

# WHAT THE #METOO CAMPAIGN TEACHES ABOUT STOP AND FRISK

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*"I felt helpless. . . . Like my [modeling] agency said, he has a lot of power."*<sup>1</sup>

*"I've never experienced a pat-down in my life, where officers do not go into your pockets, do not go into your pants, do not open your jacket, do not fondle your genitals[.]"*<sup>2</sup>

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## I. INTRODUCTION

There is much that #MeToo and feminism can illuminate about the policing practice known as stop and frisk. The #MeToo campaign turned a spotlight on power, consent, and sexual abuse. The hashtag describes a movement in which

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1. Male model, Josh Ardolf, discussing a situation with photographer Bruce Weber when Mr. Ardolf was twenty years old. Jacob Bernstein et al., *Male Models Say Mario Testino and Bruce Weber Sexually Exploited Them*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html> ("The experience, once seen as the price models had to pay for their careers, is now being called something else: abuse of power and sexual harassment.").

2. Ailsa Chang, *Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests*, WNYC NEWS (Apr. 25, 2011), <https://www.wnyc.org/story/126232-marijuana-arrests/>. This is quote from Hasan Covington, a thirty-two-year-old black man from the Bronx.

women, and some men,<sup>3</sup> share the fact that they have been the victim of unwanted sexual aggression, from harassment to rape. Thanks to the 2017 campaign, the public increasingly appreciates that power and authority impose new meanings on what might appear superficially as consensual encounters. When a person submits to someone who wields power over them, this may be deeply disturbing and coercive even for encounters that lack visible violence. These insights are equally applicable to policing.

The Supreme Court handed down its decision in *Terry v. Ohio* fifty years ago this year, allowing stop and frisk to flourish throughout the United States.<sup>4</sup> While the current president extolls aggressive stop and frisk tactics that a federal district court ruled unconstitutional,<sup>5</sup> the current scholarly debate centers on whether the regime set forth in *Terry v. Ohio* should be completely overturned or whether it is better to simply reign in the worst abuses.<sup>6</sup>

Insights from the #MeToo campaign bolster the argument that *Terry v. Ohio* is inherently flawed. One of the strengths of #MeToo is how the campaign “put the focus back on the victims.”<sup>7</sup> Another strength is the campaign’s recognition of

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3. For example, several men accused Kevin Spacey of groping them without their consent and the Netflix staff reported that he made lewd comments towards the staff, primarily targeted at young men. See, e.g., Mike Miller, *Kevin Spacey Accused of Sexual Misconduct by Eight House of Cards Employees: Report*, PEOPLE (Nov. 2, 2017), <http://people.com/movies/kevin-spacey-accused-of-sexual-misconduct-by-eight-house-of-cards-employees-report/>; see also *supra* note 1.

4. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

5. Michael Barbaro et al., *Donald Trump Embraces Wider Use of Stop-and-Frisk by Police*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/politics/donald-trump-don-king-black-voters.html>. (In a presidential debate, Mr. Trump said: “One of the things I’d do . . . is I would do stop-and-frisk. I think you have to. We did it in New York, it worked incredibly well and you have to be proactive.”); see also Brian M. Rosenthal, *Police Criticize Trump for Urging Officers Not to Be “Too Nice” With Suspects*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/07/29/nyregion/trump-police-too-nice.html>. (“‘Like when you guys put somebody in the car, and you’re protecting their head, you know, the way you put your hand over’ their head, [Trump] said, putting his hand above his head for emphasis. ‘I said, “You can take the hand away, O.K.?”’”).

6. For examples of scholars recommending that police continue *Terry* stops after reigning in the worst abuses, see generally MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* (2016); see generally DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 154–71 (2005).

In contrast, these scholars seek to end stop and frisk altogether: Frank Rudy Cooper, *The Spirit of 1968: Toward Abolishing Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539 (2007); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 74 (2017) (asserting that the only way to reduce racial bias in stop and frisk interactions would be to eliminate the use of the tactic all together); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 164 (2016) (“[T]he simple fact of repeated police interactions over-exposes African Americans to the possibility of police violence.”).

7. See Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>. On October 2017, actress Alyssa Milano called for a “me too” hashtag, writing on Twitter, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” *Id.* #MeToo became a way for users to tell their experience with sexual violence and stand in solidarity with other survivors. *Id.* Ten years before, Tarana Burke created Just Be Inc., a nonprofit organization that helps victims of sexual harassment and assault. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), [https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?\\_r=0](https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?_r=0). Ms. Milano went on “Good Morning America,” where she publicly credited Ms. Burke for her Me Too campaign. *Id.* (“What

power dynamics and the difficulty women face in resisting someone who wields power over them. A third strength of the movement is that it exposes sexual abuse as a common occurrence. As more and more women speak up, an activist explained, “we might give people a sense of the magnitude of the problem.”<sup>8</sup> This Essay applies these three strengths towards examining the *Terry* doctrine.

*Terry* is usually taught, analyzed, and judged from the vantage point of the police officer.<sup>9</sup> Just as the #MeToo movement starts from the perspective of victims of unwanted touchings, so this Essay starts from the perspective of the person subjected to an officer’s stop and frisk.

*Terry* looks very different when I go to middle schools and churches to teach black teenagers and adults how to safely exercise their rights.<sup>10</sup> When law professors teach the case, we explain that the Constitution limits what police can do. We tell our students that police need probable cause to search for drugs; reasonable suspicion is not enough. But that’s not really true. The person who is stopped must assert his constitutional right to refuse the search. The Constitutional limits on *Terry* have to be asserted. Police only need consent from civilians, and I use the concept of consent broadly in this piece to include consent to stop, consent to answer questions, and consent to search. When community members talk about a stop from their perspective, they have many practical questions. “What happens if I say ‘no’ to the officer?” “What will the officer do to me if I walk or run away?” This is what civilians ask and what *Terry*’s victims need to know.

Just as #MeToo recognizes that “no” is not always a realistic response to an aggressor, the Court should recognize that it is unrealistic to expect civilians to say “no” to officers. From a civilian’s perspective, the constitutional limits on *Terry* are scary. Like the victims of Harvey Weinstein, these teenagers have to weigh their options at a bad time, at a time when they feel vulnerable, a time not of their own

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the Me Too campaign really does, and what Tarana Burke has really enabled us to do, is put the focus back on the victims,” Alyssa Milano said.)

8. “If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem,” tweeted Alyssa Milano. Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017), <https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html>. The hashtag was widely used on Twitter, Facebook, Snapchat and other platforms; on Facebook, it was shared in more than twelve million posts and reactions in the first twenty-four hours. *More than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS News (Oct. 17, 2017), <https://www.cbsnews.com/news/me-too-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

9. *Scott v. United States*, 436 U.S. 128, 137 (1978) (“[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer’s actions in light of the facts and circumstances then known to him.”); see also David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 275 (1997) (“the officer’s concern must be objectively reasonable” to allow searches of a driver or the car itself). For a critique of how law school texts rely too heavily on court opinions, thereby slanting readers’ assessments of the benefits and costs of the Fourth Amendment, see Catherine M. Grosso & Barbara O’Brien, *Grounding Criminal Procedure*, 20 J. GENDER RACE & JUST. 53, 86–87, 94 (2017) (“The story that emerges from the winnowed subset of published opinions is one in which police are professional, uncannily intuitive about criminal wrongdoing, and colorblind.”).

