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The Eternal Task of Understanding Terry v. Ohio

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I. INTRODUCTION

Criminal procedure scholarship would not seem to qualify as a literary art form, but in recent years it has generated a kind of literary genre: the Reassessment of the Great Case, usually on some round-number anniversary. Three of the most common subjects for this exercise have been *Gideon v. Wainwright*,[1] *Mapp v. Ohio,*[2] and *Miranda v. Arizon*a[3], and for those we can

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1. 372 U.S. 335 (1983) (Sixth Amendment right of counsel in serious criminal cases). *See, e.g.*, Symposium: *The* Gideon *Effect: Rights, Justice, and Lawyers Fifty Years After* Gideon v. Wainwright, 122 YALE L.J. 2106 (2013).

2. 367 U.S. 643 (1961) (exclusionary rule for Fourth Amendment violations applies to the states); *see, e.g.*, *Symposium on The Fortieth Anniversary of* Mapp v. Ohio, 52 WESTERN RES. L. REV. 371 (1997).

identify some key elements of this literary genre. Most of the scholarship favorably recalls these cases as announcing big broad declarations of the rights of suspects or defendants[4] and proceeds to a sober consideration of the current state of those protections and often a distressed lament for how later Court decisions have weakened them.[5] The fourth case that has been subject to the anniversary reassessment is *Terry v. Ohio*,[6] and here, the genre takes a very different form. Most obviously, in *Terry* the defendant lost. But also, as discussed below, in his majority opinion Chief Justice Warren produced a somewhat tortured compromise about how to balance police power against people's privacy and liberty, so that the theme of many *Terry* reassessments is not unfulfilled or thwarted promise so much as tragic lament that we continue to suffer from its defects. Indeed, for many, any appearance of elegant compromise in *Terry* is an illusion masking Warren's craven surrender to law enforcement.

But as a subject of reassessment *Terry* has still another distinction: G*ideon*, *Mapp*, and *Miranda* are important for what they clearly, if controversially, *did*. In none of the cases were the underlying facts terribly important,[7] nor did the language of the majority opinions contain problematic ambiguities.[8] Not so for *Terry*.

As a starting point, can we at least stipulate to *Terry*'s holding? In a ridiculously simplified nutshell, *Terry* holds that if a police officer's observations of an individual induces in the officer's experienced mind a reasonable suspicion

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3. 384 U.S. 436, 444 (1966) (suspects interrogated in custody must be warned of Fifth Amendment rights). *See e.g.*, Symposium, Miranda *at 40*, 10 CHAPMAN CHAP. L. REV. 531 (2007).

4. I am focusing here on academic scholarship, which in the American law schools academy tends to the liberal side. While *Gideon* was not so controversial, obviously *Mapp* and *Miranda* were denounced and are still criticized by entrenched law enforcement officials and tough-on-crime political voices, and *Miranda* has been subject to a very vigorous line of empirical scholarship criticizing it for undermining law enforcement and worsening crimecrim. *E.g.*, Paul Cassell, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda's *Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

5. For the relatively iconic *Gideon* the distress in the typical reassessment concerns the failure of our overall system of justice to deliver on the case's promises because of the lack of funding, *see* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1039 (2006). For the case's incomplete coverage of misdemeanors, *see* Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1070 (2013).

For *Mapp*, the typical reassessment criticizes or denounces the later limitations on the exclusionary rule, such as through the good-faith exception, although Some commentators quite sympathetic to the overall Warren Court revolution do argue that as practical matter the rule has been counter-productive. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363, 364–65 (1999). As for *Miranda*, beyond the empirical critique noted above, commentators favorably disposed to the case criticize the *Miranda* warning as an insufficient form of protection. *E.g.*, Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

6. 392 U.S. 1 (1968).

7. The facts in *Mapp* are famously colorful, *see* Yale Kamisar, Mapp v. Ohio: *The First Shot Fired in the Warren Court's Criminal Procedure "Revolution," in* CRIMINAL PROCEDURE STORIES 45, 47–48 (Carol Steiker ed., 2006), but the point of the case was blunt: an illegal search that would have led to exclusion of evidence in a federal case does so in a state case. The only key fact in *Miranda* is that the suspect was not given the warning.

8. Of course *Miranda* created uncertainties about doctrinal issues the Court left open (e.g., what is custody?; what is a true waiver?), *see* White, *supra* note 5, but the language of the holding itself is pretty straightforward.

that the person is engaging in or about to commit a crime, the officer may detain the person for a brief period to investigate (and can then arrest the person if the suspicion turns into probable cause). Then, if during this investigative stop the officer has reason to think the person might pose physical harm, the officer can "frisk"—i.e., do a "patdown" of the person's outer clothing, and if the officer infers a reasonable chance of a concealed weapon, the officer can then reach farther in to retrieve it.[9] These actions are indeed regulated by the Fourth Amendment, but they do not require a warrant or probable cause, and if the *Terry* rules are followed, the police of course can use any resulting evidence against the person. And, the case held all this on the basis of a deceptively simple—and now famous—set of facts. The very experienced Officer McFadden saw Terry and two other men walking back and forth along some store fronts, suspected that a robbery was afoot, confronted them, asked their names, got an unclear response, frisked Terry for a weapon, and found a gun that then established probable cause for arrest for illegal possession.[10]

But, on *Terry* anniversaries over the last half a century, the reassessors of *Terry* still ponder the fine details and ambiguities of the facts of the case and the vexing and often frustrating linguistic details of the way Warren renders them in the opinion. Here are just a few examples. Warren retells McFadden's narrative of events in deceptive detail, ostensibly recreating McFadden's visual observations second by second and yet implicitly emphasizing the gaps in the officer's narrative. As a result, in academic recounting of Warren's recounting of McFadden's recounting, debates continue about how many times Terry and his accomplices walked back and forth; whether they might have been on the verge of abandoning their plans; what type of store they were checking out; and what, if anything, to make of McFadden's statement that Terry "mumbled something" to him.[11] And, as a doctrinal matter, (as will be discussed more below), we still debate at what point, in the Court's view, McFadden crossed the Fourth Amendment line and "seized" Terry, and, if the crossing occurred early in the encounter, whether McFadden had any objectively suspicious facts or was just relying on his intuition that "they didn't look right to me at the time."[12]

Notably, the factual and doctrinal uncertainties are reflected in some odd tonalities in the opinion. At key points Warren sounds either ambivalent or cynically sarcastic about his own holding, such as when he refers to "the power of the police to 'stop and frisk'—as it is sometimes euphemistically termed—suspicious persons." Was Warren writing in a tone of subtle nuance, or did he (ironically) "mumble" evasively, in neurotic anxiety?

These odd details are markers of the vexing questions raised in many of the

9. Terry v. Ohio, 392 U.S. 1, 30 (1968).

10. *Id.* at 6, 7.

11. *E.g.*, Lewis B. Katz, Terry v. Ohio *At Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 434–35 (2004).

12. *Terry*, 392 U.S. at 5.

Terry reassessments. Did *Terry* save the populace from a potentially lawless police practice by at least somewhat subjecting the stop-and-frisk tactic to the Fourth Amendment? Or, did *Terry* start and signal the end of a robust application of the warrant and probable cause requirement? But, more specifically, did *Terry* grant the police the crucial power to stop/detain without ever pausing to define the scope and basis of that power? Did *Terry* place any meaningful restrictions on the power of the police to frisk when they legally do a stop?

These last two questions arise in part because of the oft-noted dissonance between Warren's opinion and the Harlan concurrence.[13] Harlan either clarifies or corrects Warren[14] on the crucial point that the power to frisk does not even arise until there is a legal stop.[15] And, Harlan either clarifies or disagrees with Warren on whether the power to frisk is 'automatic" once there is a legal stop.[16] While, as I will show below, various interpreters of *Terry* at various times since 1968 have purported to draw clear answers to these questions, dissatisfaction by and disagreements among the "anniversary reassessors" and very recent legal developments show that the answers are unsettled or in flux. In effect, the key gaps in the Warren opinion, and the disjointed relationship between the Warren and Harlan's opinion, represent the "original sin" of *Terry*, a sin that has not yet been redeemed.

In this Essay I have two goals. First, I will "reassess the reassessments," drawing on some of the most useful and representative anniversary commentaries on *Terry* to give an updated sense of how *Terry* still haunts our criminal justice system in light of the questions I have just elaborated.[17] Second, I will synthesize these continuing perplexities, reframing them into the key questions: What exactly does reasonable "suspicion" mean? Does the evocative word "suspicion," suggest a perception of some kind of social malevolence, or is it an unnecessarily evocative term meant to stand for a probability assessment—i.e., "reasonable cause" as a subset of "probable cause?" If so, how do we now make that probability assessment in light of changes in the laws of drugs and guns—the subjects of most instances of "reasonable suspicion." That is, how do we reconcile the "procedural" law of stop and frisk with changes in substantive criminal law? Then, just what is the operational meaning of the term "armed and dangerous?" What does it mean to "investigate" upon a legitimate stop? And,

13. *Id.* at 31 (Harlan, J., concurring).

