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POLICE POLICING POLICE: SOME DOUBTS

MARGARET RAYMOND*

Professor Fyfe has three things to say about *Terry v. Ohio*.¹ He argues persuasively that *Terry* authorizes a necessary and often effective investigative tool. He contends that this tool, subject to broad discretion, is often abused. He also claims that the best answer to such abuses is to involve police chiefs in developing and enforcing policies that appropriately constrain the discretion of the officer on the street in conducting *Terry* stops. I agree with Professor Fyfe's first two points, but have some significant concerns about the third.

First, I agree with Professor Fyfe that Detective McFadden's intervention at what he believed might be the preparatory stage of a violent crime—the factual core of the *Terry* case—might have been the best option available to him. His alternative, allowing the suspected crime to continue, "Special Investigation Section" style,² would have strengthened his justification for intervening and the likelihood of convicting Terry and his colleagues of a more serious offense, but it could also have posed a significant risk to person or property. Professor Fyfe makes this argument by asking the common sense question: What should Detective McFadden have done? From the police perspective, he may have pursued the best possible course.

It is worth noting that those choices, presented as practical on-the-street decisions, are, in fact, largely guided and determined by legal doctrine. *Terry v. Ohio* was not necessary to permit a police officer to intervene in a crime in the making in order to avoid a potentially dangerous situation. Indeed, Professor Fyfe indicates that police did that routinely before *Terry*, at

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¹ 392 U.S. 1 (1968).

² See James J. Fyfe, *Terry: A[n Ex-Cop's View]*, 72 ST. JOHN'S L. REV. 1231 (1998), for a discussion of the tactics of the LAPD Special Investigation Section.

least in New York,³ and probably would have continued to do so regardless of the outcome of the case.⁴ What the case did was make clear that seizure of evidence resulting from a frisk was "reasonable" for purposes of the Fourth Amendment and would therefore be admissible. Police did not need *Terry* to conduct stops and frisks; they needed *Terry* to be sure that the fruits of those stops and frisks would not be subject to the exclusionary rule.

Purely as a policy matter one might choose a different approach to the *Terry* situation: Permit McFadden to conduct the frisk, but prohibit the State from using the resulting evidence.⁵

³ *See id.*

⁴ Lawful or not, Detective McFadden could have stopped and frisked Terry to protect the public or himself. *See, e.g.,* *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (stating "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"); *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964) ("If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty . . . the frisk is a reasonable and constitutionally permissible precaution to minimize that danger."). Even if such a stop had been deemed a constitutional violation, the consequence to the officer was not likely to be significant. Departmental discipline was highly unlikely in view of the situation. Even in the improbable event of a civil suit, the injury would be slight, the plaintiff unsympathetic, and the damages minimal.

Needless to say, as an aspirational matter, we do not ordinarily model our views of the constitutional constraints on police conduct on the assumption that police will violate those rules. We want police to understand and respect the limits on their intrusions into the privacy of private citizens. At the same time, we want legal doctrine to reflect limits that are sensibly calibrated to the actual needs of enlightened law enforcement, and those concerns must implicitly reflect what will happen if police routinely decide to act outside the rules.

⁵ Justice Marshall made a similar argument in the *Miranda* context in his dissenting opinion in *New York v. Quarles*, 467 U.S. 649, 686 (1984). Police apprehended Mr. Quarles, a rape suspect, inside a supermarket. *See id.* at 651-52. Finding him in possession of an empty shoulder holster, they asked him where the gun was. *See id.* at 652. Mr. Quarles told police the location of his loaded .38-caliber revolver, and was then administered *Miranda* warnings. *See id.* At his trial for criminal possession of a weapon, the prosecution sought to offer both his statement and the weapon against him. *See id.* at 652-63. The Supreme Court held that these facts made out a "public safety" exception to the *Miranda* doctrine, allowing both the questioning (since the missing weapon posed a threat to public safety) and the admission of the statement and weapon into evidence. *Id.* at 655-57, 659-60. To hold otherwise, the majority concluded, would:

[P]lace officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover

Such an approach might have accommodated the public and officer safety concerns expressed in *Terry* as well as the privacy rights of individual citizens. But, because constitutional doctrine did not require this result,⁶ it did not become a meaningful option. It is difficult to talk for very long about the practicalities of police enforcement without coming back to constitutional law.

