

CHALLENGES TO *TERRY* FOR THE TWENTY-FIRST CENTURY

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INTRODUCTION

“Reasonable and articulable suspicion” is generally understood as the Fourth Amendment standard the Supreme Court chose in *Terry v. Ohio*¹ as the basis for brief investigative stops by police officers. Articulable suspicion is a lawyer’s

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¹ 392 U.S. 1, 30 (1968).

standard. Judges—and lawyers generally—are partial to words, which are their stock-in-trade. But much of what matters to people in the world is incredibly difficult to reduce to language. Moreover, many people, including some otherwise talented police officers, may lack the linguistic capacity to successfully recount their experiences in language that lawyers and judges can use in court. This Article considers the portion of the “totality of the circumstances” that lies beyond the articulable, exploring the limitations of witness testimony regarding fast-moving events, and the ways in which technology will alter the margins of practice on the street and in the courtroom.

As this Article is being written, the background understandings of human cognition and its effect on police practice are shifting. Emerging science on cognitive processes is introducing new challenges into the courtroom. On the one hand, some social scientists are explaining human behavior in ways that make it possible for law enforcement officers to translate their heretofore inarticulable experiences into words. On the other, the findings of other scientists who study the nature of expertise suggest that the traditional *Terry* inquiry, with its focus on conscious thought, may be missing much of the picture. Expert police officers process much of the critical information on which they rely at a subconscious—and therefore inarticulable—level. The better they get at their job, the less likely they are to make conscious note of classes of information, especially in the potentially life-threatening situations that may lead to frisks for weapons. Additionally, the process of preparing for the *Terry* test may be driving some information out of police officers’ memories, at the same time it seeks to capture other information. Police officers, as much as, and perhaps more than other eyewitnesses, are susceptible to verbal displacement.

And officer memory may not be the best evidence available. In the twenty-first century, digital recorders are proliferating—they can be found in police cars, on officers’ lapels, on witness cell phones, in retail security systems, the list expands daily. These technological advances are making it possible for many officers, and many suspects, to bring video or audio recordings of their experiences to court. Fourth Amendment doctrine must explicitly make room for these technological advances. If, as this Article

argues, “reasonable and articulable” suspicion is really a subset of “reasonable suspicion based on credible evidence,” then digital video and audio recordings should serve as a new, affordable, and widely available adjunct to officer testimony that fits nicely into this broader doctrinal framework.

This Article proceeds in four parts. Part I examines briefly the legal regime established by the Supreme Court and commonly referred to by the name of the seminal case, *Terry v. Ohio*, and suggests that the totality-of-the-circumstances approach adopted by the Court is broader than the traditional “reasonable and articulable suspicion” formulation.² Part II examines some of the developments in cognitive science that have implications for the application of the *Terry* standard. It examines new law enforcement applications of the emerging science of precognitive facial expression, which makes the previously inarticulable articulable. This new application is changing the landscape underneath *Terry*. It then looks at the naturalistic decision-making literature, a branch of psychology of expertise, and suggests that *Terry* may be asking a question that is poorly suited to the environment in which officers operate, and to the nature of their expertise. It finally considers some recent research on witness memory, and suggests that the process of preparing to meet the *Terry* standard may be introducing to the courtroom inaccuracies that are real, albeit difficult to quantify. Part III briefly considers some of the policy implications of the interaction between cognitive science and police conduct under the *Terry* regime. It suggests that the protection offered under the *Terry* standard may be slowly eroding, even as its presence may be creating a false sense of confidence that “the courts” are the answer to the age-old query, “Who watches the watchers?”³ Part IV considers the viability of digital video as an adjunct to or substitute for officer testimony. We may have a new answer to who watches: the digital video camera.

² *Id.*

³ Commonly attributed to the plays of Juvenal, the question in Latin is *Quis custodiet ipsos custodiet*.

I. *TERRY* AND REASONABLE AND ARTICULABLE SUSPICION

The language “reasonable and articulable suspicion” is immediately familiar to any student of criminal procedure.⁴ It is the Fourth Amendment standard⁵ articulated by the Supreme Court in the *Terry* line of cases as the minimum basis required for brief investigative stops by police officers. These brief, investigative “*Terry* stops”⁶ are police-citizen encounters short of a full arrest, but where appropriate they may include a “frisk” for weapons.⁷ As this Section will show, the courts have given increasing deference to the police regarding the bases for such stops, but they have retained their prerogative to review police behavior, even if the standard is more deferential than probable cause. “The stop and frisk rule permits the police to engage in what most people regard as reasonable and essential law enforcement activity but requires them to pay attention to all of the circumstances they confront and to articulate a reason for their actions that may be judicially reviewed.”⁸

Courts applying the *Terry* standard in its current state of evolution may consider a broad range of suspect conduct, such as nervousness, evasive behavior, flight, and responses to questions.⁹

In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences from suspicious behavior, and this Court cannot reasonably demand scientific certainty where none exists.

⁴ For an excellent discussion of the rise of the *Terry* standard, see Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911 (1998).

⁵ The Fourth Amendment states, in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S CONST. amend. IV.

⁶ See generally WAYNE R. LAFAYE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1 (4th ed. 2009).

⁷ A frisk is a limited pat-down of the outer clothing of a suspect to check for weapons. *Id.* at 5. If an object that might be a weapon is felt under a suspect’s clothing, it can be removed for visual examination. *Id.*

⁸ Saltzburg, *supra* note 4, at 962.

⁹ LAFAYE, *supra* note 6.

Thus, the reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior.¹⁰

In *Terry* itself, Martin McFadden, a police officer with thirty-nine years of experience as a Cleveland police officer, observed three men who were, in his estimate, “casing a job, a stick-up.”¹¹ McFadden described the elaborate sequence of events in which the men walked back and forth in front of a store for ten to twelve minutes, and stopped on the corner to talk with a third man, before returning to once again stare into the window.¹² The police officer stopped the men, and asked them some questions.¹³ Worried for his safety, he quickly frisked the men for weapons by patting down their outer clothing, and felt concealed firearms on two of them.¹⁴ The men were arrested and convicted on weapons charges.¹⁵

Terry’s appeal was based on the absence of probable cause to arrest him.¹⁶ The Court, in an opinion written by Justice Warren, agreed, but held that the absence of probable cause was not the end of the inquiry.¹⁷ The government argued that such encounters—because they fell short of full arrest—were outside the purview of the Fourth Amendment.¹⁸ Justice Warren wrote that the Fourth Amendment did apply, but that there was an

entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.¹⁹ Instead, the conduct . . . must be tested by the

¹⁰ *Illinois v. Wardlow*, 528 U.S. 119, 119 (2000).

¹¹ *Terry v. Ohio*, 392 U.S. 1, 6 (1968) (quoting McFadden’s testimony).

¹² *Id.*

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 25.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 20.

Fourth Amendment's general proscription against unreasonable searches and seizures.²⁰

The Court further held that the standard was objective, not based on the officer's subjective good faith.²¹ Judged after the fact, the circumstances must be those that would have led a reasonable person to believe that the stop and frisk were warranted.²² Given the suspicious behavior that Officer McFadden observed, he was justified in making a brief investigative stop.²³ Moreover, the limited search for weapons that he conducted was reasonable under the circumstances.²⁴

Cases since *Terry* have referred to the standard as requiring reasonable and articulable suspicion.²⁵ The officer must be acting on more than an "inchoate and unparticularized suspicion or 'hunch'"²⁶ of criminal activity, but may bring experience and training to bear to allow seemingly innocuous information to be considered as part of the totality of the circumstances. *Terry* was originally framed as a narrow exception to the Fourth Amendment requirement that officers have probable cause before searching or seizing a person or property.²⁷ In *Terry*, the Supreme Court empowered police officers to stop and frisk a suspect if the officer had a reasonable and articulable suspicion that "criminal activity [was] afoot" and the suspect was armed and dangerous.²⁸ This narrow exception, based on a standard less rigorous than probable cause, was substantially expanded in subsequent decisions,

²⁰ *Id.*

²¹ *Id.* at 21.

