Fall 2017

Terry v. Ohio and the (Un)Forgettable Frisk

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When I was first asked to participate in this symposium reflecting on the fiftieth anniversary of *Terry v. Ohio*,[1] I had trouble identifying how I could contribute. Legal scholars, after all, have criticized *Terry* for almost the entire half-century it's been on the books.[2] What is there left for me to say that hasn't

* Assistant Professor of Law, University of South Carolina School of Law. I am thankful for the thoughtful suggestions provided by Jennifer Laurin. I very much appreciate the help of Sarah Tate Chambers and the editorial assistance provided by Vanessa McQuinn and members of the *Ohio State Journal of Criminal Law*. As always, I am deeply grateful for the support of Alisa Stoughton.

1 392 U.S. 1 (1968).

2 There are many more criticisms than should ever be included in a single footnote; here, I have provided a smattering of examples. *See* Timothy C. MacDonnell, *The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment*, 73 WASH. & LEE L. REV. 1869, 1959 (2016) (arguing that since *Terry*, reasonable suspicion has increasingly favored law enforcement interests); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 85–86 (2016) (arguing that *Terry v. Ohio*'s lack of defined suspicion led to increased police reliance on subjective means); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849 (2014); David Abrams, *The Law and Economics of Stop-and-Frisk*, 46 LOY. U. CHI. L.J. 369, 372 (2014) ("Since the earliest stop-and-frisk litigation, scholars and lawmakers have scrutinized and attempted to resolve problems with stop-and-frisk programs."); Seth M. Haines, Comment, *Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 ARK. L. REV. 105, 117–18 (2004) (stating that the probable cause standard began to change with *Terry*); Margaret Anne Hoehl, Casenote, *Usual Suspects Beware: "Walk, Don't Run" Through Dangerous Neighborhoods*, 35 U. RICH. L. REV. 111, 112 (2001) (stating that *Terry* eliminated "even" the requirement of probable cause for "stop and frisk"); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001) (using *Terry* to argue that remedies for police misconduct should be sought outside of the Constitution); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 177–78 (1999) ("*Terry v. Ohio*, however, may be the Court's single most important Fourth Amendment case in terms of its role in constituting a legal environment broadly supportive of the street-level discretion of officers on patrol."); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (arguing that *Terry* set the foundation for a Fourth Amendment analysis that refused to acknowledge race and the harm cannot be undone until race is directly acknowledged); David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 22–32 (1994); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1419 (1993) (arguing that courts should not look to *Terry v. Ohio* when evaluating the reasonableness of a search for narcotics without a warrant); Jodi Sax, Casenote, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After* United States v. Sokolow, 25 LOY. L.A. L. REV. 321, 327 (1991) (arguing that later courts have expanded the scope and relaxed the requirements of *Terry*'s reasonable suspicion standard); Gary M. Tocci, Casenote, *New Application of* Terry *Stop and Frisk Standard*—Commonwealth v. Cortez, 59

already been said, often with far more eloquence than I could hope to muster? With some misgivings, I turned for inspiration to a topic that I am typically reluctant to emphasize in my scholarship: my own experiences serving as a police officer at a large municipal police department.[3] As I considered the role *Terry* has played over the last fifty years, I realized that perhaps my most significant contribution comes not from what I can say, but from what I can't.

I can't tell you about the first time I stopped and frisked someone. In fact, I can't tell you about any of the frisks I conducted.

It's not that I'm reluctant to or under some legal or ethical obligation not to. To the contrary, I'd very much like to discuss how I, as a rookie officer, was first introduced to the world of stops and frisks. I want to, but I can't.

And I can't, because I don't remember it.

This isn't, I think, because of a faulty memory.[4] I remember my first consensual encounter, including the search the individual consented to. I remember my first foot pursuit, and the first time I used force. I remember my first arrest. I even remember the first time I made arrests for specific crimes: trespassing, possession of drug paraphernalia, disorderly conduct, DUI, and so on. But I can't remember my first frisk. To be honest, I don't really remember any of the frisks I conducted.

That point bears repeating. I served as a uniformed municipal police officer for some five years,[5] and I was relatively active in that time. I made hundreds of arrests and many more traffic stops. I assisted other officers on their arrests and traffic stops on thousands of occasions. And while most were so unremarkable

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TEMP. L.Q. 695, 695 (1986) (stating that a Pennsylvania court deviated from a narrow interpretation of *Terry* and predicting a new era of deference to the subjective judgment of police officers); Neil Ackerman, Comment, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U. L. REV. 85, 94 (1981) (stating that "prior to *Terry v. Ohio*, the Court refused to dispense with the fundamental requirement of probable cause for searches and seizures.").

[3] I served as a uniformed patrol officer with the Tallahassee Police Department, which at the time employed some 320 sworn officers to serve a population of more than 150,000 people. Today, my old agency employs more than 400 sworn officers and serves a population of 188,000. Those metrics put it in the top two percent of largest police agencies in terms of number of sworn officers and in the top three percent in terms of population served. *See* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES (2015).