Professor Fyfe is plainly correct that, in view of the far-reaching discretion possessed by the officer in the *Terry* stop context, and the tremendous potential for abuse inherent in the stop and frisk authority, training and clear guidelines in this area are critical. I find myself considerably more skeptical about his notion that the best way of assuring compliance with *Terry* is more and better departmental supervision. Ultimately, I think we are stuck with looking to the courts to police our police.

This is partly because of what Professor Fyfe himself tells us. On the one hand, he indicates that chiefs of police pay little attention to *Terry* for several reasons. The first is that by and large they prefer ambiguity to clarity. Keeping the public unsure and off balance about what it is police have the authority to do is the best way for the police to maintain the upper hand. The second is that they view wrongdoers who object to being "tossed" as whiners, who, since they are "dirty," have no legitimate basis for complaint. The third reason is that fruitless frisks do not harm anybody. In fact, they are good for public relations because they reflect to the community the diligence of the officers serving it.

This information suggests two things. The first is the tremendous distance between police and community perceptions of effective and appropriate police behavior. It is difficult, to say the least, to imagine a citizen arriving at home and telling his

but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Id. at 657-58.

Justice Marshall's view, in dissent, was that public safety could be adequately served by permitting the interrogation, but prohibiting the admission of the resulting statements. *See id.* at 686 (Marshall, J., dissenting). ("The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment.")

Under current interpretations of the Fourth Amendment, the violation takes place at the time of the police intrusion, not when the evidence is wrongly admitted, distinguishing the *Miranda* context from the *Terry* situation.

⁶ In *Quarles*, the majority's response was that the statements were admissible because "there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind." *Id.* at 658 n.7.

wife, "Hi, honey. I got frisked today. The NYPD is certainly doing its job."⁷ These arguments also suggest that there may be little enthusiasm among law enforcement command officers for significant limits on police power to engage in stops and frisks. Nothing about the manifest advantages of the stop and frisk doctrine from the police perspective requires—at least in the short run—any significant limitation on the power to engage in the practice.⁸

At the same time, Professor Fyfe tells us that the major influence on what officers do is what police chiefs want. Having described the attitude of those very chiefs towards even the minimal constraints of *Terry v. Ohio*, and doubts about those officials' ability to generate⁹ and enforce meaningful limits on the conduct of officers in the street seem self-evident. While departmental administration could be part of the solution, it may also be part of the problem.

I have other reasons for being skeptical about the effectiveness of departmental discipline in generating adherence to *Terry*. Mr. McGuire adverts to one such reason: Officers sometimes lie.¹⁰ This is not to say they lie more than anybody else in the

⁷ It may be, of course, that the citizens the departments are hoping to impress with their diligence are not the same citizens who are subjected to stops and frisks. Particularly in view of the increasing reliance on the character of the neighborhood in which a suspect is found to justify a stop, see Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion* (forthcoming OHIO ST. L.J.), the likelihood that the upstanding citizens the chiefs hope to impress will happen to observe aggressive police tactics seems slim.

⁸ In the long run, however, community resistance to what may be perceived as an unfair practice may interfere with policing to the extent that constraints may be viewed as necessary to create a community climate receptive to legitimate police work.

⁹ Interestingly, we must infer that these chiefs will be evolving such policy to a large extent in a vacuum that does not appear to have been filled by leading organizations in the profession, such as the International Association of Chiefs of Police or the Commission on Accreditation for Law Enforcement Agencies. See Fyfe, *supra* note 2.

