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FOLLOWING THE SCRIPT: NARRATIVES OF SUSPICION IN *TERRY* STOPS IN STREET POLICING

JEFFREY FAGAN
AMANDA GELLER

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Following the Script: Narratives of Suspicion in *Terry* Stops in Street Policing

Jeffrey Fagan*

Amanda Geller†

Columbia University

Abstract

Regulation of Terry stops of pedestrians by police requires articulation of the reasonable and individualized bases of suspicion that motivate their actions. Nearly five decades after Terry, courts have found it difficult to articulate the boundaries or parameters of reasonable suspicion. The behavior and appearances of individuals combine with the social and spatial contexts where police observe them to create an algebra of suspicion. Police can proceed to approach and temporarily detain a person at a threshold of suspicion that Courts have been unable and perhaps unwilling to articulate. The result has been sharp tensions within Fourth Amendment doctrine as to what is reasonable, why, and in what circumstances. The jurisprudence of suspicion is no clearer today than it was in the aftermath of Terry. This issue has taken center stage in both litigation and policy debates on the legality of the Stop and Frisk policing regime in New York. Under this regime, police record the bases of suspicion using both a menu of codified stop rationales with supplemental text narratives to record their descriptions of suspicious behaviors or circumstances that produced actionable suspicion.

Evidence from 4.4 million stops provide an empirical basis to assess the revealed preferences of police officers as to the bases for these Terry stops and identify narratives of suspicion that justify their actions beyond the idiosyncrasies of the individual case. First, we identify patterns of articulated suspicion. Next, we show the individual factors and social conditions that shape how those patterns are applied. We also show how patterns evolve over time and become clearer and more refined across a wide range of police stops. That refinement seems to follow the capacious interpretative room created by Fourth Amendment jurisprudence. Next, we assess the extent of constitutional compliance and examine the neighborhood and individual factors that predict non-compliance. The results suggest that the observed patterns of narratives have evolved into shared narratives or scripts of suspicion, and that these patterns are specific to suspect race and neighborhood factors. We conclude that scripts are expressions of the norms within the everyday organizational exercise of police discretion and that these scripts defeat the requirement of individualization inherent in caselaw governing Fourth Amendment stops.

* Isidor and Seville Sulzbacher Professor of Law, Columbia University

† Clinical Associate Professor and Director, Applied Quantitative Research Program, Department of Sociology, New York University

Following the Script: Narratives of Suspicion in *Terry* Stops in Street Policing[‡]

Jeffrey Fagan*

Amanda Geller[†]

I. Introduction

A. Double Power

In 2011, the Italian philosopher Giorgio Agamben offered a useful dichotomy in thinking about the way that state power operates.¹ In one version, this power seeks to limit our freedoms to engage in certain behaviors that may produce social harms. It's obvious that state power invests police with the authority to sanction such prohibited behaviors. But this form of social control can work both sides of the divide between offenders and law enforcers. State power also limits the ways in which legal authorities can perform those tasks. The state does this through a complicated regulatory regime – enforced primarily by the courts but also through methods of democratic and political regulation – that covers virtually all aspects of police power.

But there is another form of state power that works somewhat differently: it limits what legal authorities can *not* do. In the modern era of proactive policing, we place obligations on the police to take steps to intercede with people and situations when they perceive risks or realities of criminal activity. These obligations may trump their traditional discretion, and lead to action when they might otherwise choose to use less intrusive or coercive forms of their authority. At stake in this second version of power is not so much what police can do, but the limits on their capacity *not* to make use of their power. This double power has created tensions in modern policing that have spilled over in the past decade in litigation over the authority of the police to intervene with citizens and detain –

[‡] Thanks for helpful comments from Wayne Logan and from workshop participants at the University of Arizona Rogers College of Law, School of Criminology at the University of California at Irvine, the University of Southern California Gould School of Law, and symposium participants at the University of Chicago Law School.

* Isidor and Seville Sulzbacher Professor of Law, Columbia Law School

[†] Clinical Associate Professor and Director, Applied Quantitative Research Program, Department of Sociology, New York University

¹ Giorgio Agamben, “Su ci. che possiamo non fare,” in *Nudit.* (Rome: Nottetempo, 2009), 67–70 (trans. David Kishik and Stefan Pedatella, “On What We Can Not Do,” in *Nudities* [Stanford: Stanford University Press, 2011], 43–45).

seize – them for questioning without either reasonable suspicion or probable cause.

The modern regulatory apparatus for regulating these tensions is the Fourth Amendment. Its modern expression first appeared in *Terry v. Ohio*, where the U.S. Supreme Court lowered the standard for a police intervention from *probable cause* to a newer and proceduralized concept of *reasonable and articulable suspicion*.² On the surface, *Terry*'s goals were simple: determine a set of procedural rules that would both control discretion and at the same time promote fairness while avoiding the temptations of extra-legal police encounters that had produced a series of cases constraining police behavior in the same era.³ *Terry* created a very difficult balancing act for police officers and their supervisors: safeguard the interests of citizens from unwarranted invasions of their privacy or liberty, while imposing restrictions on those freedoms in the interest of maintaining security and controlling crime.⁴

Terry's rules were the reasonableness core of the new regime governing what police *can* do: the rules told police what they *can* do and when, and provided the minimum conditions to justify their actions. The rules sought to carve out a space for exercising discretion for reasonable incursions by police on liberty. The doctrine was part of larger social and legal project to constrain police power in a way that made it politically and constitutionally accountable, particularly when used against those who often were most often the objects of police intervention. Under *Terry*, the police are required to articulate specific indicia of suspicion, and that those indicia be sufficiently salient to justify police action.

Modern policing creates a second tension: animating practices that tell police what they can *not* do. Policies such as proactive policing,⁵ order maintenance

² 392 U.S. 1 (1968)

³ *Mapp v. Ohio*, 367 U.S. 643 (1961); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). See, generally, the essays in the SYMPOSIUM ON TERRY, 30 YEARS LATER, 72 *St. John's Law Review*, Summer-Fall 1998.

⁴ John Q. Barrett, Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference, 72 *St. John's Law Review* 749, 838-9 (1998) (concluding that "[m]any thus think of Terry and the law of 'stop and frisk' as ... 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.")

⁵ For descriptions of proactive policing, see e.g., Charis E. Kubrin, et. al., Proactive Policing and Robbery Rates Across U.S. Cities, 48 *Criminology* 57 (2010); Jacqueline Cohen and Jens Ludwig, Policing Crime Guns, in *Evaluating Gun Policy: Effects on Crime and Violence* (Philip J. Cook and Jens Ludwig, eds) 217-239 (2003); Robert J.

policing,⁶ and stop and frisk,⁷ encourage if not incentivize or even demand that police interdict and temporarily *seize* citizens based on thin bases of suspicion. For example, in a recorded stop in New York in 2010, a young man named Alvin asks an officer why he had stopped him. The officer said “because you keep looking back at us.”⁸ Alvin’s stop is an example of the narrowing of discretion by police officers to take action based less on the articulable signs of suspicion than on the very “hunches” or “inchoate or unparticularized suspicion” that *Terry* abhorred.⁹ Alvin’s stop is a long way from the scenario envisioned by the *Terry* court of interdiction when “crime is afoot.” The policy of stops under a wide net of suspicion, and its enforcement in urban police regimes, tells police what they can *not* do: exercise discretion to avoid contact when suspicion is weak. Administratively, the demand for a steady flow of stops creates sanctions for police whose activity falls below the new benchmark.¹⁰

Sampson and Jacqueline Cohen, Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension, 22 *Law and Society Review* 163-189 (1988).

⁶ Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 *Colum. L. Rev.* 551 (1997); Bernard E. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 *Michigan Law Review* 291 (1998).

⁷ Tracey L. Meares, The Social Science of Stop and Frisk, *Ann. Rev. L. & Soc. Sci.* (2014, forthcoming); David Keenan, and Tina M. Thomas, An Offense-Severity Model for Stop-and-Frisks, 123 *Yale LJ* 1448 (2014); K. Babe Howell, From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color, 34 *NYU Rev. L. & Soc. Change* 439 (2010).

⁸ Ross Tuttle & Rein Schneider, Stopped-and-Frisked: ‘For Being a F**king Mutt’ [VIDEO], THE NATION, Oct. 8, 2012, at https://www.youtube.com/watch?feature=player_embedded&v=7rWtDMPaRD8. When the officer asks Alvin Cruz why he kept looking back at them, he said it was because they had just stopped him a few minutes earlier. Cruz also said that he had been stopped many times, and was hyper-vigilant and fearful when he was walking in public and spotted officers. Later on during the encounter, one of the two officers on the scene asks Cruz if he wants to go to jail. When Cruz asks why the officers are threatening to arrest him, and one replies: “For being a fucking mutt! You know that?”

⁹ *Terry* at __

¹⁰ In New York, for example, there were strong institutional pressures beginning in 2001 to increase the number of *Terry* stops as a prophylactic measure against crime. The pressures included threats of sanctions for officers whose “productivity” was low, based on the evaluations of their supervising sergeants. See, Graham A. Rayman, *The NYPD Tapes: A Shocking Story of Cops, Cover-Ups, and Courage* (2013) (showing how police supervisors threatened officers with workplace sanctions if they did not meet quotas for stops and arrests). See, also, John Del Signore, Police Union Delegate Caught on Tape Demanding Cops Meet Quotas, *The Gothamist*, March 19, 2013, at

This essay examines how officers form and apply suspicion under the conditions of both an expansion of the original *Terry* design¹¹ but in policy regimes that narrow the discretion to act on promiscuously formed notions of suspicion. Through the expansion of the constitutional bases for permissible street interventions, coupled with the narrowing of discretion to *not* act, officers have developed recurring narratives or scripts of suspicion to satisfy administrative review of their actions within the programs of their departments, and the rare instances when there are constitutional challenges to contemporary practices. We begin with a discussion of the intersection of Fourth Amendment reasonableness doctrine and the social psychology of scripted behaviors. We then examine the development of such scripts in the context of New York City's aggressive "Stop Question and Frisk" (SQF) policing regime, focusing on the recent decade leading to recent constitutional litigation and a court order mandating regulatory reforms.¹²

B. Suspicion

The permitted bases for police action evolved over four decades through a series of U.S. Supreme Court cases that extended *Terry*'s reach and inflated its originally narrow concept of individualized and reasonable suspicion.¹³ Neither courts nor social scientists know very much about how officers really form suspicion, how they crystallize specific behaviors to reach a threshold of actionable suspicion, and for which groups of persons that suspicion most often arises. Race complicates the mix, because of the particular social and neighborhood contexts

http://gothamist.com/2013/03/19/police_union_delegate_caught_on_tap.php (citing statements taped by Officer Adil Polanco at roll call in his police precinct, and who was the victim of retaliation from his superiors for publicly revealing the quota demands).

¹¹ Brief of the United States as Amicus Curiae, p. 11-12, *Terry V. Ohio* 362 U.S. 1 (1968), articulating that police should consider before conducting a "street stop" or "field interrogation."

¹² For discussions of the history and practice of the SQF regime, see: Jeffrey Bellin, The Inverse Relationship between the Constitutionality and Effectiveness of New York City 'Stop and Frisk', 94 *B.U. L. Rev.* ____ (2014); Tracey Meares, Stop and Frisk, *supra* note __; David A. Harris, Across the Hudson: Taking the Stop and Frisk Debate Beyond the Hudson, *N.Y.U. Journal of Legislation and Public Policy*, 2014 (forthcoming); Franklin E. Zimring, *The City that Became Safe: New York's Lessons for Urban Crime and Its Control* (2011).