²² *Id.* at 21-22.

²³ *Id.* at 23.

²⁴ *Id.* at 28-29.

²⁵ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot."). Justice Harlan's language in his *Terry* concurrence most closely matches the current formulation: "Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence." *Terry*, 392 U.S. at 33 (Harlan, J., concurring). A Westlaw search for the phrase "articulable suspicion" in the allfeds database on August 16, 2010 yielded more than 3,800 results. A similar search in allcases hits the 10,000 result limit.

²⁶ *Terry*, 392 U.S. at 27.

²⁷ LAFAVE, *supra* note 6, § 9.1(c).

²⁸ *Terry*, 392 U.S. at 30 (alteration to original).

leading some commentators to express concern that the exception was beginning to swallow the rule.²⁹

Since *Terry* was decided, the law has evolved in two key ways. First, the lower courts have expanded the original scenario, involving violent crimes or suspects thought to be armed and dangerous, to include crimes that are not inherently violent, such as burglaries and drug offenses, and to allow searches of suspects in certain cases where there is no direct evidence that the suspect is armed or dangerous.³⁰ Second, some observers have argued that trial courts have shown a willingness to “unquestioningly accept the testimony of police witnesses,” significantly reducing the amount of evidence that will meet the standard.³¹

In a 1994 article, Professor David Harris noted that much of the expansion of *Terry* up to that point had occurred at the trial and intermediate appellate court levels, with the Supreme Court continuing to characterize *Terry* as a narrow exception to the probable cause requirement.³² However, the Court’s recent Fourth Amendment decisions appear to embrace—and arguably even expand—the broader conception of *Terry* previously adopted by the lower courts. In two of its most recent *Terry* decisions, *United States v. Arvizu*³³ and *Illinois v. Wardlow*,³⁴ the Supreme Court overturned lower court decisions to suppress evidence based on a restrictive view of the scope of *Terry*.³⁵

²⁹ David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 5 (1994); Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 576-83 (1991); see also Michael J. Roth, Note, *Berkemer Revisited: Uncovering the Middle Ground Between Miranda and the New Terry*, 77 FORDHAM L. REV. 2779, 2800-03 (2009); Jamie L. Stulin, Comment, *Does Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court’s Decision to Compel Identification*, 54 AM. U. L. REV. 1449, 1456-58 (2005).

³⁰ Harris, *supra* note 29, at 23-32.

³¹ *Id.* at 33.

³² *Id.* at 5-6.

³³ 534 U.S. 266, 268 (2002).

³⁴ 528 U.S. 119, 121 (2000).

³⁵ *Arvizu*, 534 U.S. at 277 (holding that court below incorrectly suppressed evidence from vehicle search, where border patrol officer stopped vehicle after observing defendant driving on road frequented by drug smugglers and seeing children in back seat waving oddly); *Wardlow*, 528 U.S. at 125 (holding that Illinois Supreme Court incorrectly suppressed evidence obtained during stop and frisk of defendant who ran away from police vehicle that was entering high crime area, despite police officer’s inability to remember whether police car was marked or unmarked). In a third case,

While courts have substantially liberalized their inquiry under *Terry*, it remains an important cornerstone of Fourth Amendment law. Other scholars have written extensively on *Terry*.³⁶ It has been variously described as a “practically perfect doctrine,” and as a dismal failure.³⁷ It has been described as revolutionary, and as evolutionary.³⁸ Others have suggested that the balance in *Terry* itself was correct, but that subsequent decisions have tipped the balance in favor of the police,³⁹ and yet others suggest that *Terry*’s strength is that it is flexible enough to move back and forth with the times.⁴⁰ Other critics have noted

Hibel v. Sixth Judicial District Court, 542 U.S. 177, 191 (2004), the Court held that a state may require a suspect to disclose his name during a *Terry* stop without violating the Fourth Amendment. While the majority maintained that *Hibel* was not inconsistent with previous *Terry* decisions, *id.* at 188, commentators have argued that *Hibel* diverges from earlier opinions stating that suspects cannot be required to answer questions during *Terry* stops. See Stulin, *supra* note 29, at 1456-63. One notable exception to this trend towards an expansive interpretation of *Terry* is *Florida v. J.L.*, 529 U.S. 266 (2000), where the Court held that an “anonymous tip that a person is carrying a gun, is, without more, [in]sufficient to justify a police officer’s stop and frisk of that person.” *Id.* at 268.

³⁶ See, e.g., Wayne R. LaFave, *Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pungitinous Police, Pachydermatous Prey: Whence Fourth Amendment “Seizures”?*, 1991 U. ILL. L. REV. 729 (1991); Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053 (1998); Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 576 (1991) (arguing that the Court struck the right balance in *Terry* but later decisions undermined that balance).

³⁷ See Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 35 (1994) (arguing that *Terry*’s rationale has been distorted to justify ever-more intrusive police conduct); Saltzburg, *supra* note 4, at 912 (arguing that *Terry* strikes a “practically perfect” balance). See generally Adina Schwartz, *Just Take Away Their Guns: The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 331 (1996) (arguing that *Terry* weakened the rights of defendants of all races when it broadened the basis for admissibility of evidence); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1136-37 (1998) (discussing tension between individual liberties and police power).

³⁸ Slobogin, *supra* note 36, at 1095 (“*Terry* didn’t alter law enforcement practices; it just provided, in the hands of the post-Warren Court, a rationale for the status quo.”).

³⁹ Williams, *supra* note 36, at 576 (arguing that the Court struck the right balance in *Terry* but later decisions undermined that balance).

⁴⁰ See Craig S. Lerner, *Judging Police Hunches*, 4 J.L. ECON. & POL’Y 25, 39-40 (2007); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 402 (1988) (“[R]easonable suspicion became a valid compromise standard that comports with the [F]ourth [A]mendment if the Court decides that, after balancing the interests, it is reasonable. The government

that different and even contradictory information has been accepted by trial courts as an acceptable basis for an investigative stop, leading to a perception of oversight, even though the courts are simply ratifying officers' judgments so long as they offer any justification for their actions.⁴¹

Since *Terry* was decided, the courts have emphasized that the issue is a practical one. In *United States v. Cortez*,⁴² Chief Justice Burger, writing for the majority, emphasized the inherent difficulties that come with applying the standard, and also recognized that the courts would give deference to the particularized training of police officers:

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

no longer argues against a presumed starting point of probable cause but rather argues for reasonable suspicion as a reasonable accommodation of competing interests.”)

⁴¹ Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417, 444-47 (1987).

⁴² 449 U.S. 411 (1981).

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, supra, said that “[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court’s Fourth Amendment jurisprudence.*”⁴³

II. NEW THINGS TO ARTICULATE WITHIN THE EXISTING PARADIGM

A. A Lawyer’s Standard

Make no mistake; articulable suspicion is a lawyer’s standard. Judges—and lawyers generally—have an inherent bias in favor of words.⁴⁴ Words are the lawyer’s stock-in-trade. Ordinarily, experiences that cannot be reduced to words cannot be explained in a way that makes them available as evidence in court, and they are unreviewable by appellate judges, who depend on a written record. Lawyers are trained for years in the art of rearranging emotional responses to issues into legal arguments, to use the language of the law to reinterpret their prior experience so that it fits into the existing structure. One shortcoming inherent in a language-based system is that much of what matters to

⁴³ *Id.* at 417-18 (citations omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)).

⁴⁴ See Lerner, supra note 40, at 25 (“The legal system in practice rewards those officers who are able and willing to spin their behavior in a way that satisfies judges, while it penalizes those officers who are less verbally facile . . .”).

people in the world is incredibly difficult to reduce to language. Another is that many people lack the linguistic capacity to cast their experiences, no matter how real they have been, in language that lawyers and judges can use in court. It naturally creates biases in favor of the articulable portion of experience, and the articulate portion of the population.

