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I. INTRODUCTION

There is a collision occurring in the federal circuit courts of appeal between the Fourth and Fifth Amendments to the United States Constitution.[1] The conflict is due to the lack of clear direction from the United States Supreme Court on the amount of force police officers may exert under the *Terry* doctrine before a suspect is deemed to be in "custody."[2] The hazy line delineating "custody" raises two questions. First, at what point do indicia of arrest make a *Terry* stop custodial for purposes of the Fourth Amendment, thereby giving rise to a probable cause requirement for validity? Second, when does a *Terry* stop become custodial for purposes of the Fifth Amendment, thus requiring *Miranda* warnings to protect any possible statements of admission made by the individual?

This conflict between the custody requirements of *Terry* and *Miranda* is a constitutional issue which has arisen in the past decade.[3] The federal circuit courts' recent expansion of the amount of force police officers may use in a valid *Terry* stop has created ambiguity in the meaning of custody as applied by each amendment.[4]

A. The Original Scope of Terry

In 1968, the Court in *Terry v. Ohio* created an exception to the probable cause requirement of the Fourth Amendment.[5] The Court envisioned this exception as a very "narrowly" defined intrusion allowed to police officers based on a reasonable suspicion of the presence of a weapon and the officers' concern for their safety.[6] The court defined these intrusions as non-custodial for purposes of the Fourth Amendment despite the clearly evident restriction on the freedom of the individual.[7] The fact that the Court viewed *Terry* stops as very limited and non-custodial in nature allowed these intrusions to be insulated from any analysis under the 1966 *Miranda* decision.[8]

B. The Scope of Miranda

In *Miranda v. Arizona*, the Court analyzed the moment at which a person should reasonably be considered "in custody" for purposes of the Fifth Amendment.[9] In other words, the Court attempted to set a standard for determin-

1. Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994).
2. Godsey, *supra* note 1, at 715. *See* Terry v. Ohio, 392 U.S. 1 (1968).
3. Godsey, *supra* note 1, at 715; Miranda v. Arizona, 384 U.S. 436 (1966).
4. United States v. Tilmon, 19 F.3d 1221, 1224-25 (7th Cir. 1994).
5. *Terry*, 392 U.S. at 1.
6. *Id.* at 23.
7. *Id.* at 29-31.
8. *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
9. Miranda v. Arizona, 384 U.S. 436 (1966).

ing when a person's freedom is so restricted that the person becomes entitled to warnings regarding their constitutional rights.

The Court held that when individuals are taken into police "custody," they are entitled to be advised of their constitutional right against self-incrimination before being subjected to interrogation by officers.[10] The determination of "custody" is essential to the holding of the Court. The Court decided that, for purposes of the Fifth Amendment and *Miranda*, a person is "in custody" when his freedom of action is restricted in any significant way.[11] When this degree of restriction occurs, the person "in custody" must be advised of his constitutional rights before being questioned.[12]

C. The Original Balance Struck by the Court

It is clear from the analysis of "custody" in both Terry and Miranda that the Supreme Court did not intend Miranda and the Fifth Amendment to be implicated during "non-custodial" Terry stops.[13] In arriving at this conclusion, the Court in Berkemer v. McCarty addressed the investigatory stop of a suspected drunk driver by an Ohio State Trooper.[14] The Court, in holding that the stop was non-custodial and the statements gathered were admissible, stated that Miranda and its warnings are not triggered in a traditional Terry stop.[15] However, the Court never intended the intrusion under a Terry stop to reach the level of custody required to trigger Miranda and its warnings.[16]

The balance originally struck by the Court has been shaken recently by the holdings of six federal circuits allowing certain indicia of arrest during Terry stops.[17] By indicia of arrest, the courts popularly refer to protective measures such as drawn weapons, the use of handcuffs, and placing suspects in the lying-prone position on the ground. These measures have received approval in the aforementioned circuits as acceptable methods of protecting officers during investigatory stops such as that contemplated by the *Terry* decision.[18]

The resulting tenuous balance has made it unclear when a suspect, subjected to intrusive indicia of arrest, is "in custody" for purposes of Miranda and the Fifth Amendment.[19] The question then becomes, *when* is a person who is handcuffed on the ground at gunpoint sufficiently "in custody" to expect that the requirements of probable cause and the warnings of Miranda are in play on his behalf?

D. The Practical Application

The conflict between *Terry* and *Miranda* is most clearly understandable when applied to actual events. Police officers are often called upon to investigate the

10. *Id.* at 439.
11. *Id.* at 444.
12. *Id.*
13. *Berkemer*, 468 U.S. at 440.
14. *Id.* at 423.
15. *Id.* at 440.
16. *Id.*
17. *See* Godsey, *supra* note 1, at 729.
18. *Berkemer*, 468 U.S. at 420.
19. *See* Godsey, *supra* note 1, at 715.

suspicious activities of potentially dangerous suspects. In these situations, it has become acceptable police practice, when reasonable, to stop suspects at gunpoint and use handcuffs to secure the scene before the investigatory questioning of the *Terry* stop begins.[20] This practice has developed to protect the officers, the public, and the suspect from potential violence.[21] Officers who are able to take control of a situation before it erupts into violence are in a better position to protect everyone involved. However, as courts have held that these indicia of arrest are acceptable when reasonably necessary for protection, they have simultaneously been inconsistent in deciding whether the suspect is "in custody," both for purposes of the probable cause requirement of the Fourth Amendment and the self-incrimination protections of the Fifth Amendment.[22]

The difficulty arises in that these indicia of arrest would seem to be "custodial" in light of the Fifth Amendment and its definition of "custody" in *Miranda*.[23] Clearly, a reasonable person held at gunpoint, handcuffed and lying prone in the street would feel his freedom had been restricted in a significant way.[24] Yet, the Supreme Court seems to state otherwise.[25] The Court intimated in *Berkemer* that *Miranda* was not implicated during a *Terry* stop despite defining "custody" as any significant restraint on freedom.[26] Additionally, the Court held in *Florida v. Bostick* that a reasonable innocent person is in custody for purposes of the Fourth Amendment when they no longer feel free to terminate the encounter with the police![27] Surely a person held at gunpoint does not feel free to terminate his encounter with the police. Nevertheless, courts have continued to allow greater indicia of arrest under the rule in *Terry*, thereby insulating the entire stop from analysis under *Miranda*.[28]

The conflicting treatment of the custody issue is at the heart of the confusion regarding the concurrent application of *Terry* and *Miranda*.[29] Should the courts continue to allow indicia of arrest to be used under the protection of *Terry* and the Fourth Amendment, or must officers show probable cause when using extreme indicia of arrest against individuals and then provide the protective warnings of *Miranda* under the Fifth Amendment?

