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### **Cover Page Footnote**

J.D. Candidate, 2010, Fordham University School of Law; B.A., 2005, University of Michigan. I would like to thank my advisor, Professor John Pfaff, for his invaluable insight and feedback. I would also like to thank my family and friends for their support and encouragement throughout this process.

# **BERKEMER REVISITED: UNCOVERING THE MIDDLE GROUND BETWEEN MIRANDA AND THE NEW TERRY**

*Michael J. Roth\**

*Over the past twenty-five years, appellate courts have significantly expanded the scope of police authority to stop and frisk potential suspects without probable cause, a power originally granted to law enforcement by the Supreme Court in Terry v. Ohio. This development has led Terry's once limited licensing of police searches to run into conflict with a defendant's right against compulsory self-incrimination while in police custody, as articulated by Miranda v. Arizona. This Note explores the contours of this unforeseen collision between two core constitutional doctrines and the solutions generated by appellate courts to resolve the conflict. Courts today are generally divided as to whether Miranda should apply during a valid, but intrusive Terry stop. This Note argues that a distinct overlap now exists between Miranda and Terry; one that should compel courts to invoke Miranda where police detain and question a suspect in a manner analogous to custodial interrogation. However, this Note also stresses that courts should be vigilant in enforcing the public safety exception to Miranda, particularly in light of Terry's inherent unpredictability and extemporaneous nature.*

## INTRODUCTION

On July 23, 2004, a man carrying a gun entered the Liberty Savings Bank in St. Cloud, Minnesota.<sup>1</sup> He pointed the gun at the teller and demanded that she place all the money from the drawer beneath her on the counter. The man took the money and fled.<sup>2</sup> A few moments later, the bank contacted the police and provided them with a description of the robber.<sup>3</sup>

During their surveillance of the area, about a half-mile away from where the robbery took place, a police officer noticed a man sharing similar attributes to the description provided by the police report.<sup>4</sup> The officer did

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1. United States v. Martinez, 462 F.3d 903, 906 (8th Cir. 2006).

2. *Id.*

3. *Id.*

4. *Id.*

not have an exact match, but he held a reasonable suspicion based on the suspect's physical characteristics, principally his race, height, and weight. The police officer, with the assistance of a fellow officer, surrounded the man, patted him down for weapons, and informed him that he was being detained for further investigation.<sup>5</sup> During the encounter, the police handcuffed the suspect and inquired whether he possessed any weapons. They also discovered a large bundle of cash in the suspect's pocket.<sup>6</sup>

While questioned by police, the suspect made inconsistent statements about the money's origin and the circumstances leading up to his procurement of the money.<sup>7</sup> Based on the suspect's conflicting responses, the police placed him in their patrol car where, only then, did they notify him of his right to remain silent and the right to an attorney. The officers drove the suspect to the bank for identification.<sup>8</sup> There, the employees confirmed that the suspect was indeed the perpetrator. The police then formally placed the suspect under arrest.<sup>9</sup>

This case illustrates an important legal conflict that currently exists among a majority of federal appellate courts: at what point should police officers be required to inform a suspect of his rights during their detention? More specifically, if a suspect is detained in a manner similar to that of an arrest, such as being handcuffed and surrounded by police, is there a legitimate concern that statements made by the suspect during this detention might be the product of police coercion? If so, should courts strive to deter such results?

Twenty-five years ago, the U.S. Supreme Court ruled in *Berkemer v. McCarty*<sup>10</sup> that routine traffic stops authorized by *Terry v. Ohio*<sup>11</sup> do not, as a general rule, require law enforcement officials to read suspects their rights as articulated in *Miranda v. Arizona*<sup>12</sup> before further questioning.<sup>13</sup> *Terry* and its progeny provide police with a narrowly tailored exception to the traditional probable cause standard for searches permitted under the Fourth Amendment (*Terry* stops, *Terry* searches, or stop and frisks).<sup>14</sup> The

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. 468 U.S. 420 (1984).

11. 392 U.S. 1 (1968).

12. 384 U.S. 436 (1966).

13. *Berkemer*, 468 U.S. at 438-39 ("In short, the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself, and in the subsequent cases in which we have applied *Miranda*." (citing *Orozco v. Texas*, 394 U.S. 324, 325 (1969); *Mathis v. United States*, 391 U.S. 1, 2-3 (1968); *Miranda*, 384 U.S. at 445, 491-98)).

14. A frisk in connection with *Terry v. Ohio* does not constitute a traditional search within the Fourth Amendment rubric. 392 U.S. at 29. Contrary to a comprehensive search sustained by probable cause, the U.S. Supreme Court in *Terry* envisioned a frisk to involve only a brief pat down of a suspect to secure potential weapons that might threaten public safety, not a search to secure evidence with an eye toward criminal prosecution. *See id.* Despite the formal distinction between a frisk and search, this Note will often refer to a frisk

exception provides that police may conduct a brief and limited stop and frisk of a suspect without probable cause when they have a reasonable suspicion that the individual is on the verge of (or in the midst of) committing a crime that involves some immediate danger.<sup>15</sup> Meanwhile, *Miranda* provides defendants with some relief from potentially coercive police interrogations by mandating that, before the interrogation, officers read a defendant his legal rights when in custodial settings that involve inherently coercive pressures (*Miranda* rights or *Miranda* warnings).<sup>16</sup>

Looking back, *Berkemer* marked only the initial confrontation in what now has emerged as a palpable tension between two core principles of the Warren Court jurisprudence: heightened vigilance toward protecting a criminal suspect's Fifth Amendment privilege against compulsory self-incrimination, and a police officer's authority to conduct a limited search based on a reasonable suspicion of criminal activity, a firm exception to the Fourth Amendment probable cause requirement.<sup>17</sup> Back in 1984, the Court in *Berkemer* understood these two doctrines as operating largely in a mutually exclusive context.<sup>18</sup> After all, the type of search authorized by the Court in *Terry* was intended to be brief and limited, unlike the highly intrusive character of police interrogations associated with *Miranda*.<sup>19</sup> In addition, the Court's narrow holding in *Berkemer* applied only to routine vehicle stops, not the broad spectrum of *Terry* encounters for which lower courts would ultimately deem it authoritative.<sup>20</sup> Since *Berkemer*, the vast expansion of police authority permitted by lower courts under *Terry*, such as the use of handcuffs, drawn weapons, and the relocation of suspects to police cruisers, has reinvigorated the debate about whether a tangible overlap between *Miranda* warnings and *Terry* stops now exists, leaving appellate courts with an issue far different in scope than that addressed by the Supreme Court in *Berkemer*.<sup>21</sup>

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under *Terry* as a type of search or "Terry search." Indeed, the Court has done so on several occasions. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993); *Michigan v. Long*, 463 U.S. 1032, 1050 (1983). Even *Terry* itself referred to the frisk as a search. See generally *Terry*, 392 U.S. 1.

15. See *infra* Part I.B.1–2.

16. See *infra* Part I.A.1–2.

17. This current struggle has been waged at the appellate level and among state courts. The U.S. Supreme Court has remained silent on the issue since *Berkemer v. McCarty*, 468 U.S. 420 (1984). See *infra* notes 261–63 and accompanying text.

18. See, e.g., *United States v. Manbeck*, 744 F.2d 360, 379 n.30 (4th Cir. 1984) (observing that the "Supreme Court has implied that custodial interrogations [for *Miranda*] and *Terry* stops are mutually exclusive").

19. See *infra* Part I.A.1, B.1.

20. See *Berkemer*, 468 U.S. at 435–42; see also *infra* Part II.A.

21. See *infra* notes 223–25 and accompanying text; see also E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 281–89 (2005) (tracing the evolution of *Terry* from its original, limited scope to its currently broad implementation); Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 728 (1994). Mark Godsey's article was the first to introduce and fully elaborate on the growing schism among appellate courts on this issue.

To better understand and ultimately resolve the current conflict between *Miranda* and *Terry*, one must be able to distinguish between the particular rules codified by each doctrine and the respective interests they each serve. Aside from producing basic guidelines for courts to follow, each doctrine is itself the product of balancing competing societal interests, in particular society's fundamental "interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."<sup>22</sup> As this Note demonstrates, the current schism among courts is as much a discord over the appropriate balance between these institutional factors as it is a disagreement over the basic application of *Miranda*'s and *Terry*'s technical holdings.<sup>23</sup>

It is also worth mentioning up front that this Note accepts as a given the expansion of police authority permitted by courts under *Terry* over the past forty years. Almost immediately following its inception, courts began applying the *Terry* doctrine beyond the limited constraints of its original scope and purpose.<sup>24</sup> In fact, one would be hard-pressed to find a court today that applies *Terry* according to that opinion's initial framework.

It follows that this Note rejects the argument that scaling back *Terry* to its original character would best resolve the matter.<sup>25</sup> To be sure, reining *Terry* back to its original context would in theory resolve the conflict, dissipating any vestige of potential tension between *Miranda* and *Terry*.<sup>26</sup> However, doing so is not only improbable, but also impractical given the degree of reliance exercised by courts and law enforcement officials on *Terry*'s progeny.<sup>27</sup> Maintaining theories, as Justice Oliver Wendell Holmes, Jr., wrote, is not the U.S. Constitution's intention.<sup>28</sup> It is rather "to preserve practical and substantial rights."<sup>29</sup> This Note seeks to explicate the growth of *Terry* for the sole purpose of reconciling its expansion with contemporary concerns and interests promoted by *Miranda*. Only then can courts formulate a "practical and substantial" legal solution.<sup>30</sup>

Part I of this Note details the background leading up to the current conflict. It emphasizes the historical context that produced both *Miranda* and *Terry*, and the evolution of each doctrine in subsequent years. Both *Miranda* and *Terry* were products of the Warren Court, an era characterized

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22. *Spano v. New York*, 360 U.S. 315, 315 (1959).

23. See *infra* notes 267–70 and accompanying text.

24. See *infra* notes 173–87 and accompanying text.

25. See Godsey, *supra* note 21, at 746–47.

26. See *id.*; see also *supra* note 21 and accompanying text.

27. See *infra* notes 223–25 and accompanying text. Mark Godsey's 1994 article advocated scaling back *Terry* during a period when lower courts were still in the process of defining *Terry*'s new and expansive scope. However, fifteen years later, the breadth of police authority under *Terry*, to the extent addressed in this Note, can no longer be considered an issue of material debate among appellate jurisdictions. Today, the matter is well settled.

28. *Davis v. Mills*, 194 U.S. 451, 457 (1904).

29. *Id.*

30. *Id.*

by broad, far-reaching opinions that made a lasting impact on both federal and state law.<sup>31</sup> While *Terry* expanded law enforcement authority, granting it power to briefly detain a suspect without probable cause, *Miranda* placed limitations on police conduct by requiring officers to abide by certain procedural guidelines if their detention generated potentially coercive pressures. Following Chief Justice Earl Warren's retirement in 1969, a more conservative Court labored to restrict *Miranda*'s hold on law enforcement while expanding the scope of the *Terry* exception.<sup>32</sup>

Part I also analyzes the Court's ruling in *Berkemer*, its seminal perspective on the relationship between *Miranda* and *Terry*. *Berkemer*'s holding was limited to the denial of a *Miranda* claim during a routine, motor vehicle stop. However, the opinion also included important dicta suggesting that *Miranda* warnings would not apply to most *Terry* encounters, given what it considered to be *Terry*'s limited character. Since then, appellate courts have seized upon *Berkemer*'s language to justify denial of *Miranda* rights during far more intrusive stop and frisk scenarios.<sup>33</sup>

Part I concludes with a discussion of recent developments that have sustained the current conflict. Over the past twenty-five years, appellate courts have significantly expanded police authority under *Terry*, assenting to the use of handcuffs, drawn weapons, and transportation of suspects under the aegis of an officer's stop and frisk powers.<sup>34</sup> In addition, new societal concerns related to the threat of terrorism indicate that courts are now more likely to side with police and to increase law enforcement authority to search and forcefully detain potential suspects.<sup>35</sup> These recent developments have injected *Terry* stops with more coercive police techniques, which raise new *Miranda* concerns not foreseen by the *Terry* or even *Berkemer* Courts. Indeed, the current conflict is rooted not only in *Terry*'s expansion, but also in lower courts' unwillingness to acknowledge that growth as they continue to apply *Berkemer*'s dicta to situations well beyond its intended scope.

Part II introduces the two basic approaches adopted by appellate courts to resolve the current problem. The U.S. Courts of Appeals for the First, Fourth, and Sixth Circuits have held that the inherent reasonableness of a stop and frisk permitted under the *Terry* doctrine precludes the necessity of *Miranda* considerations during particularly intrusive stops (inherent reasonableness approach).<sup>36</sup> The U.S. Courts of Appeals for the Second, Seventh, and Tenth Circuits have ruled that highly intrusive *Terry* stops

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31. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1744 (1991) ("At least in the area of criminal procedure, the Warren Court acted on a view of the judicial role, in both its substantive and its remedial aspects, that permitted far-reaching constitutional revision.").

32. See *infra* Part I.A.2, B.2.

33. See *infra* Part II.B.

34. See *infra* notes 223–25 and accompanying text.

35. See *infra* notes 230–54 and accompanying text.

36. See *infra* Part II.B.

may require *Miranda* warnings before further interrogation can proceed (intrusive level approach).<sup>37</sup> In addition, the U.S. Courts of Appeals for the Eighth and Ninth Circuits have each rendered inconsistent rulings on the matter.<sup>38</sup>

Finally, Part III recommends a balanced approach that seeks enforcement of *Miranda* when such custodial interrogations do arise, but also takes seriously potential public safety threats that warrant a delay of *Miranda*'s application, a condition that might arise frequently during *Terry* encounters given their focus on ad hoc detentions in public venues. This Note asserts that there exists a patent overlap between the two doctrines during highly intrusive *Terry* stops. Rather than constructing an approach that ignores this reality or advocates unrealistic changes in the law as a matter of convenience, courts should seek common ground between *Miranda* and *Terry*, a compromise that can be attained through awareness and understanding of the interests each doctrine respectively serves.

To accomplish that feat, this Note proposes a two-part inquiry that determines first whether a defendant is subject to custodial interrogation during a *Terry* stop according to the basic *Miranda* standard. If custodial interrogation is established, the additional question then becomes whether the state can present an overriding public safety concern that might justify postponement of *Miranda* warnings. Enforcing this exception preserves the Supreme Court's paramount concern in *Terry* for law enforcement to be able to act swiftly in situations involving exigent circumstances.<sup>39</sup> It is also perfectly consistent with *Miranda* itself, as the Court determined in *New York v. Quarles*,<sup>40</sup> where public safety concerns warranted a delay of *Miranda* warnings so that the police could gather vital information to avoid potential violence.<sup>41</sup> If the state cannot present such a justification, then *Miranda* should apply. This Note's test, however, does not alter the current, expanded version of *Terry* altogether.<sup>42</sup> The approach does not argue for the exclusion of physical evidence under the Fourth Amendment as a way to counteract *Terry*'s broad expansion at the appellate level. It merely subjects that legitimate police authority under *Terry* to Fifth Amendment exclusionary principles when *Miranda* enters the equation.

In fact, enforcing *Miranda* during various *Terry* encounters by no means undermines law enforcement's ability to carry out its proper duties as peacekeepers. For one, *Miranda*'s application during ad hoc police encounters does not jeopardize the admissibility of any physical evidence

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37. See *infra* Part II.C.

38. See *infra* Part II.B-C.

39. See *infra* notes 143-56 and accompanying text.

40. 467 U.S. 649 (1984).

41. *Id.* at 651. For the reader's clarification, this Note uses variations of the terms "public safety," "immediate danger," and "immediate exigency" interchangeably. They all refer to immediate potential violence directed at either law enforcement or innocent bystanders.

42. An officer may justify a *Terry* stop today based on any suspicion of criminal activity. See *infra* notes 175-83 and accompanying text.



during trial, even where *Miranda* itself has been violated.<sup>43</sup> The Supreme Court has established that the Fifth Amendment right against compulsory self-incrimination does not extend to physical evidence, which, in this context, applies to any evidence obtained during a valid *Terry* frisk or as a product of police questioning.<sup>44</sup> Only the defendant's statements may be excluded as a product of a *Miranda* violation. Meanwhile, the public safety exception assures that when police need a defendant's cooperation at a moment of immediate peril, *Miranda* will be delayed until that danger is averted. In the end, this Note's proposal seeks to preserve and enforce a defendant's constitutionally guaranteed right against compulsory self-incrimination while not placing an insurmountable burden on the state to protect the public from immediate harm.

Ultimately, resolving the current conflict between *Miranda* and *Terry* provides much needed clarity to the law of criminal investigative procedure. While a *Miranda* challenge can only exist in the context of attempting to exclude evidence at trial, there is also great value in preserving liberty at the moment when the individual's constitutional right is violated.<sup>45</sup> In the post-9/11 era, where the apparent need to remain vigilant over suspicious activity has created more uncertainty than clarity, the judiciary must be at the forefront of that movement to more effectively articulate the proper balance between liberty and security.<sup>46</sup> Law enforcement's ability to act swiftly in cases involving reasonable suspicion remains a vital tool, in particular against potential threats that far exceed those imaginable forty years ago. However, the law must operate within its permitted barriers according to the Constitution. In this context, the current impasse created by *Miranda* and *Terry* should be resolved.

## I. EARL WARREN'S TWO OPINIONS: THE SEEDS OF CONFLICT AND THE MODERN EXPANSION OF *TERRY V. OHIO*

Part I discusses the birth and development of both *Miranda* and *Terry* over the past forty years, along with recent trends that have fostered the collision between the two doctrines. Part I.A focuses exclusively on

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43. See *United States v. Patane*, 542 U.S. 630, 634 (2004) (holding that physical fruits of a *Miranda* violation need not be excluded).

44. See, e.g., *Schmerber v. California*, 384 U.S. 757, 764 (1966) ("The distinction which has emerged . . . is that the privilege [against compulsory self-incrimination] is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.")

45. This is what Justice Antonin Scalia characterized as the "distinction between, on the one hand, trial rights that *derive* from the violation of constitutional guarantees [(exclusionary principles)] and, on the other hand, the nature of those constitutional guarantees themselves." *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

46. September 11th has undoubtedly altered the manner in which judges view the world and, hence, the law. See, e.g., Panel Discussion, *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 *FORDHAM L. REV.* 1, 2 (2008) (comments of Judge Gerald Ellis Rosen) ("[I]t occur[s] to me how much the world is changing—not just for [citizens living in] New York in the aftermath of 9/11, but for those of us in the judicial system and in the courts. We all have to adapt and change.").

*Miranda*'s inception and growth while Part I.B traces the evolution of *Terry*. Part I.C examines the Supreme Court's first and only impression of the potential overlap between the two in *Berkemer*, a decision that has gradually become obsolete and misleading for courts who today continue to struggle with the collision between *Miranda* and *Terry*. Finally, Part I.D. discusses two post-*Berkemer* developments that have rendered that opinion outdated: the sanction of more intrusive police tactics under *Terry* by lower courts and the new political reality facing the judicial system in the post-9/11 era.