¹³ William Stuntz, *Terry's Impossibility*, 72 *St. John's L. Rev.* 1213, 1213-15 (1998) (arguing that any attempt to legally regulate street policing is prone to error since courts are incapable of systematically taking into account the realities of why the police detained a suspect).

in which police have contacts with non-whites.¹⁴ The possibility that the construction of suspicion for street encounters also varies by race, net of other factors.¹⁵ In other words, what appears suspicious to the average police officer about the behavior of a Black person may be less suspicious or even neutral for a White.¹⁶

The reality of the formation of suspicion may in fact be far simpler than the *Terry* court envisioned. Jerome Skolnick, riding with police in the wake of the 1960s riots in American cities, identified the archetype of the *symbolic assailant* that police called on to decide whom to put under their gaze: the person who used certain gestures, language or wore certain attire that police saw as predicates of criminal violence.¹⁷ Police often responded to these vague indicators of crime risk by tightening scrutiny and, when possible, conducting “field interrogations.”¹⁸ John Van Maanen conducted several ethnographic studies of the police, noting that police classify people into three categories: “suspicious persons,” or those who police have a reason to believe may have committed a serious offense, “assholes”, or those who do not accept the police definition of the situation and fail to give deference to the police, and “know nothings,” or those who are not from either of the first two categories but are not police and therefore cannot understand what police do or why they do it.¹⁹ Suspicious persons in particular were recognizable by their appearance and behavior in public areas, especially distinguished by their furtive and non-routine movements.

Carl Klockars identified element of police culture that lead to collective definitions of suspicion, again including “furtiveness” and being “out of place,” but these were inchoate and highly subjective accounts from the officers he observed.²⁰ Rod Brunson and Ronald Weitzer also showed how being out of place

¹⁴ See, e.g., David S. Kirk, The Neighborhood Context of Racial and Ethnic Disparities In Arrest, 45 *Demography* 55 (2008) (showing empirically that social context in explains racial and ethnic disparities in arrest, and that the race-specific social and political features of neighborhood residential patterns explain variations in criminal outcomes.)

¹⁵ *Floyd v. City of New York*, Opinion and Order at 2, August 13, 2012.

¹⁶ The example of looking into cars demonstrates this.

¹⁷ Jerome Skolnick, *Justice Without Trial* XX (1966).

¹⁸ Id. Skolnick cites an article by Thomas Adams, a “criminal justice professional,” summarizing the characteristics of which persons are suspicious *enough* to merit a field interrogation: automobiles that do not “look right,” persons out of place, known trouble-makers, persons who evade or avoid the officer, persons wearing a pea coat on a hot day, persons near a crime scene, people who are visibly rattled by a policeman.

¹⁹ John van Maanen, The Asshole, in *Policing: A View from the Street*, 221 (Peter K. Manning and John van Maanen, eds.) 1978.

²⁰ Carl Klockars, *The Idea of the Police* (1985)

and defying racial boundaries aroused police suspicion and at times, verbal and physical aggression by police.²¹

Direct observation also provided some evidence on how officers form suspicion *in situ*. Analyzing notes from researcher-observers during ride-alongs, Geoffrey Alpert and his colleagues showed that police are more likely to view a minority citizen as suspicious—leading to a police stop—based on non-behavioral cues – location, associations, appearances – while relying more often on behavioral cues to develop suspicion for white citizens.²² Jon Gould and Stephen Mastrofski also analyzed ride-along data from a mid-size city, and concluded that officers based nearly half their stops on constitutionally insufficient criteria.²³ Their analysis only examined Fourth Amendment sufficiency without elaborating on the narratives across the limited number of events in their sample. Bernard Harcourt went deeper into the Gould-Mastrofski data to show how an institutional “account of policing” at the intersection of drug profiling with community policing helped create narratives that shaped decision making with respect to whom to stop and how the stop should unfold.²⁴

²¹ Rod K. Brunson and Ronald Weitzer, Police Relations with Black and White Youths in Different Neighborhoods, *Urban Affairs Review* 858, 868 (2009). See, also, Rod K. Brunson and Jody Miller, Young Black Men and Urban Policing in the United States, 46 *British Journal of Criminology* 613-640 (2006); Carmen Solis et al., Latino Youths’ Experiences with and Perceptions of Involuntary Police Encounters, 623 *Annals of the American Academy of Political and Social Science* 39-51 (2009); Victor Rios, *Punished: Policing the Lives of Black and Latino Boys* (2011) (showing how adaptive styles of resistance to unfair police encounters impedes desistance from crime and the social mobility needed to escape criminogenic settings).

²² Geoffrey P. Alpert, John M. MacDonald, and Roger G. Dunham, Police Suspicion and Discretionary Decision Making During Citizen Stops, 43 *Criminology* 407 (2005) (showing that a suspect’s location and social status influences an officer’s decision to form non-behavioral versus behavioral suspicion).

²³ Jon Gould and Stephen Mastrofski, Suspect Searches: Assess Police Behavior Under the U.S. Constitution, 3 *Criminology and Public Policy* 315 (2004) (showing that officers violated Fourth Amendment standards for both stops and searches in 45% of a sample of XXX cases, based on ratings of researcher-generated narratives by a panel of defense lawyers, prosecutors and retired judges).

²⁴ Bernard Harcourt, Unconstitutional Police Searches and Collective Responsibility, 3 *Criminology & Public Policy* 363 (2004) (describing how community policing officers invoked a drug enforcement rationale to stop a suspect without any indicia of drug use or possession, and proceeded to conduct a fruitless strip and cavity search.) Showing the tension between accuracy and suspicion, the officers concluded the search by saying to the observer that they were certain that the suspect was holding drugs, despite failing to find any in his clothing or on his person or in his person.

In recent years, case law has expanded the logic and substance of reasonable suspicion. For example, *Wardlow* broadened the boundaries of suspicion to allow consideration of presence in a “high crime area.”²⁵ But *Wardlow* and other cases²⁶ left unsettled exactly what a high crime area is, and how police were to factor location into more behavioral indicia of suspicion such as “casing.” In fact, there is no consensus as to how much suspicion is needed to justify a seizure. Nor are there substantive indicia as to what behaviors or factors matter, only that these indicia be *reasonable*. In a dissent in *Naverette*, Justice Scalia suggested that an outcomes test – a regime of suspicion passes constitutional muster if the police are “right” in one of 20 stops via an arrest – might sort out the dilemma over how much suspicion is necessary and what sorts.²⁷ A similar outcomes test was considered in *Floyd* to claim that the police were so often wrong in the bases of suspicion for their stops that those bases were faulty.²⁸

Telling police what they can *not* do with respect to stops has pushed the boundaries of both reasonableness and suspicion beyond what the *Terry* court may have envisioned as a set of workable rules implemented by experienced police. There is no clear standard as to what types and levels of suspicion that courts demand (or should demand) in police encounters. The configuration of *Terry* and its progeny tends to assume that there is a threshold of suspicion that renders police action constitutionally permissible. Suspicion in this formulation

²⁵ *Illinois v. Wardlow*, 120 S. Ct. 673 (2000). See, e.g., Bernard E. Harcourt and Tracey L. Meares, Randomization and the Fourth Amendment, *supra* note ___. See, also, Bernard E. Harcourt, “Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally,” 71 *U. Chi. L. Rev.* 1275, 1292 (2004); Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 *Colum. L. Rev.* 1456 (1996); William Stuntz, “Terry’s Impossibility,” *supra* note __; Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing, 97 *Colum. L. Rev.* 551 (1997).

²⁶ While officer testimony is often used to establish that an area has a high incidence of criminal activity, the Ninth Circuit has held that “more than mere war stories are required to establish the existence of a high-crime area” and that district courts must “examine with care the specific data underlying any such assertion.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1139 n.32 (9th Cir. 2000). See also *United States v. Bonner*, 363 F.3d 213, 218-19 (3d Cir. 2004) (Smith, J., concurring) (discussing possible burdens of proof in establishing an area is “high-crime”).

²⁷ In *Navarette v. California*, Justice Scalia suggested that an accuracy or “hit” rate of between 5% and 10% would be indicative of reasonable suspicion in a pattern of stops. *Navarette v. California*, No. 12-9490, 2014 BL 111267 (U.S. Apr. 22, 2014) at 11. According to Scalia, absent a showing at that order of magnitude, the basis of suspicion is not *reasonable*.

²⁸ See, *Floyd v. City of New York*, Opinion and Order, *supra* note __.

becomes a hurdle model, or a binary category, where the stop is either constitutional or it's not.²⁹ Courts worry more than police about whether there is "enough" suspicion to get over that bar satisfies the "individualized" suspicion test. But the bar or hurdle itself has become a moving target with succeeding Fourth Amendment opinions, as is the "enough" standard.³⁰ Suspicion now is highly contextualized in local conditions.

So, the determination of suspicion, and whether the quantity of suspicion is enough suspicion to motivate action, is now about subjective and probabilistic assessments in those circumstances that, in *Terry's* language, "crime is afoot."³¹ It has become the application of *ex ante* factors of what suspicion ought to look like to a particular circumstance. Those who would regulate the use of these standards have to apply good faith assumptions that the officer is accurately reconstructing the triggers and clues that move her action beyond merely a hunch. Contemporary standards don't really tell a police officer doing modern police work³² how much suspicion is "enough" to satisfy constitutional standards. Officers are left to the extremes of roll-call training on the one hand and litigation challenges on the other to define a space where their actions comport with the shifting territory of the Fourth Amendment.³³

Even when officers do articulate the bases of suspicion, it's often recorded after the fact: when the contact is resolved one way or another, after an interaction has taken place which may create some cognitive baggage that carries over, after there has been some level of emotional arousal, often in the company of peers and supervisors who may weigh in on the interaction,³⁴ and after the bases of "suspicion" have been validated or not. Telescoping and other cognitive

²⁹ Harcourt and Meares, Randomization and the Fourth Amendment, *supra* note ____.

³⁰ See, Tracey Meares, Programming Errors, in this volume.

³¹ *Terry* at ____

³² Proactive policing instantiates the notions of criminal archetypes by encouraging police interdiction with persons who they decide *could* be committing a crime, albeit without explicit markers or indicia of suspicion. It anticipates the one-off intervention into a crime in progress in the *Terry* case. See; Charis Kubrin et al., Proactive Policing, *supra* note _____. See, also, Meares, Programming Errors, in this volume.

³³ One of my students, a former NYPD officer who was assigned to a special patrol designed to maximize stop activity in a high crime area, confided in me that his time in law school convinced him that much of what he learned about the Fourth Amendment in rookie training and roll call refreshers was wrong.

³⁴ See, "Mutt" video, *supra* note _____. The sergeant could be heard in the background at several points over the course of the stop urging the other officer to escalate the tension between Alvin and the officer by interpreting Alvin's responses as challenging to the officer's authority.

distortions all come into play as officers try not only to reconstruct their own thinking but to accurately portray the actions and settings of an individual in a moment of salience if not arousal.

So, how much can we trust the accuracy and neutrality of these ‘accounts’ of perception, cognition and decision making? It’s hard to come up with a clear answer to this, since other than real-time recording, there is little opportunity for observing police behaviors. While there have been experimental studies on police reactions to provocative situations,³⁵ there is less about the everyday encounters that make up much of modern police work in an era of proactive engagement or stop and frisk. The inherent limitations in accurate accounting of what constitutes reasonable suspicion suggests some caution in offering generalizations about what we might call the “cognitions of suspicion.” There is no obvious solution to this question, since the realities of the situations and police encounters are masked by the contexts and contingencies in which they take place.