14. With deceptive politeness, Harlan says he is "constrained to fill in a few gaps" in the majority opinion. *Id.*

15. *Id.* at 32.

16. *Id.* at 33.

17. Of course the scholarship on *Terry* and the issues emanating from it are voluminous beyond any power to inventory, much less review. I am concentrating on the overall "reassessment" as distinct form of scholarship. Also, I am looking at *Terry* issues almost wholly in terms of the visceral encounter of police officer and individual. Thus, I am not addressing one of the key emanations from *Terry*, the extensions of its "reasonableness" balancing into the great variety of "administrative searches or "special needs" contexts in which the Court has relaxed the requirements of warrant and probable cause, *e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (drunk-driving roadblocks without individualized suspicion); New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches of public school students on mere reasonable suspicion).

how do we tell a stop from an arrest at the moment of seizure or during the various stages of a seizure?

II. EXEMPLARY ASSESSMENTS

A. The "Standard Model"

While there are a very many anniversary treatments of *Terry*, I will choose a few telling ones that represent certain rough subcategories. One of the richest commentaries is by Professor Lewis R. Katz, and while it is full of original insights, it can also stand as what might call the standard model of the *Terry* reassessment—and that means a fairly negative one. For Professor Katz, while *Terry* gave the police a great crime-fighting tool, it "dismally failed" in its balancing between law enforcement and privacy.[18] First, *Terry* miserably failed at one of the main jobs implicitly entailed by the certiorari grant—to define an "investigatory stop." The result, Processor Katz avers, was that later courts could exploit this failure so as to render the Fourth Amendment irrelevant to most on-the-street police-citizen encounters. While, he notes, the Court recognized that it was writing at a crossroads moment of both widespread public fear of crime and heightened concerns about racist abuses by police, *Terry* left judges with a paucity of doctrinal resources to alleviate these roiling social tensions.[19] Professor Katz notes that *Terry* could at least have borrowed from *Miranda* in one sense*:* It could have written some "prophylactic rules" that could have guided both policed and judges and mitigated the risks of arbitrary and racist police and judicial decisions.[20] What might such rules have looked like? Professor Katz does not say, but he does suggest that there might have been administrable, if somewhat arbitrary, set of formulas that would have supplied at least some leverage for constraint.

Professor Katz then turns to a very odd (and one might say) gratuitous portion of the *Terry* opinion, Chief Justice Warren's strange comments on the exclusionary rule. Here, Warren admits that legitimating the stop-and frisk has the effect of denying suspects like Terry the benefits of *Mapp*'s exclusionary rule. But, he rationalizes this outcome by (perhaps disingenuously) lamenting that the rule would do little good anyway to constrain abusive police stops. The reason is that a great deal of the time, the police detain people to preemptively thwart crime or to control the risk of social disorder without any expectation that there will be an adjudication of a crime where suppression of evidence would matter.[21] For Professor Katz, in what proved to be his penultimate year in the Court, and after more than a decade of pathbreaking constitutional expansion,

18. Katz, *supra* note 11, at 424.
19. *Id.*
20. *Id.* at 427.
21. *Terry*, 392 U.S. at 13.

Warren was abdicating the leadership role the Court had taken on in *Mapp* and *Miranda*. He was making an "amazing admission of powerlessness from a Court that purported to care about the issue."[22] As Professor Katz acerbically put it, "Thus, the Court elected not to marshal whatever was left of its moral strength to demand that police obey the law while enforcing it."[23]

And, Professor Katz then offers a very sharp insight into the illogic of the opinion on this point. He observes that the Court's remarks about the exclusionary rule were based on the erroneous assumption that McFadden's only option was to seize the men. If, as Warren says, the rule is irrelevant in that a great number of cases where the police do not foresee arrest or prosecution—that is the officer's goal is to prevent a crime by discouraging or dispersing the suspects—McFadden could have scrutinized their behavior by continuing to follow them. Thus, says Professor Katz, McFadden could have simply let the men know without confronting them that he was a police officer.[24] No robbery would have been committed on that street at that time, and the suspected crime would have been prevented in a far less invasive way.

Professor Katz concedes that such a suggestion might invite the criticism that anything less than a seizure, a search, and ultimately an arrest would have left the men armed and free to commit a robbery somewhere else later on.[25] But, Professor Katz notes, that criticism presumes something that the premise of the stop, as approved by Warren cannot support: that McFadden had a very strong basis for inferring they were about to commit a robbery, or indeed, at the time of the stop they had guns. And, this argument by Professor Katz identifies another conceptual problem in *Terry*. Could McFadden have, in effect, "investigated" the men even without seizing them? Or, does "investigation" under *Terry* mean doing something that requires a seizure? And if so, exactly what does post-seizure "investigation" legally entail? As discussed later,[26] questions remain about how long police can protract a stop to perform a legitimate investigation, but Professor Katz shows that the problem of defining "investigation" arises even before the stop begins.

Ultimately, the heart of the "standard model" critique, as deftly wrought by Professor Katz, is that Warren never really told us when the stop occurred or acknowledged that the possibility that what might otherwise strike a person as an innocuous request sounds very different when it comes from a police officer. If Warren meant that no stop occurred before McFadden laid hands on Terry and spun him around, then Professor Katz's reaction is, "Only an ostrich could reach that conclusion."[27] But, the consequence of that conclusion is that Warren never has to decide what level of suspicion might permit an officer to do what

22. Katz, *supra* note 11, at 439.
23. *Id.* at 439–40.
24. *Id.* at 446.
25. *Id.*
26. *See infra* Part E.i.
27. Katz*, supra* note 11, at 442.

McFadden clearly did earlier in the encounter, unless Warren meant that at that point the men would have felt perfectly free to leave. So, writing decades after *Terry*, Professor Katz observes,

> if the Court truly could not tell precisely when the seizure took place, that uncertainty demonstrates a complete lack of understanding of the relationship on the street between police and citizens, especially between police and black citizens. It is an understanding that the present Court totally lacks, but we had expected better of the Warren Court.[28]

In the end, Professor Katz concludes, "What the Court, in fact, did was uphold a seizure on less than probable cause based on little more than race."[29]

In further elaboration of the "standard model," Professor Katz traces the metastasis of *Terry*'s recklessly sloppy treatment of detentions into a variety of worrisome stop contexts in such cases as *United States v. Mendenhall*,[30] *INS v. Delgado*,[31] *Florida v. Bostick*,[32] and *United States v. Drayton*.[33] Finally, Professor Katz adds a very poignant exception-that-proves-the rule memoir of personal experience that illuminates the incredible assumptions the Court made in rationalizing searches and seizure in these contexts.[34]

One more important feature of the "standard model" reassessment comes from Professor David Harris.[35] Canvassing post-*Terry* cases in the lower courts on the specific issue of "particularized suspicion," he finds something very surprising: What he calls the Court's "rhetoric" about particularized suspicion has hardly changed since 1968, the lower courts having "gradually but unmistakably eroded the force of these words."[36] Professor Harris laments that courts, without saying so, have extracted from *Terry* virtually per se categories or

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28. *Id.* at 442.

29. *Id.* at 451.

30. 446 U.S. 544, 545 (1980) (holding that an arguably coercive stop was a consensual encounter).

31. 466 U.S. 210 (1984) (during government sweep of factory for possible immigration violators, words of "request" for identification do not amount to "demand" and thus no seizure occurred).

32. 501 U.S. 429, 430 (1991) (holding that police questioning of passengers sitting in Greyhound bus during a brief scheduled stop does not necessarily amount to a seizure simply because person did not feel free to leave out of fear of benign being stranded when bus imminently left).

33. 536 U.S. 194, 195 (2002) (similarly to *Bostick*, holding that situation of passenger confronted on bus did not vitiate consent to search his bag).

34. In 1969 Professor Katz was already a law professor and a Naval reserve officer when, traveling on a Greyhound bus, he was approached by a federal agent who demanded to see his identification and draft card, presumably checking on possible draft evaders. Professor Katz refused to comply, leaving the agent angry but helpless, but he knew then that most people so confronted would not have the legal knowledge and confidence to stand by their rights. And he asks us to recognize that if we transpose his story to the modern cases of young men of color on urban streets or on commercial buses, most individuals would feel compelled to acquiesce to the police. Katz, *supra* note 11, at 484.

