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TERRY: A[N EX-]COP'S VIEW

JAMES J. FYFE*

*Law enforcement officers cannot function simply as agents who respond to the scenes of crimes and accidents after they have occurred. The police role always has and always will be based primarily upon the performance of tasks designed to minimize or prevent such incidents from happening.*¹

If there is a unanimous view among cops, it is the belief that the authority to stop, question and, where danger apparently exists, to frisk suspicious persons, is an indispensable part of their work.² I concur completely, and believe that the best test of the validity of this view involves no sophisticated legal theorizing, but is a concrete question of the type that invariably pops up in police training classes: *What should Detective McFadden have done when he watched John Terry and his companions engage in activities that any cop—or mildly interested bystander—would have suspected were the prelude to a stick-up?*

The alternatives available to McFadden were limited:

He could have continued to watch surreptitiously. As any reasonable police instructor would inform the class, however, this would have involved so many risks that it would have been a violation of the primary police responsibility to protect life. If Terry and company proceeded to rob the store they apparently were casing,³ some innocent person might have been killed or

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¹ GEORGE W. O'CONNOR & CHARLES G. VANDERBOSCH, *THE PATROL OPERATION* 59 (1st ed., 1967).

² See *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

³ Critics may opine to the effect that, because McFadden testified in the *Terry* suppression hearing that he had never before seen anybody "casing a job," his stop,

injured. Even if nobody had been hurt during such a robbery, McFadden would have been left with the problem of apprehending three robbers, two of whom would almost certainly have had guns in their hands, as they emerged from the store. This may well have precipitated a shooting incident on a public street (in which McFadden was outnumbered) and/or a hostage situation and, therefore, would also have been a poor attempt toward protection of life.

McFadden also might have gone in search of a telephone and called for help (keep in mind that he stopped Terry on October 31, 1963, a couple of weeks after I graduated from the New York City Police Academy and several years before police anywhere carried portable radios). But this would have taken him off the scene at what he suspected was a critical time. His absence might have given Terry and company the opportunity to commit a robbery, hurt people, and escape. At best, even if the three suspects were still loitering when McFadden and his helpers arrived at the scene, they still would have been left with the question of whether, and how, to stop and question the three suspects.

McFadden could have approached Terry and company and questioned them without attempting to determine whether they were armed. This, an Australian police labor union solicitor friend recently told me, is what is done by the police he represents because, absent a full arrest, they are prohibited from frisking or searching suspicious persons. The occasion for my friend's call was the most recent in a series of stabbings of Sydney police officers who had stopped—but were prohibited from frisking—suspicious people under apparently dangerous circumstances. My friend did not specifically know of *Terry*, but he un-

detention and frisk of Terry, Chilton and Katz were arbitrary. McFadden's prior inexperience with such situations is not a convincing basis upon which to dismiss his claim of a reasonable suspicion that Terry and company appeared to be engaged in the prelude to a robbery. It is not surprising that McFadden had never before seen "people casing a job" because offenders smart enough to come up with better stories than Chilton's account of having found the guns in a paper bag usually do not case jobs in front of witnesses. Further, what McFadden did see and testify to was consistent with what robbers do before holding up stores. Before dismissing McFadden's account as insufficient to raise a reasonable suspicion in an alert officer, critics should consider what other explanations of the conduct of Terry and company are viable or whether, had employees of the store apparently being cased seen Terry and company, they would have been alarmed enough by the suspicious behavior to call the police.

derstood that United States police did not have to expose themselves to danger in this way, and he was interested in finding out what could be done to better protect his own officers.⁴ In this country, where guns, rather than knives, are the weapon of choice, reasonable police instructors—like mine—were instructing their charges long before *Terry* that police are not paid enough to put themselves in harm's way in this fashion.⁵

McFadden could have walked on his way without taking any action on his suspicions. In this case, regardless of what *Terry* and company may have gone on to do, neither he nor McFadden would have become inextricably linked with detentions short of arrests. *Terry* might or might not have robbed the store but, even if he had, we would never have heard of McFadden because he would never have admitted to anyone that he had seen and walked away from *Terry* and company's suspicious actions.