While my perspective is certainly shaped by my time as an officer, I am customarily reticent to make my own experiences a significant aspect of my scholarship. My reluctance stems from a desire to avoid over-generalizing, especially because I originally joined the force with no idea that I would ever pursue an academic career. At the time, I viewed my service as an officer from the perspective of a serving officer. It wasn't until years later that I began to look back on my own experiences through a more academic lens.

[4] My wife may disagree with me on this point, but I would characterize her disbelief as strategic and rhetorical rather than contextually sincere.

[5] I served as a full-time officer for just under five years and as a part-time reservist for another six months.

that I have no particular recollection of them, there are dozens and dozens of exceptions that make up my repertoire of colorful "war stories." But I don't have any stories about stops and frisks. I know I stopped people. I know I frisked people. I know I did it quite frequently—so frequently, in fact, that my memories of how I conducted frisks are fairly extensive—but I have no specific memories of any single frisk. However many there were, those incidents were the background noise of my professional life, the elevator music of my law enforcement career. I remember them in the same way that I remember my commute; I can tell you the route that I drove, but I can't recall any details of any particular trip. Those frisks—and there were almost certainly hundreds of them—were without exception so utterly unremarkable as to be entirely forgettable. At least to me they were. I wonder now, as we mark *Terry*'s golden anniversary, whether those stops and frisks were as forgettable to the individuals on the receiving end. I rather doubt it.

This essay is intentionally limited. I set up, but do not here engage in, a more robust discussion of *Terry*'s legacy; the normalization of not just a particular set of police tactics—stops and frisks—but of a particular approach to policing itself.[6] I do so through the frame of my own experiences with *Terry*, describing in some detail the stops and frisks that I conducted as an officer. By doing so, I hope to provide a useful touchstone; robust descriptions of frisks are surprisingly lacking in both academic literature and judicial opinions. There are exceptions, of course, but those exceptions tend to focus on what are easily categorized as abusive practices.[7] Here, my goal is to describe what was, to me, an entirely routine encounter, untainted by questionable legality,[8] verbal cruelty, or physical injury. It bears emphasizing that in describing my own experiences making *Terry* stops and conducting frisks, I do not mean to suggest that the tactics and techniques I used are universal or necessarily representative of standard police practices. Nor do I downplay or ignore the very real abuses that can occur. Abuses are troubling and deserve to be addressed, but my focus here is on illustrating the nature of at least some stops and frisks that do not constitute misconduct. Indeed, I hope to illustrate how the casual exercise of coercive authority may be an issue of concern even absent abuse.

As the Court itself described in *Terry*, frisks are far more than "petty indignities."[9] "Even a limited search of the outer clothing for weapons," the Court

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[6] For more on the principles that underlie modern policing, see Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016).

[7] *See, e.g.*, Simmons, *supra* note 2.

[8] I thank Jennifer Laurin for pointing out, with remarkable delicacy, the limited value of my assessment that the routine *Terry* stops I initiated and the frisks that I conducted were legally sound. It may be more accurate to say that my description in this essay is of stops and frisks that I *believed* to be—and continue to believe were—untainted by questionable legality. I acknowledge, however, that some of the features of the encounters that I describe herein raise questions about whether my confidence is well-placed.

[9] Terry v. Ohio, 392 U.S. 1, 16–17 (1968).

wrote, "constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[10] Most readers, I expect, will find that description confirmed by my account of the frisks that I used to regularly engage in. At the time, however, I did not. Although the circumstances that justified a frisk—having reasonable suspicion that an individual who had been lawfully stopped was armed and dangerous[11]—were concerning, the frisk itself was an entirely unremarkable aspect of my job. For me, it was a threshold event in the greater context of an investigative detention, a relatively minor facet of the real focus of the interaction. If I may be permitted a broad over-generalization, let it be this: however they are conducted, stops and frisks are a rather routine exercise for most officers.

Individuals subjected to a stop or frisk may have a very different perspective.

The differences are perhaps least noticeable in the context of stops that do not involve frisks. I was trained to initiate stops using the same approach that I would use to initiate consensual encounters, at least whenever the circumstances allowed for it. Contrary to the way they are often portrayed—which is, to be sure, based on at least some actual accounts—I never initiated a stop by jumping out of my squad car and shoving someone up against a wall. Instead, I sought to approach people in a non-confrontational way: walking up from the side or behind someone when I could, for example, and never stepping in front of someone who was walking. Verbally, good-humored requests were, for me and most of the other officers I worked with, a far more common method of initiating an investigative detention than shouted commands. My go-to phrase was some variant of "Hey, lemme talk at you for a minute." I might know that the individual I was approaching was not free to leave and that I would take steps to stop them from leaving, if necessary, but I didn't want them to realize that. In part, that was an example of policing in the shadow of the law:[12] I had learned that as long as they didn't know that they were being seized there was a good chance that the interaction would be legally considered to be consensual rather than a seizure.[13] That served as something of a security blanket, preserving the legality of the encounter in the off chance that a court later determined that I didn't have reasonable suspicion to justify a *Terry* stop. In part, it was simply a safer and more effective way to approach people. I had both learned from older officers and seen firsthand the value of convincing

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[10] *Id.* at 24–25.

