



POLICE STUDENT'S GUIDE

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Policing Legally:

Investigative Encounters with the Public

~ CHAPTER 11 ~

Topics and concepts included in this chapter:

1. The 4th Amendment prohibition against unreasonable searches and seizures
2. The Exclusionary Rule
3. The legal standards set forth in *Terry v. Ohio*
4. The legal standards set forth in *People v. DeBour*
5. The four levels of investigative encounter
6. Proper preparation of a Stop Report
7. Proper Activity Log entries for investigative encounters
8. Supervisory review of Stops
9. Investigative encounter summary charts

Mandatory Patrol Guide Procedure

Command Operations

P.G 212-11 "Investigative Encounters: Request for Information, Common Law Right of Inquiry and Level 3 Stops" should be consulted as a resource for information about (a) the legal standards for pre-arrest investigative encounters (b) the proper documentation of Level 3 *Terry* stops and (c) what to expect from the supervision of Level 3 *Terry* stops.

As a police officer, you have enormous responsibility to enforce the law, to give people orders and instructions that help to serve the community, to maintain order, and to protect the constitutional rights of citizens. Before beginning training, you took an "Oath of Office" during which you promised to uphold the Constitution of the United States, as well as the Constitution of New York, and pledged to faithfully discharge your duties as a New York City Police Officer. The Fourth Amendment, which protects individuals from unreasonable searches and seizures, is one of the most important imperatives of your job as a police officer. You should keep this in mind at all times while you are



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discharging your duties. Interactions with citizens are varied. While more often than not these interactions take the form of friendly salutations, sometime interactions end in a life and death struggle with an armed perpetrator. Your ability and authority to interact and, at times, intrude on an individual's liberty will depend largely upon your knowledge of the law and Department regulations, as well as an understanding of your environment and members of the community.

In this chapter, you will learn about the degree to which you can intrude upon an individual's liberty when you have less than probable cause to arrest. What is also important to be aware of is the role such interactions play in our overall goal to protect and serve the people of the City of New York. An investigative encounter, for the purposes of this chapter, is a police interaction with a member of the public/civilian for a law enforcement or investigative purpose. New York State has established the types or levels of such encounters and the authority of the police at each level, consistent with federal constitutional standards. This chapter describes these encounter levels and the authority of the police at each level.

You will learn about the ability of an officer to stop and detain a person to determine whether he or she may have committed a felony or Penal Law misdemeanor (known as a "Terry stop"), and that there are legal limitations on when this tool can be used. The utilization of Terry stops is legal and recognized as an essential instrument to achieve the Department's mission of providing a safe environment for all. However, police officers must be vigilant and be mindful that there are circumstances under which a stop would be unlawful. Terry stops must always comport with the United States Constitution, as well as the New York State Constitution, and should not be utilized as a simple deterrent to future crime. Moreover, this chapter should not be interpreted to discourage an officer from engaging in voluntary, consensual conversations with members of the public. Members of the service are encouraged to develop positive relationships in the communities they serve. Such positive interactions with the community foster trust and understanding, which will in turn enhance public safety and officer safety.

Later in this chapter, and throughout the course of your training, you will learn about proper police conduct during investigations, including the most serious police intrusions involving the use of force and your authority to deprive people of their freedom. At all times, police conduct and action must be constitutional within the confines of both the United States Constitution and New York State laws. This section will illustrate how you can conduct effective field investigations by interacting with citizens. You will learn how to detect crime, protect your safety and a citizen's right to be free from *unreasonable* government intrusion.

CONSTITUTIONAL CONSIDERATIONS



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Arrest and full search situations must be based on a standard of proof, or level of information, known as *probable cause*. Suppose, however, you are merely performing routine patrol and a brief encounter or interaction with a citizen makes you somewhat suspicious. Although unsure that a crime was committed, what, if anything, may you do? May you question the person? Detain the person? Use force? Search the person or their belongings? If so, to what extent may you interfere with their right to be free from police intrusion? Before any of these questions can be answered, you must have an understanding of a citizen's constitutional rights, the effects of improper police action, and how the law allows officers to conduct investigations without violating citizens' rights.

PART I: THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution provides: "*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.*" Thus, the Fourth Amendment applies to searches and seizures of property and persons. Its purpose is to guarantee against unreasonable governmental intrusions. The large majority of Fourth Amendment issues that arise are based on the reasonableness of searches and seizures. Article I, Section 12 of the New York State Constitution also prohibits unreasonable searches and seizures.

PART II: THE EXCLUSIONARY RULE

In an effort to deter unlawful or improper police conduct, the U.S. Supreme Court created the Exclusionary Rule (*Weeks v. U.S.*, 1914). The Exclusionary Rule was applied to the states in 1961 in the case of *Mapp v. Ohio*. The rule provides that evidence obtained by violating the defendant's Fourth Amendment rights may not be introduced at trial by the prosecution for the purpose of providing proof of the defendant's guilt. The "suppressed," or inadmissible, evidence limits the prosecution's ability to obtain a conviction. Additionally, and importantly, improper police activity can result in disciplinary action, or civil and or criminal liability upon the officer.

PART III: U.S. SUPREME COURT DECISION IN TERRY V. OHIO (1968)

There are situations where officers, in the interest of investigating crime, are permitted to act on less than probable cause. In the landmark case of *Terry v. Ohio*, the U.S. Supreme Court, for the first time, addressed the issue of a seizure and a search of a suspect on less than probable cause, and found that where an officer had reasonable articulable suspicion that a person was committing, had committed or was about to



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commit a crime, and that the person was presently armed and dangerous, a stop and frisk were consistent with the Fourth Amendment.

Facts: Det. McFadden, an experienced plainclothes officer on a foot patrol in a commercial area in Cleveland, observed two men in the process of “casing” a store. He watched both men walk, sometimes alone other times together, past the front of the store. On each trip, they looked inside and around as they walked past the store and then did so again on their way back. The men repeated this routine 12 times. He then saw the men confer with a third man who joined the first two as they walked toward the store. McFadden then approached them, identified himself and requested an explanation. When one of them responded incoherently, McFadden spun one man around and patted down his overcoat, felt a pistol and removed it. The defendant, Terry, was later convicted of carrying a concealed weapon.

Question for the Court: Is it always unreasonable for a police officer to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest?

Court's answer: No. While the Court held that the stop of Terry amounted to a seizure – though only a brief one - and that the frisk was, in fact, a search - though not a full search - within the meaning of the Fourth Amendment, the Court rejected the notion that probable cause was required for McFadden's actions and held the gun to be admissible evidence against Terry.

Analysis. In its decision, the Court reasoned that McFadden's stop was proper under the circumstances because the Court believed it would have been “poor police work” for an officer of McFadden's experience to witness the particular behavior and not attempt to investigate further. Therefore, the test was not whether McFadden had probable cause, but whether his conduct was reasonable under the Fourth Amendment. The Court developed a new test of reasonableness in a situation in which a person is subjected to a brief seizure and frisk. A key ruling in Terry concerns the limited exterior “pat down,” or “frisk.”

The Court held that the frisk was reasonable since it was based on two important factors: (1) McFadden justifiably feared that the men were armed and his safety was in jeopardy, as it was reasonable for him to suspect that a daylight robbery likely would involve the use of weapons; and (2) it was not a full search but instead was a limited exterior “pat down” of Terry's clothing for a hard object.

Stop and Frisk Law

Terry is a significant case because it marked the Supreme Court's approval of stop and frisk (hence the name “Terry Stop”) when the officer did not have probable cause for an arrest. In its conclusion, the Court noted that where an officer, in light of his experience, reasonably suspects that criminal activity is taking place, he or she may investigate and make reasonable inquiries. The Court further held that where an officer observes:



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“that the persons with whom he is dealing may be armed and presently dangerous ... and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others to conduct a carefully limited search of the outer clothing...in an attempt to discover weapons which might be used to assault him.”

Following *Terry*, New York State adopted its own standards, or guidelines, for permissible police activity during investigative encounters with citizens consistent with the Supreme Court’s ruling in *Terry*. The New York State Court of Appeals’ decision in *People v. DeBour* created the standard by which all investigative encounters in New York are assessed.

PART IV: THE NEW YORK STANDARD: PEOPLE V. DEBOUR (1976)

People v. DeBour is an important case for many reasons. The case outlines four levels of police encounters and defines the amount of information an officer must have for each level. In creating the four-tiered analysis, the New York Court in *DeBour* expanded on *Terry*, which dealt with the narrow issue of a possible crime in progress, in comparison to *DeBour*, which as you will see, began as a simple request for information.

