VOLUME 130 JUNE 2017 NUMBER 8

HARVARD LAW REVIEW

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ARTICLE

THE JUDICIAL PRESUMPTION OF POLICE EXPERTISE

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THE JUDICIAL PRESUMPTION OF POLICE EXPERTISE

Anna Lvovsky[*]

This Article examines the unrecognized origins and scope of the judicial presumption of police expertise: the notion that trained, experienced officers develop insight into crime sufficiently rarefied and reliable to justify deference from courts. That presumption has been widely criticized in Fourth Amendment analysis. Yet the Fourth Amendment is in fact part of a much broader constellation of deference, one that begins outside criminal procedure and continues past it. Drawing on judicial opinions, appellate records, trial transcripts, police periodicals, and other archival materials, this Article argues that courts in the mid-twentieth century invoked police expertise to expand police authority in multiple areas of the law. They certified policemen as expert witnesses on criminal habits; they deferred to police insights in evaluating arrests and authorizing investigatory stops; and they even credited police knowledge in upholding criminal laws challenged for vagueness, offering the officer's trained judgment as a check against the risk of arbitrary enforcement.

Complicating traditional accounts of judicial deference as a largely instrumental phenomenon, this Article argues that courts in the midcentury in fact came to reappraise police work as producing rare and reliable "expert" knowledge. And it identifies at least one explanation for that shift in the folds and interconnections between the courts' many diverse encounters with the police in these years. From trials to suppression hearings to professional activities outside the courtroom, judges experienced multiple sites of unique exposure to the rhetoric and evidence of the police's expert claims. These encounters primed judges to embrace police expertise not only through their deliberative content, but also their many structural biases toward police knowledge. This development poses important and troubling consequences for the criminal justice system, deepening critiques of police judgment in criminal procedure and raising novel concerns about the limits of judicial reasoning about police practices.

INTRODUCTION

Since the Supreme Court in *Terry v. Ohio*[1] first urged courts to give due weight to inferences drawn by policemen "in light of [their] experience,"[2] judicial deference to police judgment in criminal procedure

* Academic Fellow, Columbia Law School. For many helpful comments and conversations, I would like to thank Barbara Black, Richard Briffault, Andrew Crespo, Peggy Davis, Harold Edgar, Jeffrey Fagan, Sean Farhang, Barry Friedman, Marie-Amélie George, Roger Goldman, Risa Goluboff, Michael Graetz, Jamal Greene, Bernard Harcourt, Jeremy Kessler, Jennifer Laurin, James Liebman, Adi Liebovitch, Ryan Liss, Wayne Logan, Henry Monaghan, Luke Norris, Lauren Ouziel, David Pozen, Daniel Richman, Matthew Shapiro, Seth Stoughton, Ryan Williams, and Maggie Wittlin. I am also grateful to workshop participants at UC Berkeley School of Law, Columbia Law School, Harvard Law School, Michigan Law School, NYU School of Law, University of Virginia School of Law, and University of Utah S.J. Quinney College of Law. Many thanks to the editors of the *Harvard Law Review* for their insight and diligence in shepherding this piece toward publication.

[1] 392 U.S. 1 (1968).

[2] *Id.* at 27.

has inspired a small library of criticism.[3] Although defended by some,[4] the judicial tendency to relax constitutional scrutiny of police tactics based on an officer's professional insight has been condemned for a variety of vices. Critics point to the lack of evidence corroborating the police's specialized knowledge. They decry the overzealousness of officers and the disproportionate enforcement in minority neighborhoods.[5] They protest the lack of democratic checks on police stops[6] and the abdication of the courts' duty to defend individual rights.[7] Lurking behind these objections is the sense that the Fourth Amendment is simply anomalous: in other spheres, such as the vagueness doctrine, courts tend to reject police discretion as a governing principle of law.[8]

This Article shows that the Fourth Amendment is in fact part of a broader shift in judicial reasoning about the police, one that began outside criminal procedure and continued past it. Starting in the

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[3] *See, e.g.*, Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 754–57 (2010); Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 816 (2014); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 533 (2015); Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 410 (2013); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1161 (2012); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 301. The phenomenon of deference typically involves searches and seizures, but also reaches into excessive force, *e.g.*, Graham v. Connor, 490 U.S. 386, 396–97 (1989), and the Fifth Amendment, *see, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 115 (1977) (suggesting enhanced reliability of eyewitness identifications by police officers).

[4] *See, e.g.*, Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 472–73 (2006); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 594–95 (1997).

[5] For comprehensive critiques of police judgment, see generally Kinports, *supra* note 3; Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213 (2012); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); and Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7 (2010). For further discussion, see *infra* pp. 2068–69.

[6] Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1853–55 (2015).

[7] *E.g.*, Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 683 (1998); Claire R. O'Brien, Recent Development, *Reasonable Suspicion or a Good Hunch?* Dapolito *and a Return to the Objective Evidence Requirement*, 93 N.C. L. REV. 1165, 1178–81 (2015).

[8] *See* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 400–01 (2001); Tracey L. Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1345 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 777 (1999); *see also* Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 166–67 (noting divergence).

1950s, judges came to rely on the promise of police expertise — the notion that trained, experienced officers develop rarefied and reliable insight into crime — to expand police authority in multiple areas of the law. They welcomed policemen as expert witnesses on criminal habits at trial. They deferred to police insight in evaluating probable cause and authorizing investigatory stops. And they even credited the police's criminological knowledge in upholding criminal statutes challenged for vagueness. Largely uncontroversial in its origins, the promise of police expertise expanded over the course of the twentieth century to invade increasingly questionable sites of the judicial system — bolstering not only the police's discretion in enforcing the law, but also the scope of the criminal law itself.

Drawing on judicial opinions, appellate records, trial transcripts, police periodicals, and other archival materials, this Article tracks the presumption of police expertise from its origins outside the courtroom to its long march through the justice system, shifting from one doctrinal flashpoint to the next. This history has yet to be told,[9] and it reveals the unexpected breadth of a deeply controversial phenomenon. But it also sheds light on several broader features of the courts: the role of expertise in constitutional analysis,[10] the divergence between judicial and popular views of executive actors,[11] the influence of police practices on statutory interpretation. Not least, it illustrates the profound *interconnectivity* of the judicial process: how seemingly discrete spheres of the criminal system influence the development of legal rules in others — not only through their doctrinal content, but also through their internal structures and accidental analytic effects.[12]

This history begins beyond the courtroom, for the idea of the police "expert" was hardly a judicial invention. It was a core tenet of the police professionalization movement, which gained prominence in the

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[9] Scholars have provided separate accounts of litigation surrounding loitering laws and investigatory stops, generally without addressing the topic of police expertise. *See, e.g.*, RISA GOLUBOFF, VAGRANT NATION (2016); John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749 (1998); Maclin, *supra* note 5 (stops); John A. Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964). They have also noted that New York's stop-and-frisk legislation figured into public debates about police professionalism, but have not connected this story to the broader history of the courts' negotiations with police expertise. *See* Anders Walker, *"To Corral and Control the Ghetto": Stop, Frisk, and the Geography of Freedom*, 48 U. RICH. L. REV. 1223 (2014); Josh Segal, Note, *"All of the Mysticism of Police Expertise": Legalizing Stop-and-Frisk in New York, 1961–1968*, 47 HARV. C.R.-C.L. L. REV. 573 (2012).

[10] For broader discussions of judicial deference to "experts," see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999); and Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAP. L. REV. 293 (2013).

[11] *See* Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664 (1985) (discussing judges' unique cultural outlook).

[12] *See infra* note 19 and accompanying text.

1950s and, though remembered largely for advocating bureaucratic management, was also deeply invested in recasting the individual officer as an expert investigator. The police's bid for professional status was dismissed by most contemporaries, who questioned officers' claims to any cognizable body of expert knowledge. Yet in these same years and shortly thereafter, many core platforms of police reform, including the recognition of policemen as "professionals" and the emphases on knowledge and *training*, began to exert a significant pull on legal doctrine.

That trend first emerged in the realm of evidence, where trial judges in the 1950s welcomed police officers as expert witnesses on crime, including on topics previously deemed either commonsensical or the province of scientific professionals. It subsequently moved into criminal procedure, where courts in the early 1960s invoked the wisdom of trained officers — evidenced in part by the rise of police expert witnessing — to analyze probable cause and to authorize investigatory stops, a practice that had long been upheld on other grounds. It culminated, finally, in the criminal law, where the promise of police expertise — now borne out both on the witness stand and at suppression hearings — repeatedly salvaged controversial loitering statutes from vagueness claims, offering the officer's criminological insight as a check against the risk of arbitrary enforcement. Far from distinguishing Fourth Amendment analysis from the vagueness doctrine,[13] judicial deference to police expertise crucially bridged the two, weakening constitutional scrutiny of both the police's enforcement tactics and the legislature's duties of statutory drafting.

The broader history of police expertise demonstrates the importance of casting our sights away from the Supreme Court in examining criminal procedure. Hardly a symptom of *Terry*, judicial deference to police judgment may be understood only by examining its roots among state and lower courts, including the discretionary practices of trial judges. Most basically, this broader lens expands the scope of the presumption of police knowledge, from a personal characteristic justifying individual police actions to a general fact used to salvage statutory schemes. Yet it also shifts our understanding of how that presumption arose. A fuller account of police expertise revises both the timeline and the context in which judges began to recognize police knowledge. And it illuminates that process as one of significant interconnection among different arenas of criminal adjudication, each

[13] *See, e.g.*, Livingston, *supra* note 8, at 166–67 (contrasting deference in analysis of procedure with deference in analysis of substantive laws); Maclin, *supra* note 8, at 400–02; Roberts, *supra* note 8, at 777.

judicial encounter with police knowledge modeling the courts' uptake of police expertise in the next.[14]

Traditional accounts of judicial deference in Fourth Amendment analysis tend to focus on essentially strategic motives: the courts' sensitivity to rising crime rates,[15] their respect for the difficulty of the police task,[16] their desire to preserve their institutional relationships,[17] among others. Some scholars have also identified the unique procedural posture of the suppression hearing, most notably the presence of incriminating evidence, as biasing judges toward the police.[18]

Yet the courts' broader embrace of police expertise strains the sufficiency of the strategic account, and it forces us to look beyond the suppression hearing itself. Debuting in the field of evidence rather than criminal procedure, and often emerging absent any practical need for judges to invoke police knowledge, that trend suggests that the courts' incentives to expand police power in these years built on an underlying recharacterization of police work as a task based on and producing reliable professional knowledge. And it locates at least one explanation for this shift in the interconnections among the courts' many encounters with police knowledge. From merits trials to suppression hearings to their professional activities outside the courtroom, judges' participation in the criminal justice system created several sites of unique exposure to the rhetoric and fruit of police expertise. These sites primed judges to accept police knowledge not simply through their substance, or even their multiplicity, but also through certain structural biases — from the suppression hearing's bias toward corroboration to the presence of uniquely qualified witnesses at trial — that made the police's expert claims seem more convincing. The courts' broad embrace of police expertise reflects what may be termed *structural spillover*: a process by which different areas of the law im-

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[14] *See* Jennifer E. Laurin, Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 676 n.19 (2011) (noting the importance of examining criminal procedure in connection to other areas of law).

[15] *E.g.*, GOLUBOFF, *supra* note 9, at 216; Livingston, *supra* note 4, at 568; Maclin, *supra* note 5, at 1317–18.

[16] *E.g.*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 233–34 (1984); *see also* Herman Goldstein, *Administrative Problems in Controling the Exercise of Police Authority*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 160, 161 (1967); Taslitz, *supra* note 5, at 35–36.

[17] *E.g.*, Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–13 (2006); Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1233 & n.269 (2010).

[18] *E.g.*, Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 434–37 (2012); Sklansky, *supra* note 3, at 301; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911–13 (1991).

pact each other through not only their substantive content,[19] but also their procedural logistics and often inadvertent analytic effects.

At many turns, the history of police expertise may not seem especially troubling. Admitting police expert testimony at trial, or even deferring to police experience at suppression hearings, can often serve a legitimate function of educating the court. Yet two aspects of this broader history should concern even those who embrace police judgment in other contexts. First, the underrecognized scope of judicial deference, expanding past criminal procedure and into the analysis of substantive laws, deepens common criticisms of police judgment. Generalizing the promise of police expertise from the personal trait of individual officers into a universal presumption buttressing legislative enactments,[20] that shift harnesses the police's controversial judgment to a more intrusive legal regime. It undercuts judges' ability to exempt underqualified officers from deference, a core safeguard in the Fourth Amendment. Most critically, it exacerbates the vagueness doctrine's core concern with preserving legislative accountability over questions of criminal policy. In context, even judges who embrace police expertise in Fourth Amendment analysis should reassess the validity of penal laws salvaged on that premise.

Beyond the matter of scope, however, the specific *process* through which police expertise wound its way through the courts compels us to reevaluate the possibilities of judicial reasoning about police practices. That process suggests that the judicial embrace of police judgment has not necessarily reflected judges' reasoned deliberation about police competence, but has also refracted numerous structural biases and presumptions across multiple spheres of the judicial process. Those biases raise intrinsic due process concerns about the legitimacy of judicial rules surrounding the police. And, in practice, they likely pushed judges to systemically overvalue police knowledge. This natural tendency of courts to aggregate their discrete encounters with police officers into broad, often-distorted presumptions about police competence adds urgency to recent calls for more rigorous empirical data on police

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[19] This story overlaps in part with the developing literature on doctrinal borrowing, a phenomenon scholars have examined across constitutional provisions, *e.g.*, Laurin, *supra* note 14, at 744; Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 59–72 (2012); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010), and in private law fields like corporations and intellectual property, *see* Laurin, *supra* note 14, at 741–42.

[20] For the classic distinction between adjudicative facts, specific to a dispute, and legislative facts, used to underwrite broad legal rules, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942); as well as Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234–36 (1985). For further discussion, see *infra* p. 2071.

conduct in constitutional analysis[21] — even as it identifies certain persisting biases to be minded in implementing such empirical correctives.

The remainder of this Article proceeds in four parts. Part I provides a new historical lens on the police professionalization movement, a project that recast the officer as a trained expert on criminal behavior. Part II turns to the courts, tracing how this new paradigm invaded judicial practices in the midcentury, from evidence to the Fourth Amendment to the analysis of substantive criminal laws. Part III examines the causes of the courts' broad embrace of police expertise. Synthesizing judges' many interactions with police knowledge, it suggests that courts came to recognize police work as a matter of professional expertise in large part through the interconnections and, often, structural biases of the criminal justice system. Finally, Part IV examines the repercussions of the courts' expanding reliance on police knowledge. Ultimately, it argues, the broader history of police expertise both heightens familiar criticisms of police judgment in criminal procedure and raises novel concerns about the limits of judicial reasoning about police conduct.

I. THE PROFESSIONALIZATION MOVEMENT

The paradigm of the police officer as an investigative "expert" first emerged outside the courtroom, in the police professionalization movement of the 1950s and 1960s. Commonly remembered as a managerial project promoting bureaucratic authority at the expense of individual discretion, that movement in fact also recast police officers as individual experts in their professional field — and it specifically sought to educate *judges* about its educational and organizational reforms.

A. Bureaucracy and Individual Expertise

"Professionalization" became something of a byword in the 1950s and 1960s. Even undertakers, janitors, and trash collectors began, contemporaries wryly observed, to restyle themselves as "funeral directors," "building engineers," and "sanitarians."[22]

Among the police, however, the twentieth century featured a particularly persistent movement toward professional status. That movement took its roots in the late nineteenth century, when

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[21] *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052–53 (2016); Friedman & Ponomarenko, *supra* note 6, at 1832, 1846; Miller, *supra* note 5, at 254; Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 915 (2009); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1056–59 (2016); Richardson, *supra* note 5, at 287–88.

[22] JERRY WILSON, POLICE REPORT 165 (1975).

Progressive reformers appalled by the influence of political machines over urban police departments lobbied for greater oversight.[23] It reemerged after the end of Prohibition, peaking in the 1950s and early 1960s — this time, far more effectively, under the helm of police executives themselves.[24] This second wave of reform shared the Progressives' concern with political influence, but it also responded to a new set of problems plaguing the police in the 1930s: a widespread, and often accurate, perception of police departments as bastions of corruption and incompetence, fueled by the lawlessness of the Prohibition era.[25] Echoing the same emphases on independence and efficiency, midcentury reformers were thus also devoted to raising the flagging *prestige* of police departments.[26]

The term "professionalization" was broad enough to encompass almost any occupational improvement, and contemporaries proposed numerous definitions.[27] Typically, however, professionalism centered on one of three features: first, the expertise of an occupation's members; second, a commitment to higher values and ideals of service; and finally, bureaucratic organization and freedom from external influence.[28] Scholars have usually seen police professionalization as falling within the third model, essentially synonymous with *managerialism*.[29] This vision of reform depended not on individual expertise but rather on bureaucratic authority; indeed, scholars suggest, its goal of top-down centralization aimed to stamp out any exercise of individual discretion.[30]

In fact, police reformers explicitly embraced all three features of professionalization. Certainly, they devoted significant attention to

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[23] For comprehensive overviews of first-wave reform, see ROBERT M. FOGELSON, BIG-CITY POLICE 93–116 (1977); and SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM 53–78 (1977).

[24] FOGELSON, *supra* note 23, at 142–43.

[25] THOMAS J. DEAKIN, POLICE PROFESSIONALISM 109–17 (1988); *see* Humbert S. Nelli, *American Syndicate Crime: A Legacy of Prohibition*, *in* LAW, ALCOHOL, AND ORDER 123, 128 (David E. Kyvig ed., 1985).

[26] FOGELSON, *supra* note 23, at 146–48.

[27] E.W. Roddenberry, *Achieving Professionalism*, 44 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 109, 109–13 (1953) (reviewing literature).

[28] *E.g.*, MICHAEL K. BROWN, WORKING THE STREET 40 (1981); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 235–39 (1966); WALKER, *supra* note 23, at ix.

[29] *See* CHARLES R. EPP, MAKING RIGHTS REAL 37 (2009); BERNADETTE JONES PALOMBO, ACADEMIC PROFESSIONALISM IN LAW ENFORCEMENT 33 (1995); DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 35 (2008); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 166 (2015); James Q. Wilson, *Emerging Patterns in American Police Administration*, 46 POLICE J. 155, 158 (1973).

[30] SKLANSKY, *supra* note 29, at 37; *see also* Harlan Hahn, *A Profile of Urban Police*, 36 LAW & CONTEMP. PROBS. 449, 457 (1971) (discussing essential conflict between professionalization as bureaucratic control and as individual judgment).

tightening the efficiency of police departments. The era's most pervasive and successful reforms focused on internal restructuring: centralizing authority with police chiefs, limiting the police task to crime prevention, dividing patrol work among specialized squads like vice and narcotics.[31] But, echoing the service model, they also stressed the significance of self-regulation and a professional code of ethics: in the case of the police, the value of "constitutional law enforcement" and civil rights.[32] And, echoing the expertise model, they emphasized the unique skills and knowledge of individual officers as professionals in their field.[33]

A hobbyhorse of some early reformers,[34] expertise emerged as an essential component of police professionalization in the mid-1950s. Police chiefs and other allies commonly listed among the core characteristics of professionalization some "organized body of knowledge" exclusive to the police.[35] As the New York police commissioner concluded in 1956, the policeman earned his status as a "true professional" through his voracious pursuit of professional education, from "long years of study and training" to "self-imposed courses of outside reading."[36] Crime detection in the modern era, other executives agreed, was not a matter of giving "a large man . . . a badge and a gun," but "*a highly scientific job*"[37] requiring "brain over brawn."[38] Indeed, advocates commonly analogized the professional insight of the police to that of the legal or medical fields: the "specialized knowledge" that marked "the ancient learned professions of theology, law and medicine," insist-

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[31] *See* FOGELSON, *supra* note 23, at 160–61; SKLANSKY, *supra* note 29, at 35–36.

[32] *E.g.*, Homer Ferguson, *Justice Under Law*, 1954 POLICE Y.B. 7, 7–11; Jack W. Rodgers, *Civil Liberties and Law Enforcement*, POLICE, July–Aug. 1961, at 10, 14; Quinn Tamm, *Constitutional Law Enforcement*, 1960 POLICE Y.B. 16, 17. These police publications and most of those cited below may be found in the Periodicals Room at the Lloyd Sealy Library, John Jay College of Criminal Justice.

[33] *See* FOGELSON, *supra* note 23, at 155 (noting significance of specialized knowledge); WALKER, *supra* note 23, at 159 (noting professionalized image as "skilled, highly trained").

[34] *See* DEAKIN, *supra* note 25, at 93–95 (discussing the emphasis placed on police education and expertise by August Vollmer, a pioneer of police reform in the early twentieth century).

[35] Paul H. Ashenhust, *The Goal: A Police Profession*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 605, 605 (1959); *see, e.g.*, W.D. Booth, *Need for Professionalization*, 3 PROC. ANN. S. INST. FOR L. ENFORCEMENT 21, 22 (1965); Walter E. Kreutzer, *The Elusive Professionalization that Police Officers Seek*, POLICE CHIEF, Aug. 1968, at 26, 26 (emphasizing "bond of common knowledge . . . not generally known to the public"); Roddenberry, *supra* note 27, at 110; Donald C. Stone, *Police Recruiting and Training*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 996, 996 (1934) (describing "body of knowledge held as a common possession").

[36] Stephen P. Kennedy, *Law Enforcement as a Profession*, 1956 POLICE Y.B. 177, 178; *cf.* J. Edgar Hoover, *Our Mutual Challenge*, FBI L. ENFORCEMENT BULL., Jan. 1958, at 2, 2 (crediting training with making law enforcement "truly a profession").

[37] Robert L. Donigan, *The Police Service as a Profession*, POLICE CHIEF, Apr. 1956, at 32, 32.

[38] Carl C. Turner, *Our Professional Challenge*, 1967 POLICE Y.B. 33, 33.

ed one prominent reformer in 1958, is "likewise the mark[] of the young, struggling police profession."[39]

The vocal hallmarks of a professional police force in the mid-twentieth century, in short, were not simply increased efficiency and managerial authority. As one sociologist concluded in the mid-1970s, the police's own rhetoric tended to "equate professionalism with expertness" and most notably concerned individual "members of the various departments, . . . not their organization."[40] The archetypical officers at the front lines of police reform were not obedient bureaucrats, but "individual experts relying heavily on their own individual judgment."[41]

B. Police Academies and the Semiotics of Crime

Where did police officers derive their expert insights? One source was basic experience: the instinctive wisdom about criminal activity gathered through an officer's exposure to the streets. Pushing back against stereotypes of police incompetence in the 1930s, police executives insisted — and commentators increasingly acknowledged — that veteran officers "acquire a perception which the ordinary person lacks," attuned to subtle "suspicion-arousing circumstances" in the field.[42]

Yet most police chiefs soon came to agree that "[e]xperience, alone, [was] not enough."[43] Throughout the mid-twentieth century, professionalization proponents stressed the value of *education* for police officers, whether through pre-service academies,[44] in-service training programs,[45] or even college degrees.[46] As Chief William Parker of the

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[39] Quinn Tamm, *Administration*, 1958 POLICE Y.B. 17, 20.

[40] Barbara Raffel Price, The Rhetoric of Professionalism: A Comparative Study of Police in Three Historical Periods 28 (Nov. 1974) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Harvard Law School Library).

[41] A.C. Germann, *Education and Professional Law Enforcement*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 603, 603 (1967).

[42] LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 40 (Frank J. Remington ed., 1967); *see also* Ronayne, *supra* note 9, at 235; Michael S. Josephson & James K. Robinson, Book Review, 71 COLUM. L. REV. 1133, 1137 (1971).

[43] E. Wilson Purdy, *Administrative Action to Implement Selection and Training for Police Professionalization*, 1 PROC. ANN. S. INST. FOR L. ENFORCEMENT 4, 4 (1963).

[44] Frank D. Day, *Police Administrative Training*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 253, 254 (1956).

[45] Philip Purcell, *In-Service Training for Police*, 1952 POLICE Y.B. 132, 133.

[46] R.E. Anderson, *Paths to Professionalization*, POLICE CHIEF, Aug. 1970, at 48, 48. On educational reform more generally, see INT'L CITY MANAGERS' ASS'N, MUNICIPAL POLICE ADMINISTRATION 175–203 (5th ed. 1961); O.W. WILSON, POLICE ADMINISTRATION 367–85 (1950); Raymond E. Clift, *Police Training*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 113, 114 (1954); and Charles W. Dullea, *Current Trends Affecting Law Enforcement*, 1953 POLICE Y.B. 89, 89–93; as well as George H. Brereton, *Police Training — Its Needs and Problems*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 247, 249 (1935); and Stone, *supra* note 35, at 998.

LAPD insisted in a widely reprinted lecture, recruits should undergo a minimum of six months' introductory training, followed by "specialist" courses further in their careers.[47] Nor were these recommendations purely hypothetical. Police executives proudly boasted that the midcentury featured a robust expansion in police training programs.[48] Universities collaborated with local police departments to offer training courses for recruits.[49] Regional groups like the Southern Police Institute hosted training sessions for local officers.[50] Larger departments like the LAPD and the NYPD opened their own academies, offering both pre-service training and continuing in-service education.[51]

Training courses covered a range of legal and practical topics, from the laws of arrest to firearms training.[52] But the heart of these programs focused on what reformers identified as the police officer's core competence: on-the-street crime detection. The veteran officer's powers of observation, police guides promised — that "often amaz[ing]" ability to "pick[] out suspicious persons" in the field[53] — were not a matter of intuition or experience, but a "skill [to] be developed" through discipline and formal instruction.[54] Even as police departments moved toward the specialization of patrol work, training programs thus aimed to give *all* recruits some insight into the core genres of urban crime. Sessions on gambling instructed recruits on the special slang and habits of bookmakers.[55] Classes on organized crime taught them the modus operandi and known enterprises of local mobs.[56] Programs on narcotics introduced officers to street jargon, common proce-

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[47] W.H. Parker, *The Police Role in Community Relations*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 368, 372 (1956).

[48] DEAKIN, *supra* note 25, at 177, 208.

[49] WALKER, *supra* note 23, at 162–63.

[50] WILLIAM J. BOPP & DONALD O. SCHULTZ, A SHORT HISTORY OF AMERICAN LAW ENFORCEMENT 132 (1972).

[51] Parker, *supra* note 47, at 372 (LAPD); *Self Portrait*, SPRING 3100, July–Aug. 1959, at 41, 42 (NYPD).

[52] *See, e.g.*, John M. Gleason, *Report of Committee on Professional Standards*, 1945 POLICE Y.B. 205, 209; J.A. Greening, *Report of the Committee on Professionalization of Police Service*, 1938–39 POLICE Y.B. 20 app. II, at 29–30; Purcell, *supra* note 45, at 133.

[53] ALLEN P. BRISTOW, FIELD INTERROGATION 13 (2d ed. 1964).

[54] POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 1-68: REVIEW OF BASIC PATROL TACTICS 9 (1968); *see also* BRISTOW, *supra* note 53, at 12–13; POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 3-63: PATROL TACTICS 3 (1963) [hereinafter PATROL TACTICS]. NYPD training memos are available in the Special Collections Division of the Lloyd Sealy Library at the John Jay College of Criminal Justice.

[55] BRISTOW, *supra* note 53, app. II, at 134–38; POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 2-69: GAMBLING ENFORCEMENT REVIEW 11–21 (1969); POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 6-63: GAMBLING ENFORCEMENT 5–7 (1963).

[56] POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 4-65: ORGANIZED CRIME 7–10 (1965).

dures for drug sales, and clothing worn to cover track marks, as well as the many physiological signs of highs and withdrawals.[57] Finally, without focusing on any specific crime, numerous departments starting in the 1950s offered training sessions aimed at honing officers' ability to recognize suspicious activity through certain systematic signs, from bulging or atypical clothing to loitering in unusual spaces to exaggerated politeness or unconcern.[58] Like the most specialized undercover investigator, instructors insisted, the regular street cop was "a specialist in his own line[,] . . . trained to be observant of every detail on his beat."[59]

A core project of police reform in the 1950s and 1960s, in short, was the use of formal instruction to transform the police into "a body of trained experts,"[60] privy to systematic signals of criminal conduct. Like the diagnosis of diseases by medical professionals, the detection of crime was by this view a professional skill, reflecting police officers' shared occupational insights into urban behavior.

C. Police Reformers and the Courts

Of course, reformers did not simply want to improve the caliber of the police force. They wanted to get credit for it.

Moved to action by the policeman's troubled image in the 1930s, and sensitive to rising urban and racial unrest in the 1960s,[61] professionalization advocates had always balanced their internal reforms with public outreach aimed at advertising their professional ideals. Beginning in the 1930s, the International Association of Chiefs of Police (IACP) — the movement's most prominent national arm — organized a public relations committee that reached out to radio, television, and print media, planting flattering articles about police and rebuking what it saw as exaggerated tales of misconduct.[62] Following its lead, representatives of local departments circulated fliers, wrote to civic groups, spoke at public meetings, and even collaborated with television dramas about police.[63]

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[57] BRISTOW, *supra* note 53, at 43–46; *id.* app. I, at 126–33; POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 4-64: NARCOTICS AND THE LAW 3–8 (1964).

