

Fall 6-1-2005

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Recommended Citation

Jermoe H Skolnick, Democratic Policing Confronts Terror and Protest, 33 Syracuse J. Int'l L. & Com. 191 (2005)

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DEMOCRATIC POLICING CONFRONTS TERROR AND PROTEST

Jerome H. Skolnick*

The idea of legal evolution to a rule of law necessarily implies restraints upon the coercive power of the state.¹ Whatever we might mean by coercive state power, surely the institution of the police embodies the essence of such power. Democratic policing has long been a guiding concern in studies of American policing; and it is a major goal of nations in transition to democracy, especially those in Eastern Europe.² By those seeking change, democratic policing must be concerned with the rule of law as well as with crime and public order—and terrorism.

As police scholar Herman Goldstein argued in 1977, when crime was menacing America's cities, "a concern for preserving and extending democratic values [should] be made the ethos of professional police work." He maintained this commitment, partly because it exemplifies the differences between democratic and totalitarian policing, and, foreshadowing his later work on "problem-oriented" policing, it is the conduit to community respect and cooperation.³ David Alan Sklansky offers a rich, recent discussion of the nuances of the concept of democracy and the implications for policing of differing interpretations of democracy.⁴ This article is intended neither as an exposition of democratic theory nor the implications of Constitutional jurisprudence for policing in general. Rather, in it I intend to illustrate, using the New York City Police Department as an example, how a democratic police department has responded to terrorist threats following two major attacks to New York City's World Trade Center; and the stance it has taken to policing anti-war protest since the United States invasion of

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1. RONALD DWORIN, *LAW'S EMPIRE* 96 (1986); PHILIP SELZNICK, PHILLIPE NONET, & HOWARD M. VOLLMER, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 11 (1969).

2. See DVD: *Police in Transition* (Hungarian Helsinki Committee 1998) (on file with author).

3. HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 13 (1977).

4. See David A. Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699 (2005).

Iraq.

Following the dreadful terrorist attack on New York City's World Trade Center on September 11, 2001,⁵ the New York City Police Department (NYPD) was required to address three issues beyond its ordinary anti-crime and law enforcement duties. The first was to prevent future terrorist attacks; the second was to be capable of instituting appropriate public health and safety measures in the event of a terrorist attack; the third was addressing anti-war protest, especially when the President and his Republican party, were scheduled to hold their Presidential election convention in New York City in 2004. These responsibilities: anti-terror prevention; maximizing public health and safety following an attack; and policing anti-war protest, were essentially add-ons to the day-to-day and more familiar police public safety responsibilities of the NYPD.

I. POLICE WORK

In their day-to-day patrolling, police are called upon to employ "non-negotiably coercive force."⁶ I shall call this the *peacekeeper paradigm*. Most empirical research on police focuses on such peacekeeping, and stresses styles of street policing.⁷ Peacekeepers deal mainly with minor crimes, the punishment for which is famously "the process."⁸ Constitutional law addresses and shapes these practices, but students of police have shown that they enjoy wide discretion about whom they stop, search and arrest while peacekeeping.⁹ Sometimes, such discretion is abused, as in "racial profiling."¹⁰

Constitutional law also regulates and shapes police felony investigative practices—surveillance, searching, taking custody of persons and property, and questioning—in short, the work of detectives. Let's call this the *detection-prosecution paradigm*.

5. See generally Michiko Kakutani, *Struggling to Find Words for a Horror Beyond Words*, N.Y. TIMES, Sept. 13, 2001, at E1.

6. EGON BITTNER, *THE FUNCTIONS OF POLICE IN MODERN SOCIETY* 46 (Oelgeschlager, Gunn & Hain, Publishers 1980) (1970).

7. See, e.g., GOLDSTEIN, *supra* note 3, at 13; WILLIAM KER MUIR, JR., *POLICE: STREETCORNER POLITICIANS* (1977); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* (1968).

8. See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

9. See, e.g., Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, in *GUNS, CRIME AND PUNISHMENT IN AMERICA* 249-79 (Bernard E. Harcourt ed., 2003).

10. See, e.g., DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy*, 42 *CRIMINOLOGY* 253, 253-81 (2004).

II. CRIME OR TERROR

Anti-terror policing rarely employs coercive force, and is more concerned with prevention than with criminal prosecution. In currently fashionable jargon, it is dedicated to the reduction of risk.¹¹ How should the police and prosecutors respond to a terrorist attack? The response to the first attack on The World Trade Center on February 26, 1993, treated it primarily within the detection-prosecution paradigm, even though the damage to persons and property was breathtaking:

The blast blew through the concourse level of the Vista Hotel two floors up, as well as three floors down. It tore a three-thousand-pound diagonal steel brace off the building, sending half of it flying some thirty-five feet. The gas enhancement apparently failed. Six people, most of them building workers, were killed while they ate in a lunchroom, and about a thousand were injured. The damage to the building cost \$510 million to repair.¹²

The perpetrators were alive, and were quickly apprehended by skilled federal and local detectives. They were tried and convicted in federal court. Indeed, the rapidity with which the “crime” was solved eased fears in national and local law enforcement communities about the danger of a future terrorist attack, and scarcely changed police organization and practices.¹³

The September 11, 2001 attack on the World Trade Center was immediately understood as part of a larger strategy—an act of war—to destroy major American institutions, from business cites to the Pentagon and the White House. The strategically planned attacks by suicidal perpetrators revealed the limitations of the “detection-prosecution” paradigm. The nation’s response was a declaration of war, rather than a mobilization of detectives to identify and prosecute perpetrators.

The 9/11 attacks on New York City and Washington D.C. has altered police organization and practices in New York City—and presumably in democratic police departments around the world—for as

11. See, e.g., David Garland, *Rise of Risk*, in RISK AND MORALITY 48 (Richard V. Ericson & Aaron Doyle eds., 2003); Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice: the Emerging New Criminal Law*, in THE FUTURES OF CRIMINOLOGY 173-201 (David Nelken ed., 1994).

12. DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR 12 (2002).

13. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 72-73 (2004) [hereinafter 9/11 COMMISSION REPORT].

many years as international terrorism remains a threat. In what follows, I shall describe and discuss some of these changes and their implications for democratic policing in New York—which naturally has implications for other cities conducting policing in a democracy during a time of terror.

III. PROTECTING AGAINST TERROR ATTACKS

Most New Yorkers and most Americans understandably demand a forceful, energetic effort by federal and local law enforcement to prevent a major attack against any part of the United States. At the same time, critics familiar with the abuses of the 1960s linked to J. Edgar Hoover's F.B.I. and the local "Red Squads," fear that lack of accountability may lead to new abuses.¹⁴

The USA PATRIOT Act, passed by Congress on October 25, 2001, has been praised by many for providing some of the tools that will help law enforcement officers to fight modern terrorist activity.¹⁵ Even those who criticize some of the provisions of the Act have welcomed its emphasis on better coordination among federal, state, and local agencies, particularly in their intelligence gathering functions.¹⁶ Nevertheless, cautionary critics have attacked the Act for eroding civil liberties, with provisions giving the FBI access to the personal information of Americans, such as internet, telephone, education and library records, without their knowledge and without a specific showing that they are involved or suspected to be involved in terrorism.¹⁷

14. FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 155-96 (1991). This portion of Donner's book entitled "The New York City Intelligence Unit: The Tarnished Badge of Professionalism," covers the NYPD's involvement with the Red Squads.

15. See, e.g., Alice Fisher, *Fisher/Schulhofer Debate – The USA Patriot Act: Where Do We Go From Here?*, 3 N.Y.U. REV. L. & SEC. 14-16 (2004).

16. HUMAN RIGHTS FIRST, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES (2003), available at www.humanrightsfirst.org/us_law/loss/assessing/assessingnewnormal.htm (last visited Dec. 30, 2005).

17. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No 107-56, §§ 215, 505 (2001). USA Patriot Act § 215 amends the Foreign Intelligence Surveillance Act provisions at 50 U.S.C. §§ 1861-63 to allow the FBI to apply to a magistrate for an order requiring production of tangible materials, e.g., books, records, papers, documents, pursuant to an investigation into international terrorism or clandestine intelligence activities. FISA orders do not require a showing of probable cause to believe the target is engaged in criminal activity, rather it requires only a showing that there is probable cause to believe that the target is the agent of a foreign power. See 50 U.S.C. § 1681. Section 505, which has the heading Miscellaneous National Security Authorities, amends various provisions throughout the United States Code, and expands the FBI powers to enlist the efforts of wire or

Much of the criticism by civil libertarians was directed at Federal law enforcement, and, especially, U.S. Attorney General John Ashcroft. "One need not fear the reappointment of a J. Edgar Hoover," Stephen Schulhofer wrote, "to worry that unbridled discretion to build files, ask embarrassing questions, and spy on dissident political and religious minorities could harm individuals, stifle First Amendment freedoms, and waste limited investigative resources that now, more than ever, need to stay targeted on the most serious potential threats."¹⁸ Even conservatives, like Congressman Bob Barr, worried about a "wish list" of authority, requested by federal law enforcement to monitor communications, financial transactions, and conduct secret searches of homes and offices. "We must not," he cautioned on September 24, 2001, "stray from the fine balance between freedom and security created during centuries of court decisions and carefully crafted legislation."¹⁹ Five years later, the issue has prominently resurfaced, as the Bush administration resists judicial review over its program of electronic eavesdropping.²⁰ Nevertheless, leading Senate Republicans, including the heads of the Judiciary, Homeland Security and Intelligence, have said that they prefer some form of judicial oversight.²¹

Prior to 9/11 the NYPD had slight *international* intelligence capability—its intelligence activities—especially its undercover surveillance—was directed mainly against organized crime and major drug dealing. In the wartime atmosphere following the World Trade Center bombing, plus two major attacks by terrorists that were not discovered or prevented by federal intelligence agencies, Commissioner Raymond V. Kelly recruited international spying and security specialists to serve as deputy commissioners in the NYPD's command staff.²² Kelly's first choice was David Cohen, a long term senior

electronic communications service providers (18 U.S.C. § 2709), banks (12 U.S.C. § 3414), and Credit Reporting Agencies (15 U.S.C. § 1618u).

18. STEPHEN SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11*, at 61 (2002).

19. BOB BARR, *Freedom Versus Security Issues*, in *IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11*, at 96 (Danny Goldberg et al. eds., 2003).

20. Sheryl Gay Stolberg and David E. Sanger, *Facing Pressure, White House Seeks Approval for Spying*, N.Y. TIMES, Feb. 20, 2006, at A9.

21. *Id.*

22. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2139 (2002). Stuntz surmises that the diversion of resources to anti-terror policing will impair the capacity of local police to maintain low crime rates, especially in homicide. This was a reasonable assumption, but it has not been borne out in New York City, where homicide rates have declined every year since 2001. *Id.*

spymaster with the CIA. The *9/11 Commission Report* notes that Cohen, in 1996 the head of the CIA's Directorate of Operations, "organized a special unit of a dozen officers to analyze intelligence on and plan operations against Bin Laden."²³

Michael Sheehan, a former Department of State Ambassador at Large for Counter Terrorism and later United Nations Assistant Secretary General in the Department of Peacekeeping Operations, is now the other Deputy Commissioner for Counter Terrorism. Sheehan was "not diplomatic" in warning the Taliban "that they would be held responsible for future Al Qaeda attacks" wrote the 9/11 Commission.²⁴

IV. COUNTER TERRORISM BUREAU

The intelligence commissioners (Sheehan's predecessor was Frank Libuti, a former Marine General, who left to be Deputy Director of Homeland Security) developed a new *Counter Terrorism Bureau*, a *Counter-Terrorism Division* and a revamped *Joint Terrorism Task Force*. Commissioner Kelly assigned more than 1,000 of his best police (out of about 37,000) to counter terrorism posts throughout the department. Even more than crime, the reduction of the risk of a terror attack is the NYPD's prime concern.

