry, supra note 329.
that he did not violate the Fourth Amendment by making the limited search of the men.\textsuperscript{338}

Black then organized the remainder of his opinion to follow the numbered sections of Warren's opinion.\textsuperscript{339} Black explained his vehement disagreement with the Warren opinion's statements that the Fourth Amendment protects "privacy."\textsuperscript{340} Black also disagreed with Warren's claims that determining the reasonableness of government conduct under the Fourth Amendment is a balancing process.\textsuperscript{341} Black also objected to Warren's assertion that the exclusionary rule remedy for Fourth Amendment violations is rooted in the Constitution.\textsuperscript{342} Black agreed with Warren's rejection of a "reasonable suspicion" as a constitutionally sufficient justification for some police conduct that otherwise would violate the Fourth Amendment;\textsuperscript{343} in his view, this concept should, like "privacy," not be grafted by the Court onto the language of the Fourth Amendment.\textsuperscript{344}

Although Black circulated his proposed \textit{Terry} concurring opinion on February 19, 1968,\textsuperscript{345} he ultimately did not file it.

\textsuperscript{338} \textit{Id.} at 2.
\textsuperscript{339} See \textit{id.}
\textsuperscript{340} See \textit{id.} at 2-4, 5-6, 8. Black wrote that "[t]he word 'privacy' is one of the broadest words in the English language and there are certainly no words in the Fourth Amendment that indicate a scope so broad as that." See \textit{id.} "The judicial addition of the word 'privacy' to the words in the Fourth Amendment thus leaves the courts freedom to expand it to mean infinitely more than the Framers could ever have intended." \textit{Id.} at 3. Black also pointed to three then-recent decisions, \textit{Berger v. New York}, 388 U.S. 41 (1967), \textit{Katz v. United States}, 389 U.S. 347 (1967), and \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), as exemplifying "what a tremendously broad power this Court has given itself to hold laws unconstitutional by adding the word 'privacy' to the language the Framers used" in the "searches and seizures" clause of the Fourth Amendment. \textit{Id.}
\textsuperscript{341} See \textit{id.} at 4-5, 8.
\textsuperscript{342} See \textit{id.} at 5.
\textsuperscript{343} See \textit{id.} at 6-7. Black wrote that he:

heartily agree[d] with the Court's refusal... to substitute the words "reasonable suspicion" for the words "probable cause" or to add the words "reasonable suspicion" to the words the Framers used. There is, of course, no reason to use the "reasonable suspicion" term unless it means something more or something less than probable cause; if it does it would change the meaning the Framers wrote into the [Fourth] Amendment, thereby making a constitutional change courts are vested with no power to make.

\textit{Id.} at 6.
\textsuperscript{344} See \textit{id.} at 6-7.
\textsuperscript{345} See Justice Hugo L. Black, Concurring Draft Opinion Circulated Feb. 19, 1968: \textit{Terry v. Ohio} (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives).
When the Court announced its *Terry* decision in June 1968, Black filed only a one sentence statement noting his concurrence in the result and in Chief Justice Warren's opinion, "except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States* and the concurring opinion [of Justice Fortas] in *Warden v. Hayden*."

C. Chief Justice Warren Recirculates

On February 21, 1968, the Chief Justice recirculated his proposed *Terry* opinion. With two minor changes, it was identical to the opinion he had circulated earlier in the month.

At the same time, Warren recirculated a proposed Si-

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Black's stop and frisk case files contain an interesting piece of correspondence that he reviewed during this period of time. Almost a year earlier, Black had received a letter from an apparent stranger. After briefly describing three street disputes that had escalated into shootings in his hometown of Detroit, the writer noted:

What appears obvious is that large numbers of assorted hoodlums are carrying weapons—carrying them without fear of being arrested—because laws designed to safeguard our rights serve instead to protect and comfort the potential killers.

In Detroit, as I am sure exists elsewhere, the majority of its residents live in an atmosphere of fright. A massive hysteria exists. And yet, a "stop and frisk" law can not be passed for fear the high court will rule it unconstitutional.

Letter from Bernard Edelman to Justice Hugo L. Black (Apr. 12, 1967) (available in Hugo L. Black Papers, cont. 402, Manuscript Division, Library of Congress). When he received the letter in April 1967, Black underlined the final two sentences quoted above and instructed his secretary to "hold it for a while." Note from Frances Lamb, secretary to Justice Hugo L. Black, to Justice Hugo L. Black, (Feb. 19, 1968) (available in Hugo L. Black Papers, cont. 402, Manuscript Division, Library of Congress). In February 1968, Black's secretary gave the letter back to him with a cover note. She "thought [he] might be interested in reading it again, in view of [his] dissenting opinion and concurring in the Sibron, Peters and Terry cases." *Id.* Black then noted that she should "File" the letter. *Id.*

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*Terry v. Ohio*, 392 U.S. 1, 31 (1968) (Black, J., concurring).


The first change made was that the sentence that had troubled Justice Douglas, see *supra* note 311, was now clarified. *See id* at 18. The other change was the deletion of the citation which Justice Marshall's law clerk had objected to, see *supra* note 312. *See id* at 20.

In the estimation of Warren's clerk, Justice Black's concurring opinion did not require any response. See Dudley Memorandum, Feb. 20, 1968, *supra* note 311, at 1 ("He does not challenge the reasoning of your opinion at any point, but merely disagrees with the use of two words. I doubt that these points will persuade others."). Warren apparently agreed with this assessment.
bron/Peters majority opinion.\textsuperscript{350} It reflected three changes from Warren's original circulation in the case. First, Warren softened, apparently at his own initiative, his claim that Sibron never posed a danger to Officer Martin.\textsuperscript{351} Second, responding directly to Justice Black's proposed dissent, Warren added a footnote explaining that Martin's frisk of Sibron had not been made for reasons of self-protection.\textsuperscript{352} Third, in response to concerns about Justice Brennan's adverse reaction to a footnote in the prior circulation, Warren deleted a statement that contraband and mere evidence discovered during a properly limited self-protective frisk would be admissible in evidence at the friskee's later trial.\textsuperscript{353}

D. Justice White's Broad View of the Stop

On February 21, 1968, Justice White circulated memoranda that articulated his positions in the stop and frisk cases.\textsuperscript{354} In

\begin{footnotes}
\footnotetext{351}{Compare id. at 4 n.4 ("Sibron, who never, so far as appears from the record, offered any resistance.") with Warren Majority Draft Circulated Feb. 9, 1968: Sibron & Peters, supra note 295, at 4 n.4 ("Sibron, whose behavior seems to have been meek and submissive from the beginning.").}
\footnotetext{352}{See Warren Majority Draft Recirculated Feb. 21, 1968: Sibron & Peters, supra note 350, at 4, 15-16; see also Memorandum by Earl C. Dudley, Law Clerk to Chief Justice Warren (Feb. 20, 1968), supra note 311, at 1 (obtaining Warren's approval for the new footnote "[t]o dispel th[e] illusion created by Black's dissent that the lower courts in Sibron "had made findings that the policeman had probable cause to search Sibron for weapons in self-defense"); Handwritten note of Stephen J. Schulhofer, Law Clerk to Justice Black, on Warren Majority Draft Recirculated Feb. 21, 1968: Sibron & Peters (available in Hugo L. Black Papers, cont. 401, Manuscript Division, Library of Congress) ("Judge—The change at pp. 15-16 is a new footnote which attempts to make a direct answer to your dissent."). In response to his law clerk's note, Justice Black wrote "Change does not bother me" on top of his copy of Warren's opinion. See id.}
\footnotetext{353}{See Memorandum by Earl C. Dudley, Law Clerk to Chief Justice Earl Warren (Feb. 20, 1968), supra note 311, at 3 ("[T]he footnote is unnecessary to the decision, and it may create some doubt about the limitations which the two opinions seek to impose on the scope of these searches. Moreover, it may needlessly alienate Justice Brennan, and create some problems for him should he seek to answer Justice Black on the scope of the search problem."). Warren wrote "OK" in the margin next to, and underlined, his law clerk's suggestion that he delete this footnote and "sav[e] the question for another day." Id.}
\footnotetext{354}{See Letter from Justice Byron R. White to Chief Justice Earl Warren, regarding No. 67, Terry v. Ohio (Feb. 21, 1968) (available in Earl Warren Papers, cont. 624, Manuscript Division, Library of Congress); Letter from Justice Byron R. White to
Terry, Justice White proposed to file a brief and somewhat cryptic concurring opinion that was, in his view, “not incompatible” with the Court’s opinion. White’s draft opinion focused largely on the stop. He discussed the frisk as an event that often will properly accompany a lawful stop.

Justice White began his proposed Terry opinion by noting that police always are free to question anyone on the street. People so questioned are free to walk away, however, unless the police have a basis to detain them forcibly. The police have this basis to detain someone forcibly, White wrote, when “circumstances indicat[e] that the person approached may somehow be implicated with a crime.” White called these circumstances “probable cause for temporary investigative detention,” which “fall short of probable cause to arrest.” Justice White then announced that Terry was, in his view, a case where the police officer had the “proper circumstances” to detain persons forcibly for questioning, but White’s short draft opinion in no way identified or explained the facts he had in mind when he reached that conclusion.

Justice White then turned to the frisk. He stated, but did not explain why, it “seem[ed] likely to [him]” that in cases where there are sufficient circumstances to stop someone forcibly, “there also will be sufficient cause to search, without the necessity of pointing to further facts indicating that the person may be armed and dangerous.” Applying this presumption to the Terry case, White declared, again without explaining why, that it was an instance where the same circumstances that “justified an investigative seizure... also justified the frisk.” He closed by stating that it “seem[ed] to [him] that this would be true in most cases, although it is not difficult to imagine circumstances where


See id. at 1-2.