[58] *See, e.g.*, BRISTOW, *supra* note 53, at 15–19; PATROL TACTICS, *supra* note 54; Thomas F. Adams, *Field Interrogations*, 7 POLICE, Mar.–Apr. 1963, at 26, 26–28; L.A. Police Dep't, *How to Conduct a Field Interrogation*, 2 DAILY TRAINING BULL., Jan. 13, 1950, *reprinted in* INT'L CITY MANAGERS' ASS'N, *supra* note 46, at 192–93. For additional manuals, see Frank J. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 386, 389 n.22, 391 n.37 (1960).

[59] Arthur M. Thurston, *Scientific Training for Police*, 1952 POLICE Y.B. 135, 137.

[60] KEVIN TIERNEY, COURTROOM TESTIMONY 13 (1970).

[61] *See* WILLIAM W. TURNER, THE POLICE ESTABLISHMENT 256–57 (1968).

[62] FOGELSON, *supra* note 23, at 147–48, 236–37.

[63] *Id.* at 147–48; SAMUEL WALKER, POPULAR JUSTICE 173–74 (2d ed. 1998).

In the 1950s, however, professionalization advocates became particularly concerned with the police's standing before a more specific audience: the courts. As early as 1952, the IACP's public relations committee had warned of the courts' unfortunate "distrust[]" of the police.[64] Beginning in the mid-1950s, a series of decisions limiting the police's investigative powers created an uproar among police chiefs. From *Mallory v. United States*,[65] constricting the police's right to interrogate suspects prior to arraignment,[66] to *Mapp v. Ohio*,[67] requiring the exclusion of evidence obtained in violation of the Fourth Amendment,[68] police departments denounced the judiciary's tightening hand over criminal procedure as a disastrous impediment in the fight against crime.[69] Police executives protested the cases at their conferences,[70] skewered them in their publications,[71] pilloried them in the popular media,[72] and lobbied the legislatures to intervene.[73]

To be sure, some reformers saw cases like *Mapp* as boons to the cause of professionalization. At a time when unions and old-guard police chiefs continued to resist training initiatives,[74] the Warren Court's criminal procedure revolution provided a useful forcing mechanism for expanding police education.[75] Indeed, *Mallory* and *Mapp* inspired a wave of remedial training programs across the country, instructing of-

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[64] John F. Murray, *Public Relations in Law Enforcement*, 1952 POLICE Y.B. 146, 149.

[65] 354 U.S. 449 (1957).

[66] *Id.* at 454–56.

[67] 367 U.S. 643 (1961).

[68] *Id.* at 655.

[69] *See* TURNER, *supra* note 61, at 242–43 (discussing the "furor" in the police community, *id.* at 242).

[70] *E.g.*, William Barnes, *The Effect of Recent Judicial Decisions upon Progressive Law Enforcement*, 1 PROC. ANN. S. INST. FOR L. ENFORCEMENT 64, 70–72 (1963); John F. McGinty, *Imbalance*, POLICE CHIEF, Nov. 1958, at 12 (decrying excessive concern for individual rights in panel discussion on "Relationship of the Judiciary, Prosecutor and Law Enforcement").

[71] *E.g.*, Joseph J. Capser, *Obstacles Confronting a Vital Profession*, 1964 POLICE Y.B. 29, 31; J. Edgar Hoover, *The High Path of Democratic Justice*, POLICE CHIEF, Nov. 1960, at 28, 31; Robert V. Murray, *Rights of the Criminal vs Rights of Law-Abiding Public*, POLICE CHIEF, Jan. 1958, at 28.

[72] *See* TURNER, *supra* note 61, at 242–43.

[73] *E.g.*, COMBINED COUNCIL OF LAW ENF'T OFFICIALS, LET YOUR POLICE — POLICE! (1963); Letter from William H. Parker, Chief of Police, City of L.A., to Subcomm. on Illegal Searches, Seizures, and the Laws of Arrest, Cal. Assemb. Comm. on the Judiciary, Subcomm. on Illegal Searches, Seizures, and the Laws of Arrest (Jan. 1956), *in* PARKER ON POLICE 113 (O.W. Wilson ed., 1957).

[74] ALBERT DEUTSCH, THE TROUBLE WITH COPS 228 (1954).

[75] *E.g.*, William M. Ferguson, Mapp v. Ohio *Ruling Affects Operations of Law Enforcement*, FBI L. ENFORCEMENT BULL., May 1962, at 3, 4; Eliot H. Lumbard, *Summary of the Decision in* Mapp v. Ohio *and Its Implications*, MUN. POLICE TRAINING COUNCIL BULL., Oct. 1962, at 4, 6.

ficers on both the specifics of the Constitution and the newfound importance of actually respecting it.[76]

Yet others saw in the Court's criminal procedure cases the opposite commentary: not a much-needed invitation for expanded education, but an insult to the substantial training and expertise that the police had already achieved. In the 1950s, professionalization advocates like Parker decried restrictive judicial decisions as evidence that the courts did "not regard any refinements in police techniques" over the past decades.[77] Such protests escalated after *Mapp* was decided in 1961. In New York, the Combined Council of Law Enforcement Officials, a newly formed lobby group of police executives and prosecutors,[78] warned that the Court's search and seizure cases undervalued the policeman's authority in his own field, "render[ing] good police work meaningless and police experience as worthless."[79] One master's candidate at the John Jay College of Criminal Justice ventured to suggest that the judiciary might have ulterior motives, based on its own professional interests, to "retard" the "acceptance of law enforcement as an emerging professional group."[80]

Hoping to ease such mistrust, police executives often specifically targeted the courts. As early as the 1930s, police training programs had paid particular attention to courtroom presentation, hoping that more articulate, well-mannered police witnesses would better impress judges and juries alike.[81] In the 1950s, reformers began interacting more directly with the court community. Police schools throughout the decade exposed judges to the police's instructional initiatives, inviting them to participate in training sessions[82] or preside over graduation ceremonies.[83] In the 1960s, police executives also introduced judges to

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[76] Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966) (discussing the effects of *Mapp*); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 262 (1961) (discussing the effects of *Mallory*).

[77] W.H. Parker, *The New Tomorrow*, 1958 POLICE Y.B. 10, 14; *see also id.* at 13–14.

[78] Segal, *supra* note 9, at 585–86.

[79] COMBINED COUNCIL OF LAW ENF'T OFFICIALS, *supra* note 73, at 2.

[80] Loren McClain Bussert, An Exploration of Police Professionalization 145 (Aug. 1968) (unpublished M.P.A. thesis, John Jay College of Criminal Justice) (on file with the Harvard Law School Library); *see id.* at 145 n.8.

[81] *See, e.g.*, POLICE DEP'T, CITY OF N.Y., THE POLICE ACADEMY UNIT TRAINING MEMO 1-65: COURTROOM CONDUCT AND PROCEDURE 3–4 (1965); TIERNEY, *supra* note 60; *Moot Court — A Vital Phase in Police Training*, FBI L. ENFORCEMENT BULL., Oct. 1958, at 16, 16–19; *see also* Greening, *supra* note 52, app. II, at 30; Segal, *supra* note 9, at 589 (noting that police reform sought to "maximize the appearance of police expertise before the bench").

[82] *See* Purcell, *supra* note 45, at 133 (commending practice of inviting judges as "occasional guest speaker[s]"); *see also, e.g.*, ADMIN. SERVS. DEP'T, CITY OF BOS., 1966 ANNUAL REPORT 16 (1967) (describing judicial participation in training).

[83] Judge Warren E. Burger, U.S. Court of Appeals for the D.C. Circuit, Address at the FBI National Academy Commencement (Nov. 6, 1958), *in* FBI L. ENFORCEMENT BULL., Jan. 1959,

their broader reform agenda, hosting them at workshops and conferences held by police professional organizations.[84] Perhaps the most vocal fora for discussing police training and professional advances, the IACP's conferences in the 1960s featured a series of judicial guests, from local trial judges to current and future Supreme Court Justices.[85] Looking back in 1972, preeminent reformer O.W. Wilson commended the practice of "inviting judges to [participate] . . . in round-table or seminar-type discussions which encourage a two-way flow of information"[86] as an "effective device" for addressing unfavorable judicial rulings.[87]

In turn, police chiefs and their allies reached out to the professional associations of the legal world, publishing articles, speaking at conferences, and visiting bar associations to stress recent advances in police work.[88] Lecturing at the University of Texas School of Law, NYPD Commissioner Michael J. Murphy emphasized the "knowledge, training, and instinct"[89] of modern police officers, which alone enabled them to navigate the "split second" decisions of the streets.[90] In 1964, a former NYPD inspector published an article in the *Fordham Law Review* urging courts to consider "the knowledge and experience gained by trained officers."[91] Aptly summarizing the core aspirations of police training in these years, he insisted that the officer's "experience with past crimes, his observation of the actions of criminals, and his training in the *modus operandi* of criminals gives him a specialized type of knowledge" — which, if not always evident to judges, was obscured only by the "inarticulateness of the police" in court.[92]

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at 3, 5–8; Chief Justice Warren E. Burger, U.S. Supreme Court, Address at the FBI National Academy Commencement (Nov. 3, 1971), *in Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Law and Procedures of the S. Comm. on the Judiciary*, 92d Cong., 3025–28 (1972).

84 *E.g.*, N.Y. State Ass'n of Chiefs of Police, Inc., *Panel Discussion: "Knock Knock" and the "Stop and Frisk Laws"*, 64 CONF. PROGRAM 228 (1964) (featuring New York judge on panel).

85 *E.g.*, Tom C. Clark, *"We Seek Not Efficient Tyranny, but Effective Freedom"*, 1965 POLICE Y.B. 11 (Justice Clark); *Workshop: Checks and Balances*, 1965 POLICE Y.B. 119 (then-Judge Burger); *cf.* Roger Lacoste, *Defining Justice*, 1962 POLICE Y.B. 47 (Canadian municipal judge); Redmond Roche, *Law Enforcement and the Courts*, 1962 POLICE Y.B. 51 (Canadian criminal court judge).

86 O.W. WILSON & ROY CLINTON MCLAREN, POLICE ADMINISTRATION 49 (3d ed. 1972).

87 *Id.* at 48.

88 *See, e.g.*, Patrick V. Murphy, *The Role of the Police in Our Modern Society*, 26 REC. ASS'N B. CITY N.Y. 292, 295 (1971) (Police Commissioner Patrick Murphy's address to New York City Bar Association stating that police tactics are "sensitive" tasks "requir[ing] professional people with professional training").

89 Murphy, *supra* note 76, at 941.

90 *Id.* at 940.

91 Ronayne, *supra* note 9, at 235.

92 *Id.*

The surging debate about police professionalism in the 1960s thus responded to the Court's criminal procedure decisions in two separate ways. In one sense, due process and Fourth Amendment cases like *Mapp* sparked professional reform, making long-sought advances in training and specialization practical necessities for police departments.[93] Yet they also inspired a growing emphasis on the *rhetoric* of professionalism, aimed at apprising judges of the police training and expertise that already existed. The growing calls for education in the 1960s, one sociologist observed, "legitimiz[ed] police claims that unique knowledge exclusive to police operations exists and can be imparted to others."[94] Police professionalization was a classic example of executive self-binding: strategically adopting training costs and other organizational burdens to enhance the police's ultimate credibility before the courts.[95]

D. The Public Limits of Professionalization

The police's reform and outreach efforts bore at least some fruit. The extent of professionalization varied based on region and city, with departments like the NYPD and LAPD far more committed than smaller units. Yet as a general rule, by the 1960s, the police kept better records, conducted more systematic investigations, and were freer from the grosser excesses of political meddling.[96] Officers were seen as more competent and harder working.[97] And, as commentators recognized, many departments achieved new heights of academic and in-service training.[98] In 1947, a survey of occupational prestige ranked the police fifty-fifth out of ninety entries, below tenant farmers and insurance agents; in 1963, they ranked forty-seventh, just under newspaper columnists and trained machinists.[99]

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[93] *See* Josephson & Robinson, *supra* note 42, at 1134 (noting that Supreme Court decisions "imposed upon policemen a duty to learn and apply the law as never before").

[94] Price, *supra* note 40, at 134.

[95] *See* JACK GOLDSMITH, POWER AND CONSTRAINT 107–08 (2012); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 137–38 (2010); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 573 (2013).

[96] EGON BITTNER, CTR. FOR STUDIES OF CRIME & DELINQUENCY, NAT'L INST. OF MENTAL HEALTH, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 53 (Pub. Health Serv. Publ'n No. 2059, 1970); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 12 (2003).

[97] FOGELSON, *supra* note 23, at 244; Walker, *supra* note 96, at 11–12.

[98] *E.g.*, Germann, *supra* note 41, at 606; Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1146 (1967); Samuel Haig Jameson, *Quest for Quality Training in Police Work*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 210, 211–12 (1966); Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule — Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 593–94 (1965).

[99] FOGELSON, *supra* note 23, at 234–35.

Forty-seventh place, of course, still put policemen well beneath "professional" status.[100] Despite these various advances, most contemporaries dismissed the police's claims of professionalization as purely aspirational, betraying occupational ego rather than reality.[101] That skepticism reflected a number of factors, including persisting tales of corruption, inefficiency, and brutality emerging from the police's treatment of civil rights protesters in the South.[102] But it also hung on what many saw as the police's failure to achieve the core planks of "professionalism" they so vocally sought. Against reformers' rhetoric of policemen as individual experts, observers recognized that officers were subject to strict oversight from their superiors — a far cry from the classic ideal of the autonomous white-collar professional.[103] And they rejected the suggestion that police work required or spawned any "expert" knowledge. Unlike the true professional, insisted political scientist James Wilson in 1968, police "acquire most of their knowledge and skill on the job," and they "do not produce . . . knowledge about their craft."[104] The first of three primary "barriers" against police professionalization, echoed sociologist Barbara Raffel Price, "is the lack of systematic knowledge which must be appropriated" to achieve professional status.[105]

Not least, critics questioned the reformers' promises about police training. Well through the 1960s, they noted, most training programs were cursory at best, typically providing fewer than 200 hours per officer, with some smaller departments eschewing instruction altogether.[106] Training materials were frequently outdated, vague, and unhelpful,[107] exhorting officers to use their own "judgment" rather than

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[100] *See id.* at 235–36.

[101] *See, e.g.*, TURNER, *supra* note 61, at 13–14 (reviewing public reactions); Hahn, *supra* note 30, at 451 (observing that "citizens display a considerable reluctance to grant esteem" to police); Josephson & Robinson, *supra* note 42, at 1138 n.15 (noting still-"gradual development" of professionalization); Price, *supra* note 40, at 8 (noting that police "have not become professionalized").

[102] FOGELSON, *supra* note 23, at 274, 282–83.

[103] *E.g.*, BROWN, *supra* note 28, at 40 (noting that police officers "are not independent professionals like doctors and lawyers"); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 30 (1968) (noting that officers "are emphatically subject to the authority of their superiors").

[104] WILSON, *supra* note 103, at 30.

[105] Price, *supra* note 40, at 15; *see also* BROWN, *supra* note 28, at 40 (questioning whether officers have a "claim to expertise that might underpin a professional police"); PALOMBO, *supra* note 29, at 37 (attributing failure to "lack of a systematic body of knowledge"); WALKER, *supra* note 23, at ix–x (attributing failure to lack of "body of knowledge, capable of being codified and applied to social problems," *id.* at ix).

[106] FOGELSON, *supra* note 23, at 227–28; NEAL E. TRAUTMAN, LAW ENFORCEMENT — THE MAKING OF A PROFESSION 22 (1988); *see also* LaFave, *supra* note 98, at 595, 598–601 (describing limits of training programs).

[107] Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1007 (1965).

providing clear guidance in crime detection.[108] Veteran instructors often had little knowledge of relevant legal precedents and were sometimes openly dismissive of the courts.[109] After their introductory training was over, most officers ignored their lessons in favor of more informal advice gleaned from colleagues.[110]

To the extent police recruits did learn a unique outlook on the world, critics continued, that perspective was not necessarily a superior instinct for crime. Like all professions, police work ingrained in its members particular values and biases, related to but not always constructive for job performance.[111] Police officers tended to be cynical,[112] hostile to the public,[113] preoccupied with their own authority,[114] and paranoid, primed to see danger in any unusual behavior. The trained policeman, concluded sociologist Jerome Skolnick, is "generally a 'suspicious' person."[115] And his suspicion had a racial bias, heightened in black neighborhoods, where ordinary "street life . . . is perceived as an uninterrupted sequence of suspicious scenes."[116]

All considered, contemporaries and even most reformers concluded, the professionalization drive did little to improve the public status of the police.[117] If anything, it may have aggravated distrust in the communities where the police faced most opposition.[118] Scholars have suggested that the reformers' emphasis on efficiency alienated officers from their communities, portraying patrols as arrogant, militaristic, and ignorant of minority cultures.[119] The zealous use of preventative

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[108] TIFFANY ET AL., *supra* note 42, at 40; Remington, *supra* note 58, at 389 n.22, 391 n.37.

[109] *E.g.*, Adams, *supra* note 58, at 26 (protesting courts' overly rigid "interpretations of civil rights"); *see* LaFave, *supra* note 98, at 604–05.

[110] WILSON, *supra* note 22, at 109–10; Neal A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 472–73 (1971). *See generally* Peter Feuille & Hervey A. Juris, *Police Professionalization and Police Unions*, 3 SOC. WORK & OCCUPATIONS 88, 92, 95 (1976).

[111] Robert P. McNamara, *The Socialization of the Police*, *in* POLICE AND POLICING 1, 2–3, 9–10 (Dennis Jay Kenney & Robert P. McNamara eds., 2d ed. 1999).

[112] *Id.* at 10.

[113] *Id.*; Price, *supra* note 40, at 6; *see also* Milner, *supra* note 110, at 470 (noting that police culture "foster[s] an intolerance of perspectives that differ from the policeman's own").

[114] Hahn, *supra* note 30, at 465; Milner, *supra* note 110, at 476–77; Herman Schwartz, *Stop and Frisk: A Case Study in Judicial Control of the Police*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 444 (1967).

[115] SKOLNICK, *supra* note 28, at 44.

[116] Carl Werthman & Irving Piliavin, *Gang Members and the Police*, *in* THE POLICE: SIX SOCIOLOGICAL ESSAYS 56, 56 (David J. Bordua ed., 1967); *see also* Schwartz, *supra* note 114, at 445–47.

[117] *E.g.*, Kreutzer, *supra* note 35, at 26 (acknowledging that "recognition as professionals . . . has not been forthcoming").

[118] BROWN, *supra* note 28, at 49; Walker, *supra* note 96, at 13.

[119] DEAKIN, *supra* note 25, at 231; HARLAN HAHN & JUDSON L. JEFFRIES, URBAN AMERICA AND ITS POLICE 11 (2003).

tactics exacerbated tensions between police and local residents,[120] particularly the racial minorities who bore their brunt.[121] The insistence on political autonomy left police chiefs hostile to any external interference in their operations, including civilian review boards and even individual complaints.[122]

Looking back, however, professionalization advocates need not have considered their public relations venture a loss. Because in the courts, the effect was somewhat different.

II. POLICE EXPERTISE IN COURT

Soon after the Court's decision in *Terry*, an article in the *American Bar Association Journal* echoed a popular view of police incompetence. "I need help[!]" the author imagined a bumbling cop complaining to his supervisor; "I'm having trouble telling . . . the hard-core crooks [from] . . . the hard-core nice guys."[123]

By 1968, that opinion was fairly far afield from most judges' understanding of the police. In their public dealings with police executives and in their courtrooms, judges in the midcentury absorbed the distinctive image of police work propounded by the professionalization movement. That included, most basically, the recognition of officers as "professionals," a characterization that began to populate judicial opinions in the mid-1960s.[124] Yet it also included a growing emphasis on police work as something both lending itself to and producing unique, systematic professional knowledge.

This section tracks the judicial embrace of police expertise as it proceeded through three areas of the law: evidence, where judges in the 1950s welcomed police officers as certified "experts" on criminal conduct; criminal procedure, where courts in the early 1960s invoked police knowledge to loosen their probable cause analysis and uphold investigatory stops; and the criminal law, where courts in the 1970s and 1980s drew on the police's criminological insights to help salvage broadly worded statutes from vagueness claims. Although routinely faced with attacks on police judgment by defendants, and often able to

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120 DEAKIN, *supra* note 25, at 235–36; PALOMBO, *supra* note 29, at 34.

121 FOGELSON, *supra* note 23, at 256–57.

122 WALKER, *supra* note 23, at 170; *cf.* James R. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515, 519 (1971) (noting police resistance to civilian review).

123 Thomas R. Behan, *Stop and Frisk: A Clarification*, 54 A.B.A. J. 968, 968 (1968).

124 *See, e.g.*, Pennsylvania *ex rel.* Ford v. Hendrick, 257 A.2d 657, 669 (Pa. Super. Ct. 1969) (Hoffman, J., dissenting) (emphasizing competence of "professional police"); People v. Escollias, 70 Cal. Rptr. 65, 70 (Ct. App. 1968) (Kaus, J., concurring) (disclaiming challenging "the expertise of another profession"); Commonwealth v. Dugan, 42 Pa. D. & C.2d 698, 702 (Phila. Cty. Ct. Quarter Sessions 1967) (emphasizing that the Fourth Amendment ensures a "professional police force"); *In re* McShane, 235 F. Supp. 262, 269 (N.D. Miss. 1964) (noting officers' "professional knowledge").

achieve similar outcomes through other means, judges in these years consistently identified police officers as stewards of professional insight worthy of deference in court.

While incorporating a variety of historical sources, the story below draws primarily on a careful survey of cases discussing police knowledge, professionalism, and training in the twentieth century.[125] Reflecting the limits of judicial recordkeeping, this set is comprised largely of published cases and of appellate records, though these sources often shed significant light on unreported trials. Particularly in fields like evidence, appellate cases likely reveal only a sliver of more prevalent courtroom practices, and they risk skewing the timeline forward. They also fail to account for false negatives, precluding a precise gauge of the breadth of deference among trial courts. Nevertheless, a comparison of the available cases, including their chronological patterns and internal references to routine trial practices, reveals several unmistakable shifts in judicial views of police knowledge in the midcentury.

A. Expert Witnesses

Ahead of suppression hearings, police expertise entered the criminal trial. In the 1950s and 1960s, roughly the same years that reformers recast policemen as trained investigators, judges began to recognize officers as professional experts on the patterns of urban crime — including on matters previously deemed either commonsensical or requiring *scientific* expertise. While defendants questioned police insight and sometimes presented rival experts to rebut such testimony, judges increasingly embraced police officers as reliable criminological authorities. And they broadly expanded their pool of "experts" by identifying the source of police knowledge not only as veteran experience, but also the formal training programs implemented by reformers.

1. The Rise of the Police "Expert." — The history of the expert witness has been fairly well sketched. English courts relied on some sort of expert advice to resolve legal proceedings as early as the fourteenth century, either by summoning expert advisors or by convening juries made of knowledgeable persons in the field.[126] Only in the latter half of the eighteenth century did courts begin admitting "skilled

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[125] For expert witnesses, the initial set reflected a chronological Westlaw search for root-related variants of police, officers, or agents in the same paragraph as witness, testimony, or evidence and expert or special. For the other cases, it reflected a search for root-related variants of police, officers, and agents in the same paragraph as expert, knowledge, training, experience, professional, judgment, or insight. Once these sets revealed basic temporal patterns and identified specific case studies, such as investigatory stops or vagueness challenges to loitering laws, I also tracked related cases without reference to police expertise.

[126] Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 VILL. L. REV. 763, 767–69 (2007).

witnesses" called by the parties themselves.[127] The practice was promptly denounced as biased, unreliable, and obstructive of the jury's proper role in factfinding,[128] but it filled a niche in the increasingly formal trial process of the nineteenth century.[129] By the 1950s, expert witnesses were a mainstay in American courts, from doctors to forensic analysts to pollsters showing market trends in unfair trade practice suits.[130]

Within this story, the rise of the *police* expert witness has received essentially no attention.[131] A full history of the police expert exceeds the scope of this Article, but suffice it to say that some aspects of investigation were long considered specialized matters within the province of police. In the field of gambling, a vice crime traditionally entrusted to special units, prosecutions as far back as the 1890s featured police officers testifying as experts on the significance of betting notations and policy slips.[132] By the early twentieth century, police officers in civil and criminal trials commonly shared expert opinions on forensic matters, including the reconstruction of vehicular accidents,[133] firearms and ammunition,[134] the causes of bruising and physical injuries,[135] and handwriting comparisons.[136]

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[127] *Id.* at 769.

[128] *Id.* at 770–71, 781; William L. Foster, *Expert Testimony, — Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169, 169–71 (1897) (reviewing mid-nineteenth-century attacks).

[129] STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 16–18 (2012) (reviewing formalization of criminal trial in the eighteenth and nineteenth centuries).

[130] Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417–18 (1952).

[131] Existing scholarship on police expert testimony has focused primarily on two points: its prejudicial effects, including opining about ultimate issues and blurring fact and expert evidence, neither of which is specific to the police, *see* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 375–77 (2012); Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 7–8 (2004); Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 241–44 (1993); Gail Sweeney Stephenson, Note, *Police Expert Witnesses and the Ultimate Issue Rule*, 44 LA. L. REV. 211 (1983), or judges' contemporary trend of applying lower standards in admitting police experts, typically attributed to judicial sympathies for repeat state players, *see* Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141, 1147 (2003); Mark Hansen, *Dr. Cop on the Stand*, A.B.A. J., May 2002, at 31, 36; Christopher McGinnis & Sarah Eisenhart, Note, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111 (2010).

[132] *E.g.*, United States v. King, 20 D.C. (9 Mackey) 404, 405–08 (1892); People v. Hinkle, 221 P. 693, 694 (Cal. Dist. Ct. App. 1923) (concluding that veteran investigators "acquired some special knowledge . . . not within the common experience"); *cf.* United States v. Tarr, 28 F. Cas. 16 (D. Pa. 1861) (No. 16,434) (considering the admissibility of police officer testimony in a counterfeiting case).

[133] *E.g.*, People v. Cicardo, 250 N.Y.S. 477, 478 (Magis. Ct. 1931).

[134] *E.g.*, Gibson v. State, 174 S.E. 354, 355–56 (Ga. 1934).

[135] *E.g.*, Blake v. State, 145 A. 185, 187 (Md. 1929).

Beginning in the 1950s, the jurisdiction of the police expert began to expand. As the advent of training programs and specialized units gave policemen newly colorable claims to professional insight, prosecutors increasingly offered officers as "expert" witnesses in court. As in gambling cases, this new form of police testimony consisted largely of ethnographic insights into criminal habits, though this time its beneficiaries were not only undercover investigators but also beat cops on the street.[137] One common subject was prostitution, where in a matter of decades judges moved from disdaining the suggestion that officers "be clothed with an expertise"[138] on the topic to embracing police experts on slang,[139] client lists,[140] and modes of solicitation.[141] Yet the most prevalent example focused on an area that increasingly dominated police resources in the twentieth century: narcotics.

The first recorded instance of a police officer claiming "expertise" on drugs dates back to a 1917 divorce proceeding, where a mother-in-law invoked her experiences as a former police matron to diagnose the groom as a cocaine addict.[142] The court was not impressed,[143] and indeed through the early twentieth century courts rarely recognized the police as experts on narcotics. In some cases, judges simply did not see police testimony as a matter of "expert" knowledge. California courts in the early 1950s, for example, allowed officers to testify as lay witnesses on drug-related slang.[144] Texas courts insisted that officers without any "expert" credentials could identify drugs like marijuana.[145]

In other cases, by contrast, judges required medical or scientific professionals to testify. While welcoming lay testimony on slang, California courts in the early 1950s typically demanded medically trained witnesses to opine when an individual's physical symptoms, such as nausea, dizziness, or glazed eyes, suggested the influence of a narcotic.[146] Some courts, as in New Jersey, continued that requirement

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136 *E.g.*, U.S. Health & Accident Ins. Co. v. Hill, 62 So. 954 (Ala. 1913); People v. Ball, 282 P. 971, 972 (Cal. Dist. Ct. App. 1929).

137 *See infra* pp. 2021–24.

138 Commonwealth v. Altizer, 242 A.2d 274, 276 (Pa. 1968).

139 *E.g.*, Hicks v. State, 254 S.E.2d 461, 462 (Ga. Ct. App. 1979); State v. Bennett, 258 N.W.2d 895, 897–98 (Minn. 1977).

140 *E.g.*, Wood v. State, 573 S.W.2d 207, 211 (Tex. Crim. App. 1978).

141 *E.g.*, State v. VJW, 680 P.2d 1068, 1072 (Wash. Ct. App. 1984).

142 Tegethoff v. Tegethoff, 199 S.W. 460, 463 (Mo. Ct. App. 1917).

143 *See id.*

144 *E.g.*, People v. Garcia, 266 P.2d 233, 234 (Cal. App. Dep't Super. Ct. 1953).

145 *E.g.*, Hernandez v. State, 129 S.W.2d 301, 303 (Tex. Crim. App. 1939); *see, e.g.*, Alcala v. State, 293 S.W.2d 645, 645–46 (Tex. Crim. App. 1956).