The Court went beyond what the Supreme Court addressed in *Terry*, which held that an encounter that results in an actual “stop” or detention is entitled to Fourth Amendment protection. In New York, under *DeBour*, there are additional restrictions placed upon encounters between the police and the public in situations that do not rise to the level of a *Terry* stop. Thus, *DeBour* created a more restrictive interpretation of a police officer’s authority to confront and question citizens.

Facts: At 0015 hours, two police officers assigned to a foot-post were patrolling a deserted residential street in Brooklyn when they noticed someone walking in their direction. The area was notable for a high incidence of narcotics-related activity. As the solitary figure came within 40 feet of the officers, he crossed the street. The officers followed and waited for the man to reach them. When he did, one of the officers asked him what he was doing in the neighborhood. The man, later identified as DeBour, nervously replied that he had just parked his car and was walking home. The officer then asked DeBour for identification. As DeBour answered that he had none, the officer noticed a waist-high bulge in DeBour’s jacket. The officer proceeded to recover a revolver from DeBour’s waistband. DeBour was arrested and charged with possession of the firearm.



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Question for the Court: May a police officer approach a private citizen to request information without having any concrete indication of the citizen's involvement in criminal activity?

Court's answer: Yes. Although the Court found that the officers did not have any indication of criminal activity, it held that the officers did have an objective credible reason for the initial approach. The Court explained that the circumstances were sufficient to arouse the officers' interest, and the subsequent questions were only intended to elicit information as a result of the defendant's actions and the subsequent observation of the bulge in the waistband. Thus, the intrusion was minimal and "...reasonably limited in scope and intensity..." and thereby constitutionally valid.

Analysis: The Court noted that the Fourth Amendment protects against unreasonable searches and seizures by the government. Further, the Court confirmed that any approach by police, whether it amounts to a seizure or not, is a violation of the Constitution if it is based on whim, caprice, arbitrariness, or a desire to harass. In this case, however, the Court reasoned that DeBour was not "seized" within the meaning of the Fourth Amendment, but merely approached and questioned in a non-threatening manner. DeBour's attempt to avoid the officers in a high crime area late in the evening justified the approach. Moreover, his failure to produce identification coupled with the suspicious bulge necessitated further inquiry. Thus, the police officer's actions were reasonable based on the amount of information known to them.

The Effect of *People v. DeBour*

The Court in *DeBour* went on to establish the four-tiered analysis that dictates the permissible level of police intrusion. Although the New York State Court of Appeals agreed with the U.S Supreme Court in *Terry* that, "...*there is nothing in the Constitution which prevents a police officer from addressing questions to anyone in the streets,*" it cautioned that an officer must have at least an objective credible reason for intrusions that affect a person's liberty.

Under *DeBour*, as a police officer, your authority to confront, request information, stop, or search will be based on your ability to articulate a legally recognized level of knowledge. They are as follows:

Level 1: A Request for Information (Objective, Credible Reason)

Level 2: The Common Law Right of Inquiry (Founded Suspicion of Criminal Activity)

Level 3: A *Terry* Stop (Individualized, Reasonable Suspicion of Felony or Penal Law Misdemeanor)

Level 4: Arrest (Probable Cause)



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NOTE: The four levels of *DeBour* are summarized in charts that appear at the end of this chapter. It may be helpful for you to reference these charts as you begin to absorb the information that follows. While the charts are based upon *DeBour*, they are presented in different formats to aid in your understanding of the material.

PART V: THE FOUR LEVELS OF INVESTIGATIVE ENCOUNTERS

The manner in which we interact with citizens is greatly influenced by our perception of people, places, and events. In addition, you have also learned that perception itself is a product of our attitudes, our physical and psychological states, the environment, and our expectations. As police officers, you must keep in mind that the perception of the police by the public, and thus *their* behavior, is swayed by the same factors. Remember that these interactions are an intrusion into the lives of the citizens who are affected by them.

Therefore, the manner in which we police – and interact – is a direct product of our training, rules, regulations, and perception. No interaction is more significant legally, administratively, and morally than those encounters initiated for purposes of investigation. This section focuses on such interactions and on the limits of your authority given various *levels of knowledge*.

What are Levels of Knowledge?

Case law has carved out various standards and criteria by which police conduct is measured. Police interactions with citizens are largely viewed as governmental intrusion into people's interests in liberty, privacy, and property. Courts have created guidelines that dictate the extent to which a police officer can impose on a citizen's freedom. Simply put, *levels of knowledge* are the amounts of information that the courts have held will justify certain kinds of police conduct. Typically, the more information or suspicion a police officer has about the likelihood of a person's criminal involvement, the greater the level of intrusion the courts allow. Moreover, investigative encounters are fluid situations in which one event or observation can escalate the encounter from one level to another.

LEVEL 1: REQUEST FOR INFORMATION

The request for information is an encounter between a civilian and a uniformed member of the service conducted for the purpose of requesting information from the citizen. In a Level 1 encounter, an officer can approach to request information when there is "some **objective credible reason** for that interference which is not necessarily indicative of criminality." An objective credible reason must be based on more than a hunch, whim curiosity, bias, or a desire to harass. The objective of a Level 1 encounter is to gather information, and not to focus on the person as a potential suspect. The Court has made



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distinctions between two types of requests for information: public service and law enforcement.

Public Service. In this function, officers are given more latitude to ask questions. This includes situations where an officer may be looking for the parents of a lost child, investigating an accident, or helping someone in distress.

Law Enforcement Function. This is a more restrictive standard and the extent and type of questions allowed will depend on the circumstances of the encounter, the manner and intensity of the interference, and the reasons for the approach. The questions must **not** be threatening or accusatory, and the person is free to leave and free to refuse to answer some or all questions.

Verbal Requests

The Court of Appeals ruled that an officer's request to stop ("Excuse me, may I speak with you?") so that the officer may approach, is permissible as long as it is done in order to get the attention of someone who is unaware that the officer wishes to speak to him or her and the request is **general** and **non-threatening**. However, if the request and questions would lead a reasonable person to conclude that he or she is not free to terminate the encounter, then the request alone amounts to a Level 3 stop. Remember, an officer may inform the person he or she is free to leave, but is not required to do so. If asked by the citizen whether he or she is free to leave, the officer must answer truthfully and advise the citizen that he or she may do so.

Types of Questions

The Court emphasized that under either the public service or law enforcement function approaches, the objective of a Level 1 encounter is to gather information and not to "focus on the citizen as a potential suspect in a criminal investigation." Officers may, therefore, ask a person non-accusatory questions as long as the questions would not cause a reasonable person to believe that she is suspected of some wrongdoing.

For example, the officer may ask for a person's name, address and destination if those questions are related to the objective, credible reason for the approach and if the questions are asked in a non-accusatory manner. During a Level 1 encounter, an individual may refuse to answer questions, answer only some questions, or walk away. Refusing to answer questions, providing innocuous answers to questions, or walking away does not raise the level of suspicion or provide a basis to issue a summons or make an arrest, and the individual may not be detained. However, answers that are clearly false can escalate the encounter. During a Level 1 encounter, an officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away. Whenever feasible and consistent with personal safety, an officer should provide the individual with an explanation for the encounter.



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Example: A detective observed the defendant purchase a holster for a firearm. While such a purchase is not criminal, it did furnish a sufficient basis for inquiry by the detective. *People v. Samuels* (1980)

Example: A defendant was observed at 0445 hours carrying two large garbage bags filled with bulky items in a burglary prone area. These circumstances justified the officer's initial approach for inquiry. *People v. Williamson* (1985)

Example: The officer had an articulable reason for speaking to the defendant, a possible witness to a kidnapping, who was observed walking away from the scene. *People v. Hopkins* (1980)

Example: A crowd of people stood around the defendant's open trunk examining clothing and shoes that still had the original store tags. As the officer approached, the defendant slammed the trunk closed and the crowd began to disperse. This was an objectively credible reason for a Level 1 inquiry. *People v. Wallace* (1986)

Permission to Search

Because a Level 1 inquiry is based on an "objective credible reason" that is not necessarily indicative of criminality, the police may not ask for permission to search either an individual's bag or person at this level.

Right to Walk or Run Away

Although the police are permitted to request information, a citizen has the right not to answer the police. The refusal, in itself, does not permit further action by police. In fact, a citizen can walk or even run away, and, ***without indication of criminal activity, an officer may not pursue***. However, a police officer can still keep the person under surveillance as long as the officer does not significantly interfere with the person's liberty.