35. David A. Harris, Terry *and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975 (1998).

36. *Id.* at 976.

contexts where facts that are perhaps at most indicia of suspicious behavior become conclusive proof—e.g., being in a "high crime area" or exhibiting a desire to avoid the police. Thus, while sometimes paying rhetorical fealty to the idea that certain facts are just factors in an overall weighing of reasonable suspicion, lower courts have slowly and steadily created categories of cases which allow police to frisk after a stop, whatever the specific facts are.[37] In Professor Harris's view, they have done this by making general declarations that crimes that police may plausibly regard as dangerous and hence friskable people whom they suspect of crimes that do not necessary involve weapons. Thus, under these cases, a frisk is automatic upon any legitimate stop that falls into one of the "always frisk" categories. In effect, the courts have treated the Harlan concurrence as the operative law, even though, Professor Harris insists, Harlan was disagreeing and not clarifying Warren on this point.[38] For Professor Harris, unless the Supreme Court corrects this problem, *Terry* will lose its legitimacy, and become, in practical terms, a decision which legally permits a stop and a frisk of almost anyone, for almost any reason.[39]

B. Counter-Standard Models

While the highly critical Katz and Harris reassessments surely represent the majority tone of this art form of scholarship, there are reassessments that take a positive position, although these counter-standard models are very heterogenous.

Perhaps the most striking is the refreshingly, if jarringly, provocative view of Professor Akhil Amar.[40] And, a distinctive feature of his reassessment is its balance of fervent praise with *Terry* with harsh criticism. Professor Amar's strategy is to speak of the good *Terry* and the bad *Terry*.

Professor Amar's good *Terry* is very good indeed. In his endorsement of the Warren opinion, he says that by affirming the legality of seizures and searches that lack warrant and probable cause, *Terry* affirmed what he (Professor Amar) has long argued is the correct foundational view of the Fourth Amendment as expressed in its very textual language. The only textually mandatory rule for searches and seizures is that they be "reasonable."[41] The Framers phrased the warrant and probable cause rules the way they did—warrants require probable cause and particularity, but searches and seizures do not require warrants—because, in the English regime we inherited, warrants were the problem, not the solution. In a feint toward criticism, Professor Amar acknowledges that Chief Justice Warren "must bear some of the blame for the current confusion"[42]

37. *Id.*
38. *Id.*
39. *Id.* at 977.
40. Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 73 ST. JOHN'S L. REV. 1097 (1998).
41. *Id.* at 1098–99.
42. *Id.* at 1097.

because the opinion does not make this magisterial principle clear enough. So writing on the 30th anniversary, Professor Amar announces that the time has come to eschew the confusing and contradictory language that Warren had taken from earlier cases, and indeed he is reassured that some post-*Terry* cases clarify what he believes Warren surely and laudably meant all along.[43]

There is a premise of the good *Terry* that leads us to understand Professor Amar's bad *Terry*. The good *Terry* takes a generously broad view of searches and seizures so that the Fourth Amendment could apply to "myriad ways in which government might intrude upon citizens' persons, houses, papers, and effects."[44] The bad *Terry* that emerges is that as we parse the details of the case we come to fear that the broad view was not broad enough. With the flexible standard of reasonableness, the Court should have been able to intervene even earlier in the encounter and not wait until what has become, in the *Terry* lore, the controversially late-in-the-narrative location of the seizure. Professor Amar laments, "Sustained and purposeful surveillance by the unaided eye, the bad Terry implied, is not a Fourth Amendment 'search' and thus, apparently, need not be reasonable."[45] So for Professor Amar the Fourth Amendment may have applied even when McFadden first engaged in his arguably authoritarian initial encounter with Terry. In effect, a hypothetical Justice Amar would have added his own concurring opinion to Justice Harlan's.

And, in a further twist, the flexibility of the pure reasonableness standard permits Professor Amar to diversify (or hedge) his agreements or disagreements with other perspectives. If law enforcement would resist early intervention of the Fourth Amendment because it might set too demanding a standard for a borderline-coercive encounter, then no problem: reasonableness allows us to calibrate or adjust the height of that bar in proportion to the degree of coercion.[46]

And, Professor Amar has still more ways to adjust his distinctive reading of the Fourth Amendment to address or accommodate disparate views. He is well aware of the racially disparate effects of police discretion, and thus aware that his praise of the good *Terry* will provoke criticism that he fails to acknowledge the racial justice problem. But, he is confident, even Panglossianly so, that "the spacious concept of reasonableness allows us to look race square in the eye, constitutionally."[47] On the other hand, this "spacious concept" will also allow us to sensibly and flexibly implement the presumption that the Bill of Rights is designed to be counter-majoritarian by being "suitably responsive to popular sentiment."[48] Finally, Professor Amar concedes that it might be an aspect of the

43. *Id.* at 1125 (citing Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (upholding saucepan stops at police roadblock checkpoints as reasonable), and Veronia School District 47J v. Acton, 515 U.S. 646 (1995) (upholding as reasonable random drug testing of high school athletes)).

44. *Id.* at 1098.

45. *Id.* at 1099.

46. *Id.*

47. *Id.* at 1098.

48. *Id.* at 1099.

bad *Terry* that Warren seems tragically disconsolate that the exclusionary rule is helpless in the face of common stop and frisk activity. But, to the rescue, the good *Terry* would turn this into a positive by taking the opportunity of the stop and frisk to remind us that, as Professor Amar has also long believed, the exclusionary rule has no constitutional basis in the first place.[49]

Thus, the hypothetical Amar concurrence makes highly versatile use of the *Terry* case to accomplish all the goals his theory of the Fourth Amendment seeks to fulfill.

A different kind of counter-standard assessment comes from Professor Stephen Saltzburg.[50] The Amar assessment is theoretical, normative, even aspirational, with side reassurances that it could be implemented pragmatically. By contrast, Professor Saltzburg's stays close to the pragmatic, confidently asserting that the core *Terry* holding was a sound doctrinal way of balancing the Fourth Amendment and public safety, while acknowledging that this proper balance needed some post-*Terry* years to become clear, and recommending one key refinement. Professor Saltzburg is confidently assertive at the start:

> My thesis is rather simple and straightforward. It has four prongs. First, *Terry* itself failed to provide a clear enough yard-stick for law enforcement, and without further elaboration by the Supreme Court, the doctrine might have become unworkable. Second, subsequent Supreme Court elaborations on *Terry* have developed a standard that is as clear as most Fourth Amendment standards can be and that is adequate to distinguish permissible from impermissible law enforcement confrontations with citizens, at least as far as stops are concerned. In fact, the results reached under *Terry* are practical, reasonable and defensible. They are practically as perfect as we are likely to get. Third, the extension of *Terry* to a number of different situations that are analogous to stops has been, for the most part, logical and defensible. Fourth, the aspect of *Terry* that is most problematic and that requires a more subtle approach than the Court has offered thus far is "the frisk."[51]

Perhaps the key here is that as compared to Professor Amar's virtually celebratory explanation of the good *Terry*, Professor Saltzburg has very modest expectations for the ability of the Fourth Amendment to do all it is being asked to do in the highly fraught arena of police-citizen encounter. And, in his view, the Court's performance in doing so is, well, not great, but at least defensible.

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49. *Id.* at 1119.

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

51. *Id.* at 911–12.

Professor Saltzburg observes with some respect, but considerable concern, that Warren limited his opinion to a deceptively narrow question, i.e., "[W]e have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him."[52] In initial harmony with the standard model critique he laments that Warren's opinion provides:

> virtually no guidance to either the police or the public as to what a police officer may do when confronting suspicious behavior. Notwithstanding the fact that Terry is widely known today as a reasonable suspicion case and as establishing a reasonable suspicion standard, one can find nothing in Chief Justice Warren's opinion to support the claim that he thought that was the standard the Court was adopting.[53]

Still Professor Saltzburg offers a more generous take on parts of the holding, including the gaps and ambiguities, arguing that the Court was quite aware of and sympathetic to the difficulties that law enforcement officers face when they are called upon to make split-second decisions: "The Chief Justice understood that Detective McFadden and others like him could not be present indefinitely in front of a single store, if they were to do their jobs, and they must sometimes act when criminal activity may be 'afoot' or lurking."[54]

But, in any event, Professor Saltzburg goes on to cite a series of cases that, in his view, cure any of Warren's gaps or errors. Some of these are cases that many critics of *Terry* lament or even denounce because, the argument goes, they prove how dangerous *Terry* ultimately turned out to be. But, for Professor Saltzburg, the opposite is true: For him, they clarify that the true heart of the *Terry* doctrine is that a stop is to be based on "reasonable suspicion" that justifies an "investigatory stop" and entails a frisk. Thus, he positively notes *Adams v. William,*[55] where the Court upheld reasonable suspicion based on an informant's tip and no direct police observation. Professor Saltzburg praises the Court's willingness to permit the officer to consider "the area in which the car was located, the time of the morning, the absence of any legitimate explanation for the car's presence, and his familiarity with the tipster in deciding that he should intervene and confront the suspect."[56] And, Professor Saltzburg admires the Court for appreciating that "no police officer could be expected to approach a suspect who is supposed to be armed and who may be involved with narcotics

52. Terry v. Ohio, 392 U.S. 1, 16. *See* Saltzburg, *supra* note 50, at 920.

53. *Id.* at 926. Professor Saltzburg suggests that this gap in Warren's opinion reflected his effort to deal with the different factual postures of the companion cases of Peters v. New York and Sibron v. New York, 392 U.S. 40 (1968).