10. Along with Howard law students, I teach “Know Your Rights” to community groups, a course on exercising one’s constitutional rights vis-à-vis the police. We have done this in Chicago, New Orleans, Maryland, and Washington D.C.

choosing. To critique *Terry v. Ohio* properly, we must grapple with the fact that requiring civilians to assert their rights represents a weak bulwark against unlimited police power. In reality, *Terry's* constitutional limits are virtually impossible to assert on the street.

While #MeToo revealed a hidden tsunami of sexual abuse in film studios and offices, this essay points out that police sexual misconduct is extensive and underreported. Like other types of sexual harassment, police sexual misconduct ranges from unconstitutional overreach to criminal assault.<sup>11</sup> Even constitutional frisks can feel like rape to those on the receiving end.

Teaching “Know Your Rights” in the community led me to recognize the flawed reasoning at the heart of *Terry v. Ohio*, flaws that have not been investigated in the pages of law reviews. This Essay asserts that the case law that allows police to obtain consent from individuals is not a stand-alone doctrine independent from *Terry v. Ohio*, any more than consent for sex is separate from the definition of rape. Rather, even a constitutional application of *Terry v. Ohio* relies upon vulnerable individuals consenting to searches or otherwise waiving their rights. Looked at in this light, stop and frisk can no longer be defended as a method that does more good than harm.

## II. ERIC GARNER

While Eric Garner is best remembered for his final words, “I can’t breathe,” he could be the poster child for why *Terry v. Ohio* was a mistake from its inception. On July 17, 2015, officers tackled the forty-three-year-old black New Yorker, holding him down first in a chokehold and then compressing his chest as Mr. Garner’s friend recorded the deadly encounter in a video that went viral.<sup>12</sup> The tragedy of what happened to Mr. Garner drew so much attention and outrage that demonstrations were held across the country in which people carried signs that read, “I can’t breathe.”<sup>13</sup> Scholars properly point to his needless death to criticize the chokehold and excessive force.<sup>14</sup> In addition, scholars correctly use his death to indict broken

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11. See TIMOTHY M. MAHER, POLICE CHIEFS’ VIEWS ON THE NATURE, EXTENT, AND CAUSES OF POLICE SEXUAL MISCONDUCT, 9 POLICE PRAC. & RES., 239–250 (2008).

12. J. David Goodman & Viviana Yee, *Death of a Man in Custody Adds Fuel to a Dispute Over a Policing Strategy*, N.Y. TIMES (July 20, 2014), <https://www.nytimes.com/2014/07/21/nyregion/death-of-a-man-in-custody-adds-fuel-to-a-dispute-over-a-policing-strategy.html>. For the video, see “I Can’t Breathe”: Eric Garner Put in Chokehold by NYPD Officer—Video, GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>.

13. *Emotional Rally Held for NYC Man Who Died After Police Choke Hold*, CBS NEWS (July 19, 2014), <https://www.cbsnews.com/news/eric-garner-death-rally-held-after-nyc-man-put-in-police-chokehold-dies/>.

14. Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 557 (2017); Joëlle Anne Moreno, *Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 BERKELEY J. CRIM. L. 36, 45 (2016); Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503, 504 (2017); Laura Rose Matteis, Note, *Stay Away from the Neck: Why Police Chokeholds and Other Neck Restraints Violate International Human Rights*, 38 T. JEFFERSON L. REV. 101, 103–04 (2015); Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds*, ATLANTIC (Dec. 4, 2014), <https://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/>.

windows policing, a theory closely aligned with stop and frisk.<sup>15</sup> But Eric Garner's death is a tale of so much else that's wrong with stop and frisk.

After Mr. Garner was killed, the NYC police department claimed that he was resisting arrest.<sup>16</sup> This claim is troubling because the video does not show him committing any crime and my research uncovered no evidence that the police had probable cause to arrest him.<sup>17</sup> The lawyer who represented the family in their claim against the police department, Jonathan C. Moore, verified that the police lacked an arrest warrant.<sup>18</sup> "It was a bad *Terry* stop," Attorney Moore explained.<sup>19</sup> Not only did the police lack probable cause for arrest but they did not even possess reasonable suspicion for a Class A or Class B misdemeanor.<sup>20</sup>

Under *Terry*, Mr. Garner was free to tell the police to leave him alone and he was free to leave. As the *Terry* Court stated: "Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."<sup>21</sup> As Attorney Moore put it, "he was walking away, just as he is supposed to be able to do. He had an absolute right to do all of that."<sup>22</sup>

Assuming the officers wished to arrest Mr. Garner for untaxed cigarettes, they must see him sell them or they must witness loose cigarettes in his possession.<sup>23</sup>

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15. K. Babe Howell, *The Costs of "Broken Windows" Policing: Twenty Years and Counting*, 37 *Cardozo L. Rev.* 1059, 1061 (2016) ("Eric Garner would not be dead and his children would have a father if not for zero-tolerance policing.").

16. See *Fact Sheet in Richmond County (Staten Island) Grand Jury in Eric Garner Homicide*, COLUM. L. SCH. (Jan. 23, 2015), <http://www.law.columbia.edu/news/2014/12/eric-garner-case-fact-sheet> ("The grand jury was tasked with deciding whether there was sufficient evidence to believe that Officer Pantaleo (1) violated any of the homicide provisions of the New York Penal Law and (2) whether Officer Pantaleo's actions were justified as the legal use of force by a law enforcement officer in effecting an arrest" under N.Y. PENAL LAW § 35.30.1 (McKinney 2018)).

17. "I Can't Breathe": *Eric Garner Put in Chokehold by NYPD Officer—Video*, *supra* note 12.

18. Telephone Interview with Jonathan C. Moore, Attorney for the Garner Family (Dec. 24, 2017). This was a private phone call between myself and the Garner family's attorney, Jonathan C. Moore. Mr. Moore represented the family in their dispute with New York City and negotiated the \$5.9 million settlement. [hereinafter Telephone Interview]; see J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html>.

19. Telephone Interview, *supra* note 18.

20. Police had reasonable suspicion to believe that Mr. Garner had loitered and been among a group selling untaxed cigarettes, but this was stale information and the person was only described to the police as "Eric." See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> (Landlord complained of group loitering in March of 2014, "[t]hough police officials understood the Eric of his complaint to be Mr. Garner, [the landlord] said he was referring to someone else"). Moreover, selling or possessing untaxed cigarettes are not misdemeanors found in the penal code. N.Y. PUB. HEALTH LAW § 1399-bb (McKinney 2003). Rather, they are regulatory infractions. *Id.* The New York Code permits police to perform stops based upon a reasonable suspicion of a felony or misdemeanor but not for mere violations. *People v. Brukner*, 43 N.Y.S.3d 851, 853 (N.Y. Crim. Ct. 2016) ("Had the legislature intended to include violation level offenses, it most certainly would have done so.").

21. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

22. *Id.*

23. See *People v. De Bour*, 352 N.E.2d 562, 571–72 (N.Y. 1976) (articulating the standard for contacts, stops, and frisks under New York common law).

This was a classic stop and frisk conundrum. If Mr. Garner had cooperated, the police would have called this a consensual encounter, a mere *contact*, camouflaging their unlawful detention as the civilian's choice.

Because police knew from past arrests that Mr. Garner sometimes earned money selling loose cigarettes, the police wanted to search Mr. Garner's pockets.<sup>24</sup> To search Mr. Garner's pockets under *Terry v. Ohio*, police needed probable cause to believe that their suspect possessed contraband, or they needed his consent to search. But Mr. Garner did not consent to a search.<sup>25</sup> He told police, "*I'm minding my business, officer . . . Please just leave me alone.*"<sup>26</sup> The chokehold that ended Mr. Garner's life must be recognized as his punishment for refusing to give the police what they wanted. The investigatory stop morphed into an arrest when Mr. Garner complained: "Every time you see me, you want to mess with me. I'm tired of it. It stops today."<sup>27</sup> The NYPD called it resisting arrest.<sup>28</sup> But Mr. Garner's crime was actually *refusing to consent*. Eric Garner's death illustrates what can happen under *Terry* when a man tries to hold onto his dignity and rights.<sup>29</sup>

Personal history may have played a role in Mr. Garner's failure to consent. Seven years earlier, he filed a civil rights lawsuit against another police officer for performing a strip-search on him in public during a pedestrian stop.<sup>30</sup> In the complaint, Mr. Garner alleges under oath that police stopped him on the street, patted him down against a cruiser, handcuffed him, and while he remained handcuffed, the officer performed a "cavity search on me by . . . 'digging his fingers in my rectum in the middle of the street.'"<sup>31</sup> In the box asking for injuries, Mr. Garner wrote, "the injuries I received was to my manhood . . ."<sup>32</sup>

Fast forward to Mr. Garner's fatal encounter. Caught on video, Eric Garner uttered another chilling phrase before his infamous last three words, "I can't

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24. See Howell, *supra* note 15.

25. See Bryan J. Lawline, *The Eric Garner Incident: Whatever the Outcome, We Should be Ashamed*, SILIVE (July 22, 2014), <http://www.silive.com/opinion/index.ssf/2014/07/garner.html>.

26. Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014), <https://www.cnn.com/2014/12/04/us/garner-last-words/index.html> (emphasis added).

27. *Id.*

28. *Id.*

29. The police violated the constitution by tackling Eric Garner. The settlement was for \$5.9 million. Goodman, *supra* note 18. Nevertheless, the tackle still fell under the *Terry* regime that directs officers to seek evidence of a crime based on suspicion. The officers were not indicted or otherwise punished for their handling of Mr. Garner because the department considered the tackle to be in furtherance of police business.

30. "On September. 1, 2007, at approx. 7:30 p.m. on the corner of Castleton Ave & Heberton Ave [a police officer] and his team stopped me for reasons of there own [sic]." John M. Annese, *Seven Years Before His Death, Eric Gardner Hand-Wrote a Civil Rights Lawsuit Against the NYPD*, SILIVE (July 22, 2014), [http://www.silive.com/news/2014/07/seven\\_years\\_before\\_his\\_death\\_e.html](http://www.silive.com/news/2014/07/seven_years_before_his_death_e.html); see also Shaun King, *Copy of the Heartbreaking Civil Rights Lawsuit Eric Garner Filed Against the NYPD in 2007*, DAILY KOS (Apr. 15, 2015), <https://www.dailykos.com/stories/2015/4/15/1377940/-Copy-of-the-heartbreaking-civil-rights-lawsuit-Eric-Garner-filed-against-the-NYPD-in-2007>.

31. Annese, *supra* note 30.

32. *Id.* Under the "injuries" category, Garner claims "the injuries I received was to my manhood in which (the officer) violated" through the search of his rectum and genitals 'for his own personal pleasure. (The officer) violated my civil rights.'" *Id.*

breathe.”<sup>33</sup> As the police surrounded him, moments before they would tackle and strangle him, he pleaded with them not to touch him.<sup>34</sup> In the context of his earlier experience at the hands of the police, Mr. Garner’s final plea for dignity and liberty gathers new meaning.

Every time you see me, you want to mess with me. I'm tired of it. It stops today. Why would you...? Everyone standing here will tell you I didn't do nothing. I did not sell nothing. Because every time you see me, you want to harass me. You want to stop me (garbled) Selling cigarettes. I'm minding my business, officer, I'm minding my business. Please just leave me alone. I told you the last time, please just leave me alone. please, please, don't touch me. Do not touch me.<sup>35</sup>

Even airport frisks can be especially upsetting for people with a history of sexual assault.<sup>36</sup> In Mr. Garner’s case, the history was close to home because the prior sexual abuse was at the hands of an officer. In fact, the prior strip search began in somewhat the same way as his final encounter with the police began.<sup>37</sup> Who can blame Mr. Garner for not consenting to a frisk or full-blown search? Who can blame Mr. Garner for wishing not to be touched?

### III. THE FRISK

#### A. Frisks as Sexual Touchings

Even when done by the book, a frisk can feel like a sexual violation. As Paul Butler explains in his new book *Chokehold*, “Frisks are frequently experienced as []

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33. TheAdviseShowTV, *NYPD Publicly Executes Eric Garner for Illegal Cigarettes*, YOUTUBE (July 22, 2014), <https://www.youtube.com/watch?v=g-xHqf1BVE4>.

34. *Id.*

35. Capelouto, *supra* note 26. “I told you the last time” does not refer to the 2007 sexual assault. The person named in Mr. Garner’s 2007 complaint was not among the officers who stood around him the day he died. See Baker et al., *supra* note 20 (Daniel Pantaleo was the officer who choked Garner and he was partnered with Justin D’Amico for the stop); see also Annese, *supra* note 30 (naming William Owens as the officer who stopped him on September 1, 2007). In addition, Eric Garner was stopped several times in between. See Baker, *supra* note 20 (Eric Garner “had been arrested twice already that year near the same spot, in March and May, charged both times with circumventing state tax law” and then, in the same month he was killed, police approached him, but that time, “officers left him with a warning.”) His wife, Esaw Garner, spoke of constant harassment by police: “They harassed him. When we went to the supermarket, they harassed him.” See James Queally, *Eric Garner’s Widow Speaks Out; NYPD Probes New Brutality Allegation*, L.A. TIMES (July 26, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-garner-family-nypd-investigates-20140726-story.html>.

36. Kate Dailey, *TSA Screenings Worry Sexual-Assault Survivors*, NEWSWEEK (Nov. 17, 2010), <http://www.newsweek.com/tsa-screenings-worry-sexual-assault-survivors-70029> (“‘After a sexual assault, it seems that many survivors have difficulty having their bodies touched by other people,’ says Shannon Lambert, founder of . . . a nonprofit organization that provides support and information to survivors of rape and sexual abuse.”).