Some of the anti-terror police have overseas assignments. Officers are stationed in London, working with New Scotland Yard; in Lyon, at the headquarters of Interpol; and in Tel Aviv, Hamburg, Madrid, Toronto, and other cities, as well. New York City police have conducted interrogations in Afghanistan, Egypt, Pakistan, Yemen, the Philippines, and at the U.S. Army's military prison in Guantánamo Bay.

NYPD detectives were sent to Madrid, to find out whatever they could learn, following the commuter train bombing in 2004. They had no official status and were not vetted by the State department. They were sent in the belief that any information they could gather from Madrid police to prevent a New York subway or commuter train attack would be valuable.²⁵ The subtext, of course, is that the FBI, the CIA and the Bush administration did not prevent the 9/11 terrorist attack on New York City—perhaps savvy New York detectives, mentored by former CIA and counterterrorism specialists like Cohen and Sheehan, could do better.

23. 9/11 COMMISSION REPORT, *supra* note 13, at 109.

24. *Id.* at 176.

25. Interview with Michael Sheehan, Deputy Comm'r for Counter Terrorism, NYPD, in New York, N.Y. (Dec. 4, 2002).

Cohen and Sheehan work closely together and with Kelly, who they brief five mornings a week at 9 a.m. These meetings, and Cohen and Sheehan's presence, are well known throughout the department's Manhattan headquarters at One Police Plaza, and express the Department's major commitment to combating terror.

When the Counter Terrorism Bureau was started in 2002, there was no model or strategy in the NYPD for developing an anti-terrorism program—despite the 1993 attack and the Giuliani Mayoral years. Cohen said in a 2002 interview “We have essentially written the book on a day-in, day-out basis on how to think about the terrorist threat to the city, what to do about it in way of prevention, and if, God forbid, we don't prevent it, how to respond.”²⁶

Al-Qaeda is of course a major focus of counter-terrorism, but said Cohen “We can't be consumed by Al-Qaeda,” adding, “Al Qaeda has become an umbrella organization that has a very hard core to it, but there are many other organizations that have essentially signed on to its agenda. They have overlapping agendas, and therefore are able and willing to work together. But when their agendas don't match up, they may go out and do their own thing.”²⁷

The Counter Terrorism's Bureau's operations center is a long automobile ride from the fourteen story Manhattan Headquarters of the NYPD. A police officer and I had trouble locating it among the area's auto body shops and junkyards, which, at first confusing glance, it resembles. Yet close up, the roof is dotted with gleaming satellite antennae. Even the entrance is hard to find. A lone female worker, standing outside smoking a cigarette, directed us to a plain metal door. Inside, we found ourselves in a functional building with brightly lit and painted offices that bear a striking contrast to Manhattan's precinct houses.

A Global Intelligence room holds large flat screen television sets tuned into Al-Jazeera and other distant programming. News tickers, like those in Times Square, display headlines and the latest color alert from Homeland Security. There are electronic maps and digital readouts from cities ranging from Moscow to Tel Aviv, from Islamabad to Baghdad, Beijing, and Tokyo. Communications are monitored by language specialists who speak many of the languages of the world, including Arabic, Pashto and Fujianese.

26. Interview with David Cohen, Deputy Comm'r of Intelligence, NYPD, in New York, N.Y. (Nov. 26, 2002).

27. *Id.*

V. BEYOND HANDSCHU

None of this is legally controversial. Still contentious, however, is the scope of police investigations of political and religious groups. The issue has a long history with urban police departments.²⁸ During the Vietnam War period, “Red Squad” and COINTEL incursions were challenged by civil-liberties plaintiffs and their lawyers in major American cities. In New York City, after long litigation, a highly respected federal judge, Charles Haight, negotiated a settlement in 1985, known as the “Handschu” agreement.²⁹ Handschu was one of the plaintiff activists who in 1971 filed a class action suit accusing the NYPD of using dossiers and undercover agents to chill and punish lawful dissent.³⁰ The settlement actually went into effect in 1985, when the police promised to follow certain guidelines—especially a core requirement that police establish some evidence of criminal activity before undertaking surveillance of an individual.³¹

On September 25, 2002, Deputy Commissioner for Intelligence Cohen asked Judge Haight to make significant modifications to the agreement.³² Cohen’s request reflected changes in the NYPD’s vision of its post 9/11 anti-terror responsibilities—a concern it shares with local police departments in democracies throughout the world

In court papers, Commissioner Cohen asserted that “[i]t is difficult to imagine a state of affairs more outdated by the events of September 11th.”³³ Arguing against the requirement that police must produce evidence of criminal activity before initiating surveillance, Cohen wrote that “[t]his criminal requirement as a threshold for investigative authority may effectively shield from discovery the lawful preparatory activities which invariably precede terrorist attacks. In the case of terrorism, to wait for an indication of crime before investigating is to wait far too long.”³⁴

The lawyers opposing the city acknowledged the tragedy of September 11, but denied that it presented a persuasive reason to allow police to record names from organizations mailing lists and petitions, to

28. See DONNER, *supra* note 14.

29. See *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1389-93, 1420-24 (S.D.N.Y. 1985) (*Handschu I*).

30. See *id.* at 1388.

31. See *id.* at 1389.

32. See *Handschu v. Special Servs. Div.* 273 F. Supp. 2d 327, 329 (S.D.N.Y. 2003) (*Handschu II*).

33. *Id.* at 341.