### A. A History of *Miranda*

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .<sup>47</sup>

The *Miranda* decision sought to protect defendants from inherently coercive pressures during police interrogation that might compel them essentially to be witnesses against themselves. Part I.A.1 details the impetus for creating *Miranda*'s framework and its legal impact on police interrogations. Part I.B.2 discusses the post-Warren Court's treatment of *Miranda*, a period that ultimately limited *Miranda*'s scope primarily to the circumstances and conditions specified by *Miranda* itself.

#### 1. The Decision

The Warren Court decided *Miranda* in 1966 at the peak of its so-called criminal procedure revolution,<sup>48</sup> in which constitutional protections afforded to criminal suspects expanded while traditional police practices became subject to increased judicial scrutiny.<sup>49</sup> As the Warren Court carried out this movement, its detractors often accused the Court of basing its decisions on the Justices' own personal philosophies rather than on the

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47. U.S. CONST. amend. V.

48. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 407 (2000) ("*Miranda* was the highpoint of the Warren Court's criminal procedure revolution . . . ."); see also Stephen Schulhofer, *Miranda v. Arizona: A Modest but Important Legacy*, in *CRIMINAL PROCEDURE STORIES* 155, 157-63 (Carol S. Steiker ed., 2006); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 *WM. & MARY L. REV.* 845, 868 (2007); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 *GEO L.J.* 1627, 1627-29 (2006).

49. See *Katz v. United States*, 389 U.S. 347, 357-59 (1967) (declaring that wiretapping of telephone booths by investigators without a warrant violated the Fourth Amendment); *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (ruling that the Sixth Amendment provides a criminal defendant the right to counsel during a police interrogation); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding a due process violation where the prosecution withheld certain evidence from the defendant during trial); *Douglas v. California*, 372 U.S. 353, 355 (1963) (guaranteeing indigent defendants the right to counsel during their first appeal of a criminal trial); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (requiring states to provide counsel to defendants who could not afford one in criminal trials according to the Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 653-55 (1961) (incorporating the exclusionary rule to state criminal procedure law through the Fourteenth Amendment).

Constitution itself.<sup>50</sup> In the end, few decisions generated more discussion and controversy than *Miranda*.<sup>51</sup>

The Court's ruling in *Miranda* was in many respects a conservative reaction to its more open-ended decision rendered two years earlier in *Escobedo v. Illinois*,<sup>52</sup> in which the Court increased judicial oversight over confessions and admissions made by defendants during the course of police interrogations.<sup>53</sup> Justice Arthur Goldberg's brief, but expansive, majority opinion in *Escobedo* explained that the Sixth Amendment's right to counsel (not the Fifth Amendment's protection against compulsory self-incrimination, which the Court would later use to support *Miranda*) granted a criminal defendant the right to an attorney while being interrogated once he became the focus of the police investigation.<sup>54</sup> The Court determined that an attorney's presence was necessary based on the recurring practice among police to use coercive means to produce self-incriminating confessions from criminal suspects.<sup>55</sup> The Court in *Escobedo* reiterated its intent to go beyond the pillars of a courtroom setting and into the more discrete confines of a police station when considering criminal defendant protections.<sup>56</sup>

Most significant, the opinion possessed an especially hostile attitude toward police interrogation practices altogether, in particular their

50. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) (challenging the Warren Court's legitimacy on several constitutional issues based on his view that "no argument that is both coherent and respectable can be made supporting a Supreme Court that 'chooses fundamental values' because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society"); Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 272-73 (1987) (arguing that some members of the Court "were then willing to compromise the search for truth in favor of extrinsic policy objectives"). Criticism of the Warren Court came from all different directions, including retired Supreme Court Justices, politicians, academics, and various political and social organizations. See generally CLIFFORD M. LYTLE, *THE WARREN COURT AND ITS CRITICS* (1968). Even renowned author Truman Capote, who had recently published his best-selling novel, *In Cold Blood*, testified before a congressional subcommittee that "had the *Miranda* ruling been in effect when the murderers of the Clutter family were captured, the two killers, who were later hanged, would have gone 'scot free.'" LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 201 (1983).

51. See Schulhofer, *supra* note 48, at 163-67 ("*Miranda* drew bitter opposition, literally from day one."). In response to popular sentiment against *Miranda v. Arizona*, 384 U.S. 436 (1966), Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, by which 18 U.S.C. § 3501 purportedly overturned *Miranda*. See Pub. L. No. 90-351, § 701(a), 82 Stat. 210 (1968), *invalidated by* *Dickerson v. United States*, 530 U.S. 428 (2000). However, the Supreme Court eventually ruled 18 U.S.C. § 3501 unconstitutional. See *Dickerson*, 530 U.S. at 431-32; see also *infra* notes 115-16 and accompanying text.

52. 378 U.S. 478 (1964).

53. See *id.* at 490-91.

54. *Id.*

55. *Id.* at 485-90.

56. *Id.* at 484-85 (stating that "a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding" (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)) (internal quotation marks omitted)).

procurement of confessions through unseemly tactics.<sup>57</sup> The dissenting bloc in *Escobedo* argued vigorously against the Court's Sixth Amendment interpretation and predicted that its enforcement would ultimately render police interrogations useless in the fact-seeking process.<sup>58</sup>

Two years later, in *Miranda*, the Court reaffirmed that preindictment police interrogations would be subject to robust constitutional supervision. However, the *Miranda* opinion curtailed *Escobedo*'s implication that confessions during police interrogation would never be admissible.<sup>59</sup> Chief Justice Warren's opinion in *Miranda* declared that the Fifth Amendment guarantee against compulsory self-incrimination prohibited police officers from questioning a suspect in custody unless the police gained a suspect's consent after notifying him of his legal rights.<sup>60</sup> In doing so, the opinion abandoned *Escobedo*'s Sixth Amendment imposition of an attorney's presence during the interrogation, a change that provided police with at least some opportunity to question a suspect if he consented.<sup>61</sup>

Those essential rights articulated by the Court in *Miranda*, now enshrined in our culture, include the right to remain silent, the right to be informed that "anything said can and will be used against the individual in court," and the right to an attorney regardless of a suspect's economic status.<sup>62</sup> *Miranda* rights are required, the Court ruled, from the moment that a defendant was subject to custodial interrogation by police.<sup>63</sup> The Court defined such a situation as one of "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>64</sup> As in *Escobedo*, the opinion did not create a bright-line distinction between arrest and nonarrest scenarios.<sup>65</sup>

Underlying the Court's demand for *Miranda* warnings was its assumption that an officer's custodial interrogation of a suspect, by its very

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57. *See id.* at 488–89.

58. *Id.* at 495 (White, J., dissenting) (indicating that the rule established by *Escobedo* is a "major step . . . to bar from evidence all admissions obtained from an individual suspected of a crime, whether involuntarily made or not").

59. *See* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 245; Russell L. Weaver, *Miranda at Forty*, 44 SAN DIEGO L. REV. 439, 442–44 (2007).

60. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

61. *See* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 120–21 (1989) (asserting that *Miranda* represented a capitulation to the demands of law enforcement following the outcry from *Escobedo*); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 121 (1998) ("*Miranda* was something of a compromise. The Court did not forbid all interrogations without counsel, as some had invited it to do and as others had feared it might hold in the wake of *Escobedo*. Interrogations still could continue, but within set procedures that would protect Fifth Amendment rights." (footnotes omitted)).

62. *Miranda*, 384 U.S. at 468–70.

63. *Id.* at 460–63.

64. *Id.* at 444.

65. *Id.*

nature, involved a coercive element.<sup>66</sup> Chief Justice Warren summarized the kinds of tactics often utilized by police during interrogations as follows:

When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.<sup>67</sup>

Chief Justice Warren repudiated such tactics, concluding that this “practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself.”<sup>68</sup> By compelling police officials to notify a criminal of his rights before further interrogation, the Court sought to restore the proper constitutional balance between a criminal defendant’s protections while in custody and law enforcement’s ability to unearth vital facts through interrogation.<sup>69</sup>

The Court’s focus on the environment surrounding police interrogations was critical toward reaching its ultimate conclusion.<sup>70</sup> The inherent coercion at a police station, where investigators operated in private quarters with no judicial supervision, placed vulnerable defendants at the mercy of law enforcement officials.<sup>71</sup> In response, the Court instituted *Miranda* warnings to counterbalance and diffuse those concerns. The majority viewed the addition of *Miranda* rights as part of a balancing formula between a state’s interest to prosecute potential criminals and the constitutional safeguards required for defendants under the Fifth Amendment.<sup>72</sup> Accordingly, the announced rule in *Miranda* did not remedy any specific constitutional violation made by police officers. Instead, it instituted a previolation requirement meant to ease tensions during custodial interrogation and to prevent any potential Fifth Amendment abridgment that might result.<sup>73</sup>

For opponents of Chief Justice Warren’s opinion, the Court’s “invention” of *Miranda* rights threatened to shatter the basic distinction between

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66. *Id.* at 467 (“We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”).

67. *Id.* at 455.

68. *Id.* at 457–58.

69. *Id.* at 477–78.

70. *Id.* at 445 (“An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today.”).

71. *Id.* at 457 (“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.”).

72. *See id.* at 460 (discussing the importance maintaining a “fair state-individual balance” (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 317 (John T. McNaughton ed., rev. ed. 1961) (internal quotation marks omitted))).

73. One subsequent Court opinion referred to *Miranda*’s purpose and effect, perhaps appropriately so, as “preventive medicine.” *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

legislature and judiciary.<sup>74</sup> Though *Miranda* did scale back *Escobedo*'s more radical insinuations, the birth of *Miranda* warnings, in their mind, represented the Warren majority's unapologetic attempt to rewrite the Constitution according to its own policy objectives.<sup>75</sup> The imposition of *Miranda* warnings during custodial interrogation would have the practical effect of deterring suspect cooperation with police.<sup>76</sup> Moreover, Warren's detractors insisted that it was the legislature's task, not the judiciary's, to implement broad procedural guidelines for police to counteract general concerns of police manipulation.<sup>77</sup> The Court's purported reliance on the Fifth Amendment to conceive its new doctrine, it followed, was nothing more than a "*trompe l'oeil*."<sup>78</sup>

Though *Miranda* represented a conservative shift away from *Escobedo*'s condemnation of all interrogations, it also stood as a powerful emblem of the Warren Court's boldness to prescribe new criminal defendant protections according to its own reading of the Constitution. The final sentence of Justice John Marshall Harlan II's dissent illustrated the pervasive concern that the Court was entering territory that could no longer be adequately checked by the Constitution itself. Borrowing a line from an opinion written twenty-three years earlier by Justice Robert Jackson, Justice Harlan warned that "[t]his Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."<sup>79</sup>

## 2. *Miranda*'s Progeny

Having established a novel Fifth Amendment framework in *Miranda*, much of the Court's attention shifted toward honing its definition of custodial interrogation. For the most part, the post-Warren Court adopted a narrow approach. In *Beckwith v. United States*,<sup>80</sup> a seven-Justice majority refused to find a *Miranda* violation where the government (in this case, the Internal Revenue Service) targeted a particular suspect and questioned him in his private residence but, according to the majority, had not restricted his

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74. *Miranda*, 384 U.S. at 531 (White, J., dissenting) ("[T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy . . .").

75. See *supra* note 50 and accompanying text.

76. *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("[T]he thrust of [*Miranda* warnings] is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward 'voluntariness' in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.")

77. See *Dickerson v. United States*, 530 U.S. 428, 460 (2000) (Scalia, J., dissenting) (deriding *Miranda*'s preventive rule as a "legislative achievement"). See generally Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. REV. 100 (1985).

78. *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

79. *Id.* at 526 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., concurring)) (internal quotation marks omitted).

80. 425 U.S. 341 (1976).

freedom in any significant way.<sup>81</sup> Later, the Court extended this rule to police interrogations of suspects at a police station, where the police informed a defendant that he was a potential suspect but also made clear that he was not under arrest.<sup>82</sup>

In *California v. Beheler*,<sup>83</sup> the Court appeared effectively to dismiss *Miranda*'s application during prearrest detentions altogether.<sup>84</sup> The opinion elaborated that "the ultimate inquiry [for *Miranda*] is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."<sup>85</sup> Soon after, appellate courts, seizing on *Beheler*'s restrictive language, began to deny *Miranda* challenges during most prearrest detentions, justifying their decision according to *Beheler*'s strict correlation between custodial interrogation and formal arrest.<sup>86</sup> Today, commentators often view custody and arrest as being virtually synonymous within the *Miranda* rubric.<sup>87</sup>

The Court similarly adopted a narrow approach for police interrogations. In *Rhode Island v. Innis*,<sup>88</sup> the Court denied *Miranda*'s applicability to a defendant whose confession resulted from a conversation with police, but not, in the Court's mind, an interrogative discourse.<sup>89</sup> At first glance, the Court in *Innis* endorsed what appeared to be a broad test for interrogation, defining it as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response

81. See *id.* at 347 ("Although the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview . . . he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding."). The Supreme Court had previously declined to restrict *Miranda* to the police station. See *Orozco v. Texas*, 394 U.S. 324, 326–27 (1969) (holding that custodial interrogation in the defendant's bedroom necessitated *Miranda* warnings).

82. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) ("Such a noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a 'coercive environment.'").

83. 463 U.S. 1121 (1983) (per curiam).

84. See *id.* at 1125.

85. *Id.* (quoting *Mathiason*, 429 U.S. at 495). The Court's language in *California v. Beheler* suggests that *Miranda*'s reliance on an arrest focused exclusively on the nature of an arrest's custody and degree of physical restraint. *Beheler* in no way suggested, for instance, that *Miranda* also required that an officer possess probable cause, or any other noncustodial element of an arrest. Instead, the Court deemed an arrest to be the appropriate barometer in determining when police custody of a suspect produced an inherently coercive setting.

86. See, e.g., *United States v. Phillips*, 812 F.2d 1355, 1360 (11th Cir. 1987); *United States v. Manbeck*, 744 F.2d 360, 378–79 & n.30 (4th Cir. 1984).

87. See, e.g., Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1109 (2002) ("[T]he Court . . . has adopted a strict definition of 'custody' that generally exempts encounters with police short of actual arrest from the strictures of *Miranda*."); George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, 825 (1995) (reviewing JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* (1993)) (noting that *Miranda*'s definition of custody is "the functional equivalent of arrest").

88. 446 U.S. 291 (1980).

89. See *id.* at 303.

from the suspect."<sup>90</sup> Thus, interrogation required the form of "express questioning or its functional equivalent."<sup>91</sup>

When applying its newly constructed test to the facts in *Innis*, however, the Court's holding suggested a far more narrow definition. In *Innis*, a group of officers searching for a missing gun placed the suspect in the back of their patrol car.<sup>92</sup> Without directing any questions at the suspect, the officers engaged in a conversation amongst themselves in which one of the officers mentioned, "[T]here's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."<sup>93</sup> The officers continued discussing the dangers of a missing gun until the suspect finally confessed to the gun's whereabouts.<sup>94</sup> The majority in *Innis* refused to look beyond the surface of the casual police conversation to determine whether the officers' discussion reasonably elicited the confession.<sup>95</sup> The majority found that the conversation possessed no coercive element or "measure of compulsion above and beyond that inherent in custody itself" akin to an interrogation.<sup>96</sup>

Finally, in *Quarles*, the Justices created a public safety exception to *Miranda* warnings.<sup>97</sup> The Court ruled that, where immediate danger still existed during a police interrogation, law enforcement could delay reciting *Miranda* rights following an arrest that would otherwise constitutionally require such warnings, until they could act to avert the immediate crisis.<sup>98</sup> Justice William Rehnquist's opinion justified the exception based on the Court's view that reciting *Miranda* warnings during such a dangerous interval would place too great a strain on police to make an instantaneous decision as to the suspect's rights during a pressing exigency.<sup>99</sup>

In *Quarles*, the police had spotted a potential rape suspect in a supermarket, having received his physical description from the accuser.<sup>100</sup> The police surrounded and handcuffed the defendant before conducting a brief search.<sup>101</sup> During the course of their search, the police discovered that the defendant possessed an empty gun holster, which immediately prompted them to ask for the gun's whereabouts without first reciting *Miranda* warnings.<sup>102</sup> The defendant gave up the location of the gun, a

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90. *Id.* at 301 (footnote omitted).

91. *Id.* at 300-01.

92. *Id.* at 294.

93. *Id.* at 294-95 (internal quotation marks omitted).

94. *Id.* at 295.

95. *Id.* at 302 (alluding to the fact that the "conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited").

96. *Id.* at 300.

97. *New York v. Quarles*, 467 U.S. 649, 651 (1984).

98. *Id.* at 656-57.

99. *Id.*

100. *Id.* at 652.

101. *Id.*

102. *Id.*



statement later determined to be self-incriminating after the government charged the defendant with criminal possession of a weapon.<sup>103</sup>

It is noteworthy that the majority opinion determined the suspect in *Quarles* to be under arrest based solely on the fact that the police handcuffed and surrounded him in the supermarket.<sup>104</sup> The Court concluded that these measures subjected the defendant to a degree of restraint comparable to a formal arrest under *Beheler*.<sup>105</sup> Only after the defendant uttered the self-incriminating statement did the police formally arrest him.<sup>106</sup>

Overall, the circumstances in *Quarles* were markedly different than those involved in *Miranda*. The detention took place outside the police station, where the officer's conduct was exposed to public scrutiny.<sup>107</sup> Most important, the police interrogation was not focused on securing a conviction, but on averting an immediate danger.<sup>108</sup> Their objective was to play the role of peacekeeper, a duty that the state precisely authorizes police to carry out during such exigent circumstances.

The Court concluded that the unique set of factors in *Quarles* had shifted the balance of interests in favor of the state.<sup>109</sup> The Justices' institutional concern, ensuring that police officers carry out their peacekeeping duty during dangerous intervals, outweighed *Miranda*'s concern regarding confessions produced through coercion.<sup>110</sup> To be sure, the police conduct in *Quarles* did involve coercive tactics worthy of *Miranda*'s custodial standard. However, from the Court's perspective, the police objective, given the circumstances, warranted such measures.<sup>111</sup>

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103. *Id.* at 652–53.

104. *Id.* at 655.

105. *Id.*

106. *Id.* at 652.

107. *See id.*

108. *See id.*

109. *See id.* at 657–60. Justice William Rehnquist elaborated on the balance shift:

Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here . . . the cost would have been something more than merely the failure to obtain evidence useful in convicting *Quarles*.

*Id.* at 657.

110. *Id.* at 656–58. The Court's allowance of an exception to *Miranda* based on its concern for public safety (including the safety of the officers) involved similar theoretical and practical considerations, as did the Warren Court's justification in *Terry* for an exception to the probable cause requirement under the Fourth Amendment. *See infra* Part I.B.1.