Protective Measures

When an officer has an objective credible reason to approach someone and request information, he or she may choose to continue to observe the individual or approach and ask non-accusatory questions related to the reason for the approach. In addition to the tools of observation and non-accusatory questions, in some Level 1 encounters, an officer may need to engage something we refer to as "protective measures." Because such measures are more commonly required at Level 2, we will address the topic during our Level 2 discussion.

LEVEL 2: COMMON LAW RIGHT OF INQUIRY



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A Level 2 inquiry is an encounter between a civilian and a uniformed member of the service conducted for the purpose of asking the civilian pointed or accusatory questions because the police officer has a **“founded suspicion that criminal activity is afoot.”** The officer must be able to express why he or she thought that **suspicious** or **unusual activity indicative of criminality** was taking place. Similar to a Level 1 encounter, during a Level 2 encounter an individual may refuse to answer questions, answer only some questions, or walk away, and the individual may not be detained. An officer may inform the person he or she is free to leave, but is not required to do so. If asked by the citizen whether he or she is free to leave, the officer must answer truthfully and advise the citizen that he or she may do so. Moreover, the officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away; that would turn a Level 2 encounter into a Level 3 Terry stop.

Criminal Activity Afoot

Founded suspicion is defined as a *“present indication of criminality based on observable conduct or reliable hearsay information.”* It cannot be based on a hunch, or “gut feeling.”

Example: A radio run from an anonymous source furnishing a description of three men selling drugs in a particular area, combined with their observations of individuals matching the description, gave officers the right to conduct a common-law inquiry of persons matching the description from the radio run. *People v. Erazo* (1994).

Types of Questions

This level results in a wider scope and more intense level of questioning because the encounter **focuses on the citizen as a possible suspect of a particular crime**. The officer's questions can be **pointed, invasive, and accusatory** in nature and can be intended to elicit an incriminating response. The officer, however, may not touch the person, display a weapon, or act in a threatening manner. Thus, while the officer's questions can be pointed and accusatory, his or her tone and body language when asking them must not make the person feel like he cannot walk away.

Permission to Search

When an officer is exercising his or her Common Law Right of Inquiry, he or she may seek consent to search. Consent to search, if given, must be provided voluntarily, that is, without any coercion or duress. The request for consent to search should be conveyed as just that - a request - and not an order. When asking for consent to search, officers must ask in a way that elicits a clear ‘yes’ or ‘no’ response. They must then follow up by explicitly saying, “I can only search you if you consent.” Officers must also then ask “Do you understand?” If a consent search is sought, the person searched will be offered a **BUSINESS CARD**.



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If you have a body camera and seek consent to search, you must record it and tell the person they may request the video by making a FOIL request through the NYPD website at www.nyc.gov/nypd.

Regardless of whether you are equipped with a body worn camera, you must document in your memo book the time, location, and date of the search or refusal, and the apparent race/ethnicity, gender and age of the person from whom you sought consent to search. You must also document your name, precinct and shield number. A new form will be provided in the future in order to assist with this documentation.

Right to Know Act

There has been a recent change in the law. From now on, officers must identify themselves to an individual who is the subject of law enforcement activity by providing their name, rank, and command. Officers must also explain the purpose of the interaction in the following circumstances:

- All Level 2 encounters
- All Level 3 *Terry* stops
- All frisks
- Any search of person or property, including vehicles
- Vehicle checkpoints
- Home searches
- Investigatory questioning of victims and witnesses to crimes

Additionally, unless the situation results in an arrest or summons, you must offer a Business Card at the end of the encounter. You are not required to offer a Business Card during investigatory questioning of victims and witnesses to crimes, unless you are the assigned detective or a card is requested by the person.

If the person you have interacted with is a minor, you must offer the business card either to the minor or, if they are present at the scene, a parent, legal guardian, or responsible adult.

Officers must also provide a Business Card if a person requests an officer's identifying information.

Business cards include the officer's name, rank, shield number, and a space for the officer to write his/her command. You should write your command on each business card you hand out.

If you run out of pre-printed cards, you must offer to provide the person with the information on a handwritten card. If you run out of cards altogether, you must offer this information verbally and provide the person with sufficient time to write it down.



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If explaining the purpose of the interaction would impair a criminal investigation, you do not have to do so.

Officers are not required to offer a Business Card to identify themselves if engaged in undercover activities, if exigent circumstances are present (for example, imminent physical injury or destruction of evidence, to name a couple), if it is a security search of someone attempting to enter a public building, an event, or an MTA facility or if verifying the identity of a person seeking entry into an area restricted by the Department due to health or safety concerns.

Similarly, the Right to Know Act's requirements for consent searches do not apply if exigent circumstances are present or if it is a security search of someone attempting to enter a public building, an event, or an MTA facility where a person's entrance into the location constitutes implied consent to be searched under an exception to the warrant requirement.

Remember, Body Worn Camera video may be obtained through the NYPD's FOIL page or via the website on the back of the Business Card. In addition, if a person wants to obtain more information about their stop or a copy of their Stop Report, you should tell them to go to the website on the back of the Business Card.

Protective Measures

You will recall that the Supreme Court in *Terry v. Ohio* ruled that Det. McFadden was authorized to frisk the suspect in that case because he had a reasonable suspicion that the suspect was about to commit an armed robbery. In other words, it was a Level 3 stop based upon reasonable suspicion of a violent felony. The tool of frisk (i.e. an officer running his or her hands over the suspect's clothing feeling for weapons) is available in that kind of situation, but it is not available at Levels 1 and 2, nor is it available at Level 3 if the officer does not have reasonable suspicion that the person is armed and dangerous. There are, however, less intrusive measures an officer can take to be safe if he or she has a reasonable safety concern. For example, using the Level 2 example provided above, if officers respond to a location where an anonymous caller reported certain people were selling drugs, observed suspects matching the descriptions provided, and decided to approach and question them without further investigation or observations that corroborated the drug sales, the officers would be at Level 2. If upon the approach, one of the individuals repeatedly put his hands in his pockets after being asked to remove them, the approaching officer could take measures to control the suspect's hands.

An officer may engage something we refer to in our training as "protective measures" at any Level when an officer does not yet possess enough information to support a Level 3



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reasonable suspicion that the person is armed and dangerous, but nevertheless perceives his or her safety may be in jeopardy. The officer is permitted to take protective measures that are reasonably related to the circumstances. Protective measures are essentially quick, reactive measures designed to control a person's hands.

Examples of protective measures include:

- Directing the person to put down an object
- Asking the suspect to take their hands out of their pockets or to show their hands
- Forcibly removing the suspect's hands from their pockets if he or she refuses to take them out
- Grabbing the suspect's hand or placing a hand on their pocket if the person moves their hand toward their waistband or pocket
- Directing the person to raise their hands, if the circumstances warrant (i.e. an anonymous gun run)

The use of protective measures is generally not necessary at Level 1. But in the rare Level 1 encounter, due to the nature of the approach or the person's behavior, an officer may reasonably perceive that his or her safety is in jeopardy.

Protective measures may be engaged at Level 2, but must be done so in a way that does not make the suspect feel as though they are not free to leave, e. g, an officer can remove a person's hands from his pockets if the person persists in putting them there, but can follow up by saying the person is not being detained and that the action was taken to ensure the officer's safety.

At Level 3, an officer can engage protective measures but does NOT have to do so in a way that makes the suspect feel free to leave, because during a Level 3 *Terry* stop the person is not free to leave.

Refusal to Answer or Flight of Suspect

While police officers can ask for explanations and answers, a citizen has no obligation to cooperate. A citizen's silence cannot be used as a reason to escalate the encounter into a more intrusive one. Innocuous answers to questions, without further indication of criminal involvement, will not justify additional questioning. However, answers that are clearly false can escalate the encounter.

If a confronted citizen walks away from a Level 2 encounter without answering, the officer may not pursue without reasonable suspicion that a felony or Penal Law misdemeanor has been, is being, or is about to be committed. However, at Level 2, there is a difference in the law about running away. You will recall that during a Level 1 encounter, a person can walk or even *run* away from an officer and his flight alone does not elevate the encounter. But at Level 2, you have formed a founded suspicion that a



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particular person is engaged in criminality, and if that person runs from you at Level 2, his *flight* from you elevates the encounter to Level 3 and you *can* pursue him and stop him.