See id. at 1.

See id.

Id.

Id.

Id. at 2.

Id. at 1-2.
it would be otherwise."\textsuperscript{34}

In his letter to Chief Justice Warren regarding the New York cases,\textsuperscript{35} Justice White separately articulated his view that a frisk can be justified by the probable cause that justifies a stop for questioning. White wrote that "[w]ith respect to Peters, . . . I need not reach the question of whether or not there was probable cause to arrest since in any event there was probable cause to stop Peters for questioning and therefore to frisk him for weapons."\textsuperscript{36} White again did not explain what it was about the justification for the stop that gave Officer Lasky sufficient basis to frisk Peters. White simply declared the conclusion, and his intention to "probably write briefly along these lines."\textsuperscript{37}

\textbf{E. Justice Douglas Describes the Probable Cause for the Terry Stops and Frisks}

On February 26, 1968, Justice Douglas sent the Chief Justice a short letter offering input on the proposed stop and frisk opinions.\textsuperscript{38} Douglas wrote that he had "been spending a lot of time" on Warren's proposed opinions.\textsuperscript{39} In \textit{Sibron}, Douglas offered only "a few suggestions," which he regarded as "relatively

\textsuperscript{34} \textit{Id.} White did not suggest any "circumstances where it would be otherwise." Significant portions of this circulation became parts of Justice White's ultimate opinion. \textit{See} \textit{Terry v. Ohio}, 392 U.S. 1, 34-35 (1968) (White, J., concurring).
\textsuperscript{36} \textit{Id.} (emphasis added).
\textsuperscript{37} \textit{Id.} Justice White ultimately concurred in the result in \textit{Peters}, filing a short opinion that merely repeated his conclusion "there was probable cause to stop Peters for questioning and thus to frisk him for dangerous weapons." \textit{Sibron} v. New York, 392 U.S. 40, 69 (1968) (White, J., concurring).

\textsuperscript{39} \textit{Letter} from Justice William O. Douglas to Chief Justice Earl Warren, \textit{supra} note 365 ("As I told you the other day on the phone, I have been spending a lot of time on your \textit{Terry}, No. 67 and \textit{Sibron}, No. 63.").
In *Terry*, Douglas complimented Warren’s “fine opinion” and offered two suggestions that would not, in Douglas’s view, “change [its] basic theme.”

Douglas urged Warren, in essence, to clarify that Detective McFadden had probable cause, based on his observation of incipient crime, to stop Terry; that McFadden was entitled to make a self-protective frisk as part of that stop; and, subsequently, that McFadden had probable cause, based on the frisk, to arrest Terry for carrying a concealed weapon:

The first [suggestion] is that when the policeman saw these men doing what they were doing, he had probable cause to believe that a crime was in the making. Since he had probable cause, he was therefore authorized not to make an arrest but to make what might be called an investigative seizure, namely, temporary detention. But as you say, even a temporary detention might be an extremely dangerous thing if the men were armed. So he did have the right as an incident to that investigative seizure to pat down their pockets and coats to see if there were guns. So far so good.

The validity of the arrest then comes into focus. Since he found the guns he had probable cause to believe that another crime, namely, carrying concealed weapons, had been committed and therefore the arrests were justified.

Douglas’s input is generally consistent with the views he expressed during the Court’s *Terry* conference. It is inconsistent with the vehement dissenting opinion he ultimately filed in the case.

F. Justice Harlan Endorses Stops, Including Self-Protective Frisks, Based on “Reasonable Suspicion”

On February 27, 1968, Harlan circulated an opinion that he previously had alerted his colleagues to expect. Harlan pro-
posed to address the three cases in one opinion, concurring in the results in *Terry* and *Peters* and dissenting in *Sibron*. His opinion demonstrates his serious thought about the constitutional puzzles that the stop and frisk cases embodied, and also his very close scrutiny of Chief Justice Warren’s proposed opinions of the Court.

Justice Harlan began his proposed concurring opinion by describing Chief Justice Warren’s failure to identify the legal basis for the frisk of *Terry* and the subsequent seizure of his concealed weapon. Harlan wrote that he could “think of three, and only three, such bases” for a lawful frisk. First, a frisk could properly be incident to a traditional arrest based on probable cause. Because Harlan agreed with Warren’s determination that De-
tective McFadden lacked probable cause to arrest Terry, however, that basis for a lawful frisk was irrelevant to the case before the Court. 379

A second basis for a lawful frisk, according to Harlan, would be if it occurred pursuant to a state law that authorized police officers to frisk people to find concealed weapons. 380 But such a "prophylactic" rationale for frisks would leave unanswered the question whether such laws constitutionally could authorize police frisks on a lesser basis than the probable cause that is required for a constitutional arrest. 381 According to Harlan, if the Court meant to approve such prophylactic approaches, 382 it should recognize that it also would be giving constitutional approval to frisks based on something less than probable cause. 383 Harlan wrote that he would agree with the Court taking such an approach, but he urged the Court in that instance to attempt to state the lesser quantity of justification for a lawful frisk. 384

The third possible basis for a lawful frisk, according to Justice Harlan, would be a police officer's general right to protect himself when making a lawful stop. 385 But this rationale would require the Court, in Harlan's view, to articulate the constitutionally-required basis on which police may make a "forced, hostile" stop, 386 for Harlan believed that it was such a stop that necessarily entailed the officer making a self-protective frisk. 387

379 See id. ("[T]he Court notes, properly, that there was no probable cause to arrest Terry for anything.").
380 See id. at 3-4 ("A State can certainly provide authority to search for and take away concealed weapons, upon adequate grounds, without regard to suspicion of any non-weapons offense, and without regard to circumstances indicating a particular danger to the police officer himself."). This is a "stop to frisk" theory of the frisk.
381 Id. at 4.
382 See id. ("If a State made such a provision, the question would be whether, consistent with the Constitution, the 'adequate grounds' would be identical with 'probable cause to arrest' for violation of a concealed-weapons law, or would be less demanding in view of the urgent practicalities of street-corner law enforcement.").
383 See id. at 4-5. As Harlan noted, the Ohio trial and appellate courts had not based their approvals of McFadden's frisk of Terry on this prophylactic theory of the constitutionally-permissible frisk. See id.
384 See id. at 4.
385 See id.
386 See id. at 5. This is a "stop includes self-protective frisk" theory of the frisk. Harlan noted that the Ohio courts had approved Detective McFadden's frisk of Terry on this basis. See id.
387 Id. at 6.
388 See id. at 6-7 ("The real question, then, is the justification for a forced, hostile stop. Since the stop necessarily entails a frisk, the grounds for it must be strong
Harlan believed that Warren's proposed opinions skipped over this question of the basis on which police could constitutionally stop pedestrians. 389

Harlan’s proposed opinion then turned to the Peters case to illustrate why he believed the Court needed to address, as Warren had not, the constitutionality of street “stops” by the police. In Harlan’s view, Peters plainly was not subjected to a search incident to a lawful arrest because Lasky had no basis—i.e., no probable cause—on which to base an arrest. 390 Harlan wrote that Warren was, by characterizing the Peters incident as an arrest, “diluti[ng]... the probable cause requirement ... to avoid rec-

ognition of a special and lesser standard for stopping persons in flight.” 391

In Harlan’s view, the real constitutional issue that the stop and frisk cases raised was whether police officers may stop persons when the officers do not have probable cause to arrest them. Harlan wrote that the Court had correctly answered that question in the affirmative, but it had not explained why or when such stops were permitted by the Constitution. 392 Harlan then answered these questions directly. Although Harlan saw stops as less intrusive than formal arrests, he also recognized that they nonetheless are “seizures” that must be “reasonable” under the Fourth Amendment. 393 Because “probable cause” is the constitutional standard for a reasonable arrest, Harlan said the Court should use different phraseology to define a reasonable stop. His proposed standard was “reasonable suspicion.”

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389 See id. at 7. Harlan wrote:
If this is the Court’s theory, it is impossible to determine where the law stands after today’s opinions. The Court has declared that the stop of Terry was not an “arrest”; that there was no probable cause to arrest him; but that there were grounds to “stop” him, grounds the Court insists on refer-
ing to as “probable cause” but whose nature the Court does not explain.

390 See id. at 7-8.
391 Id. at 7.
392 See id. at 8.
393 See id. at 9-11.
394 Id. at 12. Harlan wrote:
In sum, I prefer to use the words “reasonable suspicion” to describe the adequate grounds necessary to support a stop, in order to distinguish a spade from a club and to avoid the overtones of neutrality, objectivity, and probability that go with “probable cause” as a constitutional term. To dif-
Much of the remainder of Harlan’s proposed opinion was devoted to defining reasonable suspicion in operation, in the context of street stops. Harlan wrote that a stop based on reasonable suspicion would be particularized to an individual. The stop “should not be used for routine checking of pocketbooks and credentials, still less for harassment.” Reasonable suspicion also would support stops only in “fluid” situations where no alternative course of investigation was available to the police. Harlan believed that the central failing of the Chief Justice’s opinions was his effort to address police stops and frisks, which

ferentiate between the two kinds of police activity by using discrete terminology to describe the different constitutional standards applicable to each seems to me to be but facing up to the realities of what we are doing today. It will, I believe, create better understanding by the police of what is expected of them, and lead to a more orderly development of the law in this new constitutional field than would imparting into the law a new concept of “probable cause.”

Id. at 12-13.

395 See id. at 13-14. Harlan also argued, in a concluding section, that the Sibron case was not justifiable because it was moot. See id. at 15-18.

396 Id. at 13.

397 See id.

398 Id.

399 See id. at 14. Harlan wrote:

In a case such as the present, the trial court must necessarily base its decision upon acceptance or rejection of highly conclusory police statements, for particular grounds for suspicion will be difficult to articulate. In this case, the trial court, having Officer McFadden before it, chose to believe that the totality of behavior of Terry and his companion suggested that they were “casing.” Nothing in the record indicates that the credence attached to the officer’s statement was unwarranted.