¹⁰ For anecdotal discussions of police lying or perjury see, for example, PAUL CHEVIGNY, *POLICE POWER* 183-92, 194-98, 201-02, 215-17 (1969) (explaining that police officers often "vary the facts" to satisfy probable cause requirement when they believe the suspect is involved in criminal activity but the facts do not support the suspicion); JONATHAN RUBINSTEIN, *CITY POLICE* 386-88, 390-93 (1973) (arguing that acts of perjury and lying by police officers are the result of disproportionate pressure for vice arrests). The "dropsy" phenomenon that followed the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), is chronicled in Note, *Effect of Mapp v. Ohio on Police Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 94-96 (1968). The

system. Nonetheless, there is impetus at several levels for officers to shape and manipulate their experience, and their resulting testimony, to fit the applicable legal standard. First, the officer's own recollection and articulation of his experience evolves over time. Police officers, like the rest of us, want to do a good job, and an officer aware of the applicable standards may well convince himself, after the fact, that events happened and observations were made in a manner consistent with what the law requires.¹¹ Supervisors will play a role in this process as well, going over the story and encouraging the testimony to come out in the most positive light. Prosecutors, as Dan Richman suggests, are next in line, trying to develop the evidence in the way that most fully makes the case.¹² Others have recognized elsewhere the notion that the court's view of the exclusionary remedy for Fourth Amendment violations shapes and manipulates the content of Fourth Amendment rights.¹³ It seems reasonable to believe that the consequences of the exclusionary remedy similarly impact police officers, and shape their testimony in particular

author notes the decline, after *Mapp*, of claims that contraband was found on the body of a suspect and a "suspicious rise" of cases where the officer claimed the suspect either dropped the contraband or had it in plain view. *Id.* at 94-95.

My co-panelists acknowledge concerns with police perjury in their thoughtful and impressive volume about police brutality, JEROME H. SKOLNICK AND JAMES J. FYFE, *ABOVE THE LAW* 45-49 (1993).

¹¹ See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 215 (1966) ("[T]he policeman respects the necessity for 'complying' with the arrest laws. His 'compliance,' however, may take the form of *post hoc* manipulation of the facts rather than before-the-fact behavior.").

¹² See Daniel C. Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN'S L. REV. 1043 (1998).

¹³ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) ("Judges do not like excluding bloody knives so they distort doctrine claiming the Fourth Amendment was not really violated If exclusion is the remedy, all too often ordinary people will want to say that the right was not really violated."); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036-40 (1974) ("The courts have often avoided applying the exclusionary rule in situations in which the consequences of so doing would offend their own sense of proportionality or reach beyond their view of what the public would tolerate."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910-18 (1991) ("[I]t is at least plausible to suppose that the character of the claimant in an exclusionary rule proceeding tends to exacerbate the bias that is naturally present in all after-the-fact proceedings."); George C. Thomas III and Barry S. Pollack, *Saving Rights From a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147-49 (1993) ("The possibility of . . . 'erroneous acquittals' may cause courts to twist the facts and doctrine to avoid finding Fourth Amendment violations.").

cases.

That some officers sometimes lie should be no surprise. It is to some extent nothing more than we should expect. In other contexts, we encourage law enforcement officers to act consistent with their visions of justice, even if doing so stretches the truth. I can provide a simple example. In Iowa, where I live now, if you are stopped for speeding the fine you pay is determined in part by how many miles per hour over the speed limit you are driving.¹⁴ When a county sheriff's deputy pulls a driver over to write him a speeding ticket, the deputy may decide to give the driver a break and reduce the offense by indicating on the citation that the driver was driving more slowly than he really was. So, instead of citing the driver for driving twenty miles per hour over the speed limit, which is what the offender was actually doing,¹⁵ the deputy will cite him for driving ten miles per hour over the speed limit. This carries a reduced fine and lacks the potential collateral consequences of the offense actually committed.¹⁶

The ticket this deputy writes tells a story that never really happened—this particular suspect was never observed or apprehended driving ten miles per hour over the speed limit. While it is not a true story, it is a story consistent with the officer's view of justice. The result is what the officer thinks is fair, given the circumstances,¹⁷ and constitutes what most of us would view as a perfectly valid exercise of discretion. So perhaps it should not be a surprise to us that some officers may feel, at times, that their

¹⁴ Pursuant to IOWA CODE § 805.8(2g)(3), (4) (1997), driving 10 miles per hour over the speed limit incurs a \$20 fine, while driving between 10 and 15 miles per hour over the speed limit incurs a fine of \$30 or \$40 (depending on the speed zone in which the driver exceeded the speed limit).