Example: Uniformed police officers responded to a radio run of an individual selling drugs at a location. The radio dispatcher provided a description of the person's race, gender and clothing. The officers knew that the location was known for narcotics sales. Upon arrival, the officers observed an individual who matched the radio description. The officers' observations, coupled with the individual's immediate flight, then raised the police officer's level of suspicion to reasonable suspicion, thus justifying the officer's pursuit. *People v. Bora* (1994)

Example: Uniformed police officers patrolling in a marked vehicle approached a location known for drug activity. The officers saw a group of men talking on the corner and one of the officers recognized several of the men as having been arrested previously for drug transactions at the same location. One of the men had an unidentified large bulge in his right jacket pocket and when he saw the officers approach, he turned and began to walk away. He ignored the officer's call to come to their vehicle and ran when the officer exited the vehicle. "While the police may have had an objective credible reason to approach defendant to request information--having observed him in a 'known narcotics location' with an unidentified bulge in the pocket of his jacket--those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit." This knowledge did not amount to reasonable suspicion to pursue. *People v. Holmes* (1993)

Anonymous Callers

Generally speaking, when an individual calls 9-1-1, provides his or her name, a sufficiently detailed suspect description and reports that a suspect is, for example, engaged in drug sales or has a gun, and officers promptly respond to the location and observe a suspect matching the description provided, this level of information would warrant a Level 3 reasonable suspicion *Terry stop*. However, when the caller is *anonymous*, the officer only has the authority for a Level 2 approach unless the allegation of criminality from the anonymous source is corroborated.

This rule does not apply to individuals who personally approach officers on the street, report a crime and give a suspect description. The officer can, for example, ask the complainant to wait there, let the complainant know that another sector will be by to get their information, and then proceed to promptly act on the information and search for the suspect. The officer need not gather all of this, thus far, unnamed person's pedigree. This person is not truly anonymous and the officers are in a better position to judge that person's credibility during the face-to-face encounter.

Nor does this rule apply to dire, ongoing emergencies, like a bomb threat or an anonymous caller saying a particular individual is on his way *to go shoot someone now*.



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Calls like these are rare. The typical anonymous call you will deal with will contain a suspect description and a report that the suspect “has a gun” or is involved in a “dispute” or some other criminality. While these are serious situations, these do not rise to the level of exigency to get around this rule.

When acting on a suspect description and report of criminality from an anonymous caller, there are steps an officer should try to take to corroborate the reported criminality. Arriving at the scene and simply confirming the clothing description or location of the suspect is not enough to elevate the encounter. When the anonymous caller is reporting that a suspect has a weapon or is involved in a violent crime, it is particularly important that you engage strategies to enhance the level of your knowledge from a Level 2 (when frisking is NOT permitted) to a Level 3 (when frisking IS permitted). Here are some of the steps an officer can take to attempt to enhance his or her level of knowledge when acting upon a description and report of criminality supplied by an anonymous caller:

Prior to arriving on the scene:

1. Call the caller back and attempt to get his or her name.
2. If the caller is unwilling to provide his or her name, ask the caller WHAT he or she saw and WHEN. If the caller is *currently* observing criminality or *just observed* criminality (i.e. “the gun is in his hand” or “I just saw him threaten this other guy with a gun and I got off the block immediately and called 9-1-1”), provided the officer arrives at the location promptly and in fact sees a suspect matching the description, the follow up call where the caller told the officer about what he or she is seeing or just saw would be enough to elevate it to a Level 3 encounter.
3. Alternatively, if the caller provides detailed information predicting what the suspect will do and the suspect then does what the caller predicted, this can also allow for a Level 3 approach.
4. If the original job is particularly detailed, a follow up call may not be necessary to corroborate the anonymous caller’s report and get the encounter to Level 3. Check the details provided by Central. If it is rich with detail about criminal acts the caller is observing essentially in real time, that can be enough to elevate the encounter to Level 3. However, if the job just conveys a description, location and a report of a “man with a gun” or an “armed dispute,” that would not be enough.

If these strategies are not fruitful, once at the location provided by the caller, if you see an individual matching the description:

1. Observe the suspect and look for behavior or visible signs (i.e., a suspicious bulge in the suspect’s waistband or the suspect “blading”). Such observations would corroborate the criminality and elevate the encounter to Level 3.
2. If the suspect flees upon seeing the police, that will elevate the encounter.



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3. If the suspect provides evasive or false answers, these responses can also elevate the encounter.

Difference between Level 1 and Level 2

Even courts agree that the difference between the first two levels is subtle. In the first level, the officer must have an objective credible reason to *ask for information*. In the second level, the officer must have information that indicates criminal activity and his or her *questions are related to the possible criminal activity*. Therefore, innocuous (i.e., harmless, innocent) behavior may justify a Level 1 approach, but not a Level 2 encounter.

Officers should remember that during Level 1 and Level 2 encounters, an individual may refuse to answer questions, answer only some questions, or walk away. During Level 1 and Level 2 encounters, the officer may inform the individual that he is free to leave. While officers are not required to inform individuals that they are free to leave during Level 1 and Level 2 encounters, if an individual asks the officer if he or she is free to go, the officer must inform the individual that he or she is free to leave. The officer may not detain an individual in a Level 1 or Level 2 encounter.

Example: Uniformed officers responded to a report of an assault in progress inside of an apartment building. Upon arrival, the officers observed an individual exiting the building carrying a shopping bag. The officers approached him to ask if he knew about the assault and for his assistance getting into the building. Upon seeing the officers, the individual ran and while running discarded the shopping bag. The officers chased after him, and ultimately recovered the shopping bag, which contained contraband. The contraband was suppressed because the officers merely had an objective credible reason, seeking information about a crime, to approach the individual and request information—a Level 1 encounter. At a Level 1 encounter, an individual may walk or even run away from the police. Note that if an officer were to chase an individual who fled a Level 1 encounter, catch that individual and conduct a frisk, evidence or contraband uncovered during the frisk would also be suppressed. *People v. Murrell* (2008).

Example: Officers assigned to a precinct burglary RMP saw an individual carrying an object similar in size to a stereo component or VCR. The object was wrapped in a sweat suit. In the officers' experience, items carried in that manner were usually covered in order to conceal them. The officers' observations, along with their investigation into a rash of burglaries in that area, permitted them to exercise their common law right of inquiry. *People v. D'Agostino* (1999).

Officers should note that events and observations at Level 1 or Level 2 encounters can elevate the encounter to a Level 3 stop or to a Level 4 arrest.



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LEVEL 3: *TERRY STOP* (INDIVIDUALIZED REASONABLE SUSPICION)

The third level of permissible police intrusion is the right to **stop** and detain a citizen. A Level 3 stop is also known as a "Terry Stop." A stop occurs any time a reasonable person would not feel free to disregard the officer and walk away. Under this level, an officer may stop and detain a person when he or she has **reasonable suspicion** that the person has committed, is committing, or is about to commit any **felony** or a **Penal Law misdemeanor**.

At Level 3, because an officer's level of knowledge and information is higher (reasonable suspicion), so is his or her authority. An officer retains the Level 2 tools (the authority to ask accusatory questions, seek consent to search, and engage appropriate protective measures) but he or she also gains additional tools at this level. Unlike Levels 1 and 2, at Level 3, an officer may use force if force is required to effectuate the detention. The type and amount of force used, however, must be objectively reasonable under the circumstances. In addition, unlike Levels 1 and 2 where the individual is still free to walk away, at Level 3 an officer may detain the person, who is not free to leave. This investigatory detention should be brief and should last only as long as it is necessary to **confirm or dispel** the officer's suspicion. Also, in *some* Level 3 encounters, an officer may conduct a **frisk**. **If the officer** reasonably suspects that **the person stopped is armed and dangerous**, the officer is authorized to frisk.

The frisk must be strictly limited to a running of the hands or pat-down over the outside of a person's clothing, feeling for weapons that could harm the police officer or others nearby. A frisk may not be conducted to discover evidence or the proceeds or instrumentalities of a crime, or other contraband such as drugs. Most importantly, the fact that a police officer has a legal right to stop someone **does not** mean that he or she automatically has the right to frisk that person. Whenever it is feasible and consistent with personal safety, the officer should provide the individual with an explanation for the encounter.

ELEMENTS OF A LEVEL 3 STOP

N.Y.S. Criminal Procedure Law §140.50

Section 140.50 of the New York State Criminal Procedure Law entitled, "Temporary Questioning of Persons in Public Places; Search for Weapons" reads, in part, as follows:

Subdivision (1) "...a police officer may stop a person in a public place located within the **geographical area** of such officer's employment when he **reasonably suspects**



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that such person is committing, has committed or is about to commit either (a) a **felony** or (b) a **misdemeanor** defined in the Penal Law, and **may demand** of him his **name, address**, and an **explanation** of his conduct.”

Subdivision (2) “Any person who is a peace officer and who provides security services for any court of the unified court system may stop a person in or about the courthouse to which he is assigned when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the Penal Law and may demand of him his name, address and explanation of his conduct.”