[11] *Id.* at 30.

[12] *See* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[13] This description is not entirely accurate from a doctrinal perspective, of course. The proper standard is objective, not subjective; an individual is seized when a *reasonable person* would not feel free to disregard the police and go about their business, regardless of the individual's purely subjective perspective. Florida v. Bostick, 501 U.S. 429 (1991); United States v. Drayton, 536 U.S. 194 (2002). Looking back, the nuance of that distinction evaded me as an officer.

people to cooperate rather than insisting on their compliance.[14] As the old adage says, "You catch more flies with honey than with vinegar." And in part, my approach was the result of agency culture; my agency prided itself on its commitment to professionalism and police/community relations, which meant treating people as well as the circumstances allowed.

Perhaps the memories of the individuals whom I stopped, or whom I would have stopped if they had not cooperated, are as elusive as mine. Perhaps they remember something like a casual conversation, albeit one in which a uniformed officer requested some form of identification and called in a criminal background check during the course of the chat. Perhaps they, like I, don't even remember that.

Frisks likely left a more lasting impression. A frisk, you'll recall, is constitutionally permissible when an officer both has initiated a lawful stop and has reasonable suspicion to believe that the person they have stopped is armed and dangerous.[15] Reasonable suspicion, of course, requires more than an inarticulable "hunch"; it requires "specific and articulable facts which, taken together with rational inferences from those facts," would "warrant a man of reasonable caution in the belief" the individual was armed and dangerous.[16] I cannot tell you today why I concluded at the time that I had the requisite quantum of proof to frisk someone. On some occasions, it would have been because of a specific observation: a suspicious bulge in someone's waistband or peculiarities in their behavior.[17] On other occasions, it would have been because of my experiences with or knowledge of the specific suspect; an individual known to carry a weapon, for example, or someone with a history of violence against the police. Sometimes the frisk would have been based primarily or exclusively on the nature of the underlying offense that I had stopped the individual to investigate, as with a drug

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[14] For a more lengthy discussion of the distinction between demanding compliance and earning cooperation, and the way those two approaches can affect police encounters, see Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017) (discussing conflict avoidance); Stoughton, *supra* note 6, at 652–58.

[15] *Terry*, 392 U.S. at 30.

[16] *Id.* at 21–22.

[17] Suspects' nervous behavior is frequently cited as a factor giving rise to reasonable suspicion, although there is a tendency for officers to cite multiple indicators of nervousness. For example, an officer might describe a suspect's eye contact, perspiration, stammering, and fidgeting not just as indicia of nervousness, but as factors that separately contribute to the reasonable suspicion determination. This has not gone completely unobserved by courts. *See, e.g.*, State v. Moore, 781 S.E.2d 897, 902 (S.C. 2016) ("While nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion."). Nor have the courts been blind to the tendency to describe a range of apparently innocuous behaviors as suspicious. *See, e.g.*, United States v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005) ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you.").

offense or crime of violence.[18] In any case, there were a series of relevant factors that I could have articulated: the time of day, characteristics of the place where the interaction occurred, my physical stature as opposed to that of the suspect, and so on.[19] My training had included the frequent admonition to pay attention to what was referred to as the police version of "Spidey-Sense"; officers' ability to recognize at an unconscious level when things were out of place.[20] When we learned about the many factors that could be cited to articulate reasonable suspicion, they were presented in the context of making us consciously aware of the unconscious factors that made our Spidey-Senses tingle. Looking back, it may be true that those factors were, in some cases, simply ex post rationalizations, logical cover for implicit associations or heuristics that I was not conscious of at the time.

Regardless of how exactly I would have articulated reasonable suspicion, I believed I might have been interacting with someone who was armed and dangerous. That left me highly motivated to ensure that I confirmed or dispelled that suspicion as early into the encounter as possible—doing otherwise gave the suspect more opportunity to access a weapon and attack—and with as much certainty as I could. After patting someone down, I wanted to be as confident as I could be that either they were not, in fact, armed or that I had recovered all the weapons they were carrying.