¹⁵ Driving twenty miles per hour over the speed limit would incur a fine of \$40 or \$60, depending on the speed zone in which the offender was speeding. *See id.*

¹⁶ While the Iowa Code provides for suspension of the license of a habitually reckless or negligent driver, the first two speeding violations within any 12 month period of 10 miles per hour or less over the legal speed limit, in speed zones having a limit between 34 miles per hour and 56 miles per hour, may not be considered in a license suspension proceeding. *See* IOWA CODE § 321.210(2)(d) (1997). Absent this exclusion, implemented in IOWA ADMIN. CODE r. 761-615.12(2) (1997), three convictions of speeding violations within a 12 month period would subject the driver to license suspension. *See* IOWA ADMIN. CODE r. 761-615.12(1)(a) (1997).

¹⁷ This exercise of the officer's discretion is, however, both ungoverned and unreviewable. That an officer will typically choose to give this break to someone with a "good attitude," who is respectful, polite, and seems like a "decent guy," should not be surprising; it would not be surprising either to find that the "break" was given less to those drivers who seemed hostile, uncooperative, or "different" or whose attitude and body language were more difficult for the officer to interpret.

perspective on justice—what they think is “fair” in a given situation—should control even if they have to manipulate the truth somewhat to produce a just outcome. I have some concern that this possibility will undermine internal efforts at enforcement in the same way it can undermine judicial enforcement of the Fourth Amendment.

Whether a meaningful policy can be developed and enforced under the existing legal standard is also a significant question. First, it is hard to tell what conduct amounts to a “stop” and what merely constitutes a voluntary encounter. Not only is it difficult to identify a stop, it is hard to tell when such a stop is justified. Resources that might make the police job easier—a checklist, a manual, a previously approved list of factors that will amount to reasonable suspicion—create the risk that courts will view recitation of preapproved factors as a fabricated substitute for independent observation.¹⁸

Moreover, the standards are increasingly evanescent. While the Supreme Court requires that a stop be supported by “specific, articulable facts”¹⁹ that create a particularized and objective basis for suspecting the particular person stopped of criminal activity,²⁰ the lower courts’ vision of what suffices to demonstrate reasonable suspicion is confused and inconsistent. It may be, as the training materials cited in Professor Fyfe’s paper reflect,²¹ the “out of place” individual, the derelict in the

¹⁸ In this regard, note *United States v. Rodriguez*, 976 F.2d 592 (9th Cir. 1992), amended by 997 F.2d 1306 (9th Cir. 1993). Mr. Rodriguez was stopped by the Border Patrol while driving a 1976 Ford Ranchero along a Southern California interstate highway that was a “notorious route for alien smugglers.” *Rodriguez*, 976 F.2d at 594. The factors claimed to create reasonable suspicion were that Mr. Rodriguez “looked Hispanic,” that he looked straight ahead and “did not ‘acknowledge’ the agents,” and that his vehicle—a type that could be used for smuggling aliens—“responded sluggishly when it went over a bump as if heavily loaded, rather than with a ‘crisp, light movement.’” *Id.* at 593-94. The resulting search of Mr. Rodriguez’ vehicle turned up 168 pounds of marijuana. *See id.* at 594. Noting that this case was “not the first time Border Patrol agents have tendered a similar profile . . . as evidence of the existence of reasonable suspicion,” and that “this profile is so familiar, down to the very verbiage chosen to describe the suspect, that an inquiring mind may wonder about the recurrence of such fortunate parallelism in the experiences of the arresting agents,” *id.* at 595, the Court of Appeals rejected the argument that there had been reasonable suspicion to stop the vehicle. It refused to accept what appeared to it to be a “prefabricated or recycled profile of suspicious behavior” based “merely on hunch.” *Id.* at 595-96.

