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Police Officers' (In)ability to Detect Concealed Objects

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Proactive policing strategies aim to predict and prevent crime before it occurs.¹ Often, proactive activities require a tradeoff—to preempt criminal activity, law enforcement officials act in ways that can intrude on constitutionally protected privacy and rights to autonomy.² This is certainly the case in the context of policing concealed objects. When police conduct a search for illegal or dangerous objects, it implicates a civilian's Fourth Amendment right to be free from unreasonable searches and seizures by the government.

Determining how much intrusion is acceptable, and under what circumstances, involves applying a subjective legal standard to an officer's assertion about their "reasonable suspicion." However, judges have struggled to address the question of what is "reasonable" in this context. This is, in part, due to a lack of empirical work that can speak to what kinds of criminal activity can be predicted and how. Here, we describe new evidence that sheds light on police officers' abilities to accurately detect when someone is concealing something illegal or dangerous, and whether it is even possible to acquire such a skill. This project was conducted and published in 2023 in *Criminal Justice and Behavior* by Dr. Dawn Sweet, an Assistant Professor at the University of Idaho, Dr. Adele Quigley-McBride, an Assistant Professor at Simon Fraser University and former Postdoctoral Fellow at the Wilson Center for Science and Justice at Duke Law, and Dr. Chris Meissner, a Professor at Iowa State University.³

Sweet and colleagues found that trained police officers and lay persons were equally bad at determining whether people were concealing dangerous or illegal objects. In addition, there were no movements or behaviors found to be present more often by objective observers when the person was concealing something. This work sheds light on when, if ever, an officer's suspicion is reliable enough that it should be considered "reasonable," and whether officers should be given the power to search people they believe are concealing something dangerous.

Terry Stops: A Standard of Rational Inferences and Reasonable Suspicion

In *Beck v. Ohio* (1964), the U.S. Supreme Court noted that specific, objective facts are essential to justify warrantless searches and that mere evidence of "subjective good faith"⁴ on the officer's part is insufficient. The Supreme Court opined that they would not sanction intrusions on constitutionally guaranteed rights unless an objective standard could be used to assess the case facts.⁵ The principle advocated for in *Beck* is important—an officer can always claim that they operated on a good faith suspicion, and deference to a claim of subjective intentions made at a later time has the potential to break down the protection offered by the Fourth Amendment in the stop and frisk context altogether.

Nonetheless, only four years later, in *Terry v. Ohio* (1968),⁶ the U.S. Supreme Court ruled that police could "stop and frisk" any civilian that they had reason to believe was "presently dangerous." This type of police activity is now

colloquially referred to as a “*Terry* Stop”. The Supreme Court ruled that a *Terry* stop was justified when the officer could “point to specific and articulable facts” and “rational inferences from those facts” that suggest dangerousness.⁷ Under *Terry*, police can perform these warrantless searches in situations where there is “reasonable suspicion” the person observed has committed, is committing, or will commit a crime, or a reasonable belief the person “may be armed and presently dangerous.”⁸ This holding opened the floodgates of proactive stop and frisk searches.

The *Terry* standard has evolved under subsequent cases, with more recent judgments emphasizing the consideration of the “totality of the circumstances — the whole picture”⁹ and making use of “commonsense judgments and inferences about human behavior”¹⁰ from the perspective of a reasonable officer.¹¹ Under this caselaw, judges have wide discretion about what to consider and how to weigh those factors into their decisions. Thus, despite the earlier declaration that a subjective test would be insufficient to justify an intrusion of constitutional rights, the *Terry* standard calls upon judges to engage in case-by-case, fact-specific assessments of the relevant situation and what the police knew and observed. In fact, in *Illinois v. Gates*, the Supreme Court indicated it was neither possible nor useful to attempt to create a neat set of objective rules to govern these assessments.¹²

The Accuracy of “Articulable Facts and Behaviors” Suggesting Concealment

Often a judge’s fact-specific assessment turns on a police officer’s assertion that they observed behavior or movements that gave them reasonable suspicion to think that the person was trying to deceive or hide something.¹³ Judges tend to give these assertions some amount of deference, ostensibly because the officer’s training and experience equips them to make these judgments about people’s behavior in a way that is reliable enough for it to form the basis of “reasonable suspicion” of danger or illegal activity.

Of critical import though is whether the behaviors and movements that police believe to be clues that someone is concealing something are actually able to distinguish between people who should and should not be stopped by police. If a police officer is relying on “specific and articulable facts” that are not accurate or reliable predictors of concealing, then the inferences are not rational, the suspicion is not reasonable, and these articulable facts should not be sufficient to justify a search.