34. *Id.* at 339.

photograph and videotape protestors, and to plant undercover agents inside groups and events.³⁵ Recalling those days, they believed that the police would overstep the bounds of civil liberty in monitoring protests and infiltrating organizations.³⁶ They argued that the guidelines come into play only when the NYPD intends to investigate persons or groups who associate or express themselves to support or criticize government policies or social conditions.³⁷ Terrorists, they claimed, don't do that; nor do members of covert cells exercise rights of advocacy and free expression.³⁸

Judge Haight acknowledged that some of Commissioner Cohen's claims might be overbroad.³⁹ After all, he pointed out, renting apartments, leasing cars or taking flying lessons, as the 9/11 terrorists did, is not participation in political activities.⁴⁰ Consequently, the police were not constrained from investigation of such activities. But he rejected the civil libertarians' implicit assumption that terrorists would never engage in "lawful political, religious, educational or social activities" to further their unlawful purposes.⁴¹ "[T]he convicted architect of the 1993 World Trade Center bombing was the imam of a mosque. . . . [A] sad reality," he comments, ". . . but a reality nonetheless."⁴²

It is in the light of such realities that Commissioner Cohen argued that "the use of undercovers is a necessary and vital tool."⁴³ He did not say explicitly that he is planning to place undercover operatives in Islamic religious, social, political or educational institutions. Nevertheless, given the radical Islamist creed of the terrorists who have attacked the United States at home and abroad, and that the architect of the 1993 bombing was the imam of a Brooklyn mosque, the inference seems inescapable that undercover officers or agents will likely be sent into mosques.

Given the post 9/11 dangers facing the city, on February 11, 2003, Judge Haight granted the city's motion to modify the *Handschu* agreement, with terror, rather than crime, being the lynchpin of permissible police inquiry. In addition, the NYPD is permitted to share

35. *See id.* at 338-39.

36. *See id.*

37. *See Handschu*, 273 F. Supp. 2d at 338-39.

38. *See id.*

39. *Id.* at 339.

40. *Id.*

41. *Id.*

42. *Handschu*, 273 F. Supp. 2d at 339.

43. *Id.*

information with federal, state and local law enforcement agencies which were formerly required to comply with *Handschu's* restrictions before they could review the NYPD's intelligence data.⁴⁴

The first paragraph of the new "*Guidelines For Investigations of Political Activity*," crafted following Judge Haight's decision, contains the following language:

Subsequent to the terrorist attacks on the City of New York on September 11, 2001, which resulted in the loss of thousands of lives and the total destruction of the World Trade Center complex, it became apparent that the City faces unprecedented threats to its continued safety and security. In the view of federal, state and local law enforcement agencies, the prevention of future attacks requires the development of intelligence and the investigation of potential terrorist activity before an unlawful act occurs.⁴⁵

VI. THE RISK RESPONSE

Security against terrorist attack has become the NYPD's major focus and major anxiety, even more than crime control, which the NYPD has confidently dealt with for a decade or more. (It is interesting to note that the 2,800 deaths on September 11, 2001, are not counted as homicides in the NYPD's crime statistics. Murders committed by terrorists are categorized in a class by themselves.) Commissioner Kelly and Mayor Michael R. Bloomberg have regularly lobbied Congress for more anti-terrorist funds for New York City, repeating an undeniable claim—that the city has taken the hit for the nation, and that federal law enforcement did not prevent terrorists from twice attacking the World Trade Center.

Were we to convert democratic values into the language of risk,⁴⁶ we could conclude that the greater the risk of a terrorist attack, the more likely are legislators and judges to offer deference to local and federal police to collect information, search premises and "seize" persons and their possessions. The attacks on the World Trade Center and the Pentagon, as well as other attacks internationally, have clearly altered the normative terrain of how the rule of law in the United States strikes the balance between security and liberty.

44. *See id.* at 341, 349-50.

45. NEW YORK CITY POLICE DEPARTMENT, *Preamble to Guidelines for Investigations of Political Activity*, in NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE MANUAL (2004).

46. *See* Garland, *supra* note 11, at 48.

Mostly, the public appreciates and supports heightened security measures. Few, if any, citizens object to visible target hardening, despite the inconvenience of searches in entering public buildings or airports. Ironically, target hardening, particularly in securing valuable buildings, was already far advanced before the 9/11 attack.

Indeed, because the World Trade Center buildings had been bombed in 1993, those buildings were protected by state-of-the-art security—which obviously did not include protection from terrorists who turned hijacked airplanes into massive weapons of destruction. Since that attack, airline passengers have learned to accept not only clearance by a metal detector, but even more intrusive searches. As a society, we have reached a new normative consensus allowing security measures once considered to be privacy invasions as “normal.”

VII. TRAINING FOR TERROR – THE LOCAL BECOMES INTERNATIONAL⁴⁷

Training for terrorist attacks presents a novel and difficult challenge for urban police. The post-9/11 Training Division, headed by Deputy Commissioner James J. Fyfe, has two responsibilities related to terrorism: training patrol officers to *prevent* terrorism and training them to *respond* to a terrorist attack. In addition, police are encouraged to broaden their knowledge. Terrorism is international, and what happens in Tel Aviv, Madrid, or London—and the security shortcomings in those cities—is highly relevant to the safety of New York City. Consequently, New York City police are encouraged to read and learn as much as they can about how terrorists operate abroad, through newspapers, books, television and the internet.

Patrol officers—“peacekeepers”—have always been taught to gather information in the neighborhoods where they work. This requires developing a conception of normal and acceptable behavior. One can appreciate that something is out of order only if he or she develops a conception of the normal order. Usually, Commissioner Fyfe pointed out, police officers’ observations focus on geographically confined locations, violations of the penal code, and short time frames. Police have always gathered generalized information about criminal conduct. Indeed, part of the rationale for community and problem-oriented policing is based on expanding neighborhood knowledge—but usually regarding more common crimes, such as unlawful drug dealing.