111. *Quarles*, 467 U.S. at 656–59. There currently exists a dispute among circuit courts as to the breadth of circumstances covered by the *Quarles* exception. The U.S. Courts of Appeals for the Fourth, Fifth, and Sixth Circuits have held that only exigent circumstances may warrant a public safety exception to *Miranda*. *See* United States v. Williams, 483 F.3d 425, 428–29 (6th Cir. 2007); United States v. Mobley, 40 F.3d 688, 693 (4th Cir. 1994); United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989). Meanwhile, the U.S. Courts of Appeals for the First, Eighth, and Tenth Circuits have ruled that *Quarles* should apply so long as there exists inherently dangerous material (such as a hidden weapon) at the place of

Writing for the majority in *Quarles*, Justice Rehnquist possessed an exceedingly skeptical attitude toward *Miranda*'s constitutional validity, referring to *Miranda* as "the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination," not as a constitutional rule in itself.<sup>112</sup> In light of an increasingly conservative Court, many Supreme Court observers speculated whether *Quarles*, among other opinions,<sup>113</sup> would ultimately lead to *Miranda*'s demise.<sup>114</sup>

Speculation surrounding *Miranda*'s future remained potent until 2000, when the Court finally affirmed the decision's constitutional stature and assured its continued survival in *Dickerson v. United States*.<sup>115</sup> Ironically, it was now Chief Justice Rehnquist, perhaps *Miranda*'s most enduring critic, who wrote for the majority in *Dickerson*. In his opinion, the Chief Justice justified *Miranda*'s constitutional legitimacy according to the indisputable fact that it had "become embedded in routine police practice to the point where the warnings have become part of our national culture."<sup>116</sup>

Though the actual holding in *Miranda* has not been undermined, its progeny have produced a definition of custodial interrogation that aligns closely to the type of situations analogous to a police station interrogation. *Miranda* warnings may still apply outside the confines of a police station where the setting possesses an inherently coercive environment.<sup>117</sup> As the Supreme Court provided more recently in *Thompson v. Keohane*,<sup>118</sup> the current inquiry for *Miranda* asks whether factual circumstances present a setting in which a defendant reasonably believed he was not at liberty to

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custodial interrogation, but that an ostensible emergency is not necessary. See *United States v. Liddell*, 517 F.3d 1007, 1009–10 (8th Cir. 2008), cert. denied, 129 S. Ct. 627 (2008); *United States v. Fox*, 393 F.3d 52, 60 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1125 (2005); *United States v. Phillips*, 94 F. App'x 796, 801 (10th Cir. 2004), vacated on other grounds, 543 U.S. 1101 (2005). This Note's treatment of the public safety exception aligns closer to the latter's argument than the former. Though the possibility cannot be too remote to render the danger's likelihood minimal, the existence of inherently dangerous material may be probative of the need of immediate police action as in *Quarles*, where there existed an "immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe" constituted a danger to public safety. *Quarles*, 467 U.S. at 657.

112. *Quarles*, 467 U.S. at 657. The Court first characterized *Miranda* as a prophylactic rule in *Michigan v. Tucker*, 417 U.S. 433, 439 (1974), once again courtesy of a Justice Rehnquist opinion. See Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 579–80 (2007).

113. See *Davis v. United States*, 512 U.S. 452, 462–65 (1994) (Scalia, J., concurring); *Oregon v. Elstad*, 470 U.S. 298, 317–18 (1985).

114. See, e.g., Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 462–63 (1998); Daniel P. Collins, *Farewell Miranda?*, 1995 PUB. INT. L. REV. 185, 202–06 (reviewing GRANO, *supra* note 87); Steven Andrew Drizin, Note, *Fifth Amendment—Will the Public Safety Exception Swallow the Miranda Exclusionary Rule?*: *New York v. Quarles*, 75 J. CRIM. L. & CRIMINOLOGY 692, 713–14 (1984); see also William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 822–24 (2005).

115. 530 U.S. 428, 432 (2000).

116. *Id.* at 443.

117. See *Orozco v. Texas*, 394 U.S. 324, 326–27 (1969); see also *supra* note 81 and accompanying text.

118. 516 U.S. 99 (1995).

leave during an interrogation that the police should have known might lead to self-incrimination.<sup>119</sup> Based on the Court's body of precedent, this setting is typically invoked during circumstances in which the police detain a suspect in a manner analogous to custodial arrest.<sup>120</sup>

### B. *A History of Terry*

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 . . . .<sup>121</sup>

With respect to unreasonable searches and seizures prohibited by the Fourth Amendment, the Court's decision in *Terry* provided police with a new, limited authority to frisk potential suspects on the street without probable cause. The Justices implemented this new exception to the Fourth Amendment's probable cause standard in response to contemporary societal pressures to restore peace in urban communities following the destructive race riots of the late 1960s. Part I.B.1 analyzes the Court's conception of *Terry* and the parameters of its new exception to the Fourth Amendment. Part I.B.2 analyzes the post-Warren era expansion of *Terry* and its implications on future jurisprudence.

#### 1. The Decision

By the time the Warren Court announced its decision in *Terry* during the tumultuous summer of 1968, two years after *Miranda*, the Justices' tenor had noticeably changed. Absent were bold proclamations revolutionizing criminal suspect protections under the Constitution.<sup>122</sup> The Court's new, subdued tone can be traced to a series of developments taking root across the nation during the late 1960s.

During the interlude between *Miranda* and *Terry*, the country endured increased social unrest as race riots spread rapidly in cities across the nation. During the "long, hot summer of 1967," 128 cities, most prominently Newark and Detroit, experienced varying degrees of racial rioting and civil unrest that ultimately shattered the infrastructure of their low-income neighborhoods.<sup>123</sup> The assassination of Martin Luther King,

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119. *See id.* at 112. Courts must now "consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave." *Yarborough v. Alvarado*, 541 U.S. 652, 659 (2004) (citing *Keohane*, 516 U.S. at 112).

120. *See supra* notes 83–87, 104–06 and accompanying text.

121. U.S. CONST. amend. IV.

122. *See, e.g.*, Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 31 (2005) ("Earl Warren stepped down from the Supreme Court in June 1969. But the so-called revolution in American criminal procedure had already ended. It had done so a full year earlier when the Court handed down its opinions in the 'stop-and-frisk' cases—*Terry v. Ohio* and two companion cases." (footnote omitted)).

123. POWE, *supra* note 48, at 274–78 (internal quotation marks omitted); Charles Sumner Stone, Jr., *Thucydides' Law of History, or From Kerner, 1968 to Hacker, 1992*, 71 N.C. L.

Jr., in April of 1968 sparked a new wave of riots in urban black neighborhoods, increasing tensions between police and the black community.<sup>124</sup> In fact, amidst the Justices' drafting of the *Terry* opinion, Washington, D.C., witnessed some of the fiercest rioting in the city's history.<sup>125</sup>

In the political arena, President Lyndon B. Johnson, a close ally of several members of the Court, announced in March of 1968 that he would not seek a second term as President.<sup>126</sup> Meanwhile, a revived Republican Party was developing a strategy to seize the White House in 1968, predicated, at least in part, on a crusade against the Warren Court.<sup>127</sup> Indeed, few decisions had drawn more fire from Republican politicians than *Miranda*.<sup>128</sup> The Republicans' prospect for victory appeared almost assured when, only five days before the Court handed down its decision in *Terry*, Robert F. Kennedy was assassinated at the Ambassador Hotel in California in the midst of his bid for the Democratic nomination for President.<sup>129</sup> The news of Kennedy's death only exacerbated existing worries about the degree of social unrest throughout the country. The circumstances surrounding *Terry* placed the Justices in a precarious situation, as they well understood the potential impact that the *Terry* decision might have in an unstable political climate.<sup>130</sup>

The facts in *Terry*, while occurring in 1963, illustrated the problems plaguing urban communities during the uneasy moments of the late 1960s. During a patrol of downtown Cleveland, Officer Martin McFadden, a white police detective of nearly forty years, spotted two black men acting

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REV. 1711, 1717-19 (1993) (describing the hostile state of race relations during the late 1960s).

124. See Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 891-92 (1998).

125. *Id.*

126. JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 487 (2006).

127. See, e.g., Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1424 & n.323 (2004) (noting that presidential candidate Richard "Nixon wrote a position paper on crime in which he blamed most of the country's woes on the Supreme Court" and criticized *Escobedo* and *Miranda* as undermining police authority while empowering criminals); see also Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 438-40 (2004).

128. See Schulhofer, *supra* note 48, at 164 ("For Nixon, *Miranda* came at the perfect time and provided just the highly visible opening he needed."); *supra* note 127 and accompanying text.

129. See Katz, *supra* note 127, at 438.

130. See *id.* at 436 n.77. Only three months before the Court made its ruling in *Terry*, the Kerner Commission, established by President Lyndon B. Johnson to investigate the causes of the crippling race riots, released its report. The report found that the escalating tensions between urban blacks and local police played a major role in the outbreak of violence. *Id.*; see also Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2258, 2263 (2002) (discussing the Kerner Report in historical context and in relation to *Terry*). See generally Stone, *supra* note 123 (describing the Kerner Commission's impact and legacy).

suspiciously in front of a store window.<sup>131</sup> Believing that the men were planning to rob the store, the officer stopped the two men as they walked toward a third suspicious individual.<sup>132</sup> Based on his observations, the police officer patted down the three men and discovered that two of them, John W. Terry and Richard Chilton, possessed weapons.<sup>133</sup> McFadden then brought the two men to the police station where they were charged with carrying concealed weapons.<sup>134</sup> When the defendants challenged the evidence's admissibility based on McFadden's lack of probable cause, the Ohio courts denied the defendants' motion.<sup>135</sup> On appeal to the U.S. Supreme Court, Terry repeated the assertion that, absent probable cause, Officer McFadden had no authority to search and had violated his Fourth Amendment rights.<sup>136</sup>

Still inclined to provide firm protections for criminal defendants, Chief Justice Warren's first draft of the *Terry* opinion allied steadfastly with the proposition that only probable cause could justify frisking a person for weapons.<sup>137</sup> The draft contained lengthy, drawn-out instructions for police officers similar to those provided by his *Miranda* opinion.<sup>138</sup> Nonetheless, Warren's first draft upheld Terry's conviction, since it reasoned that Officer McFadden's suspicion satisfied the threshold of probable cause—a conclusion undoubtedly driven by the sensitivity of the issue at the time.<sup>139</sup> When Warren distributed his initial draft, most of the Justices rejected the opinion's adherence to the probable cause standard and demanded broader authority for police to search potential criminal suspects.<sup>140</sup> In response to the Justices' consensus, Justice William Brennan aided Chief Justice Warren in crafting a revised opinion that veered *Terry* in an entirely new direction.<sup>141</sup> The final version of the opinion, endorsed by six Justices altogether, carved out an exception to the Fourth Amendment's probable cause requirement where exigent circumstances warranted a brief but limited frisk by police.<sup>142</sup>

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131. *Terry v. Ohio*, 392 U.S. 1, 5–6 (1968). Chief Justice Earl Warren's opinion in *Terry* notably omitted the defendant's race, no doubt an indication of his concern for racial tension while drafting the opinion. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–73 (1999).

132. *Terry*, 392 U.S. at 6–7.

133. *Id.*

134. *Id.* at 7.

135. *Id.* at 7–8.

136. *Id.* at 8. A few weeks after the U.S. Supreme Court agreed to hear the case, Richard Chilton was killed in a confrontation with police after attempting to rob a drugstore. See John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less than Probable Cause*, in CRIMINAL PROCEDURE STORIES, *supra* note 48, at 295, 300.

137. See Barrett, *supra* note 136, at 304; Frank Rudy Cooper, *The Spirit of 1968: Toward Abolishing Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539, 542 (2007).

138. See Barrett, *supra* note 136, at 304; Cooper, *supra* note 137, at 542.

139. See Barrett, *supra* note 136, at 305; Cooper, *supra* note 137, at 542.

140. See Barrett, *supra* note 136, at 304–05; Cooper, *supra* note 137, at 542.

141. See Barrett, *supra* note 136, at 305–06; Cooper, *supra* note 137, at 542.

142. *Terry v. Ohio*, 392 U.S. 1, 24–27 (1968).

The narrow exception articulated in *Terry* contained a two-part analysis. First, a police officer could only conduct a frisk lacking probable cause when he held a reasonable suspicion of imminent danger either to himself or to others nearby.<sup>143</sup> The Court announced that it would review the reasonableness of police activity under an objective standard: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”<sup>144</sup> Any justification lacking a reasonable suspicion of immediate danger, the Court warned, “would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches,” a basis too feeble to override a defendant’s constitutional protections.<sup>145</sup>

Second, the Court allowed only a limited search to the extent that it was “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>146</sup> Once the fear of danger was averted, no frisk would be valid under *Terry*.<sup>147</sup> The Court authorized the frisk of the suspect only as a necessary measure to prevent injury to police or bystanders, not as a routine investigatory tool. Accordingly, the admissibility of evidence found during the frisk would only be an incidental product of *Terry*’s primary aim—to protect civilians from immediate harm.

Most important, a police officer could only conduct a limited, superficial frisk of a suspect for the purpose of securing weapons or other dangerous material.<sup>148</sup> A pat down of the suspect would be reasonable, but any search beyond the outer surface of his clothing would exceed police authority.<sup>149</sup> Having permitted police action against a suspect where probable cause did not exist, the *Terry* Court viewed the limited breadth of the frisk as the appropriate trade-off to best preserve balance between state and individual interests.<sup>150</sup>

The six-Justice majority in *Terry* only approved of a police frisk, not the additional “stop,” which would have encompassed the power to interrogate

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143. *Id.* at 20–21, 28–29 (justifying the exception because a police officer’s duty to investigate suspicions involves “an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been . . . subjected to” probable cause requirements). The Court’s discussion of immediate danger possessed similar language to that which it would eventually use sixteen years later in *New York v. Quarles*, 467 U.S. 649 (1984). See *supra* notes 97–111 and accompanying text.

144. *Terry*, 392 U.S. at 21–22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

145. *Id.* at 22. The term “reasonable suspicion” was ironically coined by Justice William Douglas, the lone dissenter in *Terry*. See *id.* at 37 (Douglas, J., dissenting).

146. *Id.* at 20 (majority opinion).

147. See *id.* at 30–31.

148. *Id.* at 29–31.

149. *Id.*

150. See Godsey, *supra* note 21, at 746; Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 424–26 (2006).

the suspect.<sup>151</sup> The majority's aim—to create a narrow, but effective exception to the probable cause requirement—produced an exceedingly cautious attitude toward embracing the additional “stop,” which would have only disrupted the delicate balance already achieved.<sup>152</sup> Thus, the original *Terry* holding did not consider a scenario in which the suspect would be subjected to both a frisk and police interrogation.<sup>153</sup> This likely explains why the majority felt no need to address any potential *Miranda* concerns that might arise during a coercive *Terry* setting. In fact, not one of the four opinions issued by the Justices in *Terry* even mentioned *Miranda*.<sup>154</sup>

Chief Justice Warren acknowledged that the circumstances then surrounding the country played an influential role in fueling the Court's novel approach.<sup>155</sup> Domestic pressures to restore peace were simply too great for the Court to “blind [itself] to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”<sup>156</sup> As a result, the Court shifted the balance in favor of the government, despite trying to limit that authority as much as possible.

Indeed, the Court's strains in reaching its conclusion were evident from the opinion itself. As one of Chief Justice Warren's biographers has pointed out, “[o]ne cannot read [the opinion] without being struck by its caveats, its revealing ‘howevers’ and ‘on the other hands.’”<sup>157</sup> Another observer notes that “[t]he tension between idealism and realism was apparent in the very structure of Warren's opinion for the Court in *Terry*.”<sup>158</sup> Though it approved only a limited frisk, the Court's delicate balance nonetheless established a framework that provided police with a new and forceful justification for invasive searches.<sup>159</sup> In retrospect, one

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151. *Terry*, 392 U.S. at 19 n.16. The term “stop and frisk” has become synonymous with *Terry* based on subsequent rulings by the Court. However, the original opinion specifically rejected a stop and frisk framework. See POWE, *supra* note 48, at 406.

152. When referring to a stop, the Court was not referring to the physical stop of a suspect, which was, to be sure, a necessary prerequisite for their ability to frisk that suspect. Instead, a stop in the *Terry* context referred to the officer's right to question or detain a suspect beyond the initial frisk. See *id.* at 10.

153. Justices Byron White and John Marshall Harlan II conversely asserted, in their respective concurring opinions, that the authority to stop and the authority to frisk were logically connected; that the power to frisk necessarily implied the initial right to stop. See *id.* at 31–34 (Harlan, J., concurring); *id.* at 34–35 (White, J., concurring). The Court would eventually assume this view of *Terry* four years later in *Adams v. Williams*, 407 U.S. 143 (1972). See *infra* note 175 and accompanying text.

154. See generally *Terry*, 392 U.S. 1.

155. *Id.* at 9–10 (“We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court.”).

156. *Id.* at 24.

157. NEWTON, *supra* note 126, at 489.

158. Mark Tushnet, *The Warren Court as History: An Interpretation, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE I*, 23 (Mark Tushnet ed., 1993).

159. *Terry*, 392 U.S. at 27 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to

might conclude that “[t]he same chief justice who had outraged police with *Miranda* handed them wide latitude and power with *Terry*.”<sup>160</sup>

Finally, *Terry* did not so much recognize a type of search as it did a justification. To be sure, the opinion articulated certain limits to the actual conduct permitted by *Terry*,<sup>161</sup> nevertheless its focus remained on the set of circumstances that would justify police activity akin to Officer McFadden’s conduct.<sup>162</sup> The Court’s decision ultimately cast a wide umbrella over an infinite number of scenarios in which observations of suspicious activity made by police justified extemporaneous searches.<sup>163</sup> In doing so, *Terry* produced an amorphous category of searches, not limited to a particular set of facts, that today have become routine for police to use.<sup>164</sup>

## 2. *Terry*’s Progeny

In subsequent cases, as the post-Warren Court remained cognizant of the *Terry* majority’s painstaking effort to accentuate a delicate balance, the Justices repeatedly stressed the importance of preserving *Terry*’s compromise.<sup>165</sup> In *Dunaway v. New York*,<sup>166</sup> the Court emphasized that it had “been careful to maintain [*Terry*’s] narrow scope,” mindful of the fact that a police frisk could only be a limited intrusion of a suspect’s privacy in order to investigate a reasonable suspicion of danger.<sup>167</sup> In *Dunaway*, Justice Brennan’s opinion rejected the government’s argument that *Terry* permitted police to bring a suspect back to the station when the officers lacked probable cause.<sup>168</sup> By forcing a suspect to accompany officers to the police station, the action crossed the threshold from a *Terry* stop to an arrest.<sup>169</sup> Since *Terry* was an exception to the probable cause requirement, and an arrest required probable cause, a valid *Terry* stop could not venture into the realm of arrest authority.<sup>170</sup>

Yet, while repeatedly underscoring *Terry*’s limited nature and scope, the Court slowly began to loosen its strings, making deliberate alterations to *Terry*’s fragile balance.<sup>171</sup> Only four years after its ruling in *Terry*, the

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believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual . . .”).