54. Saltzburg, *supra* note 50, at 927.

55. 407 U.S. 143 (1972).

56. Saltzburg, *supra* note 50, at 944.

without checking for weapons."[57] In doing so, avers Professor Saltzburg, the Court confirmed that the Harlan concurrence's "two-step" explanation of the majority opinion in *Terry* has become the operative law.[58]

But Professor Saltzburg, one should note, does not praise *Terry* for necessarily favoring police; he praises it for getting the balance just right. Thus he approves of *Almeida-Sanchez v. United States*,[59] where the Court held that roving near-the-border searches without probable cause were impermissible but where the Court took pains to refer to *Terry* and *Adams* in noting that the Government had not even tried to justify the searches on reasonable suspicion grounds. But, he also approves of *United States v. Brignoni-Ponce*,[60] where the Court justified stopping cars near the border without probable cause if the police have *Terry* reasonable suspicion, but still put some teeth into that standard by rejecting a stop based solely on the driver's supposedly 'Mexican" appearance.

Professor Saltzburg actually has a more mixed view of the application or extension of *Terry* into new contexts. He applauds the extension to seizures of *property* in such cases as *United States v. VanLeeuwen*,[61] where, in his view, in allowing a temporary seizure of mail reasonably suspected to be contraband the Court solved a practical problem for the police parallel to the pedestrian street stop in *Terry*.[62] On the other hand, and somewhat cursorily, Professor Saltzburg seems to disdain the application of *Terry* to some contexts usually placed under the umbrella term of "special needs" or balancing cases. He approves of *New Jersey v. T.L.O.*[63] where the Court permitted searches without probable cause in public high schools so long as they met a *Terry*-style criterion of reasonableness in terms of a balance of the schools *parens patriae* duties and students' privacy.[64] By contrast, he disapproves of *Griffin v. Wisconsin*,[65] where Justice Scalia relieved the police of the probable cause requirement in the search of a probationer. As Professor Saltzburg notes aprovingly, the Court found the search sufficiently justified by the probation official's direct experience with the probationer, the need to protect confidential sources, and the assumption that the probationer is in need of monitoring and rehabilitation because of his established criminal proclivity. And, in particular he says that the confidential source argument "sheds no light on whether a probable cause or reasonable suspicion standard"—the heart of *Terry* to which Professor Saltzburg is so devoted. "The rationale for a rule of necessity is not easily extended to justify rules of convenience."[66] Thus, while Professor Saltzburg sees some value in this species

57. *Id.*
58. *Id.*
59. 413 U.S. 266 (1973).
60. 422 U.S. 873 (1975).
61. 397 U.S. 249 (1970).
62. Saltzburg, *supra* note 50, at 960.
63. 469 U.S. 325, 337 (1985).
64. Saltzburg, *supra* note 50, at 971–72.
65. 483 U.S. 868, 872–73 (1987).
66. Saltzburg, *supra* note 50, at 972–74.

of special context interest balancing, he would limit these extensions of *Terry* to situations where there is some distinct need for quick action—in which case *Terry* itself can apply.

Finally, Professor Saltzburg has one enduring objection to the Warren opinion itself—although it still reflects his *Terry* loyalty because it involves the Harlan concurrence. Warren, of course, seemed to apply the reasonable suspicion standard with respect to the danger to the officer that justified a frisk. Harlan believed that the right or power to the frisk should be "immediate and automatic" if the stop is legitimate—at least if the suspicion is about a crime of violence.[67] And, Professor Saltzburg regrets that later courts have not heeded Harlan's view.[68] At the very least Professor Saltzburg wants to set a rule that gives a huge benefit of the doubt to the officer:

> Recognition of the automatic nature of the frisk is preferable than [sic] pretending that it is reasonable to individualize decisionmaking in these circumstances. When no officer can be reasonably certain that a person is not dangerous, and the circumstances—one on one contact, darkness, and the size of a suspect, for example—indicate that danger might be present, an officer should be able to make a frisk. An officer should not be denied the right to self-protection simply because the conditions surrounding the stop make it impossible to make a reasoned determination about danger.[69]

But overall, Professor Saltzburg concludes, with perhaps just a touch of rhetorical wryness, that

> the *Terry* rule that I regard as practically perfect had clearly been established in 1979. . . . If the Supreme Court pays more careful attention to the arguments for permitting frisks or related self-protective measures in future cases, the *Terry* rule will become even more practically perfect than it presently is. The rule has stood the test of time, but with a little refinement, it promises to stand the test of the future.[70]

The most strikingly original of the reassessments comes from Professor Susan Bandes.[71] Her starting point is that *Terry* should be on her "hit list" of the worst Supreme Court cases she can imagine—cases so awful that the historical

67. Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).
68. *E.g.*, Ybarra v. Illinois, 444 U.S. 85, 91 (1979); Michigan v. Long, 63 U.S. 1032, 1049 (1983).
69. Saltzbrug, *supra* note 50, at 968, 970.
70. *Id.* at 951, 974.
71. Susan Bandes, Terry v. Ohio *in Hindsight: The Perils of Predicting the Past,* 16 CONST. COMMENT. 491 (1999).

counter-factual whereby they had never happened would carry clearly good consequences.[72] But, about *Terry* she is not so sure. Despite its possibly merited place on the hit list, *Terry* has led Professor Bandes to conceive a new subgenre of reassessment—where a bad case must be compared not to a better different decision that could have been rendered on that occasion, but to the consequences of there being no decision at all on that occasion. In a remarkable interdisciplinary borrowing, she imagines how chaos theory might inform us in this inquiry:

> Chaos theory studies the behavior of dynamic systems, or systems that are not in constant equilibrium. It posits that in such systems, cause and effect are not linear or proportionate- instead, seemingly minor causal agents may lead to disproportionately major effects. The connection among forces in a system may even appear random, though over time more complex and subtle patterns may appear. But even these patterns will not be exactly duplicative because each recurrence takes place in a different environment. Moreover, individual systems do not exist in isolation, but are themselves part of a complex environment that is in a continual state of flux.[73]

So, what would have occurred if *Terry* had never been decided? Professor Bandes notes that as Professor Wayne LaFave said at the time, the decision "[left] room for later movement in almost any direction."[74] For her, the question is especially difficult for an ambiguous case like *Terry*: Indeed, she finds the question not just difficult, but likely incoherent. *Terry* asks the question at the heart of criminal procedure: what is the proper balance between law enforcement and citizens' privacy and autonomy? And, Professor Bandes bluntly states, "There can be no answer to this question that isn't shaped by time, place, vantage point, and a host of interactive, evolving societal forces."[75] Perhaps police would have continued to stop and frisk suspects, mostly neighborhoods with poor people of color, with no formal legal restraint. But what would have been the secondary social and political effects? Would police departments respond by self-regulating in a manner somewhat parallel to *Terry*? Would local and state governments have acted to fill the Supreme Court void? A few months after *Terry*, Richard Nixon was elected in part because he exploited—and even orchestrated—angry public reaction, sparked particularly by *Miranda*, to the Warren Court's perceived favoring of criminals over police.[76] To ask how

72. *Id.* at 491.
73. *Id.* at 492.
74. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond,* 67 MICH. L. REV. 40, 46 (1968).
75. Bandes, *supra* note 71, at 494.
76. *Id.* at 495–96.

national politics would have changed without *Terry* one would have to know what, if any, effect *Terry* had on the anti-Warren anger. Did it exacerbate it or assuage it? Would the non-declaration of the *Terry* holding led to more sympathy for or more fear of possible offenders? Would it have increased or decreased the usefulness of crime as a topic for political demagoguery? These are questions that call for highly sophisticated empirical political science and sociology—and they may even be too difficult for the expert practitioners of those disciplines.

What about the courts themselves? Professor Bandes surmises that absent *Terry*, lower courts, lacking guidance, would have continued generating contradictory decisions that might have exacerbated uncertainty about all manner of Fourth Amendment matters, including probable cause and consent.[77]

As for the Supreme Court itself, would it have gone on to more or less expansive definitions of probable cause and consent? Would it have shifted to the equal protection clause? As Professor Bandes nicely puts it, it is hard to say how the Court would have deployed its "finite amount of capital."[78] As she summarizes:

> Was *Terry* wrongly decided? Yes. It didn't achieve what it set out to; it never faced the racial issues that have, if anything, worsened; and it arguably placed its imprimatur on an abusive set of practices. In the bargain it seriously damaged the structure of Fourth Amendment law, allowing for an ad hoc, unprincipled balancing whose costs go far beyond the excesses of stop and frisk. Would we have been better off without it? That depends.[79]

III. THE CONTINUING PUZZLES OF *TERRY*

Drawing on the diverse and conflicted history of reassessments of *Terry*, I now want to offer my own modest contribution to the art form—a kind of meta reassessment in which I try to extrapolate the elements and implication of the *Terry* legacy that make it such a haunting and troubled one for criminal justice. In doing so, I will consider several cases which by virtue of being from lower courts may soon disappear from scholarly attention, but which serve as diagnostic markers of *Terry* questions witch most surely will not disappear.

