How About a Friendly Frisking?: The Myth of the "Consensual" Police Encounter

By Justin Peters
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On Jan. 17, 2011, a habitual felon named Joseph June was riding his bike down the Gulf Coast Highway in Escambia County, Fla., when a police car pulled up behind him. Officer Jason Von Ansbach Young got out of the car and initiated a conversation. As Young later explained it, while he had no reason to suspect that June was doing anything illegal, he hadn’t seen the man before and wanted to make his acquaintance. As they talked, June started fidgeting—he had a pocketknife on his person, he explained. The officer conducted a search, and found crack cocaine in June’s shirt pocket. In Florida, cocaine possession is a third-degree felony, and Escambia County judges aren’t inclined toward leniency for 64-year-old African-American career criminals. June was sentenced to the maximum five years in prison.

Monday, Florida’s First District Court of Appeal affirmed June’s conviction, denying his argument that the cocaine was seized in an illegal stop-and-frisk. In his opinion, Judge Joseph Lewis found that Young followed protocol: “Officer Young initially began a consensual encounter with Appellant. Officer Young pulled his patrol car behind Appellant while he was riding his bicycle, and never ordered him to stop, but merely engaged in a conversation with him.” Once June started acting suspicious, though, Officer Young had reason to initiate a search.

June’s case didn’t get any media attention, which isn’t surprising. There’s nothing new about a fidgety black guy getting caught with cocaine and sent away for a long time. June wasn’t even one of those non-violent offenders you hear prison reformers talk about—he had been arrested at least twice before on weapons charges. It’s not as if they’re locking up Bubbles.

But what interests me about this case is the way the appeals court characterized the initial contact between June and Young as a “consensual encounter.” The Florida Supreme Court classifies police encounters into three distinct levels: consensual, investigatory, and arrest. A consensual encounter is one into which each party enters willingly—a beat cop and a storekeeper exchanging greetings, for instance. It can be terminated by either party at any time with no consequences. You can’t initiate a search during a consensual encounter, and you can’t initiate an investigatory encounter without “a well-founded, articulable suspicion of criminal activity.”

The idea of a consensual encounter is a nice one, conjuring an image of lovers sneaking away for some mutually fulfilling afternoon delight. But, in reality, a police officer who pursues a “consensual” conversation is often just looking to screw you. As Janice Nadler and J.D. Trout note in their fascinating paper “The Language of Consent in Police Encounters,” many consensual engagements are pretexts for less-consensual behavior. “The police officer’s main purpose is to get information about what the person is doing, and get permission to do something else, like search their person, house, car, bags, etc.,” they write.
Police officers don’t just initiate conversations because they’re bored and want to talk sports with a stranger. (That’s what call-in shows are for.) They stop you because they can generally tell if you’re suspicious or “up to something,” and because they know the average person doesn’t feel they’re in a position to decline a conversation with a cop. Although courts tend to interpret consensuality based on surface-level cues—whether the police officer was polite, for instance—there’s always more going on. The unspoken power dynamics in a police/civilian encounter will generally favor the police, unless the civilian is a local sports hero, the mayor, or a giant who is impervious to bullets.

As Nadler and Trout write:

> When a citizen summons the police, police presence is a welcome relief. But when officers approach uninvited, it is seldom a happy event for the citizen. Without a clear idea of where this encounter is going and how it will turn out, a citizen would feel irresponsible to treat this exchange like any other. People know that they should be courteous to police, that police carry guns and handcuffs, that they make mistakes that can cause you harm, and that additional police are just a radio call away.

In other words, there’s a vast gulf between the legal and practical definitions of the word consensual. I’d argue that no reasonable person would have refused Young’s invitation to stop. It’s possible that Young is naturally ebullient, and that he stopped his car because he wanted to swap restaurant tips or gab about the weather. But it’s more likely that he saw a black guy riding a bike and figured he was probably up to no good.

The fact that June was up to no good is irrelevant. Most people who are stopped by the cops aren’t doing anything illegal. In New York City, for example, the NYPD’s stop-and-frisk policy specifies that cops are only allowed to stop someone if, just like in Florida, they have an articulable suspicion that he or she is involved in criminal activity. But of the 685,724 police stops initiated in 2011, 605,328 of them found absolutely nothing. That’s almost a 90 percent whiff rate. Either the NYPD is staffed by a bunch of Mr. Magoos, or the police are violating the rules of the stop-and-frisk program pretty egregiously. But it’s hard for a citizen to challenge an improper stop and frisk, because any his-word-against-yours system favors the guy with the gun and the badge.

As Nadler and Trout explain, most social interactions proceed according to implicitly understood rules, and there are unspoken potential penalties for violating those rules. When your boss greets you with a paternal clap on the shoulder, you know you’re not supposed to reciprocate by pinching his cheek. When a police officer initiates a conversation, you know you’re not supposed to run away.

> “By ignoring the pragmatic features of the police-citizen encounter,” Nadler and Trout write, “judges are engaging in a systematic denial of the reality of the social meaning underlying these encounters, and are thereby constructing a collective legal myth designed to support current police practices in the ‘war on drugs.’ ”
And that’s the point. Florida’s drug laws are harsh, and cops have been tasked with making drug arrests. They stop black men because they expect them to be carrying drugs. The strategy here is clear: Florida is making it harder for you to carry drugs by making it easier for the police to stop you for any reason. There’s nothing consensual about that.