A. *TERRY* IN NEW YORK

From this ex-cop's perspective, therefore, McFadden had no real choice but to do what he did. In fact, *Terry* had little or no impact on what police do here in New York City. In 1964, the

⁴ Police in New South Wales currently are permitted to frisk people they reasonably suspect to possess stolen property or "any other thing used or intended to be used in the commission of an indictable offence," Crimes Act, 1900, no. 40 (Austl.), but, as interpreted, this provision does not permit preemptive stops or protective frisks for weapons like that conducted by McFadden. A pending bill would modify this provision "to create an offence of having custody of a knife in a public place or a school without a reasonable excuse" (a reasonable excuse being that it is necessary to one's trade, for preparation of food, for lawful sporting purposes, for sale, for exhibit at a show, as part of an official uniform, or for "genuine religious purposes"). Crimes Legislation Amendment (Police and Public Safety) Bill (Explanatory Note) Overview (Austl. 1998). The bill would also enable "a police officer to conduct an electronic or frisk search of a person and an examination of any bag or other personal effect that the person has with him or if the officer suspects on reasonable grounds that the person has unlawful custody of a dangerous implement," obviously including a knife. *Id.* at div. 2.

⁵ This does not mean that concerns for the safety of the police are so overwhelming that they *always* outweigh citizens' Fourth Amendment rights. Properly framed as it applies to *Terry*, the question is whether the safety interests of police officers investigating what they suspect may be preparations to armed robbery (a situation that accounts for about 30% of urban police deaths nationally) outweigh the right of the citizens involved to be free from brief detention and relatively unintrusive frisks. A negative answer to this question would lead police to simply refrain from responding to citizens' calls to investigate suspicious people: "Sorry Ma'am, it doesn't matter that those fellas have been outside your store and peeking in and ducking in and out of the shadows. If they rob you, let us know and we'll respond after we have probable cause to arrest them."

New York State legislature wrote a new "stop and frisk" law which authorized police officers to stop and question persons suspected of felonies or certain misdemeanors,⁶ and to frisk them in circumstances which give rise to a reasonable fear by officers for their safety. Of this latter provision, an accompanying policy issued by the New York State Combined Council of Law Enforcement Officials instructed officers that:

3. No search is appropriate unless the officer "reasonably suspects that he is in danger." Among the factors that may be considered in determining whether to search are:

- a. Nature of the suspected crime, and whether it involved the use of a weapon or violence.
- b. The presence or absence of assistance to the officer, and the number of suspects being stopped.
- c. The time of the day or night.
- d. Prior knowledge of the suspect's record and reputation.
- e. The sex of the suspect.
- f. The demeanor and seeming agility of the suspect, and whether his clothes so bulge as to be indicative of concealed weapons.

(This listing is not meant to be all inclusive).

4. Initially, once the determination has been made that the officer may be in danger, all that is necessary is a frisk—an external feeling of clothing—such as would reveal a weapon of immediate danger to the officer.

5. A search of the suspect's clothing and pockets should not be made unless something is felt by this frisk—such as a hard object that feels as if it may be a weapon. In such event, the officer may search that portion of the suspect's clothing to uncover the article that was felt.

6. If the suspect is carrying an object such as a handbag, suitcase, sack, etc., which may conceal a weapon, the offi-

⁶ These were the misdemeanors delineated in Section 552 of the former New York State Code of Criminal Procedure, and included weapons offenses, possession of burglar's tools, receiving stolen property, unlawful escape, impairment, carnal abuse, indecent exposure, obscenity and other indecency provisions, sodomy, rape and possession of narcotics, amphetamines and hypodermic needles. See N.Y. CODE CRIM. PROC. § 108-a (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)).

cer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not represent any immediate danger to the officer.⁷

Thus, New York police had the authority and the information necessary to comply with *Terry's* provisions four years before the case was decided. At that time, such specific instruction in any area of police activity was so unusual that the President's Commission on Law Enforcement and Administration of Justice singled it out as an exemplar of the type of policy guidance that police across the country should enact. In bemoaning the absence of guidance for officers' street-level decisions, the Commission wrote:

One of the most adequate statements of enforcement policy was produced in New York State in conjunction with the enactment in 1964 of the new "stop and frisk" law. Police and prosecuting officials recognized that this newly legislated authority to stop and question persons short of arrest and to subject them to a frisk was vulnerable to attack on constitutional grounds, and they were aware that opposition to its passage would result in its implementation being closely watched.

It was for these reasons that the New York City Police Department and the District Attorney's Office joined with other law enforcement agencies throughout the state to publish a set of guidelines for operating personnel prior to the date on which the new law became effective. Five pages of specific requirements, limitations, prohibitions, and examples were used to elaborate upon the legislation which itself is contained in two relatively brief paragraphs. Emphasis was not placed upon defining the law so much as it was upon urging the police to exercise restraint and to act well within the outer limits of their prescribed authority.⁸

⁷ NEW YORK STATE COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, POLICY STATEMENT (1964), in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. JUSTICE, TASK FORCE REPORT: THE POLICE 40 (1967) [hereinafter PRESIDENT'S COMM'N].