The suspicion must relate to ANY of the felony crimes OR only those misdemeanors that are contained in the Penal Law. While you are empowered to issue a summons or make an arrest upon probable cause that a person has committed a misdemeanor contained in the Administrative Code, reasonable suspicion that a person committed an Administrative Code misdemeanor may not serve as the basis for an investigative Level 3 *Terry* stop. In the third level of police intrusion, a police officer has the right to detain and investigate a person reasonably suspected of criminal activity. Thus, a constitutionally valid stop, question, and possible frisk consist of the following elements:

1. **Reasonable suspicion that a person is committing, has committed or is about to commit a felony or a Penal Law misdemeanor;**
2. A **stop** and **detention** of a person;
3. **Reasonable force** may be used;
4. Takes place within the officer's **geographical area of employment** (“GAOE”);
5. The officer may **frisk** when there is reasonable suspicion that the person is armed and dangerous;
6. The officer conducts **questioning** regarding the crime;
7. Investigation lasts a reasonable amount of **time**.

Reasonable Suspicion – Defined



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The Court of Appeals has defined reasonable suspicion as the “*quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand.*” Additionally, the U.S. Supreme Court requires that an officer have a “*particularized and objective basis for suspecting*” the person of criminal conduct. The officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient. This is an objective standard requiring police officers to point to specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion on a citizen’s liberty interest. In addition, the reasonable suspicion must be individualized. That is, the officer must have grounds to reasonably suspect the specific person being stopped of criminal wrongdoing.

FACTORS THAT MAY LEAD TO REASONABLE SUSPICION

It is simple for an officer to know that he or she needs to have reasonable suspicion before conducting a Level 3 *Terry* stop. However, it can be difficult to understand exactly when you actually have reasonable suspicion. Because determining reasonable suspicion requires a case-by-case factual analysis, no judge, manual, or course could ever list every single scenario in which you would or would not have reasonable suspicion. Therefore, an officer must be able to articulate specific facts that led to reasonable suspicion.

Listed below are a few common factors that may give an officer reasonable suspicion:

1. Information from an Identified Individual

Detailed information from an identified individual may provide a basis for reasonable suspicion. An identified individual may be a person who provides a name, someone whose credibility the officers have had an opportunity to assess, or a known informant.

2. Suspicious or Evasive Behavior

Suspicious or evasive behavior, sometimes referred to as “furtive movement,” including “telltale” signs of a particular crime, can contribute to facts observed by the officer that leads to reasonable suspicion. However, generally, evasive behavior by itself will not lead an officer to reasonable suspicion. It must be coupled with more specific information that links the behavior to a specific type of crime, such as casing a victim or location, acting as a lookout, or actions indicative of concealing or possessing a weapon.

The officer must be able to articulate something *specific about the suspicious nature of the movement*. The officer’s training, experience, and/or expertise in identifying that



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type of crime or peculiarities of a specific area are often taken into account in these situations.

Example: When an individual saw a police officer, the individual pushed a bag up his sleeve, and when the officer approached, the individual secreted the bag in his pants, apparently placing it in his buttocks. This unusual behavior was highly suspicious particularly since the individual's behavior on a prior occasion in a possible drug transaction had similarities to this incident, and the police accordingly had reasonable suspicion justifying a stop and detention. *People v. Lynah* (2008).

Example: A police officer investigating a reported fight between two individuals with handguns was informed that the men involved had just walked into a nearby market. The police officer immediately responded to the market, at which point an individual matching the description stepped into and attempted to push past the officer. The individual moving his hands quickly toward his waistband as a police officer pulled him aside for questioning as a part of the investigation was behavior that gave the officer reasonable suspicion and formed the basis for the frisk. *People v. Curry* (2011).

It is important to note that certain behaviors may be indicative of particular crimes. Trained and experienced officers may make observations of certain behaviors that, coupled with other factors, may be indicative of certain crimes. For example, telltale signs and hallmarks of narcotics transactions, at a known narcotics location, may mean nothing to a civilian, but may provide a police officer with reasonable suspicion.

3. Resemblance to the Suspect of a Crime

The police are justified in conducting a Level 3 *Terry* stop when someone bears a strong resemblance to a known person who is wanted for a crime. An individual can be approached but may not be stopped merely because he meets a vague or generalized description (e.g. "young black male"). There must more, such as a detailed description from an identified caller that includes identifying characteristics beyond just race, age, and gender. Race may only be considered where the stop is based upon a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics.

4. Flight

You will recall that at Level 1, the police cannot start chasing a person merely because the person started running when he or she saw the police. In contrast, when the police have a founded suspicion of criminality and approach a person to exercise their Level 2 Common Law Right of Inquiry and the person takes flight immediately upon their approach, the suspect's flight elevates the encounter to reasonable suspicion justifying pursuit and, if the suspect is apprehended, a Level 3 *Terry* stop.



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Example: Officers performing anti-crime patrol responded to a radio run of a robbery in progress, arrived at the location minutes later and observed two individuals. The individuals began to walk away while repeatedly looking over their shoulders at a marked police car. As the officers left their car, the individuals quickened their pace, and continued to look over their shoulders. An officer overheard one of the individuals say "[t]he cops are here." The individuals then began to run. These circumstances provided the officers with reasonable suspicion. *People v. Esquilin* (1997).

Some additional factors that could contribute to reasonable suspicion are listed below. Whether any of these factors contribute to reasonable suspicion will depend on the circumstances of the encounter and the specific information the officer possesses.

- The demeanor of the individual.
- The gait and manner of the individual.
- Knowledge the officer may have of the individual's background.
- What the individual is carrying.
- Manner of dress of suspect, including suspicious bulges in clothing.
- Time of day or night.
- Overheard conversation of the individual.
- Specific information about the location.
- Information received from a reliable person or informant.
- Proximity to scene of recent crime.

It is important to note that each individual factor alone may not constitute reasonable suspicion. For example, presence in an area with high rates of crime, standing alone, is an insufficient basis for a stop or a frisk, although it may contribute to reasonable suspicion. Moreover, a "high crime area" cannot be defined too broadly, such as encompassing an entire precinct or borough.

Examples of reasonable suspicion:

- Suspect fitting a detailed description (more than just race, age and gender) from an identified caller.
- A person looking into car windows in the middle of the night holding a wire coat hanger.
- A person exiting an apartment window.
- A person on a fire escape at night holding a large bag.

THE STOP



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As previously noted, the issue of investigatory stops based on less than probable cause was first addressed by the United States Supreme Court in the landmark case of *Terry v. Ohio*. It is important to remember that a Level 3 *Terry* stop is a significant interruption in a person's liberty and amounts to a limited seizure. However, the Court in *Terry* held that this type of investigative stop was reasonable under the Fourth Amendment on the basis of less than probable cause.

A stop may only be conducted when an officer has *individualized, reasonable suspicion that the subject is committing, has committed, or is about to commit a crime*. The New York State Legislature has limited the term crime, for purposes of a stop, to mean a felony or a **Penal Law** misdemeanor (CPL § 140.50(1)).

A police officer must be able to articulate facts that establish reasonable suspicion for making the stop. Absent reasonable suspicion, an officer may not detain a citizen simply for purposes of deterring crime.

A Level 3 *Terry* stop may take many different forms. It can be constructive in nature or it could be an actual physical stop. Surrounding a suspect, blocking his or her path with an RMP, giving certain verbal commands, or ordering a motorist to pull over with the use of turret lights are all examples of constructive stops. Physically subduing suspects by grabbing or holding them would be an actual stop. The test is whether a reasonable person would conclude that he or she is not free to leave. Remember, a stop occurs whenever *a reasonable person would not feel free to disregard the officer and walk away*. And remember, whether the stop is actual or constructive, reasonable suspicion is always required.

It is important for officers to understand that, in the eyes of the law, they may be stopping people even though they do not physically touch them. Officers must also understand that only an objectively reasonable amount of force necessary may be used in achieving their objective.

Handcuffs should not be used during a *Terry* stop unless one or more of the following factors is present:

- An officer has to deal with a rapidly unfolding, dangerous situation
- The suspect acts violently, resists being detained or tries to flee
- The suspect may be armed
- There may be a weapon near the site of the stop

Pursuit vs. Surveillance

The New York State Court of Appeals has determined that pursuing a person amounts to a "seizure." As was previously discussed, police can only use this amount of



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intrusion when they have reasonable suspicion. On the other hand, no level of proof is needed for an officer to simply conduct surveillance so long as the surveillance is unobtrusive and doesn't restrict the subject's freedom of movement.