The world of *Terry* is undergoing an important change. Whether and how much that change will ultimately affect the gross number of searches that the courts allow to meet the *Terry* standard remains to be seen. Nonetheless, social scientists such as Paul Ekman in the area of facial expression of emotion⁴⁵ and Ray Bull and Aldert Vrij in the science of distinguishing truth from lies,⁴⁶ are creating a scientific framework that makes it possible for law enforcement officers to translate their previously unexplained experiences into words. Training in their methods will make it possible for the police to introduce heretofore inaccessible evidence regarding their experiences in court. If judges credit the new science, more searches will meet the reasonableness threshold.

How many cases this will affect is impossible to predict. Some courts already have been willing to accept vague language about facial expression and behavior because they understand that describing in detail how someone looks and acts can be challenging. Paul Ekman and the other social scientists who have adopted or adapted his methods for studying human expression and emotion have created a system that permits highly specific

⁴⁵ See *infra* at notes 47-67 and accompanying text; see also PAUL EKMAN, EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE (2d ed. 2003) [hereinafter EMOTIONS REVEALED]; PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS AND MARRIAGE (3d ed. 2001) [hereinafter TELLING LIES]. Ekman's work, and its possible applications police investigations, has been explored recently in the television series *Lie to Me*. According to his website, he "frequently advises police departments, anti-terrorism groups, and animation studios." See *The Truth Behind the Lies: Evening Seminar*, SMITHSONIAN RESIDENT ASSOCIATES PROGRAM, <http://residentassociates.org/ticketing/tickets/reserve.aspx?performanceNumber=219398> (last visited Nov. 1, 2010).

⁴⁶ See, e.g., ALDERT VRIJ, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND ITS IMPLICATIONS FOR PROFESSIONAL PRACTICE (2000); Aldert Vrij, *Criteria-Based Content Analysis: A Qualitative Review of the First 37 Studies*, 11 PSYCHOL. PUB. POL'Y & L. 3 (2005); Aldert Vrij, Katherine Edward & Ray Bull, *Stereotypical Verbal and Nonverbal Responses While Deceiving Others*, 27 PERS. & SOC. PSYCHOL. BULL. 899 (2001).

description of observed facial expression. Ekman's system has the potential to change the way people, including the police, perceive and describe people's facial expressions. The Facial Action Coding System Ekman and Wallace Friesen created has more than fifty possible components of an expression.⁴⁷ The components of an expression are created by the contraction of numerous facial muscles, some of which most people have conscious control over, and some of which most people leave to their autonomic muscles. The example Ekman uses is the difference between the "Pan-American" smile, the say-cheese smile that has appeared in photo albums everywhere, looks posed and never reaches the eyes, and a genuine smile, which activates different muscles⁴⁸ around the nose and eyes.⁴⁹ Many people can tell the difference between a true smile and a false smile. Far fewer have the training or the vocabulary to explain why one was false and the other was not.

Subject those untrained people to skilled cross-examination in a courtroom, and the results will not be pretty. But give them some training, and things might change considerably. The officer who previously thought something was not right will be able to explain what it was that he saw that was not right. Instead of the processing taking place subconsciously, it can be moved to the conscious level. This has implications under *Terry* because it will allow the basis for suspicion to be articulable.

B. The Underlying Scientific Claim: Precognitive Facial Expression

The basic scientific claims underlying the science of precognitive facial expression are fairly simple and somewhat intuitive. First, basic facial expressions related to human emotion are biologically, not socially determined.⁵⁰ They are "hardwired" and are the same across cultures, barring some abnormality.⁵¹

⁴⁷ PAUL EKMAN & WALLACE V. FRIESEN, *THE FACIAL ACTION CODING SYSTEM* (1978).

⁴⁸ EKMAN, *TELLING LIES*, *supra* note 45, at 150-51.

⁴⁹ Errol Morris, *The Most Curious Thing*, NYTIMES.COM (May 19, 2008 10:56 PM), <http://opinionator.blogs.nytimes.com/2008/05/19/the-most-curious-thing/>; *see also* EKMAN, *EMOTIONS REVEALED*, *supra* note 45, at 204-12.

⁵⁰ EKMAN, *EMOTIONS REVEALED*, *supra* note 45, at 2-14.

⁵¹ *Id.*

Babies smile when they are happy, not because they have learned to smile from watching their parents, but because they have instinctive physiological responses.⁵² Second, people's emotions are revealed on their faces via involuntary muscular contractions, and these facial expressions occur precognitively, before the individual becomes consciously aware that they are experiencing the emotion.⁵³ Once the individual is aware that they are experiencing the emotion, they can regain control of their facial expressions,⁵⁴ hence the term "fleeting expression." There are some limits to this. People can artificially limit their facial expressions in advance by adopting a "poker face." While it is hard to mask genuine emotions, it is also difficult to voluntarily mimic genuine facial expressions of emotion.⁵⁵ It is hard for most people to voluntarily contract a subset of the facial muscles that are naturally involved in genuine expressions.⁵⁶ Because autonomic systems control those responses, a smile that comes from genuine emotion is in fact different in appearance from a forced smile.⁵⁷

Perhaps less intuitive is a third claim: with training, most people can see and identify the fleeting expressions, and can detect and articulate the difference between genuine and forced expressions.⁵⁸ Some people—those with strong intuitive skills—are very good at this naturally, although they usually lack the capacity and the vocabulary to explain what it is they were doing.⁵⁹

The science has a long intellectual history, starting with the work of Wallace Friesen,⁶⁰ and being largely systematized by Paul Ekman, a psychologist and professor who created the Facial

⁵² This theory dates back to Darwin's observations of blind children.

⁵³ EKMAN, *TELLING LIES*, *supra* note 45, at 123-26.

⁵⁴ *Id.* at 131.

⁵⁵ *Id.* at 132-33.

⁵⁶ *Id.*

⁵⁷ *Id.* at 158-60.

⁵⁸ See Paul Ekman et al., *A Few Can Catch A Liar*, 10 *PSYCHOL. SCI.* 263, 263-65 (1999) (finding that seventy-three percent of federal intelligence and law enforcement officers, sixty-seven percent of Los Angeles County sheriffs, and sixty-two percent of federal judges could detect a lie after completing training in facial recognition methods).

⁵⁹ *Id.*

⁶⁰ Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 *PSYCHIATRY* 88 (1969).

Action Coding System (“FACS”) for documenting the component changes in facial expression.⁶¹ Ekman’s work was popularized in science writer Malcolm Gladwell’s 2005 bestseller, *Blink: The Power of Thinking Without Thinking*.⁶² Ekman and some of his successors have adapted the methodology and now offer training in this science to law enforcement.⁶³

In *Blink*, Malcolm Gladwell offered a tantalizing glimpse of the potential use of the science of facial expression in the courtroom when he interviewed Ekman. Ekman chose, as one example of his system, videotaped testimony from the murder trial of former University of Southern California and Buffalo Bills running back O.J. Simpson.⁶⁴ He dissected the testimony of Brian “Kato” Kaelin, an actor who rented Simpson’s pool house and saw O.J. Simpson the night that his ex-wife Nicole Brown Simpson and Beverly Hills waiter Ronald Goldman were murdered.⁶⁵ Kaelin’s testimony regarding Simpson’s whereabouts that night and Simpson’s demeanor when he encountered Kaelin shortly after the murders was important to the case. As Gladwell explains the exercise:

Ekman slipped a tape taken from the O.J. Simpson trial into the VCR. It was of Kato Kaelin, Simpson’s shaggy-haired house guest, being examined by Marcia Clark, one of the prosecutors in the case. Kaelin sits in the witness box, with his trademark vacant look. Clark asks a hostile question. Kaelin leans forward and answers softly. “Did you see that?” Ekman asked me. I saw nothing, just Kato being Kato—harmless and passive. Ekman stopped the

⁶¹ EKMAN & FRIESEN, *supra* note 47.