A. Suspicion and Probability, Procedure and Substance

Rarely discussed in all the commentary on *Terry* is that Ohio generally prohibited carrying of weapons, and this fact is important to the ambiguities of

77. *Id.*
78. *Id.*
79. *Id.* at 497.

the case.[80] Granted that the case is rightly criticized for focusing on the frisk rather than the stop, we know that reasonable suspicion, at least in retrospect, was to be the standard for a stop. On the one hand, the very term "suspicion" in Warren's reference to hunches about Terry's "suspicious appearance" suggests that a general indication of malevolent intent might be the heart of the matter. On the other hand, if we think of reasonable suspicion as a "lesser included" standard under probable cause, then the suspicion must be of a crime and it is probabilistic. Whatever the probability percentage is, it is obviously lower for a stop than for an arrest. On the other hand, we now know from *Terry* that reasonable suspicion may be with respect to a crime on the verge of occurring—that it is "afoot"—so if we bring the "afoot" factor unto contact with the probabilistic concept of reasonable suspicion, we might say that even while not knowing which store they were aiming at, McFadden could make a certain percentage probability assessment that *some* robbery would occur (or that someone might have attempted or, to take things farther, might arguably be on the verge of attempting a robbery). On the other hand, Warren's statement of facts can also be read as allowing McFadden to seize Terry on the probabilistic assessment that he was carrying had already committed the crime of gun possession. And, alas, it can also be read as essentially acknowledging that in the streets of America, where police survey a terrain of human behavior giving off murky signs of possible antisocial conduct, we must recognize the power of the police to act on wizened intuition against possible "danger."

This question whether we should view reasonable suspicion as a quantitate subset of probable cause is important because over the decades the majority of pedestrian stops under *Terry* have involved reasonable suspicion of crimes involving drugs or guns, and perhaps most often the suspected is mere possession thereof.[81] Thus, if one side of the equation changes—that is the legality or illegality of possession—then the *Terry* calculation might have to be altered—and this is exactly what courts have only very recently begun to struggle with. And as a premise for these questions, we must stipulate to the necessary interaction of probable cause and reasonable suspicion. Some of the cases discussed below are about probable cause, some about reasonable suspicion, and some both. The point is that if reasonable suspicion is a step on a probability continuum, the changes in substantive criminal law will apply to booth—but in proportionate degrees.

B. The Problem of Marijuana

One obvious context for this issue is of course marijuana, because it has been

80. *See* the state court opinion in State v. Terry, 214 N.E.2d 114 (Oh. 1965).

81. For a through discussion of the commonest "reasonable suspicion" bases for stops, *see generally* David Rudovsky & David A. Harris, Terry *Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 1 (2018).

increasingly legalized in the states in recent years (put aside the fact that marijuana possession remains a federal crime). How marijuana law reform affects the Fourth Amendment depends on the nature of reform and the degree and nature of "legalization." Under particular new state laws, for example, is it just use for medical purposes that is permitted? Is marijuana possession decriminalized but still closely regulated? Is the legal immunity just for "personal consumption" and in small amounts?

A major scholarly treatment of this question comes from Professor Alex Kreit,[82] but here I will just note some exemplary cases. Consider *State v. Senna*.[83] Vermont law allows qualified registered patients to possess marijuana after going through an administrative process. The court ruled that this law did not preclude police from justifying probable cause of a crime solely on the basis of the smell of marijuana. On the other hand, the court made clear that it had no immediate occasion to consider whether Vermont's recent decriminalization of small amounts of recreational marijuana would call for a different oncome.[84]

But then consider the Massachusetts case of *Commonwealth v. Cruz*,[85] where the police stopped Cruz for a traffic violation and then ordered him out of the car after detecting the odor of marijuana. The police ultimately found cocaine in the car, but Cruz moved to suppress the cocaine because the discovery traced back to the detection of marijuana. Cruz argued that because a recent state law decriminalized possession of less than one ounce of marijuana in Massachusetts, mere evidence or suspicion of marijuana did not give reasonable cause to believe a crime had occurred. The court agreed. While in theory the police could have been concerned with diving under the influence, in this case the officers did not conduct any field sobriety tests to determine if the driver was presently under the influence of marijuana. Because the state law, decriminalized possession of one ounce or less of marijuana, the court inferred the voters' intent to be that possession of such amounts was to be solely a matter of civil regulation.[86] Therefore, the odor of burnt marijuana "coupled with the driver's statement that he had been smoking earlier in the day" suggested that any marijuana that remained would be less than one ounce.

Finally, the court found that although the state statute has no effect on the crimes of possession with intent to distribute or operating while under the influence of marijuana, "there was no probable cause to believe that any of those offenses were being committed."[87] Without probable cause to believe that the defendant or the driver was committing any criminal offense, the court concluded, the police were not justified in ordering the defendant out of the car.

But the dissenting judge observed:

82. Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L.J. 741 (2016).
83. 79 A.3d 45 (Vt. 2013).
84. *Id.* at 49–51.
85. 945 N.E.2d 899 (Mass. 2013).
86. *Id.* at 905.
87. *Id.* at 904.

> Even though possession of a small amount of marijuana is now no longer criminal, it may serve as the basis for a reasonable suspicion that activities involving marijuana, that are indeed criminal, are underway. The essence of reasonable suspicion is that it justifies an inquiry that may result in establishing that no offense has occurred, or that one may have occurred, but there is insufficient evidence to proceed to probable cause. An inquiry that does not produce evidence that supports going further does not retroactively render unreasonable a suspicion that was reasonable at the time.[88]

As Professor Kreit demonstrates, the degree to which courts have altered the calculus of probable cause for arrest or reasonable suspicion for *Terry* stops depends on the nature and degree of changes in particular state laws. The clearest distinction is between laws that only "decriminalize" and those that more fully "legalize."[89] Especially in that latter category, as he shows, the police will have few opportunities to stop people on minor offenses and then leverage stops into the possibility of finding true contraband or evidence of other crimes. So, cases like *Cruz* will therefore affect the utility to the police of the important doctrine of *Whren v. United States*,[90] whereby so-called pretextual stops for minor offenses based on objective evidence of minor offenses are permissible even if the true intent of the police is to find evidence of something more serious for which they lack sufficient cause. *Whren*, in effect, was built on *Terry*. It is what *Terry* in a sense wrought, and we might ponder whether the effect on *Terry* of these changes in substantive criminal law will cause *Whren* to lose its salience without any need to overrule it.

C. The Problem of Guns

As compared the marijuana issue, supposedly safe assumptions about the permissibility of a stop under *Terry* have been upended even more by the application of the Fourth Amendment to gun possession, for at least two reasons: First, the "legalization" or "decriminalization" of gun possession has taken on its own *constitutional* force. Second, it is the gun which has exposed the continuing fault line created by Warren's clumsy meme of "armed and dangerous" and the ambiguities it created in the relationship between danger and crime.

Does the Fourth Amendment apply differently depending on the severity of gun regulation in a jurisdiction? Permits to carry concealed weapons are

88. *Id.* at 914–15.
89. Kreit, *supra* note 82, at 771.
90. 517 U.S. 806, 813 (1996).

notoriously hard to obtain in New York City,[91] but so-called "shall issue" jurisdictions are very generous with concealed handgun possession, using a presumption of allowing concealed carry, subject to a few narrow exceptions. (There can of course be parallel variations in regard to the legality of long guns or open carry.) This issue taken on new salience since the Supreme Court's decisions in *District of Columbia v. Heller*[92], finding a right to individual gun ownership in the Second Amendment, and *McDonald v. Chicago*,[93] applying that right to the states. The scope of these cases and possible legality of some gun control legislation are being worked out in many courts now,[94] but only a few courts have addressed this question of the relationship of the Fourth Amendment and gun legislation.

One decision from the Illinois Court of Appeals, *People v. Penister*, is usefully revealing.[95]The gist of the facts: Officer Whitlock and partner saw a car run a red light and ordered a stop. After the driver, Rockett, did so, the officers asked some questions and then asked Rockett and a passenger, Penister, to step out of the car. Whitlock opened the glove compartment and found a handgun, later the basis for a possession charge. In his suppression motion, Penister argued that his possession of a gun did not give Whitlock reason to believe he had committed any offense, because for all Whitlock knew, Penister *might* have had a valid FOID [Firearms Owners' Identification] card (although he did not have one). The state argued Whitlock had probable cause to believe Penister was "engaged in an activity that requires a license," and that Whitlock was allowed to wait until after the arrest to determine if the arrestee had the required license.[96]

The court vehemently disagreed, mockingly saying that by the state's logic, "any officer can wait outside any courtroom, arrest all persons who acted as attorneys, and find out after the arrests whether the persons had the requisite licenses to practice law" because unlicensed practice of law punishable as contempt, or that if "any officer sees a person driving a car, the officer has probable cause to arrest the driver, and the officer can find out later whether the arrested person has a license to drive."[97] The heart of the problem was that the police were acting on an "an outdated assumption" about the illegality of gun possession. What should Whitlock have done? In the court's view, once he discovered the gun in the glove compartment, he should have tried to find out whether either man had a permit, and only if there turned out to be no permit, then arrest on probable cause. The court added that the short-cut taken by

91. *See* Rudovsky & Harris, *supra* note 81, at 535.

