

St. John's Law Review

Volume 72
Number 3 *Volume 72, Summer-Fall 1998,*
Numbers 3-4

Article 13

March 2012

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Recommended Citation

Richman, Daniel (1998) "The Process of Terry-Lawmaking," *St. John's Law Review*. Vol. 72 : No. 3 , Article 13.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol72/iss3/13>

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THE PROCESS OF *TERRY*-LAWMAKING

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The organizers of this Conference obviously gave a lot of thought to its structure. We started off with a session that showed the Supreme Court at its best, working under the gentle leadership of Chief Justice Warren, and guided by the sage counsel of Justice Brennan, to balance the demands of the Fourth Amendment with the exigencies of street encounters. Now we come to a session in which the Supreme Court comes off well, not merely in one, but in *both* papers. For Steve Saltzburg, *Terry*¹ itself may not have been perfect, but, over time, the Court has made it "practically perfect."² David Harris is not so satisfied, however, he has no quarrel with the Court either.³ The bad actors in David's piece are the lower courts that have been tone-deaf to the Supreme Court's demands for particularized inquiries into reasonable suspicion. These courts have instead developed gross categorical rules that relieve police officers of the burden of justification that the Court tried to put on them in *Terry*.⁴

Given what I know about some of the people who will be participating in sessions of this Conference after this one, I have a feeling it's going to be downhill for the Supreme Court from here. I don't want to be too mean. I will not condemn the Court. My politeness will go even further; I will not castigate the lower courts. I will not even really disagree with either Steve or David. I shall be the model guest.

David is quite right to argue that the gross categorical rules developed by the lower courts have undercut the fact-sensitivity at the heart of the *Terry* doctrine that Steve speaks so highly of.

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¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² Steven A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998).

³ See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975 (1998).

⁴ *See id.*

These overbroad categorical rules are not coincidental, though. They are an almost inevitable product of the procedural context in which *Terry* doctrine operates. Indeed, the whole *Terry* story makes a great case study in how the structure of our adjudicatory system affects the contours of constitutional rights.

How does *Terry* law really develop? Sure, Supreme Court cases may have some impact,⁵ but they do not have as much impact as the daily grind of the criminal justice system. Let us go through the process step by step.

A police officer makes an investigative stop. Perhaps he acts out of arbitrariness, perhaps racism, or perhaps just an inchoate sense that something is amiss. Whatever his actual motivations, odds are that he will not be under any immediate internal obligation to justify the stop to his superiors. If nothing comes of the stop—no prosecution, no seizure, none of those rare civil suits—our officer will not have to articulate the basis of his suspicion.⁶ The pressures on him to internalize *Terry* doctrine are thus somewhat limited.

The stops our police officer will have to justify are primarily those that result in prosecution. When this happens, he is not going to be on his own. He probably will get considerable help from a prosecutor. When the prosecutor sits down with the officer and develops his articulated justification, she is not suborning perjury. Because the *Terry* standard is an objective one,⁷

⁵ See *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (holding that police may seize items discovered by touch during a lawful pat down search); *Horton v. California*, 496 U.S. 128, 130-36 (1990) (concluding that discovery of contraband need not be inadvertent for a valid seizure, so long as the item is instantly apparent and discovered during a lawful search); *Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987) (declaring that probable cause, rather than reasonable suspicion, is necessary to invoke the plain view doctrine for search and seizure in the suspect's home); *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (holding a police officer may conduct a limited search of a suspect's car where there is reasonable suspicion that the suspect is armed and dangerous); *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979) (clarifying that there must be reasonable suspicion that a person is armed and dangerous before a search can be conducted).

⁶ See *Terry*, 392 U.S. at 21-22.

⁷ See *Whren v. United States*, 517 U.S. 806, 812 (1996) ("Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."); *Scott v. United States*, 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."); see also David A. Sklansky,

there is nothing at all improper about her probing the officer's recollection and drawing out elements that she feels will bolster the state's claim that the stop was justified. The stop and frisk was the officer's. The subsequent articulation of the grounds for the measure is likely to be the prosecutor's.