⁶² MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 197-214 (2005).

⁶³ According to Ekman’s website, he “frequently advises police departments, anti-terrorism groups, and animation studios.” See *See The Truth Behind the Lies: Evening Seminar*, SMITHSONIAN RESIDENT ASSOCIATES PROGRAM, <http://residentassociates.org/ticketing/tickets/reserve.aspx?performanceNumber=219398> (last visited Nov. 1, 2010). Customs officials report that after receiving training from Ekman their “hit rate” for finding drugs during passenger searches increased to 22.5 percent from 4.2 percent in 1998. Bob Burns, *The Truth Behind the Title: Behavior Detection Officer*, THE TSA BLOG (Feb. 29, 2008 4:12 PM), <http://blog.tsa.gov/2008/02/truth-behind-title-behavior-detection.html>.

⁶⁴ GLADWELL, *supra* note 62, at 211.

⁶⁵ *Id.*

tape, rewound it, and played it back in slow motion. On the screen, Kaelin moved forward to answer the question, and in that fraction of a second his face was utterly transformed. His nose wrinkled, as he flexed his levator labii superioris, alaeque nasi. His teeth were bared, his brows lowered. "It was almost totally A.U. nine," Ekman said. "It's disgust, with anger there as well, and the clue to that is that when your eyebrows go down, typically your eyes are not as open as they are here. The raised upper eyelid is a component of anger, not disgust. It's very quick." Ekman stopped the tape and played it again, peering at the screen. "You know, he looks like a snarling dog."

Ekman said that there was nothing magical about his ability to pick up an emotion that fleeting. It was simply a matter of practice. "I could show you forty examples, and you could pick it up. I have a training tape, and people love it. They start it, and they can't see any of these expressions. Thirty-five minutes later, they can see them all. What that says is that this is an accessible skill."⁶⁶

And some police are now training to access that skill. As they do so, their reliance on it, and their testimony about it will become crucial.⁶⁷

C. A Common Fact Pattern

Ekman's work may be giving new answers to old questions: How do good cops explain what they are doing and why they are doing it to those of us who have never been there? How is expertise in criminal behavior and the patterns of street conduct translated into language accessible by the courts? To help work through the practical implications, consider the following fact pattern: Imagine for a moment a police officer passing an

⁶⁶ *Id.*

⁶⁷ It also may lead to more searching than civil libertarians might be comfortable with, if it ever became a permissible sole basis for a *Terry* stop. And it has the potential to make already bad situations even worse, if we widely accept these new techniques, and give bad cops something new, and fundamentally unfalsifiable, to say in court. For the bad cops, it may make very little difference because they will lie to meet the legal standard no matter what it is. However, it may give them something to say when cameras capture many aspects of a situation but miss the suspect's face.

individual on a crowded street late one summer night, in a bar district he regularly patrols on foot. Something about the individual he just passed strikes a chord in him somewhere, but he is not sure why. His instincts, honed by years on the street, ring an alarm bell and are screaming danger. He cannot articulate a reason. The man is dressed normally, although he is wearing a loose jacket with a bulge under his arm. His clothing is out of place for the area, which is a nightclub district, and the weather is warm. He is walking oddly, but that is not enough to have set off the officer's instincts. His face was wrong, but he can't explain what about it made him react. The man clearly appears to be looking for someone. He watches the man's back a little while longer. He imagines having to explain to his sergeant and to the courts later why he stopped the man and decides that he does not have enough information to explain why he made a stop, so he proceeds on his way. Twenty minutes later, the man shoots and kills his estranged wife. Did this officer do the right thing?

Now re-imagine the same scenario. At the moment the alarm bells are triggered in his head, the police officer reacts to his instinct and stops the man. He attempts to ask him questions, but the man says "If you're arresting me, arrest me, if you're not, leave me alone. I know my rights." After this very brief conversation, the officer cannot shake the feeling that the man is dangerous. The bulge that he noticed in the man's jacket is too indistinct for him to say what is in it. Although he cannot say why, he is convinced the man is dangerous. He tells the man to put his hands on top of his head, leans him against the wall, and frisks him. It turns out he is carrying a concealed weapon—a handgun, in a shoulder holster. The officer takes the man's gun, handcuffs him, and takes his wallet out of his pocket to identify him. He radios the station for information on the man, based on the ID he finds in his wallet. It turns out that the man is a convicted felon with a history of spousal battery who is under a current domestic violence restraining order. Further investigation reveals that his estranged wife was out with a date at a nightclub three blocks from the location where the man was stopped. In this jurisdiction, it is a crime to carry a concealed weapon while subject to a domestic violence restraining order, so the officer arrests the man. Did this officer do the right thing? What he did was

unconstitutional under current doctrine, and the handgun would almost certainly be suppressed as the fruit of the poisonous tree.

Let us imagine the same scenario again. This time, the officer finds a flashlight in the man's coat pocket, not a concealed weapon. The officer takes the man's ID as before, writes down his name, apologizes for the inconvenience, and leaves.⁶⁸ Did this officer do the right thing?

Now let us once again imagine this scenario differently, in a world where police have extensive training in behavioral observation and a new technique—precognitive facial expression analysis, a form of applied cognitive psychology. Now, when he is asked about what he saw, the officer says that when he looked into the man's face as he was approaching him on the street, he saw a series of microexpressions or “emblematic slips.” These microexpressions included anger and disgust as the man looked at women passing him on the street and mingled fear and disgust when he saw the police officer.⁶⁹ The officer explains how he was able to do so, based on his training in precognitive facial expression. The officer explains that he has been trained that there are fleeting facial expressions that appear in response to environmental stimuli, and that these expressions occur precognitively, before the individual is aware of them and consciously asserts control over his facial muscles. Because they are instinctive and precognitive, they are very effective indicators of a person's genuine emotion. In addition, the man's behavior was consistent with hunting for someone, not simply strolling down the street. He was rapidly scanning the crowd, checking faces, dismissing them, and continuing down the street. He appeared to be hyper-alert, in an area where most people were relaxed and

⁶⁸ Cf. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 63 (2009) (noting that only one out of ten individuals stopped and frisked by the New York Police Department in 2006 were arrested or served summons); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 374 n.34 (1999) (noting that only one out of one-hundred people stopped by New Orleans police officers in the late 1960s were prosecuted).

⁶⁹ Of course, people may fear or distrust the police for many reasons. See, e.g., Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79 (2007); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 10-12.

having a good time. The officer stops and frisks the suspect based on these criteria.

Is this enough to change the balance? That will depend in part on the interaction between the legal standard—“reasonable and articulable suspicion” and judicial consumption of the police officer’s training in the new methods. Social scientists who study human expression and emotion have created the language that will permit translation of police experience into words. We can expect a shift from cop-speak terms like “there was something ‘hinky’⁷⁰ about the guy” (a statement which in this author’s experience has drawn nods from experienced law enforcement officers across the country but will draw frowns from judges) to “his precognitive affect was inconsistent with his surroundings.” This statement is scientifically sound, almost impossible to falsify, will include embedded value judgments about what human emotions should be showing on a person’s face in a given context, and may lead to more searching than we are comfortable with if it becomes a permissible sole basis for a *Terry* stop.

D. The Nose of the Camel—TSA Adopts SPOT

The use of the science of precognitive facial expression in law enforcement is no hypothetical—it has arrived. If someone has flown into a major airport in the United States in the last three years, odds are that it has been applied to them or their traveling companions.⁷¹ Screeners for the Transportation Safety Authority (TSA) have been applying behavioral observation techniques based on this science under the acronym SPOT (Screening Passengers by Observation Technique).⁷² The techniques are based on behavior, so in theory they avoid the potential for bias

⁷⁰ See *Hinky* Definition, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=hinky> (visited Nov. 1, 2010) (defining hinky as 1) “Something as yet undefinable is wrong, out of place; not quite right. There’s something hinky about the deal[.]” or 2) “A cop’s version of “I’ve a bad feeling about that.”).