C. Police Actuarialism

The dilution and recasting of suspicion after *Terry* took place in the same era as developments in the practice of policing that curtailed officer discretion and mandated police action regardless of circumstances.³⁶ In emphasizing police action, aggressiveness was hardly an accident. In these tactics, when suspicion was present, police were urged if not required to act, under the evolving institutional limitation of what police can *not* do. Thus, in contemporary policing, the dilution of suspicion concurs with the mandate to *do* and the loss of discretion about what police can *not* do.

³⁵ See, for example, Modupe Akinola and Wendy Berry Mendes, Stress-Induced Cortisol Facilitates Threat-Related Decision Making among Police Officers, 126 *Behavioral Neuroscience* 167 (2012) (showing that officers threshold for shooting at suspects vary according to their biologically-measured stress in the immediate situation).

³⁶ In the *Terry* stop, Officer McFadden took nearly 20 minutes to observe Terry and Chilton. In New York stops from 2004-12, observation was limited to one minute in two-thirds of all stops, and less than two minutes in nearly of 4.43 million stops. Evidently, officers reach conclusions rather quickly that there is “enough” suspicion to act. See, *Ligon v City of New York*, Opinion and Order, supra note __ (data available from authors). The deliberation of officers envisioned by the *Terry* court seems to have given way in modern policing to a set of cognitive heuristics and shortcuts. See, Kahnemann and Twersky, supra __. It may also reflect a version of the System One and System Two” processes detailed in *Thinking Fast, Thinking Slow*. See, Kahnemann, supra note __.

The new policing,³⁷ particularly in urban areas, has been shaped by the collision of policing theories and movements dating back over three decades.³⁸ Broken Windows (BW) theories focused police attention on disorderly places that were thought to breed crime.³⁹ Initially, BW theories were designed to identify and remedy conditions that were conducive to crime, removing the triggers and signals for criminal activity. But place and people are highly correlated in policing.⁴⁰ Under BW theory, the mere presence of people in both social and physically disorderly locations was a gateway to evaluating the behavior of people in those places as *suspicious*, even if the relationship between crime and disorder was uncertain.⁴¹ In effect, place and situation supplanted person as the first stage inquiry for suspicion. The reputation of a neighborhood was integrated into the matrix of factors that might trigger suspicion, and perceptions of the place were conflated with perceptions of the person.⁴² Put another way, police attention, though initially focused on broken windows, broadened throughout the 1980s and

³⁷ Philip B. Heymann, The New Policing, 28 *Fordham Urb. LJ* 407 (2000)

³⁸ One could argue that the development of drug courier profiles in the decade after *Terry* was the beginning of the profiling regimes that have led to contentious litigation and sharp political divisions today. See, David A. Harris, Racial Profiling Redux, 22 *St. Louis U. Pub. L. Rev.* 73, 77(2003) (discussing the evolution of criminal profiles applied in everyday street and highway policing from their origins in drug courier profiles developed by the Drug Enforcement Administration). The drug courier profiling regime emerged in the 1970s in response to the concurrent drug and violence epidemics beginning in the late 1960s, and continuing through the early 1990s.

³⁹ James Q. Wilson and George Kelling, Broken Windows: The Police and Neighborhood Safety, *The Atlantic Monthly*, March 1982 (suggesting that social and physical disorder in neighborhoods is strongly linked to crime rates in those places). See, also, Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (1990). But see, Bernard J. Harcourt, Reflecting on the Subject, *supra* note _.

⁴⁰ Place figured prominently in *Terry*, for example, where McFadden was alerted to the presence of Terry and Chilton in a place where their actions suggested they were casing the store for a possible robbery. Place, in other words, was a multiplier of and a cue for suspicion. It is odd, though, the court celebrated McFadden's expertise and 20 years of experience, yet he had been relegated to pickpocket patrol on a street-level detail.

⁴¹ Robert J. Sampson and Stephen W. Raudenbush, Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods, 105 *Amer. J. Sociology* 603 (1999) (showing that the effects of disorder on crime is weaker than the effects of local social cohesion and control). See, also, Bernard Harcourt, Reflecting on the Subject, *supra* note _.

⁴² Robert J. Sampson and Stephen W. Raudenbush, Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows," 67 *Social Psychology Quarterly* 319, 319-20 (2004) (showing that perceptions of disorder are freighted with meanings that are assigned to places socially rather than what objective measures might describe).

1990s to focus as much on window breakers as on the physical and social manifestations of disorder.⁴³ The attention to places broadened the focus of policing to cast suspicion broadly on people in those places.

The same logic is present in the notion of “hot spots” policing or “problem oriented” policing, both place-based strategies that directed police toward places with acute or chronic crime problems.⁴⁴ Not only were the places targeted for intensive patrol but the people in them became the focus of patrol tactics. Stops and temporary seizures were concentrated in these locations; simply being present in these places heightened suspicion to a level that, whether by policy or simply discretion, warranted action.⁴⁵ These tactics were endorsed by a National Academy of Science Committee in its report on effective (and ineffective) policing methods.⁴⁶

A second development in policing formalized the ties between disorder, suspicion and crime beyond the boundaries of disordered neighborhoods. Order Maintenance Policing, or OMP, regarded social disorder as signifiers of more serious crime, and worthy of police attention.⁴⁷ Police tactics, resources and attention were directed toward removal of visible signs of social disorder – “broken windows” – by using police resources both for vigorous enforcement of laws on minor “quality of life” offenses. Loud music, boisterous street behavior, petty criminal activity,⁴⁸ all became occasions for police street detentions if not arrests. Arrests based on probable cause for minor crimes simplified the task of more intrusive interactions during these encounters, including searches for

⁴³ Harcourt, *supra* note __; Jeffrey Fagan and Garth Davies, Street Stops and Broken Windows: Terry, Race and Disorder, 28 *Fordham Urban Law Journal* 4457 (2000) (analyzing *Terry* stop data in New York to show that objective measures of physical disorder are not significant predictors of stop patterns once race is introduced as a predictor).

⁴⁴ Wesley G. Skogan and Kathleen Frydl (eds.), *Fairness and Effectiveness in Policing: The Evidence* (2004) (describing the nuances that distinguish policing strategies and tactics that focus on specific places).

⁴⁵ Geoffrey Alpert et al., Police Suspicion, *supra* note __; Lawrence W. Sherman And Dennis P. Rogan, Effects of Gun Seizures On Gun Violence: “Hot Spots” Patrol in Kansas City.” 12 *Justice Quarterly* 673 (1995) (reporting results of a field experiment where individuals were subject to intensive surveillance and interdiction based on their presence in areas with high rates of gun violence).

⁴⁶ Skogan and Frydl, *Fairness and Effectiveness in Policing*, *supra* note ____.

⁴⁷ Livingston, Police Discretion and the Quality of Life, *supra* __

⁴⁸ Jaywalking, alcohol violations, riding bicycles on sidewalks, possession of graffiti tools, illegal sidewalk vending, etc. See, XXX

weapons or contraband, or warrant checks for scofflaws or fugitives.⁴⁹ In effect, suspicion was bypassed and mooted when police encountered these low levels of crime. Police aggressiveness in enforcing minor laws was rooted in social science⁵⁰, promising returns both in deterrence and crime control.

Stop and frisk is the natural successor to these policing models. Stop and frisk as envisioned by the *Terry* was largely a set of distinct “retail” transactions, characterized by individualization, material or visual indicia, and specificity.⁵¹ But the current “wholesale” practice is quite different from the vision of the *Terry* court. It incorporates elements of OMP by substituting social disorder for suspicion of imminent or current criminal activity. It incorporates elements of “hot spots” by privileging high crime neighborhoods with saturated enforcement in the search for suspicious activity that may signal crime.⁵² Individualized

⁴⁹ See, e.g., *Faulkner v US*, 636 F.3d 1009 (8th Cir. 2011) (affirming practice of using *Terry* stops as pretext for searching for individuals with outstanding warrants, even during an unconstitutional seizure of a person).

⁵⁰ Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 LAW & SOCIETY REVIEW 163–189 (1988) (showing that proactive policing had a direct inverse effect on robbery rates in over 170 American cities in 1980 after controlling for other crime-generating conditions such as poverty, inequality and family disruption). See, also, Sherman and Rogan, *supra* note ____.

⁵¹ The details of the *Terry* stop suggest a lengthy period of observation by Officer McFadden, and the combination of behavioral indicia that led McFadden to conclude that Terry, Chilton and Katz were in fact ‘casing’ the store in preparation for a robbery. The factors that led McFadden to conclude that crime was ‘afoot’ included the time of day, the commercial location, and the observable behaviors of the three suspects that signaled preparation for a crime. Race may have factored into the calculus of suspicion: Terry and Chilton were Black, while the compatriot Katz was white. McFadden, a 20 year veteran of the Cleveland police, may have reacted to the mixed race company of the three suspects. In fact, McFadden initiated the seizure when Katz joined the two others to form a mixed race group, something unusual in the neighborhood that McFadden had patrolled. “Out of place” stops continue to activate suspicion today that often leads to police action. See, Rod Brunson and Ronald Weitzer, *supra* note ____.

⁵² The “hot spots” regime anticipated very small spaces that were areas of recurring crime. But these are assessed by proponents as street segments or intersections. See Weisburd et al, *Trajectories of Crime at Places: A Longitudinal Study of Street Segments in the City of Seattle*, 42 *Criminology* 283-322 (2004) (showing the recurring disproportionate concentrations of crime in very small areas). Instead, stop and frisk regimes target large residential and occasionally commercial areas, eschewing the microscopic perspective on specific locations. See, e.g., Jeffrey Fagan, Expert Report, *Floyd v City of New York*, October 15, 2010, at *See* https://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf; See, also, Ian Ayres and Jonathan Borowsky, *A Study Of Racially Disparate Outcomes In The Los Angeles Police Department*. ACLU of Southern California (2008), at

suspicion is thin and diluted, predicated not just on signs of social disorder, but on metrics that assign suspicion to people collectively in places based on their crime rates. In effect, individualized suspicion defaulted to appearance-based regulation.⁵³

Area or neighborhood became the predicate for a thinned out regime of suspicion: the fact that person A was associated with person B who was known to the police in neighborhood N that had crime problems, cast suspicion on A regardless of A's conduct under the police gaze. A became a target of a stop. *Wardlow* was the gateway to this formation of suspicion: although A's presence in a "high crime area" fell short of the *Terry* standard for particularized suspicion of criminal activity⁵⁴, a location's characteristics became relevant in deciding whether A's behavior or associations was sufficiently *suspicious* to warrant further investigation.⁵⁵ The "specific and articulable facts" that Chief Justice Warren required in *Terry* are lost in an actuarial matrix of collective suspicion.⁵⁶ Suspicion, then, has broadened well beyond the "individualization" prong to become an exercise in Bayesianism, actuarial profiling, and prospect theory in action.⁵⁷

<http://www.aclusocal.org/documents/view/47> (showing broad LAPD stop activity spread widely across minority neighborhoods of Los Angeles).

⁵³ See, e.g., Adam Samaha, Regulation for the Sake of Appearances, 125 *Harvard L Rev* 1563 (2012); Robert J. Sampson, When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation, 125 *Harvard L Rev Forum* 97 (2012).

⁵⁴ In New York, state law controls the standards for reasonable suspicion. See, *People v. DeBour*, 40 N.Y. 2d 210 (1976). In contrast to the two stage inquiry developed in *Terry*, *DeBour* articulates four levels of suspicion: Objective Credible Reason (Approach to Request Information), Founded Suspicion (Common Law Right of Inquiry), Reasonable Suspicion (Stop and Frisk), and Probable Cause. See, also, *People v. Hollman & Saunders* 79 N.Y. 2d 181(1992)

⁵⁵ Policing by neighborhood was hardly a new discovery. See *Illinois v. Wardlow*, 528 U.S. 119 (2000). The *Wardlow* court simply formalized what criminologists had known for decades, though that decision fails to parameterize exactly what constitutes a high crime area. See, Ferguson and Bernache, *supra* note . Early studies on police selection of citizens for stops suggested that both the racial characteristics of the suspect and the racial composition of the suspect's neighborhood influence police decisions to stop, search, or arrest a suspect. See, David S. Kirk, *supra* note __, for a discussion of early research on neighborhood contexts of arrest. See, also, Alpert et al., Police Suspicion, *supra* note __, showing the interaction of neighborhood characteristics, suspect behavior and suspect race to animate the formation of suspicion among police officers.