Frisking someone takes time and attention, both of which provide the suspect with the opportunity to resist. I was at least as interested in ensuring that I wasn't attacked in the middle of a frisk as I was in the outcome of the frisk. Officers are trained to be hypervigilant for potential threats, and I had been taught that suspects almost always have a number of advantages: they aren't constrained by use-of-force policies or constitutional restrictions, for example, and they can shift from calm to violent in the blink of an eye, which meant that they could act before I had the opportunity to react.[21] I was trained to approach each encounter with an eye

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[18] *See* Harris, *supra* note 2, at 22–32 (discussing decisions indicating that, in certain situations, reasonable suspicion to frisk is effectively automatic).

[19] In identifying that it was possible, in any given case, for me to articulate some number of factors justifying the stop, I do not mean to suggest that those factors *actually* applied the way I thought they did at the time. It seems likely that, on some number of occasions, my actions were based on misperceptions that I did not recognize as such. Similarly, I imagine that I engaged in "creative . . . attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion," State v. Moore, 781 S.E.2d 897, 902 (S.C. 2016), though I would not have identified that as a problem at the time.

[20] The superhero Spider-Man possesses an enhanced awareness of his immediate surroundings that manifests as an acute tingling when he is in danger.

[21] In police lingo, the amount of time between a suspect's actions and an officer's reaction is known as the "reactionary gap." Dave Grossi, *The Reactionary Gap: Reminders on Threats and Distances*, POLICEONE.COM (June 3, 2013), https://www.policeone.com/police-trainers/articles/6258834-The-reactionary-gap-Reminders-on-threats-and-distances/ [https://perma.cc/KS92-ZECC].

toward reducing a suspect's advantages and abating my own disadvantages.[22]

There are multiple ways to reduce a suspect's advantages in the context of a *Terry* frisk, starting even before officers initiate the stop itself. Officers can exercise some control by not initiating the stop until they can perform the frisk at or close to the outset of the encounter. Officers may, for example, surveil the suspect for some period of time and initiate the stop in a location that provides some tactical benefit, perhaps by separating the suspect from people who might come to his aid or limiting the directions from which the officer can be attacked by positioning the encounter next to a building. Another common tactic involves waiting for back-up before initiating the stop. With multiple officers present, one officer can be a "contact" officer who engages with the suspect while the other is the "cover" officer, who stays focused on identifying and preempting potential threats.[23]

More directly, I would reduce a suspect's advantages during a frisk by physically controlling their movement. Again, contradicting what some portrayals suggest, I never had anyone lean forward with their palms up against a wall.[24] Instead, depending on the situation and the suspect's physical characteristics, I would have the suspect put the back of their hands together behind their back, palms facing out in a handcuffing position. Sometimes I would place the suspect into handcuffs during the frisk,[25] although more frequently I would grip both of the suspect's thumbs firmly in one hand. For some suspects, including those who

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[22] That framing—of officers mitigating their disadvantages rather than obtaining an advantage—is intentional. Officers learn that to assume that they have an advantage in any given encounter is to be complacent, and complacency can be fatal. *See, e.g.*, Dave Smith, *If Complacency Is the Symptom, What Is the Disease*, OFFICER.COM (Sept. 9, 2013), http://ww.officer.com/article/11143735/if-complacency-is-the-symptom-what-is-the-disease [https://perma.cc/KR2K-RKRB].

[23] STEVEN ALBRECHT & JOHN MORRISON, CONTACT & COVER: TWO-OFFICER SUSPECT CONTROL (1992) (discussing the role of the cover officer); *Contact & Cover*, LAWOFFICER.COM (Oct. 1, 2009), http://lawofficer.com/archive/contact-cover/ [https://perma.cc/VJ7Q-2FGH].

[24] I had been trained that positioning a suspect that way can actually increase the risk of the interaction, as it allows them to use the wall to brace themselves, potentially frustrating attempts to take them to the ground should it become necessary.

[25] Courts have recognized that officers may, on at least some occasions, place an individual into handcuffs in the course of a *Terry* stop. "The last decade 'has witnessed a multifaceted expansion of *Terry*,' including the 'trend granting officers greater latitude in using force in order to "neutralize" potentially dangerous suspects during an investigatory detention.' For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention." United States v. Tilmon, 19 F.3d 1221, 1224–25 (7th Cir. 1994) (quoting United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993)). At the same time, courts have sometimes emphasized that handcuffs should not be viewed as inherently authorized whenever officers engage in *Terry* stops. *See* Ramos v. City of Chicago, 716 F.3d 1013, 1018 (7th Cir. 2013) ("The proliferation of cases in this court in which '*Terry*' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop.").

were obese or otherwise physically struggled to put their hands behind their backs, I would have the suspect interlace their fingers and put their hands on the back of their heads, at which time I would firmly hold the suspect's interlaced fingers in one hand. Regardless of whether I was grabbing the suspect's thumbs or the suspect's interlaced fingers, I would twist my wrist slightly to create some tension in the suspect's wrists, thumbs, or fingers. I would then disrupt the suspect's balance. Sometimes I would have the suspect bend forward—far forward—over the hood or trunk of a car. Other times, I would have them lean slightly, either backward or forward, depending on which part of their body I was frisking at the time. Often, I would have one of my legs touching or very close one of the suspect's legs, sometimes between the suspect's legs, with my knee pressed against one of the suspect's knees. I also stood in a way that maintained my balance while intentionally disrupting the suspect's, leaning them forward or backward slightly in a way that forced them to rely on me for stability.