37. The earlier frisk began with police stopping him “for reasons of their own,” and in both instances, Eric Garner was a pedestrian and a team of police officers came up to him in a cruiser. See King, *supra* note 30.

sexual touchings.”<sup>38</sup> Seth Stoughton, now a professor at the University of South Carolina School of Law, spent five years as a police officer in Tallahassee, Florida.<sup>39</sup> The former police officer points out that the person receiving the frisk and the officer doing the frisk will have very different feelings.<sup>40</sup> When he worked as a police officer, Professor Stoughton frisked methodically, in this way:

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.*<sup>41</sup>

A recent video posted on YouTube conforms to Professor Stoughton’s description of the invasive touching of the groin area.<sup>42</sup> Initially, the anonymous civilian on the YouTube film complies fully with the officer, raising his arms above his head and spreading his legs apart.<sup>43</sup> But as the officer feels around his groin, the young man jumps.<sup>44</sup> “I am a man, brother,” he tells the officer.<sup>45</sup> He jumps again, even after the officer handcuffs him before resuming the search.<sup>46</sup> “Stop fingering me!” he exclaims.<sup>47</sup> The frisk looks precisely as Professor Stoughton describes, routine for the officers who are simply intent on getting the job done. But quite naturally, the frisk is received as a sexual indignity by the civilian who asks the officer why he is “fingering my ass.”<sup>48</sup> In the video, at least four other police officers stand nearby while

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38. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 97 (2017).

39. Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19, 20 (2017).

40. *Id.* at 22.

41. *Id.* at 29 (emphasis added); *see also* *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (1968) (“[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.”).

42. CC mob, *Police Officer Appears to Sexually Assault a Suspect... During a Stop and Frisk*, YOUTUBE (Sept. 30, 2017), <https://www.youtube.com/watch?v=jAYieOKFY9c>. It appears to be a *Terry* stop because the civilian confidently states: “You are not going to find anything on me.” *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. CC mob, *supra* note 42.

one frisks the individual.<sup>49</sup> In Professor Butler's view, the other officers are participants in the enterprise. "Often other cops participate, either as voyeurs, or by doing another guy at the same time."<sup>50</sup>

Watching the frisk on YouTube, I am struck by the absurdity of the exercise. Even if the man were not placed in handcuffs, it is hard to believe he would somehow be able to reach into the region of his groin to pull out some small weapon without alerting the officer who is holding his arms. After all, there are four of them and all they aim to do, supposedly under *Terry*, is ask the man a few questions to dispel their suspicions before they let him walk away.<sup>51</sup> Nevertheless, this is lawful under the *Terry* regime.

As Professor Butler points out, "you are supposed to go about your business as if nothing of consequence has happened" after the police have "felt all over your body."<sup>52</sup> In this way, the *Terry* regime fails to recognize the humanity of the men, women, and children subject to frisks. While Professor Butler describes the injury of an invasive frisk as "analogous to sexual assault[,]," he is careful not to claim the frisk as a form of sexual violence.<sup>53</sup> "My claim[,] he writes, "is not that seize and search is the same as sexual harassment. My point is that stop and frisk shares certain features with this form of subordination."<sup>54</sup> In other words, it feels like a sexual violation, but the officer may be simply following his supervisor's orders, doing what he is trained to do. The officer performing the frisk may not intend to humiliate or harass. However, not all officers are like Professor Stoughton. It's an open secret that frisks also create an opportunity for abuse.

#### B. Sexual Misconduct by Police is Hardly Rare.

Sexual abuse is the second most common civilian complaint lodged against police officers in the United States.<sup>55</sup> The Cato Institute announced this surprising statistic in 2010 when they compiled and analyzed existing data from multiple sources.<sup>56</sup> Others have followed the Institute's lead, attempting to quantify the number of allegations that resulted in arrest or discipline.<sup>57</sup> An Associated Press study concluded that in a six-year period, approximately 1,000 officers lost their badges for sexual misconduct.<sup>58</sup> Reporters included serious criminal conduct, namely rape, sodomy, and other sexual assault, as well as less serious misconduct

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49. *Id.*

50. BUTLER, *supra* note 38, at 98.

51. *Terry v. Ohio*, 392 U.S. 1, 28 (1968).

52. BUTLER, *supra* note 38, at 17.

53. *Id.* at 97.

54. *Id.* at 103.

55. See CATO INST., *2010 Annual Report*, <https://www.policemisconduct.net/statistics/2010-annual-report/> (last visited May 5, 2018) (9.3% of the complaints involved sexual misconduct of some type).

56. *Id.*

57. Matt Sedensky, *Hundreds of Officers Lose Licenses Over Sex Misconduct*, AP (Nov. 1, 2015), <http://bigstory.ap.org/article/fd1d4d05e561462a85abe50e7eae4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct>; Zoë Carpenter, *The Police Violence We Aren't Talking About*, NATION (Aug. 27, 2014), <https://www.thenation.com/article/police-violence-we-arent-talking-about/>; Matthew Spina, *When a Protector Becomes a Predator*, BUFFALO NEWS (Nov. 22, 2015), <http://projects.buffalonews.com/abusing-the-law/index.html>.

58. Sedensky, *supra* note 57.

such as “consensual” intercourse with citizens while on duty.<sup>59</sup> The Buffalo News compiled its own database in 2015 and summarized its findings in this provocative sub-headline: “Every five days, a police officer in America is caught engaging in sexual abuse or misconduct. Others are never caught.”<sup>60</sup>

Transgender individuals report frisks that include being told to unzip one’s pants to reveal genitals simply to satisfy the curiosity of a police officer.<sup>61</sup> Others complain of physical abuse. A survey conducted in 2011 found that 22% of transgender people who interacted with police reported harassment, while 2% of respondents reported being sexually assaulted by officers.<sup>62</sup> Survivors of violence who report the situation to police are particularly vulnerable.<sup>63</sup> Nationally, nearly half of the lesbian, gay, bi-sexual, and transgender (LGBT) survivors of violence report police misconduct when they sought help from police.<sup>64</sup> By keeping their own statistics, the LGBT community has shed light on a problem that is exacerbated by stereotypes of transgender sex-workers and the discomfort of some police with gender-non-conforming individuals. While the connection between police harassment and sexual harassment may be more salient in LGBT complaints, the sexual misconduct extends beyond any particular group.

Even the International Association of Police Chiefs recognized sexual misconduct as a national problem. The Department of Justice underwrote an executive guide created by the Association that set out policy recommendations for eliminating sexual misconduct in police forces.<sup>65</sup> Explaining the high incidence of sexual misconduct, the executive guide opined that the job itself inadvertently creates opportunities, namely, police have power and authority over others; officers work independently; and officers engage with vulnerable populations.<sup>66</sup>

Most abuse stays hidden, in part because the conduct is shielded from discovery. Researchers complained back in 1995 that there are huge obstacles to finding data on police sexual misconduct, noting that “it is almost impossible to obtain information without a court order.”<sup>67</sup> There is still no national database and no national reporting requirements for sexual misconduct by police, not even for reports

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59. *Id.* (the AP obtained records from 2009 through 2014 from forty-one states on police decertification, an administrative process in which an officer’s law enforcement license is revoked).