Id.
raised new constitutional problems, using the constitutional rules that governed more intrusive and familiar police practices such as arrests. Harlan recognized, and was the first Justice to explain at length in writing, that such efforts to use the known Fourth Amendment language and categories in this context, although well-intended, in effect undercut their meaning. He thus advocated candor, and new constitutional approaches, to address the stop and frisk problem.

Justice Harlan's circulation had varying impacts on his colleagues. Justice Fortas read it closely and marked it up thoroughly. His notations indicate that although he agreed with many of Harlan's criticisms of Warren's proposed opinions, Fortas disagreed strongly with Harlan's views of the cases themselves and his endorsement of a "reasonable suspicion" stan-

400 See id. at 2. In a footnote, Harlan attributed much of this imprecision and difficulty to the Warren Court's method of determining which provisions of the Bill of Rights were incorporated against the States:

Before Mapp v. Ohio, 367 U.S. 643, this whole "stop and frisk" problem, largely if not exclusively a matter of state concern, would have been judged under the Due Process Clause of the Fourteenth Amendment, thereby obviating much of the difficulty encountered when the problem is viewed against the specifics of the Fourth Amendment. The present cases afford an example, I believe, of the shortcomings of the currently popular "incorporation" doctrine.

Id. at 13 n.24. A draft of this proposed Harlan opinion suggests that this critique, and an analysis of stops and frisks based in the Due Process Clause of the Fourteenth Amendment, initially played a more prominent role. See Typescript Stop and Frisk, supra note 375, at 6 (crossed out language: "I prefer, therefore, to begin with the principles of the Fourteenth Amendment divorced from the purely verbal quagmire through which they are dragged by a rigid and negative 'incorporation' of the Fourth Amendment.").


402 See Justice Abe Fortas's Copy of Justice Harlan's Draft Opinion Circulated Feb. 27, 1968: Terry, Sibron & Peters (available in Abe Fortas's Papers, Yale University Library, Manuscripts & Archives). Fortas's law clerk apparently read the Harlan circulation first and made some notes on it to his boss. See, e.g., id. at 1 ("This has some good criticisms of the Chief's opinion—substantive and mootness. The way Harlan would handle the problem is at least honest. But, as to its wisdom—? PZ" [Peter Zimroth, law clerk to Justice Fortas]).

403 See, e.g., id. at 3 (Fortas noting "Terry would not comply with this" next to Harlan's quote of Warren's statement that "the 'initial inquiry must be whether the officer has probable cause to believe that the person with whom he is dealing may be armed and dangerous.'").

404 Fortas's notes indicate that he disagreed strongly with Harlan's view that Detective McFadden lacked probable cause to arrest Terry. See id. at 3 (Fortas noting with emphasis "I don't agree" next to Harlan's statement to that effect); id. at 4 (Fortas noting "This is error in the Court's opinion"); id. at 12 (Fortas noting "I do
Justice Black, by contrast, read Harlan’s circulation immediately but wrote only one thing on his copy: “Read but I disagree.”

G. A Warren Chambers Assessment of the Justices’ Responses

In Chief Justice Warren’s chambers, the Harlan circulation prompted law clerk Earl Dudley to write an extensive and thoughtful memorandum. Dudley’s memorandum is a striking look at the gestation of Terry inside the Chief Justice’s chambers.

According to Dudley’s memorandum, Chief Justice Warren originally had been inclined to decide Terry v. Ohio by writing a model stop and frisk statute. Warren wanted to approach the constitutional and practical issues raised by these police methods, in other words, by replicating his approach two Terms earlier to the issue of police interrogations of suspects in custody, which had been to craft the now-familiar Miranda warning requirement. In the stop and frisk cases, Warren apparently told his law clerk that he wanted the Court “to try to write our own annotated stop and frisk statute, a la Miranda.” Indeed, in

mean he [Terry] was ‘about to rob a store’ next to Harlan’s statement to the contrary. Fortas also believed that probable cause had been present in the Peters case. See id. at 8 (Fortas noting “I don’t agree” at the end of Harlan’s discussion of Peters); id. at 15 (Fortas noting “in Peters there was a hell of a lot more than a forced stop—there was force—also in Terry—”).

405 See id. at 2, 11-13. Next to Harlan’s statement that he “prefer[red] to use the words ‘reasonable suspicion,’ ” for example, Fortas scrawled, “But suspicion is an invidious non-objective term!! Chacun à son gout.” Id. at 12 (roughly translated, “each to his own taste”). Fortas also wrote next to Harlan’s statement that “it would be clearer if two terms were used” that Harlan “shows this to be a word game + Harlan prefers his words[]” Id. at 11.

Although Fortas preferred to acknowledge that Fourth Amendment “probable cause” means different things in different contexts, see id. at 13 (Fortas’s marginal note: “’probable cause’ to search is different from probable cause to arrest—Probable cause to search an auto is different from probable cause to search a man’s house”), he did note his agreement with Harlan’s efforts to define limits on police powers to stop people in public places. Id.


December 1967, when Warren was assigning himself the responsibility of writing the Court’s stop and frisk opinions, he still seemed to be thinking in this vein, for he told the other Justices in conference that he “would use the [Terry] case to lay down hard rules for stop and frisk.” But the proposed opinions he circulated to the Court in February 1968 did not follow this “Miranda” path. Given the other Justices’ troubled responses to those circulations, that path not taken was by late February 1968 a matter of some regret, at least to Dudley.

Warren’s other perspective on the stop and frisk cases had been that, if the Court was not going to write a Miranda-like recipe for constitutional stops and frisks, it should avoid the “stop” issue altogether and decide only the constitutionality of Detective McFadden’s frisks. Despite the comments received and the individual opinions that other Justices had circulated, Dudley remained convinced in February 1968 that this was the right approach.

In his memorandum to Warren, Dudley spelled out two main “tactical reasons” why the Court should not decide the stop question. First, he was concerned that a decision legitimating street stops would mean that such stops would always include frisks of persons, which were the greater intrusion that the Court was seeking to control. In Dudley’s view, an analysis of stops would rightly conclude that, because stops are not major intrusions on pedestrians’ legitimate interests, the police should

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410 Douglas Terry Notes, supra note 220, at 1. Justice Fortas, by contrast, had told the Conference explicitly that he did not want “a Miranda type” opinion. Id. at 4.

411 See Dudley Memorandum, Feb. 29, 1968, supra note 270, at 1. According to Dudley:

[I]t would have been better from the start to try to write our own annotated stop and frisk statute, a la Miranda, since that seems to be what everyone ultimately wants to do in any event. It would be preferable at this stage to be negotiating the terms of the statute than to be arguing, as we are, about what issues are or are not in the cases. Our opinion suffers in the context of present discussions, I think, from its attempt to decide Terry without writing a little statute, though it may simply be that the opinion does not adequately explain the manner in which it frames the issues.

Id.

412 See id. (“I am more than ever convinced of the essential correctness of your view that if a Miranda-type approach is to be avoided, the so-called ‘stop’ question need not—in fact, ought not—be dealt with in Terry.”).

413 See id.

414 Id. at 2.

415 See id. at 2-3.
be permitted to make street stops on very little basis. The danger that Dudley saw in this stemmed from the fact that, in his view, frisks would become incidents to stops automatically. Dudley argued that the better way to insure fewer street frisks would be a decision that tied the police power to perform frisks to an element of danger and the self-protective rationale for the frisk itself. Second, although Dudley saw true stops as minimal intrusions, he argued that a pro-stop decision by the Supreme Court would risk legitimating temporary police detentions of pedestrians, which pose significant threats to individual liberties that include political beliefs and practices. Dudley argued to Warren that it would be better for the Court not to decide these "detention" issues, which were not presented by the facts of Terry, until they were raised in a case that more clearly exposed the larger values that were at stake.

In addition to his tactical reasons, Dudley's memorandum to Warren spelled out "doctrinal reasons" why the Court should avoid deciding the constitutionality of street stops. These reasons related to the core problem of defining when and why a police officer's stop of a pedestrian qualified as a Fourth Amendment "seizure." In Dudley's view, the "stop theorists" did not provide satisfactory answers to these questions. He wrote that the right answers could only be found by looking beyond police actions and law enforcement interests to the public interests

416 See id.
417 See id.
418 Although one alternative approach, exemplified in the proposed Terry, Sibron and Peters opinion that Justice Harlan had circulated on February 27, 1968, would be to define limits on when and how stops must be conducted, see Harlan Draft Circulated Feb. 27, 1968: Terry, Sibron & Peters, supra note 375 at 12-13, Dudley's memorandum to Warren argued that this approach was unrealistic in hoping that stops could be controlled by judicial fiat, and therefore it was unwise, see Dudley Memorandum, Feb. 29, 1968, supra note 270, at 4-5.
419 See id. at 5.
420 See id. at 6.
421 See id. Dudley also argued, pointing to the tangled facts of the Wainwright case, that a decision approving police power temporarily to detain pedestrians would involve the Court in an incredible and unattractive regulatory project. See id. at 7.
422 See id. at 8-11.
423 Id. at 8.
424 Id. at 9-10.
that are at stake in street encounters with the police. To protect the various public interests that are at stake, Dudley urged Chief Justice Warren to locate “seizure” at the moment when a police officer physically restrains a pedestrian or tells her that she cannot leave. Applying this definition to the Terry case, Dudley wrote that the moment of constitutional “seizure” was the moment of physical frisk, and thus that the case raised no constitutional “stop” issue that the Court needed to decide separately. Dudley believed, accordingly, that the Court could leave questions about the constitutionality of a street “detention for interrogation” for a future case that truly raised the issue.