What will inform this collaborative articulation process? The prosecutor may not have a good feel for the realities of the streets, but she does keep up with the case law. And the only case law that really counts is appellate case law. After all, most trial courts don't even produce written decisions on *Terry* issues. When they do, those decisions have limited precedential value.

What do appellate cases look like? George Thomas has given us an idea.⁸ In this fact-sensitive area, most will be affirmances, based primarily on deference to the factual findings of the trial judge. To be sure, the ultimate question of whether there was "reasonable suspicion" will be a mixed question that, at least in the federal system, the appellate court will review *de novo*.⁹ As George has pointed out, however, many state courts have a different, more deferential standard.¹⁰ And, in any event, as the remand in *Ornelas* illustrated, the ostensible degree of appellate scrutiny probably does not make much difference, as a practical matter, in this fact-sensitive area.¹¹ The inclination of the appellate court will be to distance itself from the complex, possibly subtle particulars of the stop, and rely on the good judgment of the trial court. Moreover, even if the appellate court were actually to give serious consideration to all those particulars, its opinion probably would not. Whether it upholds the stop or finds it inadequately justified, its opinion will likely be quite stylized, focusing on a few factors (present or absent) that it deems salient.¹²

Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV., 271, 284-91 (discussing the Court's objective approach).

⁸ See George C. Thomas III, *Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 ST. JOHN'S L. REV. 1025 (1998).

⁹ See *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (stating that this type of appellate review is most consistent with the Court's own approach to determining whether reasonable suspicion exists).

¹⁰ See Thomas, *supra* note 8.

¹¹ See *United States v. Ornelas*, Nos. 94-3349, 94-3350, 1996 WL 508569, at *1 (7th Cir. Sept. 4, 1996) (unpublished table decision) (applying *de novo* standard of review to uphold the probable cause determination that the court previously upheld as not "clearly erroneous").

¹² See Hon. Raymond C. Fisher, *Justice Brennan's Supporting Role*, 72 ST.

When our stop gets litigated in the trial court, the prosecutor will therefore defend it in terms of the factors that the appellate courts have deemed salient.¹³ Then the trial court will rule on the stop. Maybe the court's decision will be based upon sensitive inquiry into the particular facts and circumstances of the stop. Maybe it won't. What is certain is that if the ruling is appealed, the *Terry* issue will be presented, by both sides, with an eye to the salient factors highlighted in previous appellate opinions. If one really wants to see what happened to *Terry*'s requirement of a fact-sensitive analysis, one has only to look at the briefs in so many *Terry* appeals, with all their boiler plate arguments and string citations.

Eventually, the appellate court will rule. Its ruling will rely on the salient factors highlighted in the briefs, or the lack thereof. If published, this new decision will be used by prosecutors when preparing the next case. And so the cycle continues. With every turn, this process works to generalize, expand and embed the categories that David Harris complains of.¹⁴ Overbroad categories are not caused by any judicial antipathy to *Terry*. They are a virtually inevitable product of a system in which after-the-fact objective justifications are informed by appellate decisions that are at least one step removed from the particular facts and circumstances of a case. I, therefore, think David is far too optimistic in thinking that a message from the Supreme Court would set things to right in the lower courts.¹⁵

The part of my story in which the prosecutor helps the police officer tidy up, strengthen, maybe even manufacture, the articulation of his reasonable suspicion points up a fundamental tension in *Terry* doctrine.

Steve Saltzburg correctly points out how *Terry* (or least the *Terry* line of cases) stepped into an obvious vacuum creating a middle-tier scrutiny for intermediately intrusive police actions.¹⁶ The cases take a common sense approach to police-citizen contacts that are inevitable and necessary, but that really do not fit within doctrine governing full-blown arrests and searches.

JOHN'S L. REV. 905 (1998).

¹³ This certainly was my experience when I was an Assistant United States Attorney in the Southern District of New York in 1987-92.

¹⁴ See Harris, *supra* note 3.

¹⁵ See *id.*

¹⁶ See Saltzburg, *supra* note 2.