92. 554 U.S. 570, 595 (2008).

93. 561 U.S. 742, 791 (2010).

94. New York State Rifle & Pistol Association Inc. v. City of New York, 140 S. Ct. 1525 (2020) (holding that amendments to city's handgun licensing scheme removing challenged prohibitions mooted plaintiffs' claims).

95. People v. Penister, No. 1-15-1552, 2018 WL 3005912 (Ill. App. Ct. June 14, 2018). The court deemed the case "non precedential" and did not officially publish it.

96. *Id.* at 1–2.

97. *Id.* at 6.

Whitlock here was an example of the kind of police action all too rife with the potential for racial disparity.

Consider another very revealing case. In *Ubiles v. United States*,[98] the defendant attended the J'ouvert carnival, a festive and boisterous event, in the U.S. Virgin Islands. An unidentified man approached officers to report there was a young man in the crowd who had a gun in his possession; he described the man's clothing and appearance but did not explain how he knew that the man had a gun, nor did he report anything unusual or suspicious about the man or his behavior. Officers then approached Ubiles. They later conceded that Ubiles exhibited no unusual or suspicious behavior when they approached him or when one officer began talking to him, nor, on approach, could they tell whether Ubiles was carrying any type of weapon. One officer nevertheless did a pat-down of Ubiles and found a loaded gun that later proved to be unregistered.[99]

The District Court denied the suppression motion, saying rather whimsically:

> It's the night of—I think I can take judicial notice of—can be some heavy drinking. People are tired. So the kind of information that was given by the older gentleman . . . that he had just—pointing out the gentleman, describing the clothes that the defendant was wearing, had a gun, was enough reasonable suspicion for the law enforcement officers. . . to go over and question him in an investigative style. Prudent thing to do.[100]

The Court of Appeals reversed, holding that the officers had no reason to believe that "a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry*."[101] Moreover, it noted, there was no general law forbidding possession in public, and while there are ways to possess a gun illegally in the Territory—such as by possessing an unlicensed gun or one with an altered serial number—the government did not offer any even rough statistical or probabilistic evidence about the frequency with which these gun illegalities happen. Thus, deploying the same proves-too-much rhetorical ploy as in *Penister*, the court averred:

> This situation is no different than if Lockhart had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed

98. 224 F.3d 213 (3d. Cir. 2000).
99. *Id.* at 214–15.
100. *Id.* at 215–16.
101. *Id.* at 218.

> counterfeit bills— -the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet, and the seized bills would have to be suppressed.[102]

Thus, if a New York City police officer has probable cause that a person is carrying a concealed weapon, the officer logically has very strong probable cause of a crime to justify a full search or an arrest, but the opposite may be true in a shall-issue place.

D. "Armed and Dangerous"

The gun issue brings us even deeper into the lingering uncertainties about *Terry*. Recall that in *Terry* the Court said the police might legitimately suspect that a person is "armed and dangerous," raising the question whether that element is itself an alternate basis for a stop. Can police officers infer that someone they believe is armed is *ipso facto* dangerous enough to be stopped on that ground alone? To push things farther, what if the basis for the stop itself has nothing to do with guns—i.e., a traffic violation or a reasonable suspicion that a person on foot has just committed a theft—and the police infer the person is carrying a weapon. Does that inference justify a very forceful method of stopping the person?[103]

Here is a recent case that raises that issue. *United States v. Leo*[104] occurred in Wisconsin, which generally permits people who are 21 or older and not felons to obtain a concealed-carry license. The police relied on a tip about a possible burglary; the tip was made in good faith but later proved inaccurate. They seized Leo and his companion, Aranda, and because the tipster said Leo may have had a gun in his backpack—and because he was spotted near a preschool—they proceeded to pin him down and empty his backpack, never asking him any questions. Leo turned out to be a felon, and so he was prosecuted for the gun.[105]

The government maintained that the search of the backpack was lawful because the officers had "reasonable suspicion" that justified stopping Leo and searching his backpack. The officer insisted, however, that the two suspects were not under arrest when Leo was pinned and Aranda handcuffed.[106] Rather, one of the officers explained, he took these actions for safety reasons because, in his opinion, potential burglars and armed suspects always present "a possibility of violent action," and unholstered guns also present a danger of accidental discharge—especially near a preschool. Another officer testified that he detained and handcuffed Leo to stop him "from reaching or grabbing the firearm."

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102. *Id.*

103. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (holding that aggressive measures like ordering a stopped driver out of the car are legal if they serve officer safety).

104. 792 F.3d 742 (7th Cir. 2015).

105. *Id.* at 744–45.

106. *Id.* at 745.

The government conceded that the officers lacked probable cause to arrest the men and thus could not search the backpack incident to arrest. And at the time of the search, the officers knew neither Leo's age nor criminal history, nor did they inquire whether he had a license to carry a concealed firearm. But, the district judge ruled that the search had been authorized as part of an investigatory detention under *Terry*, and, despite the restraints on the men, they still posed a danger, for the somewhat illogical reason that they were not under arrest. Apparently, in the trial judge's view, it was precisely because Leo had not yet been arrested that he might still regain control of the backpack.[107]

The appellate court reversed, holding that at most the police had the power to *frisk*—but not to open—the backpack.[108] It distinguished *Michigan v. Long*,[109] a car stop case where the Court found that the driver had a lesser expectation of privacy, and where the roadside encounter was more "fraught with danger,"

So let us consider yet another recent case, *United States v. Robinson*, one that probes farther into the so-called "armed and dangerous concept.[110] The events happened in West Virginia, where, again, adults who are not felons can very easily get a firearm permit.[111] An unidentified man called the police to say that he had just "witnessed a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket" while in the parking lot of a 7-Eleven, and that the Camry was being driven by a white woman and had "just left" the parking lot. The 7-Eleven was in an area with the highest crime rate in the city, especially for visible drug transactions. Indeed, when any local officer heard that a report from that location, "your radar goes up a notch."[112] The officers tailed the car, noticed that the two occupants were not wearing seatbelts, and made the stop. One officer asked the driver for her papers and asked the passenger to exit the car. Both complied, and an officer asked the passenger, Robinson, if he had any weapons on him. The officer later testified that instead of responding verbally, Robinson "gave [him] a weird look" or, more specifically, an "'oh, crap' look[]." The officer then frisked Robinson and recovered a gun, and Robinson was prosecuted for felon-in-possession.[113]

Robinson moved to suppress the evidence recovered as a result of the frisk. He argued the police had no articulable facts demonstrating that he was dangerous because, as far as the officers knew, he might have had a legal permit to carry a concealed firearm. Robinson thus contended that the information that police received from the tip described seemingly innocent conduct and that his conduct at the time of the traffic stop also provided no basis for officers to

107. *Id.* at 746–47.

108. *Id.* at 749–51.

109. 463 U.S. 1032 (1983). In *Long*, the Court allowed a search of the passenger comportment of a car upon a stop for mere reasonable suspicion—i.e., a search not justified as a search incident to arrest. In effect, it allowed that intrusion into the car to serve as a form of "frisk".

110. 846 F.3d 694 (4th Cir. 2017).

111. *Id.* at 698.

112. *Id.* at 696.