⁵⁶ See, Amicus Curiae Brief of the United States, *supra* note __. See, also, Meares, Programming Errors, in this volume.

⁵⁷ Daniel Kahneman, and Amos Tversky, Prospect Theory: An Analysis of Decision under Risk, 47 *Econometrica* 263 (1979); Nicholas C. Barberis, Thirty Years of Prospect

Imagine, then, how *individualized* suspicion is constructed when police are mandated to maximize stops, and when there are institutional pressures in place to do so. The answer is that it is not. Just as stops have become an administrative regime, so too has suspicion become a de-individuated feature of the encounter. In New York, approximately 19,000 patrol officers made nearly 5 million street stops over the decade from 2004-13, rising from fewer than 100,000 in 2003 to over 685,000 in 2011 before tapering off in late 2012.⁵⁸ Most were concentrated in a relatively small number of neighborhoods with high crime rates, concentrations of non-white residents, and severe socio-economic disadvantage.⁵⁹ The mandate for ever-increasing stops thus creates a demand for narratives of suspicion to justify those stops. But throughout this period, serious crime was declining sharply in New York.⁶⁰ The prerequisite of individualized suspicion then, conflicted with the dwindling supply of criminal activity that was available. The fact that so few stops resulted in legal sanctions suggests the inadequacy of the bases of suspicion, a fact noted as a constitutional problem in the *Floyd* opinion.⁶¹ In the face of actuarial suspicion, how then was individualized suspicion managed? From the experience with stop and frisk in New York, this essay suggests an answer to this question.

D. Scripting Suspicion

Street stops in New York and most other places are almost always initiated by police, to be sure. In most stops in New York, police observe a suspect for a minute or two before proceeding to what state law – *People v DeBour*⁶² – characterizes as a Level I intrusion.⁶³ This requires officers to perform a quick cognitive processing of complicated and highly contextualized information, and to exercise care given the potential consequences of wielding that power or failing to do so. At that point, the stop becomes a social interaction between the suspect and one or more police officers. The conduct and outcome of these situated

Theory in Economics: A Review and Assessment, 27 *J Econ Perspectives* 173 (2013).

See, generally, Daniel Kahneman, *THINKING, FAST AND SLOW* (2011)

⁵⁸ NYPD Stop and Frisk database, available at

http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml

⁵⁹ Jeffrey Fagan, Expert Report, *Floyd v. City of New York*, October 15, 2010

⁶⁰ Franklin E. Zimring, *The City that Became Safe* (2011); Jeffrey Fagan, Second Supplemental Report, *Floyd v. City of New York*, November 29, 2012

⁶¹ *Floyd v City of New York*, Opinion and Order, *supra* note ____.

⁶² *DeBour*, *supra* note ____.

⁶³ Original analysis of the NYPD Stop and Frisk Database, available from authors.

transactions are shaped by the specific context of the stop. These contexts first shape the initial perceptions by police, and those perceptions and evaluations of suspicion then are modified through interactions and exchanges between the suspect and the officer(s). The setting where the interaction takes place – location, time of day, presence of bystanders, local social and crime conditions, and personal “baggage” that each party brings to the event – interacts with the details of the event to shape the verbal and perhaps physical exchanges that take place, the decisions within the event and its outcome, and how the event is perceived and reconstructed once it concludes.

The question for this essay is whether individualized suspicion gives way to the convenience of these cognitive or perceptual scripts – stylized narratives of suspicion – when police discretion narrows to mandate what police can *not* do, or in other words, what they are obligated within their command structure, *to* do. Scripts are handy conveniences to manage complex cognitive tasks, especially when those tasks become burdensome in the face of both administrative demands and the need to articulate a basis for action.

What then, is a script? Script theory offers a way of generalizing, organizing, and systematizing knowledge about the processual aspects and requirements of recurring events. The theory borrows heavily from cognitive psychology and was first articulated by Professor Robert Abelson in 1976.⁶⁴ According to Abelson, a “script” is a cognitive structure or framework that organizes a person’s understanding of typical situations, allowing the person to have expectations and to make conclusions about the potential result of a set of events.⁶⁵ Script theory has been widely used in social psychology to identify patterns of decision making and social interactions that persist among persons within social networks.⁶⁶

⁶⁴ Robert P. Abelson, Script Processing in Attitude Formation and Decision-making, in *Cognition and Social Behavior* 33 (J.S. Carroll & J. W. Payne eds., 1976).

⁶⁵ Id. See, also, Robert P. Abelson, “Psychological Status of the Script Concept,” 36 *American Psychologist* 715 (1981).

⁶⁶ Id. Script theory can explain contagion in several ways: (1) scripts are ways of organizing knowledge and behavioral choices; (2) individuals learn behavioral repertoires for different situations; (3) these repertoires are stored in memory as scripts and are elicited when cues are sensed in the environment; (4) choice of scripts varies between individuals and some individuals will have limited choices; (5) individuals are more likely to repeat scripted behaviors when the previous experience was considered successful; (6) scripted behavior may become “automatic” without much thought or weighing of consequences; and (7) scripts are acquired through social interactions among social networks members. Within structurally equivalent networks, such as professions or unions, similarly situated people are likely to influence or adopt behaviors from one another that can make that person and her ideas more attractive as a source of further relations.

Abelson locates scripts as an almost essential tool in executing a number of psychological tasks.⁶⁷ Derek Cornish regards scripts both as organizing tools for connecting events, but also as procedural tools for decisions about how to proceed within events.⁶⁸

After a time, these ideas and scripts become socially contagious, spreading from person to person and group to group.⁶⁹ In this case, we might hypothesize that there are memes of suspicion that are articulated through repetition and practice, valued for their utility within social networks, and then adopted and applied in a probabilistic way to a set of recognizable circumstances and situations.⁷⁰

This approach does not deny the importance of the individual attributes that bring people to situations, such as "disputatiousness," but recognizes that once an encounter begins, other processes shape their outcomes.⁷¹ Events can be analyzed as "situated transactions," including rules that develop within specific socio-cultural contexts including both police and street cultures, the situations and contexts where stops take place, and the personality "sets" of the actors. For

⁶⁷ He explains: "The script concept raises and sketchily addresses a number of fundamental psychological issues: within cognitive psychology, the nature of knowledge structures for representing ordinary experience; within social psychology, the way in which social reality is constructed and how constructions of reality translate into social behavior through action rules; in learning and developmental psychology, how and what knowledge structures are learned in the course of ordinary experience; in clinical psychology, how resonances between present situations and past schemata can preempt behavior maladaptively." Id at 727

⁶⁸ In applying script concepts to crimes, Cornish says that "[t]he unfolding of a crime involves a variety of sequential dependencies within and between elements of the action: crimes are pushed along or impeded by situational contingencies--situated motives; opportunities in terms of settings; victims and targets; the presence of co-offenders; facilitators, such as guns and cars." Cornish's "script" focuses in detail on the step-by-step procedures of committing crime that are learned, stored in memory, and enacted when situational cues are present. See, Derek Cornish, *The Procedural Analysis of Offending*, in 3 *CRIME PREVENTION STUDIES* 151-196 (R.V. Clarke ed., 1994).

⁶⁹ Wilkinson and Fagan, *Firearm Scripts*, supra note __. See, also, Jeffrey Fagan et al., *Social Contagion of Violence*, in *The Cambridge Handbook of Violent Behavior* (Daniel Flannery, et. al., eds.) 688 (2007).

⁷⁰ Peter Marsden, *Memetics and Social Contagion: Two Sides of the Same Coin?* 2 *Journal of Memetics - Evolutionary Models of Information Transmission* (1998), at http://cfpm.org/jom-emit/1998/vol2/marsden_p.html

⁷¹ Richard B. Felson & Henry J. Steadman, *Situational Factors in Disputes Leading to Criminal Violence*, 21 *Criminology* 59-60 (1983); Richard B. Felson, *Impression Management and the Escalation of Aggression and Violence*, 45 *Soc. Psychol. Q.* 245 (1982); David F. Luckenbill & Daniel P. Doyle, *Structural Position and Violence: Developing a Cultural Explanation*, 27 *Criminology* 422-23 (1989); William Oliver, *The Violent Social World of Black Men* 138-40 (1994).

example, there may be grounded “rules” that govern how stops unfold, and how officers employ their authority as a form of performance both for suspects and their peers.⁷²

E. Categorical Cognition and Suspicion

Police ethnographers in the era bookending the *Terry* opinion – Jerome Skolnick, John van Maanen, Carl Klockars – constructed categories that collapsed suspicious persons, suspicious appearances and suspicious behavior. Hard as it may be to unpack the cognitive steps in finalizing that sorting, the three dimensions seem to collapse into one another. In one instance, the behavior or appearance may lead to the categorization of the person, and in another instance, the person’s appearance together with other markers such as place or time of day may prime the degree of suspicion signaled by their behavior. In either case, the cognitive mechanics of sorting and classification are likely to be at work in the determination not just of suspicion, but also of risk and danger as predicates of police action.

Categorization is a natural and identifiable process. Categories are essential to navigate through a world of uncertainty in social interactions.⁷³ The embedding of those interactions in locations and institutional frameworks adds layers to the categorization process. Categorization is a well understood process, with confirming research originating with Gordon Allport in 1954 and continuing for the ensuing six decades.⁷⁴ The moving parts of the process involve human information processing, and heuristics to classify individuals based on that information (with updates). Prior experience and knowledge are important in creating a set of categories that seem to “work,” in that they efficiently sort persons or events.

As the early police ethnographers suggest, the number of categories is limited (due perhaps to capacity), so that police (in our case) are forced to group

⁷² On Alvin’s recording of a street stop, the voice of the accompanying sergeant can be heard raising doubts about Alvin’s claims of innocence and subtly challenging the patrol officer to take a skeptical, hostile and more aggressive stance, including threats of violence. A close hearing of the tape reveals the role of the sergeant as an animator and escalator of conflict between the officer and Alvin. See, “Mutt” tape, *supra* note ____.

⁷³ Roland Fryer and Matthew O. Jackson, A Categorical Model of Cognition and Biased Decision Making, 8 *The B.E. Journal of Theoretical Economics*, Issue 1, Article 6, at <http://bepress/bejte/vol8/iss1/art6>

⁷⁴ Fryer and Jackson, *id.* See, also, Gordon W. Allport, *The Nature of Prejudice*, 1954. Gordon W Allport, *The Historical Background of Modern Social Psychology*, 1 *Handbook of Social Psychology* 3-56 (1954).

heterogeneous experiences into the same categories. The less frequent the events or persons, the more heterogeneous the bins.⁷⁵ The groupings shape how new units that come along (persons, events) are sorted and classified. Rare events or persons are more coarsely grouped due to lack of information on intragroup differences. When the prior groupings can no longer resolve the indicia that a person or event presents, new groupings may be created in a process (one hopes) of Bayesian updating.⁷⁶

The early police ethnographies suggested simple schemes, perhaps even binaries. The van Maanen typology of three seemed optimal for police to accomplish their work. Van Maanen also suggests what the appropriate responses are to each group. For instance, the “assholes” were worthy of street justice – meaning physical assault – simply to reinforce the power hierarchy of the police in the areas of their routine activity, regardless of whether they had broken any laws.⁷⁷ Skolnick also suggested a binary scheme, building both on his own conclusions about archetypes who were suspicious and the work of other police professionals who used their own criteria for sorting. Perhaps such binaries are optimal in modern police work since the action that follows the categorization is a *seizure* or *street* stop. The sorting and categorization task is of interest, then, in understanding how suspicion is constructed, and how much suspicion must be present to animate police action.