As previously mentioned, some of the options facing the Supreme Court, as it waits for an opportune time to rule on this unclear and complex aspect of the law, will be outlined and discussed herein. First, however, it is important to fully understand the Supreme Court's decisions at the base of this present conflict.

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20. United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993).
21. *Id.*
22. *Id.* at 1461-62.
23. *See* Godsey, *supra* note 1, at 715.
24. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
25. *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
26. *Id.* at 420; *see* Godsey, *supra* note 1, at 715.
27. Florida v. Bostick, 501 U.S. 429 (1991).
28. United States v. Tilmon, 19 F.3d 1221, 1226 (7th Cir. 1994).
29. *See* Godsey, *supra* note 1, at 715.

II. ANALYSIS OF *Terry v. Ohio*

The Fourth Amendment to the United States Constitution states that the people have the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[30] The Fourth Amendment further states, "no warrants shall issue, but upon probable cause."[31] One of the rules which has been derived from this amendment states that unless an arresting officer has probable cause to believe that a crime has been or is being committed, the arrest becomes invalid.[32] The Constitution, however, leaves room in the language of the Fourth Amendment for interpretation by the courts. The Fourth Amendment clearly protects the individual's right to be free from unreasonable governmental intrusion.[33] However, the Constitution does not forbid all intrusion by the government — only unreasonable ones.[34] It is upon that language that the *Terry* exception to the probable cause requirement is founded.

A. The Facts of Terry

The facts in *Terry* are as follows: Detective Martin McFadden was on the "beat" he had patrolled for 30 years as an officer with the Cleveland Police Department.[35] McFadden noticed Terry and his associate, Chilton, alternately proceed down the block, conspicuously look through a particular jewelry store window, and wander back to the street corner.[36] This exercise took place approximately twelve times per individual and was interrupted only by a suspicious conference with a third man, Katz.[37] Based on his experience and his observations, Detective McFadden believed that at least Terry and Chilton were involved in "casing" the particular store for a "stick-up."[38] Since "stick-ups" usually involve a weapon, McFadden was cautious as he approached the trio, which had regrouped in front of Zucker's store.[39]

McFadden questioned the men regarding their activity, and their mumbled response did nothing to allay his suspicions.[40] At this point, McFadden grabbed Terry, spun him around, and patted the outside of his clothing in an effort to discover if he was armed.[41] Upon feeling what immediately resembled a pistol, McFadden reached inside Terry's overcoat and extracted a .38 caliber pistol from the pocket.[42] A subsequent outer clothing pat-down of Chilton uncovered yet another weapon.[43] Terry and Chilton were arrested for carrying concealed weapons.[44]

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30. U.S. CONST. amend. IV.
31. *Id.*
32. Brown v. Illinois, 422 U.S. 590, 605 (1975).
33. U.S. CONST. amend. IV.
34. Terry v. Ohio, 392 U.S. 1, 9 (1968) (citing Elkins v. United States, 364 U.S. 206, 272 (1960)).
35. *Id.* at 5.
36. *Id.* at 6.
37. *Id.*
38. *Id.*
39. *Id.* at 7.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

B. *The Rule in* Terry

Detective McFadden did not have probable cause to arrest Terry and Chilton when he approached them based on their suspicious behavior.[45] However, the *Terry* Court carved out an exception to the probable cause requirement of the Fourth Amendment.[46] The Court recognized "that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."[47]

C. *The Justification for the Rule*

Because the right to be free from governmental intrusion is so valued in American jurisprudence, the Court felt obliged to carefully balance the intrusion to be effectuated against the rights to be intruded upon.[48] The Court stated that a balancing of interests is required where the interests of the government must be weighed against the intrusion upon the individual.[49] The Court said the government has a valuable interest in the effective prevention of crime and the detention of criminals.[50] In addition, and even more importantly, the government also has a significant interest in the safety of its officers enforcing the law.[51] The Court recognized that it would certainly be "unreasonable to require that police officers take unnecessary risks in the performance of their duties."[52] The Court noted that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."[53] With this in mind, the Court fashioned the exception to the probable cause requirement known as the *Terry* stop and frisk.[54]

The holding in *Terry* states:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and . . . dangerous . . . he is entitled to conduct a carefully limited search of the outer clothing of such persons to discover [the presence] of weapons . . . .[55]

In *Terry*, Detective McFadden's reasonable suspicion that Terry and Chilton were planning a crime in which a weapon is usually employed was sufficient for the Court to hold that his suspicions were "specific and articulable" and that "taken together with rational inferences" from those and the surrounding facts, "reasonably warrant[ed] that intrusion."[56]

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45. *Id.* at 20.
46. *Id.* at 30.
47. *Id.* at 10.
48. *Id.* at 20-21.
49. *Id.*
50. *Id.* at 22.
51. *Id.* at 23-24.
52. *Id.*
53. *Id.* at 23.
54. *Id.* at 27.
55. *Id.* at 30.
56. *Id.* at 21.

This indicates that the Court is willing to accept a general belief that an individual is involved in a crime that usually includes a weapon, rather than a specific belief that this individual has a weapon.[57] The Court stated that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[58]

After conferring the exception to the probable cause requirement upon law enforcement, the Court then defined it as a narrow exception.[59] The Court stated that "[a] search for weapons in the absence of probable cause to arrest . . . must . . . be strictly circumscribed by the exigencies which justify its initiation."[60] "Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . ."[61] The justification for the search is based on the need to protect police officers by discovering the presence of any possible weapons.[62] The search must therefore be "confined in scope" to that end.[63]

D. The Test in Terry

The Court outlined a test to determine whether an intrusion is reasonable under the Fourth Amendment.[64] The Court defined the pertinent questions as, (1) were the officers' actions justified at the inception of the stop; and (2) was the "seizure" "reasonably related in scope to the circumstances which justified the interference in the first place."[65] The Court applied its new two-part test to Detective McFadden's actions and found that "McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons."[66] This, the Court determined, satisfied the test for reasonableness.[67]

While the Court in *Terry* did its best to articulate a clear definition of a non-intrusive investigatory stop, it openly admitted that the Fourth Amendment does not spell out the limitations placed upon searches and seizures for protective purposes.[68] They conceded that each case is different, and the rules will have to "be developed in the concrete factual circumstances of individual cases."[69] This language is the opening through which the lower federal courts have proceeded on their path to expanding the permissible scope of police action in a *Terry* stop.