Until this year, there were no empirical works addressing which observable clues are helpful for distinguishing between people who are concealing a weapon, or some other type of contraband, and those who are not. Here, we discuss a series of studies published recently¹⁴ that specifically address the task of judging concealment from a distance.

For the law permitting *Terry* stops and other proactive policing techniques to be truly justified, three things must be true. First, police can accurately and reliably identify behaviors that are associated with concealing a dangerous object. Second, there are behaviors or clues that predict the presence of dangerous items or indicate that someone is about to commit a crime—objective signs of criminal activity. Finally, the benefits of *Terry* stops are substantial enough to justify the infringement of Fourth Amendment rights. We address each of these assumptions here.

Police Cannot Accurately and Reliably Identify Behaviors That Predict Criminal Activity

One key element of the *Terry* rule is the assumption that people are capable of spotting behaviors and clues from a distance (such as on foot or from a vehicle) that indicate someone is likely to be concealing something dangerous or illicit. There also exists a common narrative that the more time a police officer spends “on the job,” the better that officer’s intuition becomes when making judgments about suspicious behavior, lying, and someone’s character.¹⁵ This narrative has been cultivated not only by fictional and nonfictional media, but also from within the police during training and by deference to experienced officers. Thus, the rule in *Terry* seems to also assume that, with the type of training and experience police agencies provide, ordinary people can become even more reliable and accurate at spotting behaviors that are indicative of concealing something dangerous or illicit.

In the study by Sweet and colleagues, the researchers recruited law enforcement officers and lay participants and asked them to watch videos of people walking down a street or through a room. They asked both groups of participants to make judgments about whether each person was concealing a firearm (Study 1), a bucket of water (designed to mimic an “unstable device” such as an explosive, Study 2), or a red handkerchief (designed to mimic contraband that does not have bulk, such as drugs, Study 3).¹⁶ The researchers knew that some of the people in the videos were concealing, and which ones those were, and told the people in the videos they would be rewarded if they successfully “fooled” the observer.

Although the police officers had significantly more experience with this task as a result of their career, police and lay individuals performed equally poorly on this task. Each group of participants only made correct judgments approximately half of the time—the same as if they had been guessing. In addition, when police made mistakes, they were actually more likely to incorrectly decide that someone was concealing than lay individuals—lay persons tended to think people were *not* concealing. This finding is a direct result of their experience in their job. Police are much more likely to encounter concealed weapons and other contraband, which means they expect a higher rate of such occurrences than lay persons. Thus, police are biased to find evidence that someone is concealing even when they are not, resulting in more incorrect judgments of that type than lay persons.

There Are No Behaviors or Clues That Are Objective Indicators of Criminal Behavior

Although there are skills that can be developed organically through practical experience, people can only learn to predict events if the factors they are focusing on actually predict those events. Thus, a link must exist between certain behaviors and the activity of concealing dangerous or illegal objects for police officers to accurately use them when interacting with civilians. Otherwise, even if police sometimes find something dangerous during a *Terry* stop, that decision to stop and frisk someone is based on unreliable evidence—unreliable articulated behaviors.

In the study by Sweet and colleagues, objective coders were also trained to view videos of individuals concealing different objects. The trained coders noted every movement made by the people in the video (e.g., head movements,

arm movements, gait, demeanor), but were not asked to make any other judgments about the individuals. Regardless of the type of object the person was tasked with concealing, there were no behaviors noted by the objective coders that were present more often when someone was concealing compared with when someone wasn't, and vice versa. The researchers concluded that there are no behaviors that can be observed from a distance that can be used to discriminate between people who are and are not concealing something illegal or dangerous. Therefore, even if a new training regimen was devised to correct the bias among police to think people are concealing, there are no telling behaviors that police could be trained to look out for.

The Benefits and Outcomes of Terry Stops Do Not Justify Infringing People's Rights

Some proactive policing policies involve identifying high-crime areas or identifying the types of people thought to be more likely to be committing crime, and increasing police presence and the number of *Terry* stops in those areas. Yet, the studies discussed here suggest that police and lay persons are unable to distinguish between people who are concealing and those who are not by observing “articulable behaviors” alone. In fact, there appear to be no movements or behaviors that are more likely to be observed when someone is concealing something. In light of these findings, the high error rates associated widespread, frequent stop-and-frisk policing practices are perhaps unsurprising, but are also unacceptable.¹⁷ The underlying premise of these practices is not supported by these new empirical findings, which means that the purpose of *Terry* stops (i.e., to predict and prevent crime) is not possible in these scenarios and, thus, cannot justify the violation of civilians' rights that is required to implement these practices.