Experience matters to help in the weighting of the factors. But so too does the institutional dimension that impels action. Again, categorization is one thing, deciding on the threshold for placing a suspect into a suspicion bin that warrants action is quite another. But in an institutional design that urges – or mandates – action, the threshold is likely to be forced downward. Cognitive processing of the appearances of suspicion may produce a large pool of potential suspects for stops, but which are selected may have more to do with an external threshold than with the natural or deregulated decision of the individual officer.

F. When Police Can *Not* Do

⁷⁵ The number of categories or bins that are optimal remains unknown. Fryer and Matthew, *supra* __, suggest a mathematical proof to identify an efficient set of bins, but there are no empirical tests to date.

⁷⁶ For an example on criminal behavior, see: Shamena Anwar and Thomas A. Loughran, Testing A Bayesian Learning Theory of Deterrence Among Serious Juvenile Offenders, 49 *Criminology* 667-98 (2011).

⁷⁷ Van Maanen, The Asshole, *supra* note __. See, also, John Van Maanen, Observations on the Making of Policemen, 32 *Human Organization* 407-18 (1973).

To understand what police do, it's important to also understand what they can *not* do. So, the exigencies of the institutional regime interacts with the situational dynamics of everyday stop activity, and with *ex ante* assumptions about suspects (including bias) and behavioral indicia. The institutional framing of proactive stops imparts particular meaning to the search for *suspicious* persons as part of a larger and more urgent public safety project. When we consider the neighborhood setting of a police-citizen encounter, the behavioral styles of suspects in those places, and the rank of one interaction in a long string of similar interactions for both police and suspects, the result can easily become a complex set of interactions fraught with tension and risk. In a regime that values volume, the need to simplify a complex and charged cognitive landscape through scripts can shape what is said and what happens in the course of contact. And of course, institutional prerogatives for higher stop activity threaten to compromise both the level at which the individual officer locates the threshold as well as increasing the elasticity of both the separate components of suspicion and their totality

The recording task itself also can create a demand for routinization and scripting. It takes a fair amount of cognitive work, not to mention the actual labor of writing or recording, to articulate the bases of a *Terry* stop. The physical task itself is difficult: often, writing on a small portion of a small piece of paper (an instrument) designed to gather several domains of information about the interaction between the citizen and the police. Recall becomes a burden, and the burden multiplies across strings of stops. And these are complex social interactions, where even if the balance of power resides with the police officer, there is an active process between both parties to manage the interaction toward a desired outcome. In other words, it's not just physical shoehorning of information on a small administrative form, but also conceptual shoehorning of complex interaction into narrow categories whose fit with the reality of the encounters is poor.

Also, in the course of this transaction, the meanings of suspicion at the outset will change over time as more information is revealed or withheld. And the endpoint of the interaction will reflect this negotiated situational transaction. This increases the burden on the police officer to capture and articulate – in an individualized and recognizable terms that can satisfy a legal review – the details of suspicion.

The empirical challenge in detailing this model is to identify the preferences of police in a regime of severely constrained situations where actions lie somewhere between “ritual and strategy.”⁷⁸ The construction of suspicion in modern actuarial

⁷⁸ See, generally, Jeffrey Alexander, Cultural Pragmatics: Social Performance between Ritual and Strategy, 22 *Sociological Theory* 527 (2004).

policing, whether reasonable or not, seems to reflect the convergence of revealed and normative preferences. Normative *preferences* represent the agent's actual interests, whereas *revealed preferences* are tastes that rationalize a principal agent's observed actions. But there are many cases where this assumption is violated. In this case, we can assume that *revealed preferences* are identical to *normative preferences*, since the margin for discretion has severely narrowed. The next section goes about the task of empirically detailing what those preferences are, as observed in the articulation of reasonable and individualized suspicion under New York's stop and frisk regime of the past two decades.

II. Empirics of Scripted Suspicion

The New York City stop and frisk data⁷⁹ provides an opportunity to assess recurring patterns and narratives of suspicion, and to discern whether these patterns show sufficient consistency to take on the characteristics of a *script*. Data from 4.7 million stops from 2004-12 reveal what officers see in the run-up to street stops. First, we can exploit these data on police officers' accounts of the reasons and bases for effecting a *Terry* stop. Second, using the same data, we can assess the extent to which, within the limits of reporting, police officers adhere to *Terry's* individualization requirement or develop recurring and stylized narratives of suspicion.

A. The Empirical Project

Following the 1999 investigation of the NYPD stop and frisk practices by the New York State Attorney General,⁸⁰ the City entered into a Stipulated Settlement in *Daniels v. City of New York*⁸¹ in 2003. The *Daniels* Plaintiffs had claimed Fourth and Fourteenth Amendment violations. The settlement mandated

⁷⁹ The NYPD publishes downloadable case records annually for all stops from 2003-2013. Records include information on the demographic characteristics of the suspect, the suspected crime, stop location (precinct), the command assignment of the officer, seizures of weapons or contraband, use of force during the stop, the stop outcome (frisk search, arrest, summons), and the bases for suspicion animating the stop. Data are available at: http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml. For this analysis, we use data from 2004-12. The first year in the series was dropped due to the late startup of the current recording procedure during the calendar year, and the high incidence of missing or erroneous data during that year.

⁸⁰ Spitzer Report, *supra* note __, at __

⁸¹ Stipulated Settlement, *Daniels v City of New York*, December 31, 2003

procedures for NYPD officers to record the rationales for street stops under the “stop and frisk” program.

Beginning in 2003, a set of check boxes replaced the narrative format for recording Fourth Amendment stop justifications that was used at the time of the 1999 study.⁸² The boxes included nine affirmative stop rationales plus an option to check “other” and record the specifics by hand. The nine rationales were identified jointly by plaintiffs in the *Daniels* case and the City, incorporating a set of categories based on both state and federal caselaw that would sustain a Fourth Amendment test for the individualized stop rationales.⁸³ The check boxes were rooted in both federal and state caselaw. The new procedure also included a box for “other” factors, which officers also recorded narratively. On the back side of the form, officers were trained to record a series of “additional circumstances” to justify the stop. Officers could check off as many boxes as needed to express the basis for the stop.

The form included nine “stop factors” plus as an option to check “other” and record the details. It also included nine “additional circumstances” plus an option to check “other” and record the information narratively. Table 1 lists the 20 stop factors and additional circumstances. About 95% of the stops from 2004-12 checked between one and six factors, creating 60,459 possible combinations that express the bases of suspicion. Because of redundancy in the meanings and descriptions of these factors, we reduced the 20 to a set of nine distinct and non-overlapping factors. The first column in Table 2 shows reduced factors, and the second column shows the components based on the original set of 20.

Table 1 Here

Table 2 Here

We used two analyses to illustrate the narrowing and patterning of suspicion as articulated by officers through this system. The first simply examines over time the use of each of the nine composite factors. We show this through a set of graphs that charts the use of each factor for each calendar quarter from 2004-12. Table 3 shows the characteristics of the persons stopped in this period.

The second analysis examines a set of regression models that attempt to explain stop patterns over time within New York’s 76 police precincts.⁸⁴ We first

⁸² The check boxes were incorporated into the standard reporting form for stops, the UF-250. A copy of the revised UF-250 form with the check boxes is in Appendix A.

⁸³ *Daniels* Stipulated Settlement, at __

⁸⁴ The Central Park precinct is omitted, due to low population, low crime and low stop activity.

estimate the regressions without including the stop factors. We estimate models for all stops, and then disaggregate stops by the suspected crime that animated the stop. We then add the suspicion factors to determine the extent to which individualized suspicion improves the model fit and its explanatory power. Individualized and reasonable suspicion should clarify the patterns of stops, and reveal the actual preferences of officers in forming suspicion to make stops. These bases of suspicion are disaggregated by the suspected crime in the stop. For example, models that estimate the patterns of stops alleging drug offenses should improve with the inclusion of the “drug transaction” stop factor. We test this assumption across a range of suspected crimes.

B. Dilution, Expansion, and Dependence

Over time, officers identify progressively more circumstances to justify their stops. Figure 1 shows that the average number of factors has grown by about 30% over 9 years, from 3.0 factors per stop to 3.8 factors per stop. The number of stops where officers check off five or more factors also rose, from 16.5% in 2004 to 28.1% of all stops in 2012, an increase of 83%. This could reflect better training and sensitivity to the specific circumstances surrounding each stop, but as the graphs in Figure 2 suggest, it more likely reflects a decreasing sensitivity or attention to matching the realities of stops to the categories available to check them off. As stops have grown in number over time, officers appear to be casting a wider net of justifications to satisfy the suspicion requirements for the stop.

Figure 1 Here

At the same time that the accounts of “suspicion” were diversifying, officers increasingly relied on a narrow set of specific factors to articulate individualized suspicion. Figure 2 shows a set of simple graphs charting changes in the use of each of the stop factors over time. We look in these graphs for patterning and narrowing, to examine whether the specificity of the reasons for stops has been diluted over time, in contrast to the individualization requirements of both state and federal caselaw.⁸⁵

Figure 2 Here

⁸⁵ *Terry v. Ohio*, 392 U.S. 1 (1968). See, also, *People v. De Bour*, 352 N.E.2d 562 (1976) (articulating the standard for search and seizure under New York common law). See, also, Brief of the United States as Amicus Curiae, supra note __, for the narrow set of indicia that the U.S. put before the *Terry* court. See, Tracey Meares, Programming Errors, in this volume. Meares points out that there is almost no overlap between the factors put before the *Terry* court (and presumably incorporated into its conceptualization of “reasonable” and “individualized” suspicion, and the factors on the NYPD form shown in Appendix A.

Several distinct patterns are evident. First, three factors are used consistently and infrequently over time. “Drug Transactions” are marked in about 10% of all stops, as is “Criminal Appearances” and “Suspicious Object.” The latter rises over time from 10% to 15% of stops, but the increase is slight in degree. “Criminal Appearances” is marked in just under 10% of stops, with little variation over time. “Violent Crime” rises over time from about 5% of all stops to 10%, but remains low.⁸⁶ There seems to be some care by officers in the use of these three factors, suggesting a measure of individualization under particular circumstances.

Others are used consistently over time or with little variation, but at a higher rate. “Fits Description” is marked in about 25% of stops, but varies within a narrow range and declines slightly over time. “Casing” exhibits a similar pattern: it is checked in about 35% of stops. (Casing was the suspected crime that animated the stop of John Terry). Use of this factor rises from about one stop in five in 2004 to nearly 30% by the end of 2011. While falling within the broad conceptual space of “reasonableness,” these two factors seem to say less about individualization of suspicion than serving as handy bins of suspicion that judges can easily understand to satisfy constitutional review.

The use of either of the two “Other” factors declines over time, from nearly 30% of all stops to just below 20%. The decline in use of the opportunity to tailor and articulate the suspicion rationale suggests increasing comfort with the broad bins offered by the other categories, and perhaps a shift among officers toward de-individuation when offered a suspicion recipe or menu. It could also simply be an efficiency choice: checking “other” requires an additional recording burden to state the specific circumstances that fell outside the easier choices. And if officers invoke additional factors that boost the amount of suspicion – such as “High Crime Area”⁸⁷ – the need to record details of suspicion is mooted. Absent an

⁸⁶ “Actions Indicative of Engaging in Violent Crimes” is generally a factor that, standing alone, can serve as the basis of a lawful stop. *See People v. Howard*, 542 N.Y.S.2d 536, 538 (1st Dep’t 1989).