⁸ *Id.* at 17 (footnote omitted). The law apparently was not successful in convincing NYPD Officer Martin, the arresting officer in *Sibron v. New York*, 392 U.S. 40, 45 (1968), to employ proper restraint. On March 9, 1965, after observing Sibron loitering with other drug addicts in and around a restaurant on Broadway, he approached [Sibron] and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer,

Even the 1964 law, as I recall it, was viewed by street cops as a clarification of longtime practice rather than as a definition of new authority. The law, in effect, gave the police license to do what they had already been doing, and put into black and white the principles that most officers already had learned informally, or had been taught by their employers. Thus, neither the law nor the decision was in any way comparable in effect to *Mapp v. Ohio*,⁹ the other Cleveland case that told cops in New York and elsewhere that they could not simply tell people to *assume the position* and subsequently obtain convictions on the basis of whatever contraband their illegal searches produced.

B. *TERRY* OUTSIDE NEW YORK

It is probably reasonable to suspect, however, that *Terry* did change police behavior in many places outside of New York. The New York State guidelines fell into a policy void, and were the first substantive prescriptions for police officers' field behavior that my colleagues and I had ever received. Indeed, even use of firearms by officers went ungoverned by NYPD rule until 1972, when the department issued its first internal administrative supplement to the Penal Law's vague limits on the use of deadly force.¹⁰

In 1968, and still today, I suspect, police discretion to stop, question, and frisk is largely uncontrolled by administrative rules.¹¹ During the late 1980s, for example, the International

"Sibron mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

Id. In what appears to be a very broad interpretation of the 1964 law, Sibron's conviction for drug possession was affirmed by the New York State Court of Appeals. See *People v. Sibron*, 18 N.Y.2d 603 (1966). The conviction was, of course, reversed by the U.S. Supreme Court on the same day that *Terry* was decided. See *Sibron*, 392 U.S. 40.

⁹ 367 U.S. 643 (1961).

¹⁰ See POLICE DEPARTMENT, CITY OF NEW YORK, TEMPORARY OPERATING PROCEDURE 237, app. B (1972). Another example of the early 1960's level of police sophistication in providing guidelines for field officers' behavior comes to mind. An NYPD insert for officers' memo books purported to enable officers to communicate with the city's growing Hispanic populations. It included many phonetic common Spanish phrases ("KOHMO SAY-YAMMA- OOSTEDD"), but included no information on how to interpret responses to these questions.

¹¹ As if to underline the dangers of generalizing about the 21,000 or more U.S. police agencies, a century-old police manual is an exception to my claim about the absence of guidance for officers confronted by suspicious persons and circumstances:

Association of Chiefs of Police began to promulgate model policies for member departments, but these do not yet include a stop, question and frisk standard. The Manual of the Commission on Accreditation for Law Enforcement Agencies, Inc. does include such a standard, but it, as well as the accompanying commentary, leave much to the imagination and are optional, rather than mandatory:

41.2.3 *A written directive governs the conduct of field interviews.*

Commentary: A field interview program may deprive actual and potential offenders of some of their initiative in selecting the time, place, and circumstances for the commission of crimes. The agency should clearly indicate what constitutes a valid field interview situation to guard against its misuse and to minimize potentially adverse citizen reactions. Field interview contacts may be documented to provide other officers, investigators, and crime analysts with information concerning suspicious persons and situations.¹²

Thus, it appears that police chiefs have paid little attention to *Terry*. I propose that this is so for four reasons.

First, chiefs do not want to deter officers from attempts to detect and deter crime, or to put "suspicious persons" on notice that they may carry guns or other contraband without fear of

[P]olicemen must judge from all the circumstances of the case what the intention of the party is. In some cases no doubt can exist, as when the party is attempting to break into a house, or is examining the doors and windows, or endeavoring to take the property secretly. If the intention of the party admits of a doubt, the policeman will not act hastily, but will closely watch the suspected party that he may discover his design.

If the policeman see any one carrying, or in any manner conveying any goods, under circumstances which may lead to strong suspicions that they may have been stolen, he should, particularly in the night, stop and examine the person; and if the appearance and manner of the party, his account of himself and the goods, and all the circumstances of the case, should leave no doubt that the goods have been stolen, he should arrest the person and take possession of the goods; but if the suspicions of the policeman be slight, he should not stop the person, but watch him to discover where the goods may be deposited; and if he then become[s] fully convinced that the property has been stolen, he will then make the arrest and take charge of the goods.