Although Dudley was still convinced that the Chief Justice had been correct to circulate proposed opinions that avoided the stop question, he also recognized that it was very much in doubt whether a majority of the Court would join Warren’s Terry opinion. Dudley wrote:

[it] is clear that the Terry opinion, as it stands, satisfies no one. Apparently, no one else presently accepts our view of what questions are presented in the case and why. This may simply be because the opinion does not adequately explain why it has limited the inquiry in the way it has.

In his law clerk’s view, the Chief Justice could attempt to gather a Court majority behind his approach to the case, or he could file his opinion as his own concurrence while another Justice wrote for the Court, or he could redraft his opinion to address the “stop/seizure” issue.

None of the available documents indicate much about what Chief Justice Warren thought of his clerk’s insightful memorandum. Warren did make marks in the margin of the memoran-

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425 See id. at 11-13.
426 Id. at 13.
427 See id. at 14.
428 See id. In addition to this discussion of the Terry “stop” issue, Dudley’s memorandum urged Chief Justice Warren to try to keep five votes in the Peters case for an opinion holding that there had been probable cause for arrest, even though Justice Harlan’s circulation demonstrated the weakness of that position. See id. at 16-17. Dudley also noted the strength of Harlan’s mootness arguments in Sibron, but urged the Chief Justice to stick to the position that a criminal case can never become moot on direct review. See id. at 18.
429 Id. at 15.
430 See id.
431 The documents also do not indicate how Warren responded to an extremely interesting follow up memorandum that Dudley sent the Chief Justice two weeks
dum at a point that suggests his agreement with the law clerk’s statement that there is, in a police-pedestrian street encounter, “no ‘seizure’ until the officer affirmatively restrains a person from moving, or informs him that he cannot leave.”

We can also surmise from the fact that Dudley’s arguments and analysis echoed Warren’s original views of the cases that he continued to find them to be persuasive in February and March 1968. Yet Warren’s June 1968 opinion for the *Terry* Court does not reflect this perspective.

There is an explanation for the apparent gap between what Chief Justice Warren believed and the decision he ultimately authored. In Justice Brennan’s chambers, the opinion circulations that precipitated the Dudley-to-Warren memorandum contributed to Brennan’s own wholesale rethinking of the stop and frisk cases. Brennan then persuaded the Chief Justice to address the “stop” issue, and to do so within the framework of Fourth Amendment “reasonableness” rather than in terms of “probable cause.” Warren’s later circulations of proposed opinions demonstrate his ultimate flexibility in writing the stop and frisk opinions for as much of the Court as he, with assistance from Brennan, could garner.

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later. See Dudley Memorandum, Mar. 12, 1968, supra note 46, at 1. In this memorandum, Dudley described:

a possible alternative way out of the present impasse. The difficulty, as I indicated in my [earlier] Memo, is that *Terry* is not really a stop case . . . . It occurs to me that the *Wainwright* case . . . is really the only thing approaching a stop case presently before the Court. *Wainwright*, rather than *Peters* and *Sibron*, may be the proper companion case for *Terry*. If I read the Court’s mood correctly, there is probably no way to prevent it from attempting to decide the stop issue in these cases, since most Justices seem to view the stop as a necessary conceptual antecedent to the frisk . . . . The Court might hold that the stop in *Wainwright* was perfectly justified, that the frisk was also legitimate in light of the danger to the officers if Wainwright turned out to be the murderer they sought, but that when the stop and the frisk did not turn up probable cause to arrest Wainwright for murder, they were required to let him go and were most emphatically not empowered to take him to the station.

*Id.* at 1. The Court, which had decided in October 1967 to dismiss Wainwright’s petition as improvidently granted, see supra note 146 and accompanying text, ultimately stuck to this course. Chief Justice Warren dissented from this judgment. See *infra* text accompanying note 511.

422 Dudley Memorandum, supra note 270, at 13.
V. THE SHIFT TO “REASONABLENESS”

A. Justice Brennan’s Contribution Behind the Scenes

Although Justice Brennan had given private advice and editorial input to Chief Justice Warren in early 1968 as he drafted and redrafted proposed majority opinions in the stop and frisk cases, Brennan’s deep involvement did not end with the initial opinion-drafting. In February and March 1968, he read the proposed opinions that Chief Justice Warren and Justices Black, White and Harlan circulated, and he spoke with Justices Douglas and Fortas about their own conversations with, and suggestions to, the Chief Justice. Brennan then became centrally involved in clarifying and recasting Warren’s *Terry* opinion. Justice Brennan’s involvement in the Court’s *Terry* decision has been largely invisible, however, because he did not write his own opinion in *Terry* or any stop and frisk case. Brennan’s full role in the Court’s decision is visible only in the papers that he and Chief Justice Warren each preserved.

During February 1968, Justice Brennan discussed *Terry* with Raymond C. Fisher, who was one of his law clerks during the Court’s October 1967 Term. Although the available records

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433 But see SCHWARTZ, supra note 235.

432 See, e.g., ROGER GOLDMAN & DAVID GALLEN, JUSTICE WILLIAM J. BRENNAN, JR.: FREEDOM FIRST 187-88 (1994) (asserting that although “Brennan voted with the majority in *Terry* . . . he consistently opposed making additional exceptions to the probable-cause standard” and citing his post-*Terry* opinions in *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)); PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 191-92 (1994) (quoting from Brennan’s March 14, 1968, letter to Chief Justice Warren, see infra note 456, but noting that “Brennan joined the [*Terry*] majority and not explaining the context of his letter to Warren). But see CRAY, supra note 18, at 467 (briefly describing the Justices’ conference discussion of *Terry* and stating that Warren wrote the Court’s opinion “[w]ith Brennan’s considerable aid—he was to write the majority of the opinion”).

do not give much substantive information about these discussions, they do record Justice Brennan's assignment that Fisher redraft Warren's latest Terry circulation while retaining as much of Warren's language as possible.\textsuperscript{439} Fisher completed his assignment by drafting a lengthy opinion that would replace all but the first five pages of Warren's February 21, 1968 Terry circulation.\textsuperscript{439} Although Fisher attempted to retain Warren's language, he reorganized and deleted much of it. He also drafted two appendices that explained the theoretical bases for the draft's treatments of the Fourth Amendment's Warrant Clause and the exclusionary rule remedy for Fourth Amendment violations.\textsuperscript{440} Fisher gave his proposed Terry rewrite and the two accompanying appendices to Justice Brennan in late February or early March 1968.\textsuperscript{441} Justice Brennan read Fisher's work closely and revised it in many spots. The result was a comprehensive Brennan rewrite of the Court's proposed Terry opinion.\textsuperscript{442}

The Brennan rewrite of Terry contained three significant sections. After noting his agreement with Warren's recitation of

\textsuperscript{438} See id.

\textsuperscript{439} Fisher's draft, which proposed to retain many of Chief Justice Warren's numbered footnotes, also included more than ten pages of lettered endnotes. These endnotes were written in the first person from Fisher to Justice Brennan. They explain with particularity Fisher's reasons for proposing alternatives to Chief Justice Warren's draft text, and also some of his remaining concerns about the replacement text that he had drafted. See Fisher Terry Draft attached to Fisher Memorandum, supra note 437, at nn.1-15.

\textsuperscript{440} Fisher's Appendix A set forth in detail his understanding of the role of probable cause in the case. See Appendix A: Relationship to the Warrant Clause, attached to Fisher Memorandum, supra note 437. Appendix B considered how the Supreme Court legitimizes certain types of police conduct when it does not apply the exclusionary rule to the evidence they produce. See Fisher Terry Draft attached to Fisher Memorandum, supra note 437, at FN-1, n. b.

\textsuperscript{441} See Fisher Memorandum, supra note 437. In his cover memorandum to Justice Brennan, Fisher explained that he tried to revise the Chief Justice's Terry opinion along the lines that they had discussed. See id. at 1. Fisher wrote that he had tried to retain as much of Warren's language as possible, but he also noted that he had deleted "a good deal of the Chief's opinion" because of concerns about its "tone." Id. at 1. Fisher also noted that an alternative to the draft's approach would reach the opposite result: reversing Terry's conviction because Detective McFadden did not, at the time of the stops and frisks, have probable cause to arrest the men for possessing concealed weapons. See id. at 1-3.

the facts, Brennan proposed text that reframed the constitutional question that Terry raised. In Brennan's view, the case was about "reasonableness" of stops and frisks under the Reasonableness Clause of the Fourth Amendment, not about the presence or absence of the probable cause required by its Warrant Clause. In Brennan's words, the case concerned "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause to make an arrest."

Brennan's next section of revised text, which is the heart of his proposed Terry rewrite, explained in detail why "reasonableness" is the relevant constitutional inquiry regarding street stops and frisks. In this section, Brennan first explained that stops and frisks are Fourth Amendment "seizures" and "searches," and that Detective McFadden clearly had seized and searched Terry at the moment he stopped and frisked him. Brennan then considered the reasonableness of McFadden's conduct, both at its inception and as he conducted the stops and frisks of Terry and his companions. Brennan explained that because street stops and frisks are not police activities that were, or ever could be, approved by judges in advance—i.e., because a "stop-and-frisk warrant" is an impossibility—the reasonableness of stops and frisks is not to be judged by the presence or absence of probable cause. Probable cause is a component of the Fourth Amendment's Warrant Clause, and thus a measure of reasonableness in situations where police are engaged in warrant-type activity. But probable cause is not relevant, Brennan wrote, in determining the constitutional reasonableness of police activity that is not of the warrant type.