47. The following is taken from a series of interviews conducted over the course of 2004 with James J. Fyfe, Deputy Comm’r for Training, NYPD, in New York, N.Y. James J. Fyfe passed away from cancer on November 12, 2005, see Al Baker, *James Fyfe*, 63, *Criminologist and Police Training Director*, N.Y. TIMES, Nov. 15, 2005, at A25.

Post-9/11, NYPD recruits and officers are encouraged to make contact with doormen, building superintendents, janitors, anyone who might be in a position to see something unusual, suggestive, but not necessarily illegal. "We know that terrorists don't like to live in corners, they prefer the middle of the block, they keep windows covered, they have little furniture, they come and go, they pay in cash, they don't have checking accounts, [and] they don't have credit cards. Any one of these is not a crime, but taken together, they might constitute a pattern suggesting terrorist activities," said Fyfe. "So if a cop can build relationships in a community, that's valuable for enforcing the criminal law, and for preventing terror."

Prevention is not difficult to teach to police, since it involves redirecting them in some already familiar paths. Responding to a terrorist attack is more difficult. "Police officers typically work by themselves or with a partner, and respond to crises as they come up," Fyfe explained. "But if there is a major terrorist event, police officers will be required to work as part of a coordinated machine, so we train officers to know their specific duties, and where he or she fits into the whole operation."

This involves training officers in large cohorts—which clearly necessitates overtime—and for this the Department has received additional funding as a result of one of Commissioner Kelly's many fund-seeking trips to the nation's capital.

Approximately ten thousand officers have been trained to respond to what the NYPD calls COBRA events—chemical or biological and radiological attacks. Officers are trained with their own work groups, including a Lieutenant, Sergeant and eight or ten officers. They are trained alongside a comparable group or two from the same patrol borough so they can coordinate and will have practiced their assignment if an event happens.

The Chief of Department and the Counter-Terrorism Division undertake mobilization training exercises five or six times a day, in different parts of the city, but mainly in Manhattan. From time to time one can see in Manhattan a cluster of police officers, who have been randomly called together, as in a fire alarm test. Sometimes police will be drawn from different boroughs so that officers, who work in northern Queens, for example, or south Brooklyn, will know parts of the city, especially Manhattan, most likely to be attacked by terrorists.

All NYPD officers are now carrying, as part of their uniform, hoods that will allow them to breathe for about half an hour in case of a chemical or biological attack. "We also," Fyfe said, "train officers to wear complete body suits. These are not protective enough for the

officers who are assigned to dispose of weapons of mass destruction, but they are protective of those who need to function in that environment. Our training officers, who have been trained by federal specialists in Alabama, are currently training 10,000 of our officers to function in that environment.” These officers were trained and available for duty at the 2004 Republican National Convention.

The threat of terror has heightened cooperation among the tangle of police agencies responsible for the safety of major local transportation hubs. Should a terrorist event have occurred in Manhattan’s Pennsylvania Station during the Republican National Convention a number of agencies were prepared to coordinate. These agencies included New York City police and firefighters, New York’s Emergency Management Office, the Port Authority and Transit Authority, and Emergency Medical Services. Federal police, the FBI, ATF and Secret Service would probably be on the scene, as well. If the attack was on a train that passed through New Jersey those responding might include Amtrak police and local and state New Jersey police. We still, of course, have local police patrolling in neighborhoods, but policing in the major Metropolitan areas—especially when terror threatens—often crosses local boundaries.

Because American police are local and not national, each agency has typically developed its own “Incident Command System,” with distinctive terminology and “protocols,” that can be like a different language for other departments. The National Homeland Security agency has mandated that all U.S. law enforcement agencies follow a standardized Incident Command System. But this also involves a substantial retraining task for a department the size of the NYPD.

Unlike crime, which is the familiar, inevitable, and measurable part of the police assignment, there are no measures of success against terrorism except the absence of attack. As I write this in early 2006, following the Republican National Convention, no subways, buses or major buildings have exploded in New York City, nor has the city been threatened with chemical or biological weapons. But New York is the city that, as Kelly often reminds questioners, twice “took the hit for the nation.” When a possible threat to bomb the New York City subway arose in October 2005, city officials took it very seriously, even though it was somewhat discounted by the Homeland Security Agency, but not by the FBI.⁴⁸ Since 9/11, the NYPD takes every credible threat seriously, even if unproven. Vigilance is the NYPD’s watchword—it is

48. Willam K. Rashbaum & Douglas Jehl, *Terror Officials Work to Assess Subway Threat*, N.Y. TIMES, Oct. 8, 2005, at A1.

always on "orange" or heightened alert.

VIII. PROTEST

If police investigation involving political and religious activity is inevitably a delicate "democratic rule of law" issue in "wartime," so is public protest. Two major anti-Iraq War protests occurred in New York City, one controversial and heavily criticized by the New York Civil Liberties Union; the other less so. The first, on February 15, 2003, coincided with a day of worldwide demonstrations against the U.S. invasion of Iraq. The city insisted on a "stationary rally" instead of a march, with the police using "pens" to control crowd movement. This crowd control tactic worked well on New Year's Eve celebrations in Times Square, where the NYPD mounted a show of force to prevent a terrorist attack on the New Year celebrations of 2002-2004, and where crowds cooperate in celebration. But it did not work so well in an anti-war protest rally.

The NYPD changed and improved its tactics in a March 22, 2003 demonstration. Nevertheless, several hundred protesters who were arrested were debriefed about their political activities; where they had attended school, what organizations they belonged to, and their involvement with past protests.⁴⁹ Constitutional scholars and civil libertarians considered the practice a violation of civil liberty, which could have a chilling effect on political freedom and brought the matter to federal district court. Commissioner Kelly and Deputy Commissioner Cohen apologized, telling the Court that they were unaware of the practice; that it would be discontinued, and the collected data destroyed.⁵⁰

IX. THE REPUBLICAN NATIONAL CONVENTION – 2004

New York City authorities, especially the police, planned for eighteen months for the challenges likely to occur in connection with the Republican National Convention (August 29 to September 3, 2004). Preparation involved all levels of the Department, but especially the training division, counterterrorism units, and special disorder control units. High ranking officials reviewed the websites of potentially disruptive protestors.