146 *E.g.*, People v. Tipton, 268 P.2d 196, 198 (Cal. Dist. Ct. App. 1954); People v. Candalaria, 264 P.2d 71, 72–73 (Cal. Dist. Ct. App. 1953). There were some early exceptions. *E.g.*, People v. Moore, 160 P.2d 857, 861 (Cal. Dist. Ct. App. 1945) (allowing lay police testimony).

well into the 1970s.[147] Similarly, state courts through the 1950s admitted doctors as expert witnesses for the purposes of identifying track marks traceable to drugs,[148] limiting police testimony to objective descriptions of a defendant's arms.[149] And, breaking with the Texas rule, many courts required trained chemists to identify heroin, cocaine, or marijuana at trial.[150]

Starting in the mid-1950s and accelerating through the 1960s, however, judges increasingly began certifying police officers as "experts" on narcotics.[151] That shift occurred along three dimensions.

First, judges rechristened traditional subjects of police testimony, previously requiring no expert credentials, as specialized matters. By the late 1950s, courts in California, having formerly admitted lay testimony on drug-related slang, began qualifying officers as "experts" for the purposes of clarifying jargon.[152] Other jurisdictions soon followed. While defendants insisted that such interpretive questions be entrusted to the jury,[153] judges concluded that expert testimony was necessary to explain the drug world's cryptic "lexicographic meanings" to a layman.[154] Similarly, by the late 1950s, Texas courts were splitting between judges who saw the identification of marijuana as a lay skill and those who qualified police witnesses as "experts" for that purpose.[155] Over the next fifteen years, other states echoed the presumption toward expertise, demanding formal "expert" credentials for officers who identified narcotic plants or pills in court[156] — and dismissing

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147 *E.g.*, State v. Tiernan, 302 A.2d 561, 564 (N.J. Cty. Ct. 1973).

148 *E.g.*, *Garcia*, 266 P.2d at 234; State v. Campisi, 136 A.2d 292, 294 (N.J. Super. Ct. App. Div. 1957).

149 *E.g.*, People v. Eddy, 268 P.2d 47, 52–53 (Cal. Dist. Ct. App. 1954); People v. Gin Hauk Jue, 208 P.2d 717, 718 (Cal. Dist. Ct. App. 1949); *Campisi*, 136 A.2d at 294.

150 *E.g.*, *Candalaria*, 264 P.2d at 71 (heroin); People v. Hoff, 190 P.2d 616, 617 (Cal. Dist. Ct. App. 1948) (marijuana); Williams v. United States, 94 A.2d 473, 474 (D.C. 1953), *rev'd*, 210 F.2d 687 (D.C. Cir. 1953) (heroin); State v. Mah Sam Hing, 295 P. 1014, 1015 (Mont. 1931) (cocaine). *But see* Az Din v. United States, 232 F.2d 283, 286 (9th Cir. 1956) (allowing state narcotics agents to identify opium).

151 This shift has certainly been neither unilateral nor irreversible, and courts have since differed in characterizing particular testimony as involving lay or expert matters. *See* Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. MIAMI L. REV. 429, 449 (2015).

152 *E.g.*, People v. Lewis, 23 Cal. Rptr. 495, 496–97 (Dist. Ct. App. 1962); People v. Johnson, 317 P.2d 1000, 1002 (Cal. Dist. Ct. App. 1957).

153 *E.g.*, United States v. Borrone-Iglar, 468 F.2d 419, 421 (2d Cir. 1972); Slater v. State, 356 So. 2d 69, 71 (Fla. Dist. Ct. App. 1978); Petition for a Writ of Certiorari at 14–16, Sorrentino v. United States, 419 U.S. 1056 (1974) (No. 73-1859).

154 *Slater*, 356 So. 2d at 71; *see also* United States v. Cirillo, 499 F.2d 872, 881 (2d Cir. 1974); *Borrone-Iglar*, 468 F.2d at 421.

155 *Compare* Chess v. State, 357 S.W.2d 386, 387–88 (Tex. Crim. App. 1962) (allowing lay testimony), *with* Miller v. State, 330 S.W.2d 466, 468 (Tex. Crim. App. 1959) (reviewing expert credentials).

156 *E.g.*, Sims v. State, 499 S.W.2d 54, 55 (Ark. 1973) (marijuana); Commonwealth v. Leskovic, 307 A.2d 357, 358–59 (Pa. Super. Ct. 1973) (capsules).

objections that officers lacking scientific or even basic college training failed to qualify.[157] Recasting traditional areas of lay testimony as matters of formal "expertise," and insisting that police witnesses qualified for the title, these courts newly styled police work as a source of rarefied insight into crime.

Second, courts in the 1950s and 1960s increasingly recognized police officers as authorities rivaling doctors or scientists in those fields traditionally seen to require expert qualification. Having once demanded chemical analysts to identify narcotics in court, Colorado began admitting "expert" officers in their stead.[158] States like California, Nevada, and Alabama allowed police experts to diagnose both whether an individual was under the influence of drugs and which particular ones, based on symptoms like lethargy, contracted pupils, limp limbs, or signs of nausea.[159] Over the course of the 1960s, numerous courts also embraced policemen as professional authorities on the *physical traces* of drug use, such as the source and relative freshness of track marks.[160] This new form of testimony did not go unchallenged by defendants, who insisted that drug usage could "only be testified to by medical men"[161] and sometimes introduced rival experts on the topic.[162] In California, indeed, a series of cases explicitly debated the relative standing of police and medical expert witnesses. Dismissing the defendants' demands for medical training[163] and consistently crediting

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[157] *Sims*, 499 S.W.2d at 55; White v. People, 486 P.2d 4, 6 (Colo. 1971); *Leskovic*, 307 A.2d at 358–59.

[158] *E.g.*, *White*, 486 P.2d at 6. In some cases, police experts themselves learned to administer chemical tests. *E.g.*, Stork v. People, 488 P.2d 76, 79–80 (Colo. 1971); Patterson v. State, 262 N.E.2d 520, 522 (Ind. 1970).

[159] For California, see, for example, *People v. Holland*, 307 P.2d 703, 705–06 (Cal. Dist. Ct. App. 1957); *People v. Mack*, 338 P.2d 25, 29 (Cal. Dist. Ct. App. 1959); *People v. Haggard*, 4 Cal. Rptr. 898, 903 (Dist. Ct. App. 1960); *People v. Shaffer*, 5 Cal. Rptr. 844, 846 (Dist. Ct. App. 1960); and *People v. Gurrola*, 32 Cal. Rptr. 368, 369, 370–71 (Dist. Ct. App. 1963). For Nevada, see *Crowe v. State*, 441 P.2d 90, 92 (Nev. 1968) (finding improper admission, but no prejudice). For Alaska, see *Rivett v. State*, 395 P.2d 264, 268 (Alaska 1964).

[160] *E.g.*, People v. Robinson, 4 Cal. Rptr. 50, 63–64 (Dist. Ct. App. 1960); People v. Allen, 16 Cal. Rptr. 869, 872 (Dist. Ct. App. 1961); Gault v. State, 188 A.2d 539, 542 (Md. 1963); Williams v. State, 188 A.2d 543, 544 (Md. 1963); State v. McIlvaine, 160 So. 2d 566, 570 (La. 1964); State v. Vale, 215 So. 2d 811, 823 (La. 1968); Stevens v. State, 275 N.E.2d 12, 13 (Ind. 1971); State v. Arndt, 285 N.W.2d 478, 481 (Minn. 1979).

[161] *Mack*, 338 P.2d at 29; *see also* People v. Smith, 61 Cal. Rptr. 557, 562 (Ct. App. 1967) (challenging testimony by officer who "never actually attended an accredited medical school"); People v. Montalvo, 88 Cal. Rptr. 658, 661–62 (Ct. App. 1970) (objecting to absence of testimony from "medical doctor," *id.* at 661).

[162] *E.g.*, People v. Flynn, 333 P.2d 37, 39–40 (Cal. Dist. Ct. App. 1958); *Haggard*, 4 Cal. Rptr. at 903; People v. Kesey, 58 Cal. Rptr. 625, 627 (Ct. App. 1967).

[163] *See, e.g.*, sources cited *supra* note 160; *see also* People v. Clemmons, 25 Cal. Rptr. 467, 470 (Dist. Ct. App. 1962) (insisting that trained officer was comparable to "[a]n expert in this field").

police experts *over* the testimony of physicians or psychiatrists,[164] such courts concluded that the testimony of officers "trained in police schools and experienced in dealing with narcotics" could, in the words of one appellate panel, be trusted over the "abstruse" reasoning of doctors.[165]

Finally, judges recognized police officers' expert insights into a novel field of evidence regarding narcotics users: behavioral patterns used to infer criminal *intent*. Beginning in the early 1960s, police experts increasingly testified regarding whether the drugs found on a defendant were more consistent with personal or commercial use, based on such factors as quantity, packaging, and other contextual clues. Policemen informed juries about the common doses of particular drugs and popular methods of packaging sales.[166] They explained the use of "stash house[s]" to store contraband[167] and described counter-surveillance techniques used by dealers.[168] Even in simple possession cases, police witnesses shared their expert opinions on evidence suggesting a defendant's intent to use narcotics, such as possession of paraphernalia or visits to shooting galleries.[169] Despite objections that such testimony exceeded the police's professional knowledge,[170] encroached on ultimate issues,[171] or was either too commonsensical or speculative to qualify as "expertise,"[172] police witnesses on criminal intent assumed a central role in narcotics litigation.

In sum, beginning in the 1950s and accelerating over the next two decades, trial judges recast numerous forms of criminological testimony as the unique province of the police. Whether reconstruing previously lay testimony as "expert" knowledge, welcoming police witnesses

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[164] *See, e.g.*, *Flynn*, 333 P.2d at 39–40 (noting police testimony that no local doctors matched officer's insight and emphasizing contradictions by defendant's physician); *Haggard*, 4 Cal. Rptr. at 903 (accepting officer's contested diagnosis).

[165] *Kesey*, 58 Cal. Rptr. at 627.

[166] *E.g.*, People v. Acosta, 29 Cal. Rptr. 241, 242 (Dist. Ct. App. 1963); State v. Arce, 483 P.2d 1395, 1399–400 (Ariz. 1971); Williams v. State, 286 A.2d 756, 756–57 (Del. 1971); State v. Grayton, 302 A.2d 246, 250 (Conn. 1972); State v. Bankhead, 514 P.2d 800, 803 (Utah 1973); State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975); Chasteen v. State, 551 P.2d 1171, 1172–73 (Okla. Crim. App. 1976); Couser v. State, 374 A.2d 399, 407 (Md. Ct. Spec. App. 1977).

[167] Butler v. State, 313 A.2d 554, 560 (Md. Ct. Spec. App. 1974).

[168] *E.g.*, State v. Salazar, 557 P.2d 552, 556–57 (Ariz. Ct. App. 1976).

[169] *E.g.*, People v. Robinson, 4 Cal. Rptr. 50, 60–61 n.1 (Dist. Ct. App. 1960); People v. Pagnotta, 253 N.E.2d 202, 205 (N.Y. 1969); Dabner v. State, 279 N.E.2d 797, 799 (Ind. 1972) (DeBruler, J., dissenting); State v. Covington, 206 S.E.2d 361, 363 (N.C. Ct. App. 1974); Commonwealth v. Dinnall, 314 N.E.2d 903, 906 (Mass. 1974).

[170] *E.g.*, State v. Keener, 520 P.2d 510, 513–14 (Ariz. 1974); *Oppedal*, 232 N.W.2d at 524; State v. Marks, 337 So. 2d 1177, 1184 (La. 1976); *Couser*, 374 A.2d at 407.

[171] *E.g.*, *Keener*, 520 P.2d at 514; People v. Arguello, 53 Cal. Rptr. 245, 248–49 (Dist. Ct. App. 1966); *Oppedal*, 232 N.W.2d at 524.

[172] *E.g.*, *Arguello*, 53 Cal. Rptr. at 249–50 (commonsensical); *Salazar*, 557 P.2d at 556–57 (same); State v. Williams, 363 A.2d 72, 79 (Conn. 1975) (speculative).

on subjects formerly left to medical men, or embracing the police's insights on novel topics like the urban drug trade, judges newly recognized policemen as professionals entitled to a place of epistemic authority in the courtroom.

2. Sources of Police Expertise. — On what grounds were police officers thought to qualify as "experts" on criminal behavior?

In the early years of police expert witnessing, an officer's credentials depended primarily on his experience. Many courts qualified expert witnesses simply by noting their many years in narcotics,[173] or their participation in hundreds — sometimes thousands — of arrests.[174] In Los Angeles, a city at the forefront of police reform,[175] "experienced" officers often boasted deeply impressive credentials: numerous years on the narcotics squad, hundreds or thousands of arrests, national conferences on drug crimes, even past stints as instructors at the LAPD academy.[176] Police training programs here entered the courts' analysis as an emblem of a veteran officer's experience, corroborating the value of his hard-won wisdom.

Over the course of the 1960s, however, training courses transformed from the marks of expertise for veteran instructors into the *sources* of expertise for new recruits. In California by the early 1960s, courts evaluating even policemen with years of experience and extensive arrest records frequently noted, among those witnesses' credentials, their participation in some formal narcotics training[177] — even if intermittent or "very brief[]."[178] Other courts soon followed, supplementing officers' on-the-ground experience with any claims, however rudimentary, of academic training.[179] As a national police manual observed in 1970, an officer with significant field experience could "increase his chances of acceptance" as an expert witness by showing that "he had formal instruction on such matters."[180]

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[173] *E.g.*, Williams v. State, 188 A.2d 543, 544 (Md. 1963) (eleven years); People v. Gurrola, 32 Cal. Rptr. 368, 370 (Dist. Ct. App. 1963) (four years in narcotics).

[174] *E.g.*, People v. Alcala, 337 P.2d 558, 559 (Cal. Dist. Ct. App. 1959) (over a hundred sightings of persons under the influence); People v. Clemmons, 25 Cal. Rptr. 467, 469 (Dist. Ct. App. 1962) (2000 arrests).

[175] WALKER, *supra* note 63, at 173–74.

[176] People v. Flynn, 333 P.2d 37, 38–39 (Cal. Dist. Ct. App. 1958); People v. Mack, 338 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

[177] People v. One 1960 Cadillac Coupe, 39 Cal. Rptr. 421, 423 (Dist. Ct. App.), *vacated sub nom.* People v. Reulman, 396 P.2d 706 (Cal. 1964); Vasquez v. Superior Court, 18 Cal. Rptr. 140, 141 (Dist. Ct. App. 1962).

[178] People v. Smith, 61 Cal. Rptr. 557, 561 (Ct. App. 1967).

[179] *E.g.*, State v. Keener, 520 P.2d 510, 514 (Ariz. 1974); White v. People, 486 P.2d 4, 6 (Colo. 1971); Dabner v. State, 279 N.E.2d 797, 799 (Ind. 1972); Couser v. State, 374 A.2d 399, 407 (Md. Ct. Spec. App. 1977).

[180] TIERNEY, *supra* note 60, at 154.

By the early 1970s, judicial recognition of training programs as an alternate source of professional insight allowed many officers to claim expert status even with relatively little personal experience. Judges in numerous states qualified policemen as "experts" on the basis of their attendance at training schools or drug seminars, or their exposure to instructional manuals, even where those officers spent only months on the job, had no demonstrable record of arrests, or did not even specialize in narcotics.[181] In New York, one court in the mid-1960s certified a police expert witness on the grounds of twenty-five arrests and, in his words, a "basic police academy course in narcotics"[182] — restyled by the court as "police narcotics school."[183] Another admitted an expert witness on the basis of ten drug arrests over six months and introductory "courses" upon joining the police force.[184] Another qualified an officer who had made five drug arrests, assisted with twelve others, and received about ten days of narcotics instruction.[185]

This descending bar was not solely the doing of trial courts. By the 1970s, appellate panels frequently relied on broad allusions to "training" to approve the admission of police expert witnesses at trial, falling back largely on generic references to "special education and experience,"[186] "official training,"[187] or "training, experience and knowledge in the field of narcotics."[188] In many cases, such broad language was no doubt simply an artifact of the appellate process, generalizing what might have been far more fact-intensive findings by lower courts.[189] Yet in practice, these generic endorsements invited trial judges to lower the threshold on police training as a foundation for police expertise.[190]

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[181] *E.g.*, Stevens v. State, 275 N.E.2d 12, 13 (Ind. 1971) (officer who attended school and seminars, but had only seven months' experience); Sims v. State, 499 S.W.2d 54, 55 (Ark. 1973) (officer with twelve years' general experience who "attended a school on narcotics"); Commonwealth v. Leskovic, 307 A.2d 357, 358–59 (Pa. Super. Ct. 1973) (certifying nonnarcotics officer on basis of general experience and a police manual).

[182] Brief for Defendant-Appellant at 3, People v. Pagnotta, 253 N.E.2d 202 (N.Y. 1969).

[183] *Pagnotta*, 253 N.E.2d at 204. The trial took place in March of 1966. Brief for Defendant-Appellant at 2, *Pagnotta*, 253 N.E.2d 202.

[184] United States v. Cuevas, 510 F.2d 848, 850 n.3 (2d Cir. 1975) (trial following March 1972 arrest).

[185] Appellant's Brief & Appendix at 6, People v. Quinones, 305 N.E.2d 916 (N.Y. 1973) (1971 trial, *id.* at 1); People v. Quinones, 33 N.Y.2d 811, 812 (1973) (mem.).

[186] Williams v. State, 286 A.2d 756, 757 (Del. 1971).

[187] State v. Johnson, No. 76AP-661, 1977 WL 199851, at *4 (Ohio Ct. App. Jan. 20, 1977).

[188] Chasteen v. State, 551 P.2d 1171, 1175 (Okla. Crim. App. 1976); *see also, e.g.*, People v. Kesey, 58 Cal. Rptr. 625, 627 (Ct. App. 1967); People v. Herrera, 34 Cal. Rptr. 305, 307–08 (Dist. Ct. App. 1963).

[189] Daniel Richman, *The Process of* Terry*-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1044–46 (1998) (discussing how appellate review embeds categorical rules over case-specific analysis).

[190] *See id.*; *see also* Kinports, *supra* note 3, at 762 (noting that "amorphous" notion of "police training" provides little rigor for analyzing credentials).

Over the course of the 1960s and 1970s, the demands on police "expert" witnesses thus followed two trends. First, the credentials required of police witnesses shifted from field experience to formal instruction, as the rise of police academies and seminars created a new foundation of education-based expertise. Broadly criticized as formalistic endeavors — spotty in administration, rudimentary in substance, and readily disobeyed if not forgotten — police training programs nevertheless invited judges to recognize a growing generation of recruits as professional "experts." Second, and relatedly, those credentials began to depreciate. As the expansion of basic training programs allowed a growing pool of officers to claim "expert" status, officers with little personal experience and relatively superficial claims to insight increasingly stepped into positions of professional authority in the courtroom.

3. Officers as Dual Witnesses. — For all the defendants' attacks on police expert testimony in the midcentury, there was one objection that remained surprisingly untried: the fact that such witnesses were in most cases the arresting officers themselves.

Sometimes, of course, police witnesses entered a case purely as expert advisors, called to explain drug trafficking patterns[191] or paraphernalia[192] at trial, or — more ambiguously — summoned to police stations to perform a more thorough examination of a witness.[193] Yet in many if not most narcotics cases, the policemen who testified as expert witnesses were also responsible for the original arrests. Especially in cases involving the influence of drugs, these officers functioned both as expert analysts of the incriminating facts and as crucial *fact* witnesses, testifying to the underlying evidence necessary to establish guilt: a victim or defendant's physical demeanor, bodily marks and injuries, or other visible facts at the scene.[194] The same witness whose observations provided the core evidence of guilt, in essence, doubled as a court-ordained authority over those very types of observations.[195]

Over the past decade, courts and scholars have grown sensitive to the risk that "dual" police testimony may prejudice defendants at trial,

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191 State v. Bankhead, 514 P.2d 800, 803 (Utah 1973).

192 Dabner v. State, 279 N.E.2d 797, 799 (Ind. 1972) (DeBruler, J., dissenting).

193 *E.g.*, People v. Gurrola, 32 Cal. Rptr. 368, 369 (Dist. Ct. App. 1963); People v. Mack, 338 P.2d 25, 27 (Cal. Dist. Ct. App. 1959). In these cases, police experts functioned essentially like treating physicians. *See* Courtney E. Campbell, Note, *Where Do Treating Physicians Belong as Witnesses in the Seventh Circuit?*, 9 IND. HEALTH L. REV. 247, 248 (2012) (discussing double role of physicians as fact and expert witnesses).

194 *E.g.*, People v. Holland, 307 P.2d 703, 705 (Cal. Dist. Ct. App. 1957); Miller v. State, 330 S.W.2d 466, 468 (Tex. Crim. App. 1959); People v. Pagnotta, 253 N.E.2d 202, 204 (N.Y. 1969); State v. Arce, 483 P.2d 1395, 1400 (Ariz. 1971).

195 While arresting officers in gambling cases long doubled as experts, their testimony nearly always addressed the significance of physical evidence. *E.g.*, State v. Arthur, 57 A. 156, 157 (N.J. Sup. Ct. 1904); People v. Hinkle, 221 P. 693, 694 (Cal. Dist. Ct. App. 1923).

both inflating an officer's expert opinions through his personal involvement in the case and bathing his lay testimony in the aura of "expertise."[196] But in the midcentury this challenge went essentially unheard.[197] Commonly based on paraphernalia recovered at the scene rather than an officer's observations alone, narcotics cases rarely litigated the reliability of an officer's judgments during the arrest — the type of testimony a witness's "expert" status most threatened to prejudice.

Those same questions did, however, arise in another context invaded by police expertise in these years: the suppression hearing.

B. Searches and Seizures

Tracking closely with the rise of the police expert witness, judges also began invoking the police's criminological insights as grounds for deference under the Fourth Amendment. Against a wealth of research questioning the value of police judgment, courts in the 1950s and 1960s embedded police expertise into their probable cause analysis and transformed the debate around investigative stops, a practice long upheld on other grounds, into a referendum on police judgment. Such invocations of police insight frequently reflected judges' experience with police experts at trial — both as shorthand evidence of officers' credentials and, in some cases, as a procedural model for accounting for the police's specialized knowledge.[198]

1. Police Expertise in the Age of Probable Cause. — Frequently focusing on the Supreme Court, scholars tend to treat judicial deference in Fourth Amendment analysis as essentially springing from *Terry*,[199] cemented by later investigatory stop cases emphasizing the insights of

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[196] For scholars, see Gallini, *supra* note 131, at 377; Moreno, *supra* note 131, at 7–8; Jihan Younis, Comment, *Agent-Experts in Criminal Trials: The Ultimate Issue Rule as a Defense to the Imprimatur Problem*, 47 CAL. W. L. REV. 213, 226–27 (2010); and compare Stoughton, *supra* note 151, at 451 (discussing prejudicial effects). For courts, see, for example, *United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009); *United States v. Freeman*, 498 F.3d 893, 902–03 (9th Cir. 2007); *United States v. Dukagjini*, 326 F.3d 45, 53–54 (2d Cir. 2003); and *Commonwealth v. Huggins*, 68 A.3d 962, 969–70 (Pa. Super. Ct. 2013).

[197] Police expert testimony was partially challenged on the claim that officers opining on case facts usurped the jury's authority over "ultimate issues," *see generally* Stephenson, *supra* note 131, but that objection did not address the potential inflation of officers' *factual* testimony.

[198] It is important not to exaggerate the temporal divide: invocations of police judgment at suppression hearings were in some states contemporaneous with the expanding practice of expert witnessing. Yet references to expert witnessing in warrant applications and at suppression hearings suggest that this practice preceded, and indeed helped usher in, Fourth Amendment deference.

[199] *E.g.*, Douglas H. Ginsburg, *Of Hunches and Mere Hunches: Two Cheers for* Terry, 4 J.L. ECON. & POL'Y 79, 84–85 (2007); Maclin, *supra* note 5, at 1309–11; Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843769 [https://perma.cc/AUX2-UPLL]; Richardson, *supra* note 3, at 1152–53.

"trained, experienced" officers.[200] And, indeed, the Supreme Court prior to *Terry* declined to account for a police officer's professional training,[201] assessing probable cause strictly through the eyes of the reasonable man,[202] and limiting its references to an officer's "experience" to his past knowledge of a specific defendant rather than general criminal patterns.[203] To the extent the Court acknowledged that the police have some broader professional outlook, that outlook was not uniquely perceptive but *overzealous*, tainted by "the often competitive enterprise of ferreting out crime."[204]

Beyond the chambers of the Supreme Court, however, state and lower federal courts had long recognized the police officer's investigatory insight in evaluating probable cause. That recognition emerged sporadically as early as the 1920s, almost exclusively in vice investigations involving gambling or federal liquor laws.[205] As the Connecticut Supreme Court explained in 1924, "officers charged with the enforcement of [the Prohibition Act] are familiar with [smuggling rings] and recognize them as by instinct."[206]

Beginning in the late 1950s, the police officer's professional instincts expanded beyond such specialized investigations and invaded the lower courts en masse. The moving jurisdiction was the D.C. Circuit, which in 1958 identified "the qualification and function of the person making the arrest" as among the circumstances to be considered in evaluating probable cause,[207] rewriting its formal standard into that of "a reasonable, cautious and prudent peace officer."[208] Though initially citing the familiar example of narcotics,[209] the court applied that deferential standard broadly, including in cases involving general

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[200] Brown v. Texas, 443 U.S. 47, 52 n.2 (1979); *see* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 665–66 (1994).

[201] *But see* Miller, *supra* note 5, at 227 (noting the Court's protean probable cause analysis inherently privileges police judgment).

[202] *E.g.*, Wong Sun v. United States, 371 U.S. 471, 479 (1963); Henry v. United States, 361 U.S. 98, 102 (1959); Draper v. United States, 358 U.S. 307, 313 (1959).

[203] *E.g.*, *Wong Sun*, 371 U.S. at 480; Brinegar v. United States, 338 U.S. 160, 166–67 (1949); *see also* Segal, *supra* note 9, at 613.

[204] Schmerber v. California, 384 U.S. 757, 770 (1966) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)); *accord* Chapman v. United States, 365 U.S. 610, 614 (1961).

[205] *See, e.g.*, State v. Reynolds, 125 A. 636, 638 (Conn. 1924) (liquor); United States v. Sebo, 101 F.2d 889, 890–91 (7th Cir. 1939) (liquor); Allen v. State, 13 A.2d 352, 356 (Md. 1940) (gambling); United States v. Hotchkiss, 60 F. Supp. 405, 408 (D. Md. 1945) (liquor). *But see* Ware v. Dunn, 183 P.2d 128, 131 (Cal. Dist. Ct. App. 1947) (noting experience in fornication case).

[206] *Reynolds*, 125 A. at 638.

[207] Bell v. United States, 254 F.2d 82, 85 (D.C. Cir. 1958).

[208] *Id.* at 86; *accord* Christensen v. United States, 259 F.2d 192, 193 (D.C. Cir. 1958) (quoting *Bell*, 254 F.2d at 86); Ellis v. United States, 264 F.2d 372, 374 (D.C. Cir. 1959) (quoting *Bell*, 254 F.2d at 86).

[209] *Bell*, 254 F.2d at 86.

crimes like larceny or housebreaking,[210] which dissenters insisted lent themselves to no meaningful expertise.[211]

Over the following years, other courts took a similarly deferential approach. Numerous jurisdictions in the 1960s adopted the "reasonable, cautious and prudent police officer" standard.[212] Connecticut shifted from weighing facts in light of "common knowledge"[213] to assessing them "in light of [both] common knowledge and [the officer's] own training and experience."[214] California courts insisted that police officers' "extensive training and experience" placed them in a separate "class" from the "ordinary man" in assessing probable cause.[215] And even without revising their doctrinal standards, many courts in the late 1950s and 1960s began explicitly taking an officer's knowledge and experience into account.[216]

The New York courts left behind a particularly strong record of their negotiations with police expertise. That process was hardly single sided: after one magistrate in 1961 deferred to an "expert" officer's professional "nose" for crime,[217] the county court in *People v. Brown*[218] rejected the "'trained nose' of a gendarme" as a "substitute for the United States Constitution."[219] Yet in the coming years, prosecutors populated their arguments with recurring refrains — and sometimes extended meditations — on the policeman's "specialized skill or

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[210] *Id.*; *Christensen*, 259 F.2d at 192.

[211] *Christensen*, 259 F.2d at 201 (Bazelon, J., dissenting) (denying that "anything about the crime of housebreaking . . . could have . . . any more significance for an experienced police officer than for the ordinary lay observer").

[212] *See* Commonwealth v. Johnson, 27 Pa. D. & C.2d 301, 304 (Phila. Cty. Ct. Quarter Sessions 1961); Feguer v. United States, 302 F.2d 214, 246 (8th Cir. 1962) ("prudent and cautious" (quoting Jackson v. United States, 302 F.2d 194, 196 (D.C. Cir. 1962))); State v. Harris, 121 N.W.2d 327, 331 (Minn. 1963) ("*prudent and cautious*" (quoting *Jackson*, 302 F.2d at 196 (emphasis added))); People v. Brady, 211 N.E.2d 815, 816 (N.Y. 1965) (quoting *Bell*, 254 F.2d at 86); Wright v. United States, 242 A.2d 833, 834 (D.C. 1968) (quoting Bailey v. United States, 389 F.2d 305, 309 (D.C. Cir. 1967)); *see also Feguer*, 302 F.2d at 246–47 (insisting that the officer's determinations be "guided by the whole of his police experience" (quoting *Jackson*, 302 F.2d at 196)); State v. Olson, 135 N.W.2d 181, 185 (Minn. 1965).