113. *Id.* at 697.

believe he was dangerous. In his view, as understood by the court, "Under the logic of the district court, in any state where carrying a firearm is a perfectly legal activity, every citizen could be dangerous, and subject to a *Terry* frisk and pat down."[114]

So, Robinson had no need to contest the district court's conclusion that the police had reasonable suspicion to believe that he was armed. Rather, he argued that while the officers may well have had good reason to suspect that he was carrying a loaded concealed firearm, they lacked objective facts indicating that he was also dangerous so as to justify a frisk for weapons, since, as he read *Terry*, an officer must reasonably suspect that the person being frisked is both armed *and* dangerous. Moreover, he argued, his behavior during the stop did not create suspicion—"he was compliant, cooperative, [and] not displaying signs of nervousness."[115]

But, the court rejected Robinson's claim and held that the "armed and dangerous" criterion for a *Terry* frisk was meant to unite the two terms, i.e., to be armed is to be dangerous. In the court's view, Robinson confused the standard for making stops—which requires a reasonable suspicion that a crime or other infraction has been or is being committed—with the standard for conducting a frisk—which requires both a lawful investigatory stop and a reasonable suspicion that the person stopped is armed and dangerous. Thus, the court concluded, traffic stops of persons who are armed, whether legally or illegally, pose a great safety risk to police officers.[116]

A concurring opinion at first seems to stake out a very different position, acknowledging Robinson's predicate point that the power to frisk does not derive automatically from the power to stop.[117] The concurring judge notes the view of other Circuits that the unitary interpretation "would allow law enforcement officers to frisk a wide swath of lawfully stopped individuals engaging in harmless activity. Indeed, by definition, an individual is armed" if he is "[e]quipped with a weapon. *Armed, Black's Law Dictionary* (9th ed. 2009)." The concurring judge goes on to elaborate the arguably absurd consequences of the unitary interpretation.[118] Nevertheless, this gap between the majority and concurrence turned out to be splitting hairs once the concurrence made clear that, in its view, "armed" and "dangerous" are in theory separate but in fact usually united because the suspected weapon is a gun.[119] So the concurrence concluded that while "treating individuals armed with firearms—lawfully or unlawfully—as categorically dangerous places special burdens on such individuals . . ., we recognize one such burden: individuals who carry firearms elect to subject themselves to being frisked when lawfully stopped by law enforcement

114. *Id.* at 696.
115. *Id.* at 698.
116. *Id.* at 701–02.
117. *Id.* at 703 (Wynn, J., concurring).
118. *Id.*
119. *Id.* at 705.

officers.[120]

The vigorous dissent in this case is perhaps the most telling opinion of all in this recent suite of decisions. The gist of the dissent is that while guns are inherently dangerous, when a state legislature has decided that civilians can be trusted to be safe in carrying firearms on foot and in cars, the police should not be able to contravene that trust by inferring danger from the fact or suspicion of gun possession.[121] Thus, the police could not reasonably point to danger where, as here (at least as the dissent reads the facts),[122] none of the conduct reported in the anonymous tip was illegal—nor was it even unusual or "out of place" where it occurred.[123]

There are several ironies here. The political irony—but not a self-contradiction—is that a judge clearly inclined to the liberal side on Fourth Amendment issues finds it useful to proclaim Second Amendment principles. Indeed, the dissent stresses that without more "suspicious" facts, the police were simply seizing Robinson because he was exercising a constitutional right.[124] Another irony has to do with the officers' citation of a "high-crime area." The dissent flips this point with the deceivingly obvious—and tragically plausible—sociological observation that the high crime area is often exactly where would find a high proportion of poor people of color.[125]

The dissent then homes in on consequences of the court's view:

> An armed citizen in an open-carry jurisdiction necessarily poses a "danger" to the police that justifies a protective frisk if and only if he appears to have committed some offense, however trivial—like the seatbelt violation here—leading to a valid stop. If, on the other hand, the police in this case had initiated a consensual encounter with Robinson in the 7-Eleven parking lot, then the gun Robinson was suspected of carrying would *not* have been grounds for a frisk, as the government conceded at oral argument. Likewise, had Robinson exited the car in which he was a passenger before the police could conduct their pretextual traffic stop, then again he would no longer be "dangerous" for purposes of allowing a *Terry* frisk, notwithstanding the concealed gun in his pocket.. . . [I]t is hard to see why an officer's right to protect him or herself would be made to turn on whether a dangerous person carrying a gun has remembered to fasten his seatbelt.[126]

120. *Id.* at 706.
121. *Id.* at 707 (Harris, J. concurring).
122. *Id.* at 708.
123. *Id.* at 708–09.
124. *Id.* at 708.
125. *Id.* at 715.
126. *Id.* at 711 (emphasis in original).

Thus, one of the fault lines exposed by the dissent is that by the weird logic of treating stops for traffic offenses as *Terry* stops, the criterion of "suspicion" of "crime afoot" can be satisfied by a trivial traffic offense—or even a pedestrian's jaywalking offense—where the statistical likelihood or plausible expectation of probable cause for an ultimate arrest might be nil. And, yes, the dissenting judge bumps against the *Whren* principle. But, the judge not only acknowledges this; she notes the perverse honesty of the officer in this case. He acknowledged that he looked for and took advantage of a trivial traffic offense in order to follow up on a very questionable anonymous tip that someone in the car was armed and dangerous.[127] The judge's very point is that this case demonstrates the brutality of *Whren*.

E. What Is an Investigation? What Is an Arrest?

1. A Question of Duration and Purpose

Now let us return to the *Leo* case above to see an important further problem. One of the government's arguments there was that the police officers acted on legitimate safety concerns because they "did not have authority to detain Leo indefinitely" and thus he might "be released in the parking lot of the preschool with a weapon in his backpack." Leo had no problem agreeing that the officers could not hold him indefinitely on mere reasonable suspicion, and he leveraged this point in his favor. He argued that if the officers could not elevate their reasonable suspicion into probable cause during the investigatory stop, "the Fourth Amendment demands that he was free to leave and to take his belongings with him."[128]

The court strongly endorsed Leo's position, stating that a *Terry* stop cannot continue indefinitely. A stop that is too prolonged becomes "a de facto arrest that must be based on probable cause." As the court put it, there are three possible outcomes to a *Terry* stop: (1) the police can gather enough information to augment reasonable suspicion to probable cause; (2) their suspicions may become dispelled, and the suspect is released; or, (3) the suspicions of the police are not dispelled, yet the officers have not developed probable cause and so must release the suspect because the length of the stop is about to become unreasonable.[129]

Here the police admitted they did not establish probable cause at the time of the search of the backpack; they could plausibly argue that their suspicions had not been dispelled; but they misconstrued *Terry* by reasoning that in that dilemma they could hold Leo longer. To the court, "But this step, no matter how convenient for the police, is *not* one that is authorized by *Terry* or any other

127. *Id.* at 709.
128. United States v. Leo, 792 F.3d 742, 751–52 (7th Cir. 2015).
129. *Id.* at 751.

precedent" (emphasis in original).[130] And, perhaps most tellingly, the court points out that if the officers were concerned about the safety of the preschool's occupants, "nothing prevented them from following Leo into the building after the investigatory stop to keep an eye on him in case he attempted any wrongdoing."[131] Clearly, *that* action would not have extended the seizure.

So, the *Leo* case focuses our attention on a major fault line in post-*Terry* jurisprudence. If the legal measurement for duration of a stop derives from the "investigative" rationale that supposedly justifies *Terry* seizures in the first place, the Court has not been helpful in telling us just what "investigation" means. "Investigation" obviously has some common-sense and intuitive connotations, but they are not very helpful in developing an administrable legal definition. We could rest with the idea that if there is reasonable suspicion, the police can detain for as long as is reasonably necessary to investigate and leave it at that. As I will conclude below, the Court so far has probably has left it at that. But cases like *Leo* suggest we need more.

For example, the Court could define investigation in more detail, although Warren's admonition in *Terry* about the wide variety of police-citizen encounters makes that task seem daunting. Or, the Court might say that even very long detentions are legal so long as whatever means the police are using to investigate do not themselves require probable cause (i.e., a true search rather than a frisk). Or, the Court could just say there is a specified (estimated?) time limit on a detention regardless of the means of investigation. And, whichever approach the Court takes, there is the follow-up question of what happens when the detention goes on too long. Must a court then suppress whatever evidence comes from an investigative step that occurs after the expiration moment, even if that step would otherwise not require any reasonable or probable cause?

It turns out recently the Court actually has given us *some* help on these issues. But, to see how requires a bit of a detour to—pun acknowledged—cars.

2. The Car Analogy and Investigation

Most of what the Court has said about the length of detention comes from the somewhat distinct area of car stops. The closest thing we get to a constitutional time measurement happens with an auto stop case, *United States v. Sharpe*,[132] and we get a ruling that 20 minutes is not too long. But, *Sharpe* was not a typical car stop case—that is, one for a traffic offense. *Sharpe* was about a drug intervention that happened to involve vehicles, and the officer who protracted the challenged detention of the vehicle did so to coordinate operations with another

130. *Id.* at 751–52 (The court noted that this legally baseless argument was also disingenuous, because the search was a last-ditch attempt to find evidence of a crime before the clock ran out on the detention. This was because the officer searched the backpack immediately, without even asking Leo to identify himself).

131. *Id.*

132. 470 U.S. 675 (1985).

officer who needed some time to get there to participate in the investigation. About 20 minutes after the initial stop, the police had probable cause to arrest,[133] and the Court said that was legal because the circumstances excused the delay. But, in the usual case of a stop for a traffic offense, it is way beyond the expectation of the officer that she will arrest the driver. Yes, some traffic offenses are deemed "arrestable" by statute and some not.[134] But, even if a traffic offense is theoretically arrestable, the police officer normally anticipates doing just a few ministerial things during the stop—examine license, registration, and insurance and perhaps ask the driver a few questions—and then write up a ticket. Yes, she may also take the "plain sense" opportunity to notice whether there is contraband immediately visible in the car or whether the driver exhibits signs of being drunk (in which case the officer might then perform a field sobriety test). But, most often, no such probable cause emerges, and the driver just drives off.