⁷¹ See *Behavior Detection Officers (BDO): Layers of Security*, TRANSP. SEC. ADMIN., http://www.tsa.gov/what_we_do/layers/bdo/index.shtm (last visited Nov. 1, 2011) (noting that behavior detection officers (BDOs) currently are deployed at 161 airports in the United States).

⁷² See *BDOs SPOT More Than Just Opportunities at TSA: News & Happenings*, TRANSP. SEC. ADMIN., (May 8, 2007), http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm.

that existed in profiles based on immutable characteristics.⁷³ Whether the immutable characteristics may be used more subtly, for example in selecting whom to observe in the first instance, is an open question.

Kip Hawley, the Assistant Secretary of Homeland Security described the techniques as follows:

We use a system of behavior observation that is based on the science that demonstrates that there are certain involuntary, subconscious actions that can betray a person's hostile intent. For instance, there are tiny—but noticeable to the trained person—movements in a person's facial muscles when they have certain emotions. It is very different from the stress we all show when we're anxious about missing the flight due to, say, a long security line. This is true across race, gender, age, ethnicity, etc. It is our way of not falling into the trap where we predict what a terrorist is going to look like. We know they use people who "look like" terrorists, but they also use people who do not, perhaps thinking that we cue only off of what the 9/11 hijackers looked like.

Our Behavior Detection teams routinely—and quietly—identify problem people just through observable behavior cues. More than 150 people have been identified by our teams, turned over to law enforcement, and subsequently arrested. This layer is invisible to the public, but don't

⁷³ In testimony before Congress, Assistant TSA Secretary Kip Hawley described it this way:

We have deployed hundreds of BDOs at the 40 busiest airports as part of the Screening Passengers by Observation Technique (SPOT) program. The SPOT program uses nonintrusive behavior observation and analysis techniques to identify potentially high-risk passengers based solely on their exhibited behavior. BDOs are trained to detect individuals exhibiting behaviors that indicate they may be a threat. The program is a derivative of other successful behavioral analysis programs that have been employed by law enforcement and security personnel both in the U.S. and around the world.

See Kip Hawley, Assistant Sec'y, Transp. Sec. Admin., Statement Before the United States House of Representatives Committee on Transportation and Infrastructure Subcommittee on Aviation (July 24, 2008), *available at* http://www.tsa.gov/press/speeches/072408_hawley_aviation_security.shtm. Some critics are convinced that even behavior-based programs will lead to discrimination against minorities. See *generally* Herbert, *supra* note 69.

discount it, because it may be the most effective. We publicize non-terrorist-related successes like a murder suspect caught in Minneapolis and a bank robber caught in Philadelphia.

Most common are people showing phony documents, but we have even picked out undercover operatives—including our own. One individual, identified by a TSO in late May and not allowed to fly, was killed in a police shoot-out five days later. Additionally, several individuals have been of interest from the counter-terrorism perspective. With just this limited deployment of Behavior Detection Officers (BDOs), we have identified more people of counterterrorism interest than all the people combined caught with prohibited items. Look for us to continue to look at ways that highlight problem people rather than just problem objects.⁷⁴

TSA is not alone. The techniques adopted by the agency are based on the experiences of other law enforcement agencies.⁷⁵ As the agencies and agents talk to each other, the science of facial expression will inevitably work its way into the courtroom. Collectively, society will have to answer some new questions: What weight should courts give to the new training in the context of reasonable and articulable suspicion? How do we as society want police to react under the circumstances outlined above? What are the risks to permitting the police to rely on this newly articulated way of explaining their “street sense”? What are the risks if we fail to do so?

III. SOME HIDDEN FLAWS OF THE *TERRY* PARADIGM

Psychological research suggests some additional problems that are inherent in the current paradigm. First, psychologists who study the nature of expert decision-making suggest that police officers may not be fully aware of much of the information

⁷⁴ Interview by Bruce Schneier with Kip Hawley, Assistant Sec’y, Transp. Sec. Admin. (July 30, 2007), available at <http://www.schneier.com/interview-hawley.html>.

⁷⁵ See Burns, *supra* note 63 (noting that Ekman had previously worked with Customs and Border Protection, the Central Intelligence Agency, the Federal Bureau of Investigation, and other government agencies).

on which they rely at the time they are using it.⁷⁶ Second, research into the nature of memory itself suggests that by requiring officers to write reports and prepare testimony to match a particular standard, the system may be irrevocably tampering with the officers' memory.⁷⁷ I consider each of these claims in turn.

A. Naturalistic Decision Making

At least some of the dissatisfaction with the *Terry* standard on the law enforcement side is based on a fundamental mismatch between the way emergency responders, such as police officers, and lawyers think. It seems unlikely the *Terry* standard adequately reflects the reality of the practice of experienced police officers. Research into the way experts perform their jobs in other disciplines that require rapid reaction to changing circumstances in a stress-filled environment—firefighters, military officers, and jet pilots—has shown that decisions like these are not the product of the type of analysis in which judges and lawyers routinely engage.⁷⁸ Simply put, the officer on the street is engaged in a different kind of thinking than a judge on the bench.

Naturalistic Decision Making (NDM) is the term for a new field of applied psychological research. NDM “seeks explicitly to understand how people handle complex tasks and environments. Instead of trying to reduce these to variables that can be studied at leisure, NDM examines the phenomena themselves in the context of the situations where they are found”⁷⁹

⁷⁶ Anthony J. Pinizzotto et al., *Intuitive Policing: Emotional/Rational Decision-Making in Law Enforcement*, 73 FBI L. ENFORCEMENT BULL., 1, 2-3 (Feb. 2004).

⁷⁷ Cf. Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 839 (2002) (“Whereas witness preparation certainly can assist a witness in remembering and retrieving a truthful recollection, preparation can also distort a witness’s underlying memory and produce a false recollection.”).

⁷⁸ See Gary Klein et al., *Rapid Decision-Making on the Fire Ground: The Original Study Plus a Postscript*, in PROCEEDINGS OF THE HUMAN FACTORS SOCIETY 30TH ANNUAL MEETING 576 (1986) (firefighters); George L. Kaempf et al., *Decision-Making in Complex Naval Command-and-Control Environments*, 38 HUMAN FACTORS 220 (1996) (naval officers); PETER A. SIMPSON, NATURALISTIC DECISION MAKING IN AVIATION ENVIRONMENTS (2001), available at <http://dspace.dsto.defence.gov.au/dspace/bitstream/1947/3813/1/DSTO-GD-0279%20PR.pdf> (jet pilots).

⁷⁹ Eduardo Salas and Gary Klein, *Expertise and Naturalistic Decision Making: An Overview*, in LINKING EXPERTISE AND NATURALISTIC DECISION MAKING 3 (2001).

Decision researchers such as Gary Klein, Roberta Calderwood, and Anne Clinton-Cirocco call the process that experts acting in these stressful conditions engage in “recognition-primed decisionmaking.”⁸⁰ In these situations, experts do not carefully choose among a series of generated alternatives. Instead, they rapidly pattern match, looking for an experience that fits the situation.⁸¹ We may be missing the big picture altogether by requiring explicit knowledge as the basis for a constitutional stop. According to Klein:

Many researchers are now advocating for a dual-system mode of thinking. The automatic system is fast, automatic, effortless and emotional, and uses tacit knowledge. The reflective system is slower, conscious, effortful, deliberate, logical and serial, and uses explicit knowledge. These two systems, which work in different ways, complement each other⁸²

And these two systems do not easily connect to each other.⁸³ It is not hard to imagine that they also reflect the difference between the systems that take precedence for a police officer on the street, deciding whether he or the public is at risk, and for a prosecutor or judge in the office trying to decide whether that decision meets the *Terry* standard.