What should be clear is that the positions I'm describing are not comfortable. They are not intended to be, although they are not specifically designed to be uncomfortable either. By holding the suspect's thumbs or fingers in one hand, I was limiting their ability to reach for a weapon. Ideally, I would have been able to prevent them from pulling their hands free, although my hold was more of a psychological deterrent and physical hindrance than it was an insurmountable obstacle. At the least, by paying attention to what I felt from the suspect's hands and arms, I could detect any physical tensing that signaled an effort to pull away, which would have given me some advance warning. In the same vein, I used the leg I was pushing gently against the suspect's leg to detect tension or shifts of weight that might indicate imminent resistance. By breaking the suspect's balance, I precluded some methods of resistance—it's very difficult to kick when one is off-balance, for example—and I increased the amount of time I had to identify and react to a suspect's resistance; the suspect would need to straighten off the car or regain their balance before running or turning on me. Regardless of which variant I used, my goal was to ensure that I discouraged resistance and had as much warning of impending resistance as possible.[26]

Only after establishing our respective positions would I begin to frisk the suspect. It's worth pointing out that I was concerned for my health as well as my safety. Before beginning the frisk, I would typically ask suspects whether they had anything sharp on them to avoid accidental punctures as I patted someone down; I included a question about the presence of "any knives, needles, or broken glass" in my standard patter prior to starting a frisk.[27] Some officers wore puncture-resistant

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[26] Garrett & Stoughton, *supra* note 14, at 253–58 (discussing time as a core tactical concept).

[27] My standard patter was something like the following: "You don't have anything on you that I need to be concerned about, right? No weapons of mass destruction or insurgents? Osama bin Laden? Okay, I'm going to pat you down here. No weapons on you? No guns? No knives, needles, or broken glass? Nothing sharp that's gonna poke me?" This order of presentation—from the inane to the relevant—was quite deliberate. I started with outlandish and impossible examples as a way to defuse tension by humorously making it clear to the suspect that I didn't *expect* them to have

gloves, which have patches of thick fabric or flexible armor on the inside of the fingers and palms. I found such gloves interfered with my ability to detect items of interest during the frisk, so I limited myself to donning a pair of rubber gloves—more like dishwashing gloves than surgical gloves—before starting a frisk.[28]

And what did the frisk itself involve? In a footnote, the *Terry* Court quoted an academic article from the *Journal of Criminal Law, Criminology, and Police Science*[29] that explained how "[t]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[30] That description is accurate, so far as it goes, but it does little to capture the full extent of a frisk.

Frisks are, or at least are supposed to be, about finding weapons, but weapons come in various shapes and sizes. One of drills that I went through in the police academy involved having would-be officers pair up, with one playing the role of officer and the other, the suspect. While the "officers" waited in a separate room or turned their backs, the "suspects" gathered around tables laden with various weapons or implements that could be used as weapons: folding knives, straight-bladed knives, blades from utility razors, brass knuckles, replica guns ranging from full-size hand-cannons to tiny, one- or two-shot pocket pistols known as derringers, and so on. Included on the table were a range of innocuous items that could conceivably be used as weapons: a ring of keys, an assortment of nails and screws, and, my personal favorite, a thin piece of metal that close inspection revealed to be the broken-off "temple" of a pair of eyeglasses (the arm that extends from the hinge on the rim to back over the ears). The academy cadets playing the role of suspects would choose some number of weapons and secrete them about their bodies, then the "officers" would approach and, depending on what was being taught, either frisk or search the fully compliant "suspects."

After the cadets playing the role of officers concluded that they had thoroughly searched the "suspects," the instructors had the suspects reveal what

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anything on them. I used a similar technique in the context of consent searches; my thought was that someone was more likely to consent if I had given them a list of things they *knew* they didn't (and couldn't) have on them. I would then tack on a quick question about the presence of something small, like drugs, to ensure that the scope of their consent was as broad as possible.

[28] Rubber gloves are among the more common pieces of police equipment that almost no one thinks about. I used to keep two pairs of gloves tucked between my undershirt and my bulletproof vest, replacing them as I used them so I always had at least one back-up pair available. The point, as demonstrated by the location where I stored my gloves, was not to sanitize my touch for the benefit of the suspect, but to protect me from incidental contact with bodily fluids and other potential hazards.