⁸⁷ *See, Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (finding that flight from the police in a “high crime area” could constitute reasonable suspicion for a stop). But the *Wardlow* court offered no test the basis of a *Wardlow* claim. In *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1125 (2000), the majority concluded that a suspect’s presence in a high crime area is not enough to support reasonable and particularized suspicion, and that the factor “not be used with respect to the entire neighborhood ... in which members of minority groups go about their daily business”). *See, also*, Andrew Guthrie Ferguson & Damien Bernache, “The ‘High-Crime Area’ Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis,” 57 *Am. U. L. Rev.* 1587, 1588 (2008) (demonstrating current Supreme Court jurisprudence provides those stopped in “high-crime area” with less robust Fourth Amendment protections).

institutional demand for strong articulation of the bases of suspicion, why would an officer maximize detail when satisficing on the recording burden would provide “enough” suspicion.⁸⁸ None of these interpretations suggests stronger compliance with *Terry*’s (and *DeBour*’s) individuation demands, and instead suggests an increasing comfort among officers with other shortcuts to establishing reasonable suspicion.

Two factors in particular suggest the presence of a script, and its development over time. First, officers increasingly relied on the “Evasive and Furtive” movement factor over time. One or more of its components was checked off in about 40% of all stops in 2004, rising to over 60% in 2011. The term “furtive movements” can be used to refer to an almost infinite number of actions that an officer might find suspicious. This factor is vague in its meaning and subjective in its interpretation. In some instances, a furtive movement might be a strong signal that a suspect is carrying a weapon.⁸⁹ But in others, as in Alvin’s stop, a “furtive movement” may be nothing more than a glance at an officer, or, fearing an encounter with an officer, someone hurrying down the street to avoid police contact. There is considerable space between those poles for an officer to use this particular factor to motivate and justify a stop. The general failure of officers to find guns in the millions of stops during this time is another sign of the expansiveness of the interpretation of this factor. Its increasing use suggests its core role in a script of suspicion.

Second, nearly three stops in four used one or more indicators of crime location consistently over time. HCA is vulnerable to subjective and highly contextualized interpretation, and alone, is legally insufficient to justify a stop but may be when

⁸⁸ March 2013 NYPD Operations Order requiring officer to provide narrative detail of the specific indicia of suspicion in each stop. Available from author.

⁸⁹ Absent movements indicating that suspect might be armed, furtive movements cannot give rise to reasonable suspicion. See *People v. Powell*, N.Y.S.2d 725, 727-28 (1st Dep’t 1998) (holding that officers did not have reasonable suspicion to frisk a suspect walking with his arm stiffly against his body in a high crime area); *United States v. McCrae*, 2008 U.S. Dist. LEXIS 2314, *9-*10 (E.D.N.Y. January 11, 2008); *United States v. McCrae*, 2008 U.S. Dist. LEXIS 2314, *9-*10 (E.D.N.Y. January 11, 2008) (holding that an officer did not have reasonable suspicion to stop a suspect who moved his hand from the center of his stomach to the left side of his waist in a manner that the officer claimed was similar to how an officer handles firearms while in plain clothes); *United States v. Doughty*, 2008 U.S. Dist. LEXIS 74248, *18 (S.D.N.Y. Sept. 18, 2008) (holding that an officer did not have reasonable suspicion to stop a suspect who adjusted his waistband in a manner consistent with carrying a firearm); See, also, *People v. Woods*, 64 N.Y.2d 736, 737 (N.Y. 1984)

used in conjunction with other factors.⁹⁰ But under *Wardlow*, the high crime area rationale was sufficient to multiply the constitutionality of other factors which, standing alone, were not sufficient to justify a *seizure*. Figure 2 shows the use of just the “High Crime Area” was used in more than 55% of all stops during this period. Together with other indicia of crime location, 75% of all stops were based in part on the High Crime Area factor. It is more than a sign of a script, it seems to be a pretext used by officers to reach a minimal level of individual and reasonable suspicion.⁹¹ Used this way, it has little power to distinguish the circumstances of one stop from another.

One final sign of the scripting of suspicion is evident in the consistent use of Crime Location and Evasive/Furtive factors across the city, regardless of the actual crime rate in the location where it is used. To construct Figure 3, we analyzed the specific locations of each stop, and examined the actual crime rate in those areas. The entire city was divided into quintiles, or 20% bracket. The lowest quintile in Figure 3 includes the safest 20% of all precincts in the City, and the highest quintile includes the 20% with the highest total crime rates.

Figure 3 Here

Again, as in the other indicia of individual suspicion, there is a gradual and persistent process of desensitization of these factors to conform to the realities in which NYPD officers patrol. To the trend toward increasing use of the “evasive/furtive” factor may simply reflect the adoption and spread of a cognitive framework to filter perceptions of the criminogenic and disorderly characteristics

⁹⁰ See, *Illinois v. Wardlow*, 120 S. Ct. 673 (2000). See, also, Andrew Guthrie Ferguson & Damien Bernache, “The ‘High-Crime Area’ Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis,” 57 *Am. U. L. Rev.* 1587, 1588 (2008) (demonstrating current Supreme Court jurisprudence provides those stopped in “high-crime area” with less robust Fourth Amendment protections).

⁹¹ See, *U.S. v. Montero-Camargo*, 208 F.3d 1122 (2000). Judge Kozkinsi writes in dissent: “Without hesitation, the majority treats this as a crime wave, but is it really? Does an arrest every four months or so make for a high crime area? Compare *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir.1999) (“In less than one year there had been some 2,500 drug arrests in the five-block-by-five-block area where the incident occurred.”)... Can we rely on the vague and undocumented recollections of the officers here? ... Are such estimates sufficiently precise to tell us anything useful about the area? ... [T]o rely on every cop’s repertoire of war stories to determine what is a ‘high crime area’ - and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion - strikes me as an invitation to trouble. I would be most reluctant to give police the power to turn any area into a high crime area based on their unadorned personal experiences.”

of their patrol sectors.⁹² In turn, officers may reflexively attribute the conditions of local crime and social disorder to all suspects in that area. Again, one can see a widely shared script emerging and taking hold in the perceptual frames of patrolling officers.

D. Normative and Revealed Preferences

Next, we estimated the extent incorporating the suspicion factors weaken or improve regression estimates to explain stop patterns.⁹³ If individualized suspicion is functioning well as a set of standards guiding officer discretion when making stops, the inclusion of these standards in a regression analysis predicting stop patterns should result in a substantial overall improvement in the explanation of patterns of stops. That is, if the stop factors as applied reflect a consistent and accurate pattern of the incorporating Fourth Amendment standards, model fit – the capacity of a statistical model to capture the variance of a phenomenon across sampling units – should improve. Here, we report the pseudo R^2 , a measure that shows model fit for regressions of events such as police stops.⁹⁴ Also, by identifying factors that predict crime-specific patterns that explain stops, we can begin to distinguish between normative and revealed preferences.

Table 4 summarizes four features of these analyses for each crime-specific model. First, it shows the explained variance, or goodness of fit, for each model without consideration of the stop or suspicion factors. The next five columns show results when the NYPD suspicion factors are incorporated into the model. The third column shows which of the stop factors or additional circumstances were

⁹² See, Robert J. Sampson and Stephen W. Raudenbush, “Seeing Disorder: Neighborhood Stigma and the Social Construction of ‘Broken Windows’” *67 Social Psychology Quarterly* 319-342(2004)

⁹³ Regression models were estimated in two stages. First, a series of negative binomial regressions were estimated for stops within each of six types of suspected crime. Each model included (1) precinct racial composition, (2) total precinct residential population, (3) precinct socio-economic status, (4) local crime conditions, the percentage crime complaints that corresponds to the suspected crime for the model, (5) patrol strength, and (6) a dummy variable indicating that the precinct was (or was not) one of the four business precincts. Then, for each model in Table 4, the same model was estimated again, this time including a variable for the percent of all stops in the precinct where each suspicion factor was checked. In this second set of regressions, a variable for the average number of factors for each stop was included.

⁹⁴ The goodness of fit of a statistical model describes how well it fits a set of observations. Measures of goodness of fit typically summarize the discrepancy between observed values and the values expected under the model in question. Such measures can be used in statistical hypothesis testing. See, e.g., David W. Hosmer and Stanley Lemeshow, *Goodness of Fit Statistics for the Logistic Regression Model*, 9 *Communications in Statistics* 1043 (1980).

statistically significant positive predictors of the number of stops. The fourth column shows the statistically significant negative predictors: those factors that were significantly less likely to appear in a pattern of crime-specific stops.

Insert Table 4

The fifth column shows the R^2 for each crime-specific model when the stop factors are included. The sixth column shows the marginal R^2 – the change in R^2 – that estimates the improvement over the model without stop factors. If reasonable suspicion is in fact animating these stops, the regressions should show a convergence between the normative and revealed preferences in police stop decisions. Overall model fit should improve over chance at the margins when more accurate explanatory information is included. In other words, more information should lead to less chance, and a more systematic understanding of how often, where and under what circumstances stops take place. In other words, revealed preferences should tell us more about stop patterns than when that information is masked.

Two trends stand out in Table 4. First, in most cases the models, even with the addition of the RS factors, explain only around half the variance. The model for all stops explains 74% of the variance, a strong estimate. But this estimate is perhaps misleading, since it is driven by the Crime Location measure, which is present in nearly 60% of all stops. In other words, the model is tautological with the “high crime area” script that is pervasive in the formation of suspicion in this regime.

Second, in most cases, model fit improves very little with the addition of the suspicion factors. Improvement was 10 percentage points or fewer for five of the seven models. The rationales are as likely to be unobserved as observed using *Terry* and subsequent Fourth Amendment criteria. The two models where the suspicion factors improved model fit by more than .10 were those predicting drug stops and trespass stops. In these two models, estimated model fit nearly doubles: the pseudo- R^2 for drug stops increases from .29 to .52, and the pseudo- R^2 for trespass stops increases from .30 to .57. Drug stops are tautological, as evidenced by the specific factors in those stops where suspicion often is isomorphic with the suspected crime itself. The same is true for trespass stops, which are concentrated in public housing sites.⁹⁵ Conceptually, without a stop and an inquiry, it is difficult to imagine *ex ante* factors that would lead to suspicion of trespass.⁹⁶

⁹⁵ Jeffrey Fagan and Garth Davies, Race and Selective Enforcement in Public Housing, 9 *J. Empirical Legal Studies* 697 (2012) (showing the heavy spatial concentration of trespass stops in New York City public housing sites from 2004-11)

⁹⁶ Adam Carlis, The Illegality of Vertical Patrol, 102 *Columbia Law Review* 2002 (2009) (showing the failure of trespass enforcement practices under the NYPD stop and frisk

NYPD officers routinely claim “High Crime Area” as the stop rationale in trespass stops, based on the categorization in policy of public housing as a problematically crime-ridden venue.⁹⁷

The positive predictors of stop activity suggest few crime-specific references. Stops for nearly all crime types are predicted by “crime location” (the exceptions being weapons and QOL stops), suggesting that officers may be invoking a convenient script that is rarely challenged. The “crime location” script, like the “suspicious object” rationale in weapons stops, does away with the more demanding task of articulating individuated actions, and under current caselaw, is not easily challenged.⁹⁸

III. Conclusion

As stops increased in New York from fewer than 100,000 in 1998 to over 685,000 in 2011,⁹⁹ individuated suspicion became elusive, and officers defaulted to convenient and stylized narratives to justify stops. In turn, we suspect that police constructed scripts of suspicion that could be tailored and invoked to fit the cosmetic or epidemiological circumstances of a stop. The weak evidence of specificity in stop patterns, coupled with the reliance of a small number of factors to justify individualized suspicion, hints at the drift toward memes and scripts to satisfy a weakly enforced and regulated Fourth Amendment regime. When repeated across hundreds of interactions, and when knowledge of these interactions is shared within dense information networks of officers, narratives are shaped and reinforced in a process that combines both self-presentation,¹⁰⁰ that allows officers to give accounts of their actions,¹⁰¹ and that conforms to the requirements of training and law.