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57. *Id.* at 27.
58. *Id.*
59. *Id.*
60. *Id.* at 25-26.
61. *Id.* at 26.
62. *Id.* at 29.
63. *Id.*
64. *Id.* at 20-21.
65. *Id.* at 20.
66. *Id.* at 30.
67. *Id.*
68. *Id.* at 29.
69. *Id.*

III. THE EXPANSION OF THE *Terry* STOP

The expansion by the federal circuit courts of the amount of force permissible under a Terry stop was not inadvertent and has not gone unnoticed.[70] For example, the Seventh Circuit Court of Appeals in *United States v. Chaidez*[71] recognized that "in the recent past, the 'permissible reasons for a stop and search and the permissible scope of the intrusion [under the *Terry* doctrine] have expanded beyond their original contours.'"[72] Similarly, the Tenth Circuit, in its holding in *United States v. Perdue*, stated that the last decade "has witnessed a multifaceted expansion of *Terry* . . . [including the] trend granting officers greater latitude in using force in order to 'neutralize' potentially dangerous suspects during an investigatory detention."[73] The aforementioned cases' recognition and approval of the expansion of the bounds of Terry cleared the path for the most recent, and possibly most dramatic, example of the expansion of Terry.[74]

In *United States v. Tilmon*,[75] a bank robbery occurred in Eau Claire, Wisconsin, in the late morning.[76] The suspect took a moderate sum of cash and managed to escape.[77] The description the police broadcast over the radio was that of a "black male in his early twenties, 5 [feet] 10 [inches] tall and weighing 160 pounds."[78] A description of the suspect's clothes and vehicle were also broadcast to all local and state agencies.[79]

Later that same day, Trooper Lewis of the Wisconsin Highway Patrol observed a "blue Mustang with a gray stripe, bearing Minnesota license plates."[80] This vehicle exactly matched the description of the suspect's getaway car.[81] Lewis and his back-up units drove beside the Mustang and determined that the driver was indeed a black male.[82] Based on these facts, the troopers performed a "felony stop" on Tilmon, now a bank robbery suspect.[83] Tilmon complied with the request to get out of his vehicle.[84] At all times, weapons were pointed at him.[85] Tilmon was ordered to lie down on the pavement, and as he complied, a shotgun was pointed at his head.[86] The shotgun remained on Tilmon until he was handcuffed and placed in a patrol car.[87] At the scene, Tilmon's Mustang was completely blocked by Highway Patrol vehicles.[88]

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70. *See* Godsey, *supra* note 1, at 715.
71. 919 F.2d 1193 (7th Cir. 1990).
72. United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994) (quoting *Chaidez*, 919 F.2d at 1198).
73. United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993).
74. *Tilmon*, 19 F.3d at 1221.
75. *Id.*
76. *Id.* at 1223.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

Tilmon argued unsuccessfully that the *Terry* stop performed by the troopers was unlawful because it was based merely on the suspicion that he was the suspected bank robber and yet used force that was indicative of a full arrest requiring probable cause.[89] Tilmon further argued that the use of drawn weapons, handcuffs, having him lie on the pavement, and being surrounded by officers was sufficient to raise the investigatory stop to the level of a constructive arrest.[90] The court recognized that probable cause may be required where a seizure, though not technically an arrest, becomes indistinguishable in content from a traditional arrest.[91] The court then began its analysis of this obviously intrusive stop.

The Tilmon court began by recognizing that the amount of force allowable during a Terry stop has significantly increased since the Terry decision was first delivered.[92] They recognized that the judicial trend has been to expand the powers given to law enforcement officers under the original doctrine and to allow them to use greater measures of force in an effort to "neutralize" suspects which present a potential danger during an investigatory stop.[93] The court went on to say that "[f]or better or for worse, the trend has led to permitting 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."[94] While the court recognized that an escalation had occurred in the force allowable under *Terry*, it also recognized the harrowing alternative.[95] The *Tilmon* court cited the language in *United States v. Serna-Barreto* stating that:

> Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that an investigative stop is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal, so there is a complex tradeoff involved in any proposal to reduce (or increase) the permissible scope of investigatory stops.[96]

With that in mind, the *Tilmon* court sought to fashion a rule by which the force used could be balanced against the justification for the intrusion.[97] For guidance, the *Tilmon* court looked to the holdings in *Terry* and *Chaidez*. *Terry* articulated that the test is one of reasonableness which is embodied in the Fourth Amendment.[98] The *Terry* test balances the intensity and scope of the intrusion on the individual against the importance of the governmental interests justifying the intrusion.[99] In *Chaidez*, the Supreme Court stated that "[t]he reasonableness of a

89. *Id.*
90. *Id.* at 1226.
91. *Id.* at 1224 (quoting Dunaway v. New York, 442 U.S. 200, 201 (1979)).
92. United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994).
93. *Id.* (citing United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993)).
94. *Id.* at 1224-25.
95. *Id.* at 1227.
96. *Tilmon*, 19 F.3d at 1227 (citing United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988)).
97. *Id.* at 1226.
98. Terry v. Ohio, 392 U.S. 1, 31 (1968).
99. *Id.* at 29.

particular stop depends in turn on the extent of the intrusion on the rights of the individual as well as on the reason for the restraint."[100]

Using these holdings as precedent, the *Tilmon* court sought to clarify the test for reasonableness under the "expanded" *Terry* stop.[101] The Seventh Circuit held that "[i]n assessing the reasonableness of a *Terry* stop, the facts are 'judged against an objective standard: [W]ould 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?'"[102] In other words, "[t]he totality of the circumstances controls."[103] "The process does not deal with hard certainties, but with probabilities."[104]

The rule enunciated in *Tilmon* is obviously expansive and lacks definite boundaries. Realizing this, the court attempted to justify its holding by recognizing that a judicial pragmatism was necessary to adapt the holdings of the Court to the dynamic environment of the streets.[105] A rule that was too restrictive would not be flexible enough to react to the myriad factual and circumstantial scenarios that would surely arise.[106] This justification for a flexible test was given by the Supreme Court in *Florida v. Royer*,[107] stating that "[g]iven the 'endless variations in the facts and circumstances,' there is no 'litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop' and becomes an arrest."[108] Additionally, the Court cited the language in *Michigan v. Long*[109] for justification in stating that it "is not surprising that '[i]nvestigative detentions involving suspects in vehicles is fraught with danger to police officers.'"[110]

Despite its expansiveness, the holding in *Tilmon* is the natural extension of *Terry* in adapting to a world that is much more violent than that of 1968. In *Terry*, the Court allowed McFadden to "frisk" the suspicious individuals, not because he had factual evidence to lead him to believe they were armed, but rather, because he suspected them of a crime in which the perpetrators are usually armed.[111] In today's world, where criminals do not hesitate to shoot first and ask questions later, it follows nicely that *Terry* should allow officers to perform the same approach on a suspect like McFadden, based on the same suspicions, but to also allow the officer to use the indicia of arrest necessary to protect himself. It defies reason to place an officer and a potentially dangerous suspect on an "even playing field" in a game of "quick draw." If an officer is allowed to use his drawn weapon to establish superiority over the suspect initially, it is much less likely that the individual will attempt aggressive action, thereby protecting the officer, innocent bystanders, and the suspect as well.