[29] Published from 1910 to 1960, this was "the first periodical published in the English language devoted to the cause of criminal law and criminology." Kurt Schwerin, *Journal of Criminal Law, Criminology, and Police Science—1910–1960—A Brief Historical Note*, 51 J. CRIM. L. & CRIMINOLOGY 4, 4 (1960).

[30] Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968) (quoting L. L. Priar & T. F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481 (1954)).

had been missed. Inevitably, there was a broken-off knife blade concealed in the fold of a sock or a derringer nestled under someone's testicles or breasts. Some cadets would be even more creative, tucking a utility razor blade flat against the inside of their cheek, sliding a three-inch nail hidden into a tear in the brim of a baseball cap, or slipping a piece of metal under a wedding band so it could be "held" even with the hand completely open. The instructors made a point of having the "suspects" describe how they could use the undiscovered weapons to attack the "officers." And they emphasized that the few cadets who found all the hidden weapons had managed to do so only because of their "suspect's" lack of creativity.

There were several lessons baked into those drills. They reiterated a persistent message in police training: that even the most mild-mannered suspect is capable of hiding a deadly weapon and turning it on the officer without warning. For our own survival, we learned to treat everyone as an armed threat until we could conclusively prove to ourselves that they weren't—and even then, we should avoid taking anything for granted.[31] More specifically, the search drills established in our minds the need for frisks and searches to be exceptionally thorough. That was the only tactic to address the many creative ways people could conceal weapons about their bodies.[32] The frisks I conducted in the field, then, were deliberatively invasive. My training had taught me that they had to be; it was impossible to be as thorough as I believed safety required without being invasive.

Frisks are often described as "pat-downs," which is how the *Terry* Court described Officer McFadden's search of the men he stopped,[33] but in practice I did very little "patting." Instead, I would slide my hand (or hands) over the area of suspect's body that I was searching, moving them in small circles as I did so, so that my fingertips and palms might detect any protuberance in or under the suspect's clothing. At the same time, I would lightly clench and release my fingers, not enough to gather the fabric of clothing or manipulate items under the clothing, but enough to shift clothing over the skin so I could ensure that I could identify items and not mistake a weapon for a seam or fold in the clothing. I

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[31] Seth W. Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. FORUM 225, 228 n.17 (2015) (citing Richard Fairburn, *Cooper's Colors: A Simple System for Situational Awareness*, POLICEONE.COM (Aug. 9, 2010), http://www.policeone.com/police-trainers/articles/2188253-Coopers-colors-A-simple-system-for-situational-awareness [http://perma.cc/5PU5-5957]); Nick Jacobellis, *How to Spot a Concealed Firearm*, POLICE MAG. (Nov. 1, 2007), http://www.policemag.com/channel/patrol/articles/2007/11/how-to-spot-a-concealed-firearm.aspx [https://perma.cc/RN5V-3PVU] ("[I]t is virtually impossible to know if an individual is carrying a concealed firearm. One way to deal with this ongoing problem is to assume that every subject or individual that you meet or encounter is armed until you prove otherwise.").

[32] Jacobellis, *supra* note 31 ("Over the years, illegally armed individuals have used a variety of methods to transport and conceal firearms. Criminals have hidden guns in their crotches, in special pockets in their baggy jeans, in concealed compartments inside their pants, in their waistband, and the same way that you do in ankle holsters, shoulder holsters, belt holsters, and fanny packs. They have also had less suspicious looking members of their entourage carry a gun for them.").

[33] *Terry*, 392 U.S. at 7.

remember focusing on feeling with the pads of my fingers rather than the tips, thinking that doing so would make it less likely that I would exceed the limits of a frisk by manipulating the clothing or items under the clothing.

After securing someone in the appropriate position, I would start by using my free hand to frisk the locations where weapons were most likely to be: the suspect's midsection. I would start at either the front or rear center of the suspect's midsection and run my fingers along and beneath their belt, then frisk their waistband, front and back pockets, groin, and buttocks. The groin and buttocks bear special mention, as it had been drilled into me in training that criminals knew and took advantage of the fact that officers were naturally uncomfortable searching these areas. The potential for avoiding discovery made those areas particularly attractive as hiding spots, which in turn made it particularly important for me to search there. To do so, I would make the same motions as I've just described, reaching around over the front of the thighs and doing the same from the back, running my hand along clothing between suspects' legs starting on one side and making my way across. Inevitably, this involved contact (through gloves and clothing) with suspects' buttocks and genitalia, but that contact was essential for an effective frisk. As I was trained, I sought to avoid unnecessarily discomforting suspects by informing them of what I was doing as or immediately before I did it. I even had a standard phrase that, I thought, disarmed some of the tension: "I don't mean to feel you up or nothing, but I'm about to." I may have had to grope people, but I didn't want to be unprofessional about it.