To illustrate negative examples of police conduct, thousands of

49. See Benjamin Weiser, *Judge Criticizes Police Methods of Questioning Protestors*, N.Y. TIMES, Aug. 8, 2003, at B1.

50. See *id.*

officers were shown videotapes of disorderly protests, where police clashed with protestors. Officers were shown how protestors might taunt them, they were taught how to avoid conflict, how to remain calm and in command of themselves and to appreciate that televised images of cops beating protestors was a goal of the anarchist protestors. The police were taught not to respond individually. They were instructed to use force only as a unit, on orders from a supervisor, not on their own initiative.⁵¹

The Republican National Convention was also considered to be a dangerous time for a terrorist event, in line with Al-Qaeda's previous history of attacking symbolic targets. Moreover, a Republican Convention in New York City was certain to attract delegates, tourists, and protestors in huge numbers. Based on previous anti-free trade and anti-war protests, police managers assumed that some protestors would try to be disruptive. For example, the RNCNotWelcome website's "Direct Action Handbook" offered instructions in tactics that were arguably unlawful—for example, wearing masks while protesting.⁵²

Described in *The New York Times* as "one of the greatest tests Police Department has seen in recent years," the Republican Convention was indeed a major challenge.⁵³ The NYPD needed to respond to days of protest, in different locations, as well as be prepared for a potential terrorist attack, all the while being watched, photographed and televised by an international body of journalists. Some of the protest highlights were as follows:

On Thursday, August 26, eleven Act Up members stood naked on Eighth Avenue and 34th Street (opposite Madison Square Garden), and blocked traffic to protest what they claimed was the under financing of AIDS programs by the Bush Administration. They were arrested.⁵⁴

On Friday, August 27, thousands of Critical Mass cyclists rode from Union Square to Central Park to the West Side and back to the East Village. More than 100 were arrested, most for disorderly conduct.⁵⁵

51. Videotape: Crowd Control and Protest Training Video (New York City Police Department 2003) (on file with the New York Police Department).

52. Direct Action Handbook, <http://www.rncnotwelcome.org/daction.html> (last visited Dec. 30, 2005).

53. See Michael Slackman & Al Baker, *The Republicans: The Convention in New York—The Police; With Restraint and New Tactics, March Is Kept Ordely*, N.Y. TIMES, Aug. 30, 2004, at P1.

54. See Diane Cardwell, *Preparing for the Convention: Demonstrations; For Convention, Demonstrations Start Early, as Do Arrests*, N.Y. TIMES, Aug. 27, 2004, at B1.

55. See Randal C. Archibold, *Preparing for the Convention: Protesters; 100 Cyclists*

On Saturday, August 28, an estimated 25,000 persons, mostly women, marched across the Brooklyn Bridge to City Hall to demand access to safe abortion, "real sex education," birth control options and family planning.⁵⁶

The largest march, with as many as 300,000 protestors—not all from start to finish—took place almost without incident on Sunday, August 29, 2004. Most of a few hundred arrests were videotaped by police officers, and also by camera carrying monitors, offering pictorial evidence to test any later claims of police misconduct.

There was general agreement, even by those normally critical of the police, that the main march occurred virtually without incident. Civil rights lawyer and radio talk show host Ronald Kuby agreed, but credited the protestors for the peacefulness of the march saying that "A quarter of a million people made a commitment to a peaceful[,] legal march. . . . They were the ones who kept the peace. . . . So this notion that the police did a good job is true only to the extent that the demonstrators themselves had a powerful commitment to keep this demonstration peaceful and legal."⁵⁷

Nevertheless, a team of seven observers assigned by The New York Times reported that as hundreds of thousands demonstrators marched and sometimes confronted the police, the police avoided confrontation, as they had been trained to do—even with anarchist protestors who would engage with in-the-face confrontation. "At one point, a large group of demonstrators surrounded a patrol car, waving anarchist flags and taunting the two officers inside. The police officers hit their siren, backed up and drove off. A few uniformed officers arrived and ordered the protestors onto the sidewalks, and the group just melted away."⁵⁸ According to reporters covering the main march, protestors praised the police for their overall restraint, noting, in particular, that individual officers did not allow themselves to be provoked.

In a post-RNC press conference on Friday, September 3, Commissioner Kelly praised his officers and the vast majority of protestors for mostly peaceful and lawful protest.⁵⁹ He announced that

Are Arrested as Thousands Ride in Protest, N.Y. TIMES, Aug. 28, 2004, at B1.

56. See Michael Slackman & Ann Farmer, *Campaign 2004: Demonstrations; 25,000 Abortion-Rights Advocates March to City Hall*, N.Y. TIMES, Aug. 29, 2004, at A27.