Return to the hypothetical officer observing the suspect on the street. Imagine that instead of the officer observing everything, a camera worn by the officer records it. The same information that was available to the camera is now available to his supervisor, the prosecutor, the judge, and ultimately the jury. Ironically, much of the information that they will be processing may not be available to the officer, at least not consciously. While he is on the street, in the danger zone, if his instincts suggest something is wrong, and that the suspect may be dangerous, his focus may change. Instead of closely watching the suspect’s face, at least consciously, his focus may change to the suspect’s hands

⁸⁰ Klein, *supra* note 78.

⁸¹ *Id.*

⁸² GARY KLEIN, STREETLIGHTS AND SHADOWS: SEARCHING FOR THE KEYS TO ADAPTIVE DECISION MAKING 93 (2009).

⁸³ *Id.*

and to the clothing where weapons may be hidden. His subconscious mind may be processing all of the details that we are watching on camera, but his attention is focused down on only a few things. This attention limitation may mean that, at times, the officer will have less accessible to him than we might expect when he is called upon to testify in court about the basis of his actions.⁸⁴

B. Constructed Memory and Verbal Overshadowing: Going From That's How It Must Have Happened to That's How It Did Happen

Constructed memory is one of the concerns that attorneys must grapple with for all witnesses.⁸⁵ Memory is not a fixed point, and it is constructed, and reconstructed, from the moment of the event to the moment of recall on the witness stand. Many readers of this Article have a memory of themselves involved in some significant event—a birthday party, Christmas, a wedding—where they can see themselves engaged in the activity in their mind's eye. This third-person view of the event is both real and an artifact. Barring an out-of-body experience, it is unlikely that the person with such a memory truly saw themselves that way. The image may well come from a photograph, or a video, or some other reconstruction based on family stories, fragmentary memories, and the rest of the memory is filled in around it. It may contain many important and accurate details, such as who was present, what was received, how one felt, but the image has become part of the memory in such a way that it is intertwined in one's mind.⁸⁶

Advances in memory research show that there are multiple paths in which a witness can develop a real but false memory.⁸⁷ Factors such as stress and gap-filling can affect the acquisition of

⁸⁴ See *infra* notes 113-19 and accompanying text for a discussion of replacing the hypothetical camera with a real one.

⁸⁵ See Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 149, 150 (Alan M. Goldstein ed., 2003).

⁸⁶ See Elizabeth F. Loftus, *Memory Faults and Fixes*, 18 ISSUES IN SCI. & TECH. 42 (2002).

⁸⁷ FREDERICK CHARLES BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (Cambridge Univ. Press 1997); ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994).

information.⁸⁸ Stress and the post-event misinformation effect can also alter memories after they have been initially encoded, and memories can be significantly affected by the passage of time.⁸⁹

“People integrate new materials into their memory, modifying what they believe they personally experienced. When people combine information gathered at the time of an actual experience with information acquired later, they form a smooth and seamless memory and thereafter have great difficulty telling which facts came from which time.”⁹⁰

It gets worse. Post-event suggestion, which may include new information from other witnesses, photos, records, reports, or even leading questions, often does more than refresh and bolster a fading memory.⁹¹ It can create entirely new, and entirely false, memories.⁹² Many of the criticisms of hypnotically induced memory, for example, are based on this phenomenon.⁹³ Memory researchers have been able to successfully implant genuinely believed but entirely false memories, demonstrating clinically that this phenomenon exists.⁹⁴

⁸⁸ Wells & Loftus, *supra* note 85, at 150.

⁸⁹ *Id.*

⁹⁰ Loftus, *supra* note 86, at 43. Legal scholars have considered the dangers in the context of all witness preparation. *See also* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1094 (1975) (“During the sessions devoted to “coaching,” the future witness is likely to try to adapt himself to expectations mirrored in the interviewer’s one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer’s expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.”).

⁹¹ Loftus, *supra* note 86, at 43.

⁹² *Id.*

⁹³ *See, e.g.*, Amanda J. Barnier & Kevin M. McConkey, *Reports of Real and False Memories: The Relevance of Hypnosis, Hypnotizability, and Context of Memory Test*, 101 J. ABNORMAL PSYCHOL. 521, 521-27 (1992) (comparing studies of the factors affecting false memory, including hypnosis).

⁹⁴ D.S. Lindsay et al., *True Photographs and False Memories*, 15 PSYCHOL. SCI. 149 (2004) (discussing implanted false memories of being hospitalized overnight for an ear infection, spilling a punch bowl on the bride’s parents at a wedding, getting one’s hand caught in a mousetrap, hiding the toy slime in the teacher’s desk, and witnessing a demonic possession); Elizabeth Loftus & Jacqueline Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720, 720-21 (1995) (experimentally implanting false memories of being lost in a shopping mall as a young child); Giuliana Mazzoni & Amina Memon, *Imagination Can Create False Autobiographical Memories*, 14 PSYCHOL. SCI. 186 (2003).

Moreover, witness confidence in the quality of the memory can increase as the officer prepares for trial, even as the contamination increases.⁹⁵ According to experimental research done to test the effects that witness preparation had on witness confidence:

Postevent questioning led to significantly higher later confidence ratings for incorrect responses in all three experiments, as well as for correct responses in one of the experiments. This finding is consistent with some anecdotal evidence from the legal arena that eyewitnesses often become more confident in their memories of a criminal episode as the time for testimony at trial draws near (and as the accumulated amount of postevent questioning increases).⁹⁶

This matters in the *Terry* context because honest officers trying to recall what happened are just as likely as other witnesses to experience all of these memory-altering effects. And because they may have been involved in hundreds of similar situations by the time they testify in court, the details of one may be blurring into another. As repeat players, officers may be more, not less, susceptible to the creation of false memories.⁹⁷ An officer who has made fifty additional traffic stops in the same stretch of highway or has had fifty citizen encounters in the same area of his beat between the time he encountered a particular defendant and the time he testifies, may be unable to keep the details from blending. As the following section explains, asking him to reduce the experience to a written report, one that focuses on legally relevant

⁹⁵ See Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 822 (1995) (noting that studies indicate that "confidence in one's ability to make a correct identification is a poor predictor of identification accuracy").

⁹⁶ John S. Shaw III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629 (1996).

⁹⁷ It is possible, of course, for police officers to lie, and for judges to fail to critically examine their testimony. See, e.g., Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 790-91 (2001) (asserting that judges sometimes "ignor[e] telltale signs that police officers fabricate testimony to obtain convictions. . . . include[ing] amazingly similar stories by officers regarding the conduct of unrelated defendants, inconsistencies in police officer reports, [and] dramatic recalls of memory . . .") (alteration in original).

facts, may preserve information, but may also have the additional effect of changing the way his memory works altogether.⁹⁸

The courts' preference for articulable experiences, and the practical support systems that come with that in the form of written reports, may actually be altering the memories of officers and witnesses over multiple stages. Translating a largely subconscious experience into *Terry* terms requires officers to go from recall of the event as a set of subjective experiences—sights, sounds, smells—to a set of verbalized experiences. By requiring officers to translate their conduct into articulable suspicion to meet the standard, we may have the unintended effect of reprogramming their memories of the event so that the standard we ask them to articulate actually alters the memory of the event to conform with the criteria.

In particular, the research of psychiatrist Jonathan Schooler has shown that using words to describe memories can interfere with recall of faces or images.⁹⁹ His work shows that recall favors the verbal description, however inaccurate it may have been initially, once the subject has committed to it.¹⁰⁰ Verbal memory operates through a different area of the brain than visual memory.¹⁰¹ Schooler's work has shown that committing to a verbal description actually changes the part of the brain that is accessed when recalling the event.¹⁰²

⁹⁸ Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115 (2006); Richard A. Wise & Martin A. Safer, *What U.S. Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427 (2004); see also C. A. Elizabeth Luuss & Gary Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714 (1994); John S. Shaw, *Increases in Eyewitness Confidence Resulting from Postevent Questioning*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 126-46 (1996).