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43 See id. at 3. Brennan began this section by summarizing the arguments for and against the constitutionality of street stops and frisks. See id. at 1-2.
44 Id. at 3.
45 See id. at 3-6. Brennan explained that he was basing this constitutional conclusion on the actual stop and frisk moment, and not on the investigatory approach that had preceded it, because the record in the case did not clarify much about what really had transpired when McFadden approached the three men. See id. at 6. Brennan noted that, although Justices White, Douglas and Harlan appeared willing to make a blanket ruling in Terry's case about the constitutionality of "detention for questioning," he preferred to leave that issue to future cases with more developed factual records. See id. at FN-3 to FN-4, n.f.
46 Id. at 7.
47 See id.; see also Memorandum, Relationship to Warrant Clause, attached to Brennan Terry Rewrite, supra note 442 (the final version, reflecting Justice Bren-
Instead of relying on probable cause as a measure of reasonableness, Brennan's *Terry* redraft said that the reasonableness of non-warrant-type police activity must be determined by, first, identifying the government interest that is involved and, second, by determining whether specific and articulable facts justify a particular intrusion.\textsuperscript{468} In *Terry*’s case, Brennan said that the government interests that were involved in McFadden approaching the three men—the stops—were its broad, almost omnipresent, interests in crime investigation and/or prevention.\textsuperscript{469} The interests that were involved in McFadden searching the men—the frisks—were the much less common need of a police officer to protect himself.\textsuperscript{470} Regarding the latter interest, Brennan wrote that it would be constitutionally unreasonable to deny a police officer the power to frisk where he is justified in believing that a person is armed and presently dangerous.\textsuperscript{471}

In the final section of his proposed *Terry* rewrite, Brennan explained the objective reasonableness of Detective McFadden’s conduct. McFadden first observed conduct that was a preface to a stick-up, which demonstrated that stopping the men for questioning was reasonable.\textsuperscript{472} McFadden’s subsequent frisks also were reasonable because a reasonably prudent officer had reason to believe, while investigating this suspicious conduct, that *Terry* and his colleagues were armed and threats to the officer’s safety.\textsuperscript{473} Furthermore, nothing occurred at any point during McFadden’s encounter with the men that dispelled his objectively reasonable beliefs.\textsuperscript{474} Brennan also noted that, although the precise Fourth Amendment limits of a protective search would have to be developed in the concrete circumstances of future cases, the protective rationale for this kind of search defined

\textsuperscript{468} See Brennan *Terry* Rewrite, supra note 442, at 7-8. To permit judicial review of such police conduct after the fact, the specific and articulable facts must satisfy some objective criteria. See id.

\textsuperscript{469} See id. at 9-12.

\textsuperscript{470} See id.

\textsuperscript{471} See id. at 12. The draft explained that its approach, in this respect, differed from Justice Harlan’s. Whereas Harlan was concerned to control police power to stop, this approach would effectively leave to future cases the process of defining limits on stops. It would instead place real controls on police power to frisk people on the streets. See id. at 17.

\textsuperscript{472} See id. at 18.

\textsuperscript{473} See id. at 11-12.

\textsuperscript{474} See id. at 18-19.
a limit on its scope, and that McFadden had not exceeded this limit.\footnote{See id. at 20-22.}

After Justice Brennan finished editing and finalizing his proposed rewrite of \textit{Terry}, he wrote, in longhand, a letter to Chief Justice Warren. Although Brennan's letter tracked his own law clerk's memorandum to him, it contained much more material and documented the Justice's personal involvement in and anguish about deciding the stop and frisk cases:

\textbf{The “Stop and Frisk” cases}

Dear Chief

I have heard from Bill [Douglas] and Abe [Fortas] something of their comments upon your opinion, + of their suggestions for changes. I've read also, of course, the views stated by Hugo [Black], John [Harlan] + Byron [White] in their circulations. All of this has prompted me to do some extended + hard thinking, which I hope I may share with you.

I'm attaching a rather extensive suggested revision of your \textit{Terry} opinion with explanatory notes outlining my reasons, and also a rather extensively foot-noted memorandum stating my reasons for the conviction I've reached (contrary to my previous view) that we should not handle this question as a matter of “probable cause” and the Warrant Clause, but as a matter of the Reasonableness Clause. I hope you won't think me presumptuous to submit my thoughts in this form—I do it only because I think it's the best way for me to state them.

You will note that I've retained much of your exposition . . . . You will note, too, that I have suggested the omission of a great deal from your opinion, + this requires a particular explanation.

I've become acutely concerned that the mere fact of our affirmance in \textit{Terry} will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present “aggressive surveillance” techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit + other ghetto cities. This is happening, of course, in response to the “crime in the streets” alarums being sounded in this election year in the Congress, the White House + every Governor's office. Much of what I suggest be omitted from your opinion strikes me as susceptible to being read as sounding the same note. This seems to me to be particularly unfortunate since our affirmance
surely does this: from here out, it becomes entirely unnecessary for the police to establish "probable cause to arrest" to support weapons charges; an officer can move against anyone he suspects has a weapon + get a conviction if he "frisks" him + finds one. In this lies the terrible risk that police will conjure up "suspicious circumstances," + courts will [crossed out: accept] credit their versions. It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police——the Court will become the scapegoat.

The alternative would of course mean a reversal of the conviction—a holding that there is no constitutional authority to frisk for weapons unless the officer has probable cause to arrest for the crime of carrying a weapon.[.] I recognize that police will frisk anyway, + try to make a case that the frisk was incident to an arrest for public disturbances, vagrancy, loitering, breach of peace, etc + etc—but at times I think these abuses would be more tolerable than those I apprehend may follow our legitimating of frisks on the basis of suspicious circumstances[.]

This states frankly my worries. But if we are to affirm Terry, I [crossed out: hope we may do so without appearing affirmatively to] think the tone of our opinion may be even more important than what we say. If I have exceeded the proprieties, I hope you will forgive me—I am truly worried.457

Justice Brennan sent this letter, his rewrite of the Court's proposed Terry opinion and the background paper regarding the probable cause requirement to Chief Justice Warren on March 14, 1968.458 Although none of the available papers document what happened next between these principals, their pattern of close communication, in general and in connection with the stop and frisk cases,[459] suggests that they discussed, probably at length over a number of conversations, the recasting of Warren's proposed Terry opinion. Warren's next circulation makes it clear that Brennan's input had a decisive impact on the Chief Justice's thinking about these cases.


457 Id.

458 See id. (containing the change discussed in supra note 456).

459 See supra notes 22, 275 and accompanying text.
B. Chief Justice Warren Recirculates Again

On May 31, 1968, Chief Justice Warren circulated a thoroughly revised version of the Court’s proposed Terry opinion. Although Warren disregarded some of Justice Brennan’s advice that certain passages should be deleted from the opinion, Warren accepted the general reorganization that Brennan had proposed and employed vast sections of the rewritten text—some of which of course, employed passages from Warren’s earlier circulation—that Brennan had provided to him. The Brennan approach had become, more than less, the Chief Justice’s proposed opinion for the Court in Terry.

Unlike the Chief Justice’s earlier efforts, this proposed Terry circulation impressed and garnered approval from most of the other Justices. Justice Stewart, after first obtaining Warren’s agreement to delete a seven-word phrase deep in the opinion, joined the opinion enthusiastically within hours of its circulation. Justice Marshall wrote simply that he was “pleased” to join Warren’s opinion. Justice Fortas, after reading the circu-


461 Despite Brennan’s advice, which was directly contrary to his initial advice on this topic, Warren retained his extended discussion of the exclusionary rule and its limitations as a remedy for Fourth Amendment violations. See id. at 8-12. He also ignored Brennan’s advice to omit a section characterizing what prior Fourth Amendment decisions had to say about the permissible scope of a lawful search. See id. at 14-15.

462 The overall result (Warren largely accepting Brennan’s rewrite but also retaining selected passages from the initial Warren drafts) corresponds well to Professor Amar’s theory that the Court’s ultimate Terry opinion is actually two Terrys. See Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097 (1998).


464 Stewart wrote a second letter to Warren on May 31, 1968, after Warren consented to Stewart’s suggestion for the opinion. See Letter from Potter Stewart to Chief Justice Earl Warren (May 31, 1968) (“For me, this case is in many ways the most difficult one of the Term. I think you have done an excellent job with it, and am glad to join in your opinion for the Court.”) (available in Earl Warren Papers, Manuscript Division, Library of Congress).


Justice Marshall came to regret his vote in Terry. In Adams v. Texas, which
lation closely, sent Warren a personal note. Fortas offered a few comments on specific passages in the circulation, but he

came four years later, the Supreme Court had what Justice Marshall described as its "first opportunity to give some flesh to the bones of Terry." 407 U.S. 143, 153 (1972) (Marshall, J., joined by Douglas, J., dissenting). The Adams Court included four new Justices since Terry. The Court held by a 6-3 vote that a police officer did not violate the Fourth Amendment when the officer, responding to an informant's tip that a man sitting in parked car possessed narcotics and had a gun in the waistband of his pants, commanded this man to open the car, reached into his waistband, seized a gun, arrested him immediately for gun possession, and upon searching him incident to that arrest found and seized narcotics. See id. at 144-45. Justice Marshall, dissenting, described the Court's analysis as inconsistent with Terry, which "never meant to approve th[is] kind of knee-jerk police reaction." Id. at 159. In addition, in a separate, concluding section of his dissenting opinion, Justice Marshall offered reflections that seemed almost to retract his vote in Terry:

Mr. Justice Douglas was the sole dissenter in Terry. He warned of the "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees. . . ." 392 U.S., at 39. While I took the position then that we were not watering down rights, but were hesitantly and cautiously striking a necessary balance between the right of American citizens to be free from government intrusion into their privacy and their government's urgent need for a narrow exception to the warrant requirement of the Fourth Amendment, today's decision demonstrates just how prescient Mr. Justice Douglas was.