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100. *Tilmon*, 19 F.3d at 1224 (quoting United States v. Chaidez, 919 F.2d 1193, 1197 (7th Cir. 1990)).
101. *Id.*
102. *Id.* (quoting United States v. Adebayo, 985 F.2d 1333, 1339 (7th Cir. 1993)).
103. *Id.*
104. United States v. Cortez, 449 U.S. 411, 418 (1981).
105. *Tilmon*, 19 F.3d at 1224.
106. *Id.*
107. 460 U.S. 491 (1983).
108. *Tilmon*, 19 F.3d at 1224 (quoting *Royer*, 460 U.S. at 506).
109. 463 U.S. 1032 (1983).
110. *Tilmon*, 19 F.3d at 1226 (quoting *Long*, 463 U.S. at 1047).
111. Terry v. Ohio, 392 U.S. 1, 28 (1968).

While expanding the rule from *Terry*, the *Tilmon* court adhered to the language of *Terry* in stating that "[t]he reasonableness of an investigatory stop may be determined by examining: (1) whether the police were aware of specific and articulable facts giving rise to reasonable suspicion; and (2) whether the degree of intrusion was reasonably related to the known facts."[112] "In other words, the issue is [once again] whether the police conduct — given their suspicions and the surrounding circumstances — was reasonable."[113] The court went on to say that "[a] court in its assessment 'should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.'"[114] In addition, "the fact that 'the protection of the public might, in the abstract, have been accomplished by 'less intrusive means' does not, by itself, render the search unreasonable.'"[115] The Supreme Court nevertheless suggests in *Florida v. Royer*, that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[116]

Other circuits have agreed with the ruling of the court in *Tilmon*. The Ninth Circuit in *United States v. Greene* stated that "[t]he mere use or display of force in making a stop does not necessarily transform a stop into an arrest if the surrounding circumstances give rise to a justifiable fear for [the] personal safety" of the officer.[117] Similarly, the Tenth Circuit held in *United States v. Perdue* that officers were justified in ordering an individual out of his car at gunpoint and onto the ground to be handcuffed where the individual was suspected of being the resident of a home where extensive amounts of narcotics and weapons were found.[118] In addition, the Sixth Circuit in *United States v. Hardnett* held that using indicia of arrest or force during a stop will not necessarily transform the stop into an arrest.[119] However, the "surrounding circumstances [must] give rise to a justifiable fear for personal safety."[120] In *Hardnett*, the court held that "a seizure effectuated with weapons drawn may properly be considered an investigative stop."[121]

Therefore, it appears that the definition of "custody" under the Fourth Amendment currently used in the nine circuit courts which espouse the expanded Terry stop is well-grounded in Supreme Court precedent.[122] For instance, the *Terry* Court clearly advocated a balancing test to determine whether a governmental intrusion was reasonable in light of the surrounding circumstances.[123] Similarly, the Court in *Florida v. Royer* eschewed a "litmus-paper" test in recog-

112. *Tilmon*, 19 F.3d at 1224 (quoting *Terry*, 392 U.S. at 19-20).
113. *Id.*
114. *Id.* at 1225 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).
115. *Id.* (quoting Cady v. Dombrowski, 413 U.S. 433, 447 (1973)).
116. Florida v. Royer, 460 U.S. 491, 500 (1983).
117. United States v. Greene, 783 F.2d 1364, 1367-68 (9th Cir. 1986).
118. United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993).
119. United States v. Hardnett, 804 F.2d 353, 355 (6th Cir. 1986).
120. *See* Godsey, *supra* note 1, at 730 (quoting *Hardnett*, 804 F.2d at 357).
121. *Hardnett*, 804 F.2d at 357.
122. Florida v. Royer, 460 U.S. 491, 500 (1983); *Perdue*, 8 F.3d at 1463; *Hardnett*, 804 F.2d at 355; *See* Godsey, *supra* note 1, at 730.
123. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

nition that the facts of each case must be balanced based on reasonableness.[124] Finally, in *Dunaway* v. New York, the Court's willingness to allow intrusion appeared to meet its boundary when police restraint was deemed so intrusive under the circumstances that it amounted to a "constructive arrest."[125] However, allowing intrusion to the point of constructive arrest is actually the outermost limit of permissible restraint. A person's restraint can hardly be more custodial than when they are under formal arrest.

An apparent inconsistency arises, however, between the permissive balancing tests of Terry, Royer and Dunaway and the Court's definition of custody in Florida v. Bostick.[126] The Bostick Court described "seizure" as being the point at which a reasonable person would no longer feel free to leave.[127] A somewhat more restrictive standard of custody. Arguably, any indicia of arrest would meet this definition and necessitate probable cause and Miranda warnings. However, Terry, Royer and Dunaway are all distinguishable from Bostick in that they address detention of individuals based on a reasonable suspicion that the individuals were involved in criminal activity.[128] In those cases, the Supreme Court was addressing the need for officers to safely detain potentially dangerous suspects based on the Terry exception to the probable cause requirement.[129] The Court, in each case, saw the need to allow flexibility in the responses available to police officers, and the Court's treatment of custody in each of those cases reflects that end.[130]

The Court in Bostick was addressing a wholly different issue. In Bostick, officers boarded a bus to perform totally random consensual searches of passengers' bags.[131] This is an intrusion into the privacy of individuals, not only without probable cause, but lacking even reasonable suspicion.[132] Therefore, it is easy to see why the Court would apply a stricter standard of "custody" in an effort to protect individuals from baseless police intrusion. Thus the rule in Bostick, which announced that an individual is considered seized when he no longer feels free to terminate the police encounter.[133] *Bostick*, and its defintion of custody, is not applicable to investigatory stops performed under the Terry doctrine based on reasonable suspicion.