When there is a burden on officers to develop sustainable narratives, these network supports become important places to practice and refine plausible

regime to comport with Fourth Amendment standards of reasonable and articulable suspicion).

⁹⁷ See generally *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012); Second Amended Complaint, NAACP LEGAL DEFENSE FUND, June 8, 2011, <http://www.naacpldf.org/document/davis-amendedcomplaint>. See, also, Carlis, *id.*

⁹⁸ See, e.g., *Montero-Camargo*, *supra* note __.

⁹⁹ Spitzer Report, *id.* Fagan Expert Report, *supra* note __.

¹⁰⁰ Erving Goffman, *The Presentation of Self in Everyday Life*, 17-25 (1959). See, also Marsden, *Memetics and Social Contagion*, *supra* note __.

¹⁰¹ Marvin B. Scott, and Stanford M. Lyman, Accounts, 33 *American Sociological Review* 46-62 (1968).

narratives of suspicion. The narratives, in turn, become scripts that are widely shared. They are handy, in fact, to simplify complexity. The scripts are "rules" that shape, both cognitively and perceptually, how situations are perceived, how to choose among contingent actions to proceed (or not) with a stop, what language and tone is used, and how to respond to any of several reactions from the suspect. To some extent, such formalities or patterned responses to a heavy workload and set of administrative demands are unavoidable. But when built into everyday practice, the use of scripts, or memes, or stylized narratives poses real challenges for Fourth Amendment regulation.

Regulation fails in this regard since the scripts seem to sustain a regime that is remarkably inefficient at detecting wrongdoing while simultaneously failing to satisfy even today's weak Fourth Amendment standards.¹⁰² It's more than reasonable to ask how useful it is to memorialize these categories and scripts when the rates of arrest, prosecution and conviction are so low. The police must surely know that their accounts will go unchallenged, since most are never challenged in an adversarial setting. The centrality of these scripts with what the federal court found to be a constitutionally deficient regime suggests that *Terry's* balancing act has gone awry.

¹⁰² *Floyd v. City of New York*, Opinion and Order, *supra* __ (noting that police fail to make arrest or seize guns or other contraband in about nine stops in 10). Among those subject to court review, nearly half of those fail to reach a conviction, suggesting an error rate of nearly 95%. See, Eric T. Schneidermann, A Report on Arrests Arising from the New York City Police Department's Stop-and-Frisk Practices (November 2013), at http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf

Figure 1. Factors per Stop, 2004-12

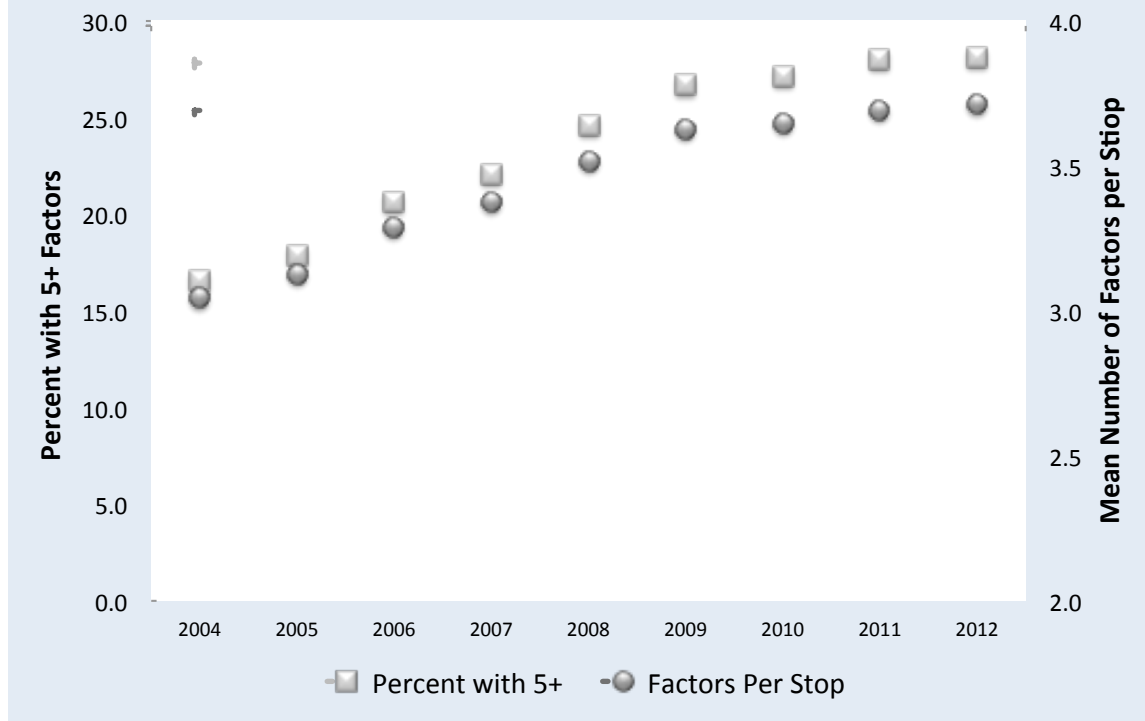


Figure 2. Percent of Stops Using Each Suspicion Factor by Calendar Quarter, 2004-12

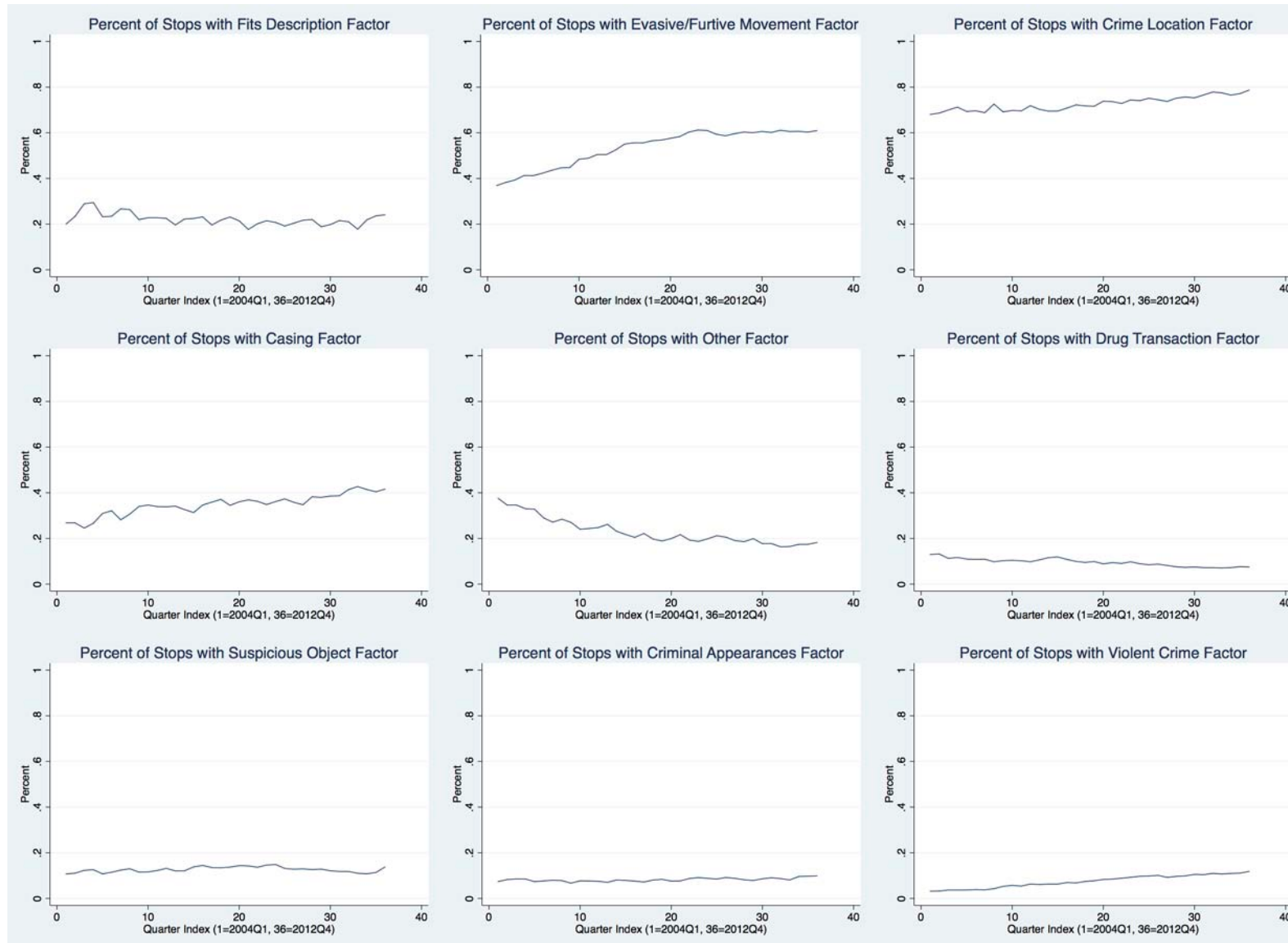


Figure 3. Percent High Crime Area Stops and Furtive Movement Stops by Precinct Crime Quintile