It seems that the delicate balance that Terry struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in Terry is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.


Fortas urged Warren to delete his discussions of two topics. Fortas "would have eliminated" the theoretical discussion of whether a 'seizure' occurred when the policeman approached Terry, et al. Id. He suggested that Warren eliminate or greatly reduce his "abstract discussion" of the limits of the exclusionary rule as a remedy for Fourth Amendment violations. See id. Fortas was concerned that Warren's "detailed description of what the cops can get away with might not incite them to greater use of the latitude described!" Id. Warren, however, ultimately did not change his opinion in either of these respects, See Terry v. Ohio, 392 U.S. 1, 16-19 (discussing whether McFadden's approach was a seizure and discussing the remedial limits of the exclusionary rule). Warren did change footnote 16, which Fortas
told Warren that he could “disregard” them “without affecting [Fortas’s] total agreement” and praised the quality of Warren’s proposed opinion for the Court. Justice Black, displaying less enthusiasm, asked Warren to note Black’s concurrence in the judgment and in Warren’s opinion except where it quoted from or relied upon two previous opinions that Black had opposed. Justice Brennan, displaying no visible sense of irony, wrote Warren a short note indicating his agreement with an opinion that was largely his own creation.

On June 4, 1968, Warren circulated a revised *Sibron/Peters* opinion. In response to Justice Harlan’s concerns, it contained a significantly expanded section explaining why Sibron’s case was not moot.

Warren’s *Sibron/Peters* circulation got a mixed reaction from his colleagues. Justice Marshall immediately noted his agreement with the opinion. Justice Harlan was persuaded by
Warren's *Terry* and *Sibron/Peters* circulations to withdraw his February 27 circulation addressing these three stop and frisk cases. Although Justice Fortas wrote some skeptical comments in his copy of the circulation, he seemed generally to agree with Warren's approach. Justice Black, however, was unmoved from his previous view that Sibron's conviction should be affirmed.

VI. FINAL POSITIONS TAKE SHAPE AND THE COURT DECIDES

A. *Justice Douglas's Terry Dissent and His Sibron and Peters Concurring Opinions*

Justice Douglas had, until early June 1968, been part of the unanimous Court vote to affirm Terry's conviction. In the Court's December 1967 conference, Douglas had voiced his agreement with Chief Justice Warren's view of the case. In February 1968, Douglas had endorsed Warren's proposed opinion. Warren's May 1968 recasting of the opinion, however, which shifted the rationale for approving the constitutionality of stops and frisks from an analysis based in probable cause to an analysis based in reasonableness ascertained by balancing competing governmental and individual interests, caused Douglas to change his mind.

Douglas's stop and frisk opinions took shape quickly during the first week of June 1968. When Warren re-circulated his pro-

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478 See Letter from Justice William O. Douglas to Chief Justice Earl Warren (Feb. 26, 1968) (available in Earl Warren Papers, cont. 624, Manuscript Division, Library of Congress) ("I do not believe that the [changes] I have on *Terry* change the basic theme of your fine opinion."
posed Terry opinion on May 31, Douglas was hospitalized and awaiting surgery. One of Douglas's two law clerks, Carl J. Kim Seneker II, sent him a memorandum the next day that summarized and critiqued Warren's opinion. Seneker also, at Douglas's instruction, drafted an opinion taking the position that there had been probable cause at the times of the seizures in Terry, in Sibron, and in Peters "to believe that the person seized had committed, was committing, or was about to commit a crime, and therefore that the Court need not reach the question whether some test different from or less than 'probable cause' is permissible under the Fourth Amendment. Over the next few days, Douglas, with additional research and drafting input from his clerk, decided that he would dissent rather than concur in Terry, and, thus, to treat each of the three cases in a separate opinion.

On June 5, 1968, Douglas circulated three short opinions in the stop and frisk cases. Douglas's proposed Terry dissent described the Court's abandonment of probable cause as the constitutional requirement for police searches and seizures. His

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480 See Memorandum by Carl J. Kim Seneker II, Law Clerk to Justice Douglas, regarding Chief Justice Warren's Majority Draft Re-circulation May 31, 1968: Terry (June 1, 1968) (available in William O. Douglas Papers, cont. 1416, Manuscript Division, Library of Congress). Seneker's main criticism was that Warren's opinion was "confused in trying to disassociate the 'probable cause' requirement from the requirement of 'reasonableness'. . . . [I]n focusing upon 'reasonableness' instead of 'probable cause' to take any action, and in failing to discuss the factor of a crime about to be committed, it [Warren's circulation] appears . . . to set a dangerous precedent for a watering down of Fourth Amendment guarantees." Id. at 1.


482 See Typed Note from Carl J. Kim Seneker II, Law Clerk to Justice Douglas, to Justice Douglas (June 4, 1968) (available in William O. Douglas Papers, cont. 1416, Manuscript Division, Library of Congress) (reporting on research into the early American debates on a bill of rights, and on research regarding earlier Supreme Court decisions that separated the Fourth Amendment's Reasonableness Clause from its Warrant Clause); Typed Note from Carl J. Kim Seneker II, Law Clerk to Justice Douglas, to Justice Douglas (June 5, 1968) (available in William O. Douglas Papers, cont. 1416, Manuscript Division, Library of Congress) (reporting on Seneker's re-reading of the record in Terry).

483 See Justice William O. Douglas, Draft Dissenting Opinion Circulated June 5, 1968: Terry v. Ohio (available in Abe Fortas Papers, Yale University Library, Manu-
proposed *Sibron* concurrence displayed personal sympathy for the plight of drug addicts and also, in accord with his commitment in *Terry* to the probable cause standard, declared that "suspicion" is not a constitutionally sufficient basis for search or seizure. John Douglas's proposed *Peters* concurrence merely stated his view that Officer Lasky had probable cause to believe that Peters "was on some kind of burglary or housebreaking mission," and thus to seize him and to search his person.

Although other Justices took note of Douglas's opinions (particularly his *Terry* circulation), he was the only defector from the previously unanimous Court.

**B. Justice Harlan's Concurring Opinions**

On June 5, 1968, Justice Harlan withdrew the opinion he had circulated in February. He circulated in its stead a short proposed concurring opinion in *Terry* that would "fill in a few gaps" in Chief Justice Warren's latest circulation. Harlan did

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484 See Justice William O. Douglas, Draft Concurring Opinion Circulated June 5, 1968: *Sibron* v. New York (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) ("[T]alking with addicts without more rises no higher than suspicion. That is all we have here; and if it is sufficient for a 'seizure' and a 'search,' then there is no such thing as privacy for this vast group of 'sick' people."). The *Sibron* concurrence that Douglas filed five days later is the same as this circulation. See *Sibron* v. New York, 392 U.S. 40, 68 (1968) (Douglas, J., concurring in No. 63).

485 See Justice William O. Douglas, Draft Concurring Opinion Circulated June 5, 1968: *Peters* v. New York (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives). Interestingly, although Douglas seemed to be saying that Lasky had probable cause to arrest Peters and to search his person incident to that arrest, Douglas did not use "arrest" terminology in this brief opinion. The *Peters* concurrence that Douglas filed five days later is the same as this circulation. See *Sibron*, 392 U.S. at 68-69 (Douglas, J., concurring in No. 74).


488 See Justice John M. Harlan, Concurring Draft Opinion Circulated June 5, 1968: *Terry* v. Ohio (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives) [hereinafter Harlan Concurring Draft Circulated June 5, 1968: *Terry*]. A typed draft of this proposed opinion indicates that Harlan's initial reaction
so because he recognized that the Court's opinion would "serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops."48

Harlan's *Terry* opinion accomplished four things. First, it stated plainly the Court's holding that the Constitution permits a police officer to make street stops and frisks, despite his lack of a warrant and the absence of probable cause, if such actions are "reasonable under the circumstances as the officer credibly relates them in court" after the fact.49 Second, Harlan stated that the Court was approving frisks that police officers make to protect themselves from people they have stopped.49 Third, Harlan stated that a constitutional question that is antecedent to establishing the reasonableness of a self-protective frisk is establishing the reasonableness of the forcible stop that put the potentially dangerous person in proximity to the police officer in the first place.49 Fourth, Harlan explained that where the basis for a lawful stop is "an articulable suspicion of a crime of violence," that same suspicion makes it reasonable to frisk "immediately"

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48 Id. Harlan later deleted criticisms of the Chief Justice's opinion from his own draft opinion that he circulated to the other Justices, recasting it as a full concurrence. See *id.*

49 Harlan did not include in this opinion, however, the extensive argument for the "reasonable suspicion" standard that had been part of his initial circulation. See *supra* notes 394-398 and accompanying text.

50 As he had in his February circulation, see *supra* note 375, Harlan distinguished this self-protective rationale for the frisk from the frisks that could occur in a state that had granted its police officers "routine authority to frisk and disarm on suspicion." Harlan Concurring Draft Circulated June 5, 1968: *Terry, supra* note 488, at 2. Perhaps to encourage such state legislation, Harlan added the comment that he had "little doubt that action taken pursuant to such authority could be constitutionally reasonable." *Id.* at 1. On his copy of the Harlan circulation, Justice Fortas drew large question marks next to this assertion. See *id.* at 1-2.

51 See *id.* at 2-3.
and automatic[ly].” Putting all of these elements together, Harlan categorized *Terry* as “a proper stop and an incident frisk.”

Two days later, Harlan circulated a proposed opinion concurring in the results of the judgments that the Court was about to render in the New York cases, *Sibron* and *Peters*. As a threshold matter, he disagreed with the Court’s refusal to acknowledge that the language of New York’s stop and frisk statute was consistent with the Court’s forthcoming *Terry* decision. Harlan also took the occasion to state flatly that *Terry* was deciding that a street “stop may indeed be premised on reasonable suspicion,” which was consistent with his earlier recommendation that the Court employ “reasonable suspicion” phraseology.