[213] State v. Reynolds, 125 A. 636, 637 (Conn. 1924).

[214] State v. DelVecchio, 182 A.2d 402, 406 (Conn. 1962).

[215] People v. Williams, 16 Cal. Rptr. 836, 837 (Dist. Ct. App. 1961); *accord* People v. Whyte, 18 Cal. Rptr. 889, 892 (Dist. Ct. App. 1962); *see also* People v. Di Blasi, 18 Cal. Rptr. 223, 226 (Dist. Ct. App. 1961) (emphasizing officer experience).

[216] *E.g.*, Cameron v. State, 112 So. 2d 864, 871–72 (Fla. Dist. Ct. App. 1959); Butler v. United States, 273 F.2d 436, 441 (9th Cir. 1959); Bryant v. State, 155 So. 2d 396, 397 (Fla. Dist. Ct. App. 1963); Browne v. State, 129 N.W.2d 175, 181 (Wis. 1964); United States *ex rel.* Murphy v. New Jersey, 260 F. Supp. 987, 990–91 (D.N.J. 1965); State v. Stotts, 220 N.E.2d 718, 719–20 (Ohio Ct. App. 1966); *see also* Allen v. State, 182 A.2d 832, 834 (Md. 1962) (extending deference in the narcotics context).

[217] People v. Brown, 225 N.Y.S.2d 157, 159 (Cty. Ct. 1962).

[218] 225 N.Y.S.2d 157.

[219] *Id.* at 161.

knowledge,"[220] insisting that trained officers develop a unique expertise in "the *modus operandi* of criminals"[221] that "distinguishe[d] [them] from the ordinary citizen."[222] By 1965, the Court of Appeals had embraced the "reasonable, cautious and prudent [police] officer" standard,[223] while lower courts routinely couched their holdings in the professional "experience" and "training" of "expert" officers.[224] Those judges who ventured to disagree with an officer's determination inspired strongly worded dissents, castigating the majorities for second-guessing the "training and experience" of police veterans.[225] By the 1970s, many trial courts in New York were systematically erring on the side of deference, relying on an officer's "expertise" or training to establish probable cause even in cases involving thin factual patterns that were promptly reversed by unanimous appellate panels.[226]

2. Logistics of Deference at Suppression Hearings. — Pre-trial proceedings adjudicating the admissibility of evidence, suppression hearings involve a lower evidentiary burden than merits trials,[227] and judges at such hearings did not treat policemen exactly as they did at trial. Certainly, they did not demand that officers qualify as "experts" to take their experience into account.[228] Since judges at suppression

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[220] Respondents' Brief at 10, People v. Corrado, 239 N.E.2d 526 (N.Y. 1968) [hereinafter Respondents' Brief, *Corrado*]; *see also* Respondent's Brief at 13, People v. Glover, 213 N.E.2d 800 (N.Y. 1965) [hereinafter Respondent's Brief, *Glover*] (distinguishing "experienced" policeman from "untrained passers-by"); Respondent's Brief at 8, People v. White, 213 N.E.2d 438 (N.Y. 1965) ("special expertise"); Respondent's Brief at 4, People v. Brown, 248 N.E.2d 867 (N.Y. 1969) [hereinafter Respondent's Brief, *Brown*] ("knowledge and experience"); Respondent's Brief at 5, People v. Lebron, 369 N.Y.S.2d 440 (App. Div. 1975) [hereinafter Respondent's Brief, *Lebron*] ("training and experience"). Appellate records for these New York cases and those cited below are available at the New York County Lawyers' Association Library.

[221] Respondent's Brief, *Brown*, *supra* note 220, at 11.

[222] Respondents' Brief, *Corrado*, *supra* note 220, at 12; *see also* Respondent's Brief, *Glover*, *supra* note 220, at 13; Respondents' Brief, *Corrado*, *supra* note 220, at 10; Respondent's Brief, *Brown*, *supra* note 220, at 4–5; Brief & Appendix for Respondent at 3, People v. Russell, 313 N.E.2d 732 (N.Y. 1974).

[223] People v. Brady, 211 N.E.2d 815, 816 (N.Y. 1965) (quoting Bell v. United States, 254 F.2d 82, 86 (D.C. Cir. 1958)).

[224] *See, e.g.*, People v. Valentine, 216 N.E.2d 321, 323 (N.Y. 1966) (describing officer as "experienced" and a "conceded expert"); Brief for Defendant-Appellant at 5, *Glover*, 213 N.E.2d 800 (appellate term emphasizing experience of officers); Respondents' Brief, *Corrado*, *supra* note 220, at 9 (1966 trial court emphasizing "experience of . . . expert in the field of narcotics").

[225] *E.g.*, *Brown*, 248 N.E.2d at 869 (Jasen, J., dissenting).

[226] *See Russell*, 313 N.E.2d at 734; People v. Lebron, 369 N.Y.S.2d 440, 440–41 (App. Div. 1975); People v. Russell, 337 N.Y.S.2d 20 (Cty. Ct. 1972); *see also* Remers v. Superior Court, 470 P.2d 11, 14–15 (Cal. 1970); Taylor v. State, 264 A.2d 870, 873 (Md. Ct. Spec. App. 1970).

[227] For Fourth Amendment purposes, the state's burden is to show probable cause rather than establish guilt beyond a reasonable doubt.

[228] *E.g.*, People v. Alcala, 337 P.2d 558, 560 (Cal. Dist. Ct. App. 1959) (holding officer's experience sufficient for "establishing probable cause," but not if "offered to establish defendant's guilt"); People v. Rowell, 262 N.E.2d 217, 217 (N.Y. 1970) (affirming deference to officer "not qualified to give expert testimony"); Munn v. United States, 283 A.2d 28, 30–31 (D.C. 1971) (deferring to "ex-

hearings aim not to establish any authoritative truths about the defendant, but simply to gauge the arresting officer's knowledge as "[a]mong the . . . pertinent circumstances" in evaluating his actions,[229] one common ground for deference throughout the midcentury remained simple experience.[230] Experience entered the courts' analyses even when it was relatively meager: as few as five or ten prior arrests,[231] a few dozen prior observations,[232] or past "experience" spent solely in an unrelated unit.[233]

At the same time, deference at suppression hearings came to reflect several trends in expert witnessing itself. Most basically, the credentialing of police officers echoed the growing emphasis on formal training. Judges evaluating probable cause increasingly invoked the arresting officers' instruction in police academies and other entry-level programs as grounds for deference,[234] often despite those officers' minimal experience in the field.[235] While some colleagues clung to higher standards,[236] here, again, the promise of education through formal academy programs expanded the police's authority before the courts.

More than just the shared emphasis on training, however, courts absorbed the example of police expert witnessing as a *model* for recognizing police authority under the Fourth Amendment. First, individu-

perience[d]" officer, *id.* at 31, but admitting separate expert at trial, *id.* at 30 n.4); *see also* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 123–24 (2007) (noting that officers at suppression hearings need not qualify as experts).

229 Bell v. United States, 254 F.2d 82, 85 (D.C. Cir. 1958); *accord* Feguer v. United States, 302 F.2d 214, 246–47 (8th Cir. 1962); Jackson v. United States, 302 F.2d 194, 196 (D.C. Cir. 1962); *see also* Stephens v. United States, 271 F.2d 832, 834 & n.3 (D.C. Cir. 1959) (noting officer's expert knowledge "as an element" of totality of circumstances, *id.* at 834 n.3); State v. Olson, 135 N.W.2d 181, 186 (Minn. 1965) (analyzing whether facts on the scene "together with reasonably trustworthy information and [officers'] general experience as police officers" justified "prudent men" in finding probable cause).

230 *E.g.*, People v. Sanchez, 11 Cal. Rptr. 407, 408, 411 (Dist. Ct. App. 1961) (7.5 years in narcotics); People v. Di Blasi, 18 Cal. Rptr. 223, 225 (Dist. Ct. App. 1962) (six years and two hundred arrests); United States *ex rel.* Murphy v. New Jersey, 260 F. Supp. 987, 990 (D.N.J. 1965) (ten years as investigator); People v. Corrado, 239 N.E.2d 526, 529 (N.Y. 1968) (Jasen, J., dissenting) (four years in narcotics); *Brown*, 248 N.E.2d at 870 (Jasen, J., dissenting) (four years and three hundred arrests).

231 People v. Ditman, 277 N.Y.S.2d 620, 621 (App. Div. 1966); People v. Cohen, 23 N.Y.2d 674, 675 (1968).

232 People v. Glover, 213 N.E.2d 800, 800 (N.Y. 1965).

233 Cameron v. State, 112 So. 2d 864, 871–72 (Fla. Dist. Ct. App. 1959); *see also Cohen*, 23 N.Y.2d at 675.

234 *E.g.*, Respondent's Brief, *Lebron*, *supra* note 220, at 3 (seventy-five arrests with several months' training); *see also* People v. One 1960 Cadillac Coupe, 39 Cal. Rptr. 421, 423–24 (Dist. Ct. App. 1964); Commonwealth v. Johnson, 27 Pa. D. & C.2d 301, 304 (Phila. Cty. Ct. Quarter Sessions 1961).

235 Appellant's Brief & Appendix, *supra* note 185, at 6 (five arrests with some training).

236 *E.g.*, People v. Cruz, 70 Cal. Rptr. 249, 252 (Ct. App. 1968) (finding no probable cause where officer had no "background of experience in narcotics violations except some instruction training at the police academy").

al officers' histories as expert witnesses came to provide significant evidence of their insight in evaluating probable cause. As the practice of police expert witnessing grew more robust, officers both filling out warrant applications and defending them in court commonly tabulated their prior appearances on the witness stand in support of their suspicions.[237] Such invocations of expertise were not always considered useful — in 1948, a Wisconsin court dismissed a warrant application relying on an officer's "experience" as "pure conclusion . . . and utterly worthless"[238] — but by the 1960s judges commonly credited officers' expert histories as grounds for deference.[239] Similarly, judges evaluating warrantless arrests routinely invoked an arresting officer's expert appearances to support his findings of probable cause.[240] In such cases, the recognition of police work as the stuff of professional "expertise" in the evidentiary context redounded to elevate the police's prestige at suppression hearings. Indeed, some appellate panels explicitly invoked an arresting officer's subsequent appearance as an expert for the prosecution in defending his initial arrest under the Fourth Amendment,[241] taking his status as a general "expert" on criminal patterns to establish the fairness of his specific inferences in the field.

Second, and more notably, some judges imported the *procedural* trappings of the expert witness into the suppression phase. At most suppression hearings, judges weighing an arresting officer's professional background as among the circumstances establishing probable cause do not formally qualify that officer as an expert witness. Considering the lower bar on police knowledge required for deference at such proceedings, indeed, in many cases they could not do so. Yet some judges in the 1960s, used to receiving police officers' criminological insights in the posture of "expert testimony," defaulted to those same procedures and qualified arresting officers as "experts" even at suppression hearings. In California and New York, for example, judges routinely admitted arresting officers in the authoritative posture of

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[237] *E.g.*, People v. Massey, 238 N.Y.S.2d 531, 536 (App. Term 1963); People v. Peterson, 43 Cal. Rptr. 457, 470 n.2 (Dist. Ct. App. 1965) (Fleming, J., dissenting); People v. West, 47 Cal. Rptr. 341, 343 n.1 (Dist. Ct. App. 1965); People v. Wells, 53 Cal. Rptr. 762, 764 (Dist. Ct. App. 1966); People v. Magaril, 319 N.Y.S.2d 641, 642 (Sup. Ct. 1971); *cf.* Dean v. State, 107 A.2d 88, 92–93 (Md. 1954) (noting that judges may consider officers' "experience and special knowledge," *id.* at 92, in bookmaking warrant applications).

[238] State v. Mier, 35 N.W.2d 196, 198 (Wis. 1948).

[239] *E.g.*, *Massey*, 238 N.Y.S.2d at 536; People v. Kesey, 58 Cal. Rptr. 625, 627 (Ct. App. 1967).

[240] *E.g.*, People v. Avila, 34 Cal. Rptr. 677, 677 (Ct. App. 1963).

[241] *E.g.*, Stephens v. United States, 271 F.2d 832, 834 n.3 (D.C. Cir. 1959); *see also* People v. One 1960 Cadillac Coupe, 39 Cal. Rptr. 421, 423–25 (Dist. Ct. App. 1964) (noting expert admission in same case); People v. Brown, 248 N.E.2d 867, 870 (N.Y. 1969) (Jasen, J., dissenting) (noting failure to impeach expert testimony at subsequent trial as a ground for deference).

"expert" witnesses,[242] inviting the police both to recount their factual observations of the defendant and to share their expert "opinions" about the significance of those observations.[243]

Officers appearing as "experts" at these hearings did not simply recount the substance of their professional knowledge as a backdrop against which judges could appraise their actions — the process initially envisioned by courts injecting police expertise into the probable cause inquiry.[244] Rather, those officers testified as professional authorities to the *truth* of their suspicious inferences, to which courts — as inferior experts — ought now to defer. Transplanted from the merits trial into the suppression stage, the policeman as "expert witness" no longer envisioned the officer's expertise as a body of fact submitted to the court for its analysis, but rather as a demand for deference, displacing the court's discretion in favor of his superior judgment.

3. Investigatory Stops and Police Expertise. — It is this embrace of police expertise in the probable cause context that set the backdrop for the courts' confrontation with investigatory stops in the mid-1960s.

The investigatory stop — briefly detaining an individual for questioning without an arrest or other lengthy interrogation — was a widespread police tool by the mid-twentieth century.[245] Courts in California, Illinois, and West Virginia had approved it as early as 1908,[246] and at least nine legislatures had enacted statutes authorizing detentions on mere "suspicion" by 1961.[247] The absence of any meaningful remedy against unlawful seizures in these years meant that the practice was rarely challenged in court,[248] yet those cases that confronted its constitutionality consistently sided with the police, conclud-

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[242] *E.g.*, People v. Martin, 290 P.2d 855, 855–56 (Cal. 1955) (officer testifying "[a]s an expert," *id.* at 856); People v. Hernandez, 10 Cal. Rptr. 267, 268 (Dist. Ct. App. 1961) (reporting that the officer was admitted "to give expert testimony"); People v. Herrera, 34 Cal. Rptr. 305, 306 (Dist. Ct. App. 1963) (officer testifying "[a]fter being qualified as a narcotics expert"); People v. Quinones, 33 N.Y.2d 811, 812 (1973) (mem.) (reporting that court "qualified [officers] as narcotics experts" prior to testimony); Respondent's Brief, *Glover*, *supra* note 220, at 11 (characterizing officer's suppression testimony as expert testimony).

[243] *See, e.g.*, *Martin*, 290 P.2d at 856 (officer giving his "expert . . . opinion" that defendant was in gambling hotspot); *Hernandez*, 10 Cal. Rptr. at 268 (arresting officer asked "opinion" in light of expert credentials); *Herrera*, 34 Cal. Rptr. at 306 (officer testified describing defendant and giving expert "opinion" that defendant was under the influence of narcotics).

[244] *See supra* note 229 and accompanying text.

[245] *See* Barrett, *supra* note 9, at 758–59 (noting long history of investigatory stops).

[246] Gisske v. Sanders, 98 P. 43, 44–45 (Cal. Dist. Ct. App. 1908); *see also* People v. Henneman, 10 N.E.2d 649, 650–51 (Ill. 1937); State v. Hatfield, 164 S.E. 518, 519 (W. Va. 1932).

[247] Three were modeled on the Uniform Arrest Act, *see* Ronayne, *supra* note 9, at 215 (NH, RI, DE), while six adopted original text, *see id.* at 215 & n.28 (CA, IL, MA, MO, WI); *Legislation — the "No-Knock" and "Stop and Frisk" Provisions of the New York Code of Criminal Procedure*, 38 ST. JOHN'S L. REV. 392, 405 & nn.75–76 (1964) (HI).

[248] Barrett, *supra* note 9, at 758–60.

ing that field stops did not amount to "seizure[s],"[249] that their long history undercut any constitutional concerns,[250] or that public safety concerns simply rendered them "reasonable" under the Fourth Amendment.[251] Certainly, no consideration of the police's professional competence entered the equation.

In the 1960s, the Supreme Court's expansion of the exclusionary rule in *Mapp* ignited a new wave of legislation authorizing police to collect evidence on less than probable cause. Such legislation was deeply controversial, criticized for both its questionable legality under the Fourth Amendment and its risk of discriminatory enforcement.[252] But it proved popular with lawmakers, beginning with New York's seminal stop-and-frisk statute in 1964, which authorized stops whenever officers "reasonably suspect[]" a serious crime,[253] and continuing over the coming decades in numerous other states.[254]

Whether authorized by statute or common practice, investigatory stops inspired an influx of Fourth Amendment challenges. And courts continued to uphold the practice. Many did so on the same grounds their predecessors had invoked in prior decades. Well into the 1960s, judges in New Jersey, California, Massachusetts, Alaska, Pennsylvania, and New York concluded that mere "stops" did not qualify as seizures,[255] contrasted their minimal intrusiveness with their boon to public safety,[256] or, in some states, emphasized that earlier cases had long resolved the question.[257]

Yet at the same time, as field stops reentered the public eye, they became rewritten around a new rationale: the police officer's unique criminological insight. In part, that insight emerged as a core consideration among lawmakers themselves. In New York, scholars have noted, the passage of the stop-and-frisk statute exemplified the rhetoric

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[249] *See* People v. Ellsworth, 12 Cal. Rptr. 433, 435–36 (Dist. Ct. App. 1961); De Salvatore v. State, 163 A.2d 244, 248 (Del. 1960); Kavanagh v. Stenhouse, 174 A.2d 560, 562 (R.I. 1961).

[250] *See De Salvatore*, 163 A.2d at 248; *cf. Henneman*, 10 N.E.2d at 650–51 (remarking that constitutionality of investigatory stops "cannot be doubted," *id.* at 650).

[251] *Gisske*, 98 P. at 44–45; *Hatfield*, 164 S.E. at 519.

[252] *See* Brief of Amicus Curiae, ACLU of Ohio in Support of Petition for Writ of Certiorari at 3 & n.3, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67) (listing law review and popular articles critiquing field stops).

[253] Sibron v. New York, 392 U.S. 40, 43 (1968) (quoting N.Y. CRIM. PROC. LAW § 180–a (McKinney 1965)).

[254] George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 862–63.

[255] People v. Ellsworth, 12 Cal. Rptr. 433, 435–36 (Ct. App. 1961); Goss v. State, 390 P.2d 220, 224 (Alaska 1964); People v. Rivera, 201 N.E.2d 32, 34 (N.Y. 1964); State v. Hope, 205 A.2d 457, 459 (N.J. Super. Ct. App. Div. 1964).

[256] *Goss*, 390 P.2d at 224; Commonwealth v. Ballou, 217 N.E.2d 187, 190 (Mass. 1966); *Rivera*, 201 N.E.2d at 34; Commonwealth v. Hicks, 223 A.2d 873, 875–76 (Pa. Super. Ct. 1966).

[257] *Ellsworth*, 12 Cal. Rptr. at 435; Commonwealth v. Lehan, 196 N.E.2d 840, 843 (Mass. 1964); *Hicks*, 223 A.2d at 875–76.

of police reformers.[258] Throughout the early 1960s, Governor Rockefeller's annual messages to the legislature praised the "increasing professionalization" of the New York police, including their mounting entry requirements and training programs.[259] When the Combined Council of Law Enforcement Officials first proposed the stop-and-frisk statute, its memo emphasized those same advances, lauding the policeman's "training and experience" over "covert and oftentimes ingenious" criminal patterns.[260] Recounting the passage of the bill some months later, Assemblyman Richard J. Bartlett singled out his colleagues' regard for the police's "special knowledge"[261] and "antennae"[262] for crime as core grounds for the legislation.[263]

Yet the courts, too, increasingly turned to police expertise as a factor in their analysis. In California, where judges had long approved investigatory stops based simply on public safety, they now defended that practice based on the "[e]xperienced" police officer's "ability to perceive the unusual and suspicious."[264] In New Jersey, where courts had only recently held that mere stops did not qualify as seizures, they now stressed the officer's criminological insight as a limit against constitutional abuses.[265] And in New York, several high-profile cases turned the stop-and-frisk statute into a referendum on police judgment. While defendants protested the law's loose standards for police detentions,[266] prosecutors emphasized the legislature's deference to the professional expertise of policemen, who, like "attorneys" and "physicians" in their fields, "acquire over a period of years an acute sensitivity to crime and criminals."[267] And the courts agreed, expressly upholding the reasonable suspicion standard in light of the "experienced

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[258] *See* Walker, *supra* note 9, at 1245; Segal, *supra* note 9, at 575.

[259] Nelson D. Rockefeller, Governor's Annual Message to the N.Y. Legislature (Jan. 9, 1963), *in* NEW YORK STATE LEGISLATIVE ANNUAL, Leg. 174, 1st Sess., at 410, 431 (1963); *see also* Nelson D. Rockefeller, Governor's Annual Message to the N.Y. Legislature (Jan. 8, 1964), *in* NEW YORK STATE LEGISLATIVE ANNUAL, Leg. 174, 2d Sess., at 461, 468–69 (1964).

[260] Memoranda of Combined Council of Law Enforcement Officials, *in* NEW YORK STATE LEGISLATIVE ANNUAL 61, 63 (1964).

[261] N.Y. State Ass'n of Chiefs of Police, Inc., *supra* note 84, at 233.

[262] *Id.* at 224.

[263] *See id.* at 223–24, 233.

[264] People v. Cowman, 35 Cal. Rptr. 528, 534 (Dist. Ct. App. 1963); *see also* People v. Beasley, 58 Cal. Rptr. 485, 490 (Ct. App. 1967).

[265] *See* State v. Dilley, 231 A.2d 353, 354 (N.J. 1967) (noting officer's "experience[]" and academy training); State v. Bell, 215 A.2d 369, 372 (N.J. Super. Ct. App. Div. 1965).

[266] *E.g.*, Appellant's Brief at 18, People v. Peters, 219 N.E.2d 595 (N.Y. 1966); Brief for Defendant-Appellant at 9, People v. Sibron, 219 N.E.2d 196 (N.Y. 1966).

[267] Record on Appeal at 33, People v. Peters, 265 N.Y.S.2d 612 (App. Div. 1965) (No. 39); *accord* Respondent's Brief at 5, *Peters*, 219 N.E.2d 595 (emphasizing "legislative confidence in the judgment of the police"); Respondents' Brief at 7, *Sibron*, 219 N.E.2d 196 (quoting People v. Peters, 254 N.Y.S.2d 10, 12 (Cty. Ct. 1964)).

police officer's intuitive knowledge and appraisal of . . . criminal activity."[268]

Over the course of the 1960s, in short, a police practice common across the nation for decades — and long upheld on grounds unrelated to police competence — transformed into a core battleground over the constitutional significance of police knowledge. Even as traditional arguments in favor of investigatory stops remained viable, a core virtue of the practice emerged as the reliability of police judgment: the professional officer's unique insights into criminal conduct.

4. Police Expertise at the Supreme Court. — The case that finally brought investigatory stops before the Supreme Court barely relied on police expertise. After the veteran officer in *Terry* stopped a group of men outside a storefront,[269] he admitted that he had never seen robbers "casing a place"[270] and that there was nothing particularly suspicious about these men.[271] The defense decried his ignorance.[272] The prosecution cursorily noted his years on the force,[273] but focused primarily on police necessity.[274]

When the case went up to the Court, however, it was accompanied by two high-profile New York cases, and together they mounted a robust debate about the value of police knowledge. Against New York's continuing defense of the officer's trained judgment, petitioners and their amici rehearsed all the arguments lodged against police reformers in these years, attacking not only the existence of some body of police knowledge but also the darker sides of the police mindset. Experienced officers, they insisted, were marked not by expertise but by paranoia,[275] racism,[276] and ignorance of minority cultures[277] — a

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[268] *Peters*, 219 N.E.2d at 599; *see also Sibron*, 219 N.E.2d at 196; *Peters*, 254 N.Y.S.2d at 12.

[269] Terry v. Ohio, 392 U.S. 1, 4–7 (1968).

[270] *Appendix B:* State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearings and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1420 (1998) [hereinafter *Appendix B*].

[271] *Id.* at 1455–56, 1458.

[272] *Id.* at 1438 (suppression hearing); Brief for Petitioner at 13–15, *Terry*, 392 U.S. 1 (No. 67).

[273] *Appendix B*, *supra* note 270, at 1425 (suppression hearing).

[274] Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio at 15–16, *Terry*, 392 U.S. 1 (No. 67); *see also* Reuben M. Payne, *The Prosecutor's Perspective on* Terry*: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN'S L. REV. 733, 738–39 (1998) (recalling "importance of this [practice] to police departments," *id.* at 738, as sole issue stressed on appeal).

[275] Brief for Appellant at 30–31, 30 n.**, Sibron v. New York, 392 U.S. 40 (1968) (No. 63); Brief for the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as Amicus Curiae at 42–43, *Sibron*, 392 U.S. 40 (No. 63).

[276] Brief for Appellant, *supra* note 275, at 31 & n.*; Brief for the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as Amicus Curiae, *supra* note 275, at 3–4, 4 n.5.

[277] Brief for the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as Amicus Curiae, *supra* note 275, at 44–45.

group "not likely to be overly discriminating" in its enforcement practices.[278]

Terry reached the Court on the tail of a series of pro-defendant cases, aimed at constraining what the Court saw as troubling levels of discretion and racial discrimination in the police's pre-trial procedures[279] — concerns very much present in *Terry* itself.[280] Yet the national debate on both race and criminal justice was shifting. Concerns over urban unrest and surging crime rates in the 1960s raised the public stakes of the Court's criminal procedure decisions.[281] Field studies of urban policing brought a newfound appreciation of the centrality of officer discretion in street patrols.[282]

And it turned out that the Court was not insensitive to the expert claims that dominated lower courts over the past decade. At the Justices' conference, even the typically pro-defendant Chief Justice Warren emphasized that "a trained policeman" might read facts differently from the "ordinary citizen."[283] While acknowledging the Court's traditional concern with police officers' "competitive" instincts,[284] the final opinion in *Terry* upheld the practice of frisking suspects on reasonable suspicion[285] — a standard entitling the officer to draw "reasonable inferences . . . from the facts in light of his experience."[286]

In subsequent decades, police expertise continued to occupy the Court's Fourth Amendment jurisprudence, in ways that are now more or less familiar. In a series of smuggling cases, the Court affirmed the centrality of police insight to the "reasonable suspicion" standard, emphasizing the officer's ability "to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained ob-

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[278] Brief for Appellant, *supra* note 275, at 30; *see also* Brief of ACLU et al., Amici Curiae at 11, *Terry*, 392 U.S. 1 (No. 67) (critiquing judicial deference to police "*intuition*"); Brief for the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as Amicus Curiae, *supra* note 275, at 41 (critiquing deference to "hunch"); Brief for Appellant at 13–14, Peters v. New York, 392 U.S. 40 (1968) (No. 73) (critiquing deference to "visceral reactions," *id.* at 14).

[279] For discussions of the apparent shift between the Court's pro-defendant decisions and *Terry*, see Maclin, *supra* note 5, at 1316–17; and Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 8–13 (2010).

[280] Earl C. Dudley, Jr., Terry v. Ohio*, the Warren Court and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 892–93 (1998).

[281] *See* GOLUBOFF, *supra* note 9, at 216–17.

[282] *Id.* at 192–93.

[283] Barrett, *supra* note 9, at 785 n.225.

[284] *See* Terry v. Ohio, 392 U.S. 1, 12 (1968).

[285] *Id.* at 30–31.

[286] *Id.* at 27. Concurring in the New York cases, Justice Harlan emphasized "the special qualifications of an experienced police officer," whose "trained instinctive judgment operat[es] on a multitude of small gestures and actions impossible to reconstruct" at trial. Sibron v. New York, 392 U.S. 40, 78 (1968) (Harlan, J., concurring in the result).

server."[287] Eventually, in *Illinois v. Gates*,[288] the Court expanded the same deference to probable cause, recalibrating that traditional standard to the perspective of "those versed in the field of law enforcement."[289] Meanwhile, the basis of deference at the Supreme Court widened, from a veteran's personal experience to formal training. In the drug trafficking context, the Court's cases through the 1980s affirmed the propriety of stops based on a "drug courier profile[]" promulgated by the Drug Enforcement Administration[290] — against the dissent's objection that reliance on such "mechanistic" formulas undercut *Terry*'s own emphasis on police "experience."[291] The DEA's guidelines were likely more reliable than most police training programs, yet here, too, the dissent recognized that switching from experience to training as a source of "expertise" effectively expanded police authority under the Fourth Amendment.[292]

The Supreme Court's embrace of police judgment in *Terry* and its gradual turn to instruction over experience were controversial legal developments — but they were hardly novel. They reflected trends well rehearsed among state and lower federal courts. Beginning in the late 1950s, these courts invoked the officer's unique criminological insight to loosen constitutional scrutiny of police enforcement actions, and they specifically relied on formal *training* to broaden the scope of police authority. Starting as a useful source of information at trial, police expertise reemerged at the suppression hearing as a ground for deference in constitutional analysis.