57. Slackman & Baker, *supra* note 53.

58. See *id.*

59. See Randal C. Archibold & Michael Wilson, *After The Convention: Demonstrations; Police and Protesters Spar A Last Time, Over the Peace*, N.Y. TIMES, Sept. 4, 2004, at B1.

arrests for convention-related incidents totaled 1,821.⁶⁰ Of these, fifty-six were for felonies, 282 were misdemeanors, 1,480 were for violations, and three arrests were of juveniles.⁶¹

Anarchists told reporters that they had not planned to generate violence on the scale of the Miami and Seattle protests.⁶² “John Flanigan, an anarchist organizer in New York, [said] no such violence was necessary at the convention because ‘so much attention is already on it.’”⁶³ Instead, they said that they focused on blocking traffic, directly harassing and taunting Republican delegates at their hotels and events, and engaging in acts of civil disobedience.⁶⁴

But the NYPD had learned much from studying the earlier Miami and Seattle protests. The police created a “buffer zone” by employing two barriers in order to discourage confrontation between the protestors and the police.⁶⁵ Occasionally, anarchist protestors were able to goad the police into shutting traffic down briefly, and engaging in acts of civil disobedience, but the police were able to clear up such roadblocks quickly.⁶⁶

The Department also employed a combination of strategic and tactical intelligence. Protestors’ websites were scrutinized to know where to position mobile units on Vespa-like scooters, bicycles, motorcycles and vans.⁶⁷ The NYPD monitored from the skies, with a blimp and helicopters reporting events on the ground.⁶⁸ On December 22, 2005, Jim Dwyer of the New York Times reported that a police helicopter recorded “an intimate moment” of a lovemaking couple on a dark rooftop—illustrating how it is possible for legitimate surveillance to wrongfully invade privacy.⁶⁹

In many locations, the police used orange colored nets to scoop up potential crowds before they had a chance to block roadways.⁷⁰ Almost inevitably, at some locations, ordinary pedestrians were caught up in the netting. This generated some resentment among non-protesting New

60. *Id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* Robert Kolker, *Law Pre-Enforcement*, N.Y. MAGAZINE, Sept. 20, 2004, at 20.

66. *See id.*

67. *See id.*

68. *See id.*

69. Jim Dwyer, *Police Video Caught a Couple's Intimate Moment on a Manhattan Rooftop*, N.Y. TIMES, Dec. 22, 2005, at B10.

70. *See id.*

Yorkers, who vote Democratic and oppose President Bush's decision to invade Iraq.

Nevertheless, unlike the police actions in Miami or Seattle, the NYPD officers never struck with batons: no matter how close or nasty the taunts of some of the protestors. "Speed and the presence of a small number of officers early on are more important than having a large number of officers later," Kelly told a *New York Magazine* reporter in explaining the success of the police tactics.⁷¹ "We had done research of other cities, and the protestors would go against the flow of traffic or take the subway and pop up in some location unannounced. The mobility enabled us to react very quickly to that. The protestors, they even said that—they were unpleasantly surprised."⁷²

Although there were few accusations of excessive force, protestors and civil liberties lawyers accused the police of making more arrests than were legally justified, and of keeping hundreds of activists locked up for longer than was necessary—or legal—until the convention ended.⁷³ Those who were arrested—mainly for "violations," like a ticket for overtime parking, a charge less than misdemeanor—also complained about being fingerprinted, about the unsanitary conditions of confinement, as well as the food.⁷⁴

Although city officials said that those arrested were being processed as quickly as possible—and that the conditions and the food were acceptable, the protestors and their lawyers complained that the City violated a "twenty-four hour rule" requiring the city to arraign defendants within twenty-four hours of their arrest.⁷⁵ A state court judge agreed, holding the City in contempt, and fining the City \$1000 for each arrestee held beyond the twenty-four hours.⁷⁶ Lawyers for those who had been arrested promised that lawsuits would follow, while City officials denied any wrongdoing.⁷⁷ In the end, the NYPD settled with

71. *Id.*

72. *Id.*

73. See Jim Dwyer, *City Arrest Tactics, Used on Protestors, Face Test in Court*, N.Y. TIMES, Sept. 17, 2004, at A1.

74. See *id.*

75. See Jim Dwyer, *Judge May Consider Inquiry Into Detention of Protestors*, N.Y. TIMES, Jan. 20, 2005, at B3.

76. See Daniel Wise, *Delay in Processing Protestors Leads to Finding of Contempt*, 231 N.Y.L.J. 1, Sept. 3, 2004.

77. For the NYPD's Statement see STATEMENT OF DEPUTY CHIEF JOHN COLGAN, EXECUTIVE OFFICE, COUNTER-TERRORISM BUREAU, NEW YORK CITY POLICE DEPARTMENT TO GOVERNMENT OPERATIONS COMMITTEE OF THE NEW YORK CITY COUNCIL (Oct. 26, 2004), <http://www.nyc.gov/html/nypd/html/dcp/ir/mctestimony.html> (last visited Dec. 30, 2005).

protestors on the processing delay claims paying \$150 to 108 protestors and \$215,000 in attorneys' fees.⁷⁸ As we saw, the policing of protest poses a major challenge for democratic policing. The First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"⁷⁹ but it does not protect those whose goal is to provoke the police into streetfighting.⁸⁰

In response, the police inserted undercover officers into some of the demonstrations, notably those of the Critical Mass cyclists, thousands of whom "flooded the streets on the Friday before the Republican National Convention."⁸¹ The NYPD defended the tactic, saying that their goal was not to investigate politics, but to protect orderly free expression.⁸² The problem, of course, is that police infiltrators, to establish their *bona fides*, may encourage the very disorder that their infiltration is intended to prevent.

CONCLUSION

Policing in a time of terror raises issues for democratic "rule of law" policing that are only beginning to emerge. Terrorist attacks have demanded that police develop strategies that were not dreamt of nearly half a century ago when researchers began to study police. Yet we see that the same basic question—what we mean by policing under the rule of law—is ever more relevant.

Under the rule of law, police, who are part of the executive branch of government, may not behave arbitrarily, and must be accountable to an independent judiciary. It does not mean, however, that the judiciary will necessarily overrule the police. Since the 1970s, the judiciary has become increasingly deferential to police practices, and especially so following the 9/11 terrorist attacks. Legislation offering greater investigative latitude to the Federal police, such as the Patriot Act, has largely been upheld by the courts.⁸³

Especially after a terrorist attack, the judiciary is likely to defer to

78. See Daniel Wise, *Under Cardozo, Law Department Strives for Big-Firm Image*, N.Y.L.J., Aug. 15, 2005, at 1.

79. U.S. CONST. amend. I.

80. Crimethinc.com, *Demonstrating Resistance: Mass Action and Autonomous Action in the Election Year*, <http://www.crimethinc.com/features/10.html> (last visited Feb. 7, 2005).