Geographical Area of Employment

A police officer's geographical area of employment ("G.A.O.E.") consists of the county, city, town or village that employs him or her. If the local government functions in more than one county, the geographical area of employment of a police officer employed by the local government extends throughout all such counties; for example, a **New York City police officer's** geographical area of employment is made up of the **five counties – or boroughs – of New York City**: Manhattan, Brooklyn, Queens, Staten Island, and the Bronx.

A New York City police officer, therefore, may **only** conduct a stop, question, and possible frisk within the five boroughs of New York City - your G.A.O.E. Although you have arrest powers throughout New York State, arrests are based on probable cause; *New York City police officers are not authorized to conduct stops on less than probable cause outside the City of New York.*

Length of Time

The duration of the stop and question must be **reasonable** under the circumstances. The suspect may be detained only as long as necessary to confirm or dispel your suspicion that he/she was committing, committed, or was about to commit a felony or Penal Law misdemeanor. Authority to detain the suspect ends when the tasks tied to the reason for the stop are completed or reasonably should have been completed. There is no set limit on how long an officer can detain a person for the purpose of conducting an investigation. The Court of Appeals only mentions "brief" time limits for the police to accomplish their goals. This means that the officer must act reasonably and diligently, and not use the stop to "wait out" a suspect. A longer detention will be upheld in situations where officers transport a subject to a victim for identification purposes, while only a brief detention is authorized to receive information over the radio to confirm a description. As the detention lengthens, officers are required to show more knowledge of the suspect's involvement in criminal activity to justify the encounter. If probable cause to arrest does not exist, the officer should release the individual immediately after completing the investigation. When an officer releases an individual, the officer should provide the individual with an explanation for the stop, question and/or frisk encounter and offer the person stopped a Business Card absent exigent circumstances.

THE QUESTIONING



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The officer may question the subject to the extent necessary to **confirm or dispel** his or her suspicion and determine whether there is probable cause to make an arrest. The questions, therefore, may be pointed and accusatory and directly related to the reason for the stop, and can be for pedigree information regarding the subject.

We know that during a Level 3 *Terry* stop, the subject is not free to leave. How is it, then, that an officer may ask accusatory questions when the rule from *Miranda* bars an officer from asking accusatory questions when a person is in custody without first providing the subject with *Miranda* warnings? The law distinguishes a temporary investigative detention (a *Terry* stop) with the custodial status of a person who is under arrest. Courts have held that the questions an officer asks during a *Terry* stop – even accusatory questions - are permitted and *Miranda* warnings are not required as long as the questioning does not go beyond the reason for the stop, and the duration of the stop is reasonable (For a further discussion on *Miranda*, refer to the chapter on *Interrogation and Identification*.)

Officers will not transport or otherwise move the suspect from the location where he or she is stopped, unless he or she voluntarily consents or there is an exigent circumstance which necessitates the relocation of the suspect, such as a hostile crowd, a threat to safety, or a hospital show-up.

THE POSSIBLE FRISK

In order to conduct a frisk, a *police officer must reasonably suspect that the person stopped is armed and dangerous*. (*Terry v. Ohio*). The frisk must be strictly limited to a running of the hands or pat-down of the outside of a person's clothing, feeling for weapons that could harm the police officer or others nearby. A frisk is not authorized to discover evidence or the proceeds or instrumentalities of a crime, such as drugs. Reasonable suspicion to stop someone does not automatically permit a frisk.

Armed and Dangerous. The officer must be able to articulate that he or she reasonably suspected that the individual committed, was committing or was about to commit a felony or Penal Law misdemeanor and additionally, that he or she reasonably suspected that the person was armed and dangerous. Reasonable suspicion that a person is armed and dangerous may arise from the officer's observations or the facts and circumstances of the encounter. Below are examples in which the officer may lawfully frisk:

Observing Signs of a Weapon. An officer may frisk a suspect if he or she observes something on the person that the officer reasonably suspects is a weapon. Examples of this are a waistband bulge in the shape of a firearm in, or near, the waistband or a bulge or heavy object concealed elsewhere on the suspect that presents what appears to be the outline of a weapon. At this point, the officer may



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conduct a frisk of the area where the officer believed the weapon to be to ensure his or her safety and remove the weapon and place the subject under arrest.

However, it is important to remember that not every bulge observed in a person's clothing provides reasonable suspicion that he or she is armed. There are many everyday objects that people typically carry in their clothing pockets such as cell phones, wallets, and keys that create bulges. But those bulges do not automatically give you reasonable suspicion that the person has a weapon. The location of the bulge is noteworthy because unlike a pocket bulge, which could be caused by any number of innocuous objects, a waistband bulge is more often a sign of a weapon. Suspects carrying a weapon are often self-conscious. They are usually nervous and unable to prevent themselves from touching the weapon periodically with some part of their body such as their hand, wrist, forearm, elbow, or bicep. So their gestures near or adjustments of a bulge may also provide reasonable suspicion that the bulge is a weapon.

Other Information Regarding a Weapon. A frisk also may be conducted when the person stopped admits possessing a weapon, or if the officer has information that the suspect may be carrying a weapon, such as statements from a victim or witness that the suspect has a weapon.

Reasonable Suspicion of a Violent Crime. If an officer has reasonable suspicion that the subject has committed, is committing, or is about to commit a violent crime, such as murder, assault, kidnapping, rape, robbery, or burglary, the officer may conduct a frisk to determine if the person is armed with a weapon. An officer need not articulate independent facts of a weapon, only facts regarding a violent crime.

Scope of Frisk. If your reason for suspecting that a person is armed and dangerous is based solely on a visible bulge indicative of a weapon, your frisk should be confined to the area of the bulge. If your suspicion that a person is armed and dangerous arises from (1) suspicion of a violent crime, (2) the statements of witnesses, victims, or the suspect, or (3) other facts and circumstances of the encounter, then the span of your outer-clothing pat down may extend as far as necessary to confirm or dispel the presence of a weapon and can go as far as head-to-toe.

- ***Frisk of a Portable Container.*** An officer may not "frisk" or search a person's bag or other item of personal property unless the officer has reasonable suspicion that the person is armed and dangerous and the bag or item of personal property could contain a weapon and is within the person's reach. If the bag or item is soft, the officer may frisk by squeezing the container, and may open it only if he or she feels what he or she believes may be a weapon. If the container is solid and unlocked, the officer may open it to determine



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whether it contains a weapon. Note that the procedures outlined in this subsection do not apply to "checkpoint" type searches in subway stations.

NOTE: There is no requirement to question a suspect prior to an authorized, lawful frisk.

NOTE: Remember, even if an officer does not have reasonable suspicion that an individual is armed and dangerous, there are tactics or “protective measures” the officer can engage short of a frisk when the officer perceives his or her safety is at risk. These include ordering the individual to take his hands out of his pockets, grabbing the person’s hands if the circumstances suggest the person may be grabbing a weapon, or if the individual refuses to remove his hands from his pockets, forcibly removing the person’s hands from his pockets.

THE POSSIBLE SEARCH

If an officer reasonably suspects that an object felt in a suspect’s clothing during a frisk is a weapon, the officer may take appropriate and necessary action to examine the object and protect himself. This includes removing the object from the clothing of the stopped person. If an officer feels something in the suspect’s clothing that is clearly not a weapon, the officer may not search for or remove that item. If the officer feels something and does not know what it is but it is clearly not a weapon, he may not search for or remove it.

DIFFERENCE BETWEEN FRISK AND SEARCH

A search is the placing of hands inside a pocket or another interior part of clothing or possessions. A search, in the context of a frisk, is **ONLY** permitted to remove the object that the officer felt during the frisk and reasonably suspects to be a weapon based on his or her frisk. During a Level 3 Terry stop, for example, upon reasonable suspicion that a person committed a non-violent misdemeanor, without any indication that the individual has a weapon, an officer cannot frisk or search. An officer may ask for permission to search, but **may not compel** a person to submit to a search of their person or belongings. The consent, if given, must be provided voluntarily. When asking for consent to search, officers must ask in a way that elicits a clear ‘yes’ or ‘no’ response. They must then follow up by explicitly saying, “I can only search you if you consent.” Officers must also then ask “Do you understand?” If a consent search is conducted, the person searched will be offered a **BUSINESS CARD**, with rank, name, shield, and command captions filled out.

LEVEL 4: ARREST (Probable Cause)



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The fourth and final level of police intrusion is the arrest stage. An arrest involves the **seizure** of a suspected criminal offender. The purpose for the arrest is to bring the suspect before the appropriate court to answer charges against the person.