¹⁹ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

²⁰ *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

²¹ *See Fyfe, supra* note 2.

prosperous neighborhood, who is subjected to a stop.²² It may also be someone who in a neighborhood known for crime, crossed the street twice,²³ looked into the open palm of a companion,²⁴ walked across a shopping center parking lot late at night,²⁵ or sat in a chair in the driveway of his home at 2:00 a.m.²⁶ Or it may not. The inconsistency of the courts' approaches to the question of reasonable suspicion provides few clear guidelines for the officer eager to follow the law.²⁷ Questions of clarity, as well as equity, are presented when the police authority to intrude on the individual citizen is determined by such unclear and inconsistent standards by factors. So Professor Fyfe's reference to a training

²² While those training materials do not talk about race, race winds up being considered in the context of this evaluation of when individuals are "out of place" and attract police attention. For a discussion of consideration of race in the decision to stop, see Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); see also David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 672-77 (1994) (discussing the use of location and evasion as proxies for race in reasonable suspicion determinations).

²³ See *Thompson v. State*, 668 So. 2d 904 (Ala. Crim. App. 1995) (mem.). This stop took place in a "high drug traffic area." *Id.* at 904 (Taylor, P.J., dissenting).

²⁴ See *United States v. Lender*, 985 F.2d 151 (4th Cir. 1993). This stop took place in a neighborhood "where heavy drug traffic occurred." *Id.* at 153.

²⁵ See *People v. Ellis*, 446 N.E.2d 1282 (Ill. App. 1983). A "rash of burglaries and break-ins had recently occurred in the area" of this stop. *Id.* at 1285.

²⁶ See *Malvo v. State*, No. 01-94-00311-CR, 1995 WL 752458 (Tex. App. Dec. 21, 1995) (unpublished decision). The home was in a "high crime area." See *id.* at * 1.

²⁷ Compare *Harris v. State*, 568 So. 2d 421, 424 (Ala. Crim. App. 1990) (finding no reasonable suspicion to stop vehicle driving slowly after midnight through a neighborhood where nighttime automobile thefts and burglaries had been reported) with *United States v. Rickus*, 737 F.2d 360 (3d Cir. 1984) (finding reasonable suspicion to stop car driving slowly at 3:30 a.m. in residential area that had been recently subjected to numerous unsolved nighttime burglaries); compare *State v. Anderson*, 696 So. 2d 105, 105-07 (La. App. 1997) (finding no reasonable suspicion to stop man showing his cupped hand to another man, who walked away when officers approached) with *United States v. Lender*, 985 F.2d 151 (4th Cir. 1993) (finding reasonable suspicion to stop individual who, at 1:00 a.m. in area "where heavy drug traffic occurred," was observed with 4-5 men looking into his open palm); compare *People v. Morrison*, 555 N.Y.S.2d 183 (App. Div. 2d Dep't 1990) (finding no reasonable suspicion to stop two men sitting in a vehicle parked in parking lot in a high crime area at 4:50 a.m.) with *Bozeman v. State*, 397 S.E.2d 30, 32 (Ga. App. 1990) (finding reasonable suspicion where individual was observed "sitting for no apparent reason in a parked automobile in a remote part of a motel parking lot located in a 'high crime area' at 4:45 a.m."); compare *Commonwealth v. Espada*, 528 A.2d 968, 969 (Pa. Super. Ct. 1987) (finding no reasonable suspicion to stop individual standing on a street corner in a high crime area) with *State v. Hall*, 581 So. 2d 337 (La. Ct. App. 1991) (finding reasonable suspicion to stop three individuals standing on a street corner at 4:07 a.m. in an area where "shootings and fights" were regularly investigated).

manual suggesting that an individual who has a "poker face" and does not react to the presence of the police officer on the street is likely to be suspicious, perhaps because such demeanor is indicative of having spent time in prison,²⁸ is countered by the caselaw in which reaction to the presence of the officer, rather than the failure to react to the officer, is found to create reasonable suspicion.²⁹ This suggests that the standards for what constitutes reasonable suspicion possess, in Justice Marshall's words, a "chameleon-like way of adapting to any particular set of observations."³⁰ If both making and failing to make eye contact are suspicious, very little content remains to the requirement of reasonable suspicion. Even leaving aside concerns about the appropriateness of the existing doctrine, it is hard to provide meaningful guidance on how to pursue a moving target. It is, accordingly, difficult to discern how disciplinary standards could serve to enforce such elusive constraints on officer discretion.