Critics protested the Fourth Amendment's embrace of police judgment as an unprecedented depreciation of judicial scrutiny — one at odds with the courts' own skepticism to police discretion in other fields.[293] Their chosen example has tended to center on vagueness.

C. Vagueness Analysis

First emerging outside the realm of criminal procedure, the presumption of police expertise also extended past it. Beginning in the 1970s, the police officer's criminological insight invaded the courts'

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[287] Brown v. Texas, 443 U.S. 47, 52 n.2 (1979); *accord* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975); United States v. Ortiz, 422 U.S. 891, 897–98 (1975).

[288] 462 U.S. 213 (1983).

[289] *Id.* at 232 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)); *see also id.* at 231; Ornelas v. United States, 517 U.S. 690, 699 (1996).

[290] United States v. Sokolow, 490 U.S. 1, 10 (1989) (affirming use); *see also* Florida v. Royer, 460 U.S. 491, 502 (1983); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam).

[291] *Sokolow*, 490 U.S. at 13 (Marshall, J., dissenting).

[292] The Court's alien-smuggling cases also shifted from emphasizing "experience" to lauding the instincts of "a trained officer." *Compare Ortiz*, 422 U.S. at 897, *and Brignoni-Ponce*, 422 U.S. at 885, *with Cortez*, 449 U.S. at 418.

[293] *See* sources cited *supra* note 8.

analyses of substantive criminal laws, defending underspecified penal provisions against claims of vagueness. Confronting challenges to the arbitrary enforcement of vague laws, judges invoked the trained officer's ability to infer criminality from seemingly innocent behaviors as a reliable check on police discretion. And they specifically drew on the Fourth Amendment as a model for trusting the police's expert judgment to ensure fair enforcement in the field.

1. Loitering and the Problem of Police Discretion. — Originating in Europe following the fall of feudalism and proliferating in the United States after the Civil War,[294] vagrancy laws were a mainstay of policing by the mid-twentieth century.[295] The laws tended to coalesce around the same basic elements: loitering or wandering without a "lawful purpose," often while belonging to some scorned social group, such as vagabonds or "habitual loafers."[296] Supporters saw such laws as a core tool of preventative policing.[297] Critics objected that they more typically facilitated *social* policing, purging racial minorities, nonconformists, and the poor from the city streets.[298] Yet only in the 1960s did a series of legal innovations expanding access to the courts allow defendants to systematically challenge their vagrancy convictions.[299]

State courts adjudicating this new wave of claims invalidated loitering laws on numerous grounds,[300] but the most common emerged as unconstitutional vagueness. Some judges held that "loitering" itself lacked definition, encompassing broad swaths of seemingly benign conduct.[301] Others objected to the lists of undesirable social groups.[302] Consistently, courts questioned the requirement that a suspect provide

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294 GOLUBOFF, *supra* note 9, at 15–16; *see also* Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CALIF. L. REV. 379, 385–86 (1995).

295 GOLUBOFF, *supra* note 9, at 2.

296 Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26–57 (1965)); *see* Arthur H. Sherry, *Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 558–61 (1960).

297 *See* GOLUBOFF, *supra* note 9, at 69, 202.

298 *Id.* at 26; Livingston, *supra* note 4, at 598.

299 GOLUBOFF, *supra* note 9, at 132–33. Targeting the poor and yielding relatively short sentences, loitering laws had historically escaped systematic legal challenge. *See* Livingston, *supra* note 4, at 596; Robin Yeamans, Recent Development, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 783 (1968).

300 *See* GOLUBOFF, *supra* note 9, at 59–64, 105–07.

301 *E.g.*, People v. Diaz, 151 N.E.2d 871, 872 (N.Y. 1958); City of Seattle v. Drew, 423 P.2d 522, 525 (Wash. 1967); Ricks v. District of Columbia, 414 F.2d 1097, 1104–05 (D.C. Cir. 1968).

302 *E.g.*, *In re* Newbern, 350 P.2d 116, 123 (Cal. 1960).

a "good account" for his presence, a standard seen to defer entirely to the individual officer's discretion.[303]

In 1972, *Papachristou v. City of Jacksonville*[304] finally sounded the death knell of the vagrancy regime.[305] *Papachristou* clarified that a law could be unconstitutionally vague in either of two senses: by failing to give citizens "fair notice" of the behaviors it criminalized, or by providing insufficient guidance to the *police*, inviting arbitrary or discriminatory enforcement.[306] Eventually identified as the more significant of the two,[307] this latter prong guarded against the risk that underspecified statutes gave police officers excess authority over matters of criminal policy. The Supreme Court was, by 1972, sensitive to the discretion inherent in street policing, and its vagueness doctrine tolerated some room for judgment in areas squarely within the police's competence: gauging the risk of public disruption,[308] for example, or the obstruction of traffic.[309] But it declined to let police officers decide who deserved to occupy the public sphere.

Between the state courts and *Papachristou*, legislatures by the 1960s and early 1970s found themselves looking to stop the gap left by traditional vagrancy laws. In part, that absence was filled by the investigatory stop statutes that proliferated after *Mapp*, which served a similar function of empowering the police to intervene in troubling conduct.[310] Yet the investigatory stop was a limited power, precluding police from making arrests absent further evidence of a specific crime. Some states tried to overcome that deficiency by identifying minor actions during a stop, such as failing to identify oneself, as crimes in their own right.[311] So-called "stop-and-identify" statutes improved on loitering by curtailing questions of vagueness to the identification require-

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303 *E.g.*, United States v. Margeson, 259 F. Supp. 256, 268–69 (E.D. Pa. 1966); *Drew*, 423 P.2d at 525–26; Alegata v. Commonwealth, 231 N.E.2d 201, 205 (Mass. 1967); State v. Starks, 186 N.W.2d 245, 248–49 (Wis. 1971); *see also* Yeamans, *supra* note 299, at 788–89.

304 405 U.S. 156 (1972).

305 *Id.* at 162.

306 *Id.* (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

307 Kolender v. Lawson, 461 U.S. 352, 357–58 (1983).

308 Cox v. Louisiana, 379 U.S. 559, 568–69 (1965).

309 Colten v. Kentucky, 407 U.S. 104, 110 (1972); *cf.* Grayned v. City of Rockford, 408 U.S. 104, 113–14 (1972).

310 MODEL PENAL CODE § 250.12 cmt. 2 (AM. LAW INST., Tentative Draft No. 13, 1961) (discussing overlap between loitering laws and investigatory stops).

311 Nicholas Harbist, Note, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J. 585, 589–90 (1981).

ment,[312] though they raised separate concerns about self-incrimination and probable cause.[313]

Eager for a broader arrest power, many states focused on rehabilitating the loitering regime itself. This new breed of loitering statutes foreswore its predecessors' archaic language and winnowed their scope through geographic, temporal, or behavioral constraints. One popular variant barred loitering in sites raising particular security concerns, such as schools or college campuses.[314] Another targeted loitering that disrupted traffic or the free passage of persons.[315]

Perhaps the most useful variants, however, targeted loitering that raised an explicit risk of criminal misconduct: first, loitering with intent to commit a specific crime; and second, loitering in any circumstances that threatened the public safety.

2. Specific Intent Loitering and Police Expertise. — Redressing the concern that vagrancy laws impinged on essentially benign activities, specific intent statutes limited their scope to loitering with an actual malicious purpose. The requisite intent typically involved felonious conduct, such as drug use or sexual solicitation,[316] though it sometimes encompassed far pettier activities, including gambling[317] and even begging.[318]

Convictions centered on an individual's state of mind at the time of an arrest,[319] so the core legal debate came to center, unsurprisingly, on proving intent. In some cases, courts suggested, the best evidence of malicious purpose would be the consummated act itself.[320] But for the most part, the precise point of loitering laws was to obviate the difficulty of gathering direct evidence of a crime, particularly in the case of vices, like prostitution, that occurred in private among consenting par-

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312 While challengers have argued that such laws force citizens to guess when they have given grounds for "reasonable suspicion," and are unconstitutionally vague on that ground, *see, e.g.*, Alegata v. Commonwealth, 231 N.E.2d 201, 205 (Mass. 1967) (invalidating stop-and-identify on that ground), most courts have declined to recognize that challenge.

313 *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 192–96 (2004) (reviewing Fifth Amendment concern); *id.* at 197–99 (Breyer, J., dissenting) (reviewing Fourth Amendment concern).

314 *See, e.g.*, Dunkel v. Elkins, 325 F. Supp. 1235, 1240–41 (D. Md. 1971); People v. Hirst, 106 Cal. Rptr. 815, 816 (Ct. App. 1973); People v. Johnson, 161 N.E.2d 9, 10 (N.Y. 1959).

315 *See, e.g.*, State v. Caez, 195 A.2d 496, 497 (N.J. Super. Ct. App. Div. 1963); Henrichs v. Hildreth, 207 N.W.2d 805, 808 (Iowa 1973).

316 GOLUBOFF, *supra* note 9, at 339.

317 *E.g.*, N.Y. PENAL LAW § 240.35(2) (McKinney 1965).

318 *See, e.g.*, State *ex rel.* Williams v. City Court, 520 P.2d 1166, 1169 (Ariz. Ct. App. 1974).

319 Later cases would challenge some laws as requiring only "circumstances manifesting" intent. *See, e.g.*, Wyche v. State, 619 So. 2d 231, 235 (Fla. 1993); City of Akron v. Rowland, 618 N.E.2d 138, 144 (Ohio 1993).

320 *E.g.*, *Williams*, 520 P.2d at 1171 (speculating that "hard evidence" of loitering with intent to beg "in most cases will consist of the act of begging" (internal punctuation omitted)).

ticipants.[321] Here, establishing intent required drawing more subtle inferences of criminality from a suspect's broader patterns of conduct.

That skill might sound familiar. It was the precise insight into crime that courts invoked in deferring to police judgment under the Fourth Amendment. As early as the 1960s, some police advocates suggested that this same professional insight undergirded the enforcement of loitering laws. Effective policing against "prowlers" and loiterers, warned one issue of the *FBI Law Enforcement Bulletin*, required "thoroughly trained" officers, taught "to recognize the danger, the numerous subterfuges, and the modus operandi of the prowler."[322] Echoing that claim, defenders of specific intent loitering laws drew on the police officer's criminological expertise to defend his ability to reliably infer criminal "intent."

It was not immediately obvious that such arguments would help. In 1969, a New York court rejected the suggestion that the police's expertise over criminal habits could rescue an imprecise statute from vagueness. After the New York legislature prohibited the making of public statements "commonly made or used in the perpetration of a known type of confidence game,"[323] an offense it anticipated would "call[] for expert police testimony concerning confidence game techniques,"[324] the court in *People v. Harris*[325] invalidated the statute as abdicating the legislature's duty to mark the bounds of criminal conduct.[326] Where "the law fails to define the crime with sufficient certainty," it objected, "police action will not remedy the deficiency."[327]

In other cases, however, the police's expert insights proved more useful. First, the police's criminological expertise was often crucial to getting actual convictions under intent-based loitering statutes. A New York case issued some months after *Harris* provided an illustrative contrast: After a police officer observed Michael Pagnotta and a compatriot holding a bottle cap, eyedropper, and hypodermic needle in a residential stairwell,[328] a judge convicted Pagnotta of loitering for the purpose of using drugs[329] — and the higher courts affirmed — based on the officer's expert testimony that those instruments were

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321 *See* GOLUBOFF, *supra* note 9, at 151–52; William Trosch, Comment, *The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize "Loitering with the Intent to Sell Drugs" Pass Constitutional Muster?*, 71 N.C. L. REV. 513, 517–18 (1993).

322 *The Prowler — a Community Menace*, FBI L. ENFORCEMENT BULL., Apr. 1964, at 21.

323 N.Y. PENAL LAW § 165.30 (McKinney 1967).

324 People v. Harris, 315 N.Y.S.2d 66, 69 (App. Term 1969) (emphasis omitted).

325 315 N.Y.S.2d 66.

326 *Id.* at 70–71.

327 *Id.* at 70 (quoting State v. Caez, 195 A.2d 496, 499 (N.J. Super. Ct. App. Div. 1963)).

328 People v. Pagnotta, 253 N.E.2d 202, 204 (N.Y. 1969).

329 *See id.* at 204–05.

commonly used for cooking heroin.[330] Hanging a criminal conviction on a police officer's expert inferences, *People v. Pagnotta*[331] stood in some tension with *Harris*, and indeed subsequent courts would gloss that *Harris*'s true problem was its *exclusive* reliance on "subjective" police inferences.[332] Yet throughout these years, courts commonly relied on police testimony to establish illicit intent in prosecutions otherwise hinging entirely on seemingly innocuous conduct.[333]

Beyond the matter of evidence, police officers' criminological insights also resurfaced as a consideration bearing on vagueness itself. That debate played out most conspicuously in laws targeting sexual solicitation, the most commonly litigated intent laws of the 1970s. The typical statute prohibited loitering "under circumstances manifesting the purpose of soliciting an act of prostitution" and listed a variety of circumstances providing potential evidence, such as repeatedly beckoning pedestrians or hailing vehicles.[334] Immediately challenged for vagueness, these statutes were routinely upheld through the decade. The intent requirement itself, narrowing the field of criminal action, tended to dispose of the "fair notice" prong.[335] And in the first years, courts paid little attention to the question of arbitrary enforcement. Whether because defendants did not press the argument[336] or because judges conflated their analyses of the two,[337] courts did not address how an officer might reliably evaluate a defendant's purpose to solicit sex.

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[330] *Id.* at 204.

[331] 253 N.E.2d 202.

[332] People v. Smith, 393 N.Y.S.2d 239, 241 (App. Term 1977).

[333] *E.g.*, City of Akron v. Neal, No. 11847, 1985 WL 10687, at *1 (Ohio Ct. App. Apr. 17, 1985) (relying on police testimony that "going out" was prostitution slang); State v. VJW, 680 P.2d 1068, 1072 (Wash. Ct. App. 1984) (relying on testimony about high-prostitution neighborhood).

[334] *See, e.g.*, Brown v. Municipality of Anchorage, 584 P.2d 35, 36–37 (Alaska 1978); Lambert v. City of Atlanta, 250 S.E.2d 456, 457 (Ga. 1978); City of Akron v. Massey, 381 N.E.2d 1362, 1364 (Ohio Mun. Ct. 1978); Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980); City of Seattle v. Jones, 488 P.2d 750, 751 (Wash. 1971); City of Milwaukee v. Wilson, 291 N.W.2d 452, 455 (Wis. 1980). Others passed a close variation, prohibiting beckoning or stopping passersby "for the purpose of prostitution." *See, e.g.*, State v. Evans, 326 S.E.2d 303, 306 & n.1 (N.C. Ct. App. 1985); People v. Smith, 388 N.Y.S.2d 221, 226 (Crim. Ct. 1976). Several cities simply outlawed loitering "for purposes of prostitution." *E.g.*, State v. Armstrong, 162 N.W.2d 357, 358 (Minn. 1968) (Minneapolis).

[335] *E.g.*, Short v. City of Birmingham, 393 So. 2d 518, 520–21 (Ala. Crim. App. 1981); *Lambert*, 250 S.E.2d at 457; *Armstrong*, 162 N.W.2d at 360; *Evans*, 326 S.E.2d at 306; People v. Willmott, 324 N.Y.S.2d 616, 618–19 (Village J. Ct. 1971); *Jones*, 488 P.2d at 753; *Wilson*, 291 N.W.2d at 457.

[336] *Evans*, 326 S.E.2d at 306–07; *see also Armstrong*, 162 N.W.2d at 360 (not mentioning arbitrary enforcement); *Willmott*, 324 N.Y.S.2d at 617 (same).

[337] *Jones*, 488 P.2d at 752 (concluding simply that "men of reasonable understanding are not required to guess at the meaning"); *see also* State *ex rel.* Juvenile Dep't v. D., 557 P.2d 687, 690 (Or. Ct. App. 1976) (concluding simply that statute "is not vague in a legal sense").

In the mid-1970s, the New York courts confronted that question directly in *People v. Smith*.[338] Toni Smith was arrested for loitering for prostitution after a police officer observed her stand near a hotel corner, engage three men in conversation, and finally accompany one inside.[339] From the beginning, Smith bypassed the notice prong in challenging her prosecution, arguing only that the statute required the police to "infer criminality from wholly innocent or ambiguous activity" and thus gave them "unfettered discretion" in making arrests.[340] Smith questioned the quality of that discretion. Based solely on the officer's observations in this case, she insisted, she herself could simply have been "asking [a stranger] for directions" or "talking about the baseball score."[341]

In defense, the district attorney and his allies emphasized the policeman's professional eye for crime: those same insights that officers used to conduct investigatory stops or to explain criminal conduct at trial. The opinion in *Pagnotta*, the district attorney insisted, "illustrate[d]" the expert officer's ability to infer intent based on seemingly innocent acts,[342] leaving no doubt that "trained policemen . . . can distinguish a Times Square hooker from a female political worker."[343] Citing *Pagnotta* as well as several recent Fourth Amendment cases, New York's Attorney General echoed that incriminating inferences based on ambiguous conduct are drawn "everyday by police officers" and "have been recognized as determinative by this [c]ourt."[344]

The trial court sided with Smith,[345] but the higher courts reversed — specifically emphasizing the police's professional knowledge. Drawing on a series of Fourth Amendment cases, the appellate term noted that the "law frequently"[346] trusts police officers to determine, in light of their "superior insight into criminal activity,"[347] whether seemingly "innocent [conduct] . . . is in fact criminal."[348] Based on the statute's examples of incriminating conduct, and "on particulars obvious

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338 378 N.E.2d 1032 (N.Y. 1978).

339 People v. Smith, 393 N.Y.S.2d 239, 240 (App. Term 1977).

340 *Smith*, 378 N.E.2d at 1035.

341 Appendix for Defendant-Appellant at 40, *Smith*, 378 N.E.2d 1032 (Nos. N640315, N623204).

342 Respondent's Brief at 23, *Smith*, 378 N.E.2d 1032 (Nos. N640315, N623204).

343 *Id.* at 22.

344 Brief for Intervenor Attorney General in Support of Constitutionality of Statute at 16, *Smith*, 378 N.E.2d 1032 (Nos. N640315, N623204); *see also id.* at 11 (emphasizing statute's sufficiency to guide "experienced police officers who must enforce it").

345 People v. Smith, 388 N.Y.S.2d 221, 226 (Crim. Ct. 1976) (objecting that the statute defined criminality based on the "moment-to-moment opinions" of police (quoting Cox v. Lousiana, 379 U.S. 559, 579 (1965) (Black, J., concurring in No. 24 and dissenting in No. 49))).

346 People v. Smith, 393 N.Y.S.2d 239, 242 (App. Term 1977).

347 *Id.* (quoting People v. Meyers, 330 N.Y.S.2d 625, 627 (App. Div. 1972)).

348 *Id.*

to and discernible by any *trained law enforcement officer*," the Court of Appeals agreed, "it would be a simple task to differentiate between casual street encounters and a series of acts of solicitation for prostitution."[349] Following the state's lead, the New York courts thus adopted the police's criminological expertise as a sufficiently effective check on arbitrary enforcement to stave off a vagueness claim.

Smith touched off newfound attention to solicitation-based loitering laws' capacity for arbitrary enforcement, with varying results. Some courts upheld the laws based simply on their enumerations of incriminating circumstances, reasoning that these lists provided "explicit standards" for police.[350] Others objected that such lists were purely illustrative, and invalidated the laws accordingly.[351] And some explicitly questioned the merits of the police judgment invoked in *Smith*, insisting that broad catalogues of suspicious acts could not meaningfully help officers "differentiat[e] 'casual street encounters' from 'obvious' acts" of prostitution.[352]

Yet other courts through the 1980s echoed *Smith*'s embrace of police expertise as a supplement to underspecified loitering statutes. Upholding Toledo's prostitution-based statute, for example, an Ohio court repeated that circumstances "obvious to . . . any trained law enforcement officer[s]" allow them to identify intent and rein in "unfettered discretion" on the streets.[353] Defending the District of Columbia's antisolicitation ordinance,[354] the D.C. Court of Appeals reprinted *Smith*'s emphasis on the officer's trained insights by way of "expla[nation]" for why such laws do "not lend [themselves] to the arbitrary and erratic arrests that may recur under an impermissibly vague statute."[355] Like *Smith*, these cases embraced the suggestion that the

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[349] *Smith*, 378 N.E.2d at 1036 (emphasis added).

[350] Short v. City of Birmingham, 393 So. 2d 518, 522 (Ala. Crim. App. 1981); Lambert v. City of Atlanta, 250 S.E.2d 456, 457 (Ga. 1978); *see* City of South Bend v. Bowman, 434 N.E.2d 104, 107 (Ind. Ct. App. 1982); City of Akron v. Massey, 381 N.E.2d 1362, 1364 (Ohio Mun. Ct. 1978).

[351] Wyche v. State, 619 So. 2d 231, 237 (Fla. 1993); Coleman v. City of Richmond, 364 S.E.2d 239, 244 (Va. Ct. App. 1988).

[352] Christian v. City of Kansas City, 710 S.W.2d 11, 13 (Mo. Ct. App. 1986) (quoting *Smith*, 378 N.E.2d at 1036); *see also* People v. Soto, 217 Cal. Rptr. 795, 802 (Ct. App. 1985) (Arguelles, J., concurring) (insisting that "trained police officer['s] . . . good intuition" as to intent is no substitute for "concrete guidelines"). Some courts also found other constitutional deficiencies, including overbreadth, *e.g.*, Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980); *Coleman*, 364 S.E.2d at 243–44, criminalizing intent, *e.g.*, People v. Gibson, 521 P.2d 774, 775 (Colo. 1974), and requiring a "good account," *e.g.*, Johnson v. Carson, 569 F. Supp. 974, 980 (M.D. Fla. 1983).

[353] City of Toledo v. Kerr, No. 82-040, 1982 WL 6456, at *3 (Ohio Ct. App. June 18, 1982) (quoting *Smith*, 378 N.E.2d at 1036).

[354] While targeting solicitation directly, the D.C. statute was roughly identical to loitering statutes. *Compare* Ford v. United States, 498 A.2d 1135, 1137 (D.C. 1985), *with Smith*, 378 N.E.2d at 1034.

[355] *Ford*, 498 A.2d at 1140; *see also* People v. Superior Court, 758 P.2d 1046, 1054 (Cal. 1988) (upholding statute on grounds that seemingly innocent acts "may, in the eyes of those with

policeman's professional knowledge could help salvage a statute from vagueness, fleshing out underspecified textual references to criminal intent through the officer's trained insights into criminal behavior. Long trusted as a check on arbitrary detentions under the Fourth Amendment, the police officer's professional knowledge reemerged to mitigate fears of arbitrary enforcement under the vagueness doctrine.

3. Suspicious Loitering and the Terry *Standard.* — The most popular loitering laws, however, did not target any particular purpose. They prohibited loitering under *any* suspicious circumstances, regardless of individual intent.[356]

Attractive for their broadness, suspicious loitering statutes were deeply controversial,[357] not only raising vagueness concerns but also exacerbating the criticism that vagrancy laws circumvented the Fourth Amendment, effectively authorizing arrests on less than probable cause.[358] That criticism was very much on the mind of the American Law Institute (ALI) as it drafted the Model Penal Code's (MPC) influential loitering provision in the 1960s. The initial version prohibited loitering "under circumstances which justify suspicion" of an imminent crime,[359] but the drafters worried that such language ran straight into the prohibition on arrests for "mere suspicion."[360] The final provision substituted the reference to suspicion with "alarm."[361]

Ultimately, legislatures in the 1960s and 1970s passed a variety of statutes. Some, including New York's, modeled theirs on the original MPC version, criminalizing loitering in "circumstances which justify suspicion"[362] or under otherwise "suspicious circumstances."[363] Most adopted the final draft, barring loitering that "warrant[s] alarm" for

knowledge of the actor's criminal design, be unequivocally . . . connected to . . . crime" (quoting People v. Dillon, 668 P.2d 697, 703 (Cal. 1983))).

356 STATE OF N.Y. TEMPORARY COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, THIRD INTERIM REPORT, LEG. DOC. NO. 174-14, at 27 (1964) (noting that statute "[r]equir[es] no intent to cause either public or individual alarm").

357 *See* TEMPORARY STATE COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW 390 (1964).

358 *See* Miller, *supra* note 279, at 69 (reviewing literature).

359 MODEL PENAL CODE § 250.12 (AM. LAW INST., Tentative Draft No. 13, 1961).

360 Henry v. United States, 361 U.S. 98, 101 (1959) (quoting James E. Hogan & Joseph M. Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 22 (1958)).

361 MODEL PENAL CODE: § 250.6 (AM. LAW INST., Proposed Official Draft 1962).

362 *See* People v. Strauss, 320 N.Y.S.2d 628, 628 (Dist. Ct. 1971); Salt Lake City v. Savage, 541 P.2d 1035, 1036 (Utah 1975).

363 *See* City of Seattle v. Drew, 423 P.2d 522, 523 (Wash. 1967); *see also* Delaware v. Puchalsky, Nos. CR.A. 75-04-0003, CR.A. 75-04-0012, 1975 WL 170441, at *1 (Del. Ct. Com. Pl. July 22, 1975) (ordinance prohibiting loitering "under circumstances which raise the reasonable inference" of a crime); City of Portland v. James, 444 P.2d 554, 555–56 (Or. 1968) (construing law to bar loitering that manifests intent of crime).

public safety.[364] Subsequent clauses typically listed circumstances warranting alarm, and almost always provided an individual some opportunity to explain her presence. Some jurisdictions, like California, imported that identification straight into the offense, requiring individuals to "account for [their] presence . . . *if* the surrounding circumstances . . . indicate . . . that the public safety demands" it.[365]

Suspicious loitering laws were promptly challenged for vagueness, not least based on their public safety clauses.[366] Whether relying on the language of "suspicion" or "alarm," critics objected, such statutes gave police unfettered discretion to decide which behaviors qualified as suspicious and which suspicious behaviors demanded police intervention, hanging guilt entirely on an officer's subjective judgments.[367]

The suspicion-based statutes set the terms of the debate. At least one court summarily upheld the "suspicious conduct" standard, deeming it commonsensical enough both to provide fair notice and to keep "any unusual authority" out of the hands of police.[368] Yet the supreme courts of Washington[369] and Oregon[370] embraced the vagueness challenge, invalidating the language of suspicion as "incapable of providing any intelligible standard to guide" police discretion.[371]

Sensitive to such attacks, prosecutors in New York cast about for a strong defense of "suspicion" as a criminal standard. And much like in *Smith*, the professional knowledge of police officers emerged as a core tool in their arsenal. The New York loitering bill was introduced in

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[364] *E.g.*, DEL. CODE ANN. tit. 11, § 1321 (1974); *see, e.g.*, United States v. Rias, 524 F.2d 118, 121 n.3 (5th Cir. 1975) (Miami); Porta v. Mayor of Omaha, 593 F. Supp. 863, 865 (D. Neb. 1984); City of Portland v. White, 495 P.2d 778, 778–79 (Or. Ct. App. 1972); City of Milwaukee v. Nelson, 439 N.W.2d 562, 563 n.1, 565 (Wis. 1989); *see also* City of Bellevue v. Miller, 536 P.2d 603, 605–06 (Wash. 1975) (substantially identical); State v. Ecker, 311 So. 2d 104, 106 (Fla. 1975) (barring loitering raising "justifiable and reasonable alarm"); Bell v. State, 313 S.E.2d 678, 679 (Ga. 1984) (same).

[365] People v. Weger, 59 Cal. Rptr. 661, 664 (Ct. App. 1967) (emphasis added) (quoting CAL. PENAL CODE § 647(e) (West 1966)); *see also* N.H. REV. STAT. ANN. § 644:6(I) (1974); Powell v. Stone, 507 F.2d 93, 95 (9th Cir. 1974) (Henderson, NV).

[366] *E.g.*, People v. Berck, 300 N.E.2d 411, 413 (N.Y. 1973); *James*, 444 P.2d at 556; *Savage*, 541 P.2d at 1037; *Drew*, 423 P.2d at 523–24.

[367] *See* Watts v. State, 463 So. 2d 205, 207 (Fla. 1985) (Boyd, C.J., dissenting) (arguing that "reasonable alarm" lacks definition); Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 734–36 (1989).

[368] *Savage*, 541 P.2d at 1036; *see also* People v. Strauss, 320 N.Y.S.2d 628, 630–31 (Dist. Ct. 1971).

[369] *Drew*, 423 P.2d at 525.

[370] *James*, 444 P.2d at 557.