160. NEWTON, *supra* note 126, at 489.

161. *See supra* notes 148–50 and accompanying text.

162. *See supra* notes 143–47 and accompanying text.

163. *See Terry*, 392 U.S. at 15 (“No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.”).

164. *See Estrada, supra* note 21, at 311 (“A dexterous and amorphous creature, distinct from freedom and divorced from arrest, the *Terry* stop thrives in this peculiar no-man’s land.”).

165. *See id.* at 283–84.

166. 442 U.S. 200 (1979).

167. *Id.* at 210–11.

168. *Id.* at 211–14.

169. *Id.* at 212 (stating that “the detention of petitioner was in important respects indistinguishable from a traditional arrest”).

170. *See supra* notes 142–43 and accompanying text.

171. *See Estrada, supra* note 21, at 284–86.



Court intimated in *Adams v. Williams*<sup>172</sup> that a frisk need not result solely from the suspicion of immediate danger.<sup>173</sup> Instead, the Justices suggested that a reasonable duty to investigate could alone justify a *Terry* stop.<sup>174</sup>

*Adams* marked an important early modification to the Court's *Terry* jurisprudence. First, in *Adams*, the Court officially endorsed the position that *Terry* not only authorized a frisk, but also police authority to stop and detain the suspect briefly for additional questioning.<sup>175</sup> Second, the Court did not find it necessary to distinguish the facts of *Adams*, where the officer's reasonable suspicion derived from a tip provided by a different source, from *Terry* where the officer relied on his own observations.<sup>176</sup> Finally, the officer's interaction with the defendant did not involve a dire need to avert immediate danger as mentioned in *Terry*. The defendant in *Adams* was sitting in his car with the windows rolled up when the officer approached him.<sup>177</sup> The Court's summary of facts provided little indication that the defendant was on the verge of committing a felony.<sup>178</sup>

Based on the majority's view that *Terry* permitted the type of police action exercised in *Adams*, the Court implicitly adopted the view that police authority to conduct stop and frisks was routine in light of their basic investigatory duties, rather than a rare exception to be utilized only in cases of immediate danger.<sup>179</sup> *Adams* shifted the analytical focus of *Terry* away from exigent circumstances to a basic reasonableness inquiry of the officer's search given the totality of circumstances involved.

Building on *Adams*, the Court began to loosen its restrictions on the kinds of evidence that might be admissible based on a stop and frisk. Originally, in *Terry*, the majority opinion had suggested that only securing weapons could be the explicit aim during a *Terry* frisk, since its very purpose was to avert an immediate danger.<sup>180</sup> But as law enforcement attention shifted

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172. 407 U.S. 143 (1972).

173. *See id.* at 147–49.

174. *Id.* at 145–46.

175. *Id.*; *see also* David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 23 (1994) (“*Adams* took the point further: when the offense suspected involves the possibility of armed violence (recall that the informant reported the defendant had a gun at his waist), a frisk may follow a stop without any pause in between.”). Because the Court incorporated the “stop” almost immediately following *Terry*, and to avoid unnecessary confusion, this Note subsequently refers to the rule announced in *Terry* as a “stop and frisk.” Indeed, the term “stop and frisk” today has become synonymous with *Terry* itself.

176. *See Adams*, 407 U.S. at 144–45; *Terry v. Ohio*, 392 U.S. 1, 5–7 (1968).

177. *Adams*, 407 U.S. at 145. The tip indicated that the defendant possessed a gun but provided little information regarding an impending crime beyond mere possession of a weapon. *Id.* at 144–45.

178. *Id.*

179. *See, e.g.*, Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 944 (1998) (“*Adams v. Williams* did more than reiterate *Terry*. It seemed to bolster the ‘investigatory stop’ part of stop and frisk . . .”).

180. *Terry*, 392 U.S. at 30–31 (stating that a limited frisk “is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken”).

away from race riots in the 1970s and 1980s in favor of the war on drugs, the Justices quickly embraced the government's contention that drugs could also be the explicit target and sole fruit of a *Terry* search.<sup>181</sup> The Court's broad take on *Terry*'s "reasonableness" requirement in the post-*Adams* era also led it to approve the admissibility of evidence produced by a frisk that was conducted after a mere traffic stop violation.<sup>182</sup> Such circumstances, the three dissenters contended, undermined the compromise struck by *Terry*.<sup>183</sup>

Meanwhile, the Court also began to approve some police searches that exceeded *Terry*'s original sanction of a brief and limited frisk. In both *Michigan v. Summers*<sup>184</sup> and *United States v. Sharpe*,<sup>185</sup> the Court permitted an extended detention of a suspect under *Terry*, one that exceeded the scope permitted in *Terry* or even *Adams*.<sup>186</sup> Despite reiterating *Terry*'s call for a limited intrusion, the majority nonetheless approved longer police detentions based on the state "interest in preventing flight in the event that incriminating evidence is found" and also "the interest in minimizing the risk of harm to the officers."<sup>187</sup> The Justices would consistently reassert the notion that police conduct under *Terry* must be "the least intrusive means reasonably available" to fulfill the stop's end, but deciphering what exactly constituted that means or, for that matter, the end, remained an open and hotly contested issue.<sup>188</sup> Ultimately, the Court's "end justifies the means" rationale, evident by the statements in *Summers*, would later become a crucial source of validation for appellate courts when justifying even more intrusive police searches.<sup>189</sup>

Though somewhat mild compared to future applications of *Terry*, the Supreme Court rulings in the 1970s and early 1980s established a broader context in which *Terry* stop and frisks applied. During this period, the

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181. See *United States v. Place*, 462 U.S. 696, 703 (1983); *United States v. Mendenhall*, 446 U.S. 544, 561–62 (1980) (Powell, J., concurring); see also *United States v. Hensley*, 469 U.S. 221, 226 (1985) (defining the *Terry* rule as that where "law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity," essentially acknowledging the shift away from *Terry*'s demand for looming danger in favor of a broad test that included virtually any criminal acts). *United States v. Hensley* ruled that law enforcement possessed authority under *Terry* to investigate a suspect for past crimes (felonies), even if the suspect posed no immediate danger at the time of the stop. 469 U.S. at 229.

182. See *Pennsylvania v. Mims*, 434 U.S. 106, 108–11 (1977). In *Pennsylvania v. Mims*, police officers conducted a routine traffic stop under *Terry* when they noticed an expired license plate. *Id.* at 107. After stopping the vehicle, the officers ordered the defendant out of the car, at which time they noticed a large bulge under his jacket. *Id.* This observation provided the police with reasonable suspicion to frisk the defendant; a search that ultimately produced a weapon. *Id.* at 107–09.

183. *Id.* at 115–24 (Stevens, J., dissenting).

184. 452 U.S. 692 (1981).

185. 470 U.S. 675 (1985).

186. See *id.* at 685–86; *Summers*, 452 U.S. at 710–11 (Stewart, J., dissenting); see also Estrada, *supra* note 21, at 284–85.

187. *Summers*, 452 U.S. at 702.

188. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

189. See *infra* notes 222–29 and accompanying text.

Court shifted away from its original conception of *Terry* as a tool to prevent immediate dangers toward a view that *Terry* searches could be legitimized as an investigative norm during routine patrols. This change allowed appellate courts gradually to extend the scope of stop and frisks to an endless array of circumstances.<sup>190</sup> In the end, the theoretical balance originally struck in *Terry* was simply too delicate to withstand the force of its underlying, expansive logic as applied by courts in a practical setting.<sup>191</sup>

### C. *Berkemer v. McCarty*: Its Holding and Legacy

In their respective origins, *Miranda* and *Terry* dealt with separate constitutional inquiries. *Terry* provided police with a new justification to briefly frisk potential suspects on the street to avert danger, while *Miranda* involved protections for suspects during highly coercive police interrogations. Their significance and scope were never meant to intertwine, a point demonstrated by Chief Justice Warren's adherence to the view that *Terry* did not permit an officer to interrogate a suspect during or following the frisk.<sup>192</sup>

Perhaps just as important, however, both *Miranda* and *Terry* were products of the Warren Court—a Court bent on implementing broad and elaborate guidelines that lacked transparency in their practical effect on the nation's criminal investigative procedure law.<sup>193</sup> Each doctrine was fashioned from a balance of the same institutional factors, a state's interest to investigate and prosecute criminals and a criminal suspect's proper safeguards according to the Constitution.<sup>194</sup> Both succeeded to a more conservative Court, one willing to expand on police authority while less sympathetic to the claims of criminal defendants.<sup>195</sup> Thus, lurking beneath *Miranda* and *Terry*'s ostensible differences rested an intricate tension that would manifest itself in later years, long after Chief Justice Warren had left the bench.

In 1984, the Court considered its first and only case to date implicating a potential conflict between *Miranda* and *Terry*. In *Berkemer v. McCarty*, an officer's routine traffic stop produced a confession by the defendant that he was driving under the influence of drugs and alcohol.<sup>196</sup> The defendant subsequently challenged the admissibility of his statements in court, arguing that the police questioning subjected him to custodial interrogation and that his confession was inadmissible based on the lack of *Miranda* warnings.<sup>197</sup>

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190. See *supra* notes 172–87 and accompanying text.

191. See Dudley, *supra* note 124, at 897.

192. See *supra* notes 151–54 and accompanying text.

193. The only change to the Court between *Miranda* and *Terry* was President Johnson's appointment of Justice Thurgood Marshall, who replaced Justice Tom Clark in 1967. See NEWTON, *supra* note 126, at 480.

194. See *supra* note 22 and accompanying text.

195. See *supra* Part I.A.2, B.2.

196. *Berkemer v. McCarty*, 468 U.S. 420, 423–24 (1984).

197. *Id.*

In *Berkemer*, the Supreme Court rejected the defendant's claim and ruled as a basic principle that routine traffic stops, akin to *Terry* stops, do not automatically trigger a suspect's *Miranda* rights.<sup>198</sup> The Court perceived a traffic stop as "temporary and brief."<sup>199</sup> Meanwhile, the police intrusion of the defendant's privacy in *Berkemer* was limited.<sup>200</sup> Finally, the officer's questioning was routine.<sup>201</sup> Based on the facts specific to the *Berkemer* case and the Court's perception that the defendant's encounter was indicative of most traffic stops, the Court ruled that the defendant was not subject to the kind of coercive elements targeted by *Miranda*.<sup>202</sup>

The opinion's handling of *Miranda* reflected the Court's ongoing hesitancy to extend custodial interrogation beyond the type of inherently coercive setting envisioned by *Miranda* itself.<sup>203</sup> The Court was loath to grant "talismanic power" to *Miranda* in circumstances where police interrogations did not possess the same coercive characteristics as police interrogations at a police station.<sup>204</sup> The decision alluded to the distinction between private interrogations in a police station, where a suspect would be vulnerable to unchecked abuse and pressure, and public detentions on the highway, where witnesses and observers could monitor police activity.<sup>205</sup> The public quality of a traffic stop, the Court concluded, lacked the inherent coercion envisioned by *Miranda*.<sup>206</sup> Thus, the routine, public nature of the stop, devoid of the institutional fears articulated by *Miranda*, swung the balance in favor of the state's ability to investigate potential criminal activity.

*Berkemer* addressed only one type of *Terry* stop in which a defendant might challenge a confession based on *Miranda*. The facts in *Berkemer* provided a limited stop and frisk, making it relatively easy for the Justices to dismiss the defendant's claim. Beyond the limited circumstances of the case, the Court refused to create a categorical rule for all *Terry* stops.<sup>207</sup> Instead, it allowed lower federal and state courts to rely on their own discretion, indicating that any successful *Miranda* challenge would likely require evidence that the stop was not "temporary and brief" and that the suspect felt "completely at the mercy of the police."<sup>208</sup> In doing so, the Court acknowledged that its allowance for judicial discretion would leave some level of uncertainty, noting that the decision "will mean that the police and lower courts will continue occasionally to have difficulty

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198. *Id.* at 437–39.

199. *Id.* at 437.

200. *Id.* at 441–42.

201. *Id.* at 437–38.

202. *Id.* at 438–39.

203. *See supra* notes 80–96 and accompanying text.

204. *Berkemer*, 468 U.S. at 437.

205. *Id.* at 438 ("This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse.").

206. *Id.*

207. *Id.* at 440–41.

208. *Id.* at 437–38.

deciding exactly when a suspect has been taken into custody” for purposes of his *Miranda* rights.<sup>209</sup>

Without declaring a comprehensive rule, however, the opinion implemented a significant barrier for *Miranda* claims during *Terry* stops. The Court’s narrow holding, to be sure, found support in the limited circumstances present in the facts of *Berkemer*. But the unanimous opinion was also predicated, in part, on the Justices’ assumption that *Terry* stops, in all forms, would not rise to the level worthy of *Miranda* warnings.<sup>210</sup> The Court explicitly noted in *Berkemer* that “[t]he comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.”<sup>211</sup> Indeed, the Court’s ruling may have been limited to motor vehicle stops, but the analysis and the dicta it provided to lower courts implicated the entire spectrum of potential *Terry* encounters.<sup>212</sup>

In retrospect, *Berkemer*’s treatment of *Terry* produced somewhat of a judicial irony. The opinion ultimately widened *Terry*’s influence by ousting *Miranda* considerations from most stop and frisk interactions. However, *Berkemer*’s legacy did not reflect its author’s intention. Writing for a unanimous Court in *Berkemer*, Justice Thurgood Marshall’s opinion expressed a very narrow view of *Terry*. Marshall had dissented in *Adams*, *United States v. Mendenhall*,<sup>213</sup> *Pennsylvania v. Mimms*,<sup>214</sup> *Summers*, and *Sharpe*, and had consistently disagreed with the Court’s expansion of *Terry* since its inception.<sup>215</sup> As he wrote the unanimous *Berkemer* opinion in 1984, Justice Marshall still subscribed to a limited view of *Terry*, and used his opinion in *Berkemer* to reaffirm that brevity in scope. It was because of this narrow view that Justice Marshall believed *Terry* would not implicate *Miranda*.<sup>216</sup>

Justice Marshall’s explanation, however, did not accurately reflect the Court’s general attitude toward *Terry*.<sup>217</sup> The stark difference was even more apparent at the appellate level, where circuit courts had begun to expand *Terry* well beyond the boundaries addressed by the Supreme Court.<sup>218</sup> As a consequence, the only Supreme Court opinion on record to

209. *Id.* at 441.

210. *Id.* at 440.

211. *Id.*

212. See *infra* note 259 and accompanying text.

213. 446 U.S. 544 (1980).

214. 434 U.S. 106 (1977).

215. See, e.g., *Adams v. Williams*, 407 U.S. 143, 162 (1972) (Marshall, J., dissenting) (lamenting even then that “the delicate balance that *Terry* struck was simply too delicate, too susceptible to the ‘hydraulic pressures’ of the day,” as “the balance struck in *Terry* is now heavily weighted in favor of the government”). Justice Thurgood Marshall’s remarks in *Adams v. Williams* expressed his view that Justice Douglas was perhaps correct to oppose the Court’s decision in *Terry* from the outset. See *Adams*, 407 U.S. at 161–62; *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

216. See *supra* note 211 and accompanying text.

217. See *supra* notes 172–89 and accompanying text.

218. See *infra* notes 223–25 and accompanying text.

address the conflict between *Miranda* and *Terry* did not accurately reflect the true application of each doctrine, nor did it provide much clarity on how the two might interact in a practical setting.

#### D. *Emergence of the New Terry in the Post-Berkemer Era*

Parts I.A and I.B of this Note traced the separate developments of *Miranda* and *Terry*, while Part I.C introduced and analyzed the Supreme Court's first and only impression of a potential collision between the two doctrines—a ruling in which the Court largely dismissed a conflict between *Miranda* and *Terry*. In the aftermath of the Court's decision in *Berkemer*, new developments led lower courts to expand the character of *Terry* stops to a point where law enforcement could detain suspects in a manner analogous to custodial arrests. Part I.D.1 analyzes the consensus movement among lower courts over the past twenty-five years to permit a broader array of police tactics under *Terry* in order to maximize police safety and deter a suspect's flight. Part I.D.2 discusses a more recent trend among courts to side with local law enforcement in Fourth Amendment challenges based on local law enforcement's new role in combating terrorism in the post-9/11 era.

##### 1. The Gradual Increase of Police Authority During *Terry* Stops Permitted by Appellate Courts

The Supreme Court's early extensions of *Terry* in the 1970s and 1980s sparked an even greater aggrandizement at the appellate level.<sup>219</sup> Chief Justice Warren's majority opinion in *Terry* had allowed courts to sanction any police conduct that was reasonably related in scope to the impending threat.<sup>220</sup> Beginning around the time of *Berkemer*, appellate courts seized on this rationale to condone more intrusive police practices under *Terry* that would help police officers more effectively investigate their suspicion without converting the detention into an arrest.<sup>221</sup> Justified in large part by an officer's interest in ensuring his own protection and preventing a suspect's flight during a *Terry* stop,<sup>222</sup> most circuits today have approved police use of drawn weapons or handcuffs to restrain criminal suspects.<sup>223</sup>

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219. See *supra* notes 172–87 and accompanying text.

220. See *Terry*, 392 U.S. at 20; *supra* note 146 and accompanying text.

221. See *Godsey*, *supra* note 21, at 728.

222. See *Michigan v. Summers*, 452 U.S. 692, 702 (1981); *supra* note 187 and accompanying text.

223. See *Dorsey v. Barber*, 517 F.3d 389, 399 (6th Cir. 2008) (“During a *Terry* stop, officers may draw their weapons or use handcuffs so long as circumstances warrant that precaution.” (quoting *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 309 (6th Cir. 2005)) (internal quotation marks omitted)); see also *United States v. Thomas*, 524 F.3d 855, 858 (8th Cir. 2008); *United States v. Copening*, 506 F.3d 1241, 1248 (10th Cir. 2007); *United States v. Elston*, 479 F.3d 314, 320 (4th Cir. 2007); *United States v. Formia-Castillo*, 408 F.3d 52, 64–65 (1st Cir. 2005); *United States v. Vargas*, 369 F.3d 98, 102 (2d Cir. 2004); *United States v. Miles*, 247 F.3d 1009, 1012–13 (9th Cir. 2001); *United States v. Gil*, 204 F.3d 1347, 1350–51 (11th Cir. 2000) (per curiam).