⁹⁹ See Jonathan W. Schooler and Tonya Y. Engstler-Schooler, *Verbal Overshadowing of Visual Memories: Some Things are Better Left Unsaid*, 22 COGNITIVE PSYCHOL. 36 (1990).

¹⁰⁰ *Id.* at 37-38.

¹⁰¹ See Jonathan W. Schooler, *Verbalization Produces a Transfer Inappropriate Processing Shift*, APPLIED COGNITIVE PSYCHOL. 989, 992 (2002).

¹⁰² *Id.*

IV. WHAT POLICY IMPLICATIONS SHOULD WE DRAW FROM THESE INSIGHTS?

Requiring “articulable suspicion” rather than an “inchoate hunch” may seem perfectly sensible to lawyers and judges—after all articulating is what they do.¹⁰³ Do the courts mean that the articulation should arise before the officer acts? The answer is clearly no, although that would be the time most likely to regulate police conduct. The courts have decided that the inquiry is objective, not subjective, and that while the information must have been available to the officer at the time of the event, it need not have been processed by the particular officer as such. The question is not what this particular officer thought at the time. Rather, it is what a reasonable police officer using the information available at the time might have done.

This objective approach leads to a host of concerns about the process of translating an experience in the field into testimony. For example, when and how does the officer learn and formulate the information? Can a sergeant or a supervisor help the officer to prepare? Can departments create and use question-driven report processing that drives the officer toward meeting the legal standard? Is this simply careful capturing of information, or does framing the report to meet the anticipated constitutional objections amount to impermissible witness coaching? Is it okay for the articulation to be the result of a searching inquiry by the prosecutor before the officer takes the stand? Can a prosecutor explain the rules and ask the officer to reframe his observations in a format recognizable to the courts? And how much will the process of meeting the *Terry* standard contaminate the officer’s memory of the experience itself? Scholars such as Christopher Slobogin have written extensively on whether current Fourth Amendment doctrine and the exclusionary rule create incentives for officers to lie.¹⁰⁴ But lying, in the latter context, means that the officer is testifying in deliberate disregard for the truth; the

¹⁰³ See Lerner, *supra* note 40, at 29-31 (arguing that courts privilege articulate explanations over mere hunches, often to the detriment of the search for truth).

¹⁰⁴ Some critics suggest that the officer is “testilying” when they alter their statements to conform with the requirements of reasonable suspicion or probable cause. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043 (1996).

officer has a true memory of the event, which he then disregards while testifying, in favor of a false account that will permit the officer to meet the constitutional standard.

The contaminating effects of preparing to testify can also have a truth-distorting effect, even for honest officers and prosecutors. We should ask applied cognitive psychologists to study whether current Fourth Amendment doctrine and the mechanisms we have created to enforce it are causing officers to give subjectively true testimony regarding their encounters, i.e., statements that reflect their memory as they perceive it, but that have been altered by the process of capturing and accessing the information in constitutional terms. Specifically, the existing research begs us to consider how much the inquiry that prosecutors go through when preparing the witness, or even a witness's anticipation of the line of questioning, alters the way the police officer remembers the event.¹⁰⁵ Given that words and experiences often reside in different parts of the brain itself, does the process of writing a police report fundamentally alter the nature of the memory itself? Is a form that directs thinking down certain paths, or training that directs officers to remember things in certain, court-approved ways, changing the nature of the experience itself? Given that memory is constructed, does the way we apply the standard help or hurt the courts in their quest for accuracy?¹⁰⁶

Once we have some answers from the applied psychologists, attorneys and the courts have a related set of questions to

¹⁰⁵ For a review of the risks, see generally Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1999); Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of 'Coaching'*, 1 GEO. J. LEGAL ETHICS 389 (1988); and Gershman, *supra* note 77.

¹⁰⁶ While this Article is focused on the *Terry* inquiries, the same questions apply to preparation based on the elements of an offense. If one spends enough time in traffic court, one will hear the almost liturgical repetition of the factors that led an officer to administer a breathalyzer or equivalent blood alcohol test. It goes something like this: "I approached the vehicle and examined the subject. There was a strong odor of alcohol. The subject's eyes were glassy and bloodshot. His speech was slurred and his response to questions was delayed, and he appeared confused. Based on these preliminary indicators, I chose to administer a field sobriety test, (and a field test for blood alcohol if appropriate in the jurisdiction), and then placed the subject under arrest, before transporting him to the station for the administration of a BAC test under controlled conditions." I have personally seen officers give this speech, or a very close variant of it, on more than a dozen occasions over the course of a single day in traffic court.

examine. How does the administrative decision to adopt these methods and train law enforcement to deploy them factor into Fourth Amendment reasonableness? Is there some deference due to the executive branch in this area?¹⁰⁷ How sure do the courts have to be that the officer was wrong to suppress? How should the burdens be allocated—legally and in reality? Are there technological solutions that can help us sort through these problems?

Other observers of the *Terry* regime are comforted by the idea that even inefficient and dysfunctional judicial oversight is better than no oversight. Some have gone so far as to label *Terry* a “practically perfect” doctrine.¹⁰⁸ How much comfort should we take if the costs are fully on the table? Has the Court stunted the development of alternative methods of policing the police by creating a false sense that there is someone watching the watchers?¹⁰⁹

A. Enforcement of the Standard

Courts enforce the Fourth Amendment through the exclusionary rule. And they have chosen to do so through a standard that reflects the courtroom’s inherent bias in language skill. But while the courts will suppress evidence, they are loath to find an officer to have deliberately lied. It does evoke the question: How do we tell the honest but inarticulate officer from the corrupt officer? One way to interpret the deference that underlies many of the opinions and practices is that the courts have a sense that most police officers are doing a trying and dangerous job, that it is experiential, and that it may be hard to translate those experiences into words. And the courts assume that most of the time the officers are acting in good faith. It seems at least possible that the reluctance to punish police officers for Fourth Amendment violations stems in part from a tacit realization that there are genuine but inarticulable experiences that at least some of these police officers have relied upon to conduct what would otherwise appear to be violative stops. That is, good cops, with

¹⁰⁷ For a discussion of the deference courts show to police, see Becton, *supra* note 41, at 470-71.

¹⁰⁸ See Saltzburg, *supra* note 4.

¹⁰⁹ Levenson, *supra* note 97, at 790-91.

good street sense, have been bad at explaining why they were doing what they were doing.¹¹⁰ Judges implicitly recognize the memory contamination effects and the differential language skills of officers when they find an officer has testified incorrectly but not falsely.

This reluctance to find that officers have lied may lead to inaction even in cases where action is warranted. In her post-mortem of the Rampart scandal in Los Angeles, where corrupt police officers were framing innocent individuals, and falsifying testimony about others, Professor Laurie Levenson noted that even conscientious judges who find an officer's testimony to be false in a particular case are unlikely to go beyond that.¹¹¹ As she put it:

There has been a failure by judges who have witnessed police perjury to take meaningful action to prevent such misconduct in the future. A judge's standard course of action when an officer has lied is to dismiss the case or grant a motion to suppress, and ask the prosecutors to report the misconduct to appropriate police internal affairs authorities. There is no follow-up by the court, no judicial reporting of the misconduct, no contempt orders, and no tracking of the problem officers. As a result, while a judge may occasionally take an interest in a particular case, systemic problems with corrupt police officers continue. ¹¹²

¹¹⁰ The problem I am discussing is different from the problem addressed by scholars such as Christopher Slobogin, who suggests that current Fourth Amendment doctrine and the exclusionary rule create incentives for officers to lie, and Melanie Wilson, who is seeking ways to empirically test this proposition. See Slobogin, *supra* note 104, at 1041-48 (discussing the issue of false police testimony and indications that it occurs); see also David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 470-71 (1999) (noting that judicial opinions impugning the motives, honesty, or competency of police are rare); Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 36-38 (1993) (discussing police access to exculpatory evidence and its absence from their reports.); Melanie D. Wilson, *Judging Police Lies—An Empirical Perspective* (Jan. 2010) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=melanie_wilson.

