Out of Touch and Out of Order: Frisking as a Form of Sexual Harassment

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Josephine Ross, *What the #Metoo Campaign Teaches About Stop and Frisk*, ___ **Idaho L. Rev.** ___ (forthcoming 2018), available at SSRN.

Josephine Ross's article, *What the #Metoo Campaign Teaches About Stop and Frisk*, provides a unique and startling insight into the invasive experience of police body searches, and the psychological damage that can result. One of the law's central roles is to limit the power of government officials (among others) to interfere with the public by prohibiting state officials from engaging in certain offensive acts. This rule-of-law role is especially important when government officials, like the police, are granted enormous material and normative powers to inflict physical harm and stigmatize civilians through the criminal law. The rule of law is even more important when many of the people most likely to come into contact with the police are already vulnerable thanks to their precarious status in society.

A core limit on the rule-of-law check on police power is accountability. Sometimes, prosecutors simply do not want to punish the police, for a variety of reasons. On other occasions, police misconduct is hard to spot, because so much of policing is low visibility. The police know this. Jerome Skolnick's celebrated formulation of the problem, in his book, *Justice Without Trial*, called this a battle between the rule of law and the police's order-maintenance role. All too often, Skolnick (and most policing scholars) revealed, the police depend upon low-level acts of harassment, rather than the criminal law, to maintain order and fight crime. And while that harassment is often high-visibility in relation to the civilian subjects of their authority, it is low-visibility in relation to the legal officials who could call them to account, as well as the general public, who generally do not know (or do not want to know) what the police are up to on the street.

As Josephine Ross reminds us in her fascinating article, these features of low public visibility, low institutional accountability, but high visibility to the tormented victims of harassment are precisely the features that police harassment shares with the sort of sexual harassment called out by the #metoo movement. The #metoo framework reveals that sexual assault and sexual harassment is something that lots of people know about, but no one talks about, except perhaps in whispers. Supervisors are unwilling to regulate their star performers and tolerate a culture of harassment and intimidation in which the onus is on the victims to avoid compromising situations, often at the cost of important, career-enhancing, social interactions. In a culture that tolerates this sort of behavior, the targets of harassment know that complaining has no effect at best, and at worst, produces severe career consequences.

Professor Ross's article has, at its core, a powerful insight. Frisks, she argues, impose similar types of intrusion upon the public as sexual harassment, in ways that are both asymmetric and arbitrary. The frisk's asymmetry consists in the response of the police and the suspect to the sort of invasive touching that is euphemistically referred to as a "pat down." The police are taught to fear weapons concealed in sexualized spaces: between buttocks and breasts, and in the groin area. They are trained to target these areas, and feel for weapons, in ways that the officer may not regard as sexual, but which the suspect often experiences as sexualized. As Professor Ross reveals, to the subject, "it feels like a sexual violation, but the officer may be simply following his supervisor's orders, doing what he is trained to do."

As in the case of sexual harassment, the practice is widespread, well-known by the victims, often invisible to the public at large (who are likely to discount the scope of the practice) and commonly tolerated by police chiefs and prosecutors who are aware of the problem but unwilling to intervene to enforce the legal prohibitions on this form of workplace power. Police touching of sexual parts of the body effectively communicates the vulnerability of the person searched, and submits them to stigmatization and humiliation. In the context of mass frisking, as a consequence of aggressive

stop-and-frisk policing, some members of the public are subjected to a particularly degrading form of physical dominance and control.

Professor Ross's article opens up an aspect of policing hidden in plain sight on the pages of the law reporters. In two cases, at the beginning and at the end of the Warren Court's expansion of Fourth Amendment regulation, the Court addressed policing in the context of intimate intrusions upon the suspect's body. Most famously, perhaps, Dollree Mapp attempted to hide a purported warrant in her bosom. In the words of the *Mapp v. Ohio* Court, "A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been 'belligerent' in resisting their official rescue of the 'warrant' from her person…a policeman 'grabbed' her, 'twisted (her) hand,' and she 'yelled (and) pleaded with him' because 'it was hurting.'"[1]

At the end of its Fourth Amendment criminal procedure revolution, the Warren Court, in *Terry v. Ohio*, returned to the issue of intimate physical touching by law enforcement officers. In describing a frisk, the Court noted that "(T)he officer must feel with sensitive fingers every portion of the prisoner's body. A through 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.'"[2]

A frisk, the Court recognized, "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Id*. at 17. Put differently, encounters with the police, especially frisks conducted as part of a *Terry* stop or an arrest, place the suspect in a particularly vulnerable position.

Police encounters with the public come in all shapes and sizes, from brief visual or verbal interactions to deadly shootings. For many members of the public, the encounter, even if just a stare from a police officer in a high-crime neighborhood,[3] may be enough to remind them of their, or others', past experiences; and give rise to the fear and deference that comes with trying to avoid or placate the powerful. Little wonder that some people flee.

Eric Garner, as Josephine Ross reminds us, did not run. Instead, Eric Garner stood his ground, and said "Every time you see me, you want to mess with me. I'm tired of it. It stops today…Please just leave me alone." (P. 6-7.) Ross's revelatory account of the fatal interaction reveals that Garner, like Dollree Mapp, had been the victim of the sort of physically intrusive touching envisaged by the *Terry* Court.

"Seven years earlier, [Garner] filed a civil rights lawsuit against another police officer for performing a strip-search on him in public during a pedestrian stop. [During the frisk,] the officer performed a 'cavity search on me by . . . digging his fingers in my rectum in the middle of the street.…the injuries I received was to my manhood…'"

Professor Ross allows us to see the interaction between Eric Garner and Officer Daniel Pantaleo in a completely new light. Garner, the victim of what felt to him like a sexual assault, knew he was in a vulnerable position. He knew what might happen if the police touched him, and simply wished to walk away. But norms of race, gender, and police practice worked against his attempt to reason with the police. His past trauma and physical precariousness was hidden behind his large frame, conveying a form of hypermasculinity that undermined his credibility in conveying his psychological fragility. Particular police policies encouraged the police to interfere, including"third-party policing," which leverages shopkeepers to report minor crime, and New York's embrace of broken windows' intolerance of minor street disorder to ensure enforcement of these ordinances. Garner's failure to respect the officers' command presence likely constituted a significant factor in police escalation; his demands were taken as resistance to the street authority of the police.

The rule-of-law limitation on police power is supposed to make the public less vulnerable, by setting out clear rules of engagement and ensuring that the civilian and police officer enjoy an equal standing before the law. But the ability to engage in low-visibility, sexually-intrusive interactions entrenches a different, more arbitrary, set of norms that enforce precariousness. These unwritten rules of the encounter are, like the responses to workplace sexual harassment, repeated by the whisper network among the vulnerable to avoid contacts with harassers. Like the Hollywood practice

of powerful men interviewing vulnerable women in hotel bedrooms, Professor Ross shows that the frisk is, on its own terms, ill-fitted for the purpose it is supposed to serve. The cost to the public is not worth the benefit to the police: the amount of information generated by these "forcible encounters" (as Justice Harlan called them in *Terry*) is small and unlikely to dispel the suspicions of a persistent officer. Professor Ross's conclusion is that, because the law cannot regulate police power by setting rule-of-law limits on its use, the law should simply prohibit that practice. The power of Professor Ross's article, as with the #metoo movement itself, is that whether or not we agree with all of its prescriptions, we can no longer avoid recognizing and addressing the practices that produce this form of harassment.

1. Mapp v. Ohio, 367 U.S. 643, 644-45 (1961).
2. *Terry v. Ohio,* 392 U.S. 1 17 n.13 (1968).
3. *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000).

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