Harlan then addressed the constitutionality of the particular police conduct that was at issue in each case. In *Sibron*, Harlan abandoned his previous view that the case was moot because Sibron had finished serving his sentence and suffered no collateral

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493 *Id.* at 3. Justice Fortas, apparently finding the factual record of *Terry* to be less clear and compelling than Harlan did, circled Harlan’s statement that Detective McFadden had “an articulable suspicion” of a violent crime and wrote “Christ!” in the margin. See *id.* at 3.

494 *Id.* The *Terry* concurrence that Harlan filed five days later is substantially the same as this circulation. See *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).


496 *See* Harlan Concurring Draft Circulated June 7, 1968: *Sibron & Peters, supra* note 495, at 1-2. In Harlan’s view, the New York provision, which permitted police officers “to stop any person reasonably suspected of crime,” was generally equivalent to the Court’s decision in *Terry* that a street “stop may indeed be premised on reasonable suspicion.” *Id.* at 2. Justice Fortas, by contrast, in his own brief proposed concurring opinion in the New York cases, expressed his view that a statute authorizing a warrantless search might be so extreme that it would be unconstitutional on its face, “regardless of the facts of the particular case.” Justice Abe Fortas, Concurring Draft Opinion Circulated June 7, 1968: *Sibron v. New York*, *Peters v. New York* (available in Abe Fortas Papers, Yale University Library, Manuscripts & Archives). The *Sibron* concurrence that Fortas filed five days later is substantially the same as this circulation. See *Sibron v. New York*, 392 U.S. 40, 70 (1968) (Fortas, J., concurring).


498 *See supra* notes 394-98 and accompanying text.
consequences based on his criminal conviction. Harlan then, addressing the merits of the case for the first time since his remarks at the Court’s conference, concluded that Officer Martin’s stop of Sibron was unreasonable under the forthcoming Terry standard, and that the unconstitutional stop automatically rendered the frisk unconstitutional. In Peters, Harlan reiterated his earlier analysis that Office Lasky had probable cause to arrest Peters. Although Harlan thus disagreed with Warren’s proposed conclusion for the Court, Harlan nonetheless wrote that he concurred in the Peters result because Lasky’s stop of Peters was based upon reasonable suspicion and therefore was constitutionally reasonable under Terry.

C. The Court’s Stop and Frisk Decisions

On Monday, June 10, 1968, the Supreme Court announced its decisions and filed its opinions in Terry, Sibron, and Peters. Chief Justice Warren announced his two opinions for the Court and also, on behalf of his colleague who was out recovering from surgery, Justice Douglas’s lone dissent in Terry. The decisions made headlines, and the Court generally was applauded for its sensitivity to the safety interests of law enforcement officers.

D. Dismissing Wainwright

Until the Justices finalized their opinions and the Court handed down its decisions in the other stop and frisk cases, Wainwright v. New Orleans continued to be a case on hold. Justice Douglas, calling from outside the Court during his convales-

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500 See id. at 3-4.
501 See id. at 5-6.
502 See id. at 8-9. The opinion that Harlan filed five days later in the New York cases is substantially the same as this circulation. See Sibron v. New York, 392 U.S. 40, 70 (1968) (Harlan, J., concurring in the result).
504 See, e.g., Fred P. Graham, High Court Backs Rights Of Police To Stop And Frisk, N.Y. TIMES, June 11, 1968, at 1; ’Unreasonable’ Still Stands, N.Y. TIMES, June 12, 1968, at 46 (“There can be no doubt that the Supreme Court’s 8-1 [Terry] decision . . . will help persuade policemen that the Court does not lie awake nights dreaming up ways to increase the hazards of their jobs.”).
cence, attempted (apparently unsuccessfully) to have Chief Justice Warren make *Wainwright* an action item on the Court's conference list in late May 1968. Douglas subsequently became concerned that the case was "lost" and wanted the Court's dismissal of Wainwright's petition—and Douglas's dissent therefrom—to be announced with the other stop and frisk decisions on June 10. But the Court did not schedule *Wainwright* for final conference consideration until the afternoon following the Court's announcement of its *Terry*, *Sibron*, and *Peters* decisions.

In the week of the *Terry*, *Sibron*, and *Peters* decisions, Douglas made a series of final edits to his proposed *Wainwright* dissent. He used the opportunity to continue, in effect, the process of dissenting from the Court's *Terry* decision. In a series of late inserts to his proposed *Wainwright* opinion, Douglas called *Terry* "an ill-starred case." He wrote that *Wainwright* "points up vividly the dangers which emanate from the Court's decision in *Terry* to "dilute[]" the Fourth Amendment's probable cause requirement and analogized the New Orleans police officers'
had no more than an unsubstantiated suspicion that petitioner [Wainwright] was a murder suspect, a suspicion based only on a superficial resemblance between petitioner and the wanted man. Certainly, they did not have "probable cause" to believe that petitioner was the murderer within the historical meaning of that term . . . . Thus, in my view, they had no right to seize the petitioner. But, after Terry, whether that seizure was constitutionally permissible no longer depends upon the presence of "probable cause." Just how much less is sufficient is not clear. Did the officers here have "reasonable suspicion" justifying the seizure, or reasonable grounds to believe that petitioner was armed and dangerous? . . . The Court's opinion in Terry seeks objectivity; but once the constitutional standard of "probable cause" is diluted, I see no realistic limit to the amount by which it may be diluted.

Id.

Douglas initially invoked "Franco Spain" and "Soviet Russia." Id. at 6. In various subsequent iterations, he mentioned "modern Iran," "the so-called 'democratic' Formosa," Albania, Vietnam, Korea and Pakistan. See Justice William O. Douglas Draft Dissenting Opinion Re-circulated June 14, 1968: Wainwright v. New Orleans 6 (available in William O. Douglas Papers, cont. 1413, Manuscript Division, Library of Congress). The opinion that he ultimately filed expressed his "fear that with Terry and with Wainwright we have forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, 'democratic' Formosa, and Franco Spain, with which we are now even more closely allied." Wainwright v. New Orleans, 392 U.S. 598, 615 (1968) (Douglas, J., dissenting).

On the same day, the Court also denied a certiorari petition that challenged the constitutionality of a law enforcement officer's basis for stopping, searching and seizing heroin from persons at the U.S.-Mexican border. See Brett v. United States, 392 U.S. 945 (1968). Although the Court was originally scheduled to consider this petition in a February 1968 conference, it apparently deferred considering it, at Justice Fortas's request, until the Court decided the stop and frisk cases. See Note from Justice Abe Fortas to Chief Justice Earl Warren (Feb. 27, 1968) (available in Earl Warren Papers, cont. 352, Manuscript Division, Library of Congress) ("I suggest that this case be removed from the Special List and held for the stop and frisk cases."). Justice Douglas dissented from the denial of this petition. See Brett, 392 U.S. at 945.

Wainwright, 392 U.S. at 610; accord id. at 613, 614-15.

On Monday, June 17, 1968, the Supreme Court announced its per curiam decision to dismiss Wainwright's petition as improvidently granted and the filing of separate concurring opinions by Justices Harlan and Fortas, and separate dissenting opinions by Chief Justice Warren and Justice Douglas. Only Douglas, who suggested that the Court recently had changed "traditional Fourth Amendment standards" in Terry, took jabs at that decision by name.512
VII. CONCLUSION: OUR UNDERSTANDING OF THE JUSTICES' WORK, THE STOP AND FRISK DECISIONS AND THE COURT'S PROCESS OF DECIDING

The Justices' papers regarding the stop and frisk cases, including their memoranda, conference notes, draft opinions and private jottings, permit us to understand in new ways the Warren Court's adjudication of *Terry v. Ohio* and its companion cases during the October 1967 Term.

Although we have known *Terry*, *Sibron*, *Peters*, and *Wainwright*—at least their outcomes, and the opinions that were filed in each case—since June 1968, it is only the Justices' papers that show us the Court's process of decision-making. The papers show that in conference the Justices voiced nine individual perspectives on the issues that the cases raised. Although there were some divisions in the Justices' voting in the secondary cases, the Justices did vote unanimously in conference to affirm John Terry's conviction, based upon their view that Detective McFadden had probable cause to frisk Terry and his two companions. Only after conference, when Chief Justice Warren circulated proposed opinions that failed to persuade his colleagues, did the Court's Fourth Amendment analysis change from an assessment of probable cause to a determination of reasonableness. Warren, the author of *Terry*, actually used much of an opinion that Justice Brennan, who is not identified as an opinion writer in the case, had ghost-written for Warren and persuaded him to use. Justice Douglas, the lone dissenter in *Terry*, initially agreed with the other Justices and offered supportive input as Warren worked to describe McFadden's probable cause for the street questioning and frisks he conducted. Douglas remained "on board" until Warren shifted the analysis from probable cause to reasonableness. Only then did Douglas begin to write the seething *Terry* dissenting opinion, and the other separate opinions in the stop and frisk cases, that he ultimately filed.

The papers also show the Court's outstanding and sophisticated performance as an institution. The Court, as a collective, worked hard and communicated well in conference, in the circulations of proposed opinions, and in the private communications among and between the Justices about stop and frisk issues in their full constitutional complexity. The papers reveal, in a very raw and immediate way, the intellectual powers, work habits
and personal traits of individual Justices. The papers also demonstrate the capable and wholly appropriate support that the law clerks provided to the Justices, who by all indications were fully on the job and doing the actual judging for themselves.