Once I had finished frisking a suspect's midsection, I moved on to the rest of their body. I'd frisk both legs, starting at the top and working my way down. Using the same sliding, gripping motion, I would run my hands around the upper thigh, lower thigh, knee, and calf before frisking the suspect's socks and upper portion of the suspect's shoes. From there, I would move all the way up to the suspect's head. If the suspect had a hat on or hair of a certain length, I would frisk it by running a hand from their forehead to the hairline on their neck, starting on one side of the suspect's head and making my way to the other. If the suspect had hair long enough to hang down or collect into a ponytail, I would gently squeeze the entire length in my palm, again slightly clenching and releasing my fingers to identify foreign objects. After frisking or, in some circumstances, skipping the suspect's head,[34] I could start at top of their shirt, working my way all around the suspect's neckline. From there, I would frisk the top of one shoulder, moving down to the front of the armpit, then the armpit itself moving up to the back until I could switch sides. Once both shoulders and armpits had been frisked, I could move to the chest and back.

Female suspects' chests presented special challenges. As with the groin area, I informed suspects of what I would be doing in an effort to mitigate their discomfort and, frankly, to head off allegations of sexual impropriety. I was taught

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[34] There was, for example, no need to frisk the head of a bald suspect who was not wearing a hat.

to frisk female suspects' breasts with the edge and back of my hand, rather than the palm or inside of the fingers, and to make a point of telling them so. The assumption, which I never questioned until it was derisively rejected by one of my (female) law school classmates, was that feeling someone's breasts with the edge of back or edge of my hand was less invasive or offensive than using my palm. When I frisked a female suspect's chest, I began with the edge of my hand, thumb in, between the suspect's breasts and against their sternum. I would then slide my hand down and under one breast, keeping the edge of my hand pressed firmly against their ribs and the back of my hand riding along their breast so I could detect anything that may be hidden in a shirt or bra. After checking the perimeter of the breast, I would run the side of my hand over the top. After doing that on both sides, I would turn my hand so the palm faced inward and frisk the suspect's stomach area and back, methodically moving from the center of the suspect's body to the sides. After frisking the torso, I would move on to the arms, if they were covered, starting at the shoulder and moving to the edge of the sleeve.

If, during the course of a frisk, I felt something that I identified as weapon or contraband, my reaction depended on the situation. With some objects, including anything that I perceived to be a firearm, I might immediately restrain the suspect further by having them get onto the ground, by putting them into handcuffs, or by having a second officer hold them while I retrieved the weapon (or vice versa). For other objects, such as folding knives, I would typically retrieve the weapon and secure it either by putting it in my own pocket or by handing it to another officer. In either case, I would continue the frisk after identifying the item and, if it was a weapon, securing it. I followed what is known in law enforcement as the "plus one" rule: always assume that the suspect has at least one more weapon than you've found so far.[35] If the item was readily identifiable as contraband, such as a small baggie of drugs,[36] I would typically retrieve the item, place the suspect into handcuffs (if they were not already handcuffed), and confirm the contents by asking the suspect to identify them or by having another officer use a field test kit. If what I retrieved was an unlawful weapon or appeared to be contraband, of course, the suspect would be placed under arrest and I would begin an even more invasive search incident to arrest.

So why don't I remember any specific frisks? Identifying with any precision

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[35] ROBERT S. STERING, POLICE OFFICER'S HANDBOOK: AN INTRODUCTORY GUIDE 90 (2005) ("When conducting a search on a person, always consider the 'plus-one rule.' If one weapon is found, you should assume that the suspect has two weapons. If two weapons are found, you should assume that there are three, and so on.").

[36] Although it is outside the scope of this essay, it is worth noting that officers may also receive training in how to identify contraband during frisks. A training document provided by the Federal Law Enforcement Training Center, for example, suggests that officers may be able to establish their recognition of drugs by testifying that they have practiced frisking officers who have baggies of drugs in their pockets. STEVEN L. ARGIRIOU, *TERRY* FRISK UPDATE: THE LAW, FIELD EXAMPLES AND ANALYSIS, https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/terryfriskupdate.pdf [https://perma.cc/ZV7L-MRP2] (last visited Oct. 6, 2017).

the cognitive or psychological mechanisms to explain my lack of memory is beyond my ability. But Moshe Bar, director of the Cognitive Neuroscience Laboratory at Harvard Medical School and Massachusetts General Hospital, suggested in an easily digestible op-ed that human memory does not record mundane events precisely because they are mundane.[37] Perhaps my frisks were like the Sunday shopping trip he discusses in that piece: "[T]here was no reason to etch the day into memory; not much had happened that had not happened before."[38]

But that just begs the question: why were the frisks I performed so mundane as to be forgettable? Several answers present themselves. It was, of course, entirely routine to take actions intended to ensure officer safety to the highest extent possible. For more than 50 years, criminologists have identified a preoccupation with danger as one of the defining characteristics of policing.[39] In other work, I have described the training and messaging that reinforces that approach, as well as the type of tactical thinking and actions that it incentivizes.[40] In that vein, frisks are just one of many different tools that I used on a daily basis to engage in a routine, if important, part of my job.