Without *Terry*, courts would have to choose between ignoring the constitutional implications of street stops, or applying a probable-cause standard to them, and possibly watering down that standard in the process. Some may find *Terry* and its progeny too deferential toward the judgment calls of police officers in such encounters, but without *Terry*, such judgments might have gone completely unregulated. Moreover, by looking only to "reasonableness," these cases ensure that probable cause remains a meaningful standard, reserved for full-fledged searches and seizures. At the heart of the Supreme Court's *Terry* decisions is thus an appreciation of a police officer's job and knowledge, and a desire to give him some degree of protection when he's doing that job.¹⁷ The idea, as Steve notes, is to have judges approach cases from the perspective of law enforcement officers.¹⁸ Just as we recognize a special province for jurors, in which they draw on their "common sense conclusions about human behavior," so should we give some deference to the competence of police officers.¹⁹ Let cops do what they do best, with courts ensuring only that they don't act arbitrarily, or worse.

The use of an objective approach in *Terry* cases, however, flies in the face of this rationale. How can we say that we are letting cops be cops when, in fact, the *Terry* inquiry takes place in the context of retrospective litigation about hypothetical motivations? Surely, a subjective approach has its own problems. Probing the mind of a law enforcement officer is not something that courts are spectacularly good at. A subjective approach would put even more pressure on police officers to "shade" their testimony.²⁰ My point is not to argue for a subjective approach, or to argue against an objective one. It is only to say that the justification for *Terry* seems inconsistent with an objective ap-

¹⁷ See *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968).

¹⁸ See Saltzburg, *supra* note 2.

¹⁹ *Id.* ("Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same and so are law enforcement officers.") (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

²⁰ See Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1382-86 (1996) (advocating a two-part test for traffic stops, examining both the officer's subjective motivations, and the objective reasonableness of the stop); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 379-86 (1998) (discussing the pervasiveness of police perjury in traffic stop cases).

proach. We want to protect good police work, not creative litigation.

This inconsistency becomes even more marked if we start importing broader social policy considerations into our assessment of *Terry* stop justifications. David Harris's condemnation of cases that turn on incongruity²¹ highlights the inherent difficulty that courts must face in trying to develop a jurisprudence of appropriately articulated police "hunches." There is something deeply troubling about letting police stop white kids because they are in predominately black neighborhoods, or black kids because they are in predominately white neighborhoods. The problem is not just a matter of technical Equal Protection doctrine. I'd like to think that most of us start with an instinctive discomfort with all official rationales that turn on race. The problem is not merely symbolic: Fourth Amendment doctrine that accepts this rationale encourages cops to think in racial terms, and exacerbates the racial polarization that often infects community-police relations. Moreover, to extent that these "incongruity"-based stops become widespread, they deter the easy commerce between neighborhoods that we must foster if we want to end racial divisiveness.²²

The costs of the "incongruity" cases are nicely spelled out in David Harris's article, and will, I am sure, also be discussed at length later in this Conference.²³ My point here is *not* to defend these cases. I merely want to suggest that an alternative doctrine that was far more skeptical about all race-based articulations of suspicion would raise some of its own questions about the extent to which courts are to respect the expertise and experience of law enforcement officers. It seems outrageous to support any doctrinal approach that would permit a rookie cop in a new neighborhood to use race as his main criteria for stopping

²¹ See Harris, *supra* note 3.

²² See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 153 (1997). Kennedy argues:

Permitting color to count, albeit only in conjunction with other considerations, as an indicia of suspiciousness . . . contributes to residential racial separation, one of the most intractable and consequential problems in America. Racially selective policing will help to dissuade blacks from venturing into neighborhoods where they are viewed as being "out of place," "not belonging."

Id. (footnote omitted).