[371] *Id.* (quoting Alegata v. Commonwealth, 231 N.E.2d 201, 205 (Mass. 1967)) (construing and striking down a standard the court found to be roughly equivalent to suspicion); *see also* State v. Puchalsky, Nos. CR.A. 75-04-0003, CR.A. 75-04-0012, 1975 WL 170441, at *2 (Del. Ct. Com. Pl. July 22, 1975).

the same legislative session that passed stop-and-frisk,[372] and prosecutors insisted that it be read in light of that statute's established deference to police expertise, offering "flexibility" to the judgments of "the reasonable, . . . prudent police officer."[373] In turn, defendants attacked the value of police expertise as a check on police discretion, rehearsing the same critiques about paranoia and racism originally raised in *Terry*.[374] By these terms, the validity of New York's loitering law came down to not simply its statutory precision and reliance on police judgment, but also the merits of police judgment itself.

Some courts embraced the state's approach. The trial judge in *People v. Taggart*,[375] for example, concluded that "suspicious" conduct could, without offending due process, "rest in the professional experience of the police."[376] Ultimately, however, most trial judges and eventually the higher courts, including the New York Court of Appeals and the Second Circuit, invalidated the suspicious loitering statute.[377] Absent the "clairvoyance of a seer," these courts decried, police officers enforcing that statute had to act "on nothing more than a guess or a whim,"[378] drawing on conduct "as consistent with innocence as with guilt."[379] Echoing *Harris*, these courts rejected the police officer's expert insight as a remedy for a statute's due process deficiencies, providing some systematic guidance missing from the text.

One might have guessed that "alarm"-based loitering laws would receive comparable treatment. Indeed, the courts in Washington and Oregon promptly disposed of alarm-based statutes on the same grounds as their suspicion-based predecessors.[380] The Ninth Circuit relied extensively on the Second Circuit's opinion striking down the

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[372] STATE OF N.Y. TEMPORARY COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, FOURTH INTERIM REPORT, LEG. DOC. NO. 174-25, at 9 (1965).

[373] Record on Appeal at 49, People v. Berck, 300 N.E.2d 411 (N.Y. 1973) (No. CR 2935 B); *see also* Petition for a Writ of Certiorari to the Court of Appeals of the State of New York at 6, New York v. Berck, 414 U.S. 1093 (1973) (No. 73-581) (interpreting statute to permit "trained police officer[s] . . . to draw reasonable inferences" as in *Terry*); Brief of Appellant Attorney General at 11–12, United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974) (No. 73-2413) (on file with the National Archives, New York City branch).

[374] *See* Appellant's Brief at 18, *Berck*, 300 N.E.2d 411 (No. CR 2935 B) (arguing that "white middle class peace officer[s] patrolling a lower class black neighborhood" might find "many things which are perfectly innocent . . . suspicious").

[375] 320 N.Y.S.2d 671 (Dist. Ct. 1971).

[376] *Id.* at 675.

[377] *Newsome*, 492 F.2d at 1171; *Berck*, 300 N.E.2d at 416; People v. Bambino, 329 N.Y.S.2d 922, 930–31 (Cty. Ct. 1972); People v. Villaneuva, 318 N.Y.S.2d 167, 171 (City Ct. 1971); People v. Beltrand, 314 N.Y.S.2d 276, 280–81 (Crim. Ct. 1970).

[378] *Bambino*, 329 N.Y.S.2d at 930; *see also Berck*, 300 N.E.2d at 414 (denouncing enforcement based on police "whim").

[379] *Beltrand*, 314 N.Y.S.2d at 282.

[380] *See* City of Portland v. White, 495 P.2d 778, 780 (Or. Ct. App. 1972); City of Bellevue v. Miller, 536 P.2d 603 (Wash. 1975).

New York law to invalidate California's public safety provision.[381] Striking down an MPC-based statute, one Florida trial court not only protested the lack of textual standards for "justifiable and reasonable alarm,"[382] but also launched an extended attack on the presumption of police expertise it saw undergirding the loitering regime. The policeman, insisted the court in *Florida v. Ecker*,[383] was "a generally suspicious person,"[384] offended by "perfectly normal behavior,"[385] whose instincts invited the precise "arbitrary and erratic" arrests that the vagueness doctrine hoped to avert.[386]

Yet other courts were more forgiving. And they consistently upheld alarm-based loitering laws on the very Fourth Amendment analogy that the New York courts rejected. Courts in California, for example, repeatedly approved the same statutory language that the Ninth Circuit struck down, reasoning that the public safety clause echoed the standard that had long underwritten investigatory stops[387] and thus granted officers only "an appropriate limited discretion."[388] That standard had recognized the "experienced" officer's rarefied "ability to perceive the unusual and suspicious."[389] Similarly, the Florida Supreme Court reversed the trial court in *Ecker*, construing Florida's statute as incorporating *Terry*'s requirement that police officers identify "specific and articulable facts"[390] raising alarm, and thus reining in any "unbridled discretion" by police.[391] Taking the Fourth Amendment's accommodation of police judgment as a blueprint for embracing similar levels of discretion under the vagueness doctrine, these courts trusted the police's professional instincts to enforce loitering laws reliably against genuinely dangerous conduct.

The Supreme Court got its chance to weigh in on this debate in *Kolender v. Lawson*,[392] after the Ninth Circuit reaffirmed its reading of

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381 *See* Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1974).

382 State v. Ecker, No. C-059-883, slip op. at 9, 13–14 (Fla. Dade Cty. Ct. Aug. 10, 1973).

383 No. C-059-883.

384 *Id.* at 9 (quoting Schwartz, *supra* note 114, at 445 (internal quotation marks omitted)).

385 *Id.* (quoting David Strauss, *Field Interrogations: Court Rule and Police Response*, 49 J. URB. L. 767, 769 (1972)).

386 *Id.* Defendants also echoed the argument on appeal. Brief of Appellants Bell & Worth & Appellee Ecker at 20–21, Florida v. Ecker, 311 So. 2d 104 (Fla. 1975) (Nos. 44,586, 44,587, 44,348) (on file with the Florida State Archives).

387 People v. Solomon, 108 Cal. Rptr. 867, 870–71 (Ct. App. 1973); People v. Weger, 59 Cal. Rptr. 661, 669 (Ct. App. 1967).

388 *Weger*, 59 Cal. Rptr. at 669; *see also Solomon*, 108 Cal. Rptr. at 873 (emphasizing *Terry* as proof that suspicion "can be objectively defined and articulated" so as to guard "against arbitrary enforcement").

389 *Weger*, 59 Cal. Rptr. at 670.

390 *Ecker*, 311 So. 2d at 110 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

391 *Id.*

392 461 U.S. 352 (1983).

the California statute.[393] The Ninth Circuit's opinion skewered what it saw as the law's pervasive vagueness, not least in the public safety clause, which identified no "commonly understood [set] of suspicious circumstances" to guide police discretion.[394] The extensive briefing by the defendant and his amici emphasized the shortcomings of such discretion. Police judgment, they insisted, was not reliable but discriminatory and overzealous, tainted by the "competitive enterprise of" investigation.[395] Training was limited and largely unhelpful, providing minimal guidelines for identifying danger.[396] And daily distractions like mood, bias, and cultural ignorance presented "[o]bstacles to an officer's accurate observation" in the field.[397] Drawing on the same arguments as the stop-and-frisk debate, *Kolender* effectively relitigated the merits of police expertise as a ground for expanding police power on the streets.

For years, the Court had avoided resolving the constitutionality of suspicious loitering laws. It denied certiorari on the New York statute.[398] It denied certiorari in *Ecker*.[399]

In *Kolender*, the Court essentially managed to duck the debate once more. Widely seen as interchangeable with suspicious loitering provisions,[400] California's statute technically better resembled a stop-and-identify law, criminalizing not loitering but refusing to identify oneself under suspicious circumstances.[401] Despite the Ninth Circuit's expansive vagueness analysis, the state thus suddenly restyled the suit as a basic Fourth Amendment challenge, reading the "public safety" clause simply as authorizing a *Terry* stop and undercutting any vagueness-based attacks against it.[402] The Supreme Court echoed that ap-

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393 Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981).

394 *Id.* at 1370.

395 Application for Leave to File Amici Curiae Brief & Amici Curiae Brief of National Lawyers Guild et al. at 7, *Kolender*, 461 U.S. 352 (No. 81-1320) [hereinafter Brief of National Lawyers Guild]; *see also id.* at 2–3, 10, 14; Brief for the Appellee at 50–51, *Kolender*, 461 U.S. 352 (No. 81-1320).

396 Brief of National Lawyers Guild, *supra* note 395, at 12–16.

397 *Id.* at 18.

398 New York v. Berck, 414 U.S. 1093 (1973) (mem.).

399 Bell v. Florida, 423 U.S. 1019 (1975) (mem.).

400 *See, e.g.*, Lawson v. Kolender, 658 F.2d 1362, 1369 (9th Cir. 1981) (characterizing as loitering statute and comparing to prior statutes); State v. Ecker, 311 So. 2d 104, 108 (Fla. 1975) (citing *People v. Solomon*, 108 Cal. Rptr. 867 (Ct. App. 1973), as loitering case).

401 *See* People v. Weger, 59 Cal. Rptr. 661, 664 (Ct. App. 1967). The district court in *Kolender* had in fact treated it as such. Appendices to Jurisdictional Statement at A51–52, Kolender v. Lawson, 461 U.S. 352 (1983) (No. 81-1320).

402 Brief on the Merits at 9, *Kolender*, 461 U.S. 352 (No. 81-1320); *see also* Brief of Americans for Effective Law Enforcement, Inc., Joined by the International Association of Chiefs of Police, Inc., as Amici Curiae in Support of the Appellants at 3–4, *Kolender*, 461 U.S. 352 (No. 81-1320).

proach, limiting its analysis to the identification requirement[403] and invalidating the statute solely under the long-established rationale against "good account" clauses.[404] Commonly praised as a powerful blow against police discretion under the vagueness doctrine,[405] *Kolender* thus declined to reach the primary claim lodged against suspicious loitering laws in these years: that the standard of "suspicion" itself tied criminal guilt to an officer's subjective judgments.[406] Accordingly, it left unchallenged the state courts' practice of relying on police expertise as an extrinsic check on the risk of arbitrary enforcement.

Unsurprisingly, following *Kolender*, numerous states with MPC-based statutes continued to rely on *Terry* and the police officer's criminological insight as rebuttals against charges of vagueness.[407] In *Bell v. State*,[408] the Georgia Supreme Court upheld an MPC-style statute partly by noting that suspicious conduct was determined in the first instance by policemen "drawing on all [their] professional experience."[409] Some years later, the Wisconsin Supreme Court borrowed *Bell*'s emphasis on "professional experience" in upholding its own alarm-based loitering law.[410] In Nebraska, a federal court upheld a loitering statute directly on the example of police discretion under *Terry*, concluding that the law could "be constitutionally enforced *only* under circumstances that would justify a *Terry v. Ohio* stop."[411] Throughout these cases, judicial deference to the police's professional insight into criminal suspicion — including *Terry*'s embrace of police judgment as a check on arbitrary detentions — resurfaced to bolster the constitutionality of suspicious loitering laws.

These invocations of the Fourth Amendment complicate a common view of the relationship between *Terry* and the loitering regime: that *Terry* in some sense supplanted vagrancy, presenting an alternate tool of preventative policing and thus inclining courts against loitering laws

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[403] *See Kolender*, 461 U.S. at 355–57 (characterizing the initial selection of a suspect as a basic *Terry* stop).

[404] *Id.* at 360–61.

[405] *See, e.g.*, GOLUBOFF, *supra* note 9, at 340; Maclin, *supra* note 8, at 412; Roberts, *supra* note 8, at 777 & n.10.

[406] *See Kolender*, 461 U.S. at 361 n.10 (declining to decide remaining vagueness issues); *see also* Dan Stormer & Paul Bernstein, *The Impact of* Kolender v. Lawson *on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L.Q. 105, 111 (1984) (noting missed arguments).

[407] *But see* Fields v. City of Omaha, 810 F.2d 830, 833–34 (8th Cir. 1987) (invalidating an ordinance based on the similarity between MPC's "opportunity to dispel," *see id.* at 833, and California's identification requirement).

[408] 313 S.E.2d 678 (Ga. 1984).

[409] *Id.* at 681.

[410] City of Milwaukee v. Nelson, 439 N.W.2d 562, 567 (Wis. 1989).

[411] Porta v. Mayor of Omaha, 593 F. Supp. 863, 867 (D. Neb. 1984) (emphasis added).

in the 1970s.[412] As the cases above illustrate, *Terry* often did not supplant but rather bolstered discretion-driven loitering statutes, rehearsing a pattern of judicial deference to police judgment subsequently used to salvage imprecise loitering laws from vagueness. And *Terry*'s embrace of police discretion did not, conversely, conflict with the courts' antipathy to police discretion under the vagueness doctrine.[413] To the contrary, the Fourth Amendment's recognition of police expertise provided a powerful precedent for vagueness analysis itself, identifying the police's investigatory instincts as a reliable check on the risk of arbitrary enforcement.

The contentious history of suspicious loitering sheds light on the Supreme Court's warring opinions in *City of Chicago v. Morales*[414] in 1999. The majority in that case struck down an ordinance that prohibited gang members from loitering "with no apparent purpose"[415] — and that indeed directly invoked police expertise by entrusting enforcement only to specially trained officers.[416] Dissenting, Justice Thomas protested that the holding contradicted the Court's Fourth Amendment precedent.[417] "Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about . . . 'probable cause' and 'reasonable suspicion,'" Justice Thomas insisted, "so we must trust them to determine whether a group of loiterers . . . threaten[s] the public peace."[418] Justice Thomas's analogy might have seemed to take the Court's case law out of context,[419] yet the slippage was not on him. Long before *Morales*, lower courts had relied on judicial deference under the Fourth Amendment as a model for expanding police discretion over the substantive criminal law. And *Morales*, when all was said and done, did little to change that fact. Making no claims to undermine suspicious

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412 *See* GOLUBOFF, *supra* note 9, at 275, 326; Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1067–68 (1998). Other scholars have posited an inverse relationship, suggesting that the demise of vagrancy laws ushered in *Terry*. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1603 & n.195 (1996); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 559–60 (1992).

413 *See supra* note 8 and accompanying text.

414 527 U.S. 41 (1999).

415 *Id.* at 47 (quoting CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (1992)).

416 *See* Ernesto Palomo, Note, *"The Sheriff Knows Who the Troublemakers Are. Just Let Him Round Them Up": Chicago's New Gang Loitering Ordinance*, 2002 U. ILL. L. REV. 729, 751.

417 *Morales*, 527 U.S. at 110 (Thomas, J., dissenting).

418 *Id.* at 109–10.

419 *See* Maclin, *supra* note 8, at 403–04 (criticizing Justice Thomas's analogy). *But see* Livingston, *supra* note 8, at 179 (supporting Justice Thomas).

loitering statutes,[420] that decision left intact a swath of laws upheld largely on the policeman's superior professional judgment.

4. Vagueness and the Criminal Law Today. — Since 1999, police officers' professional expertise over crime has continued to shape the reach of the criminal law. Alarm-based loitering laws remain on the books in states like Florida, Georgia, Arkansas, New Hampshire, and Delaware,[421] as well as various cities.[422] Beyond loitering, courts have continued to defend laws involving prostitution, drugs, and gang activity against claims of vagueness on the grounds that training leaves the police well equipped to distinguish solicitations, drug dealers, and gang signs from seemingly innocent conduct.[423]

These laws make a material difference in exposing individuals to the criminal justice system. Police often rely on suspicious loitering laws to stop suspects for questioning that leads to more incriminating evidence,[424] drawing individuals into the penal system on grounds that would not even justify a *Terry* stop for another crime — sitting in a high-crime neighborhood,[425] for example, or knocking on a door and looking inside the window.[426] In other cases, defendants are arrested and even convicted of loitering where their behavior yields insufficient evidence of any more specific infraction: standing in a high drug-crime neighborhood with an acquaintance with a past record,[427] sitting on a stoop and deflecting questions,[428] or perching in a bush in daylight.[429]

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[420] *See Morales*, 527 U.S. at 67 (O'Connor, J., concurring in part and concurring in the judgment) (noting that the holding casts no doubt on loitering laws targeting "an apparently harmful purpose or effect" (quoting *id.* (majority opinion))).

[421] ARK. CODE ANN. § 5-71-213(a)(1) (2016); DEL. CODE ANN. tit. 11, § 1321(6) (2016); FLA. STAT. § 856.021(2) (2016); GA. CODE ANN. § 16-11-36(b) (2016); N.H. REV. STAT. ANN. § 644:6(I) (2016).

[422] *E.g.*, BILLINGS, MONT., CODE OF ORDINANCES § 18-701 (2017); MILWAUKEE, WIS., CODE OF ORDINANCES § 23-04 (2016).

[423] *See, e.g.*, Mid-Atl. Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 846–47 (D. Md. 1980) (drug paraphernalia); People v. Natividad, No. 2008CN001308, 2008 WL 2265729, at *1 (N.Y. Crim. Ct. June 3, 2008) (prostitution); Martinez v. State, 323 S.W.3d 493, 507–08 (Tex. Crim. App. 2010) (gang signs); City of Tacoma v. Luvene, 827 P.2d 1374, 1385 (Wash. 1992) (drugs).

[424] *See, e.g.*, Miller v. State, 922 A.2d 1158, 1162–63 (Del. 2007); United States v. Kopp, No. CR-08-153-BLG, 2010 WL 2106472, at *4 (D. Mont. May 24, 2010); *see also* Baker v. Schwarb, 40 F. Supp. 3d 881, 889 (E.D. Mich. 2014) (stop leading to questioning and release).

[425] *Miller*, 922 A.2d at 1162.

[426] *Kopp*, 2010 WL 2106472, at *4.

[427] United States v. Wilkerson, 134 F. Supp. 3d 1129, 1131 (E.D. Wis. 2015).

[428] State v. Hubbert, No. 2009AP1404-CR, 2009 WL 4042765, at *1 (Wis. Ct. App. Nov. 24, 2009).

[429] J.M.C. v. State, 956 So. 2d 1235, 1236 (Fla. Dist. Ct. App. 2007); *see also* D.J.E. v. State, 178 So. 3d 78, 80 (Fla. Dist. Ct. App. 2015) (involving defendant hiding behind a stair railing); Perez-Tejon v. State, 147 So. 3d 1094, 1095 (Fla. Dist. Ct. App. 2014) (involving defendant concealing himself behind a vehicle). For convictions, see, for example, *Ellis v. State*, 157 So. 3d 467, 470 (Fla. Dist. Ct. App. 2015); and *El-Fatin v. State*, 771 S.E.2d 902, 902 (Ga. Ct. App. 2015). For

Even more obviously alarming examples — holding a sword outside a residential building,[430] or jumping at a neighbor in the dark[431] — frequently involve circumstances where officers tried but could not charge more serious offenses. While often dismissed or resolved out of court, these cases do go to jury trials[432] and submit defendants to a variety of penalties, from several months' probation or days' detention in cases involving juveniles[433] to twelve months' imprisonment for adults.[434] And regardless of the ultimate outcome, the arrest itself subjects defendants to the many costs of the criminal system, including time, money, inconvenience, and personal embarrassment.[435]

Judicial reliance on police expertise to salvage criminal laws, in short, is not an academic episode in the history of vagrancy. It has undergirded a significant weapon of contemporary policing. From Georgia's suspicious loitering law in *Bell* to New York's prostitution statute in *Smith*, numerous jurisdictions continue to enforce criminal statutes whose constitutionality depends not only on their text, but also on the courts' faith in the special knowledge of police officers who enforce them.

III. THE STRUCTURAL BASES OF JUDICIAL DEFERENCE

The judicial presumption of police expertise has thus pervaded the law more broadly than commonly realized. Beginning in the 1950s, courts endorsed a claim of police knowledge that was, in those same years, dismissed by the broader public. They endorsed this claim largely on the basis of certain hallmarks of knowledge, most notably formal training, that although championed by police reformers rarely matched police reality or had proven links to reliable investigation. And they used that claim to expand police authority in multiple areas of the legal system. Far from obstructing "the acceptance of law enforcement as an emerging professional group,"[436] courts emerged as preeminent advocates of the expert policeman.

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trials leading to acquittal, see, for example, *Toney v. Perrine*, No. CIV 06-cv-327-SM, 2007 WL 2688549, at *3–4 (D.N.H. Sept. 10, 2007).

430 *El-Fatin*, 771 S.E.2d at 902.

431 St. Louis v. State, 763 S.E.2d 126, 127 (Ga. Ct. App. 2014) (involving a defendant suspected of intended burglary, but not charged).

432 *E.g.*, Boyd v. State, 785 So. 2d 670, 671 (Fla. Dist. Ct. App. 2001) (per curiam); *El-Fatin*, 771 S.E.2d at 902.

433 D.S.D. v. State, 997 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 2008); M.A. v. State, 964 So. 2d 831, 832 (Fla. Dist. Ct. App. 2007).

434 Roman v. State, 685 S.E.2d 775, 776 (Ga. Ct. App. 2009); *see also In re* M.S.S., 708 S.E.2d 570, 572 n.3 (Ga. Ct. App. 2011) (reporting a sentence of four months).

435 *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979).

436 Bussert, *supra* note 80, at 145.

Why were judges in the mid-twentieth century so receptive to the promise of police expertise? Why, that is, did courts not simply bolster police authority, but do so specifically based on the police's superior professional insight?

Traditional explanations for deference in Fourth Amendment analysis have focused on essentially instrumental motives. Beginning with *Terry*, by these accounts, the courts' invocations of police knowledge have justified otherwise attractive holdings, responding to a range of pragmatic factors from rising crime rates to a preference for more administrable rules. These instrumentalist motives undoubtedly played a strong role in the expansion of deference in the midcentury; indeed, they have some valuable points of overlap with the story told above.

Yet the fuller history of police expertise — including the timeline of that phenomenon, its roots in the realm of evidence, and the broader disputes about police professionalization in these years — pushes the boundaries of this strategic account. That history suggests that, in tandem with any external pressures, the mid-twentieth century featured an underlying shift in judicial *understandings* of police work as a task capable of producing rarefied and systematic "expert" knowledge. And it suggests that at least one explanation for that shift may be implicit in the folds and sequences of that history itself: the many diverse settings where judges encountered police knowledge in these years — not only in terms of their doctrinal content, but also their internal structures and more accidental analytic effects.

A. The Strategic Rationale

Numerous political, pragmatic, and ideological incentives may be seen to counsel judicial deference to the police. It is through these essentially strategic rationales that the embrace of police expertise is typically explained.

First, there are politics. In times of high crime rates or public concerns about disorder, judges are subject to intense political pressures against the obstruction of the police's enforcement efforts.[437] Especially in states holding judicial elections, judges may have a direct professional investment in appearing tough on crime.[438] Beyond such external pressure, some judges may share an ideological sympathy with rigorous policing campaigns, either as a general policy matter or in connection with specific crimes. Especially given the demographics of

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[437] *See* Maclin, *supra* note 5, at 1317–19; William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2155 (2002).

[438] David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 473 (1999); Pepson & Sharifi, *supra* note 17, at 1233–34.

the judiciary, whose members often originate as prosecutors,[439] many judges may be inclined to expand police authority and embrace officer testimony. Others may support a robust defense of defendants' rights in theory but resent suppressing evidence in specific cases, where an officer's contested instincts have in fact led directly to incriminating evidence of often-dangerous crimes.[440]

Beyond politics, there are pragmatic considerations. In the 1960s as today, judges have been deeply sensitive to the difficulties of the police task, recognizing that police officers must often act quickly in hostile and unstable circumstances,[441] courting injury or worse in the course of protecting public safety.[442] Far from presuming police expertise, the trend toward deference in such cases may accommodate the inevitable *limits* of police competence. And judges are well attuned to the pragmatic needs of the courtroom, disposed toward simple decision rules that help them maintain manageable caseloads.[443] A posture of deference to police witnesses allows the courts to avoid particularly sticky legal issues, delegating close Fourth Amendment cases to the police's ostensibly superior judgment.[444] In light of ongoing concerns about racially biased enforcement, it also lets judges sanction disproportionate but productive patterns of arrests, inviting officers to couch their enforcement decisions in subtle criminological insights about "high-crime" neighborhoods.[445] By some accounts, indeed, procedural lenience saves courts from more controversial or corrosive substantive holdings, allowing judges to defend case-specific police tactics rather than overreaching criminal laws.[446]

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[439] *See* Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203, 1235 & tbl.10 (2009). Other demographic factors may also be relevant: judges' commonly middle-class backgrounds, for example, might render them less sympathetic to and less knowledgeable about the urban cultures over which police claim expertise. *See* Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 675–76 (2005).

[440] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); Pepson & Sharifi, *supra* note 17, at 1233 & nn.266 & 268.

[441] *See* Alschuler, *supra* note 16, at 234; Goldstein, *supra* note 16, at 161; Richard E. Myers II, *Challenges to* Terry *for the Twenty-First Century*, 81 MISS. L.J. 937, 965–66 (2012); Taslitz, *supra* note 5, at 35–36.

[442] *See* Goldstein, *supra* note 16, at 161; Maclin, *supra* note 5, at 1298–300; Andrew Dammann, Note, *Categorical and Vague Claims that Criminal Activity Is Afoot: Solving the* High-Crime Area *Dilemma Through Legislative Action*, 2 TEX. A&M L. REV. 559, 560 (2015).

[443] *See* Bibas, *supra* note 17, at 913; Richard A. Posner, *What Do Judges and Justices Maximize? (the Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 20–21 (1993).

[444] *Cf.* Posner, *supra* note 443, at 14 (noting that judges dislike reversal).

[445] *See* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 64–66 (2001); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1949–50 (1993); Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 150–51 (2000).

[446] *See* Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459, 463–65 (2014); Slobogin, *supra*

Lastly, deference helps judges preserve the stability of their professional relationships within the justice system. Particularly in smaller towns with frequent repeat government players, embracing the professional competence of police witnesses allows judges to avoid denigrating the policemen and the prosecutors who appear regularly in court.[447]

Many of the innovations justified by "police expertise" in the twentieth century might have reflected these same motives. As scholars have noted, the Supreme Court decided *Terry* against a backdrop of widespread concern about rising crime rates[448] — a trend blamed by politicians, police, and others on the Warren Court's criminal procedure revolution.[449] Among state courts, too, the accommodation of police expertise in assessing probable cause gained speed around the early 1960s, just as *Mapp* extended the exclusionary rule against the states.[450] In that same decade, race riots across the nation tested the capacity of local police departments, creating all the more demand for a politically neutral defense of police power.[451] As for the vagueness doctrine, many suspicious loitering laws salvaged by the police's professional judgment were enacted in the same law-and-order period as *Terry*, and were explicitly promoted as necessary to effective patrol.[452] One plausible reason that the MPC loitering statute fared so much better than its suspicion-based analogues may have been the courts' sense, consistent with the ALI's own assessment, that the MPC draft was the last hope to keep suspicious loitering provisions alive.[453]

On this account, the judiciary's escalating deference to the police did not necessarily reflect any deep-seated faith in police judgment. It vindicated judges' more practical incentives to expand police authority, responding to such factors as public pressure, personal sympathy, and the politics of the courtroom. Particularly against the backdrop of

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note 412, at 1067–68 (crediting invalidation of loitering laws partly to the expansion of judicial lenience in criminal procedure); *cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (noting judicial preference for narrower liability rules).

447 *See* Morgan Cloud, Essay, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1323–24 (1994); Pepson & Sharifi, *supra* note 17, at 1233 n.269.

448 GOLUBOFF, *supra* note 9, at 216; Livingston, *supra* note 4, at 568; Maclin, *supra* note 5, at 1317–18.

449 *E.g.*, KEVIN J. MCMAHON, NIXON'S COURT 3–4 (2011); Friedman & Ponomarenko, *supra* note 6, at 1890; Maclin, *supra* note 5, at 1317–18.

450 *See supra* pp. 2030–32.

451 GOLUBOFF, *supra* note 9, at 216–17.

452 *See supra* p. 2037.

453 *E.g.*, City of Portland v. James, 444 P.2d 554, 556 (Or. 1968) (identifying MPC draft as potential backstop in invalidating other law); City of Seattle v. Drew, 423 P.2d 522, 526 (Wash. 1967) (same); *see also* MODEL PENAL CODE § 250.6 cmt. 5 at 396–97 (AM. LAW INST. 1980) (conjecturing that, if not the MPC draft, "no general" loitering provision could survive due process, *id.* at 396).

the Warren Court's liberal case law, the rhetoric of the police officer as a professional expert helped the courts expand police authority against competing Fourth Amendment and due process interests.

B. Limitations of the Strategic Rationale

These strategic explanations provide an important lens on the courts' relationship with the police. Undoubtedly, they helped drive the judicial embrace of police discretion in the midcentury. Ultimately, however, the broader history of police expertise also highlights a number of gaps in this instrumental narrative.