Moreover, these findings suggest that when police decide to stop somewhat based on some observed, articulable behavior, they are doing so based solely on their subjective opinion of the person and the context. When police are given leeway to make these kinds of judgments in the course of their work, there are serious consequences associated with their errors. More police-civilian interactions in areas already deemed to be high risk, or with civilians who fit the stereotype police associated with criminal activity, this increases the chance that situations will escalate. This escalated anxiety and tension surrounding police presence can increase in injuries and fatalities among civilians by police and increase in racial disparities in stops, searches, and uses of force.¹⁸

This is the type of error would be avoided if the view described by the Supreme Court in *Beck v. Ohio* had been maintained. If a task cannot be carried out or assessed in a largely objective way, then the practice will be colored by the existing knowledge, bias, and expectations of the decision-makers—the police. Police are human, and, even with training and experience, cannot undertake the task of observing civilians' behaviors in a fair and equitable manner such that people from different demographic backgrounds are positively and negatively affected by proactive policing to a similar extent.

Conclusion

Simply put, by showing that “articulable behaviors” cannot be used by police to accurately and reliably stop-and-frisk people who are actually concealing weapons or contraband, Sweet and colleagues dismantled the principles upon which courts assess *Terry* stops. Police cannot accurately and reliably distinguish between people who are and are not concealing something dangerous—whether that dangerous object is something small and easily concealed, or a bulky item such as a gun or an unstable device.

Indeed, there is no evidence that anyone can determine whether someone is concealing simply by observing people from a distance as there are no objective, reliable, observable predictors that indicate a person is concealing. Thus, it is misguided to train officers to look for “articulable behaviors” as clues that someone is hiding contraband. Furthermore, courts should reconsider their approach to assessing the evidence presented by police to justify interactions with civilians allowed under *Terry*.

References

- ¹ Proactive policing is a relatively new concept, and became popular in the 1960s, around the time of the SCOTUS decisions discussed here: The National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities*, National Academies Press (2018), <https://nap.nationalacademies.org/catalog/24928/proactive-policing-effects-on-crime-and-communities>, at 1.
- ² NASEM, *supra*, at 4.
- ³ Dawn M. Sweet, Adele Quigley-McBride, A., Chris A. Meissner, & Katherine Ringstad, *Perceptions of Movement Patterns and Concealment Detection in Naive Observers and Law Enforcement Officers: A Lens Model Analysis*. 50(3) *Criminal Justice and Behavior*, 351 (2023), <https://doi.org/10.1177/00938548221140360>.
- ⁴ *Beck v. State of Ohio*, 379 U.S. 89 (1964), at 96-97.
- ⁵ *Beck v. State of Ohio*, *supra*, at 97.
- ⁶ *Terry v. Ohio*, 392 U.S. 1 (1968), at 22.
- ⁷ *Terry v. Ohio*, *supra*, at 22; *Beck v. Ohio*, *supra*, at 96-97.
- ⁸ *Terry v. Ohio*, *supra*, at 24-30.
- ⁹ *United States v. Cortez*, 449 U.S. 411 (1981) at 417; *United States v. Sokolow*, 490 U.S. 1 (1989), at 7-9; *Alabama v. White*, 496 U.S. 325 (1990), at 330.
- ¹⁰ *Illinois v. Wardlow*, 528 U.S. 119 (2000)
- ¹¹ *United States v. Sokolow*, 490 U.S. 1 (1989) at 7-9.
- ¹² *Illinois v. Gates*, 462 U.S. 213 (1983) at 232.
- ¹³ Caroline E. Lewis, *Fourth Amendment Infringement Is Afoot: Revitalizing Particularized Reasonable Suspicion for Terry Stops Based on Vague or Discrepant Suspect Descriptions*, 63 *Wm. & Mary L. Rev.* 1797 (2022), <https://scholarship.law.wm.edu/wmlr/vol63/iss5/8>, at 1806.
- ¹⁴ Sweet et al., *supra*.
- ¹⁵ “Some would argue that perceptions of law enforcement officials is largely determined by their portrayal in the mass media.”—Kenneth Dowler, Valerie Zawilski. *Public Perceptions of Police Misconduct and Discrimination: Examining the Impact of Media Consumption*. 35(2) *Journal of Criminal Justice* 193, (2007) at 227.
- ¹⁶ Sweet et al., *supra*.
- ¹⁷ Jeffrey Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing*, 68 *UCLA L. REV.* 1584 (2022; discussing error rates and demographic biases in *Terry* stops); Jeffrey Fagan, *Terry's Original Sin*, *U. CHI. LEGAL F.* 43 (2016; discussing the social crime and constitutional context of *Terry*).
- ¹⁸ Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Vignesh Ramachandran, Cheryl Phillips, & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, *Nature Human Behavior*, (2020), https://drive.google.com/file/d/1B580s2Hb2v__YQ8whdWRULY9mgxxsHo0/view.

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