MERIDEN POLICE GUIDE AND REFERENCE BOOK 51, 53 (B.R. Debbs ed., Bridgeport, Marigold Printing 1895).

¹² COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES 41-42 (1994).

discovery by *aggressive* officers. Groundless or not, there is a fear among even the most progressive chiefs that clear specification of the limits on officers' discretion will give some part of the population the idea that the police have been handcuffed. For these officials, ambiguity—about when officers can fire their guns, use force, arrest, issue tickets or frisk—is the more certain course.

Second, regardless of their legality, frisks that produce evidence of crime are presumed to serve legitimate police purposes (e.g., taking guns or drugs off the street, deterring weapons possession). Further, the complaints of those subjected to such *tosses* should not be legitimized because they come from people who were, in fact, *dirty*, and who therefore have no right to complain about police impropriety.

Third, regardless of legality, the costs of frisks that fail to produce results are unclear. There is no physical harm to those subjected to such searches. Further, many police and their bosses do not regard people who are stopped and released as innocent, but simply as *not caught this time*. In addition, as I have found in training and talking with in-service officers and commanders in New York and elsewhere, some even argue that unfruitful frisks are a positive public relations device because they demonstrate to the innocent citizens stopped that police are vigorously doing their jobs. A half-century ago, a Massachusetts town's police pamphlet advised citizens that:

IF STOPPED BY POLICE

Do not be offended if questioned as to your identity and business by a police officer. His assignments and routine duty often require the identification of persons. Be glad that he is on the job. Remember, his job requires that he risk his life if necessary to protect *you*. Reputable persons have nothing to fear from the police.

Your Police Department is anxious to give you the maximum protection possible with the personnel and equipment available. We solicit your co-operation in assisting the police department to keep Longmeadow a respected and law abiding community.¹³

Unfortunately, this advice has not proven as soothing in our

¹³ LONGMEADOW POLICE, GUARDIANS OF YOUR PROPERTY AND WELFARE 15 (1949).

diverse inner-cities as it may have been in small-town 1940's New England. The perceived arbitrariness of police stop, question and frisk practices have proven to be among the most persistent grievances of residents in areas that have been torn by disorder.¹⁴

Fourth, the difference between a *Terry* stop and simply speaking with people is unclear. In practice, as some of the materials cited in this paper demonstrate, there often is no bright line between merely initiating a conversation with a person who looks vaguely *wrong* and detaining someone against his will. On the street, both interactions usually begin with words like, "Hi, can I talk to you for a minute?" or "How you doing? I was hoping you'd be able to help me with something here." A long-used International Association of Chiefs of Police text, for example, discusses "The Field Inquiry," and draws little distinction between casual interviews and evidence-based field interrogations:

Stopping and questioning persons observed in the vicinity of the crime scene; checking the identification of someone resembling a suspected criminal; exerting the added effort to talk to the stranger on the beat, or to the individual whose behavior arouses suspicions, are proven methods of establishing identifications, of obtaining information and of preventing crimes from being committed.

A Source of Information

The field inquiry is based upon the principle that the opportunity to apprehend criminals and to prevent crimes increases with the number and frequency of persons interviewed.

No police officer can physically observe or have complete knowledge of all the criminal activities occurring within his beat. One way of extending his power of observation is to obtain information from persons living or working within his patrol area.

The field inquiry serves this purpose as it goes further than questioning those suspected of committing a crime. It seeks information from any person who may possess it.

¹⁴ See generally JAMES KOLTS ET AL., THE LOS ANGELES SHERIFF'S DEPARTMENT (1992); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMM'N]; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); PRESIDENT'S COMM'N, *supra* note 7.

The non-criminal subject may describe the activities of a criminal living within the area or provide important information which will aid an investigation. The field contact can also be used to verify or disprove the alibi of an arrested suspect. In fact, information which otherwise would not be uncovered can be obtained by the officer who will question those who arouse his suspicions even though he realizes that many of the field contacts will be disappointing.¹⁵

C. WHAT GOOD IS ACCOMPLISHED BY *TERRY* STOPS?

The interactions most clearly definable as *Terry* stops occur in two circumstances: on particularized suspicion of a specific crime, or on an officer's general, but articulable, suspicion that a person is, in the police vernacular, *wrong* or *dirty*.¹⁶ Beyond the fact that, in cases like *Terry* itself, a stop, detention and, where appropriate, a frisk, is the only reasonable police alternative un-

¹⁵ INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *THE PATROL OPERATION* 64-65 (3d ed. 1977).