²³ See Harris, *supra* note 3.

people. But what about the experienced cop fitting the description that Reuben Payne gave us of Officer McFadden²⁴ who, although he would prefer it otherwise, has found to his sadness that the only people of X race who visit his patrol sector are kids looking to buy drugs, to rob, or whatever? To put the problem in New York terms: What of the New York City police officer in Washington Heights who regularly watches white kids from New Jersey come over the George Washington Bridge to buy crack near Audubon Avenue?²⁵

Since race is so problematic, we (or at least many of us) would like to demand that this cop articulate something more than just race. A lot more. If our police departments are to gain the full confidence of all groups in the communities they serve, our doctrine must promise a dramatic break from our ugly history of racist enforcement patterns.²⁶ Just as the Supreme Court did in *Batson v. Kentucky*,²⁷ when it ruled out race as a lawful basis for peremptory strikes,²⁸ *Terry* doctrine therefore ought to turn a deaf ear (at least for now) to any empirical justifications offered for race-based decision-making. But to the extent we minimize the role that race can play in any effort to justify our cop's stop (*and I think we should*), our cop and his colleagues are

²⁴ See Reuben M. Payne, *The Prosecutor's Perspective on Terry: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN'S L. REV. 733 (1998).

²⁵ Perhaps I date myself with this example. But this was a scenario that used to arise with some frequency when the U.S. Attorney's Office took these cases in the late 1980s. See David M. Halbfinger, *A Neighborhood Gives Peace a Wary Look*, N.Y. TIMES, May 18, 1998, at A1 (describing how, in Washington Heights in the mid-1980s, "four or five drug crews might share a single block, their street peddlers swarming over cars with out-of-state plates").

One interesting consequence of the increased federal interest in low-level drug and other street crimes, perhaps, has been to expose the lower federal courts to a far broader array of *Terry* litigation than otherwise would have been the case in a world where relatively few claims are brought under § 1983. See Kathleen F. Brickley, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1154 (1995) (discussing the increase of federal involvement in criminal law); see also *Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (precluding the relitigation of claims from state criminal cases where there has been a fair and full opportunity for litigation provided by the state).

²⁶ See KENNEDY, *supra* note 22, at 76-135.

²⁷ 476 U.S. 79 (1986).

²⁸ See *id.* at 84; see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 732 (1992) (arguing that the underlying holding of *Batson* is that "even if there were some statistical support for the view that jurors tend to be especially sympathetic to defendants of their own race, it would be profoundly wrong to enshrine any such view in our constitutional jurisprudence").

hardly going to believe us when we turn around and claim that we are just trying to promote good police work and prevent arbitrary enforcement. Perhaps our veteran cop will start developing "hunches" that are more grounded in judicially approved factors. Perhaps he will just work harder with the prosecutor after the stop, to justify it appropriately. Either way, the gulf between policing and *Terry* litigation widens.

In the end, there is a degree of futility to the whole enterprise. I suppose one might argue that there is no such thing as a good police hunch: that all alleged "hunches" either can be fully articulated, in light of particular facts and circumstances, or, if they can't be, can fairly be ascribed to arbitrariness or, worse, prejudice, conscious or subconscious.²⁹ I am uncomfortable with this analysis. Like professionals or craftsmen in other areas, a trained officer with experience in a community can often sense something wrong, even where it cannot easily be articulated. Moreover, having been selected according to a list of criteria on which the ability to offer legal justifications may not rank very high, and lacking access to the kind of comprehensive data bases that other professionals draw upon to educate and justify their intuitions, our police officer will often be particularly ill-equipped to articulate the factors informing his hunches.

This leads to a more subtle argument, one that has more force. It acknowledges that there is such a thing as a real "hunch," and/or that retrospective judicial inquiries into an officer's conduct may not be able to capture the full extent of his justification. Without denying that a scheme of judicial review that is willfully deaf to certain enforcement justifications can lead to false negatives, this argument contends that this cost is outweighed by socially important benefits we obtain from at least trying (maybe not very successfully) to control arbitrariness and racism. I think we should embrace this argument. But if we do, we can't turn around and say that we are just trying to ensure that cops can do their jobs, just trying to allow a "trained officer" to make the "inferences and deductions that might well elude an untrained person."³⁰

²⁹ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 441-42 n.1 (1991) (Marshall, J., dissenting) ("[T]he basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.") (emphasis omitted).

³⁰ Saltzburg, *supra* note 2.

So I suppose we should both celebrate *Terry's* effort to apply the Fourth Amendment pragmatically to the exigencies of street encounters, and chide those courts that are insufficiently sensitive to the racial dimensions of their *Terry* analyses. But we should recognize the tension between these two positions.