Courts have also permitted police to demand a suspect to lay prostrate on the ground during a stop and frisk search.<sup>224</sup> In addition, courts have allowed police to forcibly transport suspects (most notably to a patrol car) under a valid *Terry* stop.<sup>225</sup>

As a result, lower courts, while maintaining that *Terry* remains a limited exception, have authorized conduct similar to that associated with custodial arrest without converting that stop into a full-fledged arrest.<sup>226</sup> To be sure, lower courts have not altered *Terry*'s predicate threshold of reasonable suspicion, as distinguished from traditional arrests that require probable cause to act on suspects. Doing so would, of course, undermine the *Terry* doctrine altogether.<sup>227</sup> Instead, *Terry* remains a separate justification for law enforcement to investigate criminal activity. Officers acting within *Terry*'s parameters need only a reasonable suspicion that criminal activity is afoot.<sup>228</sup> Faced with this lower degree of certainty about the suspect's involvement, appellate courts have nonetheless deemed it appropriate to equip police with more forceful measures to investigate, a trend that has allowed law enforcement to more effectively combat criminal activity, while exposing potential suspects to more intrusive interrogations in the public domain.<sup>229</sup>

## 2. *Terry* in a New Age: A Change in Judicial Mindset

The Supreme Court has yet to address the constitutionality of the new police practices now condoned by appellate courts under *Terry*. However, the Court's recent *Terry* jurisprudence suggests that the current Justices have no plans to limit police authority under *Terry*. In fact, the Supreme Court appears to be heading in quite the opposite direction.

In a recent *Terry* decision, the Court upheld the conviction of a defendant who refused to provide a police officer with his name during a *Terry* stop in accordance with a state identification statute, sanctioning for the first time

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224. See *United States v. Tilmon*, 19 F.3d 1221, 1227–28 (7th Cir. 1994) (“When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons.”); see also *United States v. Perdue*, 8 F.3d 1455, 1462–63 (10th Cir. 1993); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983).

225. See *United States v. Stewart*, 388 F.3d 1079, 1084–85 (7th Cir. 2004); *United States v. Gori*, 230 F.3d 44, 55–56 (2d Cir. 2000); *Halvorsen v. Baird*, 146 F.3d 680, 684 (9th Cir. 1998).

226. See *Tilmon*, 19 F.3d at 1224–25 (observing that, among appellate courts, “[f]or better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention”).

227. See *supra* Part I.B.1.

228. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

229. See *Estrada*, *supra* note 21, at 279 (“Whereas a *Terry* stop was originally conceived as a narrow exception to the requirement that all governmental seizures be accompanied by probable cause—a nominally innocuous ‘stop and frisk’—the Supreme Court and its lower-court counterparts have since granted police officers broad arrest-like powers in executing a *Terry* stop.”).

compelled speech in a stop and frisk setting.<sup>230</sup> Justice Anthony Kennedy's majority opinion in *Hiibel v. Sixth Judicial District Court* justified the Court's conclusion based on the limited intrusiveness associated with mere identity requests.<sup>231</sup> A name's universal characteristic and the request's routine nature, the Court reasoned, was not so intrusive that it exceeded the bounds associated with a police officer's legitimate investigation of a reasonable suspicion.<sup>232</sup>

Noticeably absent in the Court's opinion, but at the forefront of the debate in *Hiibel*, among other recent *Terry* cases, was the potential impact of September 11, 2001, on the *Terry* doctrine and local law enforcement authority.<sup>233</sup> The new political reality confronting America in the post-9/11 era has recalibrated the balance of interests between states and individuals during ad hoc police encounters.<sup>234</sup> While not garnering the same headlines as the Federal Bureau of Investigation (FBI) or Department of Homeland Security, local law enforcement has become a vital component of the government's effort to monitor terrorist activity within its borders.<sup>235</sup> Local law enforcement's best asset to combat terrorist threats is its sheer numbers and the ability to monitor daily activities using its basic civil authority as public peacekeepers.<sup>236</sup> For example, in the weeks preceding the 9/11

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230. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185–86 (2004).

231. *See id.* at 188–89.

232. *Id.* at 186.

233. On the day that the Court delivered its holding in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, it was in the midst of completing an opinion in the first major challenge to President George W. Bush's detention of enemy combatants. *See generally* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The Court released its opinion in *Hamdi v. Rumsfeld* exactly one week after deciding *Hiibel*.

234. *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2159 (2002) (noting that “judicial concern for the need to fight terrorism, applied to cases that may have nothing to do with terrorism—is likely to produce legal change”); *see also* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1120–22 (2008) (analyzing the “convergence” of criminal and military detention models in the post-9/11 era). Robert Chesney and Jack Goldsmith argue that “[t]he problem of modern terrorism demands anticipatory or predictive forms of liability, and may demand a lower rate of erroneous acquittals than the traditional criminal system would tolerate.” Chesney & Goldsmith, *supra*, at 1120.

235. *See* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 10 (2006) (stating that “state and local police in virtually any city now participate in joint terrorism task forces with their federal law enforcement counterparts in their jurisdictions”). As a result, “local police frequently find themselves guarding critical public infrastructure, such as airports, bridges, tunnels, stadiums, and the like,” and thus court rulings may now influence an officer's ability to combat legitimate terrorist threats. *Id.* at 11; *see also* Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counter-Terrorism After 9/11*, at 5 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 08-191, 2008) (on file with the Fordham Law Review) (“[L]ocal police agencies have played a number of counter-terrorism roles in recent years. Most criminal prosecutions for crimes directly related to terrorism are investigated . . . at the federal level. But local police agencies' efforts to prevent and deter crime . . . aim to establish an environment inhospitable to terrorism-related activities.” (footnotes omitted)).

236. *See* Harris, *supra* note 235, at 3–11; Waxman, *supra* note 235, at 7 (“It is natural that local police agencies would be called upon to combat the terrorism threat. The public looks



attacks, local police had stopped three of the eventual assailants during routine motor vehicle stops,<sup>237</sup> an authority that, as *Berkemer* recognized, is analogous to a *Terry* stop.<sup>238</sup> Thus, the apparent need for local law enforcement to act swiftly and to obtain vital information may very well generate added pressure on courts to expand police authority during impromptu encounters similar to stop and frisks.<sup>239</sup> From *Terry*'s origins as a necessary evil to combat race riots of the 1960s to its reformation during the war on drugs, courts have often defined *Terry* stops within the context of contemporaneous societal concerns.<sup>240</sup> In this new post-9/11 era, the greater appreciation of the threat of terrorism will undoubtedly help further define the scope of stop and frisks in the next generation.<sup>241</sup>

Of course, one can only speculate as to the extent to which, if any, the threat of terrorism influenced the Court's 5-4 outcome in *Hiibel*. One need not stretch the imagination, however, to consider the benefits of mandatory identification statutes on local law enforcement's ability to investigate the background of suspicious individuals where terrorist warnings have been issued.<sup>242</sup> In its amicus brief to the Court in support of Nevada's statute,

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first to local police for basic security. And the federal government [must rely on] their assistance because local police agencies possess the massive manpower needed to sustain these functions . . .").

237. See Laurel R. Boatright, Note, "Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1646 (2006) (citing STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THE OPEN DOOR: HOW MILITANT ISLAMIC TERRORISTS ENTERED AND REMAINED IN THE UNITED STATES, 1993-2001, at 51 (2002), available at <http://www.cis.org/articles/2002/theopendoor.pdf>).

238. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

239. See Estrada, *supra* note 21, at 312 ("That the traumatic events of September 11th would affect the balancing of governmental interests and privacy interests in evaluating the validity of a Fourth Amendment claim is understandable and permissible."); Harris, *supra* note 235, at 4 ("Given the risks and dangers involved in potential terrorism, it would shock no one if courts gave greater power to all of law enforcement, including state and local police. In fact, courts might find it difficult to do otherwise . . ."); Stuntz, *supra* note 234, at 2160 (suggesting that one way the government might ease local law enforcement complaints about a lack of antiterrorism funding would be to reduce legal restrictions on daily police activity). In response, William Stuntz argues that "[c]ourts are likely to respond to that pressure in the same manner—by giving police more power." Stuntz, *supra* note 234, at 2160.

240. See *supra* notes 155-60, 181 and accompanying text.

241. See generally Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753 (2006).

242. In his article on police participation in the war on terror, David A. Harris discusses this issue in the context of a different Supreme Court decision, *Illinois v. Caballes*, 543 U.S. 405 (2005), in which the link between expanding local law enforcement powers and terrorism requires "very little imagination" even though the context in which the case was litigated, on the surface, shared little relation to terrorism. See Harris, *supra* note 235, at 9. In *Caballes*, the Court found that the use of a drug-sniffing dog during a routine traffic stop did not violate the defendant's Fourth Amendment rights since the encounter did not expose noncontraband items and so did not infringe upon the defendant's legitimate expectation of privacy. *Caballes*, 543 U.S. at 409. In dissent, Justice David Souter rejected the Court's broad ruling, but also made clear that he was "concerned not to prejudice a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion." *Id.* at 417 n.7 (Souter, J., dissenting).

the U.S. Department of Justice alluded to antiterrorism tools, such as the maintenance of effective “watch-lists,” as relying heavily on self-identification statutes.<sup>243</sup> *Hiibel*’s implication on post-9/11 policy had also been addressed by the Nevada Supreme Court, which, in ruling against the defendant in *Hiibel*, noted in its opinion that “[t]errorism is ‘changing the way we live and the way we act and the way we think.’”<sup>244</sup> And so “[t]o deny officers the ability to request identification from suspicious persons [under *Terry*] creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him.”<sup>245</sup> To convey its grave concern for protecting local law enforcement powers, the Nevada Supreme Court cited statements made by President George W. Bush and Senate Majority Leader Tom Daschle discussing the gravity of the threat now posed by terrorism to national security.<sup>246</sup>

Indeed, the U.S. Supreme Court has already publicly recognized the connection between local law enforcement and terrorist prevention. In its very first *Terry* case argued following the 9/11 attacks, *United States v. Arvizu*,<sup>247</sup> Justice Sandra Day O’Connor acknowledged a sudden change in judicial mindset regarding local law enforcement authority when she stated in oral arguments that “[w]e live in a perhaps more . . . dangerous age today than we did when this event [argued before the Court] took place.”<sup>248</sup> Justice O’Connor directed her concern at the lower court’s framework regarding police authority under *Terry*, which “seemed to be a little more rigid than . . . common sense would dictate today.”<sup>249</sup> In *Arvizu*, the Court ultimately upheld the police conduct at issue.<sup>250</sup>

*Hiibel* remains a prominent example of how the Court’s Fourth Amendment attitudes may be evolving in light of local law enforcement’s new role in the post-9/11 era. In *Hiibel*, the Court abandoned a number of its own previous statements that had rejected a defendant’s duty to respond to police inquiries under *Terry*.<sup>251</sup> The relative ease with which the Court

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243. Brief for the United States as Amicus Curiae Supporting Respondent at 14–15, *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (No. 03-5554), 2004 WL 121587; see also Estrada, *supra* note 21, at 312.

244. *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002), *aff’d*, 542 U.S. 177 (citation omitted).

245. *Id.*

246. *Id.*

247. 534 U.S. 266 (2002).

248. See Linda Greenhouse, *Court Rules on Police Searches of Motorists*, N.Y. TIMES, Jan. 16, 2002, at A17 (adding that “[w]hen the case was argued . . . it was evident that recent events [9/11] were on the minds of at least some justices”).

249. *Id.*

250. See *Arvizu*, 534 U.S. at 277–78. The case involved a dispute over whether a border patrol agent held a sufficient reasonable suspicion before searching a vehicle that ultimately contained 100 pounds of marijuana. *Id.* at 270–72.

251. See *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 197–99 (2004) (Breyer, J., dissenting). As Justice Stephen Breyer noted in his dissent, past Court dicta had repeatedly asserted that no obligation existed to answer police questions during a *Terry* stop. *Id.*; see *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (“Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer

pushed aside previous dicta suggests that 9/11 has altered the Court's (and the nation's) understanding about the proper balance of interests during a stop and frisk encounter.

It is also worth noting that the Court's decision in *Hiibel* raised a new constitutional dimension: that of self-incriminating speech during a *Terry* stop.<sup>252</sup> In his appeal to the Court, the defendant in *Hiibel* argued that the identification statute violated his Fifth Amendment right against compulsory self-incrimination.<sup>253</sup> Justice Kennedy's opinion rejected the argument, noting that a name's general and routine characteristic rendered it outside the Court's definition of self-incriminating evidence under the Fifth Amendment.<sup>254</sup> However, the Court has yet to articulate a definite standard with which to determine the scope of its own "routine inquiry" rationale along with its relationship to a defendant's right against compulsory self-incrimination.<sup>255</sup>

## II. CLASH OF THE TITANS: HOW THE COLLISION BETWEEN *MIRANDA* AND *TERRY* HAS IGNITED A CIRCUIT SPLIT

For a multitude of reasons, courts have sanctioned more intrusive police tactics under *Terry* that may be characterized as hallmarks of a custodial arrest. As a consequence, appellate courts have been forced to revisit *Berkemer* and the issue of whether certain *Terry* stops raise legitimate *Miranda* concerns. This has led to a distinct circuit split among appellate courts. Part II.A provides a basic summary of the current appellate conflict. Part II.B introduces and explains one position taken by appellate courts: that valid *Terry* stops, due to their inherent reasonableness and stature as nonarrest detentions, should not trigger *Miranda* warnings. Part II.C addresses the alternative approach: if *Terry* stops reach the physical threshold commonly associated with custodial interrogation, then *Miranda* should apply.

### A. *What's in a Name?: Providing Context to the Ongoing Constitutional Tension*

The sanction of more intrusive stop and frisks at the appellate level has increasingly shifted the character of *Terry* stops closer to that of a

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furnishes no basis for an arrest . . ."); see also *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his identity . . . . But the detainee is not obliged to respond."); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring) (stating that a *Terry* suspect "must be free to . . . decline to answer the questions put to him").

252. See Estrada, *supra* note 21, at 298 ("*Hiibel* is all the more significant an expansion of the *Terry* doctrine in that it parts company with the Court's earlier statements regarding compelled speech during a *Terry* encounter.").

253. See *Hiibel*, 542 U.S. at 189.

254. *Id.* at 189–91; see *Pennsylvania v. Muniz*, 496 U.S. 582, 596–601 (1990) (holding that statements providing basic, routine information, such as a suspect's name, are not testimonial for purposes of *Miranda*).

255. See *supra* note 239 and accompanying text.

traditional arrest.<sup>256</sup> This trend has increasingly blurred the distinction made in *Dunaway* between the limited character of *Terry* stops and arrests.<sup>257</sup> Whereas Justice Marshall's characterization of *Terry* in *Berkemer* described a brief, limited intrusion,<sup>258</sup> police conduct today raises the important question of whether some highly intrusive *Terry* stops overlap with custodial interrogation implicated by *Miranda*.

The problem is exacerbated by the fact that *Berkemer's* explanation of *Terry* remains the principal authority upon which judges rely to explain the intersection between *Miranda* and *Terry*. To be sure, *Berkemer's* limited holding, to deny *Miranda* rights during a brief motor vehicle stop, has not been undermined by subsequent policy or jurisprudence. However *Berkemer's* dicta on *Terry*, dismissing *Miranda's* application in just about all *Terry* interactions, has created a serious disconnect between the facts currently associated with *Terry* stops and the doctrine applied by lower courts.<sup>259</sup>

Indeed, the current conflict is not rooted solely in the expansion of *Terry*, but additionally in the failure among lower courts to recognize this change and reflect as much within their jurisprudence. Courts confronting *Terry* searches that involve handcuffs, drawn weapons, or relocation of suspects continue to cite Justice Marshall's dicta indicating that *Terry* stops lack the sort of coercive character that would require *Miranda* warnings.<sup>260</sup>

Since *Berkemer*, the Supreme Court has not revisited the relationship between *Miranda* rights and *Terry* stops. However, the Court's silence has not been for a lack of discord at the federal appellate level. Over the past fifteen years, appellate courts have struggled to articulate a uniform standard. The First, Fourth, and Sixth Circuits have held that the reasonableness of a *Terry* stop and frisk alone precludes the necessity of *Miranda* considerations, even during intrusive *Terry* stops.<sup>261</sup> The Second, Seventh, and Tenth Circuits have ruled that intrusive *Terry* stops can require *Miranda* warnings before further interrogation can proceed,

256. See *supra* note 226.

257. Consider that the Supreme Court in *Quarles* deemed handcuffing and surrounding a defendant to be custody under *Miranda*, while appellate courts now sanction the same practice as part of a purportedly limited *Terry* stop. See *supra* notes 104–05, 223 and accompanying text.

258. See *supra* notes 210–11 and accompanying text.

259. See *supra* notes 210–18 and accompanying text; see also *United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003) (“Citing *Berkemer*, we have declared that, ‘No [*Miranda*] warning is necessary for persons detained for a *Terry* stop.’” (citing *United States v. McGauley*, 786 F.2d 888, 890 (8th Cir. 1986))); *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003) (“The very nature of a *Terry* stop means that a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights.” (citing *Berkemer v. McCarty*, 468 U.S. 420, 439–41 (1984))); *United States v. Leshuk*, 65 F.3d 1105, 1108 (4th Cir. 1995) (“In *Berkemer*, the Supreme Court held that *Miranda* warnings are not required when a person is questioned during a routine traffic stop or stop pursuant to *Terry v. Ohio*.” (citing *Berkemer*, 468 U.S. at 437–42)); *supra* note 18.

260. See *supra* note 259.

261. See *Swanson*, 341 F.3d at 528–29; *United States v. Trueber*, 238 F.3d 79, 95 (1st Cir. 2001); *Leshuk*, 65 F.3d at 1110.

depending on the degree of constraint associated with the stop and frisk.<sup>262</sup> Meanwhile, the Eighth and Ninth Circuits have each rendered inconsistent rulings with respect to the issue.<sup>263</sup> The current schism among federal appellate courts<sup>264</sup> can be attributed in part to the discretion allowed by the Supreme Court in *Berkemer* to consider challenges on a case-by-case basis.<sup>265</sup> But more important, the expansion of *Terry* at the appellate level and the continued application of the obsolete and misleading framework in *Berkemer* have been the primary catalysts for the conflict.<sup>266</sup> Moreover, local law enforcement's new role in the war against terrorism highlights the importance of resolving the conflict as soon as possible.

To simply label the current appellate discord as a "circuit split" drastically understates the complexity underlying the conflict between *Miranda* and *Terry*. To be sure, appellate courts have split on this issue. However, where two colliding constitutional doctrines are involved, the lack of unanimity among circuit courts reflects not only different views on the proper outcome or formula to resolve the matter, but a more fundamental problem: how *Miranda* and *Terry* can effectively coexist.<sup>267</sup> Courts today are struggling to understand the essential relationship between *Miranda* and *Terry*, which in turn has produced a plethora of different approaches. Some circuits have developed a *Terry*-heavy analysis while others tend to emphasize *Miranda*'s interests.<sup>268</sup> This result evinces the sheer complexity involved when two robust constitutional doctrines, originally projected on different courses, unexpectedly collide.

Resolving the connection between *Miranda* and *Terry*, two doctrines the Warren Court established through balancing interests and shifting burdens,

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262. See *United States v. Newton*, 369 F.3d 659, 668–75 (2d Cir. 2004); *United States v. Perdue*, 8 F.3d 1455, 1465 (10th Cir. 1993); *United States v. Smith*, 3 F.3d 1088, 1096–99 (7th Cir. 1993).