60. Spina, *supra* note 57.

61. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 158–163 (2011) (note that 6% reported physical assault). Blacks and Latinos reported higher levels of sexual assault by police, 7% and 8% respectively. *Id.* at 160.

62. *Id.* at 158.

63. *Id.*

64. Catherine Hanssens et al., *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV*, N.Y.: CTR. FOR GENDER & SEXUALITY L. COLUM. L. SCH. (2014), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf).

65. *Addressing Sexual Offenses by Law Enforcement: Executive Guide*, THE INT’L ASS’N OF CHIEFS OF POLICE (2011), <http://www.theiacp.org/Portals/0/pdfs/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>.

66. *Id.* at 4 (addressing sexual offenses by law enforcement); Carpenter, *supra* note 57 (“Though the guide was completed in 2011, it’s not clear if it actually led to changes within individual police forces.”); Sedesky, *supra* note 57.

67. Peter Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence against Women*, 12 JUST. Q. 85, 91 (Mar. 1995).

of on-duty rape. Even more problematic, the extant data only illuminates situations where the police were charged with crimes or discharged from the force.

Sexual abuse is vastly underreported in general, and even less likely to be reported to authorities when the perpetrators are police. Nevertheless, there is enough evidence for the Cato Institute to conclude that “sexual assault rates are significantly higher for police when compared to the general population.”<sup>68</sup>

Researchers need to do more to unearth the data involving male victims of sexually abusive policing. Philip Stinson, a Criminal Justice professor at Bowling Green State University, is one of the primary researchers quantifying and analyzing data on police misconduct.<sup>69</sup> When Professor Stinson gathered data on the arrest of officers for sexual violence, he found 548 cases across the country in a three-year period.<sup>70</sup> From 2005 to 2007, the police officers arrested for sexual misconduct were overwhelmingly male and most involved victims younger than eighteen years old.<sup>71</sup> However, two-thirds of the child victims were abused by off-duty officers while three-quarters of the adults were abused while the officer was on-duty.<sup>72</sup> Over 200 of these 548 cases involved charges of forcible rape or sodomy, followed by fondling or statutory rape.<sup>73</sup> Crunching the numbers, Stinson notes that the “simple odds of an officer’s arrest for a sex-related crime versus some other type of police crime decrease by 97% if the victim is male[.]”<sup>74</sup> In addition, most of the male victims were children or teens.<sup>75</sup>

Researchers agree that arrested officers represent the tip of the iceberg.<sup>76</sup> While the gender of the victim is worthy of more study, we will likely learn that male victims are often the submerged part of the proverbial iceberg.

Men and boys have the same problems reporting sexual abuse that women do. For one, who do you call for help when the police are the bullies? Second, men and boys have the same problem of shame. Perhaps there is even more stigma for male victims in our society.<sup>77</sup> Third, the badge, gun, and power to arrest creates the

68. The Cato report used FBI statistics for comparison. See CATO INST., *supra* note 55.

69. Philip M. Stinson, BOWLING GREEN ST. U., <https://www.bgsu.edu/arts-and-sciences/center-for-family-demographic-research/about-cfdr/research-affiliates/philip-stinson.html> (last visited May 5, 2018).

70. Philip Matthew Stinson, Sr. et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL’Y REV. 665, 673 (Oct. 2015).

71. *Id.* at 674–76.

72. *Id.* at 675–76.

73. *Id.* at 675.

74. *Id.* at 678. Note that victims were male in only 8% of police prosecutions for sexual misconduct. “The inclusion of young male victims also provides data on cases of police sexual misconduct that have not been identified in prior empirical research.” *Id.* at 686 n.2.

75. *Id.* at 675–78.

76. See, e.g., Kraska & Kappeler, *supra* note 67, at 107–08; Allen D. Sapp, *Sexual Misconduct by Police Officers*, in POLICE DEVIANCE 139 (Thomas Barker & David L. Carter eds., 2d ed. 1991); SAMUEL WALKER & DAWN IRLBECK, POLICE SEXUAL ABUSE OF TEENAGE GIRLS: A 2003 UPDATE ON “DRIVING WHILE FEMALE” 4 (2003).

77. Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. INT’L L. 579, 587 (2006) (citing W. WOODEN & J. PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON (1982) (“Prisoners also may have refused to admit to having had sex with other men for fear of being labeled ‘weak’ or ‘gay.’”)); see also Hallie Martyniuk, *Understanding Rape in Prison*, PA. COAL. AGAINST RAPE 3 (2014), [https://www.pcar.org/sites/default/files/resource-pdfs/7\\_understanding\\_rape\\_in\\_prison\\_low\\_res.pdf](https://www.pcar.org/sites/default/files/resource-pdfs/7_understanding_rape_in_prison_low_res.pdf) (“The prison culture is based on assumptions about a person’s physical and mental weakness; victims are weak.”); see also Valerie Jenness, & Sarah Fenstermaker, *Forty Years after Brownmiller: Prisons for Men, Transgender Inmates, and the Rape of the Feminine*, 30 GENDER & SOC’Y 14, 25 (2016) (“[A]s in the world

power differential between officers and women and between officers and men.<sup>78</sup> Thus, there is every reason to suspect that police sexual abuse is grossly underreported among men. After all, Professor Stinson's data only included police who were arrested or prosecuted and was therefore more likely to capture the "egregious" cases<sup>79</sup> or cases that prosecutors would consider egregious.

The high rate of officers who are prone to commit sexual offenses either off-duty or on-duty creates a problem of legitimacy for the daily use of frisks. Statistically, there's a high likelihood that some patrol officers are prone to intentional sexual misconduct.<sup>80</sup> When male police chiefs in the St. Louis metropolitan area answered questions about the prevalence of sexual misconduct in their staff, on average, the chiefs suspected twenty percent of their staff. In their opinion, one out of five officers while on duty, committed at least low-level acts of sexual misconduct, such as pulling over cars to fish for dates, as well as more serious offenses.<sup>81</sup> These are the same officers who initiate *Terry* stops and conduct frisks.

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outside the prison, and depending upon the situation, sexual assault and sexual coercion can be made intelligible to all concerned by reaffirming the feminine as weak, vulnerable, and deserving of being demeaned and overpowered. Likewise, the masculine demands distance from and derogation of the feminine and draws its power from such behavior.").