In summary, the Supreme Court's varying treatment of "custody" under the Fourth Amendment has fluctuated in relation to the reasonableness of the intrusion upon the individual.[134] Where the intrusion has been based on a reasonable governmental interest, the Supreme Court has been willing to allow the intrusion as long as it remains balanced against the individual's right to be free from such

124. *Royer*, 460 U.S. at 506.
125. Dunaway v. New York, 442 U.S. 200, 214-16 (1979).
126. 501 U.S. 429 (1991).
127. *Id.* at 434.
128. *Bostick*, 501 U.S. at 434; *Royer*, 460 U.S. at 506; *Dunaway*, 442 U.S. at 214-21.
129. *Bostick*, 501 U.S. at 434; *Royer*, 460 U.S. at 506; *Dunaway*, 442 U.S. at 214-21.
130. *Royer*, 460 U.S. at 491; *Dunaway*, 442 U.S. at 200; *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).
131. *Bostick*, 501 U.S. at 433-34.
132. *Id.*
133. *Id.* at 434.
134. Berkemer v. McCarty, 468 U.S. 420, 441 (1984).

intrusion.[135] However, the intrusion still has been required to remain less intrusive than a formal arrest in order to avoid the requirement of probable cause.[136]

To fully understand the conflict at issue, it is necessary to examine "custody" under the Fifth Amendment and its protector, the Miranda Doctrine.[137]

IV. FIFTH AMENDMENT CUSTODY AND *Miranda*

The Fifth Amendment states, "[n]o person . . . shall be compelled in any Criminal Case to be a witness against himself."[138] In *Miranda*, the Court recognized the coercive nature of police custody and interrogation which affect the ability of an individual to make choices based on free will.[139]

The Court recognized there is a point during a police encounter where the pressures exerted by officers create an atmosphere which is coercive in and of itself.[140] An individual subjected to these pressures is not sufficiently in command of his decision-making processes to give valid consent.[141] The Court reasoned that when a defendant is "thrust" into the "unfamiliar atmosphere" of a police station and "run through menacing police interrogation procedures, . . . [t]he potentiality for compulsion is forcefully apparent."[142] They further stated that "[t]he current 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."[143] Therefore, a rule was fashioned for the protection of criminal defendants. The Court stated "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[144]

The Court mandated that this constitutional safeguard shall apply to defendants who are subjected to a police-initiated atmosphere of "custodial interrogation."[145] *Miranda* defines "interrogation" as "questioning initiated by law enforcement officers."[146] It is clear, however, that interrogation may be coercive in many forms not as obvious as direct questioning.[147] Nevertheless, interrogation usually means express questioning.[148]

The Supreme Court, in addressing Fifth Amendment custody, seems to be more consistent with its Fourth Amendment pronouncements than the circuit courts. The Supreme Court in *Miranda* states that a person is in custody when he

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135. *Id.*
136. *Id.*
137. *See* United States. v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993).
138. U.S. CONST. amend. V.
139. Miranda v. Arizona, 384 U.S. 436, 458 (1966).
140. *Id.*
141. *Id.* at 458.
142. *Id.* at 457.
143. *Id.* at 457-58.
144. *Id.* at 458.
145. *Id.* at 467.
146. *Id.* at 444.
147. *Id.*
148. *See* Godsey, *supra* note 1, at 721.

has been taken into custody or deprived of freedom in a significant way.[149] The Court continued in *California v. Beheler* to say that the deprivation of freedom mentioned in *Miranda* must be such that it is "associated with formal arrest."[150] Therefore, it appears that the Supreme Court has defined custody, under both the Fourth and Fifth Amendments, as an intrusion which, under the circumstances, would make a reasonable person believe they were under formal arrest.[151]

Therefore, the Supreme Court's definition of "custody" appears reasonably consistent under both the Fourth and Fifth Amendments. A person is in custody when his freedom has been restricted by the police in such a significant way that he may reasonably believe he is under formal arrest. Under this definition, any *Terry* stop, based on reasonable suspicion, must fall short of an actual or constructive arrest or be subject to the requirements of probable cause. Such a *Terry* stop, not rising to the level of a formal arrest, would never trigger Miranda. This, in essence, was the holding in *Berkemer v. McCarty* which stated that *Miranda* is not implicated during a "routine" *Terry* stop.[152]

V. THE INTERACTION BETWEEN *Terry* AND *Miranda*

Having arrived at a consistent Supreme Court definition of custody, the circuit court decisions must be examined to reveal the source of the conflict between the practical application of the doctrines of *Terry* and *Miranda*. This conflict has arisen in the past decade with the expansion of Terry in the circuit courts of appeal.[153] In nine federal circuits, the use of certain indicia of arrest, which may lead a reasonable person to believe he is under formal arrest, are allowed as non-custodial under a greatly expanded version of the Terry doctrine.[154]

As an investigatory Terry stop escalates in force in response to potential danger, certain indicia of arrest have been approved by many federal circuit courts as appropriate tools for "neutralizing the perceived threat."[155] These indicia of arrest include drawn weapons, the use of handcuffs, being forced to the ground, and being placed in a police cruiser.[156] There is little doubt that a reasonable person subjected to these indicia of arrest would feel restrained to a "degree associated with formal arrest."[157] Use of these indicia of arrest would seem to satisfy the test for "custody" under the Fifth Amendment and require Miranda warnings be given in the event of questioning.[158] However, many federal circuit courts have allowed such indicia of arrest to be utilitzed against a suspect without holding that the suspect was in custody for Fourth Amendment purposes, thereby separating the analysis of custody under the Fourth and Fifth Amendments.[159]

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149. Miranda v. Arizona, 384 U.S. 436, 436 (1966).
150. California v. Beheler, 463 U.S. 1121, 1124-25 (1983).
151. *Id.* at 1125.
152. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
153. *See* Godsey, *supra* note 1, at 715.
154. United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993).
155. *Id.*
156. *Id.* at 1462-64.
157. *Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).
158. Miranda v. Arizona, 384 U.S. 436, 436 (1966).
159. *Perdue*, 8 F.3d at 1463.

The circuit courts' have bent the custody definition to allow use of indicia of arrest without a finding of "custody" because if a suspect were deeming "in custody," the stop would have to be supported by the lofty requirement of probable cause. Probable cause is the level of knowledge required to make an arrest. To demand such certainty before allowing a potentially dangerous stop would curtail law enforcement's ability to investigate suspicious individuals based on reasonable suspicion alone. However, under the Supreme Court's traditional analysis, persons subjected to the aforementioned indicia of arrest would certainly be "in custody" and the requirements of probable cause and constitutional warnings would attach.

Though the Supreme Court, heretofore, has chosen not to address the circuit courts' expansion of the force allowed before a finding of custody under the Fourth Amendment, a uniform rule is needed to determine when a Terry stop becomes custodial for purposes of the Fourth Amendment, and its probable cause implications, and the Fifth Amendment's attachment of Miranda warnings.