First, the strategic rationale does little to account for the courts' recognition of police officers as expert witnesses at trial — a context that preceded and often set the terms of judicial deference in other spheres. The courts' acknowledgment that police officers may harbor "expert" knowledge did not arise in criminal procedure but in the realm of evidence, where as early as the 1950s judges recast officers as professional authorities on criminal patterns — even regarding matters previously admitted as lay testimony or left to scientific professionals. This evidentiary context simply does not implicate the same political or pragmatic incentives raised by loitering and street detentions, including concerns over crime or officer safety, ideologically motivated deference to the police, or a preference for procedural over substantive lenience.[454] To be sure, trial courts shared the instinct against denigrating repeat players,[455] and they might have faced a separate set of motives to admit police experts: a sympathy for such prosecutions,[456] a desire to shorten trials by avoiding excess witnesses,[457] or the doctrinal bias toward admitting plausible expert testimony to be weighed by the jury rather than excluding it altogether.[458] Yet it is hard to believe that these concerns would have consistently led courts to admit what they saw as unqualified expert testimony, especially since such evidence could often easily have entered as lay testimony, and in light of the many countervailing objections that partisan experts bias trials

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[454] Indeed, the theory that procedural deference lets courts avoid more draconian decision rules not only fails to illuminate the evidentiary context, but also conflicts directly with judges' ultimate reliance on the Fourth Amendment to uphold substantive criminal laws themselves.

[455] *See* Pepson & Sharifi, *supra* note 17, at 1231–33.

[456] Groscup & Penrod, *supra* note 131, at 1154.

[457] *See* DAVID L. FAIGMAN, LEGAL ALCHEMY 5 (1999) (reporting judicial impatience with excess expert witnesses); Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1133 (1993) (noting judicial concern with manageable trial length).

[458] *See* J. Michael Veron, *The Trial of Toxic Torts: Scientific Evidence in the Wake of* Daubert, 57 LA. L. REV. 647, 657 (1997); *see also* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States*, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1239 (1980).

and usurp the factfinding role of the jury.[459] The trend toward qualifying police officers as expert witnesses in the 1950s suggests that judges in these years genuinely came to recognize the police as offering some rare and reliable knowledge to the court.

Second, there is no clear reason why the courts' incentives to expand police authority in the 1960s, including rising crime rates, civil unrest, or the exclusionary rule, would have pushed them to adopt the rhetoric of police expertise. Culminating with *Terry*, the litigation surrounding investigatory stops has largely been credited with fostering judicial deference to police judgment, as a means of avoiding the cumbersome requirements of probable cause. But courts hardly needed this novel argument. Dating back to 1908, state courts had consistently upheld both statutes and more informal uses of investigatory stops without any mention of the police's professional judgment, dismissing Fourth Amendment challenges based solely on the practice's historical roots, minimal intrusiveness, and significance to public safety, as well as the basic necessities of policing.[460] Even following *Mapp*, when investigatory stops began drawing newfound public criticism, courts from California to Alaska, New York, Massachusetts, and Pennsylvania continued to defend them on those traditional grounds.[461] Indeed, there is no record of *any* higher court striking down investigatory stops so as to create a doctrinal gap to be filled by police expertise.

In part, the courts' rhetorical turn might have echoed their earlier embrace of police judgment in the probable cause context. Yet while that first step might explain the shift in judicial reasoning, it attenuates the causal link between the courts' invocations of police expertise and their pragmatic concerns with urban policing. Emerging in the late 1950s and spreading through the courts by the early 1960s, the incorporation of police judgment into probable cause came before the rising crime rates to which scholars typically attribute *Terry*, and indeed at a time when the Warren Court's liberal decisions had broad popular approval.[462] And while that trend coincided in part with the Court's decision in *Mapp*, it occurred in roughly the same period across numerous federal and state jurisdictions, despite significant differences in when they actually became subject to the exclusionary

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[459] Mnookin, *supra* note 126, at 770–71; Stephenson, *supra* note 131, at 212. For cases raising concerns about invading the province of the jury, see, for example, *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); and *People v. Patterson*, 337 P.2d 163, 167–68 (Cal. Dist. Ct. App. 1959).

[460] *See supra* pp. 2031–32.

[461] *See supra* pp. 2032–33.

[462] BARRY FRIEDMAN, UNWARRANTED 76–77 (2017).

rule — 1949 for federal courts, 1955 for California, or 1961 for most other states.[463]

Finally, judicial invocations of police expertise in the 1960s provided a questionable rhetorical device. Both the police professionalization movement and its promise of police knowledge were deeply controversial in these years, dismissed by the public and challenged by researchers and civil rights groups who emphasized the many deficiencies of police judgment. Judges in high-profile cases, including *Terry* and the stop-and-frisk cases in New York, had the benefit of comprehensive briefing rehearsing these very critiques.[464] Outside the courtroom, indeed, some of the most salient sources of pressure for expanding police authority, including concerns over race riots and urban unrest, simultaneously raised the greatest *skepticism* of police judgment and "professionalization."[465] These countervailing factors might have heightened the courts' doubts about police judgment, supporting the pragmatic account. But the ongoing controversy over police reform also suggests that judges would not have invoked the promise of police expertise unless they believed, against these contrary claims, that police training and experience had substantial value.

The fuller history of police expertise, in short, strains the sufficiency of the strategic explanations for deference. From police experts in the witness box to the incorporation of police judgment into the probable cause standard, that narrative suggests that the midcentury witnessed an underlying recalibration of judicial *understandings* of policing, as a task based on and producing systematic insight into crime. This is not to dispute that instrumental or ideological motives played an important role in driving judicial deference to the police. But it does suggest that those motives built on a basic, and unique, reappraisal of police knowledge.

C. The Exposure Rationale

Why, then, at a time when sociologists, political scientists, and other professionals frequently dismissed the police's claims to codified knowledge, did the courts apparently embrace those claims in multiple areas of the law?

Peering inside the subjective perceptions of judges, that question does not likely lend itself to a single answer. For one thing, the police are hardly a unique example of judicial reliance on controversial experts; beginning with the New Deal, courts have frequently resolved disputes over the reliability and jurisdiction of outside authorities by

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463 *See supra* pp. 2026–28.

464 *See supra* pp. 2033–35.

465 *See* FOGELSON, *supra* note 23, at 282–84.

deferring to their judgment.[466] One might consider (though be harder pressed to prove) that judicial deference to the police reflects some broader institutional bias toward expertise as such, guarding the boundaries of the courts' and others' professional spheres.[467]

Yet one additional factor might be implicit in the specific history of the courts' negotiations with police knowledge: the many areas in the legal system in which police expertise emerged in the midcentury. Judicial recognition of policemen as professional authorities arose around the same years that reformers pressed their vision of officers as trained experts over crime. It emerged not only under the practical pressures of criminal procedure, but first and foremost in the courts' evidentiary practices. And as it moved through the legal system, judges frequently looked to their previous confrontations with police knowledge as a blueprint for deference in subsequent fields.

This sequential, deeply *interconnected* expansion of judicial deference identifies an additional lens on the courts' embrace of police expertise — one based not just on judges' incentives but also on their objective exposure to police knowledge. From bureaucracies to scientific laboratories to economic modeling, social theorists have suggested that the instruments and methodologies used by knowledge-gathering institutions exert often-inadvertent substantive effects on the data they process.[468] The case of police expertise locates a comparable example within the justice system. Beginning in the 1950s, the courts' many encounters with the police, including judges' unique interactions with police reformers, their experiences evaluating expert witnesses, and the procedural logistics of suppression hearings, might have disproportionately exposed judges to police knowledge under circumstances that made the police's expert claims appear more credible. This section

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[466] For administrative agencies, see Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1764–65 (2012); and Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406, 439–40 (2007). For institutions including prisons, universities, and hospitals, see Horwitz, *supra* note 10, at 1069–70; and Solove, *supra* note 10, at 944.

[467] Sociologists of knowledge have suggested that the acceptance of expertise claims varies based on an audience's social identity, interests, and broader professional networks. *See* Steven Shapin, *Cordelia's Love: Credibility and the Social Studies of Science*, 3 PERSP. ON SCI. 255, 269–70 (1995); Brian Wynne, *Misunderstood Misunderstandings: Social Identities and Public Uptake of Science*, *in* MISUNDERSTANDING SCIENCE? THE PUBLIC RECONSTRUCTION OF SCIENCE AND TECHNOLOGY 19, 21–27 (Alan Irwin & Brian Wynne eds., 1996).

[468] *E.g.*, Ian Hacking, *The Self-Vindication of the Laboratory Sciences*, *in* SCIENCE AS PRACTICE AND CULTURE 29, 29–30 (Andrew Pickering ed., 1992); NICHOLAS JARDINE, THE SCENES OF INQUIRY 83–89 (2d ed. 2000) (scientific methods); DONALD MACKENZIE, AN ENGINE, NOT A CAMERA 12–13 (2006) (financial economics); J. ADAM TOOZE, STATISTICS AND THE GERMAN STATE, 1900–1945, at 36–37 (2001) (bureaucracy); VIRTUALISM (James G. Carrier & Daniel Miller eds., 1998) (economic modeling).

briefly revisits three parts of this history — focusing not on their substantive content, but on their *structural* biases toward the police.[469]

1. Outside the Courtroom. — The first site of exposure involved judges' professional activities outside the courtroom. The judicial embrace of the expert policeman occurred in much the same period that the professionalism movement projected to the public, and the legal elite specifically, an image of the officer as a trained investigator. The courts' depictions of policemen as experts on criminal behavior echoed reformers' core claims that officers accrue subtle behavioral insights into the *modus operandi* of criminals. And the courts' specific invocations of training echoed the project of police education pursued so vocally by reformers in these years. It is notable that California and especially Los Angeles, early vanguards of police training programs, were consistently at the forefront of the courts' embrace of police expert witnesses, just as New York and the D.C. Circuit, exposed to the NYPD and FBI Academy, respectively, were instrumental in absorbing police knowledge into Fourth Amendment analysis.

This overlap was likely more than just coincidence. Unlike regular citizens or even scholars of policing, judges benefited from targeted interactions with the proponents of police professionalization. They lectured at police training programs and spoke at academy graduations, seeing firsthand the departments' efforts to educate recruits. They attended police conferences and workshops, including those, like the IACP's, partly aimed at celebrating achievements in recruitment and training. And like other lawyers, judges were most likely to benefit from articles and bar association lectures defending the police officer's unique professional knowledge. This is not to imply that all judges personally experienced these aspects of the reform project, or that any particular experience had a determinative effect. Yet it is to suggest that, compared with the public or even social researchers in the midcentury, judges were uniquely privy to the hallmarks of police reform as a part of their own professional culture.

This unique proximity to the reform movement may have primed judges to embrace police expertise in three ways. First, simply enough, it might have acclimated them to the *idea* of police officers as professionals or bearers of "expertise" through greater familiarity with

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[469] This argument may be seen as a domestic analogue to theoretical arguments popular in international law scholarship, which has long debated whether compliance reflects strategic self-interest or genuine faith in international norms. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1942–62 (2002) (reviewing literature). Several scholars identify repeated interactions with and exposure to international law proponents as a mechanism of norm-internalization. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 198–200 (2004); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638–56 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626–27 (1997) (book review).

that rhetoric. Lecturing at academies or conferences, judges commonly adopted the terminology of the movement. As then-Judge Warren Burger insisted in an address before the IACP — one aimed at defending judicial checks on the police — police officers rightfully saw themselves as "professionals at their craft."[470] It is this same language of "professionalism" that pervaded judicial opinions in the 1960s,[471] just as the language of "expertise" proliferated at the start of the decade.[472]

Second, judges' professional engagement with reformers might have impressed upon them police executives' commitment to discipline and education. Judges' interactions with police chiefs skewed disproportionately toward professionalization-minded officials, who lauded police training and expertise even as many departments continued to resist such initiatives. In other contexts, commentators have suggested that some judges' selective exposure to federal investigators, typically seen as more competent and conscientious than their state counterparts, inclines them toward more pro-police rulings.[473] By the same token, judges' disproportionate exposure to reformist police chiefs may have inflated their views of the successes of police professionalization.

Finally, judges' unique interactions with police reform provided them with direct evidence of the police's professional knowledge, showing off police departments' best educational initiatives in action. Whether leading classes as guest lecturers or arranging visits to local courthouses, judges routinely witnessed, participated in, and became personally invested in the project of police training. In context, judges' greater receptivity to claims of police knowledge — and especially their frequent, often-idealized invocations of *academy training* as the basis for that knowledge[474] — might have reflected their own experiences with police education programs.

2. Merits Trials. — A second site of exposure arose at the trial stage itself, surrounding judges' interactions with police witnesses.

The practice of police expert witnessing provided the courts' earliest recognition of policemen as authorities on criminal patterns, and it set the stage for judges' subsequent embrace of police expertise in other spheres. The D.C. Circuit case that first incorporated police knowledge into the probable cause standard, itself a robbery case,

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[470] Warren E. Burger, *External Checks — Views of a Jurist*, 1965 POLICE Y.B. 126, 129.

[471] *See supra* note 124 and accompanying text.

[472] In this sense, the movement might have been a type of precursor to judicial law and economics seminars in the 1970s and 1980s, which Professor Steven Teles suggests may have advanced conservative legal reasoning through basic exposure. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 112–14, 280 (2008).

[473] *E.g.*, Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494 (2011); *see also* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2278–86 (2014) (discussing greater public trust in federal agents).

[474] *See, e.g.*, *supra* note 183 and accompanying text.

drew on narcotics — the preeminent field of expert witnessing — to defend the "experienced" officer's criminological insight.[475] At suppression hearings, police expert witnessing provided both evidence of an officer's reliable judgment and sometimes even a procedural model, as judges accustomed to processing police knowledge on the witness stand formally qualified arresting officers as "expert" witnesses. Judges' attempts to incorporate police knowledge into Fourth Amendment analysis, in sum, frequently built on their experiences with police witnesses at trial.

Those experiences themselves reflected the unique procedural biases of courtroom evidence. Beginning in the 1950s, as prosecutors increasingly offered officers as expert witnesses in court, trial judges grappled with those witnesses' claims to special knowledge, weighing the relative value of police experience in producing insight beyond lay understanding. Ultimately, and partly reflecting an institutional preference for admitting plausible expert evidence,[476] they commonly certified such witnesses, welcoming policemen in the guise of "experts" at trial. And appellate panels, though exposed to only a sliver of such proceedings, nevertheless routinely upheld the certification of police experts — urged now toward affirmance by the additional demand of deference to the trial court's discretion.

Beyond encouraging the certification of police expert witnesses at any given proceeding, this process may have had several broader effects. First, more directly than the professionalization movement, the practice of police expert witnessing provided judges with aggregate, systematic evidence of the police's insight into crime. That practice repeatedly exposed judges to police officers showcasing their professional skills in a way the general public rarely experienced. It confronted judges with officers who both were explicitly identified as criminological authorities and in fact testified to facts beyond common knowledge. Motivated to present only qualified witnesses, prosecutors likely introduced relatively impressive officers; especially in the 1950s, police witnesses were often uniquely trained and extensively experienced.[477] This was likely the case even where those witnesses, incidentally enough, were the arresting officers, since arrests made by qualified witnesses were those most likely to come to court. And unlike in civil trials, which commonly pitted two warring witnesses against each other, most criminal trials did not feature rival defense experts to challenge the police's assertions. The logistics of police expert witnessing thus presented judges with sustained, often-

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[475] Bell v. United States, 254 F.2d 82, 86 (D.C. Cir. 1958).

[476] *See* sources cited *supra* note 458.

[477] *See supra* pp. 2033–35.

uncontested evidence of both the depth and the apparent *commonality* of police insight into crime.

Second, the evidentiary procedures surrounding expert witnesses placed courts in a unique position to confront the epistemic possibilities of police work. Asked to evaluate whether police testimony might improve on the common sense of a lay jury, courts repeatedly weighed the value of police experience in producing rarefied knowledge. Even as the credentials of proffered witnesses dropped over the 1960s, judges continued to assess the relative gains of police officers' exposure to particular types of crime, deciding whether several hundred arrests, or several years of experience, or weeks of training, yielded insights beyond the ken of the ordinary man. The cognitive demands of evaluating expert witnesses, simply enough, invited judges to recognize the police officer's occupational experiences as yielding some unique professional knowledge.

Finally, the phenomenon of police expert witnessing once again acclimated judges to the idea of policemen as bearers of professional knowledge. Both through prosecutors' claims of expertise and through their own experiences certifying police officers in the role of experts, judges learned to see officers as stewards of special criminological insight within the legal system. It was that same habit that later reemerged at suppression hearings, where courts sometimes formally qualified arresting officers as expert witnesses prior to receiving their testimony. Used to recognizing police officers as professional authorities on the witness stand, some judges defaulted to granting them that same role in other spheres.

3. Suppression Hearings. — Lastly, once the police's professional insights entered the courts' Fourth Amendment analysis, a third site of exposure arose at the suppression hearing.

From the 1960s to today, suppression hearings have been a core breeding ground for deference to police judgment. For the purposes of the Fourth Amendment itself, those proceedings have shepherded courts toward ever-greater reliance on police testimony, in cases featuring increasingly weak evidence and thinly qualified witnesses. Beyond that context, the exemplar of police knowledge emerging from suppression hearings has underwritten the expansion of deference into vagueness analysis, providing judges with direct evidence of the police's criminological insights and modeling such insights as a systematic check on arbitrary action in the field.

It is commonly noted that the criminal justice system lends itself to certain selection biases. Since only those stops leading to probable cause result in arrests and only arrests based on compelling evidence

tend to lead to charges,[478] judges typically encounter Fourth Amendment challenges only where the police's inferences of suspicion are in fact corroborated. In many cases, they encounter such challenges where the police point to the *same* subtle, seemingly innocent behaviors as grounds for suspicion. And this same selection bias filters up to the appellate courts, which see a narrower but equally skewed swath of the police's enforcement practices. Scholars have argued that this posture encourages judges to defer to police witnesses in any given case, disposing them against defendants and retrospectively casting the arresting officer's substantiated inferences as more reasonable.[479]

Yet the selection bias of the suppression hearing does not just benefit officers in each particular case. It also underwrites a cumulative impression of police expertise, based on the courts' aggregate exposure to the police's professional insights. Bearing out the accuracy of police judgments across numerous cases, often featuring similar evidence, suppression hearings corroborate the ability of policing officers to *systematically* infer guilt on the basis of discrete behavioral codes.

First, and briefly: Like police expert witnessing, suppression hearings invite judges to evaluate the comparative value of police experience, deciding at which point officers might be presumed to accumulate criminological insights beyond the scope of lay understanding. They invite judges to do so for not only certified "experts," but for all officers, based on their relative training and experience. Commentators have protested some judges' tendencies to defer to police witnesses at suppression hearings even without scrutinizing their particular qualifications.[480] Yet perhaps this default reflects a preexisting determination that, in the nature of things, even basic training gives all police officers some relative insight into certain categories of crime.

More significantly, suppression hearings provide judges with further, *cumulative* corroboration of the police's expert claims. Repeated in one hearing after another, judges' encounters with productive police seizures create an expanding pool of cases substantiating the police's insight into crime. First, the repetition of productive stops based on police officers' ostensible criminological instincts bears out police expertise as a shared occupational characteristic, linking officers from case to case. Second, because such cases commonly involve similar signs of suspicion — glassine envelopes, for example, or the passing of small objects — they systematically bear out the predictive value of those particular signs, suggesting that crime detection may in fact be

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[478] *See* Bibas, *supra* note 17, at 934 (noting culling of cases through criminal system).

[479] *See* Leong, *supra* note 18, at 436–38; Sklansky, *supra* note 3, at 301 & n.141; Stuntz, *supra* note 18, at 911–13; *see also* Richman, *supra* note 189, at 1046 (discussing structural effects of appellate process on suppression hearings).

[480] *See* Kinports, *supra* note 3, at 762; Richardson, *supra* note 3, at 1159–60.

reduced to certain highly reliable codes, and thus properly seen as a subject of professional expertise. Confronting judges with dozens of cases where the same innocuous detail turns out to be correlated with crime — despite likely being a small and perhaps insignificant part of far broader constellations of suspicion — suppression hearings incline courts to believe that such details themselves carry conclusive power, even in cases presenting far thinner factual patterns. Thus, some courts have come to accept the mere allegation of a glassine envelope exchanged for money,[481] or any "small object[]" exchanged in a known drug neighborhood,[482] or the passing or even possession of tinfoil packets,[483] as establishing probable cause for a narcotics arrest.

If such holdings undersell the complexity of urban crime detection, it is in part because the inherent structure of suppression hearings encourages such simplification. And that same structure substantiates the proposition that policemen as a class share some systematic insight into crime, to be relied on in crafting decision rules more broadly — even where, as in the loitering context, direct confirmation of this insight is no longer forthcoming.[484]

D. Structural Spillover

A wider lens on the courts' confrontations with police knowledge in the midcentury thus illuminates the systemic foundations of judicial deference: both the multiple spheres of the justice system that exposed judges to police insight and the sheer interconnectivity of those spheres. Judges' experiences with police expert witnesses provided a model for processing police knowledge that later invaded the suppression hearing. Suppression hearings, in turn, yielded a pattern of substantiated criminological inferences that vouched for police judgment in the vagueness context.

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[481] *Compare* People v. McRay, 416 N.E.2d 1015, 1020 (N.Y. 1980) (concluding that street exchanges of glassine envelopes "all but constitute per se probable cause," and certainly do so if exchanged for money), *with* People v. Carter, 420 N.Y.S.2d 129, 131 (Crim. Ct. 1979) (insisting on lack of probable cause for passing of a glassine envelope in narcotic-plagued neighborhoods, without additional evidence).

[482] Pennsylvania v. Dunlap, 555 U.S. 964, 964 (2008) (Roberts, C.J., dissenting from denial of certiorari); *see id.* at 964–66 (noting split among lower courts); *see also* Remers v. Superior Court, 470 P.2d 11, 12 (Cal. 1970) (mere possession of tinfoil envelope); Munn v. United States, 283 A.2d 28, 29–30 (D.C. 1971) (passing of tinfoil envelopes).

[483] *Remers*, 470 P.2d at 12; *Munn*, 283 A.2d at 29–30 (passing).

[484] Some scholars have suggested that judges' frequent exposure to police practice leaves them more sensitive to common patterns of police misconduct or exaggeration. *See* Crespo, *supra* note 21, at 2064; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286–87 (1988). In the case of police expertise, such cumulative exposure might have an inverse effect, convincing judges of the *validity* of the police's professional knowledge.

Scholars have long noted that the structural biases and procedural postures of individual judicial proceedings — the evidence of guilt at suppression hearings, or the presence of repeat state players — may skew judges' resolutions of those proceedings.[485] Meanwhile, the past years have seen a growing literature on the phenomenon of doctrinal borrowing, a process by which substantive arguments and precedents developed in one area of law reach beyond their initial confines and invade other spheres.[486]

The courts' burgeoning embrace of police expertise in the mid-twentieth century suggests a slightly different phenomenon: what I term *structural spillover*. This phenomenon does not consider how doctrinal concepts rehearsed in one area of law impact another, nor does it examine how procedural idiosyncrasies impact any one realm of judicial proceedings. Rather, it examines how the *structural idiosyncrasies and procedures* of discrete spheres of the judicial process spawn inadvertent biases and judicial attitudes that then also affect *other arenas*. The procedural logistics of police expert witnessing, for example, by both forcing judges to weigh police knowledge vis-à-vis the public and acclimating them to the idea of policemen as informational authorities, created a climate of receptivity to police expertise that made it easier to accept comparable claims in the Fourth Amendment context. The presence of incriminating evidence at suppression hearings, yielding a robust pattern of substantiated criminological inferences linking officers across numerous cases, encouraged courts to trust the police's judgment even in other contexts lacking such substantiation.

Such structural idiosyncrasies did not simply shape the way judges resolve conflicts within a given proceeding; they also gave rise to broader presumptions that shaped the resolution of related conflicts across the judicial process. And unlike in the case of doctrinal migrations, it was not only the substantive claims vetted in each context that bled into the next, but also the largely incidental epistemic effects of that encounter. Contrary to doctrinal borrowing, after all, where judges in the best cases deliberately invoke prior precedents to guide their reasoning,[487] structural biases tend to be inadvertent through and through. Such instances of migration are truly cases of spillover: incidental if not accidental transportations of implicit biases from one judicial arena to another.

The phenomenon of structural spillover certainly need not be limited to the police. Presumably it may arise whenever judges encounter

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[485] *See* sources cited *supra* note 479.

[486] *See supra* note 19.

[487] Tebbe & Tsai, *supra* note 19, at 464.

a group of actors in multiple contexts, at least some of which skew their impressions of the group. It might thus pertain to, say, medical professionals who appear both as expert witnesses and as litigants in malpractice cases. Any such additional examples will necessarily be fact-specific, and are worth examining in their own right. In the meantime, the history of police expertise provides a useful first case: an instance where judges' unique, diverse encounters with the police consistently pushed them toward a deeply contested paradigm of police knowledge.

IV. THE LIMITS OF JUDICIAL REASONING ABOUT POLICE KNOWLEDGE

What can we make of this broad history? Beginning in the 1950s, police officers' criminological insight bolstered police authority in multiple areas of the justice system, from evidence to criminal procedure to the substantive criminal law. And it did so in large part through a process of spillover, each judicial encounter with police knowledge modeling the next.

At many points, this history might seem interesting but not particularly troubling. Certifying police "experts" on the witness stand, for example, gives officers a fairly limited grant of institutional authority that may genuinely educate factfinders at trial. At suppression hearings, too, it might often make sense to recognize an officer's unique insights into criminal conduct, especially in today's age of superior training.[488]

Yet the broad, interconnected history of police expertise also reveals two underrecognized facts about judicial deference, which should concern even those who embrace police discretion in other contexts.

First, that history reveals the troubling scope of deference, spilling past evidence and criminal procedure and into the analysis of substantive laws. Expanding the promise of police expertise in terms of not only its doctrinal impact, but also its nature — from a personal trait bolstering individual police actions to a universal fact buttressing legislative enactments — this shift exacerbates the shortcomings of police judgment in the Fourth Amendment context. It deepens the costs of officer discretion. It undercuts significant checks on police errors or abuses. And it raises novel structural concerns about the role of police judgment in setting criminal policy.

Second, that history illuminates the foundations of judicial deference, as the result of not simply the courts' reasoned deliberation about police competence, but also numerous structural presumptions

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[488] *But see* Stoughton, *supra* note 151, at 455–57 (reiterating midcentury criticisms of police training programs regarding contemporary departments).

and aggregate biases refracted through the judicial process. These spillover effects compel greater scrutiny of judicial reasoning about the police, raising intrinsic concerns about the legitimacy of judicial assessments of police knowledge and suggesting that judges are, in practice, systemically disposed to overdefer to the police. Intersecting with a burgeoning debate about the courts' capacity for systemic reasoning about police practices,[489] this trend adds urgency to scholarly calls for greater empiricism in judicial assessments of the police — even as it identifies certain persisting biases to be minded in implementing such correctives.

A. The Troubling Expansion of Police Expertise

First, there is the expansion of judicial deference to police expertise past suppression hearings, into the analysis of substantive criminal laws.

In the Fourth Amendment context, the merits of deference to police expertise have been roundly debated. Scholars certainly acknowledge that police officers may develop occupational insights into crime,[490] and some have even supported the courts' accommodation of those insights.[491] As in the police rulemaking movement spearheaded by Professor Kenneth Culp Davis in the early 1970s[492] — and revived more recently by a line of "New Administrativist" scholars[493] — commentators have even suggested that police executives' unique experience with broad questions of police management entitles them to some constructive authority over matters of criminal policy.[494]

Yet most research into police practices since the 1960s has been deeply critical of police expertise, both as an empirical matter and as a factor in the courts' constitutional analysis. Critics insist that defer-

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489 *See infra* p. 2079.

490 Even critics of deference have agreed on that much. *E.g.*, Richardson, *supra* note 3, at 1156; O'Brien, *supra* note 7, at 1179 & n.106.

491 *See* sources cited *supra* note 4.

492 *See* Friedman & Ponomarenko, *supra* note 6, at 1861–62; *see also, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 80–96 (1969); KENNETH CULP DAVIS, POLICE DISCRETION 98–120 (1975) [hereinafter DAVIS, POLICE DISCRETION]; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423–28 (1974); Goldstein, *supra* note 98, at 1130–34; Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 677–78 (1972).

493 *See* Crespo, *supra* note 21, at 2059–60, 2059 n.37 (coining term); *see also, e.g.*, Friedman & Ponomarenko, *supra* note 6, at 1832–36; Renan, *supra* note 21, at 1075–76; Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 117–18 (2016).

494 *See* Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 80 (1976) (characterizing police rulemaking as giving executives authority over legislative policy questions). In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court itself looked to high-level police policy on necessary force in adjudicating a Fourth Amendment claim. *Id.* at 18–19.

ence gives officers free reign to harass citizens on the streets, removing democratic accountability from our most common point of interaction with the state.[495] They argue that it abdicates the judiciary's duty to uphold constitutional rights, allowing policemen to define the legal limits of a search.[496] Most commonly, they question the *merits* of police judgment, emphasizing the absence of hard evidence that officers develop any systematic codes for crime.[497] To the extent that police do rely on distinct patterns in evaluating suspects — what Professors Jeffrey Fagan and Amanda Geller have termed "narratives of suspicion"[498] — research suggests that their accuracy rates are quite low.[499] And even assuming that police experience yields some criminological knowledge, scholars insist that it is offset if not overwhelmed by countervailing biases in the police profession, including excess suspicion, overzealousness in the pursuit of crime,[500] and pervasive racial prejudice leading to disproportionate enforcement against minorities.[501]

The expansion of police expertise into vagueness analysis deepens these critiques, tying police discretion to a more intrusive, less flexible legal regime. It also raises novel structural concerns, undermining the vagueness doctrine's core objective of preserving legislative accountability over criminal policy. In light of these limitations, even judges who embrace police expertise in the Fourth Amendment context must recognize the extent to which substantive laws salvaged on that premise strain any rational claims of police competence.