78. See generally Stinson, *supra* note 70. Oddly, Stinson theorizes that this proves that the inherent power differential between police officers and females extends to male children and male teens more than it does to adult men. *Id.* at 686 ("The fact that the identified male victims (M age = 15.67, SD = 4.143) were most commonly either children or teens suggests that some of the same factors that contribute to the perpetration of sex crimes against women—namely, differences in power between police and their victims—also operate in cases involving children or teens whether the victim is male or female."). Stinson builds on an earlier feminist definition of police sexual violence and agrees that "sex crimes often result from encounters involving young females because of an inherent power differential and the interplay between issues of power and gender that work to produce opportunities for sex crimes." *Id.* (Citing Kraska & Kappeler, *supra* note 67). This definition may have influenced his conclusions.

79. Stinson, *supra* note 70, at 683 ("Thus, our methodology is probably more likely to capture those cases that could not be ignored and compelled an arrest because they were indeed egregious. Still, the sheer number of violent sex crimes in our study should concern both scholars and police executives regardless of the methodology used to identify them empirically."); see also Carpenter, *supra* note 57 ("Researchers have to rely on arrest reports and press accounts, which leave out unreported or unprosecuted cases.").

80. For example, Officer Daniel Pantaleo, the officer who applied the chokehold to Eric Garner, was sued for degrading searches of other men. Kevin McCoy, *Choke-Hold Cop Sued in Prior Misconduct Cases*, USA TODAY (Dec. 4, 2014), <https://www.usatoday.com/story/news/nation/2014/12/04/choke-hold-cop-pantaleo-sued/19899461/> (law suit alleged "humiliating and unlawful strip searches in public view[.]"); see also, Carimah Townes & Jack Jenkins, *EXCLUSIVE DOCUMENTS: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINKPROGRESS (Mar. 21, 2017), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/> (Officer Pantaleo's information was leaked from the Civilian Complaint Review Board. The information shows that "[b]efore he put Garner in the chokehold, the records show, he had seven disciplinary complaints and 14 individual allegations lodged against him. Four of those allegations were substantiated by an independent review board."); "Even a conservative reading of the documents indicates Pantaleo had among the worst CCRB disciplinary records on the force two years before his encounter with Garner." *Id.*

81. Maher, *supra* note 11, at 16. ("Of those chiefs who identified percentages of officers they believed participated in some form of sexual misconduct, they reported that on average only 2.7% of all officers engage in *serious forms* of this behavior" such as "rape, sexual assault, and sex with a juvenile.") (emphasis added); When police stop cars "simply because the officer finds the driver attractive[.]" this is categorized as less serious form of police sexual misconduct. *Id.* at 3; see also Timothy M. Maher, *Cops on The Make: Police Officers Using Their Job, Power, And Authority to Pursue Their Personal Sexual Interests*, 7 J. INST. JUST. INT'L STUD. 32, 33–34 (2007) ("In unjustified traffic stops, where the officer pulls over someone

Criminologists recognize a continuum of police sexual violence ranging from humiliation to rape.<sup>82</sup> What happened to Mr. Garner falls somewhere on that continuum. If we charted frisks on a continuum of legitimacy, on one end would be the frisk where an officer is simply confirming if a bulge in the waistband of a person's pants might be a gun. On the other end of the continuum are frisks that turn into sexual assaults or rape. In the middle of the continuum one finds frisks performed with voyeuristic intent or a desire to humiliate, as well as frisks that are unconstitutional in scope or unreasonable at their inception.

Mr. Garner's public strip search was unconstitutional even if the police were searching for drugs rather than satisfying a prurient interest.<sup>83</sup> Assuming that it happened the way Mr. Garner remembered, the frisk was also sexually abusive, for it served to humiliate and dominate. These are motivations akin to the forms of abuse showcased in the #MeToo movement.

Let's add a "#HimToo" for Eric Garner. We have come a long way from thinking about police sexual misconduct as a situation where females consent to an officer's overtures.<sup>84</sup> Indeed, we cannot discuss police violence against women without talking about sexual violence. It is because we are finally talking about abuse against women that we can finally talk about abuse against men in a more open and honest way.

#### IV. WHAT'S WRONG WITH *TERRY'S* ASSUMPTION THAT SHORT DETENTIONS PREVENT CRIME

According to the Supreme Court, stop and frisk is a legitimate crime-fighting strategy. This leads the Court in *Terry* to reason that overall, the benefits of allowing police to stop and frisk on less than probable cause outweigh the reduction in Fourth Amendment individual rights.<sup>85</sup> The Court used crime-fighting as a justification for *Terry* stops even while it recognized that the method would sometimes be

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who appears attractive, an officer may do this just to get a better look at them, just to 'go fishing' is the phrase that refers to this activity.")

82. See Walker & Irlbeck, *supra* note 76, at 5.

83. See, e.g., John L. Burris, *Life as A Civil Rights Lawyer in the San Francisco Bay Area*, 47 GOLDEN GATE U.L. REV. 133, 140 (2017) (discussing how a judge stopped the Oakland police from strip searching African American men in public).

84. See ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 104–126 (2017). (Andrea Ritchie devotes a chapter to the forms of police sexual violence that were historically directed to women of color and how many of these practices continue today.)

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

used to harass black civilians.<sup>86</sup> So what is the crime-fighting strategy that justifies the harms known fifty years ago and the harms known today?<sup>87</sup>

There are two current theories for how stops and frisks prevent crimes. One might be called the “control theory” of policing. And I shall call the second theory, hidden within *Terry*, the “waive your rights theory.” Both are flawed. Both will benefit from feminist analysis. Both help explain how Mr. Garner ended up dying on a day when he was not even carrying one loose cigarette.

#### A. The Control Theory of How Frisks Fight Crime

The control theory of policing became famous in New York, where it was scrutinized during the trial in *Floyd v. City of New York*,<sup>88</sup> and in Baltimore where it was critiqued by the Justice Department.<sup>89</sup> However, the method is used in many other jurisdictions in the United States.<sup>90</sup> Basically, police use the stop and frisk as a means of controlling a population. Repeated instances of stop and frisk will cause men, women and youth to be afraid to break the law. Police are told to detain certain demographics (usually black, brown and poor) and show them that the police own the streets.<sup>91</sup> New York Mayor Michael Bloomberg trumpeted this approach to stop and frisk. When the statistics showed that police made one thousand stops before they found one person with a gun—a terrible rate of return<sup>92</sup>—Mayor Bloomberg

86. *Id.* at 14–15 (“The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.” (footnotes omitted)); see also Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect”*, 56 OKLA. L. REV. 833, 854 (2003); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 365 (1998). Crime prevention was the *Terry* Court’s sole justification for stops and frisks on less than probable cause. *Terry*, 392 U.S. at 22 (A general interest in “effective crime prevention and detection . . . underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”).

87. For a description of the harms and the growing understanding of the harms caused by stop and frisk, see Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL OF RTS. J. 689 (2016).

88. 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 851 (2014) (“Clearly, New York’s stop-and-frisk policy has evolved into a tactic whose purpose is to intimidate and harass vulnerable classes of individuals—poor, racial, and ethnic minorities.”)

89. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) [HEREINAFTER DOJ BALTIMORE REPORT].

90. See, e.g., David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 853, 863 (2013).

91. Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1560 (2016).