VI. OPTIONS FACING THE SUPREME COURT

The answer to this question has not been squarely addressed by the Court, but there are several options which may be employed when the Court decides to rule on this complex issue.[160] Briefly, the four options that are considered herein are: (1) *Miranda* does not, nor was it ever intended to, apply in any valid *Terry* stop; (2) the "two-tiered" approach allows officers during a valid *Terry* stop to determine "custody" for *Miranda* purposes prior to finding "custody" for purposes of the Fourth Amendment; (3) a return to the use-of-force parameters defined in the 1968 version of *Terry v. Ohio*;[161] and (4) break the typical *Terry* encounter into two phases including an "approach" phase and a "search" phase rather than the typical analysis which simply examines the intrusion as a whole, employ a uniform definition of "custody" to simplify the analysis, and provide a "public safety exception" to protect the validity of stops where indicia of arrest are required for officer safety.

In addressing options which the Court may choose to pursue in the future, it is necessary to establish some guidelines by which to judge the effectiveness of each option. Mark Godsey, in his Fordham Law Review article, outlines three reasonable criteria by which to judge each option.[162] The three criteria are: (1) how well the option protects the privacy rights of the individual, (2) how well the option protects the legitimate efforts of law enforcement, and (3) how easy the rule is for police officers to follow.[163] In addition to these criteria, the option will also be judged by how well it follows established Supreme Court precedent.

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160. *See* Godsey, *supra* note 1, at 715.
161. *See* Godsey, *supra* note 1, at 734-41.
162. Godsey, *supra* note 1, at 733-34.
163. Godsey, *supra* note 1, at 734.

A. Option One: Fourth Amendment Definition of "Custody" Controls

This option is most clearly reflected in the district court's holding in *United States v. Perdue*.[164] This option assumes that the permissive Fourth Amendment view of "custody" is controlling in a *Terry* stop, and *Miranda* is not triggered until a formal "arrest" is effectuated.[165] In *Perdue*, as discussed earlier, the defendant was reasonably suspected of being in possession of narcotics and weapons and was removed from his vehicle at gunpoint and questioned.[166] While lying on the ground, Perdue gave incriminating responses to police questions.[167]

The district court relied on the Supreme Court's decision in *Berkemer* to hold that *Miranda* is not triggered during a valid *Terry* stop.[168] The Court's reasoning was that since, under the Fourth Amendment, a *Terry* stop is typically non-threatening and unintrusive, then *Miranda* cannot be implicated because the situation never rises to the level of "custody."[169]

The district court's reasoning, and this option, is obviously flawed because it assumes the inquiry into "custody" stops after an analysis under the Fourth Amendment. While the circuit court, in its criticism of the district court's finding, recognized that the traditional view "is that *Miranda* warnings are simply not implicated in the context of a valid *Terry* stop,"[170] the previous holdings of the Supreme Court clearly contemplated a *Terry* stop only in the unintrusive context of the doctrine's framing.[171] It was never intended that holdings, such as the one in *Berkemer* stating that *Miranda* is not triggered in a "typical" *Terry* situation, be applied to the highly intrusive investigatory detentions allowed by the courts today.[172] Even the Court in *Berkemer* recognized that to espouse an "all or nothing" rule excluding or applying *Miranda* to all investigatory stops would contain unacceptable drawbacks.[173] Either law enforcement interests would suffer from the requirement of giving *Miranda* warnings at every traffic stop or the protections of *Miranda* would be circumvented by allowing custodial interrogations without the benefit of constitutional warnings.[174] This tradeoff is unacceptable in the opinion of the Supreme Court and therefore requires the rule be left more flexible to address the specifics of each incident.[175] The shortcomings in this option lead us to consider the "two-tiered" approach.

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164. 8 F.3d 1455, 1464 (10th Cir. 1993).
165. See Godsey, *supra* note 1, at 734.
166. *Perdue*, 8 F.3d at 1458-59.
167. *Id.* at 1459.
168. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
169. *Id.*
170. *Perdue*, 8 F.3d at 1464.
171. *Berkemer*, 468 U.S. at 439.
172. *Id.*
173. *Id.* at 441.
174. *Id.*
175. *Id.*

B. Option Two: The "Two-Tiered" Approach

Mark Godsey, in his Fordham Law Review article, defines the "two-tiered" approach as the option which "performs Fourth and Fifth Amendment analysis separately."[176] The "flagship" decision of this approach is the Tenth Circuit's opinion in *Perdue*.[177] This decision gains credibility from the Supreme Court's language, stated above, in *Berkemer*, recognizing that a "bright line" rule "has drawbacks that make it unacceptable."[178] The Tenth Circuit's method for determining "custody" is a flexible approach because it allows separate analysis of "custody" under each amendment and allows them to operate independently.[179]

In addressing the *Perdue* stop, the facts of which are stated above, the court recognized the reasonableness of the officer's actions in "neutralizing" the threat posed by Mr. Perdue before beginning the investigatory questioning of the *Terry* stop.[180] The court stated that "[t]he Fourth Amendment does not require that officers unnecessarily risk their lives when encountering a suspect whom they reasonably believe to be armed and dangerous."[181] Therefore, "the seizure was reasonable at its inception . . . ."[182] The court recognized, however, that "one cannot ignore the conclusion . . . 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."[183]

Because of the obviously "custodial" nature of this stop, the court held that *Miranda* may be implicated in some highly intrusive, yet constitutionally valid, *Terry* stops.[184] The court stated that "[p]olice 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."[185]

Godsey, while admitting that the Tenth Circuit's method scores high marks in both allowing officers to protect themselves and protecting the rights of individuals, criticizes this option because he feels that it is too complex for officers to determine the nature of the custody in the heat of the moment.[186] Godsey complains that "[n]ot only must police officers determine whether they have reasonable suspicion or probable cause and then use the appropriate level of force, they must also simultaneously perform Fifth Amendment analysis and ask: Is this a custodial stop or a non-custodial *Terry* stop?"[187]

Godsey's complaint is flawed both analytically and practically. His assertion that officers are already consumed with the task of determining whether reason-

176. *See* Godsey, *supra* note 1, at 737.
177. 8 F.3d 1455 (10th Cir. 1993).
178. Berkemer v. McCarty, 468 U.S. 420, 441 (1984).
179. *Perdue*, 8 F.3d at 1461-62.
180. *Id.* at 1463.
181. *Id.*
182. *Id.* at 1462.
183. *Id.* at 1464.
184. *Id.* at 1465.
185. *Id.*
186. *See* Godsey, *supra* note 1, at 741.
187. *See* Godsey, *supra* note 1, at 728.

able suspicion or probable cause exists is incorrect. Under most federal circuit court precedent, if reasonable suspicion exists to effectuate a stop, there is no need to immediately proceed to a determination of whether probable cause is present.[188] The expansion of the permissible scope of a *Terry* stop allows the officer to take all necessary action to "neutralize" the threat that he would have available under a stop based on probable cause.[189]