263. Compare *United States v. Martinez*, 462 F.3d 903, 910 (8th Cir. 2006) (suppressing defendant's statements during stop and frisk that involved handcuffs), and *United States v. Kim*, 292 F.3d 969, 978 (9th Cir. 2002) (finding statements inadmissible during *Terry* stop where defendant was locked in her own store by police during questioning), with *United States v. Davis*, 530 F.3d 1069, 1082 (9th Cir. 2008) (admitting defendant's statements in court after defendant was told he could not leave and was handcuffed), *United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005) (per curiam) (holding that statements made by defendant while handcuffed were admissible), and *Pelayo-Ruelas*, 345 F.3d at 592–93 (allowing statements made by defendant while surrounded by police to be heard in court).

264. Other courts and commentators have described the circuit split slightly differently. They have placed the U.S. Courts of Appeals for the First, Fourth, and Eighth Circuits in favor of the inherent reasonableness approach of *Terry* with the U.S. Courts of Appeals for the Second, Seventh, Ninth, and Tenth Circuits considering the degree of intrusion involved for *Miranda* purposes. See *United States v. Artilles-Martin*, No. 5:08-cr-14-Oc-10, 2008 WL 2600787, at \*11 n.39 (M.D. Fla. June 30, 2008); Katherine M. Swift, Comment, *Drawing a Line Between Terry and Miranda: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1075–76 (2006).

265. See *supra* notes 207–09 and accompanying text.

266. See *supra* Part I.D.1–2.

267. See Swift, *supra* note 264, at 1076 (stating that the circuit split with respect to the issue "illustrates a misunderstanding about how *Terry* and *Miranda* interact").

268. See *infra* Part II.B–C.

cannot be accomplished simply through a basic inquiry into their respective constitutional amendments. One might attempt to explain the relationship between *Miranda* and *Terry* by the "intimate relation" between the Fourth and Fifth Amendments.<sup>269</sup> But the Supreme Court has gradually abandoned the view that a symbiotic relationship exists between Fourth and Fifth Amendment protections.<sup>270</sup>

At the heart of the conflict between *Miranda* and *Terry* rests a struggle among appellate courts to define and identify how the modern *Terry* stop aligns with *Miranda* and its threshold of custodial interrogation.<sup>271</sup> A *Terry* stop, by definition, is not an arrest.<sup>272</sup> Yet, its current character involves techniques that are virtually identical to that of traditional arrests.<sup>273</sup> Thus, the ultimate question becomes whether a court should heed *Terry*'s name or substance when considering a *Miranda* challenge. It is this underlying tension that has shaped the current split among appellate courts.

### B. *The Inherent Reasonableness Approach: Justifiable Terry Stops Should Preclude the Need for Miranda Considerations*

A number of appellate courts have constructed an approach that has effectively diminished a defendant's ability to invoke *Miranda* during *Terry* stops.<sup>274</sup> This section details three appellate cases that espouse that view.

#### 1. *United States v. Leshuk*

In *United States v. Leshuk*,<sup>275</sup> the Fourth Circuit made clear that "[i]nstead of being distinguished by the absence of any restriction of liberty, *Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion."<sup>276</sup> The appropriate inference taken from the court's statement is that, so long as an

269. See *Boyd v. United States*, 116 U.S. 616, 633 (1886); see also *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect."); *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961) ("We find that . . . the Fourth and Fifth Amendments . . . do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] only after years of struggle.'" (footnote omitted) (quoting *Bram v. United States* 168 U.S. 532, 543-44 (1897))).

270. See *Couch v. United States*, 409 U.S. 322, 330-32 (1973) (denying *Boyd*'s applicability to the petitioner's case); *Warden v. Hayden*, 387 U.S. 294, 301-04 (1967) (noting that *Boyd*'s notion of a defendant's property rights as being self-incriminating during police searches has been discredited).

271. See *supra* notes 84-87 and accompanying text.

272. See *Dunaway v. New York*, 442 U.S. 200, 211-16 (1979).

273. See *supra* notes 256-57 and accompanying text.

274. Altogether, five circuit courts have handed down opinions in favor of this approach, including two courts that have also produced opinions that employ the opposing approach. See *supra* notes 261, 263 and accompanying text.

275. 65 F.3d 1105 (4th Cir. 1995).

276. *Id.* at 1109.

officer remains within the bounds of *Terry*, his actions cannot be viewed as custodial interrogation for purposes of *Miranda*.<sup>277</sup>

In *Leshuk*, two policemen cornered a defendant in the woods whom they suspected was involved in marijuana cultivation.<sup>278</sup> Aided by a companion, the officers forced the defendant to raise his hands in the air, and warned that if the defendant did not call off his operations, the police would shoot his dog.<sup>279</sup> Following the threat, the officers surrounded the defendant in the woods and proceeded to ask questions about his activity.<sup>280</sup> No *Miranda* rights were read at any point during the discussion.<sup>281</sup> After the defendant was indicted, the magistrate judge recommended the suppression of any statements made by the defendant during his conversation with police.<sup>282</sup> The district court rejected the recommendation, and the appellate court affirmed its decision.<sup>283</sup>

The Fourth Circuit's analysis relied heavily on *Berkemer*'s characterization of *Terry* stops as being limited in nature and possessing a nonintrusive quality.<sup>284</sup> The court explained that the temporal brevity of the search, lasting no longer than to dispel a suspicion, marked a crucial distinction between *Terry* stops and those instances targeted by *Miranda*.<sup>285</sup> Furthermore, the necessity for police to carry out their investigatory detention, the Fourth Circuit reasoned, justified the use of more intrusive force (such as handcuffs and drawn weapons), but the court found that "to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes."<sup>286</sup>

The Fourth Circuit likewise adopted a narrow view of *Miranda* and dismissed its application in situations lacking an official arrest.<sup>287</sup> This can be explained in part by the court's reliance on the Supreme Court's decision in *Beheler*, which had appeared to limit *Miranda* warnings to detentions that involved custodial arrest.<sup>288</sup> According to the Fourth Circuit's framework, *Beheler*'s focus on custodial arrest prevented any potential overlap between *Miranda* and *Terry* because *Terry*, by definition, provided an exception to traditional arrest authority for police.<sup>289</sup> The court

277. The U.S. Court of Appeals for the Sixth Circuit endorsed the same proposition. See *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003).

278. *Leshuk*, 65 F.3d at 1107.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 1108.

283. *Id.* at 1108, 1110.

284. *Id.* at 1110.

285. *Id.* at 1109.

286. *Id.* at 1110.

287. *Id.* at 1108.

288. See *supra* notes 85–86 and accompanying text.

289. See Godsey, *supra* note 21, at 736 ("It could be argued that this language [in *Beheler*] connects *Miranda* to the Fourth Amendment and sets forth an analytical structure where *Miranda* is not triggered until an encounter leaves the *Terry* realm and becomes a full-scale Fourth Amendment arrest.").

concluded that a restraint on the defendant's freedom could only rise to the level worthy of *Miranda*, therefore, if police acted along the lines of a traditional arrest.<sup>290</sup> As a result, the handcuffing of the suspect during a *Terry* stop, though involving conduct associated with a traditional arrest, still did not necessarily constitute custodial interrogation.<sup>291</sup> Thus, the Fourth Circuit's strict adherence to *Beheler* dismissed the possibility of any prearrest *Miranda* claims, including a valid *Terry* stop.<sup>292</sup>

The Fourth Circuit's framework produces a police-friendly approach, allowing law enforcement to detain suspects for a longer period without enhancing the possibility that a suspect will be deterred from cooperating after *Miranda* warnings.<sup>293</sup> It also provides a bright-line rule that excuses police officers from the burden of complicated caveats and legal exceptions that may create hazardous consequences when police must act according to their instincts.<sup>294</sup>

## 2. *United States v. Trueber*

Other circuit courts confronted with parallel fact patterns have developed a similar framework. In *United States v. Trueber*,<sup>295</sup> the First Circuit rejected a defendant's *Miranda* challenge during a *Terry* stop in which the police drew their weapons and forced him to place his hands over his head.<sup>296</sup> The Boston police initially stopped the defendant's car based on a suspicion of cocaine dealing.<sup>297</sup> During the encounter, several police officers surrounded both the defendant and his companion with their guns drawn.<sup>298</sup> The police asked the defendant several questions about his identity and his reasons for visiting Boston.<sup>299</sup>

Having yet to notify the defendant of his *Miranda* rights, the police officers asked the defendant for permission to inspect his hotel room, to which the defendant consented.<sup>300</sup> Once at the hotel, more agents arrived at the scene, and the officers sat the defendant down in the middle of the hotel

290. *Leshuk*, 65 F.3d at 1109 (“[T]he perception . . . that one is not free to leave is insufficient to convert a *Terry* stop into an arrest. A brief but complete restriction of liberty is valid under *Terry* [without requiring *Miranda* warnings].” (second alteration in original) (quoting *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987)) (internal quotation marks omitted)).

291. See *supra* note 286 and accompanying text.

292. See *supra* note 286 and accompanying text; see also Swift, *supra* note 264, at 1079.

293. See Godsey, *supra* note 21, at 736.

294. The Supreme Court has sometimes advocated the need for clear rules for police to follow when their duties require extemporaneous, ad hoc decisions outside the police station. See, e.g., *United States v. Robinson*, 414 U.S. 218, 234–35 (1973) (creating a bright-line rule that granted police authority to search a person under custodial arrest after he was pulled over on the street for driving with an expired car license).

295. 238 F.3d 79 (1st Cir. 2001).

296. See *id.* at 83, 94–95.

297. *Id.* at 82–83.

298. *Id.* at 83.

299. *Id.*

300. *Id.* at 84.



room, where they proceeded to ask the defendant additional questions, including the nature of his visit, his relationship to his companion, and the articles in his possession at that moment.<sup>301</sup> The officers notified the defendant that he was not under arrest.<sup>302</sup> During the interrogation, the defendant made several inconsistent statements about the nature of his business in Boston.<sup>303</sup> He also confirmed his relationship with a different suspect whom the police had recently arrested.<sup>304</sup> These statements provided police with sufficient evidence to formally arrest the defendant with probable cause.<sup>305</sup> The entire encounter lasted approximately two hours.<sup>306</sup>

In its analysis, the First Circuit rejected the defendant's argument that the police detention had constituted custodial interrogation worthy of *Miranda* warnings.<sup>307</sup> The court alluded to *Berkemer* and Justice Marshall's statements about the nonthreatening character of *Terry* stops, rendering them too limited for *Miranda* treatment.<sup>308</sup> The court posited that *Terry*'s recent expansion did not undermine *Berkemer*'s authority on such stops.<sup>309</sup> It reasoned that, since "[n]othing in the initial stop and detention exceeded the bounds of an ordinary, permissible *Terry* stop," the facts did not justify *Miranda* considerations.<sup>310</sup> Once again, *Terry*'s inherent time limit—that police may only detain a suspect to investigate their suspicion—led the court to distinguish that stop from a traditional custodial arrest, where a suspect may remain at the complete mercy of law enforcement for an indefinite period of time.<sup>311</sup>

Like the Fourth Circuit in *Leshuk*,<sup>312</sup> the *Trueber* court viewed *Miranda* as being inapplicable to detentions lacking a definitive arrest. It assumed that *Terry* searches, so long as they fell short of an arrest (as *Dunaway* prohibited),<sup>313</sup> did not justify *Miranda* warnings. The court's approach likewise placed added value on the state's interest under *Terry* to investigate suspects without deterring suspect cooperation.

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301. *Id.* at 85.

302. *Id.*

303. *Id.* at 84.

304. *Id.* at 85.

305. *Id.*

306. *Id.* at 82–86. This is a rough estimate based on the First Circuit's summary of the events.

307. *Id.* at 95.

308. *Id.* at 92.

309. *Id.* at 94 (noting that, since drawn weapons are an acceptable procedure during *Terry* stops, and the conduct "was reasonably related in scope to the circumstances which justified stopping the truck in the first place," the police conduct did not exceed its permitted boundaries and so did not convert the stop and frisk into a *de facto* arrest).

310. *Id.* at 93.

311. *Id.* at 93–95.

312. See *supra* notes 287–92 and accompanying text.

313. See *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

3. *United States v. Cervantes-Flores*

In another example, the Ninth Circuit in *United States v. Cervantes-Flores*<sup>314</sup> considered a defendant's appeal to exclude statements made after he was handcuffed and interrogated by a border patrol agent without having been first read *Miranda* warnings.<sup>315</sup> The defendant in *Cervantes-Flores* was a Mexican citizen whom U.S. officials had previously caught on American soil without proper documentation.<sup>316</sup> A week later, officials again spotted the defendant across the border, chased him down, handcuffed him, and demanded the same documentation.<sup>317</sup> During the detention, the defendant admitted that he was on U.S. soil illegally.<sup>318</sup> The Ninth Circuit denied the defendant's Fifth Amendment claim, ruling that a proper *Terry* stop precluded the need for *Miranda* considerations.<sup>319</sup> The court was silent on whether the police conduct subjected the defendant to custodial interrogation according to *Miranda* or, more recently, *Keohane*.<sup>320</sup> Instead the Ninth Circuit limited its judicial inquiry to whether handcuffing was beyond the reach of *Terry*.<sup>321</sup> Because valid stop and frisks could include the use of handcuffs, the court refused to consider the defendant's claim that he was subject to custodial interrogation.<sup>322</sup> Similar to the Fourth and First Circuits, the Ninth Circuit limited *Miranda*'s applicability to situations involving an unequivocal custodial arrest, ignoring the possibility that conduct under a valid *Terry* stop might elevate to that threshold.<sup>323</sup> The opinion concluded that, because "handcuffing . . . did not convert the *Terry* stop into a custodial arrest," the lower court "did not err in admitting the statements [the defendant] made."<sup>324</sup>

One noticeable trend among courts applying the inherent reasonableness approach is their lack of differentiation between *Terry* stops initiated by a suspicion of immediate danger and those involving mere drug trafficking.<sup>325</sup> The courts' *Terry* analyses focused solely on the degree of restraint, not on the purpose of the stop. Of course, this outcome is by no means surprising. The Supreme Court has repeatedly blurred the distinction between immediate danger and other illegal activity, accepting each as perfectly legitimate under *Terry*.<sup>326</sup>

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314. 421 F.3d 825 (9th Cir. 2005) (per curiam).

315. *See id.* at 828.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 829–30.

320. *Id.*; *see supra* note 119 and accompanying text.

321. *Cervantes-Flores*, 421 F.3d at 829–30.

322. *Id.* at 830.

323. *Id.*

324. *Id.*

325. No court that espoused the inherent reasonableness approach in this part faced factual circumstances containing a plausible public safety concern.

326. *See supra* notes 173–83 and accompanying text.

C. *The Intrusive Level Approach: Terry Stops Should Require Miranda Warnings If They Qualify as Custodial Interrogation*

Those courts that have found *Miranda* violations during a stop and frisk encounter underscore that *Terry*'s recent expansion has created an overlap between the two doctrines.<sup>327</sup> This section discusses three circuit courts that have, in their own unique fashion, asserted that *Miranda* does apply to *Terry* stops. While the first two cases provide a straightforward *Miranda* analysis to the facts of a *Terry* stop, the final case, from the Second Circuit, provides a more nuanced and comprehensive version of the intrusive level approach that ultimately forms the basis of this Note's proposed approach.

1. *United States v. Perdue*

In 1993, the Tenth Circuit observed in *United States v. Perdue*<sup>328</sup> that, while *Berkemer* envisioned *Terry* as allowing a limited, brief stop, the post-*Berkemer* era "has witnessed a multifaceted expansion of *Terry*."<sup>329</sup> In *Perdue*, police officers stopped a defendant based on a reasonable suspicion that he possessed several weapons as part of a drug operation.<sup>330</sup> The police officers drew their weapons against the defendant, forced him to lay face down on the ground, handcuffed him, and initiated questioning about the defendant's drug operation, all without first informing the defendant of his *Miranda* rights.<sup>331</sup> The court in *Perdue* accepted the police tactics as lawful under *Terry*,<sup>332</sup> but it nonetheless found that, "by employing an amount of force that reached the boundary line between a permissible *Terry* stop and an unconstitutional arrest, the officers created the 'custodial' situation envisioned by *Miranda* and its progeny."<sup>333</sup> The Tenth Circuit's conclusion that *Miranda* applied was based solely on the physical restraints associated with the *Terry* stop.<sup>334</sup> The court made no inquiry into the circumstances surrounding the *Terry* search or the nature of the police's suspicion that triggered the stop in the first place. As for determining whether the police questioning constituted "interrogation," the court's reliance on the Supreme Court standard in *Innis* effectively conceded the

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327. See *United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004) ("[I]nstead of asking whether the degree of restraint was reasonable [under *Terry*], we have focused on 'whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest.'" (quoting *United States v. Ali*, 68 F.3d 1468, 1472 (2d Cir. 1995))). Altogether, five circuit courts have handed down opinions in favor of this approach, including two courts that have also produced opinions that employ the opposing approach. See *supra* notes 262–63 and accompanying text.

328. 8 F.3d 1455 (10th Cir. 1993).

329. *Id.* at 1464.

330. *Id.* at 1458.

331. *Id.* at 1458–59.

332. *Id.* at 1462 ("It was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons drawn. While *Terry* stops generally must be fairly nonintrusive, officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures.").

333. *Id.* at 1464.

334. *Id.* at 1464–66.

point to the defendant.<sup>335</sup> Indeed, virtually any question generated during a stop and frisk would likely elicit an incriminating response given the officer's need to dispel a suspicion that criminal activity is afoot.<sup>336</sup>

In light of the identified overlap between *Miranda* and *Terry*, the Tenth Circuit entertained two separate inquiries. First, the court asked, as a threshold matter, whether the police action constituted a valid *Terry* stop.<sup>337</sup> Since most courts concede that *Terry* authority extends to a much broader set of circumstances today than it did in *Berkemer*, this element of the inquiry would typically be satisfied.<sup>338</sup> However, if the court found that the police activity exceeded *Terry*'s limit and converted the stop into a de facto arrest, then any evidence obtained as a result would be inadmissible according to the Fourth Amendment.<sup>339</sup>

Once the court determined the *Terry* stop to be valid, it then posed the additional and more important question of whether the stop subjected the defendant to custodial interrogation and *Miranda*.<sup>340</sup> If so, then any statements made by the defendant before notified of his *Miranda* rights would be inadmissible.<sup>341</sup> Whereas the inherent reasonableness approach's focus on *Terry* derives from that court's assumption that legitimate stop and frisks will never constitute custodial arrest, this alternative approach underscores the language in *Berkemer* that kept alive the possibility that some *Terry* stops may escalate to custodial interrogation.<sup>342</sup>

According to the intrusive level approach, the *Miranda* violation would not exclude any proper physical evidence obtained through the valid *Terry* stop. For example, if a police officer discovered drugs through a valid stop and frisk, but then subsequently neglected to read a defendant his *Miranda* rights when appropriate, the drug evidence would still be admissible at trial.<sup>343</sup> Thus, the only way for defendants to argue for exclusion of

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335. *Id.* at 1465; *see also* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

336. *See supra* notes 88-96 and accompanying text.