[I]n 2009 a New York Police Department (NYPD) Lieutenant instructed his officers during the “roll call” at the beginning of a shift at the 81st Precinct in Bedford Stuyvesant, Brooklyn:

“[W]e’ve got to keep the corner clear. . . . Because if you get too big of a crowd there, you know, . . . they’re going to think that they own the block. We own the block. They don’t own the block, all right? They might live there but we own the block. All right? We own the streets here. You tell them what to do.”

*Id.* (quoting *Floyd*, 959 F. Supp. 2d at 597).

92. *Floyd*, 959 F. Supp. 2d at 559 (“The rate of arrests arising from stops is low (roughly 6%), and the yield of seizures of guns or other contraband is even lower (roughly 0.1% and 1.8% respectively).”).

said this saves lives.<sup>93</sup> People are scared to carry guns thanks to stop and frisk.<sup>94</sup> The New York model is stop and frisk on steroids. When President Donald Trump praised New York's stop and frisk and called for the method to be used throughout the country, he was talking about using stop and frisk to control poor black people.<sup>95</sup>

The sexualized frisk or strip search must be understood as a logical extension of the control theory. As feminism teaches, sexual harassment and sexual abuse is often a way of demonstrating dominance. Harvey Weinstein told a distraught actress who asked him why he grabbed her breast without permission "as behavior he is 'used to.'"<sup>96</sup> Weinstein used the sexual massage as part of an overall strategy to control certain actresses.<sup>97</sup>

The authors of *Terry v. Ohio* would have been shocked to learn that the NYPD made over 685,000 stops one year only to find that over 600,000 of the people stopped or frisked were innocent of any crime.<sup>98</sup> Likewise, *Terry's* authors would have disapproved of the policing methods in Baltimore, where frisks are like a side of fries, served up with every *Terry* stop.<sup>99</sup> In fact, Judge Shira Scheindlin supposedly ended the control method in New York City in 2013 with her famous *Floyd* decision.<sup>100</sup> *Floyd* held that NYPD's stop and frisk policy violated the Fourth Amendment and the Equal Protection Clause.<sup>101</sup>

The *Floyd* decision predated Eric Garner's death by almost a year and reforms were in progress.<sup>102</sup> Thus, Mr. Garner's treatment illustrates that police control of

93. Kate Taylor, *Stop-and-Frisk Policy 'Saves Lives,' Mayor Tells Black Congregation*, N.Y. TIMES (June 10, 2012), <http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html>.

94. *Id.* ("By making it 'too hot to carry,' the N.Y.P.D. is preventing guns from being carried on our streets," [Mayor Bloomberg] said. "That is our real goal . . .").

95. Barbaro et al., *supra* note 5. ("Mr. Trump remains an unabashed fan of the tactic and has glossed over the legal and racial objections to its use for years."); Josh Zeitz, *How Trump is Recycling Nixon's 'Law and Order' Playbook*, POLITICO MAG. (July 18, 2016), <https://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066>.

96. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

97. Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html>; Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies>.

98. *Stop-and-frisk Data*, N.Y.C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Apr. 26, 2018) (data from 2011 showed 88% are innocent).

99. DOJ BALTIMORE REPORT, *supra* note 89.

100. *Floyd v. New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

101. *Id.* at 667.

102. On August 12, 2013, the U.S. District Court appointed a monitor to oversee implementation of court-remedies ordered in *Floyd*. See J. David Goodman, *Court-Appointed Police Monitor Has Fought for City and Against It*, N.Y. TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/nyregion/court-appointed-police-monitor-has-fought-for-city-and-against-it.html>. Then, in November of 2013, Mayor Bill de Blasio won the election on a campaign to end New York's stop and frisk program and he changed police commissioners in January of 2014. Jim Dwyer, *Vowing to Slay the (Already Subdued) Stop-and-Frisk Dragon*, N.Y. TIMES (Dec. 5, 2013), <https://www.nytimes.com/2013/12/06/nyregion/de-blasio-and-bratton-promise-to-deliver-on-goals-but-give-no-credit.html> ("[B]y the time Mr. de Blasio announced that he was running for mayor, the number of stops and frisks had already started a drastic decline . . ."). The New York City Council also began moving forward with policing reform in the wake of the *Floyd* decision. See, e.g., COUNCIL

the individuals selected for questioning is inherent within *Terry* stops. This is partly due to the nature of policing. We teach officers to use command presence; we train police to use body language and words that signal that they have the power.<sup>103</sup> Policing demands this. Thus, even if supervisors no longer demand frisk quotas or reward officers for drug arrests, officers would still exert power and control when they confront suspects.

#### B. The Waive Your Rights Theory: How Officers Get from Reasonable Suspicion to Probable Cause

Turning to *Terry v. Ohio*'s own thesis that stop and frisk solves crimes, the majority opinion is strangely inscrutable. While the majority reasons that reasonable suspicion can ripen into probable cause when an officer detains a person a short time while posing a few questions,<sup>104</sup> the *Terry* Court never explains how this works. How can mere suspicion blossom into probable cause by detaining someone a short time?

In fact, *Terry*'s crime-fighting strategy is premised on vulnerable civilians waiving their constitutional rights. Of course, the Supreme Court has never admitted as much, but in practice, for an officer's suspicion to evolve from reasonable suspicion to probable cause to arrest for the suspected crime, the civilian must give up either her right against self-incrimination or her consent to a search of her body or possessions.

Let's play around with the facts of *Terry v. Ohio* to demonstrate how this theory unfolds. We know that police had reasonable suspicion to believe that John W. Terry was casing a store for robbery and that this allowed the officer to stop and frisk Mr. Terry.<sup>105</sup> But what should the officer do if the frisk turned up no gun? What next? What's the Court's plan for police to develop probable cause for an arrest for conspiracy to rob?<sup>106</sup> Perhaps the Court imagines that after a couple of questions, Mr. Terry might respond—"yes, officer—I was planning a robbery, I was casing this store." Certainly, that would constitute probable cause to arrest for conspiracy to rob. Yet this crime-solving method is premised on Mr. Terry waiving his Fifth Amendment right against self-incrimination.

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OF THE CITY OF N.Y., A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, IN RELATION TO PROHIBITING BIAS-BASED PROFILING (2013), [http://www.antibiaslaw.com/sites/default/files/all/Committee\\_Report\\_2013\\_08\\_22.pdf](http://www.antibiaslaw.com/sites/default/files/all/Committee_Report_2013_08_22.pdf). Eric Garner died on July 17, 2014. See *Fact Sheet in Richmond County (Staten Island) Grand Jury in Eric Garner Homicide*, *supra* note 16.

103. See, e.g., Mary Newman, Barnes v. City of Cincinnati: *Command Presence, Gender Bias, and Problems of Police Aggression*, 29 HARV. J.L. & GENDER 485, 490–91 (2006); Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 693 (2009).

104. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior . . ."). The officer's "justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him . . ." *Id.* at 33.

105. *Terry*, 392 U.S. at 6.

106. Note that had Mr. Terry's gun been lawful, as they are in Maine and Kansas, there would have been no arrest for gun possession—the officer would have had to keep asking questions.