Once the threat is "neutralized," the officer then has the time to independently determine if sufficient indicia of arrest have been employed to render the suspect's freedom restrained to a level commensurate with formal arrest. In addition, this analysis is not performed simultaneously as Godsey believes; but rather the analysis is performed after the threat has been "neutralized" under a valid *Terry* stop, and the suspects have been rendered harmless to the officers or innocent bystanders. This gives the officers ample time to consider whether or not the suspects should be given *Miranda* warnings based on the amount of force used in the stop. Furthermore, the implication that Godsey makes, that officers are not sufficiently trained to handle such a "legal" determination, ignores the myriad of legal analyses that American law enforcement officers are required to make daily.[190] To imply that officers are not competent to remember a listing of indicia of arrest (including handcuffs, drawn weapons, lying prone, and being placed in a police cruiser) and then provide *Miranda* warnings to suspects who have been subjected to such methods, is insulting.[191] Godsey is clearly finding fault with this option because it leaves the extended boundaries of the modern *Terry* stop intact. Godsey is a proponent of returning to the original boundaries of the *Terry* stop and allowing only minor intrusions into potentially dangerous individuals' freedom.[192]

Despite all its good points, this approach does have two significant flaws. First, it appears to be inconsistent with current Supreme Court precedent which holds that "custody" is equivalent for purposes of both the Fourth and Fifth Amendments and may fall somewhere just short of formal arrest.[193] Secondly, while the effectiveness of this approach is attractive, it relies on the legal fiction that "custody" can be viewed differently for the Fourth and the Fifth Amendments. This appears to be a form of intellectual dishonesty designed to facilitate the well-intentioned goals of law enforcement while still protecting the privacy of the individual.

C. Option Three: Return to the 1968 Boundaries of Terry

The third option open to the Supreme Court is best outlined in Mark Godsey's Fordham Law Review article.[194] Godsey's grand plan is to throw back the legal clock to 1968 and force officers to return to the limits of a *Terry* stop restricted

188. *See* Godsey, *supra* note 1, at 728.
189. United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993).
190. *See* Godsey, *supra* note 1, at 741.
191. *See* Godsey, *supra* note 1, at 741.
192. *See* Godsey, *supra* note 1, at 741.
193. Terry v. Ohio, 391 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966).
194. *See* Godsey, *supra* note 1, at 741.

to a pat-down of an individual's clothing and no indicia of arrest.[195] This argument, however, ignores the reasons the courts expanded the *Terry* stop in the first place. When confronted with the original reasons for expanding the *Terry* stop, Mr. Godsey appears to advocate the "ostrich defense."[196] He completely ignores the tremendous gap that would result in the progression of an investigation if the expanded *Terry* stop were restricted.

For example, if an officer observes a vehicle showing signs of theft, such as broken vent windows or a dismantled steering column, this observation would raise a "reasonable suspicion" in the mind of the officer. At this time, the officer would not have sufficient probable cause to arrest the driver of the vehicle for auto theft but would have the requisite suspicion to conduct a stop in order to investigate further. The fact that car thieves are often armed and dangerous would, under Godsey's plan, present the officer with a dangerous dilemma. Under Godsey's "return to the old *Terry* approach," the officer would either have to: (1) do nothing because probable cause to arrest is absent; or (2) attempt to stop the suspected felon without the protection of any indicia of arrest. If the officer chooses the latter option, it is likely that the answer to any investigatory attempt "may be a bullet."[197]

In addressing the aforementioned dilemma, nine circuits have determined that it is unreasonable to require our law enforcement officers to place themselves in such a needlessly dangerous situation in the performance of their duties.[198] Mr. Godsey's incredible response to this dilemma is, "[w]hen police officers do not have probable cause that a potentially dangerous person is engaging in criminal activity, they do not have to approach the person and put their lives in danger."[199] This is perhaps the most asinine statement ever made regarding law enforcement and would surely, if put into practice by police officers, constitute a dereliction of duty. Mr. Godsey obviously has no regard for the safety of the public to recommend that police not investigate suspicious and potentially dangerous behavior unless it is clear they can make an immediate arrest. It is quite obvious that this opinion is unacceptable from the perspective of law enforcement and has been recognized as such in a majority of the circuit courts.[200]

D. Option Four: The Public Safety Exception

The fourth approach consists of two "phases" and derives its justification from the language in *Terry*. It also applies a uniform definition of "custody" to both the Fourth and Fifth Amendments and provides a "public safety exception" to allow officers to use the force necessary to eliminate danger in a *Terry* stop without invalidating the stop due to a lack of probable cause.

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195. *See* Godsey, *supra* note 1, at 741.
196. *See generally* Godsey, *supra* note 1, at 741.
197. *See* Godsey, *supra* note 1, at 741. *See also* Terry v. Ohio, 392 U.S. 1, 8 (1968).
198. United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993).
199. *See* Godsey, *supra* note 1, at 746.
200. *Perdue*, 8 F.3d at 1463.

The "two-phase" concept is derived from the facts of *Terry*, where two distinct aspects of Detective McFadden's confrontation with Terry are evident.[201] The first phase was the approach phase, where McFadden effectuated a seizure by spinning Terry into a non-threatening position.[202] The second phase was the actual search.[203] In *Terry*, however, Detective McFadden's actions were only addressed in terms of the reasonableness of the search conducted on the petitioner.[204] The action required to effectuate the search was never addressed.[205]

The Court stated that when an officer suspects an individual is armed and dangerous, the officer may take "necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[206] The Court went on to define the entire intrusion in terms of a "search" which was necessary to discover the weapons.[207] The Court, by omitting any discussion of the approach required to effectuate the search, left the issue open to interpretation.

The means McFadden used to put himself in a safe position from which to perform the limited search was the "spin."[208] When McFadden spun Terry around, he committed a battery on this individual without even enough probable cause to justify an arrest.[209] The Court's only indication that this battery was justified was their blatant omission of any discussion of this event.[210] The language appears to have been left sufficiently "open" to allow for expansion if "necessary."[211] The Court used the word "necessary" to describe the limits of the intrusion upon a suspect.[212] They went on to define what "necessary" means in terms of a search for weapons.[213] All that is necessary to discover weapons is a limited pat-down of the outer clothing. However, in terms of the action required to place the officer in a position to perform the limited search, the Court simply authorized what was "necessary."[214] If a battery upon Terry was "necessary" in 1968 to allow McFadden to position himself where he could safely effectuate a limited search, then surely the "necessity" of certain indicia of arrest is no less obvious in this day and age of drive-by shootings and serial killers.