1. Investigative v. Penal Authority. — First, judicial deference to the police in the vagueness doctrine deepens the human costs of police discretion. Judges who invoke police officers' criminological insight as a supplement to underspecified statutory text do not simply defend case-specific investigative tactics; they uphold broad statutory schemes, expanding the reach of the penal sanction. Going well be-

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[495] *See, e.g.*, Friedman & Ponomarenko, *supra* note 6, at 1854–55; Miller, *supra* note 3, at 542, 554–55.

[496] *See, e.g.*, Bacigal, *supra* note 7, at 683; Thomas R. Fulford, Note, *Writing Scripts for Silent Movies: How Officer Experience and High-Crime Areas Turn Innocuous Behavior into Criminal Conduct*, 45 SUFFOLK U. L. REV. 497, 497–98 (2012); O'Brien, *supra* note 7, at 1178–81.

[497] *See, e.g.*, Ginsburg, *supra* note 199, at 81; Maclin, *supra* note 5, at 1306 (noting lack of "objective evidence"); Miller, *supra* note 5, at 214 (arguing that police expertise is "legal fiction"); Richardson, *supra* note 3, at 1159 (criticizing trend of deference without evidence of skill).

[498] Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 62 (2015).

[499] *Id.* at 86–87; *see also* Taslitz, *supra* note 5, at 10–11 (noting high error rate).

[500] *See, e.g.*, James R. Acker, *Social Sciences and the Criminal Law: The Fourth Amendment, Probable Cause, and Reasonable Suspicion*, 23 CRIM. L. BULL. 49, 57–58 (1987); Kinports, *supra* note 3, at 762–63.

[501] *See, e.g.*, Maclin, *supra* note 5, at 1282; Richardson, *supra* note 5, at 268; Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 334–38 (1994); *cf.* Harris, *supra* note 200, at 677.

yond the police rulemaking movement, which invited high-level police executives to set the priorities of urban law enforcement,[502] such courts effectively entrust any street officer with defining the limits of criminal guilt.

This expansion tethers the officer's controversial judgment to a legal regime that is simultaneously more intrusive and less forgiving. Unlike *Terry* stops, which submit individuals only to brief detentions, substantive laws fleshed out by the police's professional judgment open individuals to the threat of arrest, prosecution, and even conviction. The risks of police misjudgment that might be tolerable in the former context, which balances a significant tool of public safety against a minimal intrusion,[503] become far more troubling attending the heavier burden of an arrest.[504]

Moreover, unlike the Fourth Amendment's rules for search and seizure, substantive criminal laws make little room for the intrinsic possibility of error. As has been well recognized, the Fourth Amendment deliberately absorbs a certain level of misjudgment in the field, opting for protean standards over bright lines and featuring several exceptions for "good faith" errors.[505] Police biases that might seem acceptable within this context have no place in determining substantive standards of criminal guilt, which are held — not least, by the vagueness doctrine itself — to a far higher standard of precision.

2. Specific v. General Facts. — Second, the expansion of police expertise into vagueness analysis broadens the generality of that presumption, from the personal characteristic of individual officers to a broad assumption about the police profession. Both in the evidentiary context and at suppression hearings, after all, judicial recognition of police knowledge theoretically depends on the qualifications of individual witnesses, many of whom boast extensive training and experience. Yet in the vagueness context, judges invoke police expertise to bolster criminal statutes writ large, preserving them as a source of authority for *all* officers on the street — regardless of their professional background. Indeed, most courts neither assume nor demand that ar-

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[502] *See* Renan, *supra* note 21, at 1047–48; *see also* DAVIS, POLICE DISCRETION, *supra* note 492, at 2.

[503] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (authorizing "limited search").

[504] *See* Dix, *supra* note 254, at 913 (contrasting balance of interests in *Terry* stops and substantive laws); E. Martin Estrada, *Criminalizing Silence:* Hiibel *and the Continuing Expansion of the* Terry *Doctrine*, 49 ST. LOUIS U. L.J. 279, 284–88 (2005) (criticizing reasonable suspicion standard in light of increasingly intrusive nature of contemporary field stops).

[505] *See* Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's* Miranda *and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1498–99 (2010) (discussing tolerance of "reasonable" errors); Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1134 (2007) (noting that probable cause allows "some room for error"); *see also id.* at 1134 n.189 (listing cases discussing flexibility).

rests be made by officers with particular training or experience in the relevant field.[506]

This universalization of deference may be the natural culmination of the courts' increasing reliance on training as a source of police knowledge. If, after all, even basic training gives officers *some* unique insight into crime, presumably any officer on the streets today should qualify.

Yet that shift also reflects an ancillary slippage in judicial reasoning about the police: an extrapolation of general facts from limited and highly selective case-specific data. At no point in these years did judges encounter formal evidence establishing the systemic competence of the police departments in their jurisdictions. Considering the vast variation in training and reform among those units, indeed, they could not have done so. Rather, judges at merits trials and at suppression hearings encountered evidence of individual officers' professional insights, and drew from them a broad presumption of expertise that they then applied to the police profession as a whole. That is, judges took *adjudicative facts* established within particular cases, specific to the resolution of those disputes, and inflated them into *universal presumptions* of police competence used to ground legal rules from case to case.[507] Scholars have warned of the dangers of slippages from adjudicative to legislative factfinding, which not only veer courts into policymaking but also risk falsely universalizing nonrepresentative data.[508] Certainly, the universalization of police expertise glossed over some very real variations in training, extending a decision rule based on an idealized vision of police judgment to all officers on the streets.[509]

This expansion of police expertise undercuts a core safety net against overdeference in the Fourth Amendment context. Despite objections that courts defer presumptively even to officers with meager

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[506] For example, after one New York court read *Smith*'s emphasis on expertise to require evidence of an officer's relevant experience for prostitution-loitering indictments, People v. Denise L., 608 N.Y.S.2d 40, 42–43 (Crim. Ct. 1994), others rejected that rule, People v. Jackson, 677 N.Y.S.2d 695, 698–99 (Crim. Ct. 1998) (citing *People v. Koss*, 580 N.Y.S.2d 629 (Crim. Ct. 1992), for the proposition that officer training and experience are two of the many factors that a court may, but is not required to, consider).

[507] *See* Davis, *supra* note 20, at 402–03 (discussing the distinction between adjudicative and legislative factfinding). Professors John Monahan and Laurens Walker have developed a similar distinction between evidence treated as "social fact," which is particular to cases and nonbinding in other litigation, and "social authority," which may be used to create decision rules and cited in future cases. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988).

[508] *See* Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1601–02 (1987).

[509] *Cf.* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 849–51 (2014) (arguing that courts frequently rely on unsubstantiated legislative facts about police work).

credentials,[510] judicial reliance on police knowledge at suppression hearings has always been highly fact-specific. Indeed, courts have withheld deference from particularly underqualified officers, throwing out arrests by novices where they might have yielded to "experts" on the same facts.[511] Yet under the vagueness doctrine, judges who invoke police expertise to uphold underspecified laws leave no room for individual exceptions, authorizing all police officers to make stops and arrests under statutes lacking firm guidelines for their discretion. Relying on police expertise to salvage substantive laws, in short, broadens the police's power on the streets without any inbuilt checks on individual judgment.[512]

3. Executive v. Legislative Actions. — Finally, the expansion of police expertise into vagueness analysis shifts the *beneficiaries* of that presumption, from law enforcement agents to legislators themselves. Judges who invoke the police's professional insights as an extrinsic check on the risk of arbitrary enforcement lower the threshold of statutory specificity demanded of legislators under the vagueness doctrine: the extent to which lawmakers must provide textual guidance to restrict police discretion. So understood, the promise of police expertise does not simply expand the authority of police officers, offering them greater leeway against constitutional scrutiny in the field. It also expands the discretion of lawmakers, relaxing their constitutional duties of statutory drafting. The presumption of police expertise functions as something of a rule of construction, urging courts to resolve close calls in statutory language in the legislature's favor on the assumption that police officers' professional insights will supplement the text.

Relying on police knowledge to stave off statutory deficiencies might not necessarily seem problematic. After all, vagueness analysis has always recognized that policing requires some exercise of discretion, frequently coming down to a judgment about what *types* of discretionary decisions may properly be delegated to officers[513] — one

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[510] *See* Kinports, *supra* note 3, at 762; Richardson, *supra* note 3, at 1159.

[511] *See, e.g.*, Howard v. State, 645 So. 2d 156, 158 (Fla. Dist. Ct. App. 1994); People v. Ditman, 277 N.Y.S.2d 620, 621–22 (App. Div. 1966). In modern practice, courts split on this issue, sometimes even within the same jurisdiction. *Compare, e.g.*, Thomas v. Commonwealth, No. 2008-CA-000737-MR, 2009 WL 1348875, at *5 (Ky. Ct. App. May 15, 2009), Brown v. State, 203 P.3d 842, 846–47 (Mont. 2009) (holding that finding of reasonable suspicion on same facts varies based on relative experience of officers), *and* Curtis v. State, 238 S.W.3d 376, 380 (Tex. Crim. App. 2007), *with* State v. Cybulski, 204 P.3d 7, 12 (Mont. 2009) (holding that determination depends on objective facts as assessed by hypothetical experienced officer); Dorrough v. Commonwealth, No. 1759-09-1, 2010 WL 2482334, at *4 n.9 (Va. Ct. App. June 22, 2010).

[512] Courts may of course still give differential grants of deference in evaluating the reasonableness of an arrest or stop under the Fourth Amendment, but this does not resolve the problem of arbitrary enforcement under the Fifth Amendment.

[513] *See* Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 497–98 (1994).

that weighs both the public impact of those decisions and the extent to which they fall within the police's competence. Statutes inviting police discretion over which activities disrupt free passage are permissible;[514] those weighing which street activities are "annoying" are not.[515] Within this framework, the officer's presumptive expertise over certain types of criminal conduct might reasonably expand our tolerance of looser statutes, bringing them within his competence alongside public disruption or traffic safety. Courts that emphasize police training to uphold laws against the sale of drug paraphernalia[516] or the display of gang signs,[517] for example, may reasonably trust police experience to facilitate reliable enforcement.

Yet many statutes salvaged by the promise of police expertise are far broader in their phrasing, and they encompass far less codified behavior. And here, judicial reliance on police judgment to relax the legislature's duties of statutory drafting is more troubling.

First, courts must recognize that the police's professional knowledge, seen even in its best light, is poorly suited to the task of filling gaps in penal statutes. Granting that experienced officers acquire some unique insights into crime, those insights are a matter of factual interpretation: contextualizing subtle clues to infer criminal activity from seemingly innocuous behavior. By contrast, underspecified legal provisions vest officers with authority over questions of *policy*: which conduct falling under no more specific prohibition than the challenged law itself — sitting on the steps at a late hour,[518] or knocking and looking through a residential window[519] — is nevertheless sufficiently inimical to the public welfare to demand state intervention. Those decisions involve a complex weighing of interests surrounding the use of state power: the elimination of undesirable behaviors, on the one hand, against the expenditure of state resources and intrusion on individual rights, on the other.

Courts have never suggested that the police have any unique competence over such policy questions.[520] To the contrary, such equitable balancing has long been considered a particular weakness of the police. Beyond fact-specific determinations like probable cause, the

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514 Colten v. Kentucky, 407 U.S. 104, 110 (1972).

515 Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

516 Mid-Atl. Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 846–47 (D. Md. 1980).

517 Martinez v. State, 323 S.W.3d 493, 507–08 (Tex. Crim. App. 2010).

518 Miller v. State, 922 A.2d 1158, 1162–63 (Del. 2007).

519 United States v. Kopp, No. CR-08-153-BLG, 2010 WL 2106472, at *4 (D. Mont. May 24, 2010).

520 *See* Friedman & Ponomarenko, *supra* note 6, at 1890–91 (arguing that lax standards of Fourth Amendment reasonableness empower officers to make policy choices outside their competence about distributive consequences of laws); Miller, *supra* note 3, at 521–22 (making similar argument).

Supreme Court has repeatedly urged simplicity in rules governing criminal procedure precisely due to police officers' "limited time and expertise to reflect on and balance the social and individual interests involved."[521] Focusing on drawing factual inferences from complex evidentiary scenes, the police's experience hardly prepares them for the legislature's task of weighing public interests.

More fundamentally, courts must realize that buttressing legislative pronouncements through the promise of police expertise only exacerbates the structural concerns underlying vagueness analysis to begin with. Beyond the risk of insufficient notice[522] or even arbitrary enforcement, a core impulse driving the vagueness doctrine is the separation of powers problem inherent in underspecified statutes: the fear that vague laws abdicate the legislature's policy-setting duties either to the courts[523] or to executive agents like the police,[524] who are neither popularly elected nor charged with setting criminal policy, nor necessarily in a position to explain their judgments to the public. Whatever the uncertain status of the nondelegation principle vis-à-vis administrative agencies,[525] vagueness continues to preserve that principle in the criminal law, at least as it applies to the police. Underspecified statutes obviate this principle, vesting the police with the authority to fill in significant gaps in statutory language and siphoning away the legislature's rightful role in defining criminal policy.[526] In doing so, they push state power past its rightful boundaries, betraying the constitutional judgment that conduct that cannot be defined with enough precision by the legislature simply cannot be prohibited consistent with due process.

The promise of police expertise cannot resolve these inherent democratic deficiencies. If anything, it deepens them. Courts that rely on police competence to lower the legislature's policy-setting responsibilities effectively use the professional advances of police departments to redistribute authority over the penal system from the legislature to the executive. They take institutional reforms in the hands of the police, adopted for their own internal purposes of bolstering efficiency and

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[521] Colorado v. Bertine, 479 U.S. 367, 375 (1987) (quoting Illinois v. Lafayette, 462 U.S. 640, 648 (1983)).

[522] *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 206–07 (1985) (discussing limitations of notice as motivating rationale).

[523] *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284–85 (2003); Jeffries, *supra* note 522, at 202.

[524] *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1518 (2007); *cf.* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 41–42 (1996). These delegation concerns apply to a lesser degree to *Terry*'s own expansion of police authority on the streets. *See* Friedman & Ponomarenko, *supra* note 6, at 1893–94; Miller, *supra* note 3, at 542.

[525] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

[526] *See* Stuntz, *supra* note 446, at 509.

public status, to demarcate the authority of the legislature. In this sense, importing police expertise into vagueness analysis does not simply expand the reach of a deeply controversial premise. It imports a factual judgment about police competence into a structural debate about democratic governance.

The expansion of judicial deference into the substantive criminal law is thus not just an underrecognized phenomenon. It is also a deeply troubling one. Considering the very different equities of expanding police discretion in this context — the greater burden on citizens, the lack of individualized assessments, the encroachment on the legislature's accountability for criminal policy — even judges who defend police expertise in Fourth Amendment analysis should rethink its use in this other sphere.[527]

B. Systemic Bias in Judicial Reasoning About Police

Beyond the scope of judicial deference, however, is the matter of process: how precisely the promise of police expertise wound its way through the courts in the twentieth century. Proceeding through multiple junctures of the criminal system, that promise pervaded the courts in large part through a series of spillover effects, inclining judges toward deference through not only the content of the courts' encounters with police witnesses, but also the many *structural* biases that shape those encounters.

These spillover effects call into question the intrinsic legitimacy of judicial assessments of police practices. Not just a product of reasoned deliberation, reflecting rational inferences drawn from reliable evidence,[528] judicial deference to police judgment was buoyed by a series of interlocking biases pouring across multiple sites of the judicial process. In practice, those biases combined to make many judges prone to systemically overvalue police knowledge.

The deeply interconnected origins of police expertise shed light on a growing debate about judicial oversight of the police: the extent to which judges have the capacity or are motivated to reason systemically about the police practices they encounter in individual cases. The longstanding tendency of courts to aggregate their discrete encounters with police knowledge into broader, often-distorted presumptions

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[527] At the very least, judges should address these equities head-on, providing some justification for the expanding scope and nature of their appraisals of police competence. *See* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 743–44 (2000) (emphasizing value of empiricism and transparency to judicial decisionmaking).

[528] *See* Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1672–77 (1998) (emphasizing significance of reasoned deliberation to legitimate decisionmaking).

about police competence adds urgency to recent demands for presenting courts with more rigorous data about the police — even as it suggests persisting blind spots that might skew even more empirical data.

1. Analytic Biases. — A full assessment of the repercussions of structural spillover is beyond the scope of this Article. Doubtless, many such instances are inevitable, a symptom of the judicial process just as the initial bias is a symptom of each sphere. Some might have an entirely benign effect. Nevertheless, the courts' uptake of police expertise demonstrates several potential dangers of this phenomenon. These may be identified as *distortion*, *multiplication and aggregation of error*, and *incongruence*.

First, spillover effects necessarily introduce distortions into judicial reasoning about the police. By definition, such analytic biases are not rational inferences drawn from reasoned consideration of the facts, but incidental and sometimes irrational reactions to the available data. Judges evaluating expert witnesses at trial, for example, did not deliberately grow accustomed to police officers as informational authorities, nor did they rationally conclude that the insight of individual witnesses reflected a common police characteristic.[529] Judges at suppression hearings did not decide, based on formal evidence establishing the proposition, that certain street behaviors could be trusted as universal signs of crime.[530] Nor were any of these inferences deliberately imported from one sphere to another. Such spillover effects suggest that judicial assessments of police conduct were shot through with incidental biases.

Second, spillover effects facilitate the multiplication and aggregation of errors in judicial reasoning about the police, compounding biases in any one sphere by replicating them in others. Most basically, spillover results in the proliferation of unsupported presumptions, as beliefs produced in one sphere of the judicial system invade and multiply in others. Thus, the suppression hearing's bias toward corroboration not only urged deference to the police's controversial inferences in Fourth Amendment cases, but also established a pattern of reliable police judgment that courts later invoked in their vagueness analysis. The trial's bias toward the admission of expert evidence not only encouraged the certification of police witnesses, but also invaded treatments of experienced officers at the suppression stage.

At the same time, spillover facilitates the aggregation of error in judicial reasoning, corroborating structural biases born in separate arenas. These distinct analytic effects might, in some cases, conflict or even neutralize each other. Yet in the case of police knowledge, judg-

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[529] *See supra* pp. 2068–70.

[530] *See supra* p. 2065.

es' various sites of exposure to police knowledge — from testimony at trials, to corroborated police inferences at suppression hearings, to evidence of police reform present outside the courtroom — combined to confirm the impression that the police are privy to widespread and reliable criminological insight. More than simply pouring over into other spheres, these biases aggregated to make their cumulative impression of police expertise all the stronger.

Finally, there is the risk of incongruence: the threat that presumptions that may be harmless or even reasonable in one context will become more troublesome when transplanted into another.[531] Like substantive doctrine, structural biases are calibrated to particular legal contexts, with their own limiting presumptions and procedural checks. Transferring those biases beyond their initial contexts removes such mitigating influences, making their effects all the more dangerous. The expansion of police expertise into the vagueness doctrine bears out this concern, importing a judicial default toward deference from a fact-specific Fourth Amendment framework into the bright-line analysis of substantive laws. Similarly, the evidentiary default toward recognizing "expert" witnesses at trial may be mitigated by the jury's invitation to discount unhelpful testimony, but less so at suppression hearings lacking such built-in steps. The impact of spillover, in short, heightens the impact of the courts' structural biases by removing them from contexts designed to mitigate their effects.

2. Practical Effects. — Taken together, these various distortions pervaded judicial assessments of the police in the midcentury, encouraging a posture of deference built not simply on careful deliberation about police practice but also certain biases exaggerated through the judicial process. From their exposure to police reform to their assessments of expert witnesses to their experiences at suppression hearings, judges' diverse interactions with police officers consistently inflated the apparent value of police knowledge.

Such distortive effects might not seem especially urgent so long as the courts' ultimate rules are good ones — that is, if judicial accommodation of police judgment reasonably matches our assessment of police reality today. Yet even if deference may be defensible in many cases, the spillover effects undergirding that trend remain troubling on several grounds.

First, there is the intrinsic legitimacy concern raised by the diffuse foundations of police expertise. To the extent that spillover effects played any meaningful role in ushering police knowledge through the

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[531] Scholars have identified such potential incongruence as a core danger of doctrinal borrowing. *See* Laurin, *supra* note 14, at 673; Tebbe & Tsai, *supra* note 19, at 495.

courts, that process offends our most basic values of due process and reasoned deliberation.[532]

More troublingly, the history above strongly suggests that these structural biases in fact routinely pushed courts to *overdefer* to police judgment. From suppression hearings to the analysis of vague laws, judges have repeatedly embraced police judgment in scenarios that raise significant empirical or doctrinal concerns, the repercussions of which they neither address nor attempt to justify. The clearest illustration is the migration of deference from criminal procedure into the substantive criminal law, a process that inflated police expertise from an individual trait to a universal presumption expanding the legislature's discretion — all without a word on the drastically different nature of "expertise" now at play. But there are also other examples: judges certifying officers as "expert witnesses" at suppression hearings, or embracing police witnesses as experts even with meager professional experience.[533] From the courts' uninterrogated universalization of police expertise to their habit of recognizing police testimony as "expert" evidence to their often-idealized faith in academy training, such generous grants of authority overlap with the unique structural biases of the criminal process.

3. The Possibilities of Aggregate Judicial Reasoning. — A comprehensive account of how to begin correcting these spillover effects would require a separate article. In the meantime, simply recognizing the justice system's refracting biases toward police knowledge illuminates one significant debate about judicial oversight of the police: the relative ability and inclination of courts to draw on systemic facts about police practices.

Recent years have witnessed growing concerns over the capacity of judges who encounter police tactics through individual adjudications to reason more systemically about criminal justice. Some scholars have urged the introduction of statistical evidence, such as an officer's "hit rates," to counteract the biasing effect of incriminating evidence at suppression hearings.[534] Others have concluded that the criminal jus-

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[532] *See* Brewer, *supra* note 528, at 1676–77; *see also* Lee Epstein, Barry Friedman & Geoffrey R. Stone, *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1002 (2015) (urging empiricism in constitutional analysis); Meares & Harcourt, *supra* note 527, at 735, 743–44 (urging transparency in legal reasoning).

[533] Even today, judges routinely embrace police "insights" that either rub against the available empirical research, *see* Crespo, *supra* note 21, at 2081–82 (discussing unsupported police testimony on "high crime" neighborhoods), or strain any plausible claims of systematic police knowledge, *e.g.*, Cost v. Commonwealth, 657 S.E.2d 505, 508–09 (Va. 2008) (reversing trial and appellate holdings that officer could infer based on "plain feel," *id.* at 508, that capsules inside defendant's pocket were heroin).

[534] *See* Miller, *supra* note 5, at 254; Minzner, *supra* note 21, at 920–21; Richardson, *supra* note 5, at 287. Scholarship calling for greater empiricism in Fourth Amendment analysis more broadly includes Epstein, Friedman & Stone, *supra* note 532, at 1002; Tracey L. Meares, *Three Objections*

tice system's transactional nature simply blinds courts to broader patterns of police conduct, demanding regulation through more administrative channels.[535] More optimistically, Professor Andrew Crespo has recently defended the latent capacity of courts to engage in systemic factfinding about the police,[536] suggesting that courts draw on their digital inventories of police records to synthesize broad patterns that might reveal contradictions in police testimony, or challenge the predictive value of ostensible criminal signs.[537] The presumption is that such systemic reasoning would present a novel analytic tool; even those who question Crespo's proposal assume that courts have thus far failed to learn from their aggregate encounters with the police.[538]

Yet the process underlying the expansion of police expertise tells a different story. That process suggests that courts have not failed to reason systemically about police practices. To the contrary, judges routinely engage in a casual form of systemic factfinding, synthesizing their discrete encounters with officers in multiple sites of the justice system into broader assumptions about police competence. They do so across individual encounters within a given proceeding — aggregating suppression hearings to conclude that certain codes, such as glassine envelopes, are universal predictors of crime.[539] And they do so across discrete spheres of the judicial process — drawing on suppression hearings to infer a broader principle of police expertise that then inflects vagueness analysis.[540]

The problem is that this casual, often-inadvertent mode of systemic reasoning lends itself by default to numerous biases and distortions, which frequently incline courts in favor of the police. Far from highlighting contradictions[541] or throwing into relief the prevalence of police abuses,[542] as scholars have suggested, the courts' repetitive encounters with police testimony as easily bolster judicial faith in police competence. In the case of police expertise, the cumulative effects of

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to the Use of Empiricism in Criminal Law and Procedure — and Three Answers, 2002 U. ILL. L. REV. 851, 856; and Meares & Harcourt, *supra* note 527, at 735.

535 *See* Crespo, *supra* note 21, at 2057–58 (reviewing relevant literature); *see also, e.g.*, Friedman & Ponomarenko, *supra* note 6, at 1832, 1865; Renan, *supra* note 21, at 1056; Slobogin, *supra* note 493, at 120–21. *But see* Meltzer, *supra* note 484, at 286–87 (suggesting that courts' aggregate experiences with criminal procedure cases might make them more sensitive to police misconduct).

536 *See* Crespo, *supra* note 21, at 2052–53.

537 *Id.* at 2070–85.

538 *See, e.g.*, Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 386 (2016) (questioning whether judges "have taken advantage of [their] opportunity" to productively aggregate facts).

539 *See supra* notes 481–482 and accompanying text.

540 *See, e.g.*, *supra* notes 387–391 and accompanying text.

541 Crespo, *supra* note 21, at 2073–85.

542 Meltzer, *supra* note 484, at 286–87; *see also* Crespo, *supra* note 21, at 2064.

judges' many encounters with the police combined to give courts an unusual regard for the reliability of the police's professional insight.

The risk of this type of impressionistic, deeply biased form of aggregation adds urgency to recent calls for greater empiricism in litigation over police practices. More than just filling gaps created by the courts' transactional exposure to the police, more rigorous empirical data might help counteract the deeply distortive aggregation that has long undergirded judicial reasoning about police testimony. That risk of distortion also broadens our view of the *types* of data that must be presented to the courts. The judicial trend toward generalizing police knowledge, for example, underscores the importance of producing stronger empirics about not only individual officers, but also police departments more broadly. Crespo has suggested uncovering scripted patterns of police testimony, or obtaining the success rates associated with warrants in a district; also useful might be hit rates for investigative stops across a precinct,[543] or data on the percentage of officers who testify as "experts" in their field. Similarly, the interconnected nature of structural spillover suggests that redressing bias toward the police in any one context may require correcting judges' misimpressions in other fields — tempering deference at suppression hearings, for example, both with more realistic data about the police's street tactics and with better statistics about their "expert" certification at trial.

At the same time, the history above highlights the persisting risks of distortion in judicial assessments of police practices — even if based on more empirical data.[544] To the extent that some of the spillover effects that ushered police expertise through the judicial process were less informational than *attitudinal* — evidentiary practices inviting judges to recognize officers' relative insight, for example, or simply habituating judges to see officers in the role of "expert" — these same slippages may well inflect judicial assessments of more rigorous statistical data. The lingering impact of such attitudes must be accounted for in implementing, and must temper our reliance on, any empirical correctives.

In the meantime, it is a good first step for the courts, and for us, simply to acknowledge the interconnected process that fueled the expansion of police expertise through the criminal justice system. More rigorous oversight of the police will remain elusive until we recognize the extent to which the courts' many diverse encounters with officers

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[543] *See* Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181 (2017) (assessing universal hit-rates for investigative stops by New York police); Minzner, *supra* note 21, at 920–21.

[544] *See* Crespo, *supra* note 21, at 2112 (acknowledging risk of judges' ideological pressures in favor of the prosecution); Levin, *supra* note 538, at 382 (noting risk that systemic factfinding by courts will reflect institutional and ideological bias).

shape their regulation of police practices — both through those encounters' substantive content and their more subtle systemic effects.

CONCLUSION

The judicial presumption of police expertise has pervaded our legal system more broadly than typically imagined. Echoing claims by the police professionalization movement, judges beginning in the 1950s invoked officers' criminological insights to bolster police authority in multiple areas of the law. That process began in the courts' evidentiary practices, where judges welcomed policemen as professional "experts" on crime. It then migrated into criminal procedure, where police expertise underwrote both a newly deferential approach to probable cause and the *Terry* stop. And it culminated, finally, in the criminal law itself, where the police officer's expert judgment helped judges defend penal statutes from vagueness claims.

Complicating more instrumental accounts, this broader history suggests that judges in the mid-twentieth century in fact came to understand police work as an occupation producing rare and reliable "expert" insight. And it locates at least one explanation for that shift in the particular structures and interconnections of the courts' many encounters with police knowledge. From merits trials to suppression hearings to professional activities outside the courtroom, judges' diverse interactions with the police in the midcentury inclined them to credit officers' expert claims — not only through their substantive content but also through their many structural biases toward the police. This fuller account of police expertise heightens the stakes of an already controversial phenomenon, challenging both the scope of judicial deference to police knowledge and the integrity of that presumption as a principle of constitutional analysis.