Next, we turn to the many drug arrests that begin with an officer's mere suspicions.<sup>107</sup> Take the stop in *Utah v. Strieff*,<sup>108</sup> where the Supreme Court recently expanded the government's power to violate the Fourth Amendment during a *Terry* stop without fear of redress. There, the police officer suspected that Edward Strieff possessed drugs.<sup>109</sup> In order to find out whether his suspicions are accurate, the officer must examine Mr. Strieff's pockets, but he lacked the probable cause required to do so.

In the actual *Strieff* situation, the officer even lacked reasonable suspicion to detain Mr. Strieff, but eventually the officer learned about an unpaid traffic ticket that enabled him to arrest his suspect.<sup>110</sup> Mr. Strieff was then searched incident to arrest.<sup>111</sup> That's a cheat! That's not the pure *Terry* theory of asking a couple of questions for reasonable suspicion that Mr. Strieff carried drugs on his person to ripen into probable cause to arrest for possession.<sup>112</sup> The *Terry* doctrine is distorted when police use warrant checks to circumvent their lack of probable cause to search. Similarly, it is widely known that police often use the frisk to look for drugs—but this also distorts the *Terry* doctrine.<sup>113</sup> Under the pure *Terry* doctrine, police can only search a person's pockets for drugs if the person admits he possesses drugs or consents to a search.<sup>114</sup> In other words, *Terry's* justification for allowing detentions on less than probable cause relies on an officer's ability to persuade vulnerable civilians to waive their right to say no.

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107. Possession of marijuana was the primary crime charged during the height of New York's stop and frisk. *Floyd v. New York*, 959 F. Supp. 2d 540, 576 n.131.

108. 136 S. Ct. 2056 (2016).

109. *Id.* at 2063 (Officer Fackrell saw Strieff leave a "suspected drug house[,] however, as Strieff's lawyers argued, the officer "lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction," meaning that the officer suspected Strieff had purchased narcotics moments before.)

110. *Id.* at 2060.

111. *Id.* at 2063.

112. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). The outstanding warrant is just another excuse to arrest. In fact, the outstanding warrant fits well under the control theory of policing. As the DOJ Ferguson Report showed, checking for warrants, particularly misdemeanor and traffic warrants, is useful for ensnaring a population into the criminal justice system. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); see also *Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting) (objecting to how the majority used the warrant to bootstrap an excuse to arrest: "The warrant check, in other words, was not an 'intervening circumstance' separating the stop from the search for drugs. It was part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.')" In other words, *Terry* requires reasonable suspicion to investigate a particular crime.

113. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citing *Sibron v. New York*, 392 U.S. 40, 65–66 (1968) ("If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* . . ."). The "sole justification" of the *Terry* frisk is the "protection of the police officer and others nearby." *Dickerson*, 508 U.S. at 378. Feeling a lump to see if it was drugs "therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize." *Id.* See, e.g., Annie Fisher, *The Myth of the Terry Frisk*, 14 U. PA. J. CONST. L.: HEIGHTENED SCRUTINY 1, 1–2 (2012) ("It is one thing when a *Terry* frisk is done and a weapon is actually recovered, but in tens of thousands of misdemeanor cases in Philadelphia, the *Terry* frisk is merely a mechanism to get into the defendant's pocket[.]"); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U. CAL. DAVIS L. REV. 1, 5–6 (1994).

114. Confessions can create probable cause for a search while consent searches create an exception to the probable cause requirement. See, e.g., Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 29 (2008).

Arguably, Mr. Garner's death was a result of *Terry's* crime-fighting method. Police needed his full cooperation to get to probable cause. They needed Mr. Garner to stop and submit to a search so that they might dispel their suspicions. When I talk to middle school students about their rights, I teach them to say "Officer, I do not consent to searches." But they worry the officer will retaliate if they do not cooperate and do everything the officer wants. It is a reasonable fear. They all know what happened to Eric Garner, and to their friends. What person in Eric Garner's neighborhood will ever feel safe saying no? It is no puzzle why over 90% of civilians consent to searches.<sup>115</sup>

We know from the #MeToo movement that it is not easy to say no to a person with power. For the most part, our country recognizes that adults and children can freely say no when an officer asks for sex. But when it comes to searches, the courts call it consent. While many have called out the Supreme Court for its fiction that people somehow wish to give up their right to walk away or that they gladly suffer the type of frisk described in this article,<sup>116</sup> *Terry's* crime-fighting justification persists.

I hope the #MeToo movement helps counter the idea that there's nothing wrong with a crime-fighting strategy that depends upon police halting civilians in order to convince them to give up their right to silence, their property rights (for searches of their bags), or inherent dignity (for searches of their person). The power dynamic in policing cannot change any more than we can stop the power dynamic between an intern and her employer. The only way to stop the abuse is to abolish the consent doctrine and that, in turn, means the end of *Terry's* justification for stop and frisk on less than probable cause.

## V. CONCLUSION

For two years, I traveled to DC Superior Court with Howard Law students on Saturday mornings to teach "*Know Your Rights*" to teenagers who had been arrested for trespassing, petty theft, and other minor misdemeanors. By attending "Youth Court," the teens avoided juvenile court.

During one "know your rights" training, a slender fourteen-year-old dressed in the ubiquitous District of Columbia uniform of tee shirt, jeans and sneakers, kept his iPhone in his pocket and leaned forward in the jury box chair, listening intently. At one point, when the law students were switching scenes, he beckoned me over to ask me a question. What happens when they feel up your private areas, he wanted to know. I asked him if it happened to him. Yes, he explained, the last time he was searched, "it felt like rape." He wanted to know whether there was something he could do about that.

This young man's question continues to trouble me. Maybe the search was legal under *Terry*. After all, we know officers are allowed to feel around the groin. Or maybe it was closer to what happened to Eric Garner and a few others who have

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115. Brett Parker, *Consent Searches and the Need to Expand Miranda Rights*, STAN. POL. (Sept. 23, 2015), <https://stanfordpolitics.org/2015/09/23/consent-searches-need-expand-miranda-rights/>.

116. For more on this, see Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. RACIAL & ETHNIC JUST. 1 (2010).

spoken out.<sup>117</sup> This is a huge but hidden part of *Terry*'s legacy. It requires more than mere tinkering with the doctrine.

The consent doctrine is a sham. It is simply not safe for vulnerable civilians to say no. We must toss out the consent doctrine. And once we get rid of the consent doctrine, *Terry v. Ohio* must fall with it. At its heart, *Terry* requires police to get individuals to waive their rights so that police can search pockets and gather confessions during short detentions.

As the #MeToo movement demonstrates, perceived consent is usually coercion when there's an imbalance in power. Often, what appears to be consensual is surely not. Moreover, the brave #MeToo victims teach us that non-consensual touching leaves scars. To recognize the power imbalance in policing would lead us to abolish the consent doctrine and end *Terry*'s claim to fighting crime. So Happy Birthday *Terry*, #Timesup!

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117. RITCHIE, *supra* note 84; see CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.