¹¹¹ Levenson, *supra* note 97, at 194.

¹¹² *Id.*

VI. CAMERAS AS A SOLUTION

As detailed above, current Fourth Amendment doctrine may actually encourage practices that restructure an honest officer's memory in unappreciated ways. Officers are witnesses, and are susceptible to the same faults of memory that apply to all eyewitnesses, including the raft of problems associated with constructed memory. Because memory is constructed, the searching inquiry that attorneys engage in when preparing or cross-examining the witness may alter irreparably the way the police officer remembers the event. Given that words and experiences often reside in different parts of the brain itself, the process of writing a police report tailored to meet Fourth Amendment demands may likewise fundamentally alter the nature of the memory itself. Report forms that direct an officer's thinking down certain paths, or training that directs officers to remember things in certain, court-approved ways, may change the nature of the experience itself because officers have their attention directed and constrained.

Given these dangers, a new approach is warranted. Reasonable and articulable suspicion, the traditional *Terry* standard, should be reframed more broadly, as reasonable suspicion supported by credible evidence. Articulable suspicion is only a subset of a larger category, based on the reasonableness more generally. The important issue is whether the courts are able to meaningfully engage in oversight of the police and remain capable of protecting the citizenry's Fourth Amendment rights. The courts should be able to make that determination based on any available evidence. Oral testimony is only one way to make the officer's action amenable to judicial review, which is the purpose of the exercise.

We are now entering the age of widespread deployment of cameras in police cars and even on police officers themselves.¹¹³

¹¹³ Every state police agency has used some form of video recording system in patrol cars and the International Association of Chiefs of Police estimates that nearly half of police cars are equipped with a video camera. Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 795 (2005). For an extensive discussion of the use of officer-mounted cameras, see David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 175-80 (2009). Civil

Cameras are everywhere, and an increasing number of departments and prosecutors have worked through the logistics of using police cameras. With the widespread use of ever-cheaper digital video, it is now clear that the costs of deploying cameras can be managed,¹¹⁴ and that protocols for handling discovery issues can be developed.¹¹⁵ Given the hidden costs of the current regime, states should consider adopting policies that mandate the use of video.

One objection to the use of video is cost, but the price of the technology to capture and store video is dropping steadily and should continue to drop as more vendors enter the market.¹¹⁶ Cross-adoption of technology should also help. Anyone who has purchased a smartphone in the last two years had the option of purchasing one that recorded and transmitted video clips. Once it becomes clear that there is a large enough market for a robust, officer-worn video-recording device, competitors who have developed hardware expertise in these other contexts will enter the market, driving costs down even further.

Some of the more difficult obstacles to the adoption of video remain cultural. Right now, many departments and police chiefs are comfortable with video so long as they can decide when it is used—to make cases and to protect their departments from false liability claims. But the video has the potential to act as a double-edged sword. There will be uses of police video in court not only for departments when they are falsely accused of violating a suspect's rights or as evidence against defendants, but also against the police when officers have in fact violated defendants' rights, or the

libertarians have not been comfortable with cameras for other reasons, so their use will remain controversial. For a discussion of the mechanics of digital camera deployment in a broader context—and a critical view of widespread use of cameras without Fourth Amendment regulation, see CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 81-110 (2007); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213 (2002); Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 *LAW & CONTEMP. PROBS.* 125, 152 (2002).

¹¹⁴ Thurlow, *supra* note 113, at 797.

¹¹⁵ I anticipate that the cameras will produce what will be another form of digital evidence. See generally Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 *COLUM. L. REV.* 279 (2005) (discussing potential protocols for managing digital evidence).

¹¹⁶ Thurlow, *supra* note 113, at 797.

video is used as evidence by defense counsel in unforeseen ways.¹¹⁷ Departments that resist the deployment of cameras are more worried about the perceived downside than the upside.¹¹⁸

One underexplored upside is the one this Article explores. There is plenty of doctrinal room within current Fourth Amendment jurisprudence for the use of digital video as a supplement to, or substitute for, police testimony. Using video will also allow the new science on facial expression to be considered, while subjecting it to judicial oversight, expert reexamination, and public scrutiny. Having video available will also reduce the problems with memory contamination explored above by permitting officers to examine the video before testifying and hopefully them from locking in to a verbal formulation of the event that may not reflect reality. It should also simplify life for prosecutors and defense attorneys. It will make cases based on good stops easier to prove, and bad cases easier to weed out. This rise in quality will lead to an increase in pretrial resolutions in both directions, saving trial resources for cases where there are genuine disputes.¹¹⁹ Finally, video evidence will empower judges to act in cases where officers are truly lying because it will obviate the swearing contest between a police officer and an accused criminal, and give judges much firmer footing on which to stand.

¹¹⁷ A 2004 study by the International Association of Chiefs of Police demonstrated that ninety-seven percent of U.S. citizens responding to a poll supported the use of in-car cameras for law enforcement. Colonel Thomas Hutchins, *In-Car Cameras: Executive Summary*, in IACP/COPS TECHNOLOGY TECHNICAL ASSISTANCE PROGRAM: TECHNOLOGY DESK REFERENCE 47 (2010) (“While law enforcement views the acquisition of camera technology as a means to demonstrate their professionalism and increase officer safety, the public views cameras as a means to guard against abuse. Despite the difference in opinions, both the public and the police support use of the technology making the acquisition and implementation of an in-car camera program a win/win proposition for all.”).

¹¹⁸ Of course, for outsiders, accurate assessments of officer conduct are likely to be seen as all upside, whether the camera reveals that the officer was good or bad.

¹¹⁹ This article is focused on the costs and benefits of the *Terry* regime. Cameras have multiple other benefits for law enforcement. For example, they can provide clear evidence in criminal trials and civil suits, resolve disciplinary complaints against officers, allow oversight and training by supervisors, and increase public confidence that officers are accountable. For further exploration of these issues, see David Harris, *Picture This: Body Worn Video (“Head Cams”) As Tools For Ensuring Fourth Amendment Compliance By Police*, 43 TEX. TECH L. REV. 357 (2010) (discussing the various contexts in which video evidence would be useful).

Whether and to what extent the evidentiary rules should *require* video before permitting certain kinds of testimony, such as the testimony on facial expression, remain open questions.

CONCLUSION

This Article has outlined some of the unexplored costs of the *Terry* regime, built on the requirement of reasonable and articulable suspicion. The current regime has flaws as practiced, and a range of challenges coming that it must face. Research on witness memory has demonstrated that there are contamination effects that are a byproduct of the way we now practice Fourth Amendment law. New pressures on the *Terry* regime are coming from other directions as well. The federal government and the police are training officers in new techniques based on advances in cognitive and behavioral science that rely on officer observation of suspect behavior, much of it subtle and operating in ways that the suspects themselves do not realize. Inevitably, officers relying on the new techniques will be bringing them into the courtroom, where the doctrine will be forced to adapt. *Terry* as now practiced may be giving us a false sense of security, while failing in two directions simultaneously. It creates the sense that the courts are meaningfully engaged in police oversight, leaving it less likely that other administrative oversight methods will be adopted. The current formulation may also be limiting perceptions about the appropriate use of evidence in some subset of cases where a good, but inarticulate officer engages in a search that we would like to take place, and has the evidence suppressed because he is inarticulate about his reasonable suspicion. Technology is also increasing the range of evidence that is available to the courts when deciding if officers acted reasonably. Rather than relying on witness testimony alone, digital video is subjecting a wide range of heretofore unavailable behavior to the courts. It is time to move beyond the *Terry* formulation of the basis for police frisks. By explicitly adopting a new standard—reasonable suspicion supported by credible evidence—the courts can make clear that there is doctrinal room for technology, in the form of cameras today and perhaps in other forms tomorrow, to help ameliorate the limitations of human memory, while allowing society the benefit of other advances in our knowledge of cognitive science.