The last concern is the public accountability of purely internal review procedures. While I applaud departmental interest in

²⁸ Fyfe, *supra* note 2.

²⁹ See, e.g., *State v. Halstead*, 414 A.2d 1138, 1142 (R.I. 1980) (finding reasonable suspicion to stop rental truck driving slowly past a patrol car at 4:30 a.m. where the "occupants of the truck stared at the police for approximately five seconds" as the truck passed in front of the police car; truck was ultimately searched and found to contain the body of a homicide victim); *State v. Butler*, 415 S.E.2d 719 (N.C. 1992) (finding reasonable suspicion to stop individual who was seen on a street corner frequented by drug dealers when individual made eye contact with the officers, then immediately turned and walked away); *State v. Short*, 694 So. 2d 549 (La. Ct. App. 1997) (finding reasonable suspicion to stop subject who was standing outside a club at 4:30 a.m. and "darted in a hurried manner" into the club when [he] made eye contact with the officer's vehicle"); *Commonwealth v. Moses*, 557 N.E.2d 14, 17 (Mass. 1990) (finding reasonable suspicion where men in a high crime area made eye contact with the police officer and then dispersed or ducked so as to avoid officer's gaze); *United States v. White*, No. 95-5752, 1997 WL 159540, at * 1 (4th Cir. Apr. 7, 1997) (unpublished table decision) (finding reasonable suspicion to stop a vehicle where man in the vehicle, in an area known for drug activity, had stopped and spoken to a pedestrian, and both men had "abruptly ended their conversation" when they saw the officer), *cert. denied*, 118 S. Ct. 242 (1997).

³⁰ *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)). The Court in *Sokolow* found reasonable suspicion based, inter alia, on behaviors engaged in by Mr. Sokolow—including paying for his ticket in cash, appearing nervous, and not checking any luggage—the DEA deemed characteristic of the "drug courier profile." Justice Marshall catalogued case law holding numerous contradictory observations all suggestive of reasonable suspicion: deplaning first, deplaning last, or deplaning in the middle; purchasing one-way tickets or purchasing round-trip tickets; traveling with no luggage, little luggage, or new luggage; traveling alone or traveling with a companion; acting nervous or acting too calmly. See *id.* at 13-14.

self-policing with regard to the requirements of *Terry*, such self-policing does not address the community's need for visible, tangible assurances that citizen rights are being protected. Even if supervision and discipline can adequately constrain the police, citizens are still likely to lack confidence in police interest or willingness to police themselves.³¹

Terry v. Ohio gave police a way to deal with persons who, while not yet subject to arrest, had aroused suspicion.³² Standards designed to address such a diffuse concern will by definition be diffuse themselves. To the extent there are standards to enforce in the *Terry* area, departmental discipline cannot replace judicial oversight of police compliance with *Terry v. Ohio*. While it is appropriate and valuable, its inherent limitations suggest that the judiciary must continue to play a role in constraining police discretion.

The judicial role could be further enhanced by reducing judicial deference to police expertise. That is not because police expertise does not exist; it does. But the basis for real expertise can and should be articulated. This not only exposes the basis for police conduct to judicial oversight, but the articulation of precisely what was observed and how it had meaning in the context of the officer's experience has educative value. Only then can we begin to bridge that gap between police perception and community perception of who should be stopped and why.

³¹ Such skepticism is part of the basis for the movement to citizen review of police misconduct. See, e.g., DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 1-4, 235-40 (1994).

³² The tactic doubtless became more meaningful in the light of the striking down of overbroad vagrancy statutes. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).