In the realm of constitutional criminal procedure, which has come to be a collection of doctrinal categories, *Terry v. Ohio*, at age thirty, is a Supreme Court decision that we know well. We know that the *Terry* Court identified police conduct short of formal arrest that nonetheless constitutes "searches" and "seizures" under the Fourth Amendment. We know that the Court, by balancing the relative intrusiveness and public purposes of this police conduct, approved the constitutional "reasonableness" of stops where the police have objective and articulable bases to believe that crime is afoot, and frisks where the police have objective and articulable bases to believe that persons lawfully stopped are armed and pose dangers to the police or others. Many thus think of *Terry* and the law of "stop and frisk" as a well-settled matter, a sensible balancing of public interests in law enforcement against relatively lesser intrusions on personal freedom, and a measure of constitutional justification—"reasonable suspicion"—that police officers on the street, and also courts evaluating police conduct after the fact, can use effectively in deciding whether a particular intrusion is constitutionally permitted.

The papers of the Supreme Court Justices reveal what came before "*Terry v. Ohio*" was all of that, and what *Terry* and its companion stop and frisk cases presented to the Justices in the internal work of the Court. In the October 1967 Term, the Supreme Court was nine individuals engaged—intellectually and emotionally—in the process of deciding among competing analytical approaches to the question of how to apply the Fourth Amendment to police stops and frisks. The Justices carefully sorted through the difficult legal and policy issues that flowed from each of these approaches. The papers show that the Justices were concerned to control abusive police practices on the streets without unduly hampering law enforcement. Some thought that they should decide *Terry* only as a "frisk" case, and

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513 Two of the most striking things that the papers document are the brilliance of Justice Fortas, who wrote many profound insights in his notes and in the margins of various circulations, and the selfless support that Justice Brennan provided to Chief Justice Warren as he crafted opinions for the Court.
that they should do so by imposing real limits on the police power to frisk, leaving questions about on-the-street questioning and investigative detentions for later cases. Others thought that, as an analytical matter, the frisk issue could not be decided without first resolving “stop” questions. The latter view, first suggested by Justice Brennan, ultimately prevailed through a process of persuasion and compromise by the Justices.

Although we think of Terry and the constitutional law of stops and frisks as well-settled rules and categories, the Justices’ papers also demonstrate that there was, from the time of the Court’s conference discussions in the fall of 1967, through the drafting and commenting process that ended in the stop and frisk decisions of June 1968, an openness to multiple possibilities and doctrinal outcomes. One path that ultimately was not taken is the approach that Chief Justice Warren wanted in his heart of hearts: promulgating a Miranda-like frisk rule. It is of course impossible, without knowing the exact language of a rule and the contingent course of subsequent events, to evaluate how this approach would have worked doctrinally, politically or practically. The Terry result itself eliminated the need, and thus any political interest, to enact stop and frisk laws to empower the police. And the Court’s flat rejection in Sibron of New York’s statutory approach also suggested that it would be difficult to enact a constitutional prescription for generically proper stops and also frisks. On the other hand, one way to view Terry itself is as something of a common law rule. Terry has, at least with the developments in later cases, become a known formula. 514 Thus, while Chief Justice Warren never embarked consciously on the project of writing a stop and frisk “statute,” his Court and the later Supreme Courts may well have done so in effect, with Fourth Amendment law ending up on the path that Warren wanted all along.

A second path, visible in the conference remarks of most Justices and in Chief Justice Warren’s first circulations of proposed stop and frisk opinions, was to stick to the “probable cause” requirement of the Fourth Amendment’s Warrant Clause. This approach took a unitary view of police actions that constitute Fourth Amendment “searches” or “seizures.” According to

Warren's early drafts, this approach would have required police officers to satisfy the requirements of the Warrant Clause whenever they searched or seized or, where obtaining a warrant was impossible, at least to justify their conduct with the "probable cause" that is a component of that Clause. The Justices' papers reveal that when Warren tried to write an opinion that used this standard, however, the Court quickly fractured, coming together again only after Justice Brennan persuaded the Chief Justice to ground the opinion in the Reasonableness Clause.

What if the Court had approved only stops and frisks that were based on Fourth Amendment probable cause? Justice Douglas, in his *Terry* dissent, implied that once some stops and frisks could be justified on less than probable cause, the protections of this Fourth Amendment component would erode in all contexts, including the full-blown arrests where "probable cause" should retain its full constitutional meaning. The past thirty years may provide some support for this claim, but the Justices' papers also establish that the converse proposition—that sticking with "probable cause" would have preserved its full meaning as a significant limit on the police—is hardly self-evident. Douglas himself, in conference and in the memorandum that he wrote to Chief Justice Warren when Warren still was writing a *Terry* opinion for all the Justices, proposed to approve street stops when the police had probable cause to believe that crime was imminent. Douglas admitted, however, that this probable cause regarding incipient crime was, by definition, a less certain level of justification than is probable cause for a custodial arrest. This admission—that "probable cause for this seizure" might differ from "probable cause for that seizure"—undercuts the central claim of Douglas's *Terry* dissent that the Court there did new violence to the Fourth Amendment. As other Justices seemed to recognize, staying on the probable cause path in *Terry* would have meant at least beginning the process of developing a unique meaning for that level of justification in each search and seizure context. Even if that development would not have led

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516 See infra Part IV. E.
517 See id.; see also *Camara v. Municipal Court*, 387 U.S. 523, 536-39 (1967); *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting) ("The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought.").
necessarily to later decisions pulling all “probable cause” requirements down to the level of its weakest form, the Court certainly would have been, as Justice Fortas remarked in conference, “inventing a new probable cause” for stops and frisks. The result would have been a two-tiered system operating under the single label “probable cause.”

Did the Court then make a mistake by not taking another path—going all the way and, as Justice Harlan advocated, announcing with a new label (reasonable suspicion) that it was approving stops and frisks that were based on less justification than the Fourth Amendment requires for a lawful arrest? In 1968, most of the Justices were unwilling to take that step in the direction of semantic candor. Later Courts, following Harlan’s lead, have not been so reserved, however, and “reasonable suspicion” is now, of course, a well-used measure of Fourth Amendment justification.

The Justices’ notes and the proposed stop and frisk opinions that the Court circulated in 1968 do not say explicitly why the Warren Court was reluctant to embrace “reasonable suspicion” in 1968. These papers suggest that fidelity to the words of the Fourth Amendment played a role, and also that pragmatic considerations were present throughout the Court’s stop and frisk deliberations. The Court was, and it knew that it was, deciding these cases in a particularly turbulent time. Concerns about societal reaction and consequences seem to have played roles not only in the judgments themselves, but also in the decisions to deny oral argument time to the NAACP Legal Defense Fund and to write the Terry opinion as only barely a race case.

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518 See supra text accompanying notes 394-98.
519 See Terry, 392 U.S. at 31 (Harlan, J., concurring); Sibron, 392 U.S. at 70 (Harlan, J., concurring).
520 See, e.g., Richards v. Wisconsin, 117 S. Ct. 1416, 1418 (1997) (holding that if police have a “reasonable suspicion” that the announcement of their presence “would be dangerous or futile, or that it would inhibit the effective investigation of the crime,” a “no-knock” entry is justified); Maryland v. Buie, 494 U.S. 325, 334-36 (1990) (concluding that the Fourth Amendment allows a “protective sweep” of premises that are an arrest scene if the searching officer has a “reasonable suspicion of danger”); Michigan v. Long, 463 U.S. 1032, 1049-50 & n.14 (1983) (authorizing area searches during investigative detentions by police who “have the level of suspicion identified in Terry”).
521 See supra text accompanying note 138.
522 In the Court’s Terry opinion, the only mention of race is a disembodied, generic reference to “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”
The Justices' papers, by illuminating the many compromises that *Terry* embodies and the genuine trepidation with which at least some of the Justices gave their approvals to police stops and frisks, also help us to understand some of the Justices' later regrets. Justice Marshall, who as a newcomer to the Court was relatively uninvolved in the Court's internal arguments over the stop and frisk cases, all but stated in later cases that he had voted wrong in *Terry.*

Justice Brennan, the shadow author of the Court's opinion, never made so flat a statement, but some of his later opinions are very hard to square with the approach that he persuaded Warren to take in 1968.

But that is the ultimate point: it was 1968, and the Justices of the Warren Court did the best they could then to apply the Constitution sensibly to the stop and frisk problem. It is to their great credit that their papers permit us to understand how they went about the hard work of making these difficult deci-

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

Similarly, although the Court's decision not to decide *Wainwright* may genuinely have been based on its factual imperfections alone, an explanation grounded in the societal context of the time also seems possible. In 1967 and 1968, the Justices might well have preferred to avoid endorsing physical resistance by civil rights protesters, anti-war protesters and others who then were being arrested illegally but generally were taking it non-violently.

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See *supra* note 465.

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> [T]he provisions of the Warrant Clause—a warrant and probable cause—provide the yardstick against which official searches and seizures are to be measured. The Fourth Amendment neither requires nor authorizes the conceptual free-for-all that ensues when an unguided balancing test is used to assess specific categories of searches. If the search in question is more than a minimally-intrusive *Terry* stop, the constitutional probable cause standard determines its validity.

*Id.; Florida v. Royer,* 460 U.S. 491, 509-10 (1983) (Brennan, J., concurring in the result) (emphasizing "that *Terry* v. Ohio... was a very limited decision that expressly declined to address 'the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation' " (quoting *Terry,* 392 U.S. at 19 n.16)); *Dunaway v. New York,* 442 U.S. 200, 213-14 (1979) (Brennan, J., joined by Stewart, White, Marshall, Blackmun and Stevens, JJ., for the Court) (stating the general rule that "Fourth Amendment seizures are 'reasonable' only if based on probable cause").

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sions. The Justices did not merely create the modern Fourth Amendment law of stop and frisk. They facilitated, in their preserved papers, public understanding of the Supreme Court and its work.