The courts call these typical auto stops "detentions" because they usually do not lead to arrests. For this reason, in theory, the stop can be based on mere reasonable suspicion of a traffic offense, but that sounds odd because, say, with observed speeding or stop-sign running, why should the officer worry about "reasonable suspicion" when she surely has probable cause—indeed virtual certainty of the traffic offense? Perhaps the legal system has come to call these detentions because the administrative tasks the officer must perform serve as a useful proxy for our general notion of an "investigation"—and because these tasks just happen to take about the same time as the *Sharpe* standard.

As for the auto detentions that do become arrests because probable cause of drug possession or DUI gets established, we get some insights from two important recent cases involving the odd confluence of dog sniffs and vehicle stops. Because of the dog sniffs, first note the background decision of *United States v. Place*,[135] holding that in most circumstances the use of a police dog to sniff out possible contraband in a private container does not invade any expectation of privacy and so is not a Fourth Amendment event at all. Then, with *Place* as a predicate, we have *Illinois v. Caballes*,[136] where the Court held that during the normal "investigatory" duration of a stop for a typical traffic offense, the use of a police dog to sniff for contraband is of no constitutional moment whatsoever because, thanks to *Place*, it does not add to the otherwise lawful detention any intervention subject to the Fourth Amendment. But in *Rodriguez v. United States*,[137] police conducted the dog inquiry after the ministerial actions for the traffic offense were done. So, the Court suppressed the evidence from the

133. *Id.* at 677–79.

134. *Compare* Atwater v. Lago Vista, 532 U.S. 318, 354 (2001) (police can carry out all incidents of an arrest for a minor offense if it is "arrestable" under state law), *with* Virginia v. Moore, 553 U.S. 164, 171 (2008) (Fourth Amendment allows search incident to arrest if police have probable cause to believe the person has committed an act classified as a crime under state law even if state law does not authorize use of the arrest power for that offense).

135. 462 U.S. 696, 707 (1983).

136. 543 U.S. 405, 409 (2005).

137. 575 U.S. 348, 356 (2015).

sniff because the sniff had resulted from an illegal detention—i.e., a seizure no longer needed to investigate the original "suspicion' of the traffic offense, nor by any independent reasonable suspicion of a drug crime.

But, in *Caballes* and *Rodriguez*, the Court's job was made easier here because the bureaucratic protocol of doing the paperwork supplied the functional parameters of the detention. And, as noted, that paperwork just happens to take about the same time as, or perhaps just slightly longer than, the detention in *Sharpe.* So *Caballes* and *Rodriguez* leave unclear how we determine the legitimate length of a stop in other contexts. Maybe, the answer should be about a half hour under any circumstances. But, would the outcome in *Sharpe* have changed if, because of some logistical problems, it took the second officer 90 minutes to get to the scene? Or, what if in a street stop of someone suspected of, say, a robbery, the police need to hold the suspect for 90 minutes while they wait for the victim to get to the scene to identify the suspect? Is the general proposition that a detention can be as long as it can reasonably take to conduct the specific form of investigation required by a specific crime or situation? If so, the logical extension is *United States v. Montoya-de Hernandez*,[138] involving the detention of person suspected of drug smuggling. There, investigation was simply waiting out the time of the bodily function needed to pass a swallowed drug balloon—in that case, 16 hours. Maybe *Montoya-de Hernandez* can be cabined as an international brooder case. But, far more mundane cases—like *Leo*—remind us that the mystery of "investigation" has contributed to *Terry*'s troubling legacy.

There is another way of reading *Terry* that might obviate these questions. Professor Saltzburg has described one function of a detention as "freezing the scene" until the police confirm or disconfirm the suspicious inference[139] But, there are surely cases where freezing the scene may be a kind of fake investigation whereby the detention serves solely to thwart potential criminal activity or scare off "suspicious" looking people. Perhaps, this is a laudable goal, but it is not one associated with the principles of the Fourth Amendment. At most it is a goal reluctantly acknowledged but not really embraced by Warren in *Terry*. This is the context in which the police may have neither expected nor desired to seize evidence, and so we recur to the tragic conclusion in *Terry* that that exclusionary rule is useless.

Finally, what is the legal significance of a finding that a detention went on too long? *Rodriguez* gives us one answer. But, a simple and more general answer is that the seizure has become an arrest, and then, as noted, a court might reject an un-Mirandized confession or a search-incident-to arrest. But, if so, perhaps we all should have been addressing this question from the opposite direction. Perhaps, we should work on defining an arrest. Alas, *that* question turns out to remain surprisingly unresolved to this day.

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138. 473 U.S. 531, 544 (1985).
139. Saltzburg, *supra* note 50, at 952.

3. So, What Is an Arrest?

In 2003 Professor Thomas Clancy wrote an important article[140] decrying a remarkable confusion in American law: We do not know exactly what an arrest is. Yes, we know someone has been arrested if she is hauled off to the station house to be booked. We can also safely say a person has been arrested if the police say to her, "You are under arrest." But, the vagaries of police-citizen encounters are such that that there are endless factual variations of seizures where the Fourth Amendment does and should identify an arrest—not just a detention—but where those two no-brainer factors are not present. These are cases in which we must make the determination of arrest early on without benefit of later facts. If the police are at the borderline between a *Terry* stop and an arrest, we have to know whether the latter has happened to answer any of three legal questions: First, must there be *Miranda* wanting before questioning, because we have "custody" (which has come to mean the same thing as an arrest)? Second, can we have a search beyond a frisk—the search incident to arrest. Third, do we need probable cause?

And, here is the problem *Terry* has left us. Had there been no such thing as Fourth Amendment regulation of that in-between species of a seizure called a stop, perhaps the Supreme Court would have given us a better definition of arrest. With the great variety of seizures now called stops under *Terry*, many lying along a subtle continuum of interventions into personal autonomy, we are often in a gray area where we just do not know for sure whether the incidents and requirements of arrest obtain. From the vantage of either the suspect or the officer or both, we face difficult questions: Do we just know that the detention has become an arrest because the time for investigation has expired? Too often we hear a definition of an arrest along the lines of "if a reasonable person would not feel free to leave," but such verbiage is useless because it really defines a seizure and so does not tell us whether the seizure is a detention or an arrest.

Yes, the Supreme Court could offer help, but so far it has been feckless, as is evident in its most recent approach to the question. In *J.D.B. v. North Carolina*,[141] a youth was summoned to an administrator's office in his school to be questioned about a crime. He was not given the *Miranda* warnings before the questioning that led to inculpatory statements, but the state argued that he was not in custody, i.e., had not been arrested, so no warning was needed.[142] The decision in the case is annoyingly oblique. It is not about the particular vulnerabilities of a youth to questioning or whether a higher standard should apply to youth in determining a waiver of Fifth Amendment rights, or whether a quasi-*Miranda* warning rule should apply for youth who are seized but not in custody. Instead the Court punts to the lower courts the question of whether the

140. Thomas K. Clancy, *What Constitutes an Arrest within the Meaning of the Fourth Amendment,* 48 VILL. L. REV. 129 (2003).

141. 564 U.S. 261, 265–66 (2011).

142. *Id. See* Berkemer v. McCcarty, 468 U.S. 420 (1984).

defendant was indeed in custody, all the decision accomplished was to add that his youth should be one of several relevant factors in that determination.

What were those factors? We are told that in general they are such things as the language or tone used by the police in addressing the suspect; the physical surroundings or location of the questioning; the duration of the interview; the extent to which the defendant is confronted with evidence of guilt; and, whether the officers brandished weapons or touched the suspect.[143]

One might find this enumeration a description of types of facts that might be noteworthy under a very general standard. But, one might prefer that for a question of this import there be a nice bright rule. Better still, one might wish that the Court had realized that some items on this list so overlap with many types of facts that are consistent with a mere stop that they only confound all these *Terry* questions. In the end, the decision rule comes close to tautology.

IV. CONCLUSION

In his brilliant review of the ways arrest has been defined, Processor Clancy recounts every definition derived from the common law, state statutes, and state constitutions, along with the vague adumbrations of the issue from the Supreme Court. With a keen critical eye he knocks most of them down as obsolete, anachronistic, tautological, vague, or unadministrable.[144] But, at the very end, he settles on one as at least a sensible or logical default—an arrest "is any seizure exceeding the permissible bounds of a stop."[145] If that definition seems to depend on a clear definition of these permissible bounds, it may seem doctrinally naïve. But Professor Clancy is not naïve. He is wise, because he knows that because of the vexing legacy that *Terry* has left us, it may be the best we can do.

143. *J.D.B.*, 564 U.S. at 286.
144. *See generally* Clancy, *supra* note 143, at 129.
145. *Id.* at 193.