The police officer must be able to articulate facts that support a finding of **probable cause**. Probable cause is a legally recognized standard of proof because it results in a significant interference of the person's liberty and is the initial stage of a criminal prosecution that may result in incarceration.

Probable cause consists of facts and circumstances within the arresting officer's knowledge, and of which he or she has reasonably trustworthy information, that would warrant a person of reasonable caution to believe that an offense is being or has been committed and that the person to be arrested committed it. This area will be discussed in greater detail in the chapter on *Authority to Arrest*.

Racial Profiling

Racial profiling is defined as a decision to initiate police action against a person that is motivated even in part by the person's race, color, ethnicity, or national origin. In the context of stop, question and possible frisk, race may only be considered where the stop is based on a specific and reliable suspect description that includes not just race, age and gender, but other identifying characteristics or information. Individuals *may not be targeted for stops and frisks because they are members of a racial or ethnic group that appears more frequently in local crime suspect data*. When an officer carries out a stop based on reasonable suspicion that a person fits such a description, race may be considered, just as a police officer may consider height or hair color. When a stop is not based on a specific suspect description, however, race may not be used at all as a motivation or justification for the stop.

Conducting stops in an unbiased manner fosters and strengthens relationships between police officers and members of the community, and inspires confidence in and support for policing efforts.

General Business Law

Ordinarily, if a civilian detained a person against that person's will, the civilian could be charged with false imprisonment and/or assault. However, §218 of the General Business Law provides an affirmative defense for merchants or persons acting on behalf of merchants. According to this section, a merchant or a merchant's agent is allowed to detain a person providing the following criteria are met:



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1. The person must have been detained on the premises or in the immediate vicinity of the premises of the retail mercantile establishment.
2. The merchant or agent must have had reasonable grounds to believe that the subject committed or attempted to commit a larceny of the merchant's merchandise.
3. The person must have been detained for a reasonable amount of time for investigation or questioning.

For the purposes of this section, *reasonable cause to believe* means knowledge that a person has concealed possession of stolen merchandise. A *reasonable time* is the time necessary to permit the person detained to make a statement or to refuse to make a statement and the time necessary to examine witnesses and store records. In addition to civilians, such as security guards, §218 of the General Business Law also pertains to police and peace officers acting pursuant to their official duties.

PART VI: PREPARATION OF DEPARTMENT FORM: STOP REPORT

Stop Reports are prepared using the “FORMS” application on the Department issued smartphone or tablet. There are many possible outcomes of an investigatory Level 3 stop of a person based on reasonable suspicion. For instance, the officer may develop probable cause and place the suspect under arrest, or the officer's investigation may not lead to probable cause and the individual may be released while the officer continues to search for the perpetrator of a crime. In any case, it is important to **record** all of the narrative details that convinced the officer to stop a suspect. This is because the courts closely scrutinize all incidents that lead to an arrest or to the seizure of contraband or evidence. Failure to accurately record details would mean that an officer would have to rely only on memory while testifying in court. This is why officers are mandated to record all information regarding a Level 3 Terry stop in two places: the Stop Report (PD383-151) and a narrative of the stop in their Activity Log.

Patrol Guide section 212-11, “Investigative Encounters: Request for Information, Common Law Right of Inquiry and Level 3 Stops” states that a member of the service will prepare a Stop Report for EACH person stopped. Patrol Guide Section 212-08, “Activity Logs” states that an officer must make an entry in their Activity Log for all assignments received and all tasks performed. So in ALL investigative encounters between an officer and a civilian in which a reasonable civilian would not feel free to leave, a Stop Report must be prepared and an Activity Log entry must be made.

Stop Report

The Stop Report is one important mechanism for recording the circumstances surrounding a stop and any subsequent frisk or search that you perform. Documenting



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the events as precisely as possible is extremely important as one or two seemingly innocuous facts could change the nature of an encounter and, therefore, your authority to stop a suspect. The Stop Report contains checkboxes that are meant to provide a general overview of the circumstances of the stop, including, a list of factors that contributed to your determination that you had reasonable suspicion for the stop, and a list of factors that contributed to your determination that you had reasonable suspicion for a frisk, if a frisk was conducted, and, if a search was conducted, a reasonable basis for the search. You must check all stop, frisk, and search factors that applied in a given Level 3 stop encounter.

The Stop Report additionally contains two narrative sections. The first requires you to describe in your own words all the facts and information you relied upon to conclude that there was reasonable suspicion that the person stopped had committed, was committing, or was about to commit a felony or Penal Law misdemeanor. This narrative description should include a detailed explanation for each stop factor you checked off (do not merely repeat the check box caption(s)).

Example: If you stop a person because they fit a specific description of a suspect in a recent robbery that was provided by an identified 911 caller, you must check the "Matches a Specific Suspect Description" stop factor checkbox and then provide the details of that description (e.g. "white male, approximately 6 feet tall, red shirt") in the first narrative section.

Example: If you stop a person whom you observe walking on the sidewalk one block away from a recently reported armed robbery who is engaging in movements or behaviors indicative of possessing or concealing a weapon, you must check both the "Proximity to the Scene of a Crime" and "Concealing or Possessing a Weapon" stop factor checkboxes, and you must provide the details about the person's temporal and geographic proximity to the crime scene and the specific nature of his suspicious movements or behaviors in the first narrative section (e.g., " Responded within 2 min to radio run of armed robbery at 123 Jennings St. Observed suspect walking one block from the location, clutching object in right side of waistband with right hand and holding jacket over waistband with left hand").

The second narrative section, which you must complete only if you conducted a frisk and/or a search during a Level 3 stop, requires you to describe in your own words all the facts and information you relied upon to conclude that there was reasonable suspicion that the person stopped was armed and dangerous and, if a search was conducted, the basis for the search, the specific area searched, and whether a weapon or contraband was found.

Example: If, during a Level 3 stop on suspicion of trespass, you observe a bulge in the stopped person's right front pants pocket that is the approximate size of a pistol and that the person keeps grabbing that pocket, you must check off the "Object



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Observed Suspected of Being a Weapon” frisk basis checkbox and describe the shape of the bulge and the fact that the person keeps clutching the bulge in the second narrative section (e.g., “observed bulge in right front pants pocket in the shape of a pistol; suspect repeatedly grabbed bulge during questioning”).

Example: If, during a frisk conducted during a Level 3 stop encounter, you feel an object in one of the stopped person’s clothing pockets that you reasonably suspect is a weapon, you must check the “Hard Object Resembling a Weapon” search basis checkbox and describe the specific characteristics of the object that led you to suspect it was a weapon, the location of the object, and whether or not the object turned out to be a weapon or other contraband in the second narrative section (e.g., “felt hard object during frisk of suspect’s right front pants pocket shaped like a pistol handle. Object removed from pocket was toy water gun”).

NOTE: You must also provide a narrative description of the bases for the stop, frisk, and search in your Activity Log as discussed below.

If the person stopped refuses to identify himself (and there is no reason to take summary action), check off “REFUSED” in the appropriate space of the Stop Report. Allow the suspect to depart only after completing the investigation and only if the investigation does not establish probable cause to arrest the suspect. Request a patrol supervisor to respond and to confirm the refusal, review the Stop Report, and the action taken. If the investigation is completed and there is no probable cause to arrest the person, do not further detain the individual while awaiting arrival of patrol supervisor.

Remember: a Stop Report is prepared only when an officer has conducted a Level 3 investigative encounter (*Terry* stop) with a civilian in which a reasonable civilian would not feel free to leave and where the officer did not already have probable cause to arrest the civilian at the outset of the encounter. Should an investigative encounter start out at probable cause (for example, a complainant points out a perpetrator from a past crime), it would be incorrect to prepare a Stop Report in this case. A Stop Report is also not required for a Level 1 or Level 2 encounter. However, an encounter may begin at Level 1 or Level 2, and then progress to a Level 3 stop in which the civilian no longer feels free to leave. If this happens, then a Stop Report is prepared. This includes preparing a Stop Report when an officer has probable cause to arrest an individual that developed during the Level 3 *Terry* stop.

Fill out all applicable data fields on the Stop Report correctly and completely, including and especially the two above-mentioned narrative sections. A supervisor or the desk sergeant on duty during your tour will review your Stop Report and corresponding Activity Log entry with you and may ask you questions about the circumstances of the encounter to make sure the Stop Report and Activity Log entry contain all of the required information and to determine whether the Level 3 stop itself (and frisk and/or search if conducted) was based on reasonable suspicion. If the reviewing supervisor or



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desk officer discovers any errors or information missing from your Stop Report, he or she will reject it and send it back to you with an electronic note telling you how it is deficient. Once you have corrected it, resubmit the Report.