The "two-phased" nature of this test allows the officers to use the force necessary to "neutralize" the threat at the outset of the *Terry* stop. "Neutralization" of the threat is a legitimate end recognized even in the restrictive language of *Terry*.[215] In the second phase, once the threat is "neutralized," the officers may perform the limited search outlined in the original *Terry* decision.[216]

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201. *Terry*, 392 U.S. at 6-7.
202. *Id.* at 7.
203. *Id.*
204. *Id.* at 8.
205. *Id.*
206. *Id.* at 24.
207. *Id.*
208. *Id.* at 7.
209. *Id.* at 7-8.
210. *Id.* at 23.
211. *Id.*
212. *Id.* at 23-24.
213. *Id.* at 24.
214. *Id.*
215. *Id.*
216. *Id.* at 29-30.

The "two-phase" approach is a natural extension of the original holding in *Terry*. This is evident because detective McFadden's intrusion actually entailed two phases as well.[217] These are the "approach phase," which authorizes what is reasonably necessary, and the "search phase," which is "strictly circumscribed" to protect the individual from an unreasonable search.[218]

Once the "two-phase" *Terry* stop has been effectuated by neutralizing the threat and performing a limited search for weapons, the officer would make a decision regarding *Miranda*. If during the "approach" phase the suspects were subjected to one or more indicia of arrest, then *Miranda* would be triggered due to a finding of "custody" under a uniform definition. If no indicia of arrest were used in the "approach" phase, the suspects could be questioned under the system envisioned in the *Terry* opinion, and *Miranda* would not be triggered.

Finally, a "public safety exception" would be recognized to avoid any problems under the uniform definition of "custody." When sufficient indicia of arrest are employed in a reasonable manner for the safety of the officers, under the uniform definition of "custody," a reasonable person would likely feel his freedom had been restricted in a way associated with a formal arrest.[219] Therefore, the individual would be found to be "in custody" for purposes of both the Fourth and Fifth Amendments and would have to be "Mirandized" accordingly. Rather than the stop being held invalid under *Terry* for lack of probable cause, due to the use of indicia of arrest, a "public safety exception" would excuse the officers' reasonable use of any indicia of arrest.

The "public safety exception" would be based on the balancing test in the language of *Terry*.[220] Where the measures taken by officers are found to be necessary for their protection and reasonable when viewed in light of the surrounding circumstances, then the invasion upon the privacy of the individual will be excused based on a strong governmental interest in the enforcement of the law and the protection of its officers.[221]

While this approach sounds complex, and constitutionally it is, its application is rather simple. As stated previously, in reference to Mr. Godsey's objection, there is really no analysis by the police officers involved. The officers simply perform the same "necessary" procedures they have been allowed to use under the circuit courts' expanded version of *Terry*. Once the threat is "neutralized" and a limited search of the suspect is performed, the officer simply determines if one or more of the roughly four indicia of arrest were used in the "approach" phase. If they were, then the suspects are given *Miranda* warnings before questioning, and a "public safety exception" protects the validity of the stop. If indicia of arrest were not used, *Miranda* is not triggered.

This approach, while simple to apply, gives deference to the Supreme Court opinion in *Terry*, and remains within its dictates by allowing the "necessary"

217. *Id.*
218. *Id.* at 30.
219. United States v. Perdue, 8 F.3d 1455, 1465 (10th Cir. 1993).
220. Terry v. Ohio, 392 U.S. 1, 20-21 (1968).
221. *Id.* at 22.

means to effectuate a search while closely circumscribing the search itself.[222] In addition, this method also protects the Fifth Amendment right of the individual to be free from coerced self-incrimination by providing *Miranda* warnings when indicia of arrest elevate the stop to a custodial detention.[223] Finally, the "public safety exception" guards the safety interests of law enforcement officers by allowing them to approach potentially dangerous individuals with the greatest tactical advantage despite the potential for creating a custodial situation. If a stop rises to the level of custody due to the indicia of arrest employed, the "public safety exception" will allow the intrusion if it is reasonable. The strong governmental interest in the safety of law enforcement officers provides the justification for a temporary intrusion based on reasonable suspicion.[224]

VII. CONCLUSION

The recent expansion in the federal circuit courts of appeal of the indicia of arrest officers may use during a *Terry* stop has birthed a conflict.[225] The conflict originates in the somewhat paradoxical desire to provide law enforcement every advantage when approaching a potentially dangerous individual while at the same time protecting that individual's constitutional rights.[226] The inherent inconsistency in these two goals requires that a balance be struck between opposing interests.[227]

The interest of the government in preventing crime and protecting its officers must be weighed against the need to protect individuals from unreasonable governmental intrusion, and a rule must be created which satisfies both interests.[228] While several options, each possessing attractive characteristics, have been previously addressed, the author finds option four most compelling.

The fourth option, first and foremost, is consistent with Supreme Court precedent defining "custody" uniformly for purposes of both the Fourth and Fifth Amendments.[229] Custody, in the interest of intellectual honesty, must be defined consistently for purposes of both Amendments. At the same time, however, law enforcement officers must be allowed to investigate from a tactically advantageous position during a potentially dangerous *Terry* stop.[230] These ends are met by employing a "two-phase" analysis. The first "phase" is illustrated in the *Terry* decision by the "spin" Detective McFadden used to place himself in a position of safety while confronting Terry.[231] Today's officers, however, are often required to employ certain indicia of arrest which would create a custodial situation under a uniform definition of custody. Therefore, a "public safety exception" is necessary to allow officers to use certain indicia of arrest during an investigative stop

222. *Id.* at 24.
223. *Perdue*, 8 F.3d at 1465.
224. *Id.* at 1463.
225. *See* Godsey, *supra* note 1, at 715.
226. Berkemer v. McCarty, 468 U.S. 420, 441 (1984).
227. *Id.* at 439.
228. Terry v. Ohio, 392 U.S. 1, 22-24 (1968).
229. United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993).
230. *Id.* at 1464.
231. *Terry*, 392 U.S. at 7.

based on reasonable suspicion. This "public safety exception" would alleviate the need to show probable cause in the event the "stop" necessarily rose to the level of custody. Once the perceived threat is resolved, the officers, based on the model provided by the Court in *Terry*, would proceed with the second "phase" of the stop.[232] The second "phase" would consist of the "strictly circumscribed," unintrusive search for weapons.[233] Once the limited search is performed, the officers would determine whether sufficient indicia of arrest were utilized such as to necessitate providing *Miranda* warnings before any investigatory questioning.

This approach serves the dual purpose of protecting both law enforcement interests and those of the individual, while maintaining judicial integrity by obviating the need to rely on the legal fiction that indicia of arrest are not custody.

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232. *Id.* at 25-26.
233. *Id.*