81. Jim Dwyer, *New York Police Covertly Join in at Protest Rallies*, N.Y. TIMES, Dec. 22, 2005, at A1.

82. *Id.*

83. See, e.g., *In re Sealed Case*, 310 F.3d 717, 729-30 (Foreign Int'l Surveillance Ct. Rev. 2002). See also John T. Soma et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 RUTGERS COMPUTER & TECH. L.J. 285 (2005).

the security claims of police—up to a point. We saw that drama played out in New York when a Federal judge, who had formerly constrained the police, upheld the request of the Deputy Commissioner for Intelligence to investigate persons and infiltrate political organizations, regardless of whether the police can show a connection to criminal activity—which they formerly had to do.

To enhance democratic policing, it is essential to have a vibrant and effective civil liberties bar, with legal adversariness understood as a necessary, even if often annoying to police, aspect of the rule of law. Although the New York Civil Liberties Union lost in the *Handschu* case, which gave greater latitude to the NYPD's intelligence division, the civil libertarians won when a judge fined the city \$1,000 for each arrested protestor held in confinement beyond twenty-four hours. Approximately 550 people were quickly released.⁸⁴

Democratic police must respect the right of dissent and protest, as the NYPD did during the Republican National Convention. By no means did the city authorities grant the protestors all of their requests. But with their lawyers, the protestors could appeal to the courts for relief; and win some, lose some.

We could imagine that, following two terrorist attacks, undemocratic authorities might declare martial law. Citizens would be forbidden to protest in the hundreds of thousands against a war and against the party in power. Yet protest against a wartime President and the ruling Republican Party, even with the presence of Internet-advertised, and previously-violent anarchist protestors, was accepted by the NYPD and the federal authorities as a problem to be handled by training and preparation, not by anything remotely resembling martial law.

In a democracy, police actions need to be open and visible to the public and a free press, as they have been in New York City during protest demonstrations. In particular, thousands of cameras recorded the protests against the Republican National Convention. A free and active press is a necessary condition for democratic policing, in ordinary times as a bulwark against police corruption and excessive force; and especially during wartime, when police stopping-and-searching activities are likely to be more aggressive.⁸⁵

84. Jennifer Gonnerman, *The Waiting Game*, VILLAGE VOICE, Sept. 7, 2004, available at <http://www.villagevoice.com/news/0436,gonnerman,56544,1.html> (last visited Dec. 30, 2005).

85. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. Blasi has argued that the Founder's conception of freedom of the press

In democratic and multicultural societies, police discrimination against members of minority groups is an ever present issue. Will police in Iraq treat members of other religious and ethnic backgrounds evenhandedly? Do police in London, Paris, Madrid—or New York?

In New York City, the Kelly administration has had its share of critics, especially complaining about the numbers of minority officers in positions of authority. At the same time, most major U.S. police departments have been fairly successful at integrating minorities and women—more successful than have most university faculties.⁸⁶ This is not to suggest that minorities do not complain—and file lawsuits—about police practices.⁸⁷ But in cities with large minority populations, police departments increasingly take these complaints seriously, and several are under federal court order to revise practices.

Racially appropriate policing requires an active civil rights bar to investigate and challenge police misconduct. Every government entity and its police should be accountable for the criminal and civil wrongs of its officers.

Democratic policing under the rule of law is an abstract ideal, an aspiration that will vary in different venues around the world. The key to democratic policing is of course, and everywhere, *accountability* to the rule of law. But, as we have seen in New York City—and in other American police departments—to be more than a slogan, policing according to the rule of law depends on the vitality of ancillary institutions—an able judiciary, a civil liberties and civil rights bar, free and honest elections, and a free press.

There is no perfect model, but the post 9/11 NYPD is a good example of democratic policing in a time of terror. Since the city has twice been victimized by terrorist attacks, the NYPD has reorganized itself to prevent such attacks. It has aggressively sought, through the courts, greater authority to conduct investigations even when it lacks evidence of criminal activity.

At the same time, New York is a city rich with institutions of accountability, including elections, courts, a vibrant civil liberties and civil rights bar and a free press. Its Mayor and Police Commissioner

rested on the “the value that free speech, a free press, and free assembly can serve in checking the abuse of power of public officials.” *Id.* at 544. For an elaboration on this theory as applied to the institution of the police, see Jerome H. Skolnick and Candace McCoy, *Police Accountability and the Media*, 1984 AM. B. FOUND. RES. J. 521.

86. See Jennifer Lee, *In Police Class, Blue Comes in Many Colors*, N.Y. TIMES, July 8, 2005, at B1.

87. See Deborah Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999).

believe in the rule of law, and are responsive to public opinion. They do not reflexively support their police. With its reorganization post-9/11 to combat terror, with improvements in recruitment, training and tactics, with its handling of the Republican National Convention, and the city's low crime rates, the New York City Police Department has become something of a model for democratic policing in the U.S. and even around the western world.

This in an international city, a majority of whose residents are non-white, and speak most of the world's languages. In the latest NYPD recruit class of 1,600, nearly fifty percent of the graduates are nonwhite. And many of the white recruits are themselves immigrants, (but not Irish or Italian) and live in the city, unlike the older white officers who gravitated to the suburbs.⁸⁸

That the NYPD should emerge after 9/11 as something of a model of democratic policing is an outcome that, following the periodic corruption and brutality scandals that plagued the NYPD for the largest part of the twentieth century, plus the fears aroused by the direct terrorist hit on the city on September 11, 2001, would scarcely have been predicted.

88. See Lee, *supra* note 86.