One of the fields in the electronic Stop Report asks the officer whether he/she offered a **BUSINESS CARD** to the person who was stopped. PG 212-11 mandates that if the person is stopped and the encounter does not end in an arrest or summons, the person must be offered one of these cards.

Failure to offer one can only be excused by a true exigency, for example, if officers stop someone matching a description, it turns out to be the wrong person and they immediately are in pursuit of the actual perpetrator. Again, if a person refuses the Business Card, the officer should note that on the Stop Report

PART VII: ACTIVITY LOGS

Your Activity Log entry is the other important part of documenting the stop. In every situation in which a Stop Report is prepared, Activity Log entries must be made.

The following is a list of required information to be included in Activity Log entries for any stops and any frisks/searches you conduct:

- Date, time and location of stop;
- Pedigree information, unless refused, and detailed description of the person stopped;
- Identify in plain language, the suspected felony or Penal Law misdemeanor;
- ICAD number, if applicable;
- Disposition, including time the encounter concluded;
- Precinct serial number assigned to the Stop Report;

Properly prepared Activity Logs are an important part of good police work.

PART VIII: SUPERVISORY REVIEW OF STOPS



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At some point after you conduct a Level 3 *Terry* stop but before your Stop Report is approved, a patrol supervisor must discuss the circumstances of the stop with you. This is required by Patrol Guide Section 212-11. The patrol supervisor will also carefully review your Stop Report and Activity Log entry for accuracy and completeness and will pay special attention to whether the narratives you provided as the basis for a stop, frisk or search are sufficiently detailed.



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PART IX: INVESTIGATIVE ENCOUNTERS SUMMARY CHARTS



<p>LEVEL 1 REQUEST FOR INFORMATION</p>	<p>LEVEL 2 COMMON LAW INQUIRY</p>	<p>LEVEL 3 TERRY STOP</p>
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<p>An objective credible reason is required to approach. Suspicion of criminality is not required.</p> <p>Only non-accusatory questions about the reason for the approach are permitted.</p> <p>UMOS CANNOT seek consent to search; there is no basis to search at Level 1.</p> <p>The subject is free to refuse to answer questions and walk or even run away. UMOs can continue to observe but may not pursue.</p> <p>Force may not be used to detain subject.</p> <p>Protective Measures will not likely be needed but are not barred if there is a reasonable safety concern.</p>	<p>Requires a founded suspicion of criminality. Focuses on a person as a suspect of a particular crime.</p> <p>Questions may be pointed and accusatory.</p> <p>UMOS may seek consent to search; consent must be voluntary. UMOs must ask for consent prior to search.</p> <p>The subject is free to refuse to answer questions and walk away. However, flight in combination with facts indicating the person is involved in criminality may elevate the encounter to a Level 3. Force may not be used to detain the subject.</p> <p>Protective Measures may be engaged.</p> <p>UMOS must inform the individual about the reason for the encounter and offer a BUSINESS CARD.</p>	<p>Requires an individualized reasonable suspicion that the subject is committing, has committed or is about to commit a felony or Penal Law misdemeanor.</p> <p>Questions may be pointed and accusatory.</p> <p>UMOS may seek consent to search; consent must be voluntary.</p> <p>In addition, if UMOs also has a reasonable suspicion that the subject is armed and dangerous, UMOs may FRISK and if UMOs feels an object he/she reasonably suspects is a weapon, he/she may search for and remove the item.</p> <p>The subject is not free to leave and may be detained for a reasonable period of time in order to confirm/dispel suspicion. A stop occurs when a reasonable person would not feel free to disregard the officer and walk away.</p> <p>UMOS is permitted to use reasonable force to stop and question the subject.</p> <p>Protective Measures may be engaged when there is a reasonable safety concern but the UMOs cannot yet frisk.</p> <p>UMOS must inform the individual about the reason for the encounter and offer a BUSINESS CARD.</p>
<p>Note: Clearly false answers to UMOs's non-accusatory questions may escalate the encounter.</p>	<p>Note: Information from an anonymous source will generally only support a Level 2 approach (not Level 3) unless the UMOs is able to corroborate the crime with his/her own observations or other information.</p>	<p>Note: A Stop Report must be prepared for all Level 3 stops.</p> <p>Note: If suspicion that suspect is armed and dangerous is based solely on a bulge indicative of a weapon, confine frisk to the area of the bulge. If the suspicion that person is armed and dangerous arises from (1) suspicion of a violent crime, (2) the statements of witnesses, victims, or the suspect, or (3) other facts and circumstances of the encounter, then frisk may extend as far as necessary to confirm or dispel the presence of a weapon, up to a head-to-toe frisk. If the suspect possesses a portable container, such as a bag, the UMOs may "frisk" the portable container if UMOs has reasonable suspicion that the person is armed and dangerous and the weapon could be within the portable container. If the container is soft, UMOs should pat down the bag for possible weapons. If it is a hard container, UMOs may open it.</p>
<p>LEVEL 4: Arrest. Requires probable cause to believe that (a) an offense was committed and (b) the subject committed it. Reasonable force may be used to effect an arrest. A Miranda waiver must be lawfully obtained before questioning but is not required for pedigree information. Search incident to arrest is permitted as well as any required inventory searched.</p>		

TYPE OF ENCOUNTER	LEVEL OF KNOWLEDGE REQUIRED	NATURE AND EXTENT OF PERMISSIBLE QUESTIONING	AUTHORITY TO SEARCH	PROTECTIVE MEASURES	FORCE AND DETENTION
I. Request for Information	An objective, credible reason to approach. Suspicion of criminality is not required. However, the member of the service must be able to articulate a basis beyond mere whim and caprice.	Non-accusatory questions concerning the reason for the approach.	At this level of suspicion, there is no basis to search. A request for consent to search a bag, pocketbook, luggage, or other item of personal property is improper.	Rare, but permitted if UMOS reasonably perceives safety in jeopardy due to nature of the approach or person's behavior.	Force may not be used to detain a subject at this level of suspicion. The subject is free to walk away from the member of the service if they so desire. They need not answer questions.
II. Common-Law Inquiry	A founded suspicion that criminality is afoot. This could be triggered by false responses to questions posed during the request for information, as well as observations by the UMOS.	UMOS may conduct more extensive questioning. Accusatory-type (guilt-seeking) questions may be asked. Inform the individual about the reason for the encounter and offer a Business Card.	A subject may be asked to consent to the search of an item of personal property. This consent must be voluntary on the subject's part. UMOS must ask for consent prior to search.	Permitted	Force may not be used to detain a subject at this level of suspicion. The subject is free to leave if they desire. They need not answer questions.
III. Terry Stop	An officer has <i>individualized, reasonable suspicion that the subject is committing, has committed, or is about to commit a crime</i> . The New York State Legislature has limited the term crime, for purposes of a stop, to mean a felony or a misdemeanor in the Penal Law. (CPL § 140.50(1)). Reasonable suspicion exists when the information known to the UMOS is of such weight and persuasiveness as to make the UMOS reasonably suspect criminality.	The UMOS may stop the subject, ask for his or her name and address, an explanation of conduct, and detain the person while an expeditious investigation is conducted to determine if there is probable cause to arrest the subject. Inform the individual about the reason for the encounter and offer a Business Card.	In addition to the consent search described above, the UMOS may frisk the subject for a deadly weapon or any instrument or article readily capable of causing serious physical injury, and of a sort not ordinarily carried in public places by law-abiding persons, if the UMOS reasonably suspects the person is armed and dangerous.	Permitted.	A stop occurs whenever <i>a reasonable person would not feel free to disregard the officer and walk away</i> . A UMOS is permitted to use reasonable force to stop and question a subject. The type and amount of physical force used must be objectively reasonable under the circumstances facing the UMOS.
IV. Arrest	Probable cause to believe that (a) an offense was committed and (b) that the subject arrested committed it. Probable cause requires the existence of facts and circumstances which when viewed together would lead a reasonable person possessing the expertise of the arresting officer to conclude that an offense has been committed.	An UMOS may engage in constitutionally permissible custodial interrogation (i.e., <i>Miranda</i> waiver must be lawfully obtained. <i>Miranda</i> waiver is not required to obtain pedigree information).	"Search incident to arrest" (i.e., a search of a subject conducted immediately after the arrest to secure weapons, prevent evidence destruction) "Inventory," etc.	Permitted.	A UMOS is permitted to use reasonable force to arrest and detain a subject.