Frisks were not just one component of a broader focus on officer safety on a macro level, they were also, in my mind, a relatively minor facet of each encounter on a micro level. As best as I can recall, my frisks did not turn up weapons or contraband in most cases, which meant that, after the frisk, I was still in the position of confirming or dispelling the suspicions that gave rise to the underling *Terry* stop. After all, the underlying stop was justified by my suspicion that the individual I just finished frisking had just been, was, or was about to be engaged in criminal activity, separate and apart from whether they were armed and dangerous. Frisks did not exist in their own right so much as they constituted a transient component of what was, to me, a totally normal interaction with a civilian. Frisks were "quasi-events," a term from anthropology that refers to "the fleetingness and fluidity of power."[41] That is not to imply that the exercise of state power was illusory; to the contrary, it suggests the difficulty of observing the scope and contours of state power in light of how it is actually exercised. Perhaps frisks were so forgettable because they were merely threshold events, pit stops on the path to whatever the eventual destination happened to be.

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[37] Moshe Bar, Opinion, *Human Memory: What Did* You *Do Last Sunday?*, L.A. TIMES (May 29, 2011) http://articles.latimes.com/2011/may/29/opinion/la-oe-bar-memory-20110529 [https://perma.cc/5SLF-LVNJ].

[38] *Id.*

[39] JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 42–48 (1966).

[40] *See, e.g.*, Garrett & Stoughton, *supra* note 14; Stoughton, *supra* note 6; Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–69 (2014).

[41] Mat Coleman & Angela Stuesse, *The Disappearing State and the Quasi-Event of Immigration Control*, 48 ANTIPODE 524, 527 (2015).

The relative significance of the frisk vis-à-vis the stop can perhaps be illustrated by the way I would explain my actions at the time. When challenged, or questioned by a suspect whom I had stopped, it was easy enough to explain why I was investigating them. When possible, my habit—and I make no claim that it was universal—was to attempt to convince the suspect of the propriety of my actions by explaining why it would be professionally inappropriate to *not* investigate them. I frequently referred explicitly to the articulable factors that justified the *Terry* stop. So, for example, I could explain to an aggrieved suspect that I had stopped them because it was unusual for pedestrians to be wandering in a non-residential area in the wee hours of the morning. By doing so, I would attempt to enlist their aid protecting the community, which just so happened to require making sure that they weren't involved in a recent rash of burglaries in the area.[42]

In contrast to my explanations for the stop itself, which could be an important part of earning the suspect's cooperation, I recall my explanations for *Terry* frisks as far more superficial. To the extent that I went beyond the generic statement, "For my safety and yours," it was only by identifying the mechanism through which our mutual safety was to be assured: "I don't know you, right? You seem like a nice guy, but I need to make sure you aren't going to hurt me." Prior to conducting the frisk, that rather abrupt explanation could be attributed to the need to establish control over the situation relatively quickly; prolonged conversation would have extended the risk I faced interacting with someone whom I (reasonably) suspected of being armed and dangerous. But even after a frisk, when time was no longer a relevant concern, the explanations did not get much deeper than that. They didn't need to be; the frisk itself was over, after all, and my objective had changed. I had conducted a frisk because the circumstances made it unwise not to; it was something to get out of the way as efficiently as possible so that I could focus on the real reason for the actual encounter in relative safety.

It's plausible that my view of frisks—as an almost incidental facet of an interaction that was really about the investigative detention—was inverse to that of the individuals whom I stopped. Being questioned about their presence or activity was invasive, of course, but I don't think it strains credulity to think that the frisk itself was, for many people, the more salient component of the interaction. The dichotomy in perspectives about the significance of frisks that determines whether they are memorable—or perhaps remember-able—may evidence a more broadly applicable, if underappreciated, structural barrier to police reform. It is not just that officers and community members disagree about the propriety or effectiveness of various police actions, it is also true that they have very different conceptions of what those actions *are*. If true, that observation offers some support for a thesis I've written about before: meaningful police reform requires changing "how officers view their job and their relationship with the community."[43] In the narrow

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[42] I did not think in terms of procedural justice at the time; it simply made sense to convince someone to cooperate whenever circumstances permitted.

[43] Stoughton, *supra* note 6, at 612.

context of frisks, perhaps a deeper appreciation for the lived experience of being frisked might have changed my perspective on, or my use of, that tactic. Even if it had no effect on the number of frisks I conducted, I wonder now whether that change in perspective would have encouraged an approach that left the civilians I frisked with a different impression of my actions.

I don't mean to suggest that my frisks left indelible scars on the souls of everyone I targeted—I certainly hope that's not the case. But one need not go to such extremes to recognize that an individual subjected to a frisk might not view that interaction the way I did: so routine as to be utterly forgettable.