337. *See Perdue*, 8 F.3d at 1461-63. Of course, under the inherent reasonableness approach, this would be the sole inquiry. *See, e.g., supra* note 319 and accompanying text. For the intrusive level approach, conversely, judging the legitimacy of the *Terry* stop is merely a precondition to the main question. *See, e.g., infra* notes 340-42 and accompanying text.

338. *See Perdue*, 8 F.3d at 1461-63.

339. *See Hayes v. Florida*, 470 U.S. 811, 814-15 (1985) (ruling that bringing a suspect to the police station for fingerprinting cannot be justified based on the *Terry* exception); *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

340. *See Perdue*, 8 F.3d at 1463-66.

341. *See id.*

342. *See United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993) ("*Berkemer* thus underscores that Fifth and Sixth Amendment rights are implicated before a defendant has been arrested.>").

343. No appellate court that has applied the intrusive level approach has prevented police from gathering physical evidence during the stop and frisk encounter under the Fourth Amendment. *See generally* *United States v. Martinez*, 462 F.3d 903 (8th Cir. 2006); *United States v. Newton*, 369 F.3d 659 (2d Cir. 2004); *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002); *Perdue*, 8 F.3d 1455; *Smith*, 3 F.3d 1088; *see also supra* note 337. The exclusion of statements in such cases has resulted from an interrogation only after police have frisked the defendant.

physical evidence in this context would be to challenge the *Terry* stop's legitimacy in the first place, which is purely a Fourth Amendment inquiry.<sup>344</sup> The intrusive level approach's primary focus, conversely, is exclusion of statements based on the Fifth Amendment.<sup>345</sup> Even physical evidence obtained by police as a direct result of a *Miranda* violation need not be suppressed.<sup>346</sup> Thus, oral statements constitute the only evidence that hangs in the balance during a *Miranda* challenge to a *Terry* stop.

Courts that espouse the intrusive level approach, like the Tenth Circuit, focus less on the societal interests and objectives associated with *Terry*. They heed the familiar adage that constitutional guarantees should not be abridged due to mere inconvenience or societal costs emanating from their enforcement.<sup>347</sup> The main inquiry remains the extent to which the stop and frisk curbs a defendant's freedom, an inquiry that relies on a pure factual determination of whether the defendant's detention qualified as custodial interrogation according to *Miranda* and its progeny.<sup>348</sup> This feature marks an important distinction between the two approaches. While the gravamen of the inherent reasonableness approach centers upon the applicability of *Terry*, the alternative approach concentrates on *Miranda*'s application to the given circumstances. Underlying this distinction rests a debate over whose interest, the state's or the individual's, should prevail at the collision point between the two doctrines. *Perdue*'s emphasis on *Miranda* demonstrates that court's inclination to value a defendant's right against self-incrimination as overriding a state's interest in investigating and prosecuting criminals.<sup>349</sup> In fact, the Tenth Circuit in *Perdue* neglected to mention any potential societal interests that might lend support to an officer's delay of *Miranda* warnings during the defendant's custodial interrogation.<sup>350</sup>

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344. See *Perdue*, 8 F.3d at 1461–63.

345. Defendants typically assert both claims. They first challenge the physical evidence obtained by the *Terry* stop according to the Fourth Amendment and also statements made during the *Terry* stop based on the Fifth Amendment and *Miranda*. See, e.g., *Martinez*, 462 F.3d at 906–07; *Newton*, 369 F.3d at 662.

346. See *United States v. Patane*, 542 U.S. 630, 634 (2004) (holding that physical fruits of a *Miranda* violation need not be excluded).

347. See, e.g., *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (“We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”).

348. See, e.g., *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995) (holding that “whether the ‘stop’ was permissible under *Terry v. Ohio* . . . is irrelevant to the *Miranda* analysis”).

349. See, e.g., *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993) (emphasizing that “[t]he purpose of the *Miranda* rule . . . is not to protect the police or the public”). The Seventh Circuit in *Smith* reasoned that “[p]olice officers have much less discretion than in [pure] Fourth Amendment cases” since *Miranda*'s sole function is to protect suspects from coercive police interrogations. *Id.*

350. *United States v. Perdue*, 8 F.3d 1455, 1463–66 (10th Cir. 1993).

## 2. *United States v. Martinez*

The debate on balancing societal interests was most evident in the Eighth Circuit's opinion in *United States v. Martinez*,<sup>351</sup> the facts of which were presented at the beginning of this Note.<sup>352</sup> In *Martinez*, the police were searching for potential suspects in connection with a reported bank robbery.<sup>353</sup> During the search, one officer noticed an individual that shared similar, but not exact, characteristics with the bank's description of the culprit.<sup>354</sup> Lacking probable cause, the police officer stopped the defendant and handcuffed him before conducting a stop and frisk.<sup>355</sup> During the officer's subsequent questioning of the suspect, the defendant made inconsistent statements regarding the money in his possession.<sup>356</sup> It was at this point that the police officer read the defendant his *Miranda* rights, placed the defendant in his police vehicle, and drove to the bank for verification.<sup>357</sup>

The Eighth Circuit accepted the police stop as valid under *Terry*, but found that the defendant's statements while handcuffed were inadmissible because they were made while the police subjected him to custodial interrogation without first reciting *Miranda* warnings.<sup>358</sup> The analysis provided a straightforward application of *Miranda* to the police detention, with little mention of the police officer's duty to investigate the defendant's potential involvement in a bank robbery.<sup>359</sup> The court made clear that the defendant "was entitled to *Miranda* warnings at the time he was handcuffed," even though the police had not yet determined the identity of the bank robber or potential accomplices.<sup>360</sup> In other words, the Eighth Circuit focused purely on the detention's physical restraint of the suspect, attaching little significance to the stop's duration or purpose.

The dissent in *Martinez* agreed with the majority that the use of handcuffs imposed an additional, if not highly intrusive, layer of physical restraint on the defendant.<sup>361</sup> However, it maintained that the interests underlying the police conduct justified the officer's delay of *Miranda* warnings.<sup>362</sup> The dissent argued that "the critical fact for *Miranda* purposes is that the questions were entirely consistent with the proper scope and purpose of a reasonable *Terry* stop."<sup>363</sup> Though the custody at issue strongly resembled an arrest, the dissent believed it could be justified as "an

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351. 462 F.3d 903 (8th Cir. 2006).

352. See *id.* at 906–07; see also *supra* notes 1–9 and accompanying text.

353. *Martinez*, 462 F.3d at 906.

354. *Id.*

355. *Id.* at 906–07.

356. *Id.* at 906.

357. *Id.*

358. *Id.* at 909–10.

359. *Id.* at 908–10.

360. *Id.* at 910.

361. *Id.* at 911–13 (Loken, C.J., dissenting).

362. *Id.* at 912–13.

363. *Id.* at 912.

action reasonably limited to officer safety concerns or the risk of flight while the officers attempt to quickly confirm or dispel their suspicions.”<sup>364</sup> In other words, the dissent claimed, the majority’s straightforward inquiry into whether the *Terry* stop imposed physical constraints associated with custodial interrogation, without considering the societal interests at stake or the stop’s duration, ignored the basic justification for invoking *Terry* in the first place. The majority, nonetheless, voted to exclude the evidence based on *Miranda*.<sup>365</sup>

### 3. *United States v. Newton*

In contrast to the inherent reasonableness approach, which inquires solely into the legitimacy of the *Terry* stop, applying *Miranda* to the facts of a legitimate *Terry* stop may distinguish situations that involve immediate danger and those stop and frisks investigating criminal activity but lacking any threat of violence or harm.<sup>366</sup> The Second Circuit in *United States v. Newton*<sup>367</sup> identified that the *Quarles* public safety exception to *Miranda* still applies during a *Terry* stop.<sup>368</sup> Touching on the relationship between the *Quarles* exception to *Miranda* and *Terry*, the Second Circuit established that *Miranda*’s application during *Terry* stops may depend largely on the nature of criminal activity involved, and the extent to which personal safety is at risk during the encounter.

In *Newton*, the defendant was seized by six law enforcement officials as part of a *Terry* stop.<sup>369</sup> He was handcuffed and questioned in his apartment following word that he had threatened to kill his mother while in possession of a gun.<sup>370</sup> The Second Circuit concluded that the police conduct subjected the defendant to custodial interrogation.<sup>371</sup> The court explained, “[h]andcuffs are generally recognized as a hallmark of a formal arrest.”<sup>372</sup> Furthermore, “a reasonable person finding himself placed in handcuffs by the police would ordinarily conclude that his detention would not necessarily be temporary or brief,” thus rendering ineffective the government’s contention that, since valid *Terry* stops can only exist in a temporary fashion, they cannot pierce the threshold of custodial interrogation.<sup>373</sup>

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364. *Id.* at 913.

365. *Id.* at 910 (majority opinion). While the majority found that the defendant’s statements should have been excluded, it nonetheless upheld his conviction based on its assessment that the failure to exclude such evidence was ultimately a harmless error. *Id.*

366. The *Quarles* exception to *Miranda* establishes this very distinction. *See supra* notes 97–111 and accompanying text.

367. 369 F.3d 659 (2d Cir. 2004).

368. *See id.* at 667–74.

369. *Id.* at 663.

370. *Id.*

371. *Id.* at 676–77.

372. *Id.* at 676.

373. *Id.*

Yet, while the court deemed the suspect in custody for purposes of *Miranda*, Judge Reena Raggi's unanimous opinion did not find a *Miranda* violation since the officers' interrogation was limited to the preservation of public safety.<sup>374</sup> Judge Raggi's opinion found that the *Terry* stop's purpose to prevent immediate harm to others, considering the defendant's possession of a gun, justified the stop's interrogation and subsequent procurement of self-incriminating evidence within a coercive setting.<sup>375</sup> The court did concede that the defendant, once handcuffed, did not pose an immediate threat.<sup>376</sup> But, citing *Quarles*, the court noted that "the presence of three persons in the apartment in addition to Newton, the reported hostility among these individuals, and the possibility that such hostility could turn against law enforcement officers" together warranted a sufficient concern among the officers that there remained a potential threat of public safety.<sup>377</sup> Though the defendant was subject to custodial interrogation, the police conduct did not have an eye toward securing a conviction. Instead the interrogation was deemed necessary to prevent serious harm, falling squarely within the parameters of *Quarles*.<sup>378</sup>

Finally, the court in *Newton* addressed how broad police questioning may extend according to the *Quarles* exception during a *Terry* stop. If, for instance, police had asked the defendant whether he had recently eaten breakfast, the question would not have been tailored to the specific public safety issue for which the Court would temporarily waive *Miranda*'s exclusionary power. In *Newton*, the defendant argued that police questions related to "contraband" were broader than the immediate danger (the gun) at issue, and, thus, his responses should have been inadmissible according to *Miranda*.<sup>379</sup> The Second Circuit rejected this view, noting, "Courts recognize that public safety questions are framed spontaneously in dangerous situations. Precision crafting cannot be expected in such circumstances."<sup>380</sup> While the officer's "inquiry about 'contraband' did not specifically refer to firearms, the term plainly encompassed such items."<sup>381</sup> Conversely, had the officer's questions traversed beyond the scope of the *Terry* stop's purpose to preserve public safety, subsequent responses would likely have been excluded at trial.

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374. *Id.* at 677. The court found that information pointing to the existence of weapons in the apartment and previous threats of violence justified the existence of a public safety concern during the *Terry* stop. *Id.* at 677-79.

375. *Id.* at 675.

376. *Id.* at 678.

377. *Id.* (citing *Quarles v. New York*, 467 U.S. 649, 657 (1984); *United States v. Reyes*, 353 F.3d 148, 153 (2d Cir. 2003)).

378. *Id.* at 677.

379. *Id.* at 678.

380. *Id.*

381. *Id.* at 679.



### III. LOCATING THE MIDDLE GROUND: A SOLUTION WHERE *MIRANDA* AND *TERRY* CAN EFFECTIVELY COEXIST

This part seeks to provide a comprehensive solution to the current conflict. Part II of this Note described the two competing approaches adopted by courts to reconcile *Miranda* and *Terry*. While some appellate courts posit that *Terry*'s focus on simply reasonable police conduct, along with its technical status as a nonarrest detention, precludes *Miranda*'s application, other courts contend that *Miranda*'s custodial interrogation standard should extend to *Terry* stops. Part III.A provides a brief analysis of the two existing judicial approaches to the conflict, along with a brief critique of proposed academic solutions. Part III.B outlines this Note's proposal that *Miranda* should apply where custodial interrogation arises from a legitimate *Terry* stop. However, where a *Terry* stop's detention involves legitimate public safety concerns, courts should not hesitate to delay *Miranda*'s application until law enforcement can resolve the immediate exigency. Finally, Part III.C applies this Note's approach to the cases discussed in Part II.

#### A. Analyzing Current Approaches to the Conflict

The two approaches currently applied by courts emphasize either *Terry* or *Miranda* to the other's detriment and fail to take into account the competing interests at the heart of the conflict. The inherent reasonableness analysis all too methodically overlooks a defendant's constitutionally protected rights and excludes inquiry into the nature of the *Terry* stop.<sup>382</sup> It ignores the new relationship between *Miranda* and *Terry* in favor of a simple and convenient bright-line approach.<sup>383</sup> In doing so, it finds shelter in the semantic distinction between a *Terry* stop and arrest, oblivious to the substantive overlap that courts and commentators have long since recognized.<sup>384</sup>

The inherent reasonableness approach is based principally on a circular argument, one that provides a distorted rationale for the conclusion that *Miranda* and *Terry* are mutually exclusive. The argument operates as follows: so long as a court deems a *Terry* stop to be valid, the police action, according to *Dunaway*, should not be deemed an arrest. Meanwhile, strict reliance on *Beheler* limits *Miranda* only to those detentions that involve custodial arrest.<sup>385</sup> Thus, according to a court's interpretation of *Beheler*, a valid *Terry* stop will never require *Miranda* warnings.<sup>386</sup>

This specious rationale has emanated from a failure among courts to acknowledge the evolution of their own *Terry* jurisprudence. Through strict

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382. See *supra* notes 284–92, 325–26 and accompanying text.

383. See *supra* notes 293–94 and accompanying text.

384. See *supra* Part II.C; *supra* note 226; see also Godsey, *supra* note 21, at 716.

385. See *supra* notes 85–86, 288–89 and accompanying text.

386. The Fourth Circuit in *Leshuk* is a prominent example of how this circular reasoning operates. See *supra* notes 276–94 and accompanying text.

application of *Dunaway* and *Berkemer*, these courts continue to apply outdated *Terry* analyses to present-day circumstances.<sup>387</sup> Indeed, by emphasizing previous Supreme Court dicta that downplays *Terry*'s invasive character, while at the same time sanctioning contemporary *Terry* measures that create far more intrusive custodies, these courts have enjoyed the unwarranted luxury of having their cake and eating it too.

Ultimately, this approach fails to recognize that *Miranda*'s primary concern is not defining the parameters of an arrest, but rather, determining whether a suspect is subjected to inherently coercive interrogation. Though an arrest's physical restraints have been recognized as the appropriate barometer to determine whether custodial interrogation exists, *Miranda* does not depend on all elements of an arrest being present.<sup>388</sup> For instance, *Miranda*'s custody inquiry does not hinge on whether an officer has acted with probable cause—an essential feature to an arrest.<sup>389</sup> That factor is ultimately irrelevant when deciding if a suspect was subject to a degree of restraint that rendered him at the mercy of police.

Meanwhile, the intrusive level approach is correct to recognize the overlap between *Miranda* and *Terry*; however, it too often overlooks compelling police concerns regarding public safety and investigating ongoing crimes. Indeed, this condition might arise frequently given the *Terry* doctrine's very purpose of addressing ad hoc suspicions, in which officers must often care for their own safety without the luxury of assistance or systematic planning.<sup>390</sup> The approach applies a straightforward *Miranda* test to *Terry* stops without considering how each doctrine's interests interact. While *Miranda* was meant to protect criminal suspects from coercive interrogations, it did not consider the kinds of exigent circumstances during a police detention that might require immediate police action as *Terry* recognized.<sup>391</sup> Only *Newton* recognized this interplay, which distinguishes the Second Circuit's reliance on *Quarles* from other court variations of the intrusive level approach.<sup>392</sup> By strictly applying *Miranda*'s custodial interrogation standard to *Terry*, most applications of the intrusive level approach consider only the factual circumstances of *Terry* stops while largely ignoring their justifications.<sup>393</sup>

Judicial commentators who have proposed solutions to the existing circuit split have developed a variety of frameworks, yet they share the similar trait of wanting to avoid overlap between *Miranda* and *Terry*. This may be achieved by embracing the inherent reasonableness approach, where

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387. See *supra* notes 256–60 and accompanying text. Only in *Quarles* did the Supreme Court consider scenarios involving exigent circumstances. See *supra* notes 97–111 and accompanying text.

388. See *supra* note 85.

389. See *supra* note 85.

390. See *supra* notes 352–60 and accompanying text.

391. See *supra* Part I.A.1, B.1.

392. See *supra* Part II.C.

393. See generally *United States v. Martinez*, 462 F.3d 903 (8th Cir. 2006); *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993).

valid *Terry* stops never trigger *Miranda* rights.<sup>394</sup> Another approach, more sympathetic to defendants, has suggested that courts roll back the current, expansive *Terry* doctrine to its original composition in order to avoid conflict with custodial interrogation.<sup>395</sup> Though coherent in theory, this approach fails to consider the degree to which courts have accepted and embraced *Terry*'s modern form.<sup>396</sup>

Finally, one recent proposal has suggested that courts should apply a sliding scale between a *Terry* stop's degree of restraint and duration to determine whether *Terry* exceeds its bounds and thus requires *Miranda* warnings.<sup>397</sup> The advocate of this proposal notes that this proposed approach "highlights the fact that a stop cannot be both valid under *Terry* and custodial under *Miranda*."<sup>398</sup> In other words, if a stop involves highly intrusive techniques, the stop would require less duration before it exceeded *Terry* and, as a consequence, require *Miranda* rights. Similarly a longer detention would require less intrusive techniques to violate *Terry* and invoke *Miranda*.<sup>399</sup> Though these academic proposals provide very different solutions to the current conflict, they all agree that *Miranda* cannot effectively operate within the confines of a valid *Terry* stop.

### B. Proposing a Two-Part Inquiry

This Note's proposed approach contends that *Miranda* and *Terry* can and should operate together within a unified framework, so long as courts can achieve the appropriate balance between the basic societal interests inherent in each doctrine.<sup>400</sup> Judging the degree of restraint should be one factor (albeit a major one) in a larger inquiry that allows all elements, both physical conditions and policy justifications, to be carefully addressed and considered. To achieve that end, this Note proposes a two-part inquiry, consistent with the Second Circuit's opinion in *Newton*, to decide whether *Miranda* should apply during a *Terry* encounter.