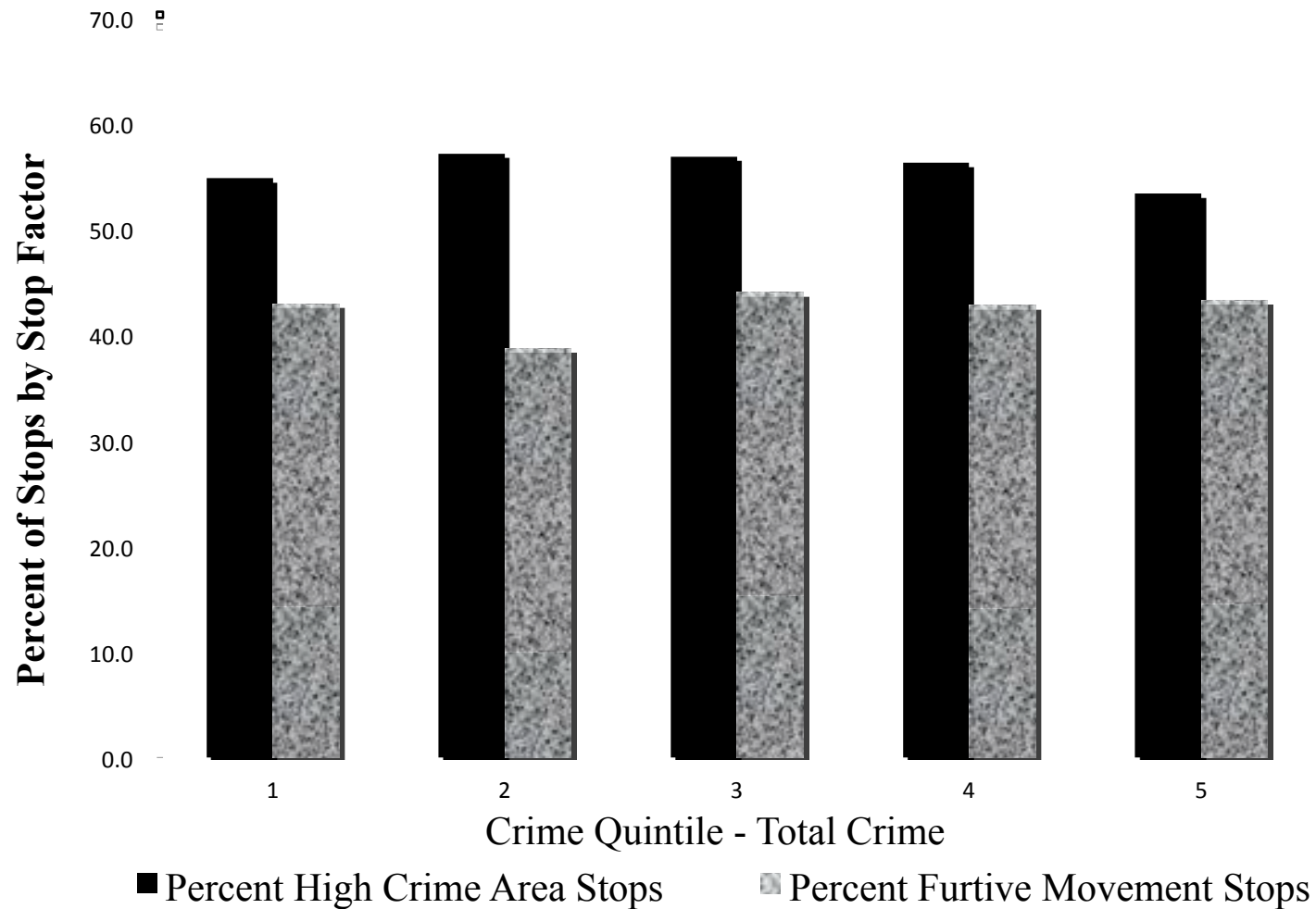


Table 1. Specific Stop Circumstances and Percent of Stops Based on Each Factor (N=4,783,793)

<i>Factor</i>	<i>% of Stops</i>
Report of Witness or Victim	12.4
Fits Description	17.0
Furtive Movements	45.0
Evasive Response	17.0
Changed Direction	24.0
Ongoing Investigation	13.0
Area has High Crime Incidence	56.0
Time of Day	37.0
Proximity to Scene	20.0
Casing	29.0
Acting as Lookout	17.0
Other (CS)	20.0
Other (AC)	4.0
Drug Transaction	9.0
Suspicious Bulge	9.0
Clothing Used in Crime	4.0
Associating with Known Criminals	4.0
Sights and Sounds of Criminal Activity	2.0
Suspicious object	3.0
Actions Indicate Violent Crime	8.0

Source: NYPD Stop and Frisk Database, various years.

Percent exceeds 100% because the majority of stops have multiple factors indicated. Stops excluded if suspect age is below 10 or above 85 years.

Table 2. Use of Suspicion Factors with Components, NYPD Street Stops, 2004-12

Factor	% of Stops	Components
N	4,433,793	
Fits Description	21.6	"Fits description"
Evasive/Furtive	54.9	"Furtive movements" "Evasive, furtive or inconsistent response to officer's questions" "Changing direction at sight of officer/flight")
Crime Location	73.2	"Area has high incidence of reported offense of type under investigation" "Time of day, day of week, season corresponding to reports of criminal activity" "Ongoing investigations, e.g. robbery pattern" "Proximity to crime location"
Casing	35.8	"Actions indicative of 'casing' a victim or location" "Actions indicative of acting as a lookout"
Other	22.2	"Other reasonable suspicion of criminal activity" "Other additional circumstance"
Drug Transaction	9.2	"Actions indicative of engaging in a drug transaction"
Suspicious Object	12.7	"Suspicious bulge/object" "Wearing clothes/disguises commonly used in the commission of a crime" "Carrying objects in plain view used in the commission of a crime"
Criminal Appearances	8.3	"Suspect is associating with persons known for their criminal activity" "Sights and sounds of criminal activity, e.g. bloodstains, ringing alarms"
Violent Crime	8.0	"Actions indicative of engaging in violent crime"

Substantive Factors are said to appear in a stop if at least one included circumstance is indicated by the NYPD. Percents exceed 100% due to multiple factors indicated per stop. Stops excluded if suspect age is below 10 or above 85 years.

Table 3. Characteristics of Suspects in NYPD Street Stops, Jan. 2004 - Jun. 2013

N	4,783,793
Race (%)	
White	9.8
Black	51.9
Hispanic	30.6
Other or Unknown	7.6
Age	
Mean	28.1
Std. Dev.	(11.5)
Sex (%)	
Male	90.2
Female	7.0
Unknown	2.8
Suspected Offense (%)*	
Murder	.1
Drug	8.3
Violence	15.6
Weapons	18.4
Property	19.1
Trespass	9.2
Quality of Life	1.3
Other	28.1

* Total > 100% due to rounding error

Source: New York City Police Department, various years. Stops with suspects below age 10 and above age 85 omitted.

Table 4. Factors Predicting Stop Rates by Suspected Crime and Change in Model Fit, All Stops 2004-2012

Suspected Crime	Model Fit (no RS factors)	Positive Predictors	Negative Predictors	Model Fit (with RS Factors)	Overall Model Improvement	% Model Improvement
Total Stops	.64	Crime Location	Fits Description Evasive/Furtive Other Criminal Appearances	.74	.10	15.6%
Violence Stops	.51	Crime Location Casing Criminal Appearances	Fits Description Evasive/Furtive Other Drug Transaction Suspicious Object	.57	.06	11.8%
Property Stops	.35	Crime Location Casing	Fits Description Evasive/Furtive Drug Transaction Suspicious Object	.40	.05	14.3%
Drug Stops	.29	Crime Location Drug Transaction	Fits Description Evasive/Furtive Casing Other Criminal Appearances Violent Crime	.52	.23	79.3%
Weapons Stops	.51	Suspicious Object	Fits Description Casing Other Drug Transaction Criminal Appearances	.57	.06	11.8%
Trespass Stops	.30	Crime Location Other Drug Transaction	Fits Description Evasive/Furtive Criminal Appearances	.57	.27	90.0%
QOL Stops	.16	Criminal Appearances	Fits Description Suspicious Object	.21	.05	31.3%

* Negative binomial regressions, population-averaged models with fixed effects for precinct and time, and AR(1) covariance.

Appendix A. UF-250 Form

STOP, QUESTION AND FRISK REPORT WORKSHEET PD344-151A (Rev. 11-02)				(COMPLETE ALL CAPTIONS)	
Pct. Serial No.		Date			
Pct. Of Occ.		Time Of Stop			
Period Of Observation Prior To Stop		Radio Run/Sprint #			
Address/Intersection Or Cross Streets Of Stop					
<input type="checkbox"/> Inside	<input type="checkbox"/> Transit	Type Of Location			
<input type="checkbox"/> Outside	<input type="checkbox"/> Housing	Describe:			
Specify Which Felony/P.L. Misdemeanor Suspected				Duration Of Stop	
What Were Circumstances Which Led To Stop? (MUST CHECK AT LEAST ONE BOX)					
<input type="checkbox"/> Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc. <input type="checkbox"/> Fits Description. <input type="checkbox"/> Actions Indicative Of "Casing" Victim Or Location. <input type="checkbox"/> Actions Indicative Of Acting As A Lookout. <input type="checkbox"/> Suspicious Bulge/Object (Describe) <input type="checkbox"/> Other Reasonable Suspicion Of Criminal Activity (Specify)		<input type="checkbox"/> Actions Indicative Of Engaging In Drug Transaction. <input type="checkbox"/> Furtive Movements. <input type="checkbox"/> Actions Indicative Of Engaging In Violent Crimes. <input type="checkbox"/> Wearing Clothes/Disguises Commonly Used In Commission Of Crime.			
Name Of Person Stopped		Nickname/Street Name		Date Of Birth	
Address		Apt. No.		Tel. No.	
Identification: <input type="checkbox"/> Verbal <input type="checkbox"/> Photo I.D. <input type="checkbox"/> Refused <input type="checkbox"/> Other (Specify)					
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female Race: <input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> White Hispanic <input type="checkbox"/> Black Hispanic <input type="checkbox"/> Asian/Pacific Islander <input type="checkbox"/> American Indian/Alaskan Native					
Age	Height	Weight	Hair	Eyes	Build
Other (Scars, Tattoos, Etc.)					
Did Officer Explain If No, Explain:					
Reason For Stop					
<input type="checkbox"/> Yes <input type="checkbox"/> No					
Were Other Persons Stopped/Questioned/Frisked?		<input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, List Pct. Serial Nos.			
If Physical Force Was Used, Indicate Type:					
<input type="checkbox"/> Hands On Suspect <input type="checkbox"/> Suspect On Ground <input type="checkbox"/> Pointing Firearm At Suspect <input type="checkbox"/> Handcuffing Suspect <input type="checkbox"/> Suspect Against Wall/Car		<input type="checkbox"/> Drawing Firearm <input type="checkbox"/> Baton <input type="checkbox"/> Pepper Spray <input type="checkbox"/> Other (Describe)			
Was Suspect Arrested?		Offense		Arrest No.	
<input type="checkbox"/> Yes <input type="checkbox"/> No					
Was Summons Issued?		Offense		Summons No.	
<input type="checkbox"/> Yes <input type="checkbox"/> No					
Officer In Uniform?		If No, How Identified? <input type="checkbox"/> Shield <input type="checkbox"/> I.D. Card			
<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Verbal			

Was Person Frisked? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, MUST CHECK AT LEAST ONE BOX <input type="checkbox"/> Inappropriate Attire - Possibly Concealing Weapon <input type="checkbox"/> Verbal Threats Of Violence By Suspect <input type="checkbox"/> Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon <input type="checkbox"/> Other Reasonable Suspicion Of Weapons (Specify)	<input type="checkbox"/> Refusal To Comply With Officer's Direction(s) Leading To Reasonable Fear For Safety <input type="checkbox"/> Violent Crime Suspected <input type="checkbox"/> Suspicious Bulge/Object (Describe)
Was Person Searched? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, MUST CHECK AT LEAST ONE BOX <input type="checkbox"/> Outline Of Weapon <input type="checkbox"/> Machine Gun <input type="checkbox"/> Other (Describe)	<input type="checkbox"/> Hard Object <input type="checkbox"/> Admission Of Weapons Possession <input type="checkbox"/> Assault Weapon <input type="checkbox"/> Knife/Cutting Instrument
Was Weapon Found? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, Describe: <input type="checkbox"/> Pistol/Revolver <input type="checkbox"/> Rifle/Shotgun <input type="checkbox"/> Knife/Cutting Instrument	
Was Other Contraband Found? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, Describe Contraband And Location Remarks Made By Person Stopped	
Additional Circumstances/Factors: (Check All That Apply) <input type="checkbox"/> Report From Victim/Witness <input type="checkbox"/> Area Has High Incidence Of Reported Offense Of Type Under Investigation <input type="checkbox"/> Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity <input type="checkbox"/> Suspect Is Associating With Persons Known For Their Criminal Activity <input type="checkbox"/> Proximity To Crime Location <input type="checkbox"/> Other (Describe)	
Pct. Serial No. _____ Additional Reports Prepared: Complaint Rpt. No. _____ Juvenile Rpt. No. _____ Aided Rpt. No. _____ Other Rpt. (Specify) _____	
REPORTED BY: Rank, Name (Last, First, M.I.) _____ Print _____ Tax# _____ Signature _____ Command _____	