¹⁶ Regardless of how much the requirements for a *Terry* stop may be exceeded by apparently clear and specific evidence, there are no guarantees in police work. On a warm summer Sunday morning in the mid-1960's (again, in the pre-radio era), I was assigned to a church crossing at the Plymouth Church of the Pilgrims, the historic Brooklyn Heights congregation founded by Henry Ward Beecher. As usual during the summer, business was nearly nonexistent because most of the congregation was at their summer or weekend homes. Then, I saw two patrol cars roll up to a residential hotel a couple of blocks away. Since department policy placed primacy on crossing duty, I could leave to see whether they needed my help only at the risk of discipline for being off-crossing, a mortal sin. After a time, one of the two crews emerged, got into their car, and slowly drove my way. They advised me that the hotel had been held up by a well-dressed white man with a short haircut, a brown sports jacket, a white shirt, a red tie, and a large semi-automatic pistol. Fortunately, as it turned out, I noted this in my memo book, and kept my eyes peeled. A few minutes later, a man appeared, quickly walking in my direction. He was white, well-dressed, had a short haircut, and wore a brown sports jacket, a white shirt, and a red tie, and carried a leather pouch under his arm. Except for my colleagues, he was the first person I had seen on the street that morning. He had not seen me, so I ducked behind a large tree, drew my gun, and waited for him to pass. As he did, I jumped out from my hiding place, grabbed him by the back of the neck, and slammed him into a wall. The pouch fell, and I grabbed it, expecting to find that it contained the pistol. It did not; it contained a bible and a sermon, and my bad guy turned out to have been the church pastor en route to services. I was nonplused and more than a little anxious to get out of his company as quickly as possible. He was stunned and more than slightly disheveled. I explained to him what had happened and, thankfully, was able to show him the description I had previously recorded. We parted on friendly terms and he continued to church, where he no doubt referred in his sermon to Paul's experience on the road. Still, I have always wondered. . . .

der the circumstances, such stops do accomplish several purposes. Regardless of whether Terry and company were planning a stick-up, they sure looked like they were, and they were, in fact, found in possession of two illegally concealed firearms. The field interrogations that my colleagues and I conducted solved many crimes, some of which had not yet been discovered when their perpetrators were stopped and questioned for suspicious behavior.¹⁷ In addition, the field interrogation reports filed by the officers in the former 18th Precinct, now Midtown North and in the 114th Precinct in Astoria, both of which were where I had been a sergeant, also provided us with much useful information in linking *Terry* subjects who had been released to crimes that were subsequently reported.

There is also some evidence that, if the public knows the police will be taking *Terry* up to its limits, those who would otherwise be carrying guns might actually leave them at home. In Richmond, California, where I am currently working on a federally funded homicide prevention study, it appears that the police seizure of guns in this manner has encouraged gang-bangers to leave their arms at home and has substantially reduced gang and gun homicides.¹⁸

In addition, just as it is difficult to suggest reasonable alternatives that might have been employed by Detective McFadden, it is difficult on the macro-level to suggest alternatives that police might employ to accomplish the purposes served by *Terry*. One alternative is to do nothing, and to instruct officers to refrain from action until actual crimes have been observed.

Such is the procedure still followed by the Los Angeles Police Department's Special Investigation Section (SIS). While ordinary Los Angeles patrol officers often are accused of crossing the

¹⁷ Indeed, one (much like that anticipated in the Meriden Police Guide, see, *supra* note 11) resulted in the arrest of a young man whom my partner and I observed carrying a typewriter and sneaking in and out of the shadows on Brooklyn's Court Street at about 4:00 am. We stopped, questioned, and frisked him and wound up arresting him for carrying burglar's tools (a screwdriver, knife, and cutting pliers) when he was able to give only some lame explanation of the typewriter (e.g., "I found it" or "I just bought it from a guy"). When the sun rose, the staff of St. John's University School of Law (then located on Schermerhorn Street in downtown Brooklyn) called to report that they were looking for an IBM Selectric that had been stolen during an overnight burglary. Of course, the numbers matched.

¹⁸ See JAMES J. FYFE ET AL., STRATEGIES FOR REDUCING HOMICIDE: THE COMPREHENSIVE HOMICIDE INITIATIVE IN RICHMOND, CALIFORNIA (1997).

line to impropriety in conducting *Terry* stops,¹⁹ the elite SIS refrains from intervening in circumstances that merely are reasonably suspicious. Instead, SIS follows suspects, observes them while they commit crimes like the ones it is presumed that Terry and his friends were planning, and confronts them forcibly when they emerge. This results in the deaths of some suspects—about one for every twenty-five arrested—and the presentation of very strong cases against those who survive. It also results in wholesale violation of the police obligation to protect life, and in a population of terrorized victims who have been robbed and brutalized while police stood by.²⁰

In one SIS case, for example, the unit followed four robbery suspects to a McDonald's Restaurant, watched for several hours while the suspects cased the store until it closed and was occupied only by a 24-year-old female manager. SIS then observed while the suspects donned ski-masks, walked to the side of the store, and kicked in its door. When the terrified manager called 911, the SIS canceled the resulting calls for patrol cars, and waited outside while the robbers threatened her with guns (which turned out to have been toys), duct-taped the victim's mouth, arms, and legs, put her in a refrigerator, and opened the safe. When the robbers emerged, they entered their car, where SIS used two unmarked police vehicles to jam them in their parking space, killed three and wounded one with 226 shotgun and pistol projectiles. In dismissing the possibility of using a timely *Terry* stop to prevent such bloodshed, then-LAPD Chief Daryl Gates said that: "If they [the SIS] had taken them outside [the restaurant before they entered it], they [the suspects] would have been out on bail today, and probably robbing someone else. . . . Now there won't be any more of these robberies at McDonald's. Perhaps we accomplished something."²¹

¹⁹ See CHRISTOPHER COMM'N, *supra* note 14, at 75-77.

²⁰ In several cases, SIS has stood by while suspects to whom they had been tipped cased premises, donned masks or wigs, drew guns and held up stores or banks. See JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 146-64 (1993); see also *Cunningham v. Gates*, 989 F. Supp. 1256 (C.D. Cal. 1997); District Court's Response to Petition for Mandamus in *Gates v. District Court*, CV-96-2666-JSL (9th Cir. Feb. 23, 1998).

²¹ David Parrish, *Gates, Commissioner Say Police Acted Properly in Sunland Shootings*, L.A. DAILY NEWS, Feb. 14, 1990, at N4.

D. THE DOWNSIDES OF *TERRY*

SIS is an extreme. But it is fair to say that, because *Terry* allows the police to take limited preemptive actions, it helps to detect and deter crime and to prevent bloodshed; who knows how many SIS analogues would exist in other police departments if officers had to wait until they had probable cause before taking action. Certainly, however, the activity clarified by *Terry* is fraught with problems. *Terry* stops are almost exclusively discretionary matters that typically take place on quiet streets, and that cannot easily be reconstructed. Consequently, they are very difficult to regulate.²² A *Terry* stop says terrible things about its subject; it is the officer's way of telling a person *you look wrong and I am going to check out my feelings about you even if it embarrasses you*. In big cities, *Terry* is invariably tied to questions of race. As John Boydston noted in one of the few empirical studies, *Terry* stops reduced suppressible crime, but also had a great potential for increasing police-community tensions.²³

Further, there is no industry standard as to what would comprise an acceptable batting average, or how many false positives occur. When I taught at John Jay College of Criminal Justice during the 1970s, for example, one of my students was a Transit Authority police officer who boasted during a lecture on

²² On my first night as a sergeant in midtown Manhattan, I was surprised when officers coming in at the end of their tours turned in dozens of completed field interrogation forms: I got as many completed reports in that one night as I had seen in the prior seven and a half years as a cop in Brooklyn. In Manhattan, it turned out, the practice was to follow the department requirement to prepare these forms whenever a field interrogation was conducted; in Brooklyn, nobody completed these reports unless there was reason to believe that the subjects of field interrogations would complain about the behavior of the officers involved. Obviously, had anybody in Police Headquarters been monitoring the process, this discrepancy would have been noticed and some explanation would have been demanded. This never happened.

²³ A technique I tried to use when stops made pursuant to specific information turned up the wrong people was to share the information with the subjects of the stop. Thus, just as I showed the minister the description that I had written, I often asked the radio dispatcher to rebroadcast descriptions for the benefit of people who had no idea why I had stopped and frisked them. When satisfied that I had the wrong people, I would invite them to stand by the car radio, and would tune it up to full volume before engaging in exchanges like the following, "84-Adam to Central. Please repeat the description of the males sought in the mugging in Fulton Street." Reply, "Adam, that's three male blacks, ages eighteen to twenty, dark complected. White tee-shirts, jeans, sneakers, short haircuts. Thin builds, last running north on Duffield Street." The response when *Terry* subjects heard these exchanges usually was to the effect that, "Hey, that sounds just like us. All right, man."

Terry that he made drug possession arrests every night. Several other students and I were interested in how he managed to do this. His technique was simple: He tossed *creeps* every night until he found one who was dirty. Then he passed the rest of the night booking his creep, and spent the following day in court rather than under the Crossroads of the World. On some nights, he came up with a hit on his first toss, on other nights, he would search 100 or more creeps before finding his way out of the underground. Not uncommonly, his supervisor and commander regarded him as an asset, and one of his unit's most valuable and active officers. Apparently, they heard little or nothing from the creeps who were not carrying drugs.²⁴ This sort of conduct is sometimes given not-so-subtle approval by police administrators and trainers. Consider the advice presented in a volume that is widely used by California police officers:

The population of American communities, and especially of large cities, is undergoing changes. Every year the percentage of minority citizens is increasing. Unlike the white middle-class citizen, they do not seem ready to accept the number of criminals arrested by improper tactics as justification for continuing this practice. They are the ones most often stopped during field interrogations. They are the ones who seem to be more often subjected to improper treatment. Because of this, officers making field stops must always bear in mind that they will be required to firmly justify their suspicions in court. No longer will "He just didn't look right" be justification enough for field interrogation. Officers should therefore train themselves to base their suspicions upon a firm foundation [sic]; no relying on a so-called sixth sense. This can be done with the proper training and effort. . . .²⁵

²⁴ See JOHN E. BOYDSTUN, SAN DIEGO FIELD INTERROGATION: FINAL REPORT (1975). An NYPD officer who apparently employed a similar modus operandi ended his career not far from St. John's University by shooting and killing a "suspicious" nine-year old boy. Officer Thomas Shea's personnel file was filled with sparkling evaluations and supervisory comments about his outstanding arrest activity. On closer examination, however, his arrests consisted almost exclusively of possessory offenses (guns, knives, drugs) that, it appeared, could have been discovered only by conducting broad scale, and probably unjustifiable, *Terry* stops and searches. There was no indication in the records I reviewed that Shea had ever conducted a *Terry* stop that did not produce evidence of a crime, so it is likely that, like my student, he simply never reported these. See TOM HAUSER, THE TRIAL OF PATROLMAN THOMAS SHEA (1980).

²⁵ GEORGE T. PAYTON & MICHEL AMARAL, PATROL OPERATIONS AND EN-

What then are the clues by which an officer will know who to stop and when to stop him? Such a list would be endless, but some of the more common are:

1) A subject who is out of place. By knowing the beat and its people, an officer can be more cognizant of a person who does not fit the situation. For example, an exceptionally well dressed man who is hanging around a "Skid row." He may be a homosexual who is soliciting partners, or he may be a heterosexual seeking a prostitute, or a gambler looking for a dice game. He may just be "slumming," wanting to see how the other half lives. In any event, he will soon be picked out as a "mark" by the local inhabitants who are always looking for a fast buck. Before long this person can become the victim of a crime. In an effort to prevent this crime, or to stop the subject from becoming involved in a criminal action, the beat officer should make an effort to have the subject leave the area. This may be done in many ways. The conversation could be started with, "Good evening, sir. Are you looking for a particular place? Maybe I can help you." This will set the stage by establishing the fact that it is obvious to the officer that the subject does not belong in this setting. The officer's next move will depend upon the subject's answer to this offer of help. If he states that he is just passing through, the matter can be dropped, because he will leave the area even if he hadn't originally intended to. He will naturally not reveal his true purpose for being in the area, as it is more than likely illegal. . . .

At the other end of the scale we find a person who is obviously a bum in a high class or residential area. His true purpose may be to beg for money or hand-outs, or to case the area for petty theft or burglary. When there was a vagrancy law in effect, it was simply a matter of telling the subject that if he didn't leave the area, he would be "booked for vag." With this law declared unconstitutional, the officer must use other means. Often just stopping the subject and talking to him will solve the problem. He may explain that he is lost and would the officer kindly tell him the direction to "Skid row" or the local "jungle." As a

safety measure, the officer should transport him from the area. . . .

Should the subject be "con wise" and tell the officer that he is just out walking and has done nothing wrong, the officer may use a little subterfuge. He or she may indicate that there has been a "peeping Tom" in that area, and that the local residents are really upset. Some of them have even threatened to shoot him on sight. The officer could explain that he or she is sure that the subject is not a "peeping Tom," but that a stranger who hangs around this area under the circumstances is really sticking his neck out. There are any number of similar subterfuges that can be used. . . .

(6) Older men in the company of young females. Older men in the company of young females can mean trouble. It may be a father and daughter. It doesn't take a long surveillance to determine if that is so. Their expressions and gestures will soon tell. Many times the young girl is a prostitute who has run away from home. . . .

There are certain characteristics that are common to bums. An officer soon learns these characteristics after booking enough of them. The bum who is transient will usually be wearing two pairs of trousers and two shirts to keep him warm at night. In his pocket he will usually have an unassembled safety razor in a cloth tobacco such as the type containing Bull Durham. . . .

A person who has been in prison a long time becomes quite adept at talking through the side of his mouth. He also develops a way to hide inner emotion through the display of a poker face. It can be quite noticeable when a police officer passes this person on the street. Other people passing by will at least give the officer a glance. The ex-con will walk by as though the police officer were not even there. His effort to conceal his concern will actually give him away.²⁶

E. SO WHAT?

The practices of my students, as well as those encouraged by

²⁶ *Id.* at 203, 206, 209.

Payton and Amaral suggest that field interviews, interrogations and frisks can easily be used to harass or to ensure that people do not wander from where officers feel they belong. In seeking to eliminate these abuses, however, we should take care not to discard the flexibility of an approach that allows police to prevent crime and bloodshed, rather than to risk bloodshed by waiting until after crimes have occurred before taking official action. One SIS is one too many.

The way to achieve this is to limit police officer's discretion in conducting field interrogations and to hold them accountable for abiding by the discretionary parameters under which they operate. The best place to accomplish this—at least at first—is not in the courtroom, but rather by the application of the model of what the New York Joint Council did in 1964 in police command offices. As street-wise cops frequently observe, there are no Supreme Court police who can assure that officers do the right thing in the street. Police chiefs do have access to supervisors, and to reward and disciplinary systems that, while not perfect, have enormous effect on police conduct. Indeed, virtually all the relevant research has concluded that the major determinant of officer's behavior in the streets is the philosophy and policy of their chiefs.²⁷

Chiefs should take a more active role than they have in the past in requiring that field interrogation be conducted properly. This can be done by formulating clear policy consistent with *Terry* and its progeny (complete with examples of what does and does not constitute "reasonable suspicion" and "reasonable fear"), by training officers carefully in the law and policy and by rewarding officers who conduct *Terry* stops reasonably and well, and by correcting officers who do not.

This is the approach in Dade County, Florida, where the police department includes field interrogations along with arrests, summonses and responses to calls for service as measures of officers' activity. Granting credits for well-done *Terry* stops requires

²⁷ See generally James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 205 (1988); James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM. JUST. 309-23 (1979); Gerald Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 15, 59 (1973); Mark Blumberg, *The Use of Firearms by Police Officers: The Impact of Individuals, Communities and Race* (1983) (unpublished Ph.D. dissertation, State University of New York at Albany) (on file with author).

officers to report such stops, including, where possible, the identities of their subjects. This in turn allows detectives to use the reports as a source of information, and allows supervisors to contact subjects for feedback on their perceptions of the reasonableness of the actions of the officers involved, as they do. What the department has done, in other words, is fit the community's desire to see that *Terry* stops are done reasonably with officer's desire to be recognized for doing their jobs properly and for contributing to the agency's crime-fighting mission.

Unfortunately, this approach is so unusual that most police administrators to whom I mention it regard it as unworkable pie in the sky. But, in fact, it was instituted during the reforms put in place after the 1981 Miami riot, was working well when I studied the Metro-Dade Police Department during 1985 and 1986, and still works today. It is time for police chiefs to use it as an example of what can be done with *Terry* when they strike the balance between properly aggressive policing and respect for citizen's rights and dignity.²⁸

²⁸ Data on the frequency of *Terry* stops is rare, but we did collect some in the project I directed in Dade, which was designed to enhance officers' responses to potentially violent situations. As part of the research, I placed observers in police cars with approximately 100 different officers for a total of 877 full eight-hour tours of duty in the county's three busiest police districts. *Terry* stops occurred during fewer than one-third (237) of these shifts. Officers conducted a total of 384 stops, or about one for each 18 hours of patrol work. These same officers initiated 1,135 non-adversarial conversations with citizens whom they did not suspect of any criminal activity, or about one during every six hours of patrol duty. These frequencies were comparable to what these officers' activity reports indicated they did when nobody was directly observing their conduct. See JAMES J. FYFE, THE METRO-DADE POLICE/CITIZEN VIOLENCE REDUCTION PROJECT: FINAL REPORT (1988).