First, in light of the totality of circumstances involved, a court should ask whether the police detention and interrogation of a suspect under *Terry* entails a degree of restraint associated with *Miranda*'s basic custodial standard as outlined most recently by the Supreme Court in *Keohane*.<sup>401</sup> In

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394. See Note, *Custodial Engineering: Cleaning Up the Scope of Miranda Custody During Coercive Terry Stops*, 108 HARV. L. REV. 665, 682 (1995) (concluding that "the *Terry* inquiry remains a sensible exception to the *Miranda* requirement").

395. See Godsey, *supra* note 21, at 746-47.

396. See *supra* Part I.D.1-2.

397. See Swift, *supra* note 264, at 1076.

398. *Id.*

399. *Id.* at 1076-77.

400. The key advantage for allowing *Miranda* and *Terry* to apply simultaneously is that it permits courts to preserve the admissibility of evidence against Fourth Amendment challenges while subjecting a defendant's statements to legitimate Fifth Amendment concerns during custodial interrogation.

401. See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); see also *supra* notes 65, 119 and accompanying text.

other words, a court should “consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave.”<sup>402</sup> Though not an arrest in name, applying *Miranda* rights to *Terry* conduct that rivals an arrest in its degree of physical restraint also satisfies *Beheler*’s requirement that custody for *Miranda*, at minimum, involve a restriction of the “‘freedom of movement’ of the degree associated with formal arrest.”<sup>403</sup>

According to *Keohane* and *Beheler*, police who surround a suspect with guns drawn, or place him in handcuffs before questioning, though not exceeding the limits of a valid *Terry* stop, have rendered the suspect in custody for *Miranda* purposes.<sup>404</sup> These kinds of police measures are quintessential features of a custodial arrest. Having a suspect lay prostrate on the ground while surrounded by police, or placed into a patrol vehicle, may also satisfy the basic *Miranda* standard, but determining whether these instances would make a suspect “feel[] completely at the mercy of the police,” is dependent on the unique facts of a particular case.<sup>405</sup> Courts should examine, among other circumstances, the number of officers involved, the sort of physical aggression exercised by police, and the extent to which the suspect is isolated from the public. Depending on the factual circumstances, these types of detentions can foster more coercive interrogation settings than traditional *Terry* stops, where an officer may require a suspect to simply place his hands over his head or against a wall during the frisk and interrogation.

As previously noted, the amorphous character of the *Terry* doctrine renders almost impossible an effective solution that evades a judge’s discretion altogether.<sup>406</sup> Cases that produce a conflict between *Miranda* and *Terry* are, by their nature, extremely fact sensitive. As a consequence, courts should avoid a framework whose fixation on technical measurements or fine details would lead judges into a profound and undesirable morass. For this conflict, courts should rely on basic standards and principles provided by *Miranda* and its progeny.

The duration of an intrusive *Terry* stop may be a contributing factor in the court’s overall analysis, but it should not play a commanding role in the ultimate outcome. To be sure, the Supreme Court in *Berkemer* included a stop and frisk’s duration as one factor among others for courts to consider

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402. *Yarborough v. Alvarado*, 541 U.S. 652, 659 (2004) (citing *Keohane*, 516 U.S. at 112).

403. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)); see also *supra* notes 83–87 and accompanying text.

404. It is difficult to square the Ninth Circuit’s view in *Cervantes-Flores* that handcuffs during a *Terry* stop did not trigger *Miranda*, while the Supreme Court assumed almost beyond argument in *Quarles* that handcuffs did constitute custody for *Miranda* purposes. The best explanation would be that the Ninth Circuit attempted to compensate for *Terry*’s particular societal interests and limited duration. See *supra* notes 104–06, 315–24 and accompanying text.

405. *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984).

406. See *supra* note 163 and accompanying text.

in a case-by-case framework.<sup>407</sup> But as *Berkemer* and, more recently, *Keohane* stated, courts should perform a reasonable person analysis from the defendant's position in custody.<sup>408</sup> Not surprisingly, more intrusive detentions during *Terry* stops may very well lead a suspect to reasonably believe that his detention will be longer despite not knowing for certain how long the custody will actually continue. The Second Circuit cited this very point in *Newton* when concluding that the officers' aggressive detention rendered moot the government's argument that the stop ultimately could not last very long.<sup>409</sup>

A stop's limited duration may also be the direct result of a highly coercive interrogation, which, in turn, produces a quick confession or statement by the suspect. In that case, courts should not judge the coercive quality of a police detention based on its effectiveness to produce desirable results. The Supreme Court established *Miranda* precisely to avoid this theory of analysis.<sup>410</sup>

A court may also ask whether the officer's words constituted an interrogation according to *Miranda*, though one would expect that most *Terry* stops involve direct questions by police for the exact purpose of eliciting an incriminating response.<sup>411</sup> The *Innis* standard, even narrowly applied, would likely encompass all questions during a *Terry* stop. After all, despite its considerable growth over the past forty years, *Terry* still only permits questions that are suitably catered to confirm or dispel an officer's reasonable suspicion.<sup>412</sup> More deliberate or indirect conversation, similar to that involved in *Innis*, could not find refuge under *Terry*'s basic requirements.

Overall, applying the basic *Miranda* standard to *Terry* avoids problems associated with creating an artificial standard to compensate for *Terry*'s own societal concerns. This is precisely how some courts have managed to circumvent *Miranda*'s application to facts that assuredly involve custodial arrest.<sup>413</sup> Since degree of restraint is only one part of the inquiry, a court's desire to provide added compensation for *Terry*'s institutional concerns need not interfere with *Miranda*'s core concern for inherently coercive settings, such as those associated with custodial arrest.<sup>414</sup> Establishing the custody element for *Miranda* would not conclude the analysis of whether *Miranda* rights should apply. Further inquiry must proceed.

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407. *Berkemer*, 468 U.S. at 437.

408. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Berkemer*, 468 U.S. at 442; *supra* note 119.

409. *See supra* notes 369–73 and accompanying text.

410. *See Miranda v. Arizona*, 384 U.S. 436, 448, 457–58 (1966) (explaining that hostile police interrogation tactics can be effective, but that their use violates basic civilized notions of dignity and liberty).

411. *See supra* notes 88–96 and accompanying text.

412. *See supra* note 188 and accompanying text.

413. *See supra* Part II.B.

414. *See supra* Part I.A.2.

If a court should find that custodial interrogation exists, its second task should be to analyze the nature of the criminal activity involved during a *Terry* detention and determine whether the police actions, once holding the suspect in custody, were narrowly catered to that legitimate end. *Terry* stops have long since evolved from the decision's original framework that dealt exclusively with averting immediate danger.<sup>415</sup> Today, police may justify a stop and frisk during a routine narcotics investigation, among other crimes lacking transparent safety concerns.<sup>416</sup> However, to forgo a suspect's *Miranda* rights, the overriding state interest during a *Terry* stop should exceed the mere risk of deterring a suspect's cooperation during a drug investigation. There must be more at stake before courts can sanction the compromise of a constitutional guarantee.

To suspend *Miranda* rights during a suspect's detention, the *Terry* stop must present a necessity to avert immediate harm to oneself or others. An unsubstantiated hunch that potential weapons exist during an ad hoc drug bust would not justify such an intrusion without *Miranda* warnings. However, a reasonable suspicion that weapons are present during a drug transaction might reach the threshold justifiable for the delay of *Miranda* warnings, assuming that circumstances indicate potential violence during the stop and frisk.<sup>417</sup> Thus, if a potential immediate danger exists while a suspect is in custody, an officer should be able compel the suspect to answer important questions that will help avert that crisis without being hindered by the deterring effects produced by *Miranda* warnings.

As the Second Circuit in *Newton* demonstrated, this rationale is fully consistent, not only with *Terry*, but also with *Miranda*.<sup>418</sup> It reconciles *Terry* with *Miranda*'s principal exception in *Quarles*, in which the concern for public safety warrants a delay in *Miranda* rights so that a potential crisis can be averted.<sup>419</sup>

As a subpart of this second inquiry, a court should investigate whether the interrogation utilized by police was "consistent with the limited purpose of the *Terry* stop"—to prevent immediate harm.<sup>420</sup> The fact that a public

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415. See *supra* notes 175–83 and accompanying text.

416. See *supra* note 181 and accompanying text.

417. In this regard, the public safety exception is slightly more lenient for police than the original *Terry* holding, which spoke of an officer's need to prevent impending harm. Under *Quarles*, the harm need not be inevitable. See *supra* note 111.

418. See *supra* notes 97–111, 143–45 and accompanying text.

419. In this inquiry, courts should not confuse a public safety concern that provides the justification for the *Terry* stop and those immediate dangers still at large once the suspect is under detention. Only exigent circumstances that exist while the suspect is in custody can be considered for purposes of *Miranda*. Thus, it is possible that an officer may initiate a *Terry* stop to prevent immediate harm and succeed in fully averting that threat by detaining the suspect. In this case, the officer could not then successfully argue for the *Quarles* exception since his subsequent custodial interrogation of the suspect would have no further immediate danger to avert. Of course, courts must use their discretion to determine whether the exigent circumstances have passed.

420. *United States v. Martinez*, 462 F.3d 903, 913 (8th Cir. 2006) (Loken, C.J., dissenting).

safety threat exists during the detention does not provide police with a blank check to perform a thorough investigative inquiry into the suspect's past. Rather, it restricts police conduct only to those questions narrowly tailored to avert that immediate harm.<sup>421</sup> For example, as Chief Judge James Loken of the Eighth Circuit discussed in his dissent in *Martinez*, had the police officer asked the suspect in *Martinez* "about his actions earlier that day, or the details of the robbery, or other crimes under investigation, that would be custodial interrogation" outside the narrow scope of the stop's purpose and beyond the grasp of the *Quarles* exception.<sup>422</sup> Police questions need not always touch exactly on the item or person at large, but they must address essential facts or clues that will ultimately lead police to their destination.<sup>423</sup> Thus, once accepting that the public safety exception applies during the *Terry* stop, a court must consider whether the interrogation was meant to avert that immediate harm or whether the questions indicate a broader investigation into the defendant's involvement, devoid of the urgency required to overcome *Miranda*.<sup>424</sup>

Under this framework, the *Terry* doctrine comes full circle. The Warren Court originally envisioned *Terry* stops as appropriate only during situations in which reasonable suspicion of immediate danger was evident.<sup>425</sup> However, the Supreme Court has long since abandoned this restriction and expanded those justifications to more routine investigations of potential criminal activity.<sup>426</sup> Reliance on *Quarles* returns *Terry* back to its original scope when dealing with *Miranda*. This inquiry does not, however, scale back the current form of *Terry* stops altogether. Officers may still utilize handcuffs or draw weapons during a stop in which they possess only a reasonable suspicion of criminal activity. They may likewise obtain physical evidence from that legitimate stop without running afoul of the Fourth Amendment. In other words, this Note's approach allows *Terry* to exist in its modern, expansive form, while imposing certain Fifth Amendment restrictions on police only when their conduct simultaneously subjects a suspect to custodial interrogation.

It is likewise worth reiterating that the conflict between *Miranda* and *Terry* only implicates statements made by the defendant. It would not exclude evidence retrieved by an officer during the valid *Terry* stop (which would precede the *Miranda* warnings) or physical evidence produced by a *Miranda* violation.<sup>427</sup> Applying a rule that enforces *Miranda* rights during a stop and frisk will thus not dramatically undermine police access to vital

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421. For an illustration of this test, see *United States v. Kim*, 292 F.3d 969, 976–77 (9th Cir. 2002).

422. *Martinez*, 462 F.3d at 913 (Loken, C.J., dissenting).

423. See *supra* notes 379–81 and accompanying text.

424. This approach follows the rationale of the Supreme Court in *Quarles*. See *supra* note 108 and accompanying text.

425. See *supra* notes 143–45 and accompanying text.

426. See *supra* notes 173–83 and accompanying text.

427. See *United States v. Patane*, 542 U.S. 630, 634 (2004); *supra* note 343 and accompanying text.

evidence. Fear that *Miranda* will exclude crucial evidence during *Terry* stops neglects the abundance of tools still at the officer's disposal during a stop and frisk to investigate criminal activity. But if courts, on the one hand, allow broad police measures under the aegis of *Terry*, they must also acknowledge the intrusions they impose on a person's liberty and subsequently enforce the constitutionally required protections afforded to suspects during custodial interrogation.<sup>428</sup>

### C. Applying the Two-Part Test to Previous Appellate Cases

Application of this Note's two-part inquiry to those appellate cases discussed earlier would reverse decisions made according to either existing approach. In *Leshuk*, the police subjected the defendant to custodial interrogation worthy of *Miranda* by surrounding him, holding him down during questioning, and threatening violence if the suspect did not comply.<sup>429</sup> This is a rather close case, however, as no handcuffs or drawn weapons were involved during the interrogation. Next, the *Terry* detention involved only drug-related hunches with little evidence that the suspect constituted a legitimate public safety threat.<sup>430</sup> Accordingly, the police stop did not entail adequate justification to curb the defendant's *Miranda* rights and thus his statements should have been excluded.

Similarly, the First Circuit's decision in *Trueber* would be reversed under this Note's approach. The presence of custodial interrogation in *Trueber* can hardly be disputed based on the multiple officers' surrounding the defendant with, at one point, their guns drawn.<sup>431</sup> Moreover, the opinion only noted the officers' suspicions of drug-trafficking and money laundering when they stopped the defendant.<sup>432</sup> This type of activity should not alone justify the delay of *Miranda* rights.

Likewise, the Ninth Circuit's decision in *Cervantes-Flores* would also be reversed. The suspect was handcuffed by law enforcement after crossing the national border based on suspicion of drug trafficking.<sup>433</sup> Though his detention was a legitimate exercise of *Terry* authority, the suspect's accompanying statements should have been excluded since law enforcement did not have a pressing public safety threat that would justify a waiver of *Miranda*.

Meanwhile, the Eighth Circuit's decision to exclude evidence in *Martinez* would also be reversed based on the police officers' need, following a bank robbery, to collect vital information through questioning

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428. See *United States v. Perdue*, 8 F.3d 1455, 1465 (10th Cir. 1993) ("Police officers must make a choice—if they are going to take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising them of their constitutional rights.").

429. See *United States v. Leshuk*, 65 F.3d 1105, 1110 (4th Cir. 1995); *supra* notes 278–81 and accompanying text.

430. See *supra* notes 278–81 and accompanying text.

431. See *supra* notes 296–306 and accompanying text.

432. See *supra* notes 296–306 and accompanying text.

433. See *supra* notes 315–24 and accompanying text.



to preserve the peace.<sup>434</sup> The officers' conduct, rightfully considered a custodial interrogation, presented a case where an ad hoc investigation targeted vital information needed to avert a legitimate and immediate harm.<sup>435</sup> Once the officers learned of the bank robbery, they possessed specific knowledge that an armed man, able and willing to commit violent crimes, was still at large in the vicinity. Furthermore, the police held a reasonable suspicion that the robbery involved co-conspirators, which would make the interrogation even more important to the officers' peacekeeping role. Accordingly, since the questioning was limited to the exigency, the Eighth Circuit should have admitted the defendant's statements.

The Tenth Circuit's exclusion of the defendant's statements in *Perdue* presents a more difficult case.<sup>436</sup> While the defendant was subject to custodial interrogation, the officer's suspicions involved a drug operation run by the defendant in a building that stored weapons, including a nine-millimeter pistol and a twelve-gauge shotgun.<sup>437</sup> Based on the officers' reasonable belief that the premise was still dangerous, they were justified to interrogate the defendant to the extent that it would collect information necessary to preserve the peace.

According to this Note's proposed inquiry, the crucial issue in *Perdue* is whether the police interrogation was tailored to the objective of preventing immediate harm. The officer's questioning only addressed the defendant's involvement with drugs, not potential weapons.<sup>438</sup> However, it is quite plausible that this questioning was essential before a further inquiry into the potential harms still at large. Moreover, the officer's questioning can be justified based on his need to confirm that it was indeed the defendant's operation that the police were investigating. That fact was only confirmed after the police questioned the defendant.<sup>439</sup> Based on these facts, the police questioning was sufficiently tailored to the purpose of preserving public safety. Accordingly, the Tenth Circuit's decision in *Perdue* would also have been reversed.

Finally, as previously discussed, the appellate court decision that most aligns with this Note's proposed test, and best preserves the interests associated with *Miranda* and *Terry*, is the Second Circuit's decision in *Newton*.<sup>440</sup> In *Newton*, the court acknowledged that the defendant was subject to custodial interrogation during a *Terry* stop and would have required *Miranda* warnings but for the police officers' compelling interest to investigate their suspicion and preserve the public peace.<sup>441</sup>

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434. See *supra* notes 352–60 and accompanying text.

435. See *supra* notes 352–60 and accompanying text.

436. See *supra* notes 329–33 and accompanying text.

437. *United States v. Perdue*, 8 F.3d 1455, 1458–59 (10th Cir. 1993).

438. *Id.*

439. *Id.*

440. See *supra* notes 368–78 and accompanying text.

441. See *supra* notes 368–78 and accompanying text.

Accordingly, the Second Circuit calibrated the proper balance of the interests associated with each doctrine to produce the appropriate outcome.

### CONCLUSION

In response to the events that shocked the nation and world on September 11, 2001, the public has instilled great trust in local law enforcement to protect it against terrorist threats of all forms. Along with the benefits associated with greater police protection inevitably arises the possibility that some liberties will be sacrificed.

The current dispute between *Miranda* and *Terry* existed long before modern terrorism gripped the national conscience. Each doctrine originated as an attempt by the Warren Court to balance two societal concerns, public safety and civil liberties, fundamental within a democratic society. Their creators did not foresee a potential collision. However, both *Miranda*'s and *Terry*'s subsequent developments produced a "subtle interplay" between the two, which courts today have not yet completely unearthed.<sup>442</sup> Thus, it is inevitable that a judicial solution to this matter, likely at the nation's highest court, will be decided with a post-9/11 outlook.

In the midst of another international crisis, plagued by concern for national security and the subsequent impact of fervent patriotism on individual freedoms, Justice Robert Jackson wrote the following:

Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.<sup>443</sup>

The continuing threat of terrorism should undoubtedly place great importance on the need for America to protect its own citizenry. And in that same light, it should demonstrate that the value of national "strength" is immeasurable.<sup>444</sup>

It is in this context that the conflict between *Miranda* and *Terry* now endures. With new institutional factors now at play, our nation's criminal procedure law stands on the brink of a new era. Courts are now trusted with the immense responsibility of elucidating these new barriers. In the end, only a balanced solution, preserving a defendant's *Miranda* rights during *Terry* encounters while stringently enforcing the public safety exception can best serve the Constitution and this nation's interests.

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442. See *Perdue*, 8 F.3d at 1461.

443. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–37 (